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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–CE–60–AD; Amendment 39–13591; AD 2004–09–02]

RIN 2120–AA64

Airworthiness Directives; Glasflugel—Ing. E. Hanle Model GLASFLUGEL Kestrel Sailplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA adopts a new airworthiness directive (AD) for all Glasflugel—Ing. E. Hanle (Glasflugel) Model GLASFLUGEL Kestrel sailplanes. This AD requires you to inspect the airbrake actuating shaft for deformation and cracks (herein referred to as damage). If any damage is found, this AD also requires you to repair or replace the airbrake actuation shaft. This AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for Germany. We are issuing this AD to detect and correct damage to the airbrake actuation shaft, which could result in failure of the airbrake control. This failure could lead to loss of control of the sailplane.

DATES: This AD becomes effective on June 18, 2004.

As of June 18, 2004, the Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulation.

ADDRESSES: You may get the service information identified in this AD from Hansjorg Streifeneder, Glasfaser-Flugzeug-Service GmbH, Hofener Weg, D–72582 Grabenstetten, Germany; telephone: 07382 1032; facsimile: 07382 1629; e-mail: *streifly@aol.com.*

You may view the AD docket at FAA, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 2003–CE–60–AD, 901 Locust, Room 506, Kansas City, Missouri 64106. Office hours are 8 a.m. to 4 p.m., Monday through Friday, except Federal holidays.

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

SUPPLEMENTARY INFORMATION:

Discussion

What events have caused this AD? The Lutfahrt-Bundesamt (LBA), which is the airworthiness authority for Germany, recently notified FAA that an unsafe condition may exist on all Glasflugel Model GLASFLUGEL Kestrel sailplanes. The LBA reports that, on one of the affected sailplanes, the airbrakes would not completely open or close.

A visual inspection of that sailplane revealed cracks and deformity (damage) on the airbrake actuating shaft. Incorrect locking forces of the airbrake control caused the damage.

What is the potential impact if FAA took no action? If not detected and corrected, damage to the airbrake actuating shaft could result in failure of airbrake control. This failure could lead to loss of control of the sailplane.

Has FAA taken any action to this point? We issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to all Glasflugel Model GLASFLUGEL Kestrel sailplanes. This proposal was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on February 5, 2004 (69 FR 5477). The NPRM proposed to require you to:

—Inspect the airbrake actuation shaft for damage; and

—Repair or replace any damaged airbrake actuation shaft.

Comments

Was the public invited to comment? We provided the public the opportunity to participate in developing this AD. We received no comments on the proposal or on the determination of the cost to the public.

Conclusion

What is FAA's final determination on this issue? We have carefully reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed except for minor editorial corrections. We have determined that these minor corrections:

—Are consistent with the intent that was proposed in the NPRM for correcting the unsafe condition; and

—Do not add any additional burden upon the public than was already proposed in the NPRM.

Changes to 14 CFR Part 39—Effect on the AD

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

Costs of Compliance

How many sailplanes does this AD impact? We estimate that this AD affects 16 sailplanes in the U.S. registry.

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

Labor cost	Parts cost	Total cost per sailplane	Total cost on U.S. operators
1 workhour × $65 per hour = $65	Not applicable	$65	$65 × 16 = $1,040

We estimate the following costs to accomplish any necessary repairs or replacements that will be required based on the results of the inspection. We have no way of determining the number of sailplanes that may need this repair or replacement:

Labor cost	Parts cost	Total cost per sailplane
5 workhours × $65 per hour = $325	$40	$325 + $40 = $365

Regulatory Findings

Will this AD impact various entities? 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.

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

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

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

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

We prepared a summary of the costs to comply with this AD and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES.** Include "AD Docket No. 2003–CE–60–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. FAA amends § 39.13 by adding a new AD to read as follows:

2004–09–02 Glasflugel-Ing. E. Hanle: Amendment 39–13591; Docket No. 2003–CE–60–AD.

When Does This AD Become Effective?

(a) This AD becomes effective on June 18, 2004.

What Other ADs Are Affected by This Action?

(b) None.

What Sailplanes Are Affected by This AD?

(c) This AD affects Model GLASFLUGEL Kestrel sailplanes, all serial numbers, that are certificated in any category.

What Is the Unsafe Condition Presented in This AD?

(d) This AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for Germany. The actions specified in this AD are intended to detect and correct damage to the airbrake actuation shaft, which could result in failure of the airbrake control. This failure could lead to loss of control of the sailplane.

What Must I Do To Address This Problem?

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

Actions	Compliance	Procedures
(1) Inspect the airbrake actuation shaft for cracks and deformation (damage).	Within the next 25 hours time-in-service (TIS) after June 18, 2004 the effective date of this AD. Repetitively inspect thereafter at intervals not to exceed 12 calendar months.	Follow H. Streifeneder Technical Note TN 401–26, dated November 22, 2001.
(2) Repair or replace any cracked or deformed airbrake actuation shaft found during any inspection required in paragraph (e)(1) of the AD.	Before further flight after any inspection required in paragraph (e)(1) of this AD in which damage is found. Continue with repetitive inspections after repairs or replacements are made.	Follow H. Streifeneder Technical Note TN 401–26, dated November 22, 2001.

May I Request an Alternative Method of Compliance?

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

Does This AD Incorporate Any Material by Reference?

(g) You must do the actions required by this AD following the instructions in H. Streifeneder Technical Note TN 401–26, dated November 22, 2001. 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 Hansjorg Streifeneder, Glasfaser-Flugzeug-Service GmbH, Hofener Weg, D–72582 Grabenstetten, Germany; telephone: 07382 1032; facsimile: 07382 1629; e-mail: *streifly@aol.com*. You may review copies at FAA, Central Region, Office of the Regional Counsel, 901 Locust, Room 506, Kansas City, Missouri 64106; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Is There Other Information That Relates to This Subject?

(h) Germany AD Number 2002–051, dated March 7, 2002, also addresses the subject of this AD.

Issued in Kansas City, Missouri, on April 29, 2004.

Scott L. Sedgwick,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–10180 Filed 5–6–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2004–NM–44–AD; Amendment 39–13622; AD 2004–09–32]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 757–200 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that is applicable to certain Boeing Model 757–200 series airplanes. This action requires initial and repetitive inspections of the fuselage skin and bear strap at the forward, upper corner of the L1 entry door cutout for cracking, and repair if necessary. This action also provides an optional terminating action for the repetitive inspections. This action is necessary to detect and correct cracking of the fuselage skin and bear strap at the forward, upper corner of the L1 entry door cutout, which could result in reduced structural integrity of the L1 entry door and consequent rapid decompression of the airplane. This action is intended to address the identified unsafe condition.

DATES: Effective May 24, 2004.

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

Comments for inclusion in the Rules Docket must be received on or before July 6, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2004–NM–44–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-iarcomment@faa.gov*. Comments sent via fax or the Internet must contain "Docket No. 2004–NM–44–AD" in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 or 2000 or ASCII text.

The service information referenced in this AD may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*.

FOR FURTHER INFORMATION CONTACT: Dennis Stremick, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6450; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION: The FAA has received reports of cracking in the fuselage skin and bear strap at the forward, upper corner of the L1 entry door cutout on Boeing Model 757–200 series airplanes. A 6.0-inch crack was found on an airplane having 27,071 total flight cycles. A 1.4-inch crack was also found on an airplane having 29,340 total flight cycles, and a 1.7-inch crack was found in the bear strap on an airplane having 26,686 total flight cycles. These cracks were found during visual inspections during maintenance and were attributed to fatigue caused by pressurization cycles.

This condition, if not corrected, could result in reduced structural integrity of the L1 entry door and consequent rapid decompression of the airplane.

Explanation of Relevant Service Information

The FAA has reviewed and approved Boeing Special Attention Service Bulletin 757–53–0089, dated March 18, 2004. The service bulletin describes procedures for performing initial and repetitive high frequency eddy current (HFEC) and low frequency eddy current (LFEC) inspections for cracking of the fuselage skin around the adjacent fasteners, along the edge of the skin and bear strap, and the bear strap around the fasteners adjacent at the forward, upper corner of the L1 entry door cutout; as applicable. The service bulletin specifies to contact Boeing for repair instructions for any cracks found during the HFEC and LFEC inspections.

The service bulletin also describes procedures for accomplishing a preventative modification, which eliminates the need for the repetitive inspections. The modification includes performing a general visual inspection to ensure that the fastener edge margins adjacent to the forward, upper corner of the L1 entry door cutout are 0.5 inch or greater; and related investigative/corrective actions, if necessary. Related investigative actions include repeating the general visual inspection at specified intervals if the margins are less than 0.50 inch or removing the fasteners and performing an HFEC inspection on the holes in the fuselage skin and bear strap if the margins are equal to or greater than 0.50 inch. The corrective actions include coldworking the fastener holes and installing oversized fasteners if no crack is found during the HFEC inspection or contacting Boeing for repair instructions if any crack is found during either the general visual or the HFEC inspection. Accomplishment of the actions specified in the service bulletin is intended to adequately address the identified unsafe condition.

Explanation of the Requirements of the Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, this AD requires accomplishment of the actions specified in the service bulletin described previously, except as discussed below. This AD also provides for optional terminating action for the repetitive inspections.

Differences Between This AD and the Service Bulletin

Although the service bulletin specifies that operators contact the manufacturer for disposition of certain repair conditions, this AD requires operators to repair those conditions per a method approved by the FAA, or per data meeting the type certification basis of the airplane approved by a Boeing Company Designated Engineering Representative who has been authorized by the FAA to make such findings.

Determination of Rule's Effective Date

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

Comments Invited

Although this action is in the form of a final rule that involves requirements affecting flight safety and, thus, was not preceded by notice and an opportunity for public comment, comments are invited on this rule. Interested persons are invited to comment on this rule by

submitting such written data, views, or arguments, as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified under the caption **ADDRESSES.** All communications received on or before the closing date for comments will be considered, and this rule may be amended in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of the AD action and determining whether additional rulemaking action would be needed.

Submit comments using the following format:

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

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 2004–NM–44–AD." The postcard will be date stamped and returned to the commenter.

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2004–09–32 Boeing: Amendment 39–13622. Docket 2004–NM–44–AD.

Applicability: Model 757–200 series airplanes, line numbers 1 through 90 inclusive; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To detect and correct cracking of the fuselage skin and bear strap at the forward, upper corner of the L1 entry door cutout, which could result in reduced structural integrity of the L1 entry door and consequent rapid decompression of the airplane; accomplish the following:

Initial Inspections

(a) Within 500 flight cycles after the effective date of this AD, or within 90 days after the effective date of this AD, whichever occurs later: Do the inspections of the forward, upper corner of the L1 entry door cutout specified in paragraphs (a)(1), (a)(2), and (a)(3) of this AD, per Part 1 of the Work Instructions of Boeing Special Attention Service Bulletin 757–53–0089, dated March 18, 2004.

(1) Do a high frequency eddy current (HFEC) inspection for cracking of the fuselage skin around the adjacent fasteners.

(2) Do an HFEC inspection for cracking along the edge of the skin and bear strap.

(3) Do a low frequency eddy current (LFEC) inspection of the bear strap.

No Crack Detected: Repetitive Inspections

(b) If no crack is detected during any inspection required by paragraph (a) of this AD: Repeat the inspections required by paragraph (a) of this AD at intervals not to exceed 1,400 flight cycles.

Any Crack Detected: Repair

(c) If any crack is detected during any inspection required by this AD, and the service bulletin specifies to contact Boeing for appropriate action: Before further flight, repair per a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA; or per data meeting the type certification basis of the airplane approved by a Boeing Company Designated Engineering Representative (DER) who has been authorized by the Manager, Seattle ACO, to make such findings. For a repair method to be approved, the approval must specifically reference this AD.

Optional Terminating Modification

(d) As an alternative to accomplishing the inspections required by paragraphs (a) and (b) of this AD, do the optional preventative modification of the forward, upper corner of the L1 entry door cutout, and do all applicable related investigative/corrective actions by accomplishing all the actions specified in Part 2 of the Work Instructions of Boeing Special Attention Service Bulletin 757–53–0089, dated March 18, 2004. Accomplishment of the modification constitutes terminating action for the repetitive inspection requirements of this AD.

Alternative Methods of Compliance

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

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

Incorporation by Reference

(f) Unless otherwise specified in this AD, the actions shall be done in accordance with Boeing Special Attention Service Bulletin 757–53–0089, dated March 18, 2004. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Effective Date

(g) This amendment becomes effective on May 24, 2004.

Issued in Renton, Washington, on April 28, 2004.

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–10240 Filed 5–6–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2004–NM–70–AD; Amendment 39–13614; AD 2004–09–24]

RIN 2120–AA64

Airworthiness Directives; Gulfstream Aerospace LP Model Galaxy and Gulfstream 200 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that is applicable to all Gulfstream Aerospace LP Model Galaxy and Gulfstream 200 airplanes. This action requires repetitive inspections of the internal and external spring sleeves of the aileron artificial feel unit (AFU) for proper lubrication, and lubrication if necessary. This action is necessary to prevent ice accumulation due to water entering the AFU, which could restrict or jam the aileron, resulting in reduced controllability of the airplane. This action is intended to address the identified unsafe condition.

DATES: Effective May 24, 2004.

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

Comments for inclusion in the Rules Docket must be received on or before June 7, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2004–NM–70–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-iarcomment@faa.gov*. Comments sent via the Internet must contain "Docket No. 2004–NM–70–AD" in the subject line and need not be submitted in triplicate. Comments sent via fax or the Internet as attached electronic files must be formatted in Microsoft Word 97 or 2000 or ASCII text.

The service information referenced in this AD may be obtained from Gulfstream Aerospace Corporation, P.O. Box 2206, Mail Station D25, Savannah, Georgia 31402. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html*.

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2125; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: The Civil Aviation Administration of Israel (CAAI), which is the airworthiness authority for Israel, recently notified the FAA that an unsafe condition may exist on all Gulfstream Model Galaxy and Gulfstream 200 airplanes. The CAAI advises that there have been several incidents of reduced aileron control due to water freezing in the internal and external spring sleeves of the aileron artificial feel unit (AFU). Investigation revealed a lack of the water displacing lubricant (Dow Corning 55) that prevents water ingress into the sleeves of the AFU. Such conditions could restrict or jam the aileron, which could result in reduced controllability of the airplane.

Explanation of Relevant Service Information

Gulfstream has issued Gulfstream Alert Service Bulletin 200–27A–230, dated February 18, 2004, which describes procedures for repetitive inspections of the internal and external spring sleeves of the aileron AFU for proper lubrication. The service bulletin also describes procedures for lubrication of the internal and external spring sleeves and the face of the nut of the AFU with Dow Corning 55 grease, if not properly lubricated.

The service bulletin refers to Certification Maintenance Procedure (CMP) Code 271051 of Chapter 05–10–00, of the Gulfstream 200 Airplane Maintenance Manual (AMM), as an additional source of service information for accomplishment of the inspection and lubrication of the internal and external spring sleeves of the aileron AFU.

Accomplishment of the action specified in the service bulletin is intended to adequately address the identified unsafe condition. The CAAI classified this service bulletin as mandatory and issued Israeli airworthiness directive 27–04–02–06, dated February 29, 2004, to ensure the continued airworthiness of these airplanes in Israel.

FAA's Conclusions

These airplane models are manufactured in Israel and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the CAAI has kept us informed of the situation described above. We have examined the findings of the CAAI, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of Requirements of Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, this AD is being issued to prevent ice accumulation due to water entering the AFU, which could restrict or jam the aileron, resulting in reduced controllability of the airplane. This AD requires repetitive inspections of the internal and external spring sleeves of the aileron artificial feel unit (AFU) for proper lubrication, and lubrication if necessary. The actions are required to be accomplished in accordance with the service bulletin described previously, except as discussed below.

Difference Between Service Bulletin and This AD

Although the service bulletin referenced in this AD specifies to submit a service reply card to the manufacturer, this AD does not include such a requirement.

Clarification of Repetitive Inspection Intervals

Paragraph (a) of this AD requires that the initial inspection and lubrication of the aileron AFU be repeated at intervals not to exceed 300 flight hours. This interval is cited in CMP Code 271051 of Chapter 05–10–00 of the Gulfstream 200 AMM, as noted in the Accomplishment

Instructions of the referenced service bulletin.

Determination of Rule's Effective Date

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

Comments Invited

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

Submit comments using the following format:

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

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 2004–NM–70–AD." The postcard will be date stamped and returned to the commenter.

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2004–09–24 Gulfstream Aerospace LP (Formerly Israel Aircraft Industries, Ltd.): Amendment 39–13614. Docket 2004–NM–70–AD.

Applicability: All Model Galaxy and Gulfstream 200 airplanes, certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent ice accumulation due to water entering the artificial feel unit (AFU), which could restrict or jam the aileron, resulting in reduced controllability of the airplane, accomplish the following:

Repetitive Inspections and Lubrication if Necessary

(a) Within 25 flight hours after the effective date of this AD: Do a detailed visual inspection for proper lubrication of the internal and external spring sleeves of the aileron AFU, by doing all the actions per the Accomplishment Instructions of Gulfstream Alert Service Bulletin 200–27A–230, dated February 18, 2004. If the AFU sleeves are not properly lubricated, before further flight, lubricate the internal and external spring sleeves and the face of the nut of the AFU with Dow Corning 55 grease, per the service bulletin. Repeat the inspection at intervals not to exceed 300 flight hours.

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

Note 2: Gulfstream Alert Service Bulletin 200–27A–230, dated February 18, 2004, refers to Certification Maintenance Procedure (CMP) Code 271051 of Chapter 05–10–00, of the Gulfstream 200 Airplane Maintenance Manual, as an additional source of service information for accomplishment of the inspection and lubrication of the internal and external spring sleeves of the aileron AFU.

No Reporting Requirement

(b) Although the service bulletin referenced in this AD specifies to submit a service reply card to the manufacturer, this AD does not include such a requirement.

Alternative Methods of Compliance

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

Incorporation by Reference

(d) The actions shall be done in accordance with Gulfstream Alert Service Bulletin 200–27A–230, dated February 18, 2004. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Gulfstream Aerospace Corporation, P.O. Box 2206, Mail Station D25, Savannah, Georgia 31402. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, Call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Note 3: The subject of this AD is addressed in Israeli airworthiness directive 27–04–02–06, dated February 29, 2004.

Effective Date

(e) This amendment becomes effective on May 24, 2004.

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

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–10239 Filed 5–6–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–NM–175–AD; Amendment 39–13628; AD 2004–09–37]

RIN 2120–AA64

Airworthiness Directives; Bombardier Model CL–600–1A11 (CL–600), CL–600–2A12 (CL–601), and CL–600–2B16 (CL–601–3A, CL–601–3R, and CL–604) Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD), applicable to certain Bombardier transport category airplanes, that currently requires a detailed inspection to detect cracks of the vane brackets of the inboard flap actuator beam, and follow-on repetitive detailed inspections or corrective actions, as applicable. That AD also provides for two optional terminating actions for the detailed inspection(s). This action requires performing one or the other of the terminating actions. The actions specified by this AD are intended to detect and correct gaps between the flap vane bracket and the adjacent lower skin and between the flap vane bracket and vane actuator beam, and premature cracking of the flap vane brackets, which could result in failure of the flap vane bracket(s) when the flaps are extended and the flap vane is aerodynamically loaded, and consequent reduced controllability of the airplane. This action is intended to address the identified unsafe condition.

DATES: Effective June 11, 2004.

The incorporation by reference of certain publications listed in the regulations was previously approved by the Director of the Federal Register as of May 8, 2003 (68 FR 19940, April 23, 2003).

ADDRESSES: The service information referenced in this AD may be obtained from Bombardier, Inc., Canadair, Aerospace Group, P.O. Box 6087, Station Centre-ville, Montreal, Quebec H3C 3G9, Canada. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, suite 410, Westbury, New York; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

FOR FURTHER INFORMATION CONTACT: Serge Napoleon, Aerospace Engineer, Airframe and Propulsion Branch, ANE–171, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, suite 410, Westbury, New York 11590; telephone (516) 228–7312; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) by superseding AD 2003–08–12, amendment 39–13125 (68 FR 19940, April 23, 2003), which is applicable to certain Bombardier transport category airplanes, was published in the **Federal Register** on February 13, 2004 (69 FR 7170). That action proposed to continue to require a detailed inspection to detect cracks of the vane brackets of the inboard flap actuator beam, and follow-on repetitive detailed inspections or corrective actions, as applicable. That action also proposed to require performing one or the other of two terminating actions.

Comments

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

Conclusion

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

Cost Impact

There are approximately 411 airplanes of U.S. registry that will be affected by this AD.

The detailed inspection that is currently required by AD 2003–08–12, amendment 39–13125, takes approximately 11 work hours per airplane to accomplish, at an average labor rate of $65 per work hour. Based on these figures, the cost impact of the currently required actions on U.S. operators is estimated to be $293,865, or $715 per airplane, per inspection cycle.

The terminating corrective actions specified in Part B of the Accomplishment Instructions of the applicable alert service bulletin identified in Table 2 of this AD, take approximately 24 work hours per airplane to accomplish the inspections and between 4 and 48 work hours per airplane to accomplish the replacement of the vane bracket(s), at an average labor rate of $65 per work hour. Required parts will cost between $535 and $6,414 for the vane brackets. Based on these figures, the cost impact of the terminating corrective actions on U.S. operators is estimated to be between $967,905 and $4,559,634, or between $2,355 and $11,094 per airplane.

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

The optional terminating corrective actions specified in Part C of the Accomplishment Instructions of the applicable alert service bulletin identified in Table 2 of this AD, take approximately 80 work hours per airplane to accomplish, at an average labor rate of $65 per work hour. Required parts will cost approximately $6,414 for the vane brackets. Based on these figures, the cost impact of the terminating corrective actions on U.S. operators is estimated to be $4,773,354 or between $11,614 per airplane.

Regulatory Impact

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. Section 39.13 is amended by removing amendment 39–13125 (68 FR 19940, April 23, 2003), and by adding a new airworthiness directive (AD), amendment 39–13628, to read as follows:

2004–09–37 Bombardier, Inc.: Amendment 39–13628. Docket 2003–NM–175–AD. Supersedes AD 2003–08–12, Amendment 39–13125.

Applicability: This AD applies to the airplanes listed in Table 1 of this AD, certificated in any category. Table 1 is as follows:

TABLE 1.—APPLICABILITY

Model	Serial Nos.
CL–600–1A11 (CL–600) series airplanes	1004 through 1085 inclusive.
CL–600–2A12 (CL–601) series airplanes	3001 through 3066 inclusive.
CL–600–2B16 (CL–601–3A and CL–601–3R) series airplanes	5001 through 5194 inclusive.
CL–600–2B16 (CL–604) series airplanes	5301 through 5499 inclusive.

Compliance: Required as indicated, unless accomplished previously.

To detect and correct gaps between the flap vane bracket and the adjacent lower skin and between the flap vane bracket and vane actuator beam, and premature cracking of the flap vane brackets, which could result in failure of the flap vane bracket(s) when the flaps are extended and the flap vane is aerodynamically loaded, and consequent reduced controllability of the airplane; accomplish the following:

Note 1: Where there are differences between this AD and the applicable Bombardier alert service bulletin specified in Table 2 of this AD, the AD prevails.

Restatement of Requirements of AD 2003–08–12

Inspection

(a) Do a detailed inspection to detect cracks of the vane brackets of the inboard flap actuator beam, per Part A of the Accomplishment Instructions of the applicable Bombardier alert service bulletin specified in Table 2 of this AD; at the applicable time indicated in Table 3 of this AD. Table 2 is as follows:

TABLE 2.—ALERT SERVICE BULLETINS

Model	Bombardier alert service bulletin	Excluding
CL–600–1A11 (CL–600) series airplanes	A600–0699, Revision 01. dated July 8, 2002	Service Bulletin Incorporation Sheet, Flap Vane Bracket Inspection Program page, and Minimum Edge Distance Inspection pages.
CL–600–2A12 (CL–601) series airplanes, and CL–600–2B16 (CL–601–3A and CL–601–3R) series airplanes.	A601–0532, Revision 01, dated July 8, 2002	Service Bulletin Incorporation Sheet, Flap Vane Bracket Inspection Program page, and Minimum Edge Distance Inspection pages.
CL–600–2B16 (CL–604) series airplanes	A604–27–007, Revision 01, dated July 8, 2002.	Service Bulletin Incorporation Sheet, Flap Vane Bracket Inspection Program page, and Minimum Edge Distance Inspection pages.

Table 3 is as follows:

TABLE 3.—COMPLIANCE TIMES

For airplanes that have accumulated—	The compliance time is—
1,200 total landings or less as of May 8, 2003 (the effective date of AD 2003–08–12).	Before the accumulation of 1,300 total landings.
More than 1,200 total landings, but less than 3,000 total landings as of May 8, 2003 (the effective date of AD landings after 2003–08–12).	Within 100 landings after May 8, 2003 (the effective date of AD 2003–08–12).
3,000 total landings or more as of May 8, 2003 (the effective date of AD 2003–08–12).	Within 50 landings after May 8, 2003 (the effective date of AD 2003–08–12).

Note 2: For the purposes of this AD, a detailed inspection is defined as: "An intensive visual examination of a specific structural area, system, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at intensity deemed appropriate by the inspector. Inspection aids such as mirror, magnifying lenses, etc., may be used. Surface cleaning and elaborate access procedures may be required."

No Crack Findings: Repetitive Inspections

(b) If no crack is detected during the detailed inspection required by paragraph (a) of this AD, repeat that inspection thereafter at intervals not to exceed 100 landings.

Crack Findings: Corrective Actions

(c) If any crack is detected during the detailed inspection required by paragraph (a) of this AD, before further flight, do the actions specified in paragraph (e) or (f) of this AD.

New Requirements of This AD

Terminating Actions

(d) Do the actions specified in paragraph (e) or (f) of this AD, at the applicable time listed in Table 4—Compliance Time—Terminating Actions.

TABLE 4.—COMPLIANCE TIME—TERMINATING ACTIONS

For airplanes that have accumulated—	The compliance time is—
Less than 2,000 total landings as of the effective date of this AD	Within 600 total landings after the effective date of this AD.
2,000 or more total landings as of the effective date of this AD	Within 400 total landings after the effective date of this AD.

(e) Do the actions specified in paragraphs (e)(1), (e)(2), and (e)(3) of this AD per Part B of the Accomplishment Instructions of the applicable alert service bulletin identified in Table 2 of this AD, unless otherwise specified in this AD. Accomplishment of these actions constitutes compliance with the requirements of paragraphs (a), (b), and (c) of this AD.

(1) Do a detailed inspection to detect gaps at flap stations 60.0, 98.5, and 137.0 between the vane bracket(s) and adjacent lower skin and vane actuator beam. If any gap is in excess of the limits specified in the applicable alert service bulletin, before further flight, repair per a method approved by either the Manager, New York Aircraft Certification Office (ACO), FAA; or Transport Canada Civil Aviation (TCCA) (or its delegated agent).

(2) Measure the minimum edge distance (MED) for the fastener holes in all flap vane brackets and actuator beams. If the MED requirements for any bracket or actuator beam do not meet the allowable values specified in Figure 2 of the applicable alert service bulletin, before further flight, replace the out-of-tolerance bracket and/or actuator beam with a new bracket and/or actuator beam that meets the MED requirements specified in Figure 2 of the applicable alert service bulletin.

(3) Do a nondestructive test (NDT) inspection on all vane brackets for cracks. If any crack is found, before further flight, accomplish the corrective actions (*e.g.*, remove gaps, ensure that the MED requirements for the replacement brackets meet the allowable values specified in Figure 2 of the applicable alert service bulletin, and replace any cracked vane bracket with a new bracket that meets the MED requirements specified in Figure 2 of the applicable alert service bulletin). Although the applicable alert service bulletin describes procedures for identifying and returning all cracked vane brackets to Bombardier, this AD does not require such actions.

(f) In lieu of the actions specified in paragraph (e) of this AD, do the actions specified in paragraphs (f)(1) and (f)(2) of this AD per Part C of the Accomplishment Instructions of the applicable alert service bulletin identified in Table 2 of this AD. Accomplishment of these actions constitutes compliance with the requirements of paragraphs (a), (b), and (c) of this AD.

(1) Replace all 12 vane brackets with new brackets that meet the MED requirements specified in Figure 2 of the applicable alert service bulletin (including removal of any gap between the vane brackets and the adjacent lower skin and actuator beams).

(2) Measure the MED for the fastener holes in all replacement flap vane brackets and actuator beams (including a detailed inspection for gaps).

(i) If the MED requirements for any bracket or actuator beam do not meet the allowable values specified in Figure 2 of the applicable alert service bulletin, before further flight, replace the out-of-tolerance bracket and/or actuator beam with a new bracket and/or actuator beam that meets the MED requirements specified in Figure 2 of the applicable alert service bulletin.

(ii) If any gap is detected, before further flight, repair the gap.

Other Means of Acceptable Compliance With Paragraph (f) of This AD

(g) Accomplishment of the inspections and modifications per Part B or Part C of the applicable alert service bulletin listed in Table 5 of this AD; and the MED dimension checks for the flap brackets and the actuator beams as specified in drawing K600–14251, including any required rework; is considered acceptable for compliance with the requirements of paragraph (f) of this AD. Table 5 of this AD is as follows:

TABLE 5.—ACCEPTABLE BASIC ISSUE ALERT SERVICE BULLETINS

For model—	Use bombardier alert service bulletin—
CL–600–1A11 (CL–600) series airplanes	A600–0699, Basic Issue, dated November 29, 2001.
CL–600–2A12 (CL–601) series airplanes, and CL–600–2B16 (CL–601–3A and CL–601–3R) series airplanes.	A601–0532, Basic Issue, dated November 29, 2001.
CL–600–2B16 (CL–604) series airplanes	A604–27–007, Basic Issue, dated November 29, 2001.

Time Limits/Maintenance Checks

(h) After doing the actions specified in paragraph (e) or (f) of this AD, revise the Airworthiness Limitation section (ALS) of the Instructions for Continued Airworthiness to state the following (this may be accomplished by inserting a copy of this AD in the ALS): "Do the applicable Time Limits/Maintenance Checks (TLMC) inspection task for the flap vane brackets at the times specified in the following table:"

TABLE.—COMPLIANCE TIME FOR TLMCS

Condition of brackets and gaps	Compliance time
No gap or crack in any flap vane bracket	Continue using existing TLMC bracket schedule as published in the applicable ALS.

TABLE.—COMPLIANCE TIME FOR TLMCS—Continued

Condition of brackets and gaps	Compliance time
No crack in any flap vane bracket, but shims added	For Model CL–600–1A11 (CL–600), CL–600–2A12 (CL–601), and CL–600–2B16 (CL–601–3A and CL–601–3R) series airplanes: Repeat inspections remain at 600 landings from rework. For Model CL–600–2B16 (CL–604) series airplanes: Repeat inspections remain at 1,800 landings from rework.
All 12 flap vane brackets have been replaced	For Model CL–600–1A11 (CL–600), CL–600–2A12 (CL–601), and CL–600–2B16 (CL–601–3A and CL–601–3R) series airplanes: New threshold of 7,000 landings from installation of new flap vane brackets. Repeat inspections remain at 600 landings. For Model CL–600–2B16 (CL–604) series airplanes: New threshold of 7,200 landings from installation of new flap vane brackets. Repeat inspections remains at 1,800 landings.

(i) After doing the requirements of paragraph (h) of this AD, except as provided in paragraph (j) of this AD, no alternative inspection times may be approved for these flap vane brackets.

Alternative Methods of Compliance

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

Incorporation by Reference

(k) Unless otherwise specified in this AD, the actions shall be done in accordance with the following Bombardier alert service bulletins as listed in Table 6 of this AD, as applicable. Table 6 of this AD is as follows:

TABLE 6.—ALERT SERVICE BULLETINS

Bombardier alert service bulletin	Excluding
A600–0699, Revision 01, dated July 8, 2002	Service Bulletin Incorporation Sheet, Flap Vane Bracket Inspection Program page, and Minimum Edge Distance Inspection pages.
A601–0532, Revision 01, dated July 8, 2002	Service Bulletin Incorporation Sheet, Flap Vane Bracket Inspection Program page, and Minimum Edge Distance Inspection pages
A604–27–007, Revision 01, dated July 8, 2002	Service Bulletin Incorporation Sheet, Flap Vane Bracket Inspection Program page, and Minimum Edge Distance Inspection pages.

This incorporation by reference was previously approved by the Director of the Federal Register as of May 8, 2003 (68 FR 19940, April 23, 2003). Copies of the service bulletins may be obtained from Bombardier, Inc., Canadair, Aerospace Group, P.O. Box 6087, Station Centre-ville, Montreal, Quebec H3C 3G9, Canada. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, suite 410, Westbury, New York; or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Note 3: The subject of this AD is addressed in Canadian airworthiness directives CF–2002–36 and CF–2002–37, both effective August 30, 2002.

Effective Date

(l) This amendment becomes effective on June 11, 2004.

Issued in Renton, Washington, on April 28, 2004.

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–10375 Filed 5–6–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–NE–46–AD; Amendment 39–13557; AD 2004–07–13]

RIN 2120–AA64

Airworthiness Directives; General Electric Company CF6–80C2 Series Turbofan Engines; Correction

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; correction.

SUMMARY: This document makes a correction to Airworthiness Directive (AD) 2004–07–13. That AD applies to General Electric Company (GE) CF6–80C2 series turbofan engines. That AD was published in the **Federal Register** on April 1, 2004 (69 FR 17033). The amendatory text in the Applicability section is incorrect. This document corrects the aircraft models that these engines are installed on. In all other respects, the original document remains the same.

DATES: *Effective Date:* Effective April 1, 2004.

FOR FURTHER INFORMATION CONTACT: Karen Curtis, Aerospace Engineer, Aircraft Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; telephone (781) 238–7192; fax (781) 238–7199.

SUPPLEMENTARY INFORMATION: A final rule AD, FR Doc. 04–7235, that applies to General Electric Company (GE) CF6–80C2 series turbofan engines was published in the **Federal Register** on April 1, 2004 (69 FR 17033). The following correction is needed:

§ 39.13 [Corrected]

■ On page 17034, in the first column, in the Amendatory Section, Applicability paragraph (c), in the eighth line, "A300 and A330" is corrected to read "A300 and A310".

Issued in Burlington, MA, on May 3, 2004.

Jay J. Pardee,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 04–10429 Filed 5–6–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 807

Medical Device Reports; Reports of Corrections and Removals; Establishment Registration and Device Listing: Premarket Approval Supplements; Quality System Regulation; Importation of Electronic Products; Technical Amendment; Correction

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; technical amendment; correction.

SUMMARY: The Food and Drug Administration (FDA) is correcting a final rule that appeared in the **Federal Register** of April 8, 2004 (69 FR 18472). That document corrected a final rule that appeared in the **Federal Register** of March 10, 2004 (69 FR 11310). The April 8, 2004, document published with inadvertent errors. This document corrects those errors.

DATES: This rule is effective May 7, 2004.

FOR FURTHER INFORMATION CONTACT: Joyce A. Strong, Office of Policy and Planning (HF–27), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–7010.

SUPPLEMENTARY INFORMATION: In FR Doc. 04–8022, appearing on page 18472 in the **Federal Register** of Thursday, April 8, 2004, the following corrections are made:

1. On page 18472, in the third column, under the **FOR FURTHER INFORMATION CONTACT** heading, the address is corrected to read "Joyce A. Strong, Office of Policy and Planning (HF–27), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–7010."

§ 807.22 [Corrected]

2. On page 18473, in the first column, in § 807.22, in paragraph (a), the first sentence is corrected to read "The first registration of a device establishment shall be on Form FDA–2891 (Initial Registration of Device Establishment)."

Dated: April 29, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–10265 Filed 5–6–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9125]

RIN 1545–AW01

Deduction for Interest on Qualified Education Loans

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the deduction under section 221 of the Internal Revenue Code (Code) for interest paid on qualified education loans. The final regulations reflect the enactment and amendment of section 221 by the Taxpayer Relief Act of 1997, the Internal Revenue Service Restructuring and Reform Act of 1998, the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, and the Economic Growth and Tax Relief Reconciliation Act of 2001. This document also contains amendments to the final regulations under section 6050S relating to the information reporting requirements for interest payments received on qualified education loans. The final regulations affect taxpayers who pay interest on qualified education loans and payees who receive payments of interest on qualified education loans.

DATES: *Effective Date:* These final regulations are effective May 7, 2004.

Applicability Dates: Section 1.221–1 is applicable to periods governed by section 221 as amended in 2001, which relates to interest paid on qualified education loans after December 31, 2001, and on or before December 31, 2010. Section 1.221–2 is applicable to interest due and paid on qualified education loans after January 21, 1999, but before January 1, 2002, and again after December 31, 2010. Taxpayers also may apply § 1.221–2 to interest due and paid on qualified education loans after December 31, 1997, but before January 21, 1999. The amendments to § 1.6050S–3 provide a transitional rule for certain interest payments with respect to qualified education loans made before September 1, 2004, and provide guidance applicable to qualified education loans made on or after that date.

FOR FURTHER INFORMATION CONTACT: Sean M. Dwyer at (202) 622–5020 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On January 21, 1999, the IRS published a notice of proposed rulemaking (REG–116826–97) in the **Federal Register** (64 FR 3257) under section 221 of the Code. The notice of proposed rulemaking implemented section 202 of the Taxpayer Relief Act of 1997, Public Law 105–34 (111 Stat. 778), which added section 221 to the Code. The IRS received written, including electronic, comments responding to the proposed regulations. There were no requests for a public hearing and none was held.

Subsequent to the publication of the proposed regulations, section 412 of the Economic Growth and Tax Relief Reconciliation Act of 2001, Public Law 107–16 (115 Stat. 38) (2001 Act) amended section 221 by eliminating the 60-month limitation period and the restriction on deductions of interest a taxpayer pays during a period when the lender does not require payments. The 2001 Act also increased the income limitations relating to interest deductions under section 221 from $55,000 ($75,000 for married individuals filing jointly) to $65,000 ($130,000 for married individuals filing jointly) and the income phase-out range from $40,000–$55,000 ($60,000–$75,000 for married individuals filing jointly) to $50,000–$65,000 ($100,000–$130,000 for married individuals filing jointly).

The 2001 Act amendments apply to interest paid on qualified education loans after December 31, 2001. Accordingly, the final regulations appear in two sections to reflect the law before and after the effective date of the 2001 Act. Section 1.221–1 is applicable to periods governed by section 221 as amended in 2001, which relates to interest paid on qualified education loans after December 31, 2001, and on or before December 31, 2010. Section 1.221–2 is applicable to interest due and paid on qualified education loans after January 21, 1999, but before January 1, 2002. Taxpayers also may apply § 1.221–2 to interest due and paid on qualified education loans after December 31, 1997, but before January 21, 1999. Unless the 2001 Act amendments are extended by future legislation, section 1.221–2 also will apply to interest due and paid on qualified education loans after December 31, 2010.

After consideration of all the comments, the proposed regulations under section 221 are adopted as amended by this Treasury decision.

On April 29, 2002, the IRS published final regulations (TD 8992) in the **Federal Register** (67 FR 20901) under

section 6050S relating to information reporting for interest payments received on qualified education loans. The Taxpayer Relief Act of 1997 added section 6050S to the Code, as well as section 221.

Explanation and Summary of Comments

Many of the comments concerned issues relating to the 60-month limitation period, which the 2001 Act eliminated. These comments are discussed in 7. and 8. below because the 60-month period continues to apply to interest on qualified education loans due and paid after December 31, 1997, but before January 1, 2002, and again after December 31, 2010.

1. Treatment of Capitalized Interest and Certain Fees

Several commentators discussed the treatment of capitalized interest, loan origination fees, late fees, and certain insurance fees. Courts have defined the term "interest," for income tax purposes, as compensation paid for the use or forbearance of money. See, *e.g., Deputy* v. *Du Pont,* 308 U.S. 488 (1940). Consistent with this definition, the final regulations provide that capitalized interest is deductible as qualified education loan interest. Generally, fees, such as loan origination fees or late fees, are interest if the fees represent a charge for the use or forbearance of money. Therefore, if the fees represent compensation to the lender for the cost of specific services performed in connection with the borrower's account, the fees are not interest for Federal income tax purposes. See Rev. Rul. 69–188 (1969–1 C.B. 54), amplified by Rev. Rul. 69–582 (1969–2 C.B. 29); see also, *e.g., Trivett* v. *Commissioner,* T.C. Memo. 1977–161, *aff'd on other grounds,* 611 F.2d 655 (6th Cir. 1979) (Tax Court found that certain fees, including insurance fees, were similar to payments for services rendered and not deductible as interest).

Some commentators expressed confusion about how to apply the rules in the proposed regulations for allocating payments to principal or interest. In response to these comments, the final regulations provide guidance on the treatment and allocation of such amounts. Under the final regulations, a payment generally first applies to interest that has accrued and remains unpaid as of the date the payment is due and then applies to the outstanding principal. An example is included.

2. Interest Paid by Someone Other Than the Taxpayer

Several commentators requested guidance on the treatment of an interest payment made by someone other than the taxpayer. To provide consistency with section 221(a), the final regulations provide, "Under section 221, an individual taxpayer may deduct from gross income certain interest paid by the taxpayer during the taxable year on a qualified education loan." (Emphasis added.) The final regulations also clarify that certain third party payments of interest are treated as first paid to the taxpayer and then paid by the taxpayer to the lender, in a manner similar to the treatment of third party payments of tuition under § 1.25A–5(b)(1). The final regulations provide for this treatment if a third party makes a payment of interest on a qualified education loan on behalf of a taxpayer.

Thus, for example, if a third party pays interest on behalf of the taxpayer, as a gift to the taxpayer, the taxpayer may deduct this interest for Federal income tax purposes, assuming fulfillment of all other requirements of section 221. Similarly, if an employer pays interest to a lender on behalf of the taxpayer, and the taxpayer as required by section 61 includes the payment in income for Federal income tax purposes, the taxpayer may deduct this interest, assuming fulfillment of all other requirements of section 221.

A commentator also recommended the allowance of a deduction to an individual even if the individual qualifies as a dependent of a taxpayer under section 151. This recommendation was not adopted because it is contrary to section 221(c).

3. Definition of Eligible Educational Institution

Several commentators suggested expanding the definition of *eligible educational institution* in a manner that is not consistent with the statutory definition under sections 221(d)(2) (formerly section 221(e)(2) (redesignated by the 2001 Act)) and 25A(f)(2). Accordingly, these comments were not adopted. Another commentator requested guidance on the deductibility of interest paid on a qualified education loan if the educational institution loses its status as an eligible educational institution after the end of the academic period for which the loan was incurred. The final regulations include a new example illustrating that the deductibility of interest on the loan is not affected by the institution's subsequent change in status.

4. Definition of Qualified Education Loan

The definition of *qualified education loan* in section 221(d)(1) (formerly section 221(e)(1) (redesignated by the 2001 Act)) provides, in part, that the indebtedness must be incurred by the taxpayer solely to pay higher education expenses that are paid within a reasonable period of time before or after the indebtedness is incurred. Several comments were received in connection with this "reasonable period of time" requirement.

One commentator suggested extending the 60-day safe harbor provided in the proposed regulations for satisfying the "reasonable period of time" requirement to 90 days or changing it so that the beginning of the safe harbor period is the earlier of 60 days prior to the start of the academic period or the end of the previous academic period. Two commentators suggested extending the safe harbor to 90 days after the end of the academic period. Another commentator expressed concern that expenses paid with loans disbursed outside the 60-day window would not satisfy the "reasonable period of time" requirement. Finally, one commentator interpreted the safe harbor to impose a 60-day limit on loans that are part of a federal postsecondary loan program.

The final regulations provide that what constitutes a reasonable period of time is determined based on all the relevant facts and circumstances. The final regulations also provide that qualified higher education expenses are treated as paid or incurred within a reasonable period of time under the following circumstances: (1) The expenses are paid with the proceeds of education loans that are part of a federal postsecondary education loan program; or (2) the expenses relate to a particular academic period and the loan proceeds used to pay the expenses are disbursed within a period that begins 90 days before the start of, and ends 90 days after the end of, the academic period to which the expenses relate.

One commentator recommended expansion of the federal loan safe harbor described above to include expenses paid with the proceeds of any non-federal loan disbursed under policies mirroring the awarding and disbursement policies governing certain federal loans. Although the final regulations do not adopt this suggestion, the IRS and Treasury Department believe that loans described by the commentator probably would fall within the 90-day safe harbor, or satisfy the "reasonable period of time"

requirement based on the facts and circumstances.

Another requirement of a "qualified education loan" is that the borrower obtain the loan "solely" to pay higher education expenses. One commentator suggested that if a taxpayer refinances a qualified education loan and receives an amount in excess of the original qualified education loan, the taxpayer may take an interest deduction under section 221 for interest paid on the refinanced loan. The commentator is correct, but only if the taxpayer uses the excess amount solely to pay higher education expenses and satisfies all other requirements of a qualified education loan. Thus, if the taxpayer uses the excess amount for any other purpose, the refinanced loan is not "solely" to pay higher education expenses, and no interest paid on the loan will be deductible.

5. Miscellaneous Comments and Changes

Federal Postsecondary Education Loan Program—The final regulations clarify that a federal postsecondary education loan program includes, but is not limited to, the Federal Perkins Loan, Federal Family Education Loan, and William D. Ford Federal Direct Loan Programs under Title IV of the Higher Education Act of 1965, and the Health Education Assistance Loan and the Nursing Student Loan Programs under Titles VII and VIII of the Public Health Service Act.

Eligible Educational Institution—Although the Higher Education Amendments Act of 1998 moved section 481 from Title IV to Title I, the regulations do not reflect this change, as the statutory language refers to section 481 of the Higher Education Act as in effect on the date that section 221 was enacted.

Interest Charges on a University In-House Deferred Payment Plan—One commentator requested clarification of the deductibility of interest charges on a university's in-house deferred payment plan, which is a revolving credit account that can include a variety of expenditures in addition to qualified higher education expenses. This situation is addressed by *Example 6* of § 1.221–1(e)(4) and *Example 6* of § 1.221–2(f)(4) concerning mixed use loans.

6. Refinanced and Consolidated Loans

The final regulations reserve a place for more detailed treatment of refinanced and consolidated loans.

7. Periods of Deferment or Forbearance

Prior to the 2001 Act, section 221(d) stated that a "deduction shall be allowed under this section only with respect to interest paid on any qualified education loan during the first 60 months (whether or not consecutive) in which interest payments are required."

Some commentators recommended that the 60-month limitation period should not be suspended during a period of deferment or forbearance. Other commentators suggested that the 60-month limitation period should be suspended during all periods of deferment or forbearance, whether or not the taxpayer makes payments. Commentators also asked whether rules under which the 60-month period is not suspended apply to loans made under federal programs as well as non-federal loans. Finally, commentators asked whether interest payments made during periods of reduced payment forbearance are deductible.

Section 221, prior to the 2001 Act, and the legislative history provide that only interest payments required under the terms of a loan are deductible. Under that provision, interest a borrower pays voluntarily during a period when payments are not required, such as during a period of deferment or forbearance or before loan repayment begins, is not deductible.

Therefore, § 1.221–2 of the final regulations retains the rule that interest payments are not deductible if paid voluntarily during a period of deferment or forbearance. However, the final regulations provide that interest payments made during a period of deferment, forbearance, or reduced payment forbearance are deductible if required as part of the terms of the deferment, forbearance, or reduced payment agreement. The final regulations include a new example involving reduced payment forbearance.

In addition, § 1.221–2 of the final regulations provides for suspension of the 60-month period for loans not issued or guaranteed under a federal postsecondary education loan program under certain conditions. The promissory note must contain conditions for deferment or forbearance that are substantially similar to the conditions established by the U.S. Department of Education for Federal student loan programs under Title IV of the Higher Education Act of 1965 and the borrower must satisfy one of those conditions.

8. Start of the 60-Month Limitation Period

A commentator expressed concern that the month a loan first enters repayment status may not be the same as the month the first interest payment is required. Section 1.221–2 of the final regulations clarifies that the beginning of the 60-month period commences on the first day of the month in which the first interest payment is required.

9. Information Reporting for Interest Payments Received on Qualified Education Loans

Section 6050S requires information reporting by certain lenders or other payees that receive payments of interest on qualified education loans. Section 1.6050S–3(b)(1) provides that interest includes stated interest, loan origination fees (other than fees for services), and capitalized interest. Section 1.6050S–3(e)(1) provides a special transitional rule for reporting loan origination fees and capitalized interest. Under the transitional rule, a payee is not required to report payments of loan origination fees and capitalized interest for loans made before January 1, 2004.

Several commentators representing payees requested that the transitional rule be extended because the necessary programming changes to capture and report these amounts could not be made in the absence of final regulations under section 221. Based on the comments received, these regulations amend § 1.6050S–3(e)(1) to extend the transitional rule to loans made before September 1, 2004.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and, because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the proposed regulations that preceded these regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these final regulations is Sean M. Dwyer, Office of the Associate Chief Counsel (Income Tax & Accounting). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

■ Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ 1. The authority citation for part 1 is amended by adding an entry in numerical order to read as follows:

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

Section 1.221–2 also issued under 26 U.S.C. 221(d). * * *

Section 1.6050S–3 also issued under 26 U.S.C. 6050S(g). * * *

■ 2. Sections 1.221–1 and 1.221–2 are added to read as follows:

§ 1.221–1 Deduction for interest paid on qualified education loans after December 31, 2001.

(a) *In general*—(1) *Applicability.* Under section 221, an individual taxpayer may deduct from gross income certain interest paid by the taxpayer during the taxable year on a qualified education loan. See paragraph (b)(4) of this section for rules on payments of interest by third parties. The rules of this section are applicable to periods governed by section 221 as amended in 2001, which relates to deductions for interest paid on qualified education loans after December 31, 2001, in taxable years ending after December 31, 2001, and on or before December 31, 2010. For rules applicable to interest due and paid on qualified education loans after January 21, 1999, if paid before January 1, 2002, see § 1.221–2. Taxpayers also may apply § 1.221–2 to interest due and paid on qualified education loans after December 31, 1997, but before January 21, 1999. To the extent that the effective date limitation (sunset) of the 2001 amendment remains in force unchanged, section 221 before amendment in 2001, to which § 1.221–2 relates, also applies to interest due and paid on qualified education loans in taxable years beginning after December 31, 2010.

(2) *Example.* The following example illustrates the rules of this paragraph (a). In the example, assume that the institution the student attends is an eligible educational institution, the loan is a qualified education loan, the student is legally obligated to make interest payments under the terms of the loan, and any other applicable requirements, if not otherwise specified, are fulfilled. The example is as follows:

Example. Effective dates. Student A begins to make monthly interest payments on her loan beginning January 1, 1997. Student A continues to make interest payments in a timely fashion. However, under the effective date provisions of section 221, no deduction is allowed for interest Student A pays prior to January 1, 1998. Student A may deduct interest due and paid on the loan after December 31, 1997. Student A may apply the rules of § 1.221–2 to interest due and paid during the period beginning January 1, 1998, and ending January 20, 1999. Interest due and paid during the period January 21, 1999, and ending December 31, 2001, is deductible under the rules of § 1.221–2, and interest paid after December 31, 2001, is deductible under the rules of this section.

(b) *Eligibility*—(1) *Taxpayer must have a legal obligation to make interest payments.* A taxpayer is entitled to a deduction under section 221 only if the taxpayer has a legal obligation to make interest payments under the terms of the qualified education loan.

(2) *Claimed dependents not eligible*—(i) *In general.* An individual is not entitled to a deduction under section 221 for a taxable year if the individual is a dependent (as defined in section 152) for whom another taxpayer is allowed a deduction under section 151 on a Federal income tax return for the same taxable year (or, in the case of a fiscal year taxpayer, the taxable year beginning in the same calendar year as the individual's taxable year).

(ii) *Examples.* The following examples illustrate the rules of this paragraph (b)(2):

Example 1. Student not claimed as dependent. Student B pays $750 of interest on qualified education loans during 2003. Student B's parents are not allowed a deduction for her as a dependent for 2003. Assuming fulfillment of all other relevant requirements, Student B may deduct under section 221 the $750 of interest paid in 2003.

Example 2. Student claimed as dependent. Student C pays $750 of interest on qualified education loans during 2003. Only Student C has the legal obligation to make the payments. Student C's parent claims him as a dependent and is allowed a deduction under section 151 with respect to Student C in computing the parent's 2003 Federal income tax. Student C is not entitled to a deduction under section 221 for the $750 of interest paid in 2003. Because Student C's parent was not legally obligated to make the payments, Student C's parent also is not entitled to a deduction for the interest.

(3) *Married taxpayers.* If a taxpayer is married as of the close of a taxable year, he or she is entitled to a deduction under this section only if the taxpayer and the taxpayer's spouse file a joint return for that taxable year.

(4) *Payments of interest by a third party*—(i) *In general.* If a third party who is not legally obligated to make a payment of interest on a qualified education loan makes a payment of interest on behalf of a taxpayer who is legally obligated to make the payment, then the taxpayer is treated as receiving the payment from the third party and, in turn, paying the interest.

(ii) *Examples.* The following examples illustrate the rules of this paragraph (b)(4):

Example 1. Payment by employer. Student D obtains a qualified education loan to attend college. Upon Student D's graduation from college, Student D works as an intern for a non-profit organization during which time Student D's loan is in deferment and Student D makes no interest payments. As part of the internship program, the non-profit organization makes an interest payment on behalf of Student D after the deferment period. This payment is not excluded from Student D's income under section 108(f) and is treated as additional compensation includible in Student D's gross income. Assuming fulfillment of all other requirements of section 221, Student D may deduct this payment of interest for Federal income tax purposes.

Example 2. Payment by parent. Student E obtains a qualified education loan to attend college. Upon graduation from college, Student E makes legally required monthly payments of principal and interest. Student E's mother makes a required monthly payment of interest as a gift to Student E. A deduction for Student E as a dependent is not allowed on another taxpayer's tax return for that taxable year. Assuming fulfillment of all other requirements of section 221, Student E may deduct this payment of interest for Federal income tax purposes.

(c) *Maximum deduction.* The amount allowed as a deduction under section 221 for any taxable year may not exceed $2,500.

(d) *Limitation based on modified adjusted gross income*—(1) *In general.* The deduction allowed under section 221 is phased out ratably for taxpayers with modified adjusted gross income between $50,000 and $65,000 ($100,000 and $130,000 for married individuals who file a joint return). Section 221 does not allow a deduction for taxpayers with modified adjusted gross income of $65,000 or above ($130,000 or above for married individuals who file a joint return). See paragraph (d)(3) of this section for inflation adjustment of amounts in this paragraph (d)(1).

(2) *Modified adjusted gross income defined.* The term *modified adjusted gross income* means the adjusted gross income (as defined in section 62) of the taxpayer for the taxable year increased by any amount excluded from gross income under section 911, 931, or 933 (relating to income earned abroad or from certain United States possessions or Puerto Rico). Modified adjusted gross income must be determined under this

section after taking into account the inclusions, exclusions, deductions, and limitations provided by sections 86 (social security and tier 1 railroad retirement benefits), 135 (redemption of qualified United States savings bonds), 137 (adoption assistance programs), 219 (deductible qualified retirement contributions), and 469 (limitation on passive activity losses and credits), but before taking into account the deductions provided by sections 221 and 222 (qualified tuition and related expenses).

(3) *Inflation adjustment.* For taxable years beginning after 2002, the amounts in paragraph (d)(1) of this section will be increased for inflation occurring after 2001 in accordance with section 221(f)(1). If any amount adjusted under section 221(f)(1) is not a multiple of $5,000, the amount will be rounded to the next lowest multiple of $5,000.

(e) *Definitions*—(1) *Eligible educational institution.* In general, an *eligible educational institution* means any college, university, vocational school, or other postsecondary educational institution described in section 481 of the Higher Education Act of 1965 (20 U.S.C. 1088), as in effect on August 5, 1997, and certified by the U.S. Department of Education as eligible to participate in student aid programs administered by the Department, as described in section 25A(f)(2) and § 1.25A–2(b). For purposes of this section, an eligible educational institution also includes an institution that conducts an internship or residency program leading to a degree or certificate awarded by an institution, a hospital, or a health care facility that offers postgraduate training.

(2) *Qualified higher education expenses*—(i) *In general. Qualified higher education expenses* means the cost of attendance (as defined in section 472 of the Higher Education Act of 1965, 20 U.S.C. 1087ll, as in effect on August 4, 1997), at an eligible educational institution, reduced by the amounts described in paragraph (e)(2)(ii) of this section. Consistent with section 472 of the Higher Education Act of 1965, a student's cost of attendance is determined by the eligible educational institution and includes tuition and fees normally assessed a student carrying the same academic workload as the student, an allowance for room and board, and an allowance for books, supplies, transportation, and miscellaneous expenses of the student.

(ii) *Reductions.* Qualified higher education expenses are reduced by any amount that is paid to or on behalf of a student with respect to such expenses and that is—

(A) A qualified scholarship that is excludable from income under section 117;

(B) An educational assistance allowance for a veteran or member of the armed forces under chapter 30, 31, 32, 34 or 35 of title 38, United States Code, or under chapter 1606 of title 10, United States Code;

(C) Employer-provided educational assistance that is excludable from income under section 127;

(D) Any other amount that is described in section 25A(g)(2)(C) (relating to amounts excludable from gross income as educational assistance);

(E) Any otherwise includible amount excluded from gross income under section 135 (relating to the redemption of United States savings bonds);

(F) Any otherwise includible amount distributed from a Coverdell education savings account and excluded from gross income under section 530(d)(2); or

(G) Any otherwise includible amount distributed from a qualified tuition program and excluded from gross income under section 529(c)(3)(B).

(3) *Qualified education loan*—(i) *In general.* A *qualified education loan* means indebtedness incurred by a taxpayer solely to pay qualified higher education expenses that are—

(A) Incurred on behalf of a student who is the taxpayer, the taxpayer's spouse, or a dependent (as defined in section 152) of the taxpayer at the time the taxpayer incurs the indebtedness;

(B) Attributable to education provided during an academic period, as described in section 25A and the regulations thereunder, when the student is an eligible student as defined in section 25A(b)(3) (requiring that the student be a degree candidate carrying at least half the normal full-time workload); and

(C) Paid or incurred within a reasonable period of time before or after the taxpayer incurs the indebtedness.

(ii) *Reasonable period.* Except as otherwise provided in this paragraph (e)(3)(ii), what constitutes a reasonable period of time for purposes of paragraph (e)(3)(i)(C) of this section generally is determined based on all the relevant facts and circumstances. However, qualified higher education expenses are treated as paid or incurred within a reasonable period of time before or after the taxpayer incurs the indebtedness if—

(A) The expenses are paid with the proceeds of education loans that are part of a Federal postsecondary education loan program; or

(B) The expenses relate to a particular academic period and the loan proceeds used to pay the expenses are disbursed within a period that begins 90 days prior to the start of that academic period and ends 90 days after the end of that academic period.

(iii) *Related party.* A qualified education loan does not include any indebtedness owed to a person who is related to the taxpayer, within the meaning of section 267(b) or 707(b)(1). For example, a parent or grandparent of the taxpayer is a related person. In addition, a qualified education loan does not include a loan made under any qualified employer plan as defined in section 72(p)(4) or under any contract referred to in section 72(p)(5).

(iv) *Federal issuance or guarantee not required.* A loan does not have to be issued or guaranteed under a Federal postsecondary education loan program to be a qualified education loan.

(v) *Refinanced and consolidated indebtedness*—(A) *In general.* A qualified education loan includes indebtedness incurred solely to refinance a qualified education loan. A qualified education loan includes a single, consolidated indebtedness incurred solely to refinance two or more qualified education loans of a borrower.

(B) *Treatment of refinanced and consolidated indebtedness.* [Reserved.]

(4) *Examples.* The following examples illustrate the rules of this paragraph (e):

Example 1. Eligible educational institution. University F is a postsecondary educational institution described in section 481 of the Higher Education Act of 1965. The U.S. Department of Education has certified that University F is eligible to participate in federal financial aid programs administered by that Department, although University F chooses not to participate. University F is an eligible educational institution.

Example 2. Qualified higher education expenses. Student G receives a $3,000 qualified scholarship for the 2003 fall semester that is excludable from Student G's gross income under section 117. Student G receives no other forms of financial assistance with respect to the 2003 fall semester. Student G's cost of attendance for the 2003 fall semester, as determined by Student G's eligible educational institution for purposes of calculating a student's financial need in accordance with section 472 of the Higher Education Act, is $16,000. For the 2003 fall semester, Student G has qualified higher education expenses of $13,000 (the cost of attendance as determined by the institution ($16,000) reduced by the qualified scholarship proceeds excludable from gross income ($3,000)).

Example 3. Qualified education loan. Student H borrows money from a commercial bank to pay qualified higher education expenses related to his enrollment on a half-time basis in a graduate program at an eligible educational institution. Student H uses all the loan proceeds to pay qualified higher education expenses incurred within a reasonable period of time after incurring the indebtedness. The loan is not federally

guaranteed. The commercial bank is not related to Student H within the meaning of section 267(b) or 707(b)(1). Student H's loan is a qualified education loan within the meaning of section 221.

Example 4. Qualified education loan. Student I signs a promissory note for a loan on August 15, 2003, to pay for qualified higher education expenses for the 2003 fall and 2004 spring semesters. On August 20, 2003, the lender disburses loan proceeds to Student I's college. The college credits them to Student I's account to pay qualified higher education expenses for the 2003 fall semester, which begins on August 25, 2003. On January 26, 2004, the lender disburses additional loan proceeds to Student I's college. The college credits them to Student I's account to pay qualified higher education expenses for the 2004 spring semester, which began on January 12, 2004. Student I's qualified higher education expenses for the two semesters are paid within a reasonable period of time, as the first loan disbursement occurred within the 90 days prior to the start of the fall 2003 semester and the second loan disbursement occurred during the spring 2004 semester.

Example 5. Qualified education loan. The facts are the same as in *Example 4* except that in 2005 the college is not an eligible educational institution because it loses its eligibility to participate in certain federal financial aid programs administered by the U.S. Department of Education. The qualification of Student I's loan, which was used to pay for qualified higher education expenses for the 2003 fall and 2004 spring semesters, as a qualified education loan is not affected by the college's subsequent loss of eligibility.

Example 6. Mixed-use loans. Student J signs a promissory note for a loan secured by Student J's personal residence. Student J will use part of the loan proceeds to pay for certain improvements to Student J's residence and part of the loan proceeds to pay qualified higher education expenses of Student J's spouse. Because Student J obtains the loan not solely to pay qualified higher education expenses, the loan is not a qualified education loan.

(f) *Interest*—(1) *In general.* Amounts paid on a qualified education loan are deductible under section 221 if the amounts are interest for Federal income tax purposes. For example, interest includes—

(i) Qualified stated interest (as defined in § 1.1273–1(c)); and

(ii) Original issue discount, which generally includes capitalized interest. For purposes of section 221, capitalized interest means any accrued and unpaid interest on a qualified education loan that, in accordance with the terms of the loan, is added by the lender to the outstanding principal balance of the loan.

(2) *Operative rules for original issue discount*—(i) *In general.* The rules to determine the amount of original issue discount on a loan and the accruals of the discount are in sections 163(e), 1271 through 1275, and the regulations thereunder. In general, original issue discount is the excess of a loan's stated redemption price at maturity (all payments due under the loan other than qualified stated interest payments) over its issue price (the amount loaned). Although original issue discount generally is deductible as it accrues under section 163(e) and § 1.163–7, original issue discount on a qualified education loan is not deductible until paid. See paragraph (f)(3) of this section to determine when original issue discount is paid.

(ii) *Treatment of loan origination fees by the borrower.* If a loan origination fee is paid by the borrower other than for property or services provided by the lender, the fee reduces the issue price of the loan, which creates original issue discount (or additional original issue discount) on the loan in an amount equal to the fee. See § 1.1273–2(g). For an example of how a loan origination fee is taken into account, see *Example 2* of paragraph (f)(4) of this section.

(3) *Allocation of payments.* See §§ 1.446–2(e) and 1.1275–2(a) for rules on allocating payments between interest and principal. In general, these rules treat a payment first as a payment of interest to the extent of the interest that has accrued and remains unpaid as of the date the payment is due, and second as a payment of principal. The characterization of a payment as either interest or principal under these rules applies regardless of how the parties label the payment (either as interest or principal). Accordingly, the taxpayer may deduct the portion of a payment labeled as principal that these rules treat as a payment of interest on the loan, including any portion attributable to capitalized interest or loan origination fees.

(4) *Examples.* The following examples illustrate the rules of this paragraph (f). In the examples, assume that the institution the student attends is an eligible educational institution, the loan is a qualified education loan, the student is legally obligated to make interest payments under the terms of the loan, and any other applicable requirements, if not otherwise specified, are fulfilled. The examples are as follows:

Example 1. Capitalized interest. Interest on Student K's loan accrues while Student K is in school, but Student K is not required to make any payments on the loan until six months after he graduates or otherwise leaves school. At that time, the lender capitalizes all accrued but unpaid interest and adds it to the outstanding principal amount of the loan. Thereafter, Student K is required to make monthly payments of interest and principal on the loan. The interest payable on the loan, including the capitalized interest, is original issue discount. See section 1273 and the regulations thereunder. Therefore, in determining the total amount of interest paid on the loan each taxable year, Student K may deduct any payments that § 1.1275–2(a) treats as payments of interest, including any principal payments that are treated as payments of capitalized interest. See paragraph (f)(3) of this section.

Example 2. Allocation of payments. The facts are the same as in *Example 1*, except that, in addition, the lender charges Student K a loan origination fee, which is not for any property or services provided by the lender. Under § 1.1273–2(g), the loan origination fee reduces the issue price of the loan, which reduction increases the amount of original issue discount on the loan by the amount of the fee. The amount of original issue discount (which includes the capitalized interest and loan origination fee) that accrues each year is determined under section 1272 and § 1.1272–1. In effect, the loan origination fee accrues over the entire term of the loan. Because the loan has original issue discount, the payment ordering rules in § 1.1275–2(a) must be used to determine how much of each payment is interest for federal tax purposes. See paragraph (f)(3) of this section. Under § 1.1275–2(a), each payment (regardless of its designation by the parties as either interest or principal) generally is treated first as a payment of original issue discount, to the extent of the original issue discount that has accrued as of the date the payment is due and has not been allocated to prior payments, and second as a payment of principal. Therefore, in determining the total amount of interest paid on the qualified education loan for a taxable year, Student K may deduct any payments that the parties label as principal but that are treated as payments of original issue discount under § 1.1275–2(a).

(g) *Additional Rules*—(1) *Payment of interest made during period when interest payment not required.* Payments of interest on a qualified education loan to which this section is applicable are deductible even if the payments are made during a period when interest payments are not required because, for example, the loan has not yet entered repayment status or is in a period of deferment or forbearance.

(2) *Denial of double benefit.* No deduction is allowed under this section for any amount for which a deduction is allowable under another provision of Chapter 1 of the Internal Revenue Code. No deduction is allowed under this section for any amount for which an exclusion is allowable under section 108(f) (relating to cancellation of indebtedness).

(3) *Examples.* The following examples illustrate the rules of this paragraph (g). In the examples, assume that the institution the student attends is an eligible educational institution, the loan is a qualified education loan, and the student is legally obligated to make

interest payments under the terms of the loan:

Example 1. Voluntary payment of interest before loan has entered repayment status. Student L obtains a loan to attend college. The terms of the loan provide that interest accrues on the loan while Student L earns his undergraduate degree but that Student L is not required to begin making payments of interest until six full calendar months after he graduates or otherwise leaves school. Nevertheless, Student L voluntarily pays interest on the loan during 2003, while enrolled in college. Assuming all other relevant requirements are met, Student L is allowed a deduction for interest paid while attending college even though the payments were made before interest payments were required.

Example 2. Voluntary payment during period of deferment or forbearance. The facts are the same as in *Example 2*, except that Student L makes no payments on the loan while enrolled in college. Student L graduates in June 2003 and begins making monthly payments of principal and interest on the loan in January 2004, as required by the terms of the loan. In August 2004, Student L enrolls in graduate school on a full-time basis. Under the terms of the loan, Student L may apply for deferment of the loan payments while Student L is enrolled in graduate school. Student L applies for and receives a deferment on the outstanding loan. However, Student L continues to make some monthly payments of interest during graduate school. Student L may deduct interest paid on the loan during the period beginning in January 2004, including interest paid while Student L is enrolled in graduate school.

(h) *Effective date.* This section is applicable to periods governed by section 221 as amended in 2001, which relates to interest paid on a qualified education loan after December 31, 2001, in taxable years ending after December 31, 2001, and on or before December 31, 2010.

§ 1.221–2 Deduction for interest due and paid on qualified education loans before January 1, 2002.

(a) *In general.* Under section 221, an individual taxpayer may deduct from gross income certain interest due and paid by the taxpayer during the taxable year on a qualified education loan. The deduction is allowed only with respect to interest due and paid on a qualified education loan during the first 60 months that interest payments are required under the terms of the loan. See paragraph (e) of this section for rules relating to the 60-month rule. See paragraph (b)(4) of this section for rules on payments of interest by third parties. The rules of this section are applicable to interest due and paid on qualified education loans after January 21, 1999, if paid before January 1, 2002. Taxpayers also may apply the rules of this section to interest due and paid on qualified education loans after December 31, 1997, but before January 21, 1999. To the extent that the effective date limitation ("sunset") of the 2001 amendment remains in force unchanged, section 221 before amendment in 2001, to which this section relates, also applies to interest due and paid on qualified education loans in taxable years beginning after December 31, 2010. For rules applicable to periods governed by section 221 as amended in 2001, which relates to deductions for interest paid on qualified education loans after December 31, 2001, in taxable years ending after December 31, 2001, and before January 1, 2011, see § 1.221–1.

(b) *Eligibility*—(1) *Taxpayer must have a legal obligation to make interest payments.* A taxpayer is entitled to a deduction under section 221 only if the taxpayer has a legal obligation to make interest payments under the terms of the qualified education loan.

(2) *Claimed dependents not eligible*—(i) *In general.* An individual is not entitled to a deduction under section 221 for a taxable year if the individual is a dependent (as defined in section 152) for whom another taxpayer is allowed a deduction under section 151 on a Federal income tax return for the same taxable year (or, in the case of a fiscal year taxpayer, the taxable year beginning in the same calendar year as the individual's taxable year).

(ii) *Examples.* The following examples illustrate the rules of this paragraph (b)(2):

Example 1. Student not claimed as dependent. Student A pays $750 of interest on qualified education loans during 1998. Student A's parents are not allowed a deduction for her as a dependent for 1998. Assuming fulfillment of all other relevant requirements, Student A may deduct the $750 of interest paid in 1998 under section 221.

Example 2. Student claimed as dependent. Student B pays $750 of interest on qualified education loans during 1998. Only Student B has the legal obligation to make the payments. Student B's parent claims him as a dependent and is allowed a deduction under section 151 with respect to Student B in computing the parent's 1998 Federal income tax. Student B may not deduct the $750 of interest paid in 1998 under section 221. Because Student B's parent was not legally obligated to make the payments, Student B's parent also may not deduct the interest.

(3) *Married taxpayers.* If a taxpayer is married as of the close of a taxable year, he or she is entitled to a deduction under this section only if the taxpayer and the taxpayer's spouse file a joint return for that taxable year.

(4) *Payments of interest by a third party*—(i) *In general.* If a third party who is not legally obligated to make a payment of interest on a qualified education loan makes a payment of interest on behalf of a taxpayer who is legally obligated to make the payment, then the taxpayer is treated as receiving the payment from the third party and, in turn, paying the interest.

(ii) *Examples.* The following examples illustrate the rules of this paragraph (b)(4):

Example 1. Payment by employer. Student C obtains a qualified education loan to attend college. Upon Student C's graduation from college, Student C works as an intern for a non-profit organization during which time Student C's loan is in deferment and Student C makes no interest payments. As part of the internship program, the non-profit organization makes an interest payment on behalf of Student C after the deferment period. This payment is not excluded from Student C's income under section 108(f) and is treated as additional compensation includible in Student C's gross income. Assuming fulfillment of all other requirements of section 221, Student C may deduct this payment of interest for Federal income tax purposes.

Example 2. Payment by parent. Student D obtains a qualified education loan to attend college. Upon graduation from college, Student D makes legally required monthly payments of principal and interest. Student D's mother makes a required monthly payment of interest as a gift to Student D. A deduction for Student D as a dependent is not allowed on another taxpayer's tax return for that taxable year. Assuming fulfillment of all other requirements of section 221, Student D may deduct this payment of interest for Federal income tax purposes.

(c) *Maximum deduction.* In any taxable year beginning before January 1, 2002, the amount allowed as a deduction under section 221 may not exceed the amount determined in accordance with the following table:

Taxable year beginning in	Maximum deduction
1998	$1,000
1999	1,500
2000	2,000
2001	2,500

(d) *Limitation based on modified adjusted gross income*—(1) *In general.* The deduction allowed under section 221 is phased out ratably for taxpayers with modified adjusted gross income between $40,000 and $55,000 ($60,000 and $75,000 for married individuals who file a joint return). Section 221 does not allow a deduction for taxpayers with modified adjusted gross income of $55,000 or above ($75,000 or above for married individuals who file a joint return).

(2) *Modified adjusted gross income defined.* The term *modified adjusted gross income* means the adjusted gross income (as defined in section 62) of the taxpayer for the taxable year increased by any amount excluded from gross income under section 911, 931, or 933 (relating to income earned abroad or from certain United States possessions or Puerto Rico). Modified adjusted gross income must be determined under this section after taking into account the inclusions, exclusions, deductions, and limitations provided by sections 86 (social security and tier 1 railroad retirement benefits), 135 (redemption of qualified United States savings bonds), 137 (adoption assistance programs), 219 (deductible qualified retirement contributions), and 469 (limitation on passive activity losses and credits), but before taking into account the deduction provided by section 221.

(e) *60-month rule*—(1) *In general.* A deduction for interest paid on a qualified education loan is allowed only for payments made during the first 60 months that interest payments are required on the loan. The 60-month period begins on the first day of the month that includes the date on which interest payments are first required and ends 60 months later, unless the 60-month period is suspended for periods of deferment or forbearance within the meaning of paragraph (e)(3) of this section. The 60-month period continues to run regardless of whether the required interest payments are actually made. The date on which the first interest payment is required is determined under the terms of the loan agreement or, in the case of a loan issued or guaranteed under a federal postsecondary education loan program (such as loan programs under Title IV of the Higher Education Act of 1965 (20 U.S.C. 1070) and Titles VII and VIII of the Public Health Service Act (42 U.S.C. 292., and 42 U.S.C. 296)) under applicable Federal regulations. For a discussion of interest, see paragraph (h) of this section. For special rules relating to loan refinancings, consolidated loans, and collapsed loans, see paragraph (i) of this section.

(2) *Loans that entered repayment status prior to January 1, 1998.* In the case of any qualified education loan that entered repayment status prior to January 1, 1998, section 221 allows no deduction for interest paid during the portion of the 60-month period described in paragraph (e)(1) of this section that occurred prior to January 1, 1998. Section 221 allows a deduction only for interest due and paid during that portion, if any, of the 60-month period remaining after December 31, 1997.

(3) *Periods of deferment or forbearance.* The 60-month period described in paragraph (e)(1) of this section generally is suspended for any period when interest payments are not required on a qualified education loan because the lender has granted the taxpayer a period of deferment or forbearance (including postponement in anticipation of cancellation). However, in the case of a qualified education loan that is not issued or guaranteed under a Federal postsecondary education loan program, the 60-month period will be suspended under this paragraph (e)(3) only if the promissory note contains conditions substantially similar to the conditions for deferment or forbearance established by the U.S. Department of Education for Federal student loan programs under Title IV of the Higher Education Act of 1965, such as half-time study at a postsecondary educational institution, study in an approved graduate fellowship program or in an approved rehabilitation program for the disabled, inability to find full-time employment, economic hardship, or the performance of services in certain occupations or federal programs, and the borrower satisfies one of those conditions. For any qualified education loan, the 60-month period is not suspended if under the terms of the loan interest continues to accrue while the loan is in deferment or forbearance and either—

(i) In the case of deferment, the taxpayer agrees to pay interest currently during the deferment period; or

(ii) In the case of forbearance, the taxpayer agrees to make reduced payments, or payments of interest only, during the forbearance period.

(4) *Late payments.* A deduction is allowed for a payment of interest required in one month but actually made in a subsequent month prior to the expiration of the 60-month period. A deduction is not allowed for a payment of interest required in one month but actually made in a subsequent month after the expiration of the 60-month period. A late payment made during a period of deferment or forbearance is treated, solely for purposes of determining whether it is made during the 60-month period, as made on the date it is due.

(5) *Examples.* The following examples illustrate the rules of this paragraph (e). In the examples, assume that the institution the student attends is an eligible educational institution, the loan is a qualified education loan and is issued or guaranteed under a federal postsecondary education loan program, the student is legally obligated to make interest payments under the terms of the loan, the interest payments occur after December 31, 1997, but before January 1, 2002, and with respect to any period after December 31, 1997, but before January 21, 1999, the taxpayer elects to apply the rules of this section. The examples are as follows:

Example 1. Payment prior to 60-month period. Student E obtains a loan to attend college. The terms of the loan provide that interest accrues on the loan while Student E earns his undergraduate degree but that Student E is not required to begin making payments of interest until six full calendar months after he graduates. Nevertheless, Student E voluntarily pays interest on the loan while attending college. Student E is not allowed a deduction for interest paid during that period, because those payments were made prior to the start of the 60-month period. Similarly, Student E would not be allowed a deduction for any interest paid during the six month grace period after graduation when interest payments are not required.

Example 2. Deferment option not exercised. The facts are the same as in *Example* 1 except that Student E makes no payments on the loan while enrolled in college. Student E graduates in June 1999, and is required to begin making monthly payments of principal and interest on the loan in January 2000. The 60-month period described in paragraph (e)(1) of this section begins in January 2000. In August 2000, Student E enrolls in graduate school on a full-time basis. Under the terms of the loan, Student E may apply for deferment of the loan payments while enrolled in graduate school. However, Student E elects not to apply for deferment and continues to make required monthly payments on the loan during graduate school. Assuming fulfillment of all other relevant requirements, Student E may deduct interest paid on the loan during the 60-month period beginning in January 2000, including interest paid while enrolled in graduate school.

Example 3. Late payment, within 60-month period. The facts are the same as in *Example 2* except that, after the loan enters repayment status in January 2000, Student E makes no interest payments until March 2000. In March 2000, Student E pays interest required for the months of January, February, and March 2000. Assuming fulfillment of all other relevant requirements, Student E may deduct the interest paid in March for the months of January, February, and March because the interest payments are required under the terms of the loan and are paid within the 60-month period, even though the January and February interest payments may be late.

Example 4. Late payment during deferment but within 60-month period. The terms of Student F's loan require her to begin making monthly payments of interest on the loan in January 2000. The 60-month period described in paragraph (e)(1) of this section begins in January 2000. Student F fails to make the required interest payments for the months of November and December 2000. In

January 2001, Student F enrolls in graduate school on a half-time basis. Under the terms of the loan, Student F obtains a deferment of the loan payments due while enrolled in graduate school. The deferment becomes effective January 1, 2001. In March 2001, while the loan is in deferment, Student F pays the interest due for the months of November and December 2000. Assuming fulfillment of all other relevant requirements, Student F may deduct interest paid in March 2001, for the months of November and December 2000, because the late interest payments are treated, solely for purposes of determining whether they were made during the 60-month period, as made in November and December 2000.

Example 5. 60-month period. The terms of Student G's loan require him to begin making monthly payments of interest on the loan in November 1999. The 60-month period described in paragraph (e)(1) of this section begins in November 1999. In January 2000, Student G enrolls in graduate school on a half-time basis. As permitted under the terms of the loan, Student G applies for deferment of the loan payments due while enrolled in graduate school. While awaiting formal approval from the lender of his request for deferment, Student G pays interest due for the month of January 2000. In February 2000, the lender approves Student G's request for deferment, effective as of January 1, 2000. Assuming fulfillment of all other relevant requirements, Student G may deduct interest paid in January 2000, prior to his receipt of the lender's approval, even though the deferment was retroactive to January 1, 2000. As of February 2000, there are 57 months remaining in the 60-month period for that loan. Because Student G is not required to make interest payments during the period of deferment, the 60-month period is suspended. After January 2000, Student G may not deduct any voluntary payments of interest made during the period of deferment.

Example 6. 60-month period. The terms of Student H's loan require her to begin making monthly payments of interest on the loan in November 1999. The 60-month period described in paragraph (e)(1) of this section begins in November 1999. In January 2000, Student H enrolls in graduate school on a half-time basis. As permitted under the terms of the loan, Student H applies to make reduced payments of principal and interest while enrolled in graduate school. After the lender approves her application, Student H pays principal and interest due for the month of January 2000 at the reduced rate. Assuming fulfillment of all other relevant requirements, Student H may deduct interest paid in January 2000. As of February 2000, there are 57 months remaining in the 60-month period for that loan.

Example 7. Reduction of 60-month period for months prior to January 1, 1998. The first payment of interest on a loan is due in January 1997. Thereafter, interest payments are required on a monthly basis. The 60-month period described in paragraph (e)(1) of this section for this loan begins on January 1, 1997, the first day of the month that includes the date on which the first interest payment is required. However, the borrower may not deduct interest paid prior to January 1, 1998, under the effective date provisions of section 221. Assuming fulfillment of all other relevant requirements, the borrower may deduct interest due and paid on the loan during the 48 months beginning on January 1, 1998 (unless such period is extended for periods of deferment or forbearance under paragraph (e)(3) of this section).

(f) *Definitions*—(1) *Eligible educational institution.* In general, an *eligible educational institution* means any college, university, vocational school, or other post-secondary educational institution described in section 481 of the Higher Education Act of 1965, 20 U.S.C. 1088, as in effect on August 5, 1997, and certified by the U.S. Department of Education as eligible to participate in student aid programs administered by the Department, as described in section 25A(f)(2) and § 1.25A–2(b). For purposes of this section, an eligible educational institution also includes an institution that conducts an internship or residency program leading to a degree or certificate awarded by an institution, a hospital, or a health care facility that offers postgraduate training.

(2) *Qualified higher education expenses*—(i) *In general. Qualified higher education expenses* means the cost of attendance (as defined in section 472 of the Higher Education Act of 1965, 20 U.S.C. 1087ll, as in effect on August 4, 1997), at an eligible educational institution, reduced by the amounts described in paragraph (f)(2)(ii) of this section. Consistent with section 472 of the Higher Education Act of 1965, a student's cost of attendance is determined by the eligible educational institution and includes tuition and fees normally assessed a student carrying the same academic workload as the student, an allowance for room and board, and an allowance for books, supplies, transportation, and miscellaneous expenses of the student.

(ii) *Reductions.* Qualified higher education expenses are reduced by any amount that is paid to or on behalf of a student with respect to such expenses and that is—

(A) A qualified scholarship that is excludable from income under section 117;

(B) An educational assistance allowance for a veteran or member of the armed forces under chapter 30, 31, 32, 34 or 35 of title 38, United States Code, or under chapter 1606 of title 10, United States Code;

(C) Employer-provided educational assistance that is excludable from income under section 127;

(D) Any other amount that is described in section 25A(g)(2)(C) (relating to amounts excludable from gross income as educational assistance);

(E) Any otherwise includible amount excluded from gross income under section 135 (relating to the redemption of United States savings bonds); or

(F) Any otherwise includible amount distributed from a Coverdell education savings account and excluded from gross income under section 530(d)(2).

(3) *Qualified education loan*—(i) *In general.* A *qualified education loan* means indebtedness incurred by a taxpayer solely to pay qualified higher education expenses that are—

(A) Incurred on behalf of a student who is the taxpayer, the taxpayer's spouse, or a dependent (as defined in section 152) of the taxpayer at the time the taxpayer incurs the indebtedness;

(B) Attributable to education provided during an academic period, as described in section 25A and the regulations thereunder, when the student is an eligible student as defined in section 25A(b)(3) (requiring that the student be a degree candidate carrying at least half the normal full-time workload); and

(C) Paid or incurred within a reasonable period of time before or after the taxpayer incurs the indebtedness.

(ii) *Reasonable period.* Except as otherwise provided in this paragraph (f)(3)(ii), what constitutes a reasonable period of time for purposes of paragraph (f)(3)(i)(C) of this section generally is determined based on all the relevant facts and circumstances. However, qualified higher education expenses are treated as paid or incurred within a reasonable period of time before or after the taxpayer incurs the indebtedness if—

(A) The expenses are paid with the proceeds of education loans that are part of a federal postsecondary education loan program; or

(B) The expenses relate to a particular academic period and the loan proceeds used to pay the expenses are disbursed within a period that begins 90 days prior to the start of that academic period and ends 90 days after the end of that academic period.

(iii) *Related party.* A qualified education loan does not include any indebtedness owed to a person who is related to the taxpayer, within the meaning of section 267(b) or 707(b)(1). For example, a parent or grandparent of the taxpayer is a related person. In addition, a qualified education loan does not include a loan made under any qualified employer plan as defined in section 72(p)(4) or under any contract referred to in section 72(p)(5).

(iv) *Federal issuance or guarantee not required.* A loan does not have to be issued or guaranteed under a federal

postsecondary education loan program to be a qualified education loan.

(v) *Refinanced and consolidated indebtedness*—(A) In *general.* A qualified education loan includes indebtedness incurred solely to refinance a qualified education loan. A qualified education loan includes a single, consolidated indebtedness incurred solely to refinance two or more qualified education loans of a borrower.

(B) *Treatment of refinanced and consolidated indebtedness.* [Reserved.]

(4) *Examples.* The following examples illustrate the rules of this paragraph (f):

Example 1. Eligible educational institution. University J is a postsecondary educational institution described in section 481 of the Higher Education Act of 1965. The U.S. Department of Education has certified that University J is eligible to participate in federal financial aid programs administered by that Department, although University J chooses not to participate. University J is an eligible educational institution.

Example 2. Qualified higher education expenses. Student K receives a $3,000 qualified scholarship for the 1999 fall semester that is excludable from Student K's gross income under section 117. Student K receives no other forms of financial assistance with respect to the 1999 fall semester. Student K's cost of attendance for the 1999 fall semester, as determined by Student K's eligible educational institution for purposes of calculating a student's financial need in accordance with section 472 of the Higher Education Act, is $16,000. For the 1999 fall semester, Student K has qualified higher education expenses of $13,000 (the cost of attendance as determined by the institution ($16,000) reduced by the qualified scholarship proceeds excludable from gross income ($3,000)).

Example 3. Qualified education loan. Student L borrows money from a commercial bank to pay qualified higher education expenses related to his enrollment on a half-time basis in a graduate program at an eligible educational institution. Student L uses all the loan proceeds to pay qualified higher education expenses incurred within a reasonable period of time after incurring the indebtedness. The loan is not federally guaranteed. The commercial bank is not related to Student L within the meaning of section 267(b) or 707(b)(1). Student L's loan is a qualified education loan within the meaning of section 221.

Example 4. Qualified education loan. Student M signs a promissory note for a loan on August 15, 1999, to pay for qualified higher education expenses for the 1999 fall and 2000 spring semesters. On August 20, 1999, the lender disburses loan proceeds to Student M's college. The college credits them to Student M's account to pay qualified higher education expenses for the 1999 fall semester, which begins on August 23, 1999. On January 25, 2000, the lender disburses additional loan proceeds to Student M's college. The college credits them to Student M's account to pay qualified higher education expenses for the 2000 spring semester, which began on January 10, 2000. Student M's qualified higher education expenses for the two semesters are paid within a reasonable period of time, as the first loan disbursement occurred within the 90 days prior to the start of the fall 1999 semester, and the second loan disbursement occurred during the spring 2000 semester.

Example 5. Qualified education loan. The facts are the same as in *Example 4,* except that in 2001 the college is not an eligible educational institution because it loses its eligibility to participate in certain federal financial aid programs administered by the U.S. Department of Education. The qualification of Student M's loan, which was used to pay for qualified higher education expenses for the 1999 fall and 2000 spring semesters, as a qualified education loan is not affected by the college's subsequent loss of eligibility.

Example 6. Mixed-use loans. Student N signs a promissory note for a loan that is secured by Student N's personal residence. Student N will use part of the loan proceeds to pay for certain improvements to Student N's residence and part of the loan proceeds to pay qualified higher education expenses of Student N's spouse. Because Student N obtains the loan not solely to pay qualified higher education expenses, the loan is not a qualified education loan.

(g) *Denial of double benefit.* No deduction is allowed under this section for any amount for which a deduction is allowable under another provision of Chapter 1 of the Internal Revenue Code. No deduction is allowed under this section for any amount for which an exclusion is allowable under section 108(f) (relating to cancellation of indebtedness).

(h) *Interest*—(1) *In general.* Amounts paid on a qualified education loan are deductible under section 221 if the amounts are interest for Federal income tax purposes. For example, interest includes—

(i) Qualified stated interest (as defined in § 1.1273–1(c)); and

(ii) Original issue discount, which generally includes capitalized interest. For purposes of section 221, capitalized interest means any accrued and unpaid interest on a qualified education loan that, in accordance with the terms of the loan, is added by the lender to the outstanding principal balance of the loan.

(2) *Operative rules for original-issue discount*—(i) *In general.* The rules to determine the amount of original issue discount on a loan and the accruals of the discount are in sections 163(e), 1271 through 1275, and the regulations thereunder. In general, original issue discount is the excess of a loan's stated redemption price at maturity (all payments due under the loan other than qualified stated interest payments) over its issue price (the amount loaned). Although original issue discount generally is deductible as it accrues under section 163(e) and § 1.163–7, original issue discount on a qualified education loan is not deductible until paid. See paragraph (h)(3) of this section to determine when original issue discount is paid.

(ii) *Treatment of loan origination fees by the borrower.* If a loan origination fee is paid by the borrower other than for property or services provided by the lender, the fee reduces the issue price of the loan, which creates original issue discount (or additional original issue discount) on the loan in an amount equal to the fee. See § 1.1273–2(g). For an example of how a loan origination fee is taken into account, see *Example 2* of paragraph (h)(4) of this section.

(3) *Allocation of payments.* See §§ 1.446–2(e) and 1.1275–2(a) for rules on allocating payments between interest and principal. In general, these rules treat a payment first as a payment of interest to the extent of the interest that has accrued and remains unpaid as of the date the payment is due, and second as a payment of principal. The characterization of a payment as either interest or principal under these rules applies regardless of how the parties label the payment (either as interest or principal). Accordingly, the taxpayer may deduct the portion of a payment labeled as principal that these rules treat as a payment of interest on the loan, including any portion attributable to capitalized interest or loan origination fees.

(4) *Examples.* The following examples illustrate the rules of this paragraph (h). In the examples, assume that the institution the student attends is an eligible educational institution, the loan is a qualified education loan, the student is legally obligated to make interest payments under the terms of the loan, and any other applicable requirements, if not otherwise specified, are fulfilled. The examples are as follows:

Example 1. Capitalized interest. Interest on Student O's qualified education loan accrues while Student O is in school, but Student O is not required to make any payments on the loan until six months after he graduates or otherwise leaves school. At that time, the lender capitalizes all accrued but unpaid interest and adds it to the outstanding principal amount of the loan. Thereafter, Student O is required to make monthly payments of interest and principal on the loan. The interest payable on the loan, including the capitalized interest, is original issue discount. Therefore, in determining the total amount of interest paid on the qualified education loan during the 60-month period described in paragraph (e)(1) of this section, Student O may deduct any payments that

§ 1.1275–2(a) treats as payments of interest, including any principal payments that are treated as payments of capitalized interest. See paragraph (h)(3) of this section.

Example 2. Allocation of payments. The facts are the same as in *Example 1* of this paragraph (h)(4), except that, in addition, the lender charges Student O a loan origination fee, which is not for any property or services provided by the lender. Under § 1.1273–2(g), the loan origination fee reduces the issue price of the loan, which reduction increases the amount of original issue discount on the loan by the amount of the fee. The amount of original issue discount (which includes the capitalized interest and loan origination fee) that accrues each year is determined under section § 1272 and § 1.1272–1. In effect, the loan origination fee accrues over the entire term of the loan. Because the loan has original issue discount, the payment ordering rules in § 1.1275–2(a) must be used to determine how much of each payment is interest for federal tax purposes. See paragraph (h)(3) of this section. Under § 1.1275–2(a), each payment (regardless of its designation by the parties as either interest or principal) generally is treated first as a payment of original issue discount, to the extent of the original issue discount that has accrued as of the date the payment is due and has not been allocated to prior payments, and second as a payment of principal. Therefore, in determining the total amount of interest paid on the qualified education loan during the 60-month period described in paragraph (e)(1) of this section, Student O may deduct any payments that the parties label as principal but that are treated as payments of original issue discount under § 1.1275–2(a). The 60-month period does not begin in the month in which the lender charges Student O the loan origination fee.

(i) *Special rules regarding 60-month limitation*—(1) *Refinancing.* A qualified education loan and all indebtedness incurred solely to refinance that loan constitute a single loan for purposes of calculating the 60-month period described in paragraph (e)(1) of this section.

(2) *Consolidated loans.* A consolidated loan is a single loan that refinances more than one qualified education loan of a borrower. For consolidated loans, the 60-month period described in paragraph (e)(1) of this section begins on the latest date on which any of the underlying loans entered repayment status and includes any subsequent month in which the consolidated loan is in repayment status.

(3) *Collapsed loans.* A collapsed loan is two or more qualified education loans of a single taxpayer that constitute a single qualified education loan for loan servicing purposes and for which the lender or servicer does not separately account. For a collapsed loan, the 60-month period described in paragraph (e)(1) of this section begins on the latest date on which any of the underlying loans entered repayment status and includes any subsequent month in which any of the underlying loans is in repayment status.

(4) *Examples.* The following examples illustrate the rules of this paragraph (i):

Example 1. Refinancing. Student P obtains a qualified education loan to pay for an undergraduate degree at an eligible educational institution. After graduation, Student P is required to make monthly interest payments on the loan beginning in January 2000. Student P makes the required interest payments for 15 months. In April 2001, Student P borrows money from another lender exclusively to repay the first qualified education loan. The new loan requires interest payments to start immediately. At the time Student P must begin interest payments on the new loan, which is a qualified education loan, there are 45 months remaining of the original 60-month period referred to in paragraph (e)(1) of this section.

Example 2. Collapsed loans. To finance his education, Student Q obtains four separate qualified education loans from Lender R. The loans enter repayment status, and their respective 60-month periods described in paragraph (e)(1) of this section begin, in July, August, September, and December of 1999. After all of Student Q's loans have entered repayment status, Lender R informs Student Q that Lender R will transfer all four loans to Lender S. Following the transfer, Lender S treats the loans as a single loan for loan servicing purposes. Lender S sends Student Q a single statement that shows the total principal and interest, and does not keep separate records with respect to each loan. With respect to the single collapsed loan, the 60-month period described in paragraph (e)(1) of this section begins in December 1999.

(j) *Effective date.* This section is applicable to interest due and paid on qualified education loans after January 21, 1999, if paid before January 1, 2002. Taxpayers also may apply this section to interest due and paid on qualified education loans after December 31, 1997, but before January 21, 1999. This section also applies to interest due and paid on qualified education loans in a taxable year beginning after December 31, 2010.

■ 3. Section 1.6050S–3 is amended by revising paragraphs (d)(1)(iii)(B) and (e)(1) to read as follows:

§ 1.6050S–3 Information reporting for payments of interest on qualified education loans.

* * * * *

(d) * * * (1) * * *

(iii) * * *

(B) In the case of qualified education loans made before September 1, 2004, for which the payee does not report payments of interest other than stated interest, state that the payor may be able to deduct additional amounts (such as certain loan origination fees and capitalized interest) not reported on the statement;

* * * * *

(e) *Special rules*—(1) *Transitional rule for reporting of loan origination fees and capitalized interest*—(i) *Loans made before September 1, 2004.* For qualified education loans made before September 1, 2004, a payee is not required to report payments of loan origination fees or capitalized interest or to take such payments into account in determining the $600 amount for purposes of paragraph (a)(1) of this section.

(ii) *Loans made on or after September 1, 2004.* For qualified education loans made on or after September 1, 2004, a payee is required to report payments of interest as described in § 1.221–1(f). Under § 1.221–1(f), interest includes loan origination fees that represent charges for the use or forbearance of money and capitalized interest. Under this paragraph (e)(1)(ii), a payee shall take such payments of interest into account in determining the $600 amount for purposes of paragraph (a)(1) of this section. For purposes of this section and section 6050S, interest (including capitalized interest and loan origination fees) is treated as received, and is reportable, in the year the interest is treated as paid under the allocation rules in § 1.221–1(f)(3).

See § 1.221–1(f) for rules relating to capitalized interest, and § 1.221–1(f)(2)(ii) for rules relating to loan origination fees, on qualified education loans.

* * * * *

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

Approved: April 27, 2004.

Gregory F. Jenner,

Acting Assistant Secretary of the Treasury.

[FR Doc. 04–10359 Filed 5–6–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Part 203

RIN 1010–AD01

Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Relief or Reduction in Royalty Rates—Deep Gas Provisions; Correction

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Correction.

SUMMARY: The technical amendments to the document titled "Oil and Gas and

Sulphur Operations in the Outer Continental Shelf—Relief or Reduction in Royalty Rates—Deep Gas Provisions" published at 69 FR 24052 (April 30, 2004) contained an incorrect effective date for the changes included in the document. This document corrects the effective date for all changes and amendments to May 3, 2004.

DATES: *Effective Date:* The effective date for all changes and amendments to 30 CFR Part 203 that were published at 69 FR 24052 (April 30, 2004) is May 3, 2004.

FOR FURTHER INFORMATION CONTACT: Marshall Rose, Chief, Economics Division, Minerals Management Service, at 703–787–1536. E-mail: *Marshall.Rose@mms.gov*. Address: Minerals Management Service, MS 4050, 381 Elden Street, Herndon, Virginia 20170.

Dated: May 4, 2004.

Patricia E. Morrison,

Assistant Secretary—Land and Minerals Management.

[FR Doc. 04–10469 Filed 5–6–04; 8:45 am]

BILLING CODE 4310–MR–P

Proposed Rules

Federal Register
Vol. 69, No. 89
Friday, May 7, 2004

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2004–NE–10–AD]

RIN 2120–AA64

Airworthiness Directives; Rolls-Royce Corporation (Formerly Allison Engine Company, Allison Gas Turbine Division, and Detroit Diesel Allison) (RRC) 250–B and 250–C Series Turboshaft and Turboprop Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for certain RRC 250–B and 250–C series turboshaft and turboprop engines. This proposed AD would require a one-time inspection of the fuel nozzle screen for contamination, and if contamination is found, inspection and cleaning of the entire aircraft fuel system before further flight. This proposed AD would also require replacement of the fuel nozzle with a new design fuel nozzle, at the next fuel nozzle overhaul or by June 30, 2006, whichever occurs first. This proposed AD results from 10 reports of engine power loss with accompanying collapse of the fuel nozzle screen, due to fuel contamination. We are proposing this AD to prevent sudden loss of engine power and uncommanded shutdown of the engine due to fuel contamination and collapse of the screen in the fuel nozzle.

DATES: We must receive any comments on this proposed AD by July 6, 2004.

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

- *By mail:* Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 2004–NE–10–AD, 12 New England Executive Park, Burlington, MA 01803–5299.
- *By fax:* (781) 238–7055.
- *By e-mail: 9-ane-adcomment@faa.gov.*

You can get the service information identified in this proposed AD from Rolls-Royce Corporation, P.O. Box 420, Indianapolis, IN 46206–0420; telephone (317) 230–6400; fax (317) 230–4243.

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.

FOR FURTHER INFORMATION CONTACT: John Tallarovic, Aerospace Engineer, Chicago Aircraft Certification Office, FAA, 2300 East Devon Avenue, Des Plaines, IL 60018–4696; telephone (847) 294–8180; fax (847) 294–7834.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to submit any written relevant data, views, or arguments regarding this proposal. Send your comments to an address listed under **ADDRESSES**. Include "AD Docket No. 2004–NE–10–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 proposed AD. If a person contacts us verbally, and that contact relates to a substantive part of this proposed AD, we will summarize the contact and place the summary in the docket. We will consider all comments received by the closing date and may amend the proposed 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 that affect you. You can get more information about plain language at *http://www.faa.gov/language and http://www.plainlanguage.gov.*

Examining the AD Docket

You may examine the AD Docket (including any comments and service information), by appointment, between 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. See **ADDRESSES** for the location.

Discussion

The FAA has received 10 reports of 250–B and 250–C series turboshaft and turboprop engines experiencing loss of engine power due to fuel contamination and collapse of the fuel nozzle screen. The existing screen of the fuel nozzle, part number (P/N) 6890917, 6899001, or 6852020, may collapse when clogging occurs. Following a 1997 accident resulting from a complete engine power loss due to fuel contamination, the National Transportation Safety Board issued Safety Recommendations A–98–84 and A–98–85. In response, we issued Special Airworthiness Information Bulletin (SAIB) No. CE–01–10 to remind operators of the importance of maintaining a clean aircraft fuel system. We also issued an NPRM, Docket No. 99–NE–47–AD, on April 25, 2000 that would require a one-time inspection of the fuel nozzle screen for model 250–C18 and –C20 engines. That NPRM was withdrawn because it appeared that the problem would be solved by the increased awareness of the importance of a clean fuel system following the issuance of SAIB CE–01–10. Shortly after the NPRM was withdrawn another accident resulted from a complete engine power loss due to fuel contamination. After that initial NPRM was issued, the manufacturer conducted extensive research into fuel contamination and introduced a new design fuel nozzle. This fuel nozzle design incorporates a new screen design that is resistant to collapse when contaminated. This NPRM is being issued because collapsed fuel nozzle screens, and the resulting engine power loss, due to fuel contamination, remains a problem. The scope of this NPRM is expanded from the original NPRM to include all Rolls-Royce Corporation model 250 engines because the improvement is equally applicable to all of these engines. This condition, if not corrected, could result in sudden loss of engine power and uncommanded shutdown of the engine.

FAA's Determination and Requirements of the Proposed AD

We have evaluated all pertinent information and identified an unsafe condition that is likely to exist or develop on other products of this same

type design. Therefore, we are proposing this AD, which would require:

- A one-time inspection of the fuel nozzle screen for contamination, within 150 operating hours after the effective date of the proposed AD; and
- Inspection and cleaning of the entire aircraft fuel system before further flight, if contamination is found; and
- Replacement of the fuel nozzle with a serviceable (new design) fuel nozzle, at the next fuel nozzle overhaul or by June 30, 2006, whichever occurs first.

Changes to 14 CFR Part 39—Effect on the Proposed AD

On July 10, 2002, we issued a new version of 14 CFR part 39 (67 FR 47998, July 22, 2002), which governs the FAA's AD system. This regulation now includes material that relates to altered products, special flight permits, and alternative methods of compliance. This material previously was included in each individual AD. Since this material is included in 14 CFR part 39, we will not include it in future AD actions.

Costs of Compliance

There are about 15,000 RRC 250–B and 250–C series turboshaft and turboprop engines of the affected design in the worldwide fleet. We estimate that 10,000 engines installed on aircraft of U.S. registry would be affected by this proposed AD. We also estimate that it would take about one work hour per engine to perform the proposed actions, and that the average labor rate is $65 per work hour. In addition, operators can either replace the fuel nozzle with a new one at a cost of about $2,595 or have the existing nozzle overhauled at a cost of about $850. We estimate that about 80% of the fuel nozzles will be overhauled and 20% will be replaced with a new nozzle. Therefore, we estimate that the required parts would cost, on average, about $1,200 per engine. Based on these figures, we estimate the total cost of the proposed AD to U.S. operators to be $12,650,000.

Regulatory Findings

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

For the reasons discussed above, I certify that the 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. Would 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 proposal 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. 2004–NE–10–AD" in your request.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Rolls-Royce Corporation (formerly Allison Engine Company, Allison Gas Turbine Division, and Detroit Diesel Allison) (RRC): Docket No. 2004–NE–10–AD.

Comments Due Date

(a) The Federal Aviation Administration (FAA) must receive comments on this airworthiness directive (AD) action by July 6, 2004.

Affected ADs

(b) None.

Applicability

(c) This AD applies to RRC 250–B and 250–C series turboshaft and turboprop engines in the following Table 1:

Table 1—250–B and 250–C Series Turboshaft and Turboprop Engines Affected

–B15A
–B15E
–B15G
–B17
–B17B
–B17C
–B17D
–B17E
–B17F
–B17F/1
–B17F/2
–C18
–C18A
–C18B
–C18C
–C20
–C20B
–C20C
–C20F
–C20J
–C20R
–C20R/1
–C20R/2
–C20R/4
–C20S
–C20W
–C28
–C28B
–C28C
–C30
–C30G
–C30G/2
–C30M
–C30P
–C30R
–C30R/1
–C30R/3
–C30R/3M
–C30S
–C30U
–C40B
–C47B
–C47M

These engines are installed on, but not limited to, Agusta Models A109, A109A, A109AII, and A109C; Bell Helicopter Textron Models 47, 206A, 206B, 206L, 206L–1, 206L–3, 206L–4, 407, and 430; B–N Group Models BN–2T and BN–2T–4R; Enstrom Models TH28, 480; and 480B; Eurocopter Canada Limited Model BO 105 LS A–3; Eurocopter France Models AS355E, AS355F, AS355I, and AS355F2; Eurocopter Deutschland Models BO–105A, BO–105C, BO–105S, and BO–105LS A–1; Hiller Aviation Model FH–1100; McDonnell Douglas 369D, 369E, 369F, 369H, 369HE, 369HM, 369HS, 369FF, and 500N; Schweizer TH269D; and SIAI Marchetti s.r.l. Models SF600 and SF600A helicopters and airplanes.

Unsafe Condition

(d) This AD results from 10 reports of engine power loss with accompanying collapse of the screen in the fuel nozzle, due to fuel contamination. We are issuing this AD to prevent sudden loss of engine power and uncommanded shutdown of the engine due to fuel contamination and collapse of the screen in the fuel nozzle.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified unless the actions have already been done.

(f) Perform a one-time inspection of the fuel nozzle screen for contamination, within 150 operating hours after the effective date of this AD.

(g) Inspect and clean the entire aircraft fuel system before further flight if there is any contamination on the screen.

(h) Remove from service fuel nozzles, part numbers (P/Ns) 6890917, 6899001, and 6852020, and replace with a serviceable fuel nozzle, at the next fuel nozzle overhaul after the effective date of this AD, or by June 30, 2006, whichever occurs first.

Definition

(i) For the purposes of this AD, a serviceable fuel nozzle is defined as a nozzle that has a P/N not specified in, or addressed by, this AD.

Alternative Methods of Compliance

(j) The Manager, Chicago Aircraft Certification Office, has the authority to approve alternative methods of compliance for this AD if requested using the procedures found in 14 CFR 39.19.

Material Incorporated by Reference

(k) None.

Related Information

(l) Information related to the subject of this AD can be found in Rolls-Royce Corporation Alert Commercial Engine Bulletin, with the identification numbers of CEB–A–313, CEB–A–1394, CEB–A–73–2075, CEB–A–73–3118, CEB–A–73–4056, CEB–A–73–5029, CEB–A–73–6041, TP CEB–A–183, TP CEB–A–1336, and TP CEB–A–73–2032, dated September 4, 2003.

Issued in Burlington, Massachusetts, on April 29, 2004.

Jay J. Pardee,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 04–10385 Filed 5–6–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–234–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier Model DHC–8–400 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the supersedure of an existing airworthiness directive (AD), applicable to certain Bombardier Model DHC–8–400 airplanes. That AD currently requires revising the Normal and Abnormal sections of the airplane flight manual (AFM) to include procedures that enable the flightcrew to determine if the main landing gear (MLG) is extended before landing, and to take appropriate actions if necessary. This new action would add an airplane to the applicability, and require replacing the existing MLG downlock proximity sensors with new, improved sensors. After the replacement, this action would also require removing from the AFM the revision to the Normal and Abnormal sections require by the existing AD. The actions specified by the proposed AD are intended to prevent failure of the MLG downlock proximity sensors on the same MLG at the same time, which could result in the MLG's failure to extend during landing, and cause injury to flightcrew and passengers.

DATES: Comments must be received by June 7, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2002–NM–234–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Commments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-nprmcomment@faa.gov*. Comments sent via fax or the Internet must contain "Docket No. 2002–NM–234–AD" in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 for Windows or ASCII text.

The service information referenced in the proposed rule may be obtained from Bombardier, Inc., Bombardier Regional Aircraft Division, 123 Garratt Boulevard, Downsview, Ontario M3K 1Y5, Canada. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Westbury, New York 11590.

FOR FURTHER INFORMATION CONTACT: Dan Parillo, Aerospace Engineer, Systems and Flight Test Branch, ANE–172, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Westbury, New York 11590; telephone (516) 228–7305; fax (516) 794–5531.

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 shall 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.

Submit comments using the following format:

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

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the 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–NM–234–AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2002–NM–234–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

On May 25, 2001, the FAA issued AD 2001–11–10, amendment 39–12253 (66 FR 30305, June 6, 2001), applicable to certain Bombardier Model DHC–8–400 series airplanes, to require revising the Normal and Abnormal sections of the airplane flight manual (AFM) to include procedures that enable the flightcrew to determine if the main landing gear (MLG) is extended before landing and to take appropriate actions if necessary. That action was prompted by notification from Transport Canada Civil Aviation (TCCA), which is the airworthiness authority for Canada, that MLG downlock proximity sensors may fail concurrently on the same gear. The requirements of that AD are intended to ensure that the flightcrew is advised of a potential gear-up landing due to misleading indications for the MLG extension, and has the procedures necessary to address that potential condition.

Actions Since Issuance of Previous Rule

The preamble to AD 2001–11–10 explains that we considered the requirements of that AD "interim action" and were considering further rulemaking. We now have determined that further rulemaking is indeed necessary, and this proposed AD follows from that determination.

We also have revised the applicability of the existing AD to include an additional airplane that was inadvertently omitted from the applicability of Canadian airworthiness directive CF–2001–16, dated April 11, 2001, which was used as a source of applicability information for AD 2001–11–10. Canadian airworthiness directive CF–2001–16R1, dated June 3, 2002, has since been issued to include the additional airplane and is used as a source for applicability information in this proposed AD.

Explanation of Relevant Service Information

Bombardier has issued Service Bulletin 84–32–09, Revision A, dated November 20, 2001, which describes procedures for replacing the existing MLG downlock proximity sensors with new, improved proximity sensors, and rigging the new sensors in accordance with the airplane maintenance manual. Accomplishment of the actions specified in the service bulletin is intended to adequately address the identified unsafe condition.

TCCA classified this service bulletin as mandatory and issued Canadian airworthiness directive CF–2001–16R1, dated June 3, 2002, to ensure the continued airworthiness of these airplanes in Canada.

The Bombardier service bulletin references Menasco Aerospace Service Bulletin 46400–32–09, dated May 15, 2001, as an additional source of service information for accomplishment of the replacement. The Menasco service bulletin is included in the Bombardier service bulletin.

FAA's Conclusions

This airplane model is manufactured in Canada and is type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, TCCA has kept the FAA informed of the situation described above. The FAA has examined the findings of TCCA, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would supersede AD 2001–11–10 to continue to require revising the Normal and Abnormal sections of the AFM to include procedures that enable the flightcrew to determine if the MLG is extended before landing, and to take appropriate actions if necessary. This new action would add an airplane to the applicability. This new action also would require replacing the existing MLG downlock proximity sensors with new, improved proximity sensors and rigging the new sensors in accordance with the airplane maintenance manual. After the replacement, this new action would also require removing from the AFM the revision to the Normal and Abnormal sections required by the existing AD. The actions would be required to be accomplished in accordance with the service bulletin described previously, except as discussed below.

Differences Between the Proposed AD and the Menasco Service Bulletin

Operators should note that, although the Menasco service bulletin contains procedures for returning certain parts to the manufacturer (BF Goodrich), this proposed AD would not include this requirement.

Changes to 14 CFR Part 39/Effect on the Proposed AD

On July 10, 2002, the FAA issued a new version of 14 CFR part 39 (67 FR 47997, July 22, 2002), which governs the FAA's airworthiness directives system. The regulation now includes material that relates to altered products, special flight permits, and alternative methods of compliance. Because we have now included this material in part 39, we no longer need to include it in each individual AD; therefore, paragraphs (b) and (c) and Note 1 of AD 2001–11–10 are not included in this proposed AD. However, this proposed AD identifies the office authorized to approve alternative methods of compliance.

Cost Impact

There are approximately 15 airplanes of U.S. registry that would affected by this proposed AD.

The revision of the AFM that is currently required by AD 2001–11–10 takes approximately 1 work hour per airplane to accomplish, at an average labor rate of $65 per work hour. Based on these figures, the cost impact of the currently required actions on U.S. operators is estimated to be $975, or $65 per airplane.

The replacement that is proposed in this AD action would take approximately 4 work hours per airplane to accomplish, at an average labor rate of $65 per work hour. Required parts would be provided free of charge. Based on these figures, the cost impact of the proposed requirements of this AD on U.S. operators is estimated to be $3,900, or $260 per airplane.

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

Regulatory Impact

The regulations 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 my be the Administrator, the Federal 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 39–12253 (66 FR 30305, June 6, 2001), and by adding a new airworthiness directive (AD), to read as follows:

Bombardier, Inc. (Formerly de Havilland, Inc.): Docket 2002–NM–234–AD. Supersedes AD 2001–11–10, Amendment 39–12253.

Applicability: Model DHC 8–400 airplanes, serial numbers 4001 through 4055 inclusive; certified in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent failure of the main landing gear (MLG) downlock proximity sensors on the same MLG at the same time, which could result in the MLG's failure to extent during landing, and cause injury to flightcrew and passengers, accomplish the following:

Restatement of the Requirements of AD 2001–11–10

Airplane Flight Manual (AFM) Revision

(a) Within 14 days after June 21, 2001 (the effective date of AD 2001–11–10, amendment 39–12253), revise the Normal and Abnormal sections of the airplane flight manual (AFM) by inserting the following into Section 4.21, opposite page 4.21.1. This may be accomplished by inserting a copy of this AD in the AFM.

"CAUTION

If illumination of LEFT gear safe (green), and LEFT gear unsafe (red), and landing gear handle (amber) advisory lights with the landing gear handle in the up position.

Or

Illumination of RIGHT gear safe (green), and RIGHT gear unsafe (red), and landing gear handle (amber) advisory lights with the landing gear handling in the up position.

1. Perform an Alternative Landing Gear extension, See paragraph 4.21.

WARNING

Selection of the gear down without following the Alternate Landing Gear Extension procedure may result in the affected gear being trapped inside the nacelle.

2.Visually inspect Main Landing Gear to confirm that it has been extended.

WARNING

A down and locked indication of the affected main landing gear is not a valid indication of the gear position.

3. Insert hydraulic pump handle in socket and operate for a minimum of 12 full strokes and ensure resistance to pump handle movement.

4. Observe the LEFT gear safe (green) and RIGHT gear safe (green) advisory lights are illuminated and the LEFT gear unsafe (red) and RIGHT gear unsafe (red) and the landing handle (amber) advisory lights are extinguished."

New Requirements of This AD

Replacement

(b) Within 6 months after the effective date of this AD, replace the left-hand and right-hand MLG downlock proximity sensors with new, improved sensors having new part numbers, per the Accomplishment Instructions of Bombardier Service Bulletin 84–32–09, Revision A, dated November 20, 2001. Once the sensors have been replaced, the AFM revision required by paragraph (a) of this AD must be removed from the AFM.

Note: Bombardier Service Bulletin 84–32–09 references Menasco Aerospace Service Bulletin 46400–32–09, dated May 15, 2001, as an additional source of service information for accomplishment of the replacement. The Mensacso service bulletin is included in the Bombardier service bombardier service bulletin.

Replacements Accomplished Per Previous Issue of Service Bulletin

(c) Replacements accomplished before the effective date of this AD per Bombardier Service Bulletin 84–32–09, dated May 18, 2001, are considered acceptable for compliance with the corresponding action specified in this AD.

Alternative Methods of Compliance

(d) In accordance with 14 CFR 39.19, the Manager, New York Aircraft Certification Office (ACO), FAA, is authorized to approve alternative methods of compliance (AMOCS) for this AD.

Note 2: The subject of this AD is addressed in Canadian airworthiness directive CF–2001–16R1, dated June 3, 2002.

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

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–10384 Filed 5–6–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–324–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 737–100, –200, –300, –400, and –500 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the supersedure of an existing airworthiness directive (AD), applicable to certain Boeing Model 737 series airplanes, that currently requires modification of certain fuselage support structure for the number 2 galley. This action would require modification of the same support structure using new methods based on new calculations. This action also would expand the applicability of the existing AD to include additional airplanes. The actions specified by the proposed AD are intended to prevent the galley from shifting, which could limit access to the galley door during emergencies, and result in injury to passengers and flightcrew. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by June 21, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2002–NM–324–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-nprmcomment@faa.gov*. Comments sent via fax or the Internet must contain "Docket No. 2002–NM–324–AD" in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 or 2000 or ASCII text.

The service information referenced in the proposed rule may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Keith Ladderud, Aerospace Engineer, ANM–150S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6435; fax (425) 917–6590.

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 shall 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.

Submit comments using the following format:

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

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the 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–NM–324–AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2002–NM–324–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

On January 19, 1995, the FAA issued AD 95–02–08, amendment 39–9127 (60 FR 8295, February 14, 1995), applicable to certain Boeing Model 737 series airplanes, to require modification of certain fuselage support structure for the number 2 galley. That action was prompted by results of engineering tests and analyses which revealed that certain fuselage support structure for the number 2 galley is unable to support certain loads that may occur during emergency landing conditions. If the fuselage support structure breaks, the galley may shift and cause blockage of the forward service door (galley door). The requirements of that AD are intended to prevent inability of passengers and crew to exit the airplane through this door after an emergency landing.

Actions Since Issuance of Previous Rule

Since the issuance of that AD, the FAA has determined that the calculations used in the initial release of Boeing Service Bulletin 737–53–1154 were incorrect, and the modification required by that AD was inadequate. Also since issuance of that AD, additional airplanes have been identified that require modification. The actions proposed in this AD are intended to prevent the galley from shifting, which could limit access to the galley door during emergencies, and result in injury to passengers and flightcrew.

Issuance of New Service Information

The FAA has reviewed and approved Boeing Special Attention Service Bulletin 737–53–1154, Revision 1, dated October 3, 2002, which describes various procedures depending on the configuration group to which the airplane belongs.

For airplanes identified in the service bulletin as Group 1, that have a galley operating weight of 995 pounds or less, the service bulletin states that no change is required. For airplanes identified in the service bulletin as Group 1 with a galley operating weight of 996 pounds or greater, the service bulletin advises contacting Boeing for modification instructions.

For airplanes identified in the service bulletin as Group 2, on which the modifications based on the initial release of the service bulletin have been incorporated, the service bulletin advises contacting Boeing for modification instructions.

For airplanes identified as Groups 3 through 9, the service bulletin describes procedures for determining the galley modification requirements by identifying the maximum allowable operating weight of the galley; for identifying the type of intercostal (triangular or rectangular) that is installed at stringer 5R; and for determining if the body station (BS) 360 frame has shear-ties from stringer 3R to stringer 7R. If there are any problems with identifying the modification requirements (*e.g.*, if the existing structure matches the structure applicable to a different configuration group), the service bulletin recommends contacting Boeing.

For airplanes identified in the service bulletin as Groups 3 through 9 that were not modified in accordance with the initial release of the service bulletin, Part I of the Accomplishment Instructions describes the following procedures:

- For Groups 3, 4, and 5: replacing the triangular intercostal with a rectangular intercostal.
- For Groups 3 through 8: installing a shear-tie kit, and installing a stringer clip kit.
- Groups 3 through 9: installing a radius strap kit.

For airplanes identified in the service bulletin as Groups 3 through 8 that were modified in accordance with the initial release of the service bulletin; Part II of the Accomplishment Instructions in the service bulletin describes the following procedures:

- Inspecting to verify that the shear-ties are attached to the BS 360 frame, retrofitting, or contacting Boeing for instructions; as applicable.
- Installing a supplemental parts kit on the rectangular intercostal; installing a radius strap kit; and contacting Boeing if a kit cannot be installed.

Accomplishment of the actions specified in the service bulletin is intended to adequately address the identified unsafe condition.

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other products of this same type design, the proposed AD would supersede AD 95–02–08 to continue to require modification of certain fuselage support structure for the number 2 galley. This new action would require modification of the same fuselage support structure using different modification methods based on new calculations. This new action would also apply to additional airplanes that were delivered with a single number 2 galley support intercostal at stringer 5R. The actions would be required to be accomplished in accordance with the service bulletin described previously, except as discussed below.

Difference Between the Proposed AD and the Service Bulletin

Although the service bulletin specifies that operators may contact the manufacturer for disposition of certain modifications, this proposed AD would require operators to make modifications per a method approved by the FAA, or per data meeting the type certification basis of the airplane approved by a Boeing Company Designated Engineering Representative who has been authorized by the FAA to make such findings.

Explanation of Change in Applicability

Additional airplanes are included in the applicability of the proposed AD that were not included in AD 95–02–08. The additional airplanes are included in the proposed AD because airplanes of a certain configuration were not included in the original issue of the service bulletin, and this configuration requires modification.

Clarification of Compliance Time

The service bulletin specifies doing the actions at the next maintenance check. Because maintenance schedules vary among operators, this proposed AD would require accomplishment of the actions within 18 months after the effective date of the proposed AD. We find that 18 months is within an interval of time that parallels normal scheduled maintenance for most affected operators and is appropriate for affected airplanes to continue to operate without compromising safety.

Cost Impact

There are approximately 583 airplanes of the affected design in the worldwide fleet. The FAA estimates that 170 airplanes of U.S. registry would be affected by this proposed AD.

The new actions that are proposed in this AD would take between 8 and 22 work hours per airplane to accomplish, depending on the airplane's configuration. The average labor rate is $65 per work hour. Required parts would cost between $5,200 and $23,790 per airplane, depending on the airplane's configuration. Based on these figures, the cost impact of the proposed requirements of this AD on U.S. operators is estimated to be between $5,720 and $25,220 per airplane.

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

Regulatory Impact

The regulations 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 39–9127 (60 FR 8295, February 14, 1995), and by adding a new airworthiness directive (AD), to read as follows:

Boeing: Docket 2002–NM–324–AD. Supersedes AD 95–02–08, Amendment 39–9127.

Applicability: Model 737–100, –200, –300, –400, and –500 series airplanes; as listed in Boeing Special Attention Service Bulletin 737–53–1154, Revision 1, dated October 3, 2002; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent the galley from shifting, which could limit access to the galley door during emergencies, and result in injury to passengers and flightcrew, accomplish the following:

Service Bulletin Reference

(a) The term "service bulletin," as used in this AD, means the Accomplishment Instructions of Boeing Special Attention Service Bulletin 737–53–1154, Revision 1, dated October 3, 2002.

Modification

(b) Except as provided by paragraph (c) of this AD: Within 18 months after the effective date of this AD, modify the upper attachment support structure of galley 2 from body station (BS) 344 to 360 (inclusive) between right stringers 3 and 7, per the service bulletin.

(c) For airplanes listed in paragraphs (c)(1) through (c)(3) of this AD: Within 18 months after the effective date of this AD, do the modification in paragraph (b) of this AD per a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA; or per data meeting the type certification basis of the airplane approved by a Boeing Company Designated Engineering Representative who has been authorized by the Manager, Seattle ACO, to make such findings. For a modification method to be approved, the approval must specifically reference this AD.

(1) Airplanes listed as Group 1 in the service bulletin, on which the galley has an allowable operating weight of 996 pounds or more.

(2) Airplanes listed as Group 2 in the service bulletin, on which the modifications specified in the initial release of the service bulletin have been incorporated.

(3) Airplanes listed as Groups 3 through 9 in the service bulletin for which the service bulletin specifies to contact Boeing.

Alternative Methods of Compliance

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

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

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–10383 Filed 5–6–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NM–293–AD]

RIN 2120–AA64

Airworthiness Directives; McDonnell Douglas Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), and MD–88 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the supersedure of an existing airworthiness directive (AD), applicable to certain McDonnell Douglas Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), MD–88,

and MD–90–30 airplanes. That AD currently requires repetitive inspections to detect cracking of the main landing gear (MLG) shock strut pistons, and replacement of a cracked piston with a new or serviceable part. This action would remove certain airplanes but would require that the existing inspections, and corrective actions if necessary, be accomplished on additional MLG shock strut pistons. This action also would require replacing the MLG shock strut pistons with new improved parts, which would terminate the repetitive inspections. This action is necessary to prevent fatigue cracking of the MLG pistons, which could result in failure of the pistons and consequent damage to the airplane structure or injury to airplane occupants. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by June 21, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2001–NM–293–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-nprmcomment@faa.gov*. Comments sent via fax or the Internet must contain "Docket No. 2001–NM–293–AD" in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 or 2000 or ASCII text.

The service information referenced in the proposed rule may be obtained from Boeing Commercial Aircraft Group, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Data and Service Management, Dept. C1–L5A (D800–0024). This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California.

FOR FURTHER INFORMATION CONTACT: Mike Lee, Aerospace Engineer, Airframe Branch, ANM–120L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5325; fax (562) 627–5210.

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 shall 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.

Submit comments using the following format:

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

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the 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 2001–NM–293–AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2001–NM–293–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

On June 15, 1999, the FAA issued AD 99–13–07, amendment 39–11201 (64 FR 33392, June 23, 1999), applicable to certain McDonnell Douglas Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), MD–88, and MD–90–30 airplanes. That action requires repetitive inspections to detect cracking of the main landing gear (MLG) shock strut pistons, and replacement of a cracked piston with a new or serviceable part. That action was prompted by reports indicating that, while an airplane was positioned on the taxiway, the right MLG shock strut piston failed due to fatigue cracking. The requirements of that AD are intended to detect and correct such fatigue cracking, which could result in failure of the piston, and consequent damage to the airplane structure or injury to the passengers and flightcrew.

In the preamble of the notice of proposed rulemaking (NPRM) for AD 99–13–07, we stated that the proposed AD was considered interim action, and that the manufacturer was developing a modification to address the unsafe condition. We indicated that we might consider further rulemaking action once the modification was developed, approved, and available. The manufacturer now has developed such a modification, and we have determined that further rulemaking action is indeed necessary. This proposed AD follows from that determination.

Actions Since Issuance of Previous Rule

Since the issuance of AD 99–13–07, we have issued AD 2002–10–03, amendment 39–12749 (67 FR 34823), which applies to certain McDonnell Douglas Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), MD–88, and MD–90–30 airplanes. That AD requires replacement of certain MLG shock strut piston assemblies with new or serviceable improved assemblies, in accordance with Boeing Service Bulletin MD80–32–309, Revision 01, dated April 25, 2001 (for Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), and MD–88 airplanes); or Boeing Service Bulletin MD90–32–031, Revision 01, dated April 25, 2001 (for Model MD–90–30 airplanes). Accomplishment of that replacement will terminate the requirements of this AD, as noted in paragraph (b) of AD 2002–10–03. Therefore, we have included in paragraph (h) of this proposed AD the requirements of paragraph (a) of AD 2002–10–03 that apply to airplanes subject to this proposed AD. The compliance time for the replacement specified in this proposed AD ("Before the accumulation of 30,000 total landings on the MLG shock strut piston assemblies, or within 5,000 landings after June 20, 2002 (the effective date of AD 2002–10–03, amendment 39–12749), whichever occurs later") is the same as the compliance time in paragraph (a) of AD 2002–10–03. Once this proposed AD becomes effective, we may consider further rulemaking to revise or rescind

AD 2002–10–03 to remove the duplicate requirement.

Explanation of Related AD

Since the issuance of AD 99–13–07, we have issued AD 2004–05–18, amendment 39–13513 (69 FR 10915, March 9, 2004). That AD requires certain actions for certain McDonnell Douglas Model MD–90–30 airplanes. The actions required by that AD include:

- Repetitive fluorescent penetrant and magnetic particle inspections to detect fatigue cracking of the MLG piston, and repair if necessary.
- Repetitive inspections for evidence of cracking in the paint topcoat of the MLG pistons.
- Replacement of certain MLG shock strut piston assemblies with new or serviceable improved assemblies.

We find that the actions required by that AD for Model MD–90–30 airplanes overlap with the requirements of AD 99–13–07 for the same airplanes. Thus, we have not included Model MD–90–30 airplanes in the applicability of this proposed AD.

Explanation of Relevant Service Information

Since the issuance of AD 99–13–07, the FAA has reviewed and approved Boeing Alert Service Bulletin MD80–32A308, Revision 04, dated June 12, 2001 (for Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), and MD–88 airplanes). (AD 99–13–07 refers to McDonnell Douglas Alert Service Bulletins MD80–32A308, dated March 5, 1998, and Revision 01, dated May 12, 1998; as appropriate sources of service information for accomplishing the actions in that AD.) That service bulletin describes procedures for repetitive fluorescent dye penetrant and fluorescent magnetic particle inspections to detect cracking of the MLG shock strut piston, and replacement of any cracked piston with a new or serviceable improved assembly. Revision 04 of the service bulletin includes additional part numbers of MLG shock strut pistons subject to the inspections described therein.

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other products of this same type design, the proposed AD would supersede AD 99–13–07 to continue to require repetitive inspections to detect cracking of the MLG shock strut pistons, and replacement of a cracked piston with a new or serviceable part. The proposed AD would remove Model MD–90–30 airplanes from the applicability, but would require the existing inspections, and corrective actions if necessary, to be accomplished on additional MLG shock strut pistons. The inspections would be required to be accomplished in accordance with Boeing Alert Service Bulletin MD80–32A308, Revision 04, except as discussed below. The proposed AD also would require replacing the MLG shock strut pistons with new improved assemblies, which would terminate the repetitive inspections. The replacement would be required to be accomplished in accordance with Boeing Service Bulletin MD80–32–309, Revision 01.

Differences Between Service Bulletins and Proposed AD

Although Boeing Alert Service Bulletin MD80–32A308, Revision 04, describes procedures for fluorescent penetrant and magnetic particle inspections, this service bulletin does not emphasize the sequence of these inspections. We find that, in each inspection cycle, it is necessary for the fluorescent penetrant inspection to precede the magnetic particle inspection. This sequencing is important because we are aware of cases in which accomplishment of a magnetic particle inspection before a fluorescent penetrant inspection interfered with the results of the fluorescent penetrant inspection. Therefore, a new paragraph (d) has been included in this proposed AD to clarify that, for inspections performed after the effective date of this AD, accomplishment of the fluorescent penetrant inspection must precede accomplishment of the magnetic particle inspection.

Although Boeing Alert Service Bulletin MD80–32A308, Revision 04, specifies that operators may contact the manufacturer for disposition of certain repair conditions, this proposed AD would require operators to repair those conditions per a method approved by the FAA.

Operators should note that, although Figure 1 of Boeing Alert Service Bulletin MD80–32A308, Revision 04, specifies to report certain inspection results to the airplane manufacturer, this proposed AD would not require such reporting. We do not need this information from operators.

Explanation of Change to Existing Requirements

We have revised certain wording from the existing AD to identify model designations as they are published in the most recent type certificate data sheet for the affected models.

Changes to 14 CFR Part 39/Effect on the AD

On July 10, 2002, the FAA issued a new version of 14 CFR part 39 (67 FR 47997, July 22, 2002), which governs the FAA's airworthiness directives system. The regulation now includes material that relates to altered products, special flight permits, and alternative methods of compliance (AMOCs). Because we have now included this material in part 39, only the office authorized to approve AMOCs is identified in each individual AD. Therefore, Note 1 and paragraph (f) of AD 99–13–07 are not included in this proposed AD, and paragraph (e) of AD 99–13–07 (which appears as paragraph (m)(1) of this proposed AD) has been revised in this proposed AD. Also, we have added paragraph (m)(2) to this AD to provide credit for AMOCs approved previously per AD 99–13–07.

Cost Impact

There are approximately 1,364 airplanes of the affected design in the worldwide fleet. The FAA estimates that 849 airplanes of U.S. registry would be affected by this proposed AD.

The inspections that are currently required by AD 99–13–07 take approximately 4 work hours per airplane to accomplish, at an average labor rate of $65 per work hour. Based on these figures, the cost impact of the currently required inspections on U.S. operators is estimated to be $220,740, or $260 per airplane, per inspection cycle.

The new inspections that are proposed in this AD action would take approximately 4 work hours per airplane to accomplish, at an average labor rate of $65 per work hour. Based on these figures, the cost impact of the currently required inspections on U.S. operators is estimated to be $220,740, or $260 per airplane, per inspection cycle.

As explained previously, the new replacement included in this AD action is already required by AD 2002–10–03. Therefore, the new proposed requirement will not add any additional economic burden on affected operators. The current costs associated with this proposed AD are reiterated in their entirety (as follows) for the convenience of affected operators.

The replacement of MLG pistons that is included in this AD action and currently required by AD 2002–10–03 takes approximately 28 work hours per airplane to accomplish, at an average labor rate of $65 per work hour. Required parts cost approximately $263,438 per airplane. Based on these figures, the cost impact of this

requirement on U.S. operators subject to this proposed AD is estimated to be $225,204,042, or $265,258 per airplane.

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

Regulatory Impact

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 39–11201 (64 FR 33392, June 23, 1999), and by adding a new airworthiness directive (AD), to read as follows:

McDonnell Douglas: Docket 2001–NM–293–AD. Supersedes AD 99–13–07, Amendment 39–11201.

Applicability: Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), and MD–88 airplanes; as listed in Boeing Alert Service Bulletin MD80–32A308, Revision 04, dated June 12, 2001; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

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

Requirements of AD 99–13–07

Initial Inspection

(a) For airplanes equipped with an MLG shock strut piston having part number (P/N) 5935347–1 through –509 inclusive, 5935347–511, or 5935347–513: Perform fluorescent dye penetrant and fluorescent magnetic particle inspections to detect cracking of an MLG shock strut piston, in accordance with McDonnell Douglas Alert Service Bulletin MD80–32A308, dated March 5, 1998, or Revision 01, dated May 12, 1998; or Boeing Alert Service Bulletin MD80–32A308, Revision 04, dated June 12, 2001 (for Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), and MD–88 airplanes). Perform the inspections at the later of the times specified in paragraphs (a)(1) and (a)(2) of this AD.

(1) Prior to the accumulation of 10,000 total landings on an MLG shock strut piston, or within 6 months after July 28, 1999 (the effective date of AD 99–13–07, amendment 39–11201), whichever occurs later.

(2) Within 2,500 landings after a major overhaul and initial inspection of the MLG shock strut piston accomplished prior to July 28, 1999, in accordance with McDonnell Douglas All Operator Letter 9–2153 (for Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), and MD–88 airplanes).

Corrective Actions

(b) For airplanes equipped with an MLG shock strut piston having P/N 5935347–1 through–509 inclusive, 5935347–511, or 5935347–513: Condition 1. If any cracking is detected, prior to further flight, replace any cracked MLG shock strut piston with a new or serviceable piston, in accordance with McDonnell Douglas Alert Service Bulletin MD80–32A308, dated March 5, 1998, or Revision 01, dated May 12, 1998; or Boeing Alert Service Bulletin MD80–32A308, Revision 04, dated June 12, 2001 (for Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), and MD–88 airplanes). Thereafter, repeat the inspections required by paragraph (a) of this AD prior to the accumulation of 10,000 total landings on the MLG shock strut piston.

Repetitive Inspections

(c) For airplanes equipped with an MLG shock strut piston having P/N 5935347–1 through–509 inclusive, 5935347–511, or 5935347–513: Condition 2. If no cracking is detected, repeat the fluorescent dye penetrant and fluorescent magnetic particle inspections thereafter at intervals not to exceed 2,500 landings, in accordance with McDonnell Douglas Alert Service Bulletin MD80–32A308, dated March 5, 1998, or Revision 01, dated May 12, 1998; or Boeing Alert Service Bulletin MD80–32A308, Revision 04, dated June 12, 2001 (for Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), and MD–88 airplanes); as applicable; until the replacement required by paragraph (h) of this AD has been accomplished.

New Requirements of This AD

Clarification of Inspection Sequence

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

Inspection of MLG Piston P/Ns SR09320081–3 through –13

(e) For any MLG piston having P/N SR09320081–3 through –13 inclusive: Perform fluorescent penetrant and magnetic particle inspections to detect fatigue cracking of the MLG pistons, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD80–32A308, Revision 04, dated June 12, 2001. Do the initial inspections at the later of the times specified in paragraphs (e)(1) and (e)(2) of this AD. Repeat the inspections thereafter at intervals not to exceed 2,500 landings, until the requirements of paragraph (f) or (h) of this AD have been accomplished.

(1) Prior to the accumulation of 10,000 total landings on the MLG piston.

(2) Within 6 months after the effective date of this AD.

Corrective Actions

(f) For airplanes equipped with an MLG shock strut piston having P/N SR09320081–3 through –13 inclusive: If any cracking is detected during the inspections required by paragraph (e) of this AD, prior to further flight, replace any cracked MLG shock strut piston with a new or serviceable improved assembly, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD80–32A308, Revision 04, dated June 12, 2001. Such replacement

terminates the repetitive inspections required by paragraph (e) of this AD for the replaced shock strut piston only.

(g) Where Boeing Alert Service Bulletin MD80–32A308, Revision 04, dated June 12, 2001; specifies to contact Boeing-Long Beach for disposition of certain repair conditions: Before further flight, repair per a method approved by the Manager, Los Angeles Aircraft Certification Office (ACO), FAA. For a repair method to be approved by the Manager, Los Angeles ACO, as required by this paragraph, the Manager's approval letter must specifically refer to this AD.

Replacement of MLG Shock Strut Piston Assemblies

(h) Replace the MLG shock strut piston assemblies, left- and right-hand sides, with new or serviceable improved assemblies, in accordance with the Accomplishment Instructions of Boeing Service Bulletin MD80–32–309, Revision 01, dated April 25, 2001. Do this replacement at the applicable compliance time specified in paragraph (h)(1) or (h)(2) of this AD. Such replacement terminates the repetitive inspections required by this AD. If the MLG shock strut piston is not serialized, or the number of landings on the piston cannot be conclusively determined, consider the total number of landings on the piston assembly to be equal to the total number of landings accumulated by the airplane with the highest total number of landings in the operator's fleet.

(1) For airplanes listed in Boeing Service Bulletin MD80–32–309, Revision 01, dated April 25, 2001: Do the replacement before the accumulation of 30,000 total landings on the MLG shock strut piston assemblies, or within 5,000 landings after June 20, 2002 (the effective date of AD 2002–10–03, amendment 39–12749), whichever occurs later.

(2) For airplanes other than those identified in paragraph (h)(1) of this AD: Do the replacement before the accumulation of 30,000 total landings on the MLG shock strut piston assemblies, or within 5,000 landings after the effective date of this AD, whichever occurs later.

Note 1: Paragraph (a) of AD 2002–10–03, amendment 39–12749, requires the same actions as paragraph (h) of this AD.

Actions Accomplished Previously in Accordance With Other Service Information

(i) Accomplishment of the replacement specified in Boeing Service Bulletin MD80–32–309, dated January 31, 2000, before June 20, 2002, is considered acceptable for compliance with the requirement of paragraph (h) of this AD.

Parts Installation

(j) As of the effective date of this AD, no person may install an MLG shockstrut piston having P/N 5935347–1 through –509 inclusive, 5935347–511, 5935347–513, or SR09320081–3 through –13 inclusive, on any airplane.

No Requirement To Submit Information

(k) Although Boeing Alert Service Bulletin MD80–32A308, Revision 04, dated June 12, 2001, specifies to submit certain inspection results to the manufacturer, this AD does not include such a requirement.

Alternative Methods of Compliance

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

(2) Alternative methods of compliance, approved previously per AD 99–13–07, amendment 39–11201, are approved as alternative methods of compliance with this AD.

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

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–10382 Filed 5–6–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–NM–13–AD]

RIN 2120–AA64

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

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to all Airbus Model A300 B2 and A300 B4; Model A300 B4–600, B4–600R, C4–605R Variant F, and F4–600R (collectively called A300–600); and Model A310 series airplanes. This proposal would require a detailed inspection of certain pulleys and control cables in the rear fuselage for corrosion and damage; and corrective action, if necessary. This action is necessary to detect and correct frayed or corroded control cables for the elevator and rudder, which could result in a ruptured control cable, and possible reduced controllability of the airplane. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by June 7, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2003–NM–13–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-nprmcomment@faa.gov*. Comments sent via fax or the Internet must contain "Docket No. 2003–NM–13–AD" in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 or 2000 or ASCII text.

The service information referenced in the proposed rule may be obtained from Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2125; fax (425) 227–1149.

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 shall 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.

Submit comments using the following format:

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

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the 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 2003–NM–13–AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2003–NM–13–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, notified the FAA that an unsafe condition may exist on all Airbus Model A300 B2 and A300 B4; Model A300 B4–600, B4–600R, C4–605R Variant F, and F4–600R (collectively called A300–600); and Model A310 series airplanes. The DGAC advises that, during a scheduled maintenance visit on an A310 series airplane, an operator found two frayed and corroded elevator control cables, and one frayed and corroded rudder control cable in the unpressurized stabilizer compartment at the rear of the fuselage. This condition, if not corrected, could result in a ruptured control cable, and possible reduced controllability of the airplane.

The subject area on certain Model A300 B2 and A300 B4; and Model A300 B4–600, B4–600R, C4–605R Variant F, and F4–600R (collectively called A300–600) series airplanes is almost identical to that on the affected Model A310 series airplane. Therefore, those Model A300 B2 and A300 B4; and Model A300 B4–600, B4–600R, C4–605R Variant F, and F4–600R (collectively called A300–600) series airplanes may be subject to the same unsafe condition revealed on the Model A310 series airplanes.

Explanation of Relevant Service Information

Airbus has issued the following service bulletins.

- For Model A300 B2 and A300 B4 series airplanes: Airbus Service Bulletin A300–27A0197, Revision 01, including Appendix 01, dated February 26, 2003;
- For Model A300 B4–600, B4–600R, C4–605R Variant F, and F4–600R (collectively called A300–600) series airplanes: Airbus Service Bulletin A300–27A6051, including Appendix 01, dated August 8, 2002; and
- For Model A310 series airplanes: Airbus Service Bulletin A310–27A2098, including Appendix 01, dated August 8, 2002.

These service bulletins describe procedures for a one-time visual inspection for corrosion and damage (*e.g.*, frayed or broken wires) of the pulleys and cables of the rudder, elevator, trimmable horizontal stabilizer, and rudder trim control located at the rear fuselage. These service bulletins also contain an Inspection Record Sheet in Appendix 01 for reporting inspection findings to the manufacturer.

For airplanes on which no damage is found, the service bulletins describe procedures for lubricating and testing the cables following the inspection. For airplanes on which any damage is found that is within certain limits defined by the applicable aircraft maintenance manual (AMM), the service bulletins allow further flight. For airplanes on which any damage is found that is outside the AMM limits, the service bulletins describe procedures for corrective actions. The corrective actions include replacing the cables prior to further flight, and lubricating and testing the cables.

The DGAC classified these service bulletins as mandatory and issued French airworthiness directive 2002–608(B) R1, dated January 8, 2003, to ensure the continued airworthiness of these airplanes in France.

FAA's Conclusions

These airplane models are manufactured in France and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the DGAC has kept the FAA informed of the situation described above. The FAA has examined the findings of the DGAC, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of Requirements of Proposed Rule

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

Differences Among the French Airworthiness Directive, the Service Bulletins, and the Proposed AD

The French airworthiness directive does not define the type of inspection, and the service bulletins state that operators should "visually inspect" the affected cables. This proposed AD defines the inspection as a "detailed inspection." A definition of this inspection is included in Note 1 of this proposed AD.

The service bulletins do not specify a compliance time for sending the inspection report to the manufacturer, and the French airworthiness directive specifies compliance within the month following the inspection. This proposed AD would require reporting the inspection findings to the manufacturer within 60 days after the proposed inspection. We find that this information is necessary for the manufacturer to gather based upon the importance of the safety issue. We also find that reporting within 60 days ensures an appropriate interval of time for operators to comply with this proposed requirement without compromising safety.

Clarification of Inspection Thresholds

The service bulletins and the French airworthiness directive give inspection thresholds in terms of flight hours accumulated (20,000, 25, 000, and 30,000 total flight hours) on the affected airplanes, well as the number of years since new (10, 13, and 16 years). We have expressed these thresholds in paragraph (c) of this proposed AD in a manner that captures the intent of the service bulletins and French airworthiness directive, and ensures that all affected airplanes are covered.

Additionally, in lieu of expressing thresholds as a number years "since new," the proposed AD specifies those thresholds as the earlier of the date of issuance of the original Airworthiness Certificate, or the original Export Certificate of Airworthiness. This decision is based on our determination that operators may interpret "since new" differently. We find that our proposed terminology is generally understood within the industry, and records will always exist that establish these dates with certainty.

Interim Action

We consider this proposed AD interim action. If final action is later identified, we may consider further rulemaking then.

Cost Impact

The FAA estimates that 174 airplanes of U.S. registry would be affected by this

proposed AD, that it would take approximately 1 work hour per airplane to accomplish the proposed inspection. The average labor rate is $65 per work hour. Based on these figures, the cost impact of the proposed AD on U.S. operators is estimated to be $11,310, or $65 per airplane.

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

Regulatory Impact

The regulations 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 adding the following new airworthiness directive:

Airbus: Docket 2003–NM–13–AD.

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

Compliance: Required as indicated, unless accomplished previously.

To detect and correct frayed or corroded control cables for the elevator and rudder, which could result in a ruptured control cable, and possible reduced controllability of the airplane, accomplish the following:

Definitions

(a) The term "service bulletin," as used in this AD, means the Accomplishment Instructions of the following service bulletins, as applicable:

(1) For Model A300 B2 and A300 B4 series airplanes: Airbus Service Bulletin A300–27A0197, Revision 01, including Appendix 01, dated February 26, 2003;

(2) For Model A300 B4–600, B4–600R, C4–605R Variant F, and F4–600R (collectively called A300–600) series airplanes: Airbus Service Bulletin A300–27A6051, including Appendix 01, dated August 8, 2002; and

(3) For Model A310 series airplanes: Airbus Service Bulletin A310–27A2098, including Appendix 01, dated August 8, 2002.

(b) In this AD, the phrase "date of airworthiness certification" means the date of issuance of the original Airworthiness Certificate or the original Export Certificate of Airworthiness, whichever occurs first.

Inspection and Corrective Action

(c) At the applicable time in paragraph (c)(1), (c)(2), (c)(3), or (c)(4) of this AD, do a detailed inspection for corrosion and damage (*e.g.*, frayed or broken wires) of the pulleys and cables of the rudder, elevator, trimmable horizontal stabilizer, and rudder trim control located at the rear of the fuselage; including any applicable testing and lubrication following the inspection. If any corrosion or damage is found that is outside the limits specified in the service bulletin, prior to further flight, replace the affected cable with a new cable; including any applicable testing and lubrication following the replacement. Accomplish all the actions in accordance with the applicable service bulletin.

(1) For airplanes that have accumulated, as of the effective date of this AD, less than 20,000 total flight hours and less than 10 years since the date of airworthiness certification: Inspect at the later of the times specified in paragraphs (c)(1)(i) and (c)(1)(ii) of this AD.

(i) Prior to the accumulation of 20,000 total flight hours, or within 10 years since the date of airworthiness certification, whichever occurs earliest.

(ii) Within 1,800 flight hours after the effective date of this AD.

(2) For airplanes that have accumulated, as of the effective date of this AD, either 20,000 or more total flight hours or more than 10 years since the date of airworthiness certification, but less than 25,000 total flight hours and 13 years since the date of airworthiness certification: Inspect at the later of the times specified in paragraphs (c)(2)(i) and (c)(2)(ii) of this AD.

(i) Prior to the accumulation of 25,000 total flight hours, or within 13 years since the date of airworthiness certification, whichever occurs earliest.

(ii) Within 1,800 flight hours after the effective date of this AD.

(3) For airplanes that have accumulated, as of the effective date of this AD, either 25,000 or more total flight hours or more than 13 years since the date of airworthiness certification, but less than 30,000 total flight hours and 16 years since the date of airworthiness certification: Inspect at the later of the times specified in paragraphs (c)(3)(i) and (c)(3)(ii) of this AD.

(i) Prior to the accumulation of 30,000 total flight hours, or within 16 years since the date of airworthiness certification, whichever occurs earliest.

(ii) Within 1,200 flight hours after the effective date of this AD.

(4) For airplanes that have accumulated, as of the effective date of this AD, either 30,000 or more total flight hours or more than 16 years since the date of airworthiness certification: Inspect within 600 flight hours after the effective date of this AD.

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

Reporting

(d) Submit a report of the findings (both positive and negative) of the inspection required by paragraph (c) of this AD to Airbus Industrie, Customer Services Directorate, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; Attn: AI/SE-D32 Technical Data and Documentation Services, or fax: (+33) 5 61 93 28 06. Send the report at the applicable time specified in paragraph (c)(1) or (c)(2) of this AD. The Inspection Record Sheet in Appendix 01 of the applicable service bulletin may be used. Include the inspection results, a description of any discrepancy found, the airplane serial number, the number of landings and flight hours on the airplane, the service bulletin number, and the date of inspection. Under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements contained in this AD and has assigned OMB Control Number 2120–0056.

(1) If the inspection is done after the effective date of this AD: Submit the report within 60 days after the inspection.

(2) If the inspection was done prior to the effective date of this AD: Submit the report within 60 days after the effective date of this AD.

Alternative Methods of Compliance

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

Note 2: The subject of this AD is addressed in French airworthiness directive 2002–608(B) R1, dated January 8, 2003.

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

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–10381 Filed 5–6–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–284–AD]

RIN 2120–AA64

Airworthiness Directives; Thales Avionics Traffic Advisory/Resolution Advisory (TA/RA) Vertical Speed Indicator-Traffic Alert and Collision Avoidance System (VSI–TCAS) Indicators, Installed on but not Limited to Certain Transport Category Airplanes Equipped With TCAS II Change 7 Computers (ACAS II)

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Thales Avionics TA/RA VSI–TCAS indicators, installed on but not limited to certain transport category airplanes equipped with TCAS II change 7 computers (ACAS II). This proposal would require a revision to the Airplane Flight Manual (AFM) to advise the flightcrew to follow the audio annunciation when an RA fail message is triggered during a multi-aircraft encounter. This proposed AD would also require modification of the software for the TA/RA VSI–TCAS indicator, which would terminate the requirement for the AFM revision. This action is necessary to prevent the TA/RA VSI–TCAS indicator from displaying a conflicting "RA FAIL" message during a multi-aircraft encounter, which could result in the flightcrew ignoring the correct aural command and traffic display information if the flightcrew believes the TCAS II computer has malfunctioned, and consequently lead to a mid-air collision with other aircraft. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by June 7, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2002–NM–284–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-nprmcomment@faa.gov*. Comments sent via fax or the Internet must contain "Docket No. 2002–NM–284–AD" in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 or 2000 or ASCII text.

The service information referenced in the proposed rule may be obtained from Thales Avionics, Air Transport Avionics, 105 avenue du Général Eisenhower, BP 1147, 31036 Toulouse Cedex 1, France; or Thales Avionics, Regional and Business Aircraft Avionics, 105 avenue du Général Eisenhower, BP 1147, 31036 Toulouse Cedex 1, France; or Thales Avionics, Avionics for Military Aircraft, Rue Toussaint Catros, 33187 Le Haillan Cedex, France. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California.

FOR FURTHER INFORMATION CONTACT: Abby Malmir, Aerospace Engineer, Systems and Equipment Branch, ANM–130L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5351; fax (562) 627–5210.

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 shall 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.

Submit comments using the following format:

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

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the 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–NM–284–AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2002–NM–284–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The FAA has become aware of an unsafe condition that may exist with Thales Avionics traffic advisory/resolution advisory (TA/RA) vertical speed indicator-traffic alert and collision avoidance system (VSI–TCAS) indicators, installed on but not limited to certain transport category airplanes equipped with TCAS II change 7 computers (ACAS II). During a ground test, the TA/RA VSI–TCAS indicator did not display the "DON'T CLIMB, DON'T DESCEND" RA command, under the scenario where the airplane is located between two other aircraft (one above and one below). Instead, the TA/RA

VSI–TCAS indicator displayed an "RA FAIL" message, which conflicted with both the correct audio annunciation to "MAINTAIN VERTICAL SPEED, MAINTAIN" and traffic display information. A conflicting "RA FAIL" message during a multi-aircraft encounter, if not corrected, could result in the flightcrew ignoring the correct aural command and traffic display information if the flightcrew believes the TCAS II computer has malfunctioned, and consequently lead to a mid-air collision with other aircraft.

Explanation of Relevant Service Information

Thales Avionics has issued the following service bulletins:

Service bulletin	Revision level	Date
457400–34–082	Original	November 28, 2002.
457400–34–083	03	January 26, 2004.
457400–34–084	02	December 19, 2003.
457400–34–085	00	February 5, 2004.

These service bulletins describe procedures for modification of the software for the TA/RA VSI–TCAS indicator. The modification involves reprogramming memory MN9 of the graphic processor board for the TA/RA VSI–TCAS indicator, and reidentifying and testing the modified TA/RA VSI–TCAS indicator. Accomplishment of the actions specified in the service bulletin is intended to adequately address the identified unsafe condition. The Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, classified this service bulletin as mandatory and issued French airworthiness directive F–2004–042, dated March 31, 2004, to ensure the continued airworthiness of these airplanes in France.

FAA's Conclusions

This TA/RA VSI–TCAS indicator is manufactured in France and is type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement.

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would require revising the Limitations Section of the Airplane Flight Manual (AFM) to advise the flightcrew to follow the audio annunciation when an RA fail message is triggered during a multi-aircraft encounter. This proposed AD would also require modifying the software for the TA/RA VSI–TCAS indicator, which would terminate the requirement for the AFM revision. The terminating action is required to be accomplished in accordance with the service bulletins described previously, except as discussed below.

Difference Between Proposed AD and French Airworthiness Directive

Operators should note that affected part number (P/N) 457400SB0711, as listed in Thales Avionics Service Bulletin 457400–34–083, Revision 03, dated January 26, 2004, was inadvertently omitted from French airworthiness directive F–2004–042, dated March 31, 2004. We have determined that the omitted part number is subject to the same unsafe condition of this proposed AD and, therefore, have included P/N 457400SB0711 in this proposed AD. Additionally, the DGAC has informed us that it plans to revise the French airworthiness directive to include the omitted part number.

Clarification Between Proposed AD and French Airworthiness Directive

The French airworthiness directive requires revising the Limitations Section of the AFM by inserting a temporary limitation. We have reviewed the language of the temporary limitation and determined that certain wording does not conform to the U.S. standard of writing AFM flightcrew instructions in either "must do" or "do not" statements for clarity and memorization. While we have clarified the language of the temporary limitation in this proposed AD, the intent of it remains the same.

Cost Impact

We do not know how many aircraft, equipped with Thales Avionics TA/RA VSI–TCAS indicators and TCAS II change 7 computers (ACAS II), of the affected design are in the worldwide fleet or on the U.S. Register. We do, however, know that it would take approximately 2 work hours per airplane to accomplish the proposed actions, and that the average labor rate is $65 per work hour. Required parts, for 2 TCAS displays per airplane, would cost approximately between $1,316 and $1,826 per airplane. Based on these figures, the cost impact of the proposed AD on U.S. operators is estimated to be between $1,446 and $1,956 per airplane.

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

Regulatory Impact

The regulations 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 adding the following new airworthiness directive:

Thales Avionics (Formerly Sextant Avionique): Docket 2002–NM–284–AD.

Applicability: Thales Avionics traffic advisory/resolution advisory (TA/RA) vertical speed indicator-traffic alert and collision avoidance system (VSI–TCAS) indicators, part number (P/N) 457400-(*), except P/Ns 457400GA1502, 457400GB1502, 457400MA1502, 457400MB1502, 457400ZA1502, and 457400ZB1502, installed on but not limited to Airbus Model A300 B2, A300 B4, and A310 series airplanes; Model A300 B4–600, B4–600R, C4–605R Variant F, and F4–600R (collectively called A300–600) series airplanes; and Aerospatiale Model ATR42 and ATR72 series airplanes; certificated in any category; equipped with TCAS II change 7 computers (ACAS II).

Compliance: Required as indicated, unless accomplished previously.

To prevent the TA/RA VSI–TCAS indicator from displaying a conflicting "RA FAIL" message during a multi-aircraft encounter, which could result in the flightcrew ignoring the correct aural command and traffic display information if the flightcrew believes the TCAS II computer has malfunctioned, and consequently lead to a mid-air collision with other aircraft; accomplish the following:

Revision of the Airplane Flight Manual (AFM)

(a) Within 15 days after the effective date of this AD, revise the Limitations Section of the AFM to include the following statement (this may be accomplished by inserting a copy of this AD into the AFM):

• Limitation:

When the TA/RA VSI–TCAS indicates an RA fail message, the flightcrew must follow the audio annunciation "Maintain Vertical Speed, Maintain" until "clear of the conflict" audio annunciation has occurred.

Note: When a preventive Don't Climb/Don't Descend resolution advisory (RA) is triggered by simultaneous, multi-aircraft encounter configuration, the TA/RA VSI–TCAS may indicate an RA fail message. The audio annunciation "Maintain Vertical Speed, Maintain" and traffic display information are correct. In this specific case, the flightcrew must follow the audio annunciation and, therefore, maintain the vertical speed until clearance of the conflict condition has occurred."

Note 1: When a statement identical to that in paragraph (a) of this AD has been included in the general revisions of the AFM, the general revisions may be inserted into the AFM, and the copy of this AD may be removed from the AFM.

Software Modification

(b) Within 48 months after the effective date of this AD, modify the software for the TA/RA VSI–TCAS indicator by accomplishing all the actions specified in the Accomplishment Instructions of the applicable service bulletin listed in Table 1 of this AD. Doing this modification terminates the requirements of paragraph (a) of this AD. After accomplishing the modification, the AFM limitation required by paragraph (a) of this AD may be removed from the AFM.

TABLE 1.—APPLICABLE SERVICE BULLETIN

For P/N—	Thales Avionics service bulletin	Revision level	Date
457400EA0311	457400–34–083	03	January 26, 2004.
457400EB0311			
457400FA0311			
457400FB0311			
457400GA0011	457400–34–085	00	February 5, 2004.
457400GA0311	457400–34–083	03	January 26, 2004.
457400GA0602			
457400GA0911			
457400GA1100			
457400GA1311			
457400GA1312			
457400GA1900	457400–34–082	Original	November 28, 2002.
457400GB0011	457400–34–085	00	February 5, 2004.
457400GB0911	457400–34–083	03	January 26, 2004.
457400GB1100			
457400GB1311			
457400GB1312			
457400GB1900	457400–34–082	Original	November 28, 2002.
457400GB2000	457400–34–084	02	December 19, 2003.
457400GB2100	457400–34–083	03	January 26, 2004.
457400HA1900			
457400JA1900			
457400KA0602			
457400KA1311			
457400KA1900			
457400KB1311			
457400KB1900			
457400LA2000	457400–34–084	02	December 19, 2003.
457400MA0602	457400–34–083	03	January 26, 2004.
457400MA1311			
457400MB1311			
457400PA1900			
457400PB1900			
457400RA0711			
457400RB0711			
457400SA0711			
457400SB0711			
457400TB0811			

TABLE 1.—APPLICABLE SERVICE BULLETIN—Continued

For P/N—	Thales Avionics service bulletin	Revision level	Date
457400TC0811 457400UA1311 457400UA1900 457400UB1900 457400UB1311 457400WA0811 457400WB0811 457400ZA1900			

Alternative Methods of Compliance

(c) In accordance with 14 CFR 39.19, the Manager, Los Angeles Aircraft Certification Office, FAA, Transport Airplane Directorate, is authorized to approve alternative methods of compliance for this AD.

Note 2: The subject of this AD is addressed in French airworthiness directive F–2004–042, dated March 31, 2004.

Issued in Renton, Washington, on April 28, 2004.

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–10380 Filed 5–6–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–NM–37–AD]

RIN 2120–AA64

Airworthiness Directives; Israel Aircraft Industries, Ltd., Model 1121, 1121A, 1121B, 1123, 1124, and 1124A Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to all Israel Aircraft Industries, Ltd., Model 1121, 1121A, 1121B, 1123, 1124, and 1124A series airplanes. This proposal would require a one-time inspection to detect cracking and other discrepancies of both sides of the rudder skins and ribs, forward to aft on each spar, to detect cracks below the skin surface; and corrective action if necessary. This action is necessary to detect and correct cracking of the skins of the rudder assembly, which could result in reduced structural capability of the rudder and reduced controllability of the airplane. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by June 7, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2003–NM–37–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-nprmcomment@faa.gov*. Comments sent via fax or the Internet must contain "Docket No. 2003–NM–37–AD" in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 or 2000 or ASCII text.

The service information referenced in the proposed rule may be obtained from Gulfstream Aerospace Corporation, P.O. Box 2206, Mail Station D25, Savannah, Georgia 31402. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2125; fax (425) 227–1149.

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 shall 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.

Submit comments using the following format:

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

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the 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 2003–NM–37–AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2003–NM–37–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The Civil Aviation Administration of Israel (CAAI), which is the airworthiness authority for Israel, notified the FAA that an unsafe condition may exist on all Israel Aircraft Industries, Ltd., Model 1121, 1121A, 1121B, 1123, 1124, and 1124A series airplanes. The CAAI advises that

multiple cracks were discovered in the skins of the rudder assemblies outside the area depicted in the Structural Inspection Program. This condition, if not corrected, could result in reduced structural integrity of the rudder and reduced controllability of the airplane.

Explanation of Relevant Service Information

Israel Aircraft Industries has issued the following service bulletins:

SERVICE INFORMATION

Service bulletin—	Revision—	Dated—	For model—
1121 Commodore Jet (Israel Aircraft Industries) Service Bulletin 1121–55–030.	1	June 23, 2003	1121, 1121A, and 1121B series airplanes.
1123—Westwind (Israel Aircraft Industries) Service Bulletin 1123–55–056.	1	June 23, 2003	1123 series airplanes.
1124—Westwind (Israel Aircraft Industries) Service Bulletin 1124–55–150.	1	June 23, 2003	1124 and 1124A series airplanes.

The service bulletins describe procedures for a one-time visual inspection of both sides of the rudder skins and ribs, forward to aft on each spar, between stations ZR=46.134 and ZR=126.900 on the front spar and Z=94.400 to Z=174.100 on the rear spar. The inspection is intended to detect loose or distorted rivet heads and cracks in the skin around the spar cap flange river holes. The service bulletins also describe procedures for a one-time x-ray inspection of the rudder assembly ribs between Z=94.400 and Z=174.100 to detect cracks below the skin surface. The service bulletins recommend that operators contact General Dynamics Aviation Services for information regarding repair of cracks and loose rivets. The CAAI classified these service bulletins as mandatory and issued Israeli airworthiness directive 55–02–12–04R1, dated December 10, 2003, to ensure the continued airworthiness of these airplanes in Israel.

FAA's Conclusions

These airplane models are manufactured in Israel and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the CAAI has kept the FAA informed of the situation described above. The FAA has examined the findings of the CAAI, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would require accomplishment of the actions specified in the applicable service bulletin described previously, except as discussed below.

Differences Between Proposed AD and Service Information

Although the service bulletins specify that operators may contact General Dynamics Aviation Services for disposition of certain repair conditions, this proposed AD would require the repair of those conditions to be accomplished in accordance with a method approved by either the FAA or the CAAI (or its delegated agent). In light of the type of repair that would be required to address the identified unsafe condition, and in consonance with existing bilateral airworthiness agreements, the FAA has determined that, for this proposed AD, a repair approved by either the FAA or the CAAI would be acceptable for compliance.

Operators should note that, although the Accomplishment Instructions of the referenced service bulletins may describe procedures for submitting a certificate of compliance with the service bulletin, this proposed AD would not require those actions. The FAA does not need this information from operators.

Interim Action

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

Cost Impact

The FAA estimates that 300 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 3 work hours per airplane to accomplish the proposed actions, and that the average labor rate is $65 per work hour. Based on these figures, the cost impact of the proposed AD on U.S. operators is estimated to be $58,500, or $195 per airplane.

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

Regulatory Impact

The regulations 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 adding the following new airworthiness directive:

Israel Aircraft Industries, Ltd: Docket 2003–NM–37–AD.

Applicability: All Model 1121, 1121A, 1121B, 1123, 1124, and 1124A series airplanes; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To detect and correct cracking of the skins of the rudder assembly, which could result in reduced structural capability of the rudder and reduced controllability of the airplane, accomplish the following:

Inspections

(a) Within 50 flight hours after the effective date of this AD, do detailed and x-ray inspections to detect discrepancies (including cracking, loose rivets, and distorted rivet heads) of both sides of the rudder skins and ribs, forward to aft on each spar, in accordance with the applicable service bulletin identified in Table 1 of this AD. Although the service bulletin referenced in this AD specifies to submit certain information to the manufacturer, this AD does not include such a requirement.

TABLE 1.—SERVICE INFORMATION REFERENCE

For—	Inspect in accordance with—
Model 1121, 1121A, and 1121B series airplanes.	1121 Commodore Jet (Israel Aircraft Industries) Service Bulletin 1121–55–030, Revision 1, dated June 23, 2003.
Model 1123 series airplanes	1123—Westwind (Israel Aircraft Industries) Service Bulletin 1123–55–056, Revision 1, dated June 23, 2003.
Model 1124 and 1124A series airplanes	1124—Westwind (Israel Aircraft Industries) Service Bulletin 1124–55–150, Revision 1, dated June 23, 2003.

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

Corrective Action

(b) If any discrepancy is found during any inspection required by paragraph (a) of this AD: Before further flight, repair it in accordance with a method approved by either the Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate; or the Civil Aviation Administration of Israel (CAAI) (or its delegated agent).

Part Installation

(c) As of the effective date of this AD, no person may install a rudder on any airplane, unless the actions required by this AD have been accomplished.

Alternative Methods of Compliance

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

Note 2: The subject of this AD is addressed in Israeli airworthiness directive 55–02–12–04R1, dated December 10, 2003.

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

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–10379 Filed 5–6–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NM–179–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to all Boeing Model 747 series airplanes. This proposal would require repetitive inspections for cracking of the top and side panel webs and panel stiffeners of the nose wheel well (NWW), and corrective actions, if necessary. This action is necessary to detect and correct fatigue cracks in the top and side panel webs and stiffeners of the NWW, which could compromise the structural integrity of the NWW and could lead to the rapid depressurization of the airplane. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by June 21, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2001–NM–179–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-nprmcomment@faa.gov*. Comments sent via fax or the Internet must contain "Docket No. 2001–NM–179–AD" in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 or 2000 or ASCII text.

The service information referenced in the proposed rule may be obtained from Boeing Commercial Airplanes, PO Box 3707, Seattle, Washington 98124–2207. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton.

FOR FURTHER INFORMATION CONTACT: Nick Kusz, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6432; fax (425) 917–6590.

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 shall 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.

Submit comments using the following format:

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

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the 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 2001–NM–179–AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2001–NM–179–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The FAA has received reports indicating that cracks have been found on the top and side panel webs and side panel horizontal stiffeners of the nose wheel well (NWW) on Boeing Model 747 series airplanes. The cause of the cracking is fatigue. If left undetected, fatigue cracks in the top and side panel webs and stiffeners could become large. This condition, if not detected and corrected, could compromise the structural integrity of the NWW and could lead to rapid depressurization of the airplane.

Explanation of Relevant Service Information

The FAA has reviewed and approved Boeing Service Bulletin 747–53A2465, Revision 1, dated October 16, 2003. The service bulletin describes procedures for performing repetitive detailed and ultrasonic inspections for cracking of the top and side panel webs of the NWW and for performing repetitive detailed and surface high frequency eddy current inspections for cracking of the top and side panel stiffeners of the NWW; replacing cracked stiffeners with new stiffeners; and repair of any cracked panel web. Accomplishment of the actions specified in the service bulletin is intended to adequately address the identified unsafe condition.

New Reports Since Issuance of Service Bulletin

Since issuance of the service bulletin, there have been several new reports of cracking in the nose wheel well panels. The reported cracking was as long as 12 inches and, in one case, was discovered within less than 1,200 flight cycles since the previous inspection per the service bulletin.

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other products of this same type design, the proposed AD would require accomplishment of the actions specified in the service bulletin described previously, except as described below.

Differences Between Proposed Rule and Service Bulletin

Operators should note that while the service bulletin, "Planning Information" 1.D. Note 2., specifies that flight cycles with a cabin differential pressure of 2.0 psi or less do not need to be counted as part of the compliance time, this proposed AD counts all flight cycles as part of the compliance time. We have determined that an adjustment of flight cycles due to a lower cabin differential pressure is not substantiated and will not be allowed for use in determining the flight cycle threshold.

It should also be noted that, although the repeat interval listed in Figure 1 of the service bulletin is listed as 6,000 flight cycles, this proposal would require repeat inspections at 1,000 flight cycle intervals due to the severity of the new reports and the relatively short interval since the previous inspection that they were found. This reduced interval has been coordinated with the manufacturer.

Clarification of Service Bulletin

Operators should note that, although the "Action" paragraph in the Summary and paragraph D., "Description," in the Planning Information of the service bulletin specify that operators may contact the manufacturer for disposition of certain repair conditions, the Accomplishment Instructions of the service bulletin specify to repair web cracks as shown in the Structural Repair Manual. This proposed AD would require the repairs be done per the Accomplishment Instructions of the service bulletin.

Cost Impact

There are approximately 1,127 airplanes of the affected design in the worldwide fleet. The FAA estimates that 255 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 42 work hours per airplane to accomplish the proposed inspection, and that the average labor rate is $65 per work hour. Based on these figures, the cost impact of the proposed AD on U.S. operators is estimated to be $696,150, or $2,730 per airplane, per inspection cycle.

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

Regulatory Impact

The regulations 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 adding the following new airworthiness directive:

Boeing: Docket 2001–NM–179–AD.

Applicability: All Model 747 series airplanes, certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To detect and correct fatigue cracks in the top and side panel webs and stiffeners of the nose wheel well (NWW), which could compromise the structural integrity of the NWW and could lead to the rapid depressurization of the airplane, accomplish the following:

Initial and Repetitive Inspections

(a) Prior to the accumulation of 16,000 total flight cycles, or within 1,000 flight cycles after the effective date of this AD, whichever is later, do the inspections specified in paragraphs (a)(1) and (a)(2) of this AD, per the Accomplishment Instructions of Boeing Service Bulletin 747–53A2465, Revision 1, dated October 16, 2003. Repeat the inspections thereafter at intervals not to exceed 1,000 flight cycles.

(1) Do detailed and ultrasonic inspections of the top and side panel webs of the NWW for cracks.

(2) Do detailed and surface high frequency eddy current inspections of the top and side panel stiffeners of the NWW for cracks.

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

Corrective Actions

(b) If any crack is found during any inspection required by paragraph (a) of this AD: Prior to further flight, do the repair specified in paragraph (b)(1) and/or (b)(2) of this AD, as applicable, in accordance with the Accomplishment Instructions of Boeing Service Bulletin 747–53A2465, Revision 1, dated October 16, 2003. Thereafter, repeat the inspections required by paragraph (a) of this AD.

(1) Repair web cracks.

(2) Replace cracked stiffeners with new stiffeners.

Inspections Accomplished Per Previous Issue of Service Bulletin

(c) Inspections accomplished before the effective date of this AD per Boeing Alert Service Bulletin 747–53A2465, dated April 5, 2001, are considered acceptable for compliance with the corresponding inspection specified in this AD.

Alternative Methods of Compliance

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

Issued in Renton, Washington, on April 29, 2004.

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–10433 Filed 5–6–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–NM–228–AD]

RIN 2120–AA64

Airworthiness Directives; BAE Systems (Operations) Limited (Jetstream) Model 4101 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to all BAE Systems (Operations) Limited (Jetstream) Model 4101 airplanes. This proposal would require a one-time inspection of the ailerons to determine if certain actions were accomplished previously, and related investigative and corrective actions if necessary. This action is necessary to prevent damage to the rear spar rib-to-rib attachment cleats and the aft rib elements of the fixed tabs of the ailerons. Such damage could lead to reduced structural integrity and consequent failure of the ailerons, which could result in reduced controllability of the airplane. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by June 7, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2003–NM–228–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-nprmcomment@faa.gov.* Comments sent via fax or the Internet must contain "Docket No. 2003–NM–228–AD" in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 for Windows or ASCII text.

The service information referenced in the proposed rule may be obtained from British Aerospace Regional Aircraft American Support, 13850 Mclearen Road, Herndon, Virginia 20171. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Todd Thompson, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1175; fax (425) 227–1149.

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 shall 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.

Submit comments using the following format:

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

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the 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 2003–NM–228–AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2003–NM–228–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The Civil Aviation Authority (CAA), which is the airworthiness authority for the United Kingdom, notified the FAA that an unsafe condition may exist on all BAE Systems (Operations) Limited (Jetstream) Model 4101 airplanes. The CAA advises that during a scheduled fatigue inspection of the ailerons, an operator found damage to the rear spar rib-to-rib attachment cleats, and the aft rib elements of the fixed tabs. Investigation revealed that the damage was caused by accomplishment of an early production change to the ailerons during manufacture. Such damage could lead to reduced structural integrity and consequent failure of the ailerons, which could result in reduced controllability of the airplane.

Explanation of Relevant Service Information

BAE Systems (Operations) Limited has issued Service Bulletin J41–57–028, dated June 27, 2003, which is written in two parts. Part 1 of the service bulletin describes the following procedures:

- Reviewing the airplane maintenance records to determine if Supplemental Structural Inspection 57–50–011 (included in the airplane maintenance manual), or the actions specified in BAE Systems (Operations) Limited Service Bulletin J41–51–001, dated August 7, 2002, were previously accomplished.
- Inspecting the ailerons by looking at the rib positions to determine if an early production change was installed.
- For airplanes on which the early production change was installed, doing a radiographic inspection for signs of damage, including distortion of the rear spar rib-to-rib attachment cleats in the ailerons, and the rib elements and cleats in the fixed tabs.

Part 2 of the service bulletin describes related investigative and corrective actions for airplanes with signs of damage, and/or with the early production change installed. These actions include:

- Removing the ailerons from the airplane.
- Inspecting the ribs and cleats for damage or incorrect installation, and reporting any adverse findings to BAE before repairing the airplane.
- Repairing/replacing damaged areas and parts per Revision C of repair drawing 141R0212, the structural repair manual, and the maintenance manual.
- Reinstalling the ailerons on the airplane.
- Doing a functional check.

Accomplishment of the actions specified in the service information is intended to adequately address the identified unsafe condition. The CAA classified this service bulletin as mandatory and issued British airworthiness directive 006–06–2003 in order to assure the continued airworthiness of these airplanes in the United Kingdom.

FAA's Conclusions

This airplane model is manufactured in the United Kingdom and is type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the CAA has kept the FAA informed of the situation described above. The FAA has examined the findings of the CAA, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of Requirements of Proposed AD

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

Differences Between the Service Information and Proposed AD

Operators should note that, although the service bulletin describes procedures for submitting certain reports to the manufacturer, this proposed AD would not require such reporting.

Although the service bulletin specifies that operators should contact the manufacturer for disposition of certain repair conditions, this proposed AD would require operators to repair those conditions per the service bulletin, or a method approved by either the FAA or the CAA (or its delegated agent). In light of the type of repair that would be required to address the unsafe condition, and consistent with existing bilateral airworthiness agreements, we have determined that a repair approved by either the FAA or the CAA (or its delegated agent) would be acceptable for compliance with this proposed AD.

Cost Impact

We estimate that 57 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 2 work hours per airplane to accomplish the proposed actions, and that the average labor rate is $65 per work hour. Based on these figures, the cost impact of the proposed AD on U.S. operators is estimated to be $7,410, or $130 per airplane.

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

Regulatory Impact

The regulations 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 adding the following new airworthiness directive:

BAE Systems (Operations) Limited (Formerly British Aerospace Regional Aircraft): Docket 2003–NM–228–AD.

Applicability: All Model Jetstream 4101 airplanes, certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent failure of the ailerons, and consequent reduced controllability of the airplane, accomplish the following:

One-Time Inspection

(a) Within 6 months or 600 flight cycles after the effective date of this AD, whichever is earlier: Do a one-time general visual inspection of the ailerons to determine if an early production change to the ailerons was installed, by doing all the actions per Part 1, paragraph (2) of the Accomplishment Instructions of BAE (Operations) Limited Service Bulletin J41–57–028, dated June 27, 2003. Instead of a general visual inspection of the ailerons, a review of airplane maintenance records is acceptable, by doing all the actions per Part 1, paragraph (1) of the Accomplishment Instructions of the service bulletin, if it can be positively determined from that review that one or both of the actions specified in Part 1, paragraph (1) of the Accomplishment Instructions of the service bulletin have been done.

(1) If the production change was not installed, or one or both of the actions specified in Part 1, paragraph (1) of the Accomplishment Instructions of the service bulletin were done, no further action is required by this AD.

(2) If the production change was installed: Do a radiographic inspection for damage by doing all the actions per Part 1, paragraph (3) of the Accomplishment Instructions of the service bulletin. If no damage is found, no further action is required by this AD. If any damage is found, before further flight, do the corrective actions required by paragraph (b) of this AD.

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

Corrective Actions

(b) If any damage is found during the inspection required by paragraph (a)(2) of this AD: Before further flight, do all of the applicable corrective actions per Part 2 of the Accomplishment Instructions of BAE Systems (Operations) Limited Service Bulletin J41–57–028, dated June 27, 2003. Where the service bulletin specifies to contact the manufacturer for repair information, do the repair per a method approved by either the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the Civil Aviation Authority (or its delegated agent).

Submission of Information Not Required

(c) Although the service bulletin referenced in this AD specifies to submit certain information to the manufacturer, this AD does not include such a requirement.

Alternative Methods of Compliance

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

Note 2: The subject of this AD is addressed in British airworthiness directive 006–06–2003.

Issued in Renton, Washington, on April 30, 2004.

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–10432 Filed 5–6–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2004–NM–47–AD]

RIN 2120–AA64

Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB–135 and –145 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain EMBRAER Model EMB–135 and –145 series airplanes. This proposal would require replacing the electrical harness for the tail boom strobe light with a new, improved harness that has a built-in metallic overbraid, and performing an operational test following the replacement. This action is necessary to ensure that there is sufficient lightning bonding at the electrical harness for the tail boom strobe light, and to prevent the simultaneous failure of multiple avionics systems in the event of a lightning strike, which could result in reduced controllability of the airplane. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by June 7, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2004–NM–47–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-nprmcomment@faa.gov*. Comments sent via fax or the Internet must contain "Docket No. 2004–NM–47–AD" in the subject line and need not be submitted

in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 or 2000 or ASCII text.

The service information referenced in the proposed rule may be obtained from Empresa Brasileira de Aeronautica S.A. (EMBRAER), P.O. Box 343—CEP 12.225, Sao Jose dos Campos—SP, Brazil. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Todd Thompson, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1175; fax (425) 227–1149.

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 shall 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.

Submit comments using the following format:

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

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the 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 2004–NM–47–AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2004–NM–47–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The Departmento de Aviacao Civil (DAC), which is the airworthiness authority for Brazil, notified the FAA that an unsafe condition may exist on certain EMBRAER Model EMB–135 and –145 series airplanes. The DAC advises that operators have reported damage to several components of the electrical system, which was caused by lightning strikes to the fuselage. Investigation revealed that the root cause of the damage is an insufficient bonding at the electrical harness for the tail boom strobe light. A lightning strike in this area could lead to the simultaneous failure of multiple avionics systems, which could result in reduced controllability of the airplane.

Explanation of Relevant Service Information

EMBRAER has issued Service Bulletin 145–33–0032, dated November 5, 2003 (for Model EMB–135 and –145 series airplanes, except Model EMB–135BJ series airplanes); and Service Bulletin 145LEG–33–0004, dated November 5, 2003 (for Model EMB–135BJ series airplanes).

These service bulletins describe procedures for replacing the tail boom strobe light electrical harness with a new, improved harness that has a built-in metallic overbraid. The replacement includes cleaning the affected area; installing a new harness and a new grommet; and performing an operational test of the navigation lights and anti-collision light following the replacement. Accomplishment of the actions specified in the service bulletins is intended to adequately address the identified unsafe condition.

The DAC classified these service bulletins as mandatory and issued Brazilian airworthiness directive 2004–01–05, dated February 5, 2004, to ensure the continued airworthiness of these airplanes in Brazil.

FAA's Conclusions

These airplane models are manufactured in Brazil and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the DAC has kept the FAA informed of the situation described above. The FAA has examined the findings of the DAC, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would require accomplishment of the actions specified in the service bulletins described previously, except as discussed below.

Difference Between Proposed Rule and Brazilian Airworthiness Directive

Brazilian airworthiness directive 2004–01–05, dated February 5, 2004, is applicable to "all EMB–145 () and EMB–135 () aircraft models in operation." However, this does not agree with EMBRAER Service Bulletin 145–33–0032, dated November 5, 2003, and Service Bulletin 145LEG–33–0004, dated November 5, 2003, which state that only certain EMB–145 and EMB–135 series airplanes are affected and identifies them by serial number. This proposed AD would be applicable only to the airplanes listed in the service bulletins. This difference has been coordinated with the DAC.

Cost Impact

We estimate that 548 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 2 work hours per airplane to accomplish the proposed replacement, and that the average labor rate is $65 per work hour. Required parts would cost between $915 and $1,255 per airplane, depending upon the airplane configuration. Based on these figures, the cost impact of the proposed AD on U.S. operators is estimated to be between $572,660 and $758,980, or between $1,045 and $1,385 per airplane.

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD.

These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

The regulations 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 adding the following new airworthiness directive:

Empresa Brasileira de Aeronautica S.A. (EMBRAER): Docket 2004–NM–47–AD.

Applicability: Model EMB–135 and –145 series airplanes, as listed in EMBRAER Service Bulletin 145–33–0032 and 145LEG–33–0004, both dated November 5, 2003; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To ensure that there is sufficient lightning bonding at the electrical harness for the tail boom strobe light, and to prevent the simultaneous failure of multiple avionics systems in the event of a lightning strike, which could result in reduced controllability of the airplane, accomplish the following:

Replacement and Test

(a) Within 5,000 flight hours or 30 months after the effective date of this AD, whichever occurs first: Replace the electrical harness of the tail boom strobe light with a new, improved harness that has a built-in metallic overbraid, and perform an operational test on the navigation lights and the anti-collision light after the replacement. Do the actions per the Accomplishment Instructions of the applicable service bulletin in paragraph (a)(1) or (a)(2) of this AD.

(1) EMBRAER Service Bulletin 145–33–0032, dated November 5, 2003 (for Model EMB–135 and –145 series airplanes, except Model EMB–135BJ series airplanes).

(2) EMBRAER Service Bulletin 145LEG–33–004, dated November 5, 2003 (for Model EMB–135BJ series airplanes).

Alternative Methods of Compliance

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

Note 1: The subject of this AD is addressed in Brazilian airworthiness directive 2004–01–05, dated February 5, 2004.

Issued in Renton, Washington, on April 29, 2004.

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–10431 Filed 5–6–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–NE–61–AD]

RIN 2120–AA64

Airworthiness Directives; Hamilton Sundstrand Power Systems T–62T Series Auxiliary Power Units (APUs)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for Hamilton Sundstrand Power Systems Models T–62T–46C12 and T–62T–40C14 (APS 500R) APUs with fuel filter housing assembly, part numbers (P/Ns) 4951627, 4951960, or 4952039, installed. This proposed AD would require installation of a bracket to prevent a failed bypass button from protruding beyond the internal o-ring seal. This proposed AD results from reports of leaks caused by cracked bypass buttons that protruded beyond the o-ring seal. We are proposing this AD to prevent a fire or explosion caused by a fuel leak from a failed bypass button on the fuel filter housing.

DATES: We must receive any comments on this proposed AD by July 6, 2004.

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

- By mail: Federal Aviation Administration (FAA), New England Region, Office of the Regional Counsel, Attention: Rules Docket No. 2003–NE–61–AD, 12 New England Executive Park, Burlington, MA 01803–5299.
- By fax: (781) 238–7055.
- By e-mail: *9-ane-adcomment@faa.gov.*

You can get the service information identified in this proposed AD from Hamilton Sundstrand Technical Publications Department, P.O. Box 7002, Rockford, IL 61125–7002, U.S.A.

You may examine the AD docket at the FAA, New England Region, Office of the Regional Counsel, 12 New England Executive Park, Burlington, MA.

FOR FURTHER INFORMATION CONTACT: Roger Pesuit, Aerospace Engineer, Los Angeles Aircraft Certification Office, FAA, Transport Airplane Directorate, 3960 Paramount Blvd., Lakewood, CA 90712–4137; telephone (562) 627–5251, fax (562) 627–5210.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to submit any written relevant data, views, or arguments regarding this proposal. Send your comments to an address listed under **ADDRESSES.** Include "AD Docket No. 2003–NE–61–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 proposed AD. If a person contacts us verbally, and that contact relates to a substantive part of this proposed AD, we will summarize the contact and place the summary in the docket. We will consider all comments received by the closing date and may amend the proposed 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 that affect you. You can get more information about plain language at *http://www.faa.gov/language* and *http://www.plainlanguage.gov*.

Examining the AD Docket

You may examine the AD Docket (including any comments and service information), by appointment, between 8 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. *See* **ADDRESSES** for the location.

Discussion

On October 22, 2003, Hamilton Sundstrand Power Systems advised us that they received reports of five fuel filter housing assemblies on which the bypass buttons failed. Fuel filter housing assemblies, P/Ns 4951627, 4951960, and 4952039, have bypass buttons that can fail from fatigue cracks. When the bypass button cracks through, the indicating portion of the button can extend beyond the internal o-ring seal and can allow fuel to leak into the APU compartment. This condition, if not corrected, could result in a fire or explosion caused by a fuel leak from a failed bypass button on the fuel filter.

Relevant Service Information

We have reviewed and approved the technical contents of Hamilton Sundstrand Power Systems Alert Service Bulletin (ASB) No. ASB–4504112–49–22, dated December 2, 2003; and ASB No. ASB–4503067–49–9, dated December 2, 2003, that describe procedures for installing brackets on the fuel filter.

FAA's Determination and Requirements of the Proposed AD

We have evaluated all pertinent information and identified an unsafe condition that is likely to exist or develop on other products of this same type design. Therefore, we are proposing this AD, which would require installing a bracket to prevent a failed bypass button from protruding beyond the internal o-ring seal.

Interim Action

These actions are interim actions and we may take further rulemaking actions in the future.

Costs of Compliance

There are about 552 Hamilton Sundstrand APUs of the affected design in the worldwide fleet. We estimate that 448 APUs installed on airplanes of U.S. registry would be affected by this proposed AD. We also estimate that it would take about 1 work hour per APU to perform the proposed actions, and that the average labor rate is $65 per work hour. Required parts would cost about $517 per APU. The manufacturer indicated that they might provide the parts at no cost. Based on these figures, we estimate the total cost of the proposed AD to U.S. operators to be $260,736.

Regulatory Findings

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

For the reasons discussed above, I certify that the 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. Would 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 proposal 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–61–AD" in your request.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Hamilton Sundstrand Power Systems: Docket No. 2003–NE–61–AD.

Comments Due Date

(a) The Federal Aviation Administration (FAA) must receive comments on this airworthiness directive (AD) action by July 6, 2004.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Hamilton Sundstrand Power Systems Models T–62T–46C12 and T–62T–40C14 (APS 500R) auxiliary power units (APUs) with fuel filter housing assemblies, part numbers (P/Ns) 4951627, 4951960, or 4952039, installed. These APUs are installed on, but not limited to, Bombardier DHC–8–400 airplanes and Empresa Brasileira de Aeronautica S.A. (Embraer) EMB–135 and –145 series airplanes.

Unsafe Condition

(d) This AD results from reports of leaks caused by cracked bypass buttons that protruded beyond the o-ring seal. We are issuing this AD to prevent a fire or explosion caused by a fuel leak from a failed bypass button on the fuel filter.

Compliance

(e) You are responsible for having the actions required by this AD performed within 400 hours time-in-service or 6 months after the effective date of this AD, whichever occurs earlier, unless the actions have already been done.

Installation of Bracket on APU Model T–62T–46C12

(f) Install a bracket onto the fuel filter housing assembly on APU Model T–62T–46C12. Use 2.A through 2.D. of the Accomplishment Instructions of Hamilton Sundstrand Alert Service Bulletin (ASB) No. ASB–4503067–49–9, dated December 2, 2003, to install the bracket.

Installation of Bracket on APU Model T–62T–40C14 (APS 500R)

(g) Install a bracket onto the fuel filter housing assembly on APU Model T–62T–40C14 (APS 500R). Use 2.A through 2.D. of the Accomplishment Instructions of Hamilton Sundstrand ASB No. ASB–4504112–49–22, dated December 2, 2003, to install the bracket.

Alternative Methods of Compliance (AMOCs)

(h) The Manager, Los Angeles Aircraft Certification Office, has the authority to approve alternative methods of compliance for this AD if requested using the procedures found in 14 CFR 39.19.

Material Incorporated by Reference

(i) None.

Related Information

(j) None.

Issued in Burlington, Massachusetts, on May 3, 2004.

Jay J. Pardee,

Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 04–10430 Filed 5–6–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 3

Docket No. 2004N–0194

Definition of Primary Mode of Action of a Combination Product

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing to amend its combination product regulations to define "mode of action" and "primary mode of action" (PMOA). Along with these definitions, the proposed rule sets forth an algorithm the agency would use to assign combination products to an agency component for regulatory oversight when the agency cannot determine with reasonable certainty which mode of action provides the most important therapeutic action of the combination product. Finally, the proposed rule would also require a sponsor to base its recommendation of the agency component with primary jurisdiction for regulatory oversight of its combination product by using the PMOA definition and, if appropriate, the assignment algorithm. The proposed rule is intended to promote the public health by codifying the agency's criteria for the assignment of combination products in transparent, consistent, and predictable terms.

DATES: Submit written comments by July 6, 2004. See section IX of this document for the proposed effective date of a final rule based on this document.

ADDRESSES: You may submit comments, identified by Docket No. 2004N–0194, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.
- Agency Web site: *http://www.fda.gov/dockets/ecomments*. Follow the instructions for submitting comments on the agency Web site.
- E-mail: *fdadockets@oc.fda.gov*. Include Docket No. 2004N–0194 in the subject line of your e-mail message.
- FAX: 301-827-6870.
- Mail/Hand delivery/Courier For paper, disk, or CD–ROM submissions: Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

Instructions: All submissions received must include the agency name and Docket No. 2004N–0194 for this proposed rulemaking. All comments received will be posted without change to *http://www.fda.gov/dockets/ecomments*, including any personal information provided. For detailed instructions on submitting comments and additional information on the proposed rulemaking process, see the "Comments" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.fda.gov/dockets/ecomments* and/or the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Leigh Hayes, Office of Combination Products (HFG–3), Food and Drug Administration, 15800 Crabbs Branch Way, suite 200, Rockville, MD 20855, 301–827–9229.

SUPPLEMENTARY INFORMATION:

I. Introduction

As set forth in part 3 (21 CFR part 3), a combination product is a product comprised of any combination of a drug and a device; a device and a biological product; a biological product and a drug; or a drug, a device, and a biological product. A combination product includes: (1) A product comprised of two or more regulated components, i.e., drug/device, biological product/device, drug/biological product, or drug/device/biological product, that are physically, chemically, or otherwise combined or mixed and produced as a single entity; (2) two or more separate products packaged together in a single package or as a unit and comprised of drug and device products, device and biological products, or biological and drug products; (3) a drug, device, or biological product packaged separately that, according to its investigational plan or proposed labeling, is intended for use only with an approved individually specified drug, device, or biological product where both are required to achieve the intended use, indication, or effect and where upon approval of the proposed product the labeling of the approved product would need to be changed, e.g., to reflect a change in intended use, dosage form, strength, route of administration, or significant change in dose; or (4) any investigational drug, device, or biological product packaged separately that, according to its proposed labeling, is for use only with another individually specified investigational drug, device, or biological product where both are required to achieve the intended use, indication, or effect.

Section 503(g) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 353(g)) requires that FDA assign a component of the agency to have primary jurisdiction for the premarket review and regulation of a combination product. That assignment must be based upon a determination of the PMOA of the combination product. For example, if the primary mode of action of a combination product is that of a biological product, the product is to be assigned to the FDA component responsible for the premarket review of that biological product. FDA issued a final rule in 1991 establishing the procedures (the "request for designation" (RFD) process) for determining the assignment of combination products under part 3.

The Medical Device User Fee and Modernization Act of 2002 (MDUFMA) further modified section 503(g) of the act to require the establishment of an office (Office of Combination Products) within the Office of the Commissioner. The purpose of the Office of Combination Products is to ensure the prompt assignment of combination products to agency components, the timely and effective premarket review of such products, and consistent and appropriate postmarket regulation of combination products. MDUFMA also requires the agency to review each agreement, guidance, or practice specific to the assignment of combination products to agency components, consult with stakeholders and the directors of the agency centers, and determine whether to continue in effect, modify, revise, or eliminate such agreements, guidances, or practices.

Currently, § 3.7 requires a sponsor submitting a request for designation to identify the PMOA of the combination product and recommend a lead agency component for its premarket review and regulation. The PMOA of a combination product, however, is not defined in the statute or regulations, and at times may be difficult to identify. Requests for assignment of combination products are usually submitted very early in a product's development. This practice is encouraged because it allows sponsors to begin working with an agency component as early in the development process as possible and to know the regulatory requirements for their products. For some products, though, the PMOA of the product is not readily apparent, to either FDA or the product sponsor, at the time the request for

assignment is submitted. Determining the PMOA of a combination product is also complicated for products that have two completely different modes of action, neither of which is subordinate to the other. In close cases, assignments may turn on subtle distinctions related to the determination of whether a mode of action is "primary," or not. The assignment process may appear to be unpredictable when two slightly different products are assigned to different agency components based on differences in their PMOAs.

To address these concerns, simplify the designation process for sponsors, and enhance the transparency, predictability, and consistency of the agency's assignment of combination products, FDA proposes to define "mode of action" and "primary mode of action." This proposal would merely clarify and codify principles the agency has generally used since section 503(g) of the act was issued in 1990.

II. Description of the Proposed Rule

A. Introduction

FDA proposes to amend its combination product regulations to create new definitions in § 3.2 of "mode of action" and "primary mode of action." This proposal also sets forth a two-tiered assignment algorithm in § 3.4, which the agency would use to determine assignment when it cannot determine which mode of action of a combination product provides the most important therapeutic action of the product. Finally, the rule proposes to require that sponsors base their recommendation of the agency component with primary jurisdiction for regulatory oversight of its product in terms of the PMOA definition and, if appropriate, the assignment algorithm.

This proposal would fulfill the statutory requirement to assign products based on their PMOA, and would use safety and effectiveness issues, as well as consistency with the regulation of similar products, to guide the assignment of products when the agency cannot determine which mode of action provides the most important therapeutic action of the combination product. It ensures that like products would be similarly assigned, and it allows new products for which the most important therapeutic action cannot be determined to be assigned to the most appropriate agency component based on the most significant safety and effectiveness issues they present. In addition, by providing a more defined framework for the assignment process, a codified definition of PMOA would further MDUFMA's requirement that the agency ensure prompt assignment of combination products. Also, by issuing this proposal, the agency furthers MDUFMA's requirement that it review practices specific to the assignment of combination products, consult with stakeholders and center directors, and make a determination whether to modify those practices.

Not only would this proposal fulfill the objectives set forth in the preceding paragraph, it would do so in a way that remains consistent with agency practice regarding the assignment of combination products. This rulemaking would thus codify criteria the agency has generally used since 1991. The proposed rule, when finalized, will affect RFD submissions received by the agency on or after the effective date of any final rule issued as a result of this proposed rule.

B. What Are "Mode of Action" and "Primary Mode of Action"

1. Definitions

a. *Mode of action* would be defined as "the means by which a product achieves a therapeutic effect." For purposes of this definition, "therapeutic" effect or action includes any effect or action of the combination product intended to diagnose, cure, mitigate, treat, or prevent disease, or affect the structure or any function of the body. Products may have a drug, biological product, or device mode of action. Because combination products are comprised of more than one type of regulated article (biological product, device, or drug), and each constituent part contributes a biological product, device, or drug mode of action, combination products will typically have more than one mode of action.

1. A constituent part has a biological product mode of action if it acts by means of a virus, therapeutic serum, toxin, antitoxin, vaccine, blood, blood component or derivative, allergenic product, or analogous product applicable to the prevention, treatment, or cure of a disease or condition of human beings, as described in section 351(a) of the Public Health Service Act.

2. A constituent part has a device mode of action if it meets the definition of device contained in section 201(h)(1) to (h)(3) of the act (21 U.S.C.321(h)(1) to (h)(3)), it does not have a biological product mode of action, and it does not achieve its primary intended purposes through chemical action within or on the body of man or other animals and is not dependent upon being metabolized for the achievement of its primary intended purposes.

3. A constituent part has a drug mode of action if it meets the definition of drug contained in section 201(g)(1) of the act and it does not have a biological product or device mode of action.

b. *Primary mode of action* would be defined as "the single mode of action of a combination product that provides the most important therapeutic action of the combination product." This would be the mode of action that is expected to make the greatest contribution to the overall therapeutic effects of the combination product. As with "mode of action," for purposes of PMOA, "therapeutic" effect or action includes any effect or action of the combination product intended to diagnose, cure, mitigate, treat, or prevent disease, or affect the structure or any function of the body.

2. Stakeholders' Comments

FDA held public hearings on May 15, 2002, and on November 25, 2002, and a public workshop on July 8, 2003, to discuss various issues pertaining to combination products, including the assignment of products to an agency component for regulatory oversight. Stakeholders also provided a number of written comments to the docket, which FDA opened to further facilitate the discussion of PMOA issues. The agency received many thoughtful comments from the stakeholders who participated in those discussions, as well as from stakeholders who submitted written comments to the docket, including some pertaining to a definition of PMOA. The November 2002 meeting in particular addressed questions regarding assignment. Some questions raised at the meeting were:

- What factors should FDA consider in determining the PMOA of a combination product?
- In instances where the PMOA of the combination product cannot be determined with certainty, what other factors should the agency consider in assigning primary jurisdiction?
- Is there a hierarchy among these additional factors that should be considered in order to ensure adequate review and regulation (e.g., which component presents greater safety questions?)

Several common themes emerged from these comments regarding the agency's definition of PMOA. For instance, many stakeholders felt that the agency should base any proposed definition of PMOA on the combination product as a whole. FDA agrees, and has crafted the definition so that PMOA would be based on the most important therapeutic action of the combination product as a whole. Furthermore, as

detailed in the section regarding the assignment algorithm, the agency expects to consider the combination product as a whole when the agency cannot determine with reasonable certainty the most important therapeutic action of the product.

Another recurring theme among a number of comments concerned the intended use of the product. Several stakeholders expressed their desire that FDA construct a definition of PMOA around this concept. As stated previously, mode of action would be defined as the means by which a product achieves a therapeutic effect. For over a decade, the agency has considered in its determination of PMOA an assessment of the product's intended use, as well as its effect on the diagnosis, cure, mitigation, treatment, or prevention disease, and its effect on the structure or function of the body. The agency intends to continue this practice, and has structured the proposed definition of PMOA to include consideration of the intended use of a combination product.

C. What If We Are Unable to Determine Which Mode of Action of a Combination Product is its Most Important Therapeutic Action? Assignment Algorithm (For easy reference, a diagram of the assignment algorithm is included at the end of this preamble.)

In certain cases, it is not possible for either FDA or the product sponsor to determine, at the time a request is submitted, which mode of action of a combination product provides the most important therapeutic effect. Determining the PMOA of a combination product is also complicated for products where the product has two completely different modes of action, neither of which is subordinate to the other. To assign such products with as much consistency, predictability, and transparency as possible, the agency proposes the application of an algorithm to determine PMOA in those instances, to be codified at § 3.4(b). In those cases, the agency would assign the combination product to the agency component that regulates other combination products that present similar questions of safety and effectiveness with regard to the combination product as a whole. When there are no other combination products that present similar questions of safety and effectiveness with regard to the combination product as a whole (e.g., it is the first such combination product, or differences in its intended use, design, formulation, etc. present different safety and effectiveness questions), the agency would assign the combination product to the agency component with the most expertise to evaluate the most significant safety and effectiveness questions presented by the combination product.

1. Stakeholders' Comments

As previously mentioned, FDA held public hearings on May 15, 2002, and on November 25, 2002, and a public workshop on July 8, 2003, to discuss various issues pertaining to combination products, including the assignment of products to an agency component for regulatory oversight. Stakeholders also provided a number of written comments to the docket, which FDA opened to further facilitate the discussion of PMOA issues.

As with the definition for PMOA, several common themes emerged from these comments regarding possible criteria for the algorithm. For example, several stakeholders suggested that the agency consider similarly situated products when assigning a combination product to a lead agency component. We agree that both precedent and expertise are important when assigning a combination product to a particular agency component, and propose that this criterion be placed first in the algorithm's decisionmaking hierarchy. Therefore, if the agency could not determine with reasonable certainty which mode of action provides the most important therapeutic effect, the agency would assign the combination product to the agency component that regulates combination products that present similar safety and effectiveness questions for the product as a whole. In other words, FDA would consider whether there is an agency component with direct experience related to the combination product in question. We note, too, that application of this criterion would require consideration of the product as a whole, rather than by its constituent parts, which is another common recommendation of stakeholders.

Another factor many stakeholders asked the agency to consider when developing an assignment algorithm relates to the relative risks of a particular combination product. We agree that this is an important consideration, and propose that the second criterion take into account the most significant questions of safety and effectiveness presented by a combination product. Therefore, if the agency cannot determine which mode of action makes the greatest contribution to its overall therapeutic effects, and the agency has no direct experience with combination products that as a whole present similar safety and effectiveness questions as the combination product at issue, the agency would assign the product to the agency component with the most expertise related to the most significant questions of safety and effectiveness of the product. In situations where the new product is the first such combination product, or where another combination product exists but the intended use, design, formulation, etc. for this combination product raise different safety and effectiveness questions, FDA would assign the product to the agency component with the most expertise to evaluate the most significant safety and effectiveness issues raised by the product.

2. Application of Proposed Definitions and Proposed Algorithm: Examples[1]

If the suggested definitions in the preceding section were applied to these products, the results would be as follows:

a. *Conventional drug-eluting stent*—a vascular stent provides a mechanical scaffold to keep a vessel open while a drug is slowly released from the stent to prevent the buildup of new tissue that would re-occlude the artery.

PMOA Analysis—*Which Mode of Action Provides the Most Important Therapeutic Action of the Combination Product?*

In this case, the product has two modes of action. One action of the vascular stent is to provide a physical scaffold to be implanted in a coronary artery to improve the resultant arterial luminal diameter following angioplasty. Another action of the product is the drug action, with the intended effect of reducing the incidence of restenosis and the need for target lesion revascularization.

Assignment of Lead Agency Component: Center for Devices and Radiological Health (CDRH)—The product's PMOA is attributable to the device component's function of physically maintaining vessel lumen patency, while the drug plays a secondary role in reducing restenosis caused by the proliferative response to the stent implantation, augmenting the safety and/or effectiveness of the uncoated stent. Accordingly, FDA would assign the product to CDRH for premarket review and regulation because the device component provides the most important therapeutic action of the product. It is unnecessary to proceed to the assignment algorithm because it is possible to determine which mode of action provides the most important

[1] As stated previously, a copy of the proposed algorithm is attached at the end of this preamble.

therapeutic action of this particular combination product.

b. *Drug eluting disc*—a surgically implanted disc contains a drug that is slowly released for prolonged, local delivery of chemotherapeutic agents.

PMOA Analysis—Which Mode of Action Provides the Most Important Therapeutic Action of the Combination Product?

In this case, the product has two modes of action. This product has a device mode of action because it is surgically implanted in the body and is designed for controlled drug release, thus affecting the structure of the body and treating disease. Another mode of action is the drug action, with the intended effect of preventing tumor recurrence at the implant site.

Assignment of Lead Agency Component: Center for Drug Evaluation and Research (CDER)—Though the product has a device mode of action, the product's PMOA is attributable to the drug component's function of preventing tumor recurrence at the implant site. Accordingly, we would assign the product to CDER for premarket review and regulation because the drug component provides the most important therapeutic action of the product. It is unnecessary to proceed to the assignment algorithm because it is possible to determine which mode of action provides the most important therapeutic action of this particular product.

c. *Contact lens combined with drug to treat glaucoma*—in this case, a contact lens is placed in the eye to correct vision. The contact lens also contains a drug to treat glaucoma that will be delivered from the lens to the eye.

PMOA Analysis—Which Mode of Action Provides the Most Important Therapeutic Action of the Combination Product?

This product has two modes of action. One action of the product is the device action, to correct vision. Another action of the product is a drug action, to treat glaucoma. Though administration through a contact lens is not necessary for the drug's delivery, the combination product allows a patient requiring vision correction to receive glaucoma treatment without having to undertake a more complicated daily drug regimen. Here, both actions of the product are independent, and neither appears to be subordinate to the other.

Because it is not possible to determine which mode of action provides the greatest contribution to the overall therapeutic effects of the combination product, it is necessary to apply the assignment algorithm.

Assignment Algorithm:

Is There an Agency Component That Regulates Other Combination Products That Present Similar Questions of Safety and Effectiveness With Regard to the Combination Product as a Whole?

CDRH regulates devices intended to correct vision. CDER regulates drugs intended to treat glaucoma. In this hypothetical example, no combination product intended to treat these different conditions simultaneously has yet been submitted to the agency for review. Though both CDER and CDRH regulate products that raise similar safety and effectiveness questions with regard to the constituent parts of the product, neither agency component regulates combination products that present similar safety and effectiveness questions with regard to the product as a whole.

Because there is no agency component that regulates products that present similar safety and effectiveness questions with regard to the product as a whole, it is necessary to apply the second criterion of the hierarchy.

Which Agency Component Has the Most Expertise Related to the Most Significant Safety and Effectiveness Questions Presented by the Combination Product?

Assignment of Lead Agency Component: CDER—Because there is no agency component that regulates combination products that present similar safety and effectiveness issues with regard to the product as a whole, the agency would consider which agency component has the most expertise related to the most significant safety and effectiveness questions presented by the product. In this hypothetical example, the most significant safety and effectiveness questions are related to the characterization, manufacturing, and clinical performance of the drug component, while the safety and effectiveness questions raised by the vision-correcting contact lens are considered routine. Based on the application of this criterion, this product would be assigned to CDER because CDER has the most expertise related to these issues.[2]

D. How Will the PMOA Definition and Assignment Algorithm Affect the Contents of My RFD Submission?

A sponsor would continue to submit its assessment of PMOA and its recommendation of lead agency component for regulatory oversight of its combination product. These requirements are not new; they are currently codified at § 3.7(c)(2)(ix) and (c)(3). Under this rule, however, a sponsor would present its recommendation of lead agency component in accordance with the PMOA definition of proposed § 3.2(m) and, if appropriate, the assignment algorithm of proposed § 3.4(b). Because this definition and the algorithm set forth a more defined framework on which to base a recommendation, the agency believes that these provisions will make it easier for sponsors to present their analysis of a product's PMOA.

[2] Had this been the second such product, it would be assigned to CDER based on the first criterion, assuming the first such product had also been assigned to CDER using the second criterion.

III. Legal Authority

The agency derives its authority to issue the regulations found in part 3 from 21 U.S.C. 321, 351, 353, 355, 360, 360c–360f, 360h–360j, 360gg–360ss, 371(a), 379e, 381, 394; 42 U.S.C. 216, 262, and 264 as stated in the Code of Federal Regulations. As stated previously in this document, Congress expressly directed FDA to assign combination products to the appropriate agency component for premarket review and regulation based on the agency's assessment of PMOA as set forth in section 503(g) of the act. Under section 701 of the act (21 U.S.C. 371) and for the efficient enforcement of the act, FDA has the authority to define and codify "mode of action" and PMOA and to issue the assignment algorithm.

IV. Environmental Impact

FDA has determined under 21 CFR 25.30(a) and (k), and 25.32(g) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

V. Paperwork Reduction of 1995

FDA tentatively concludes that the changes to the regulations on combination products proposed in this document are not subject to review by the Office of Management and Budget (OMB) because they do not constitute a "collection of information" under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The information collected under part 3 is currently approved under OMB control number 0910–0523. This proposal does not constitute an additional paperwork burden.

VI. Federalism

FDA has analyzed this proposed rule in accordance with the principles set

forth in Executive Order 13132. FDA has determined that the proposed rule does not contain policies 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. Accordingly, the agency has concluded that the rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required.

VII. Analysis of Impacts

A. Introduction

FDA has examined the impacts of the proposed rule under Executive Order 12866, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement of anticipated costs and benefits before proposing any rule that may result in an expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million (adjusted annually for inflation) in any one year. Under the Regulatory Flexibility Act, unless an agency certifies that a rule will not have a significant economic impact on a substantial number of small entities, the agency must analyze whether a rule may have a substantial impact on a substantial number of small entities and, if it does, to analyze regulatory options that would minimize the impact.

The agency believes that this proposed rule is consistent with the regulatory philosophy and principles identified in the Executive order and these two statutes. The proposed rule is not a significant regulatory action as defined by the Executive order and so is not subject to review under the Executive order. No further analysis is required under the Regulatory Flexibility Act because the agency has determined that these proposed rule amendments have no compliance costs and will not have a significant effect on a substantial number of small entities. Therefore the agency certifies they will not have a significant economic impact on a substantial number of small entities.

This proposed rule also does not trigger the requirements for a written statement under section 202(a) of the Unfunded Mandates Reform Act because it does not impose a mandate that results in expenditure of $100 million or more by State, local, and tribal governments in the aggregate, or by the private sector in any one year.

B. The Rationale Behind This Proposed Rule

The purpose of the proposed rule amendments is twofold: (1) To codify the definition of PMOA, a criterion the agency has used for more than a decade when assigning combination products to agency components for regulatory oversight; and (2) to simplify the designation process by providing a defined framework that sponsors may use when recommending and/or considering the PMOA and assignment of a combination product.

Indeed, many stakeholders have requested that the agency propose a rule defining PMOA because, without a definition of this statutory criterion, the assignment process has at times appeared to lack transparency. We believe that the proposal addresses many of the concerns stakeholders have expressed regarding the assignment process. Moreover, we have incorporated many of the suggestions stakeholders have provided regarding the PMOA definition and assignment algorithm.

The codification of these principles would also simplify the designation process for sponsors. For years, a sponsor has been required to determine PMOA and make a recommendation of lead agency component for regulatory oversight of its combination product, without a codified definition of PMOA. When the rule is finalized, a sponsor would be able to base its determination of PMOA and recommendation of lead agency component for regulatory oversight of its product on defined factors.

As mentioned previously in this proposal, the amendments proposed here would fulfill the statutory requirement to assign products based on their PMOA, and would use safety and effectiveness issues as well as consistency with the regulation of similar products to guide the assignment of products when the agency cannot determine which mode of action provides the most important therapeutic action of a combination product. It ensures that like products would be similarly assigned and regulated, and it allows new products for which the most important therapeutic action cannot be determined to be assigned to the most appropriate agency component based on the most significant safety and effectiveness issues they present. In addition, by providing a more defined framework for the assignment process, a codified definition of PMOA would further MDUFMA's requirement that the agency ensure prompt assignment of combination products. Also, by issuing this proposal, the agency furthers MDUFMA's requirement that it review practices specific to the assignment of combination products, consult with stakeholders and center directors, and make a determination whether to modify those practices.

In general, the agency believes the proposed rule will have no compliance costs and pose no additional burden to industry.

VIII. Request for Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

IX. Proposed Effective Date

The agency is proposing that any final rule that may issue based upon this proposed rule become effective 90 days after its date of publication in the **Federal Register**.

List of Subjects in 21 CFR Part 3

Administrative practice and procedure, Biologics, Drugs, Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act, the Public Health Service Act, and under authority delegated to the Commissioner of Food and Drugs, it is proposed that 21 CFR part 3 be amended as follows:

PART 3—PRODUCT JURISDICTION

1. The authority citation for 21 CFR part 3 is revised to read as follows:

Authority: 21 U.S.C. 321, 351, 353, 355, 360, 360c–360f, 360h–360j, 360gg–360ss, 371(a), 379e, 381, 394; 42 U.S.C. 216, 262, 264.

2. Section 3.2 is amended by redesignating paragraph (k) as paragraph (l), paragraph (l) as paragraph (n), paragraph (m) as paragraph (o),

paragraph (n) as paragraph (p); and by adding new paragraphs (k) and (m) to read as follows:

§ 3.2 Definitions.

* * * * *

(k) *Mode of action* is the means by which a product achieves a therapeutic effect. For purposes of this definition, "therapeutic" action or effect includes any effect or action of the combination product intended to diagnose, cure, mitigate, treat, or prevent disease, or affect the structure or any function of the body. When making assignments of combination products under this part, the agency will consider three types of mode of action: The actions provided by a biological product, a device, and a drug. Because combination products are comprised of more than one type of regulated article (biological product, device, or drug), and each constituent part contributes a biological product, device, or drug mode of action, combination products will typically have more than one identifiable mode of action.

(1) A constituent part has a biological product mode of action if it acts by means of a virus, therapeutic serum, toxin, antitoxin, vaccine, blood, blood component or derivative, allergenic product, or analogous product applicable to the prevention, treatment, or cure of a disease or condition of human beings, as described in section 351(i) of the Public Health Service Act.

(2) A constituent part has a device mode of action if it meets the definition of device contained in section 201(h)(1) to (h)(3) of the act, it does not have a biological product mode of action, and it does not achieve its primary intended purposes through chemical action within or on the body of man or other animals and is not dependent upon being metabolized for the achievement of its primary intended purposes.

(3) A constituent part has a drug mode of action if it meets the definition of drug contained in section 201(g)(1) of the act and it does not have a biological product or device mode of action.

* * * * *

(m) *Primary mode of action* is the single mode of action of a combination product that provides the most important therapeutic action of the combination product. The most important therapeutic action is the mode of action expected to make the greatest contribution to the overall therapeutic effects of the combination product.

* * * * *

3. Section 3.4 is amended by redesignating paragraph (b) as paragraph (c) and by adding a new paragraph (b) to read as follows:

§ 3.4 Designated agency component.

* * * * *

(b) In some situations, it is not possible to determine, with reasonable certainty, which one mode of action will provide a greater contribution than any other mode of action to the overall therapeutic effects of the combination product. Then, the agency will assign the combination product to the agency component that regulates other combination products that present similar questions of safety and effectiveness with regard to the combination product as a whole. When there are no other combination products that present similar questions of safety and effectiveness with regard to the combination product as a whole, the agency will assign the combination product to the agency component with the most expertise related to the most significant safety and effectiveness questions presented by the combination product.

* * * * *

4. Section 3.7 is amended by revising paragraphs (c)(2)(ix) and (c)(3) to read as follows:

§ 3.7 Request for designation.

* * * * *

(c) * * *

(2) * * *

(ix) Description of all known modes of action, the sponsor's identification of the single mode of action that provides the most important therapeutic action of the product, and the basis for that determination.

* * * * *

(3) The sponsor's recommendation as to which agency component should have primary jurisdiction based on the mode of action that provides the most important therapeutic action of the combination product. If the sponsor cannot determine with reasonable certainty which mode of action provides the most important therapeutic action of the combination product, the sponsor's recommendation must be based on the assignment algorithm set forth in § 3.4(b) and an assessment of the assignment of other combination products the sponsor wishes FDA to consider during the assignment of its combination product.

* * * * *

Dated: May 3, 2004.

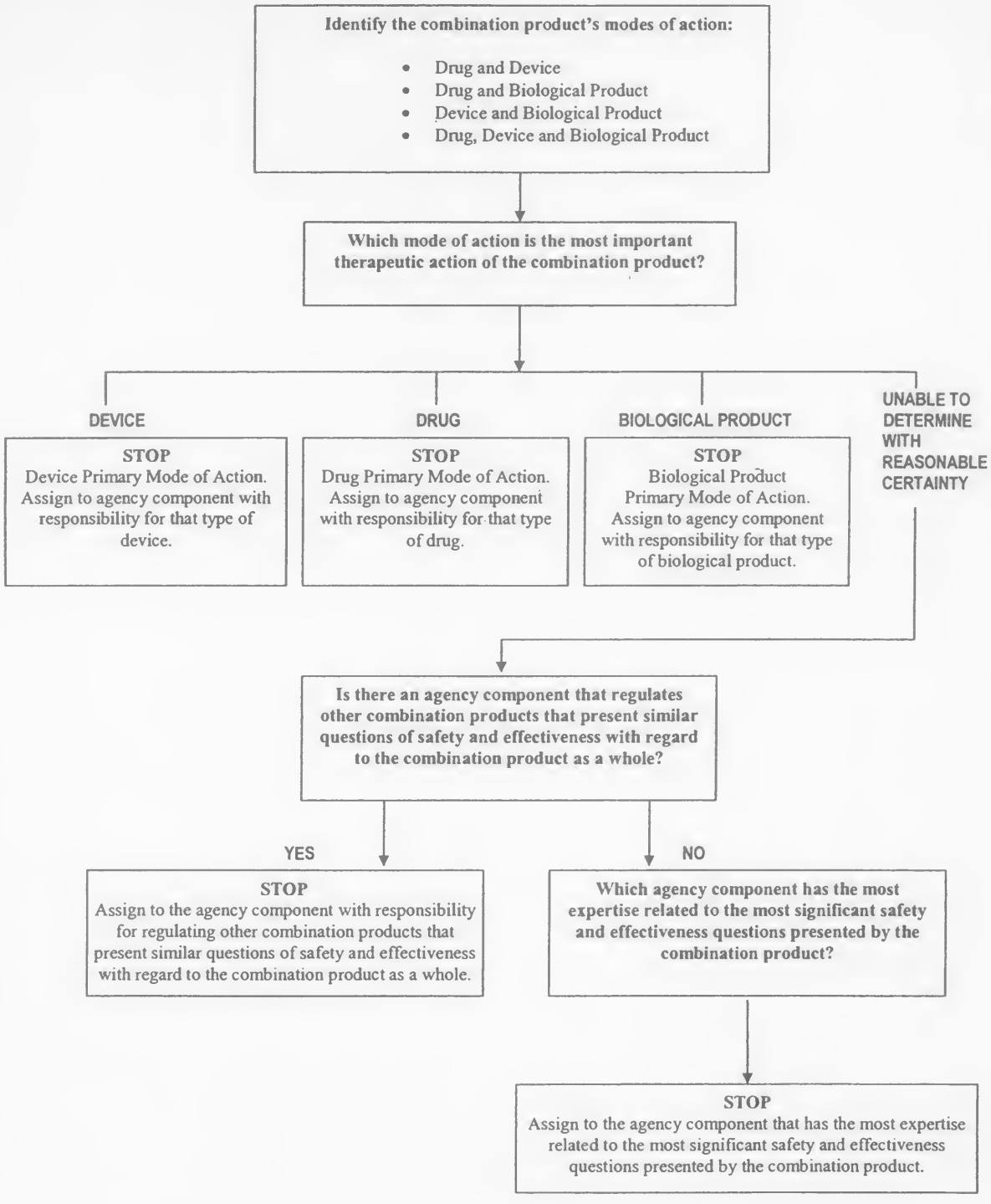
William K. Hubbard,

Associate Commissioner for Policy and Planning.

Note: The following appendix will not appear in the Code of Federal Regulations.

BILLING CODE 4160-01-S

PRIMARY MODE OF ACTION ASSIGNMENT ALGORITHM



[FR Doc. 04–10447 Filed 5–6–04; 8:45 am]
BILLING CODE 4160–01–C

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–128572–03]

RIN 1545–BC24

Application of Sections 265(a)(2) and 246A in Multi-Party Financing Arrangements; Request for Comments

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The IRS and Treasury Department are soliciting comments and suggestions regarding the scope and details of regulations that may be proposed under section 7701(f) of the Internal Revenue Code to address the application of sections 265(a)(2) and 246A in transactions involving related parties, pass-through entities, or other intermediaries.

DATES: Written or electronic comments must be submitted by August 5, 2004.

ADDRESSES: Send submissions to CC:PA:LPD:PR (REG–128572–03), room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–128572–03), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC, or sent electronically, via the IRS Internet site at *www.irs.gov/regs* or via the Federal eRulemaking Portal at *www.regulations.gov* (IRS and REG–128572–03).

FOR FURTHER INFORMATION CONTACT: Concerning submissions, LaNita Van Dyke, (202) 622–7180; concerning the notice, Avital Grunhaus, (202) 622–3930 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Section 163(a) generally allows a deduction for all interest paid or accrued within the taxable year on indebtedness. Section 265(a)(2), however, provides that no deduction shall be allowed for interest on indebtedness incurred or continued to purchase or carry obligations the interest on which is wholly exempt from Federal income taxes.

Generally, section 246A reduces the dividends received deduction under section 243, 244, or 245(a) to the extent that the portfolio stock, with respect to which the dividends are received, is debt-financed. Stock is treated as debt-financed if there is indebtedness directly attributable to the stock investment.

Section 7701(f) provides that the Secretary shall prescribe such regulations as may be necessary or appropriate to prevent the avoidance of the provisions of the Internal Revenue Code that deal with (1) the linking of borrowing to investment, or (2) diminishing risk, through the use of related persons, pass-thru entities, or other intermediaries.

Concurrent with the publication of this advance notice of proposed rulemaking in the **Federal Register**, the IRS and Treasury are issuing Rev. Rul. 2004–47 (2004–20 I.R.B.), which provides guidance on the application of section 265(a)(2) to disallow a portion of interest incurred by one member of an affiliated group when it transfers borrowed funds to another member of the group that is a dealer in tax-exempt bonds. In the circumstances described in *Situations 1* and *2* of that ruling, the funds borrowed by one member are directly traceable to the funds the borrowing member transfers to the dealer member. Under Rev. Proc. 72–18 (1972–1 C.B. 740), the application of section 265(a)(2) to these facts requires a determination of the borrowing member's purpose for incurring or continuing each item of indebtedness. The revenue ruling holds that the purpose of the borrowing member is determined by reference to the use of the borrowed funds in the business of the dealer member to whom the funds are made available. This conclusion is based on *H Enterprises International* v. *Commissioner*, 75 T.C.M. 1948 (1998), *aff'd per curiam*, 183 F.3d 907 (8th Cir. 1999). The result is a disallowance of the borrowing member's interest expense under section 265(a)(2).

In *H Enterprises*, a parent and a subsidiary were members of the same consolidated group of corporations. The subsidiary declared a dividend and, a few days later, borrowed funds and immediately used part of those funds to make the dividend distribution to the parent. A portion of the distributed funds was disbursed to two investment divisions of the parent, which used the funds to acquire investments including tax-exempt obligations and corporate stock. The court held that a portion of the indebtedness was incurred to purchase and carry tax-exempt obligations for the purpose of section 265(a)(2) and that a portion of the indebtedness was directly attributable to the purchase and carry of portfolio stock for the purpose of section 246A.

The transactions described in *Situations 1* and *2* of Rev. Rul. 2004–47 and the transaction before the court in *H Enterprises* all involve funds borrowed by one member of an affiliated group that can be directly traced to funds transferred to another member of the group.

In contrast to the transactions described in *Situations 1* and *2*, in the transaction described in *Situation 3* of Rev. Rul. 2004–47, the borrowed funds are not directly traceable to the funds transferred to the dealer member, and there is no other direct evidence linking the borrowed funds to the funds transferred to the dealer member. The revenue ruling holds that in these circumstances, section 265(a)(2) will not be applied to disallow interest expense of the borrowing member.

Other situations may not be so clear. For example, funds may be transferred among the members of an affiliated or consolidated return group in a variety of ways that make it difficult to match borrowed funds with particular investments or other uses. Furthermore, certain taxpayers may affirmatively seek to avoid application of the rules of sections 265(a)(2) and 246A by using related parties, pass-thru entities, or other intermediaries in a manner that obscures the linkage between borrowing outside of the affiliated group and the purchase or carry of investments within the group.

During the course of developing Rev. Rul. 2004–47, the IRS and Treasury began preliminary consideration of possible regulations that might be adopted under the authority granted by section 7701(f) to provide clearer rules for matching borrowings and investments and for administering more effectively the purposes of section 265(a)(2). For example, Treasury and IRS are considering a rule that would permit taxpayers to trace proceeds of borrowings to specific taxable investments or other specific uses but would apply a pro rata approach to determine the use of proceeds of borrowings that are not traceable to a specific use. This would differ from a general rule requiring a pro rata allocation of borrowings among all available uses, such as the rule in section 265(b) applicable to financial institutions.

The IRS and Treasury also are considering whether to adopt regulations under section 7701(f) for purposes of section 246A (dealing with debt financing of portfolio stock).

The IRS and Treasury are requesting comments on whether regulations should be adopted under section 7701(f) for purposes of applying section

265(a)(2) or section 246A and, if so, the approach that should be taken in such regulations. Specifically, the IRS and Treasury are inviting comments on the approach of supplementing a specific tracing rule with a pro rata allocation rule, as well as suggestions for alternative approaches. Comments addressing the possible adoption of regulations for purposes of section 246A should take into account any differences in approach that may be required under section 7701(f) because section 246A defines portfolio indebtedness by reference to indebtedness "directly attributable to" portfolio stock, while section 265(a)(2) refers to indebtedness "incurred or continued to purchase or carry" tax-exempt obligations. Persons making comments may also wish to address the mandate in section 246A(f) to adopt regulations providing for interest disallowance, rather than disallowance of the dividends received deduction, when indebtedness is incurred by a person other than the person receiving dividends.

Special Analysis

This advance notice of proposed rulemaking is not a significant regulatory action for purposes of Executive Order 12866, "Regulatory Planning and Review."

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 04–10476 Filed 5–6–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–128590–03]

RIN 1545–BC23

Special Consolidated Return Rules for the Disallowance of Interest Expense Deductions Under Section 265(a)(2)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations under section 265(a)(2) that affect corporations filing consolidated returns. These regulations provide special rules for the treatment of certain intercompany transactions involving interest on intercompany obligations.

DATES: Written or electronic comments and requests for a public hearing must be received by August 5, 2004.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–128590–03), room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–128590–03), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the IRS Internet site at *www.irs.gov/regs* or via the Federal eRulemaking Portal at *www.regulations.gov* (indicate IRS and REG–128590–03).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Frances L. Kelly, (202) 622–7770; concerning submissions of comments and/or requests for a public hearing, Guy Traynor, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Section 265(a)(2)

Section 163(a) generally allows a deduction for all interest paid or accrued within the taxable year on indebtedness. Under section 265(a)(2), however, no deduction is allowed for interest on indebtedness incurred or continued to purchase or carry obligations the interest on which is wholly exempt from Federal income taxes.

Rev. Proc. 72–18 (1972–1 C.B. 740) provides guidelines for the application of section 265(a)(2) to taxpayers holding tax-exempt obligations. Section 3.01 of the revenue procedure states that the application of section 265(a)(2) requires a determination, based upon all the facts and circumstances, of the taxpayer's purpose in incurring or continuing each item of indebtedness. Such purpose may be established by either direct or circumstantial evidence. Direct evidence includes direct tracing of borrowed funds to investments in tax-exempt obligations and the pledging of tax-exempt obligations as security for the indebtedness. To the extent that there is direct evidence establishing a purpose to purchase or carry tax-exempt obligations, the interest paid or incurred on such indebtedness may not be deducted. In certain other cases when an interest deduction is disallowed (for example, when amounts borrowed by a dealer in tax-exempt obligations are not directly traceable to tax-exempt obligations), section 7 of Rev. Proc. 72–18 sets forth a formula to calculate the disallowed interest deduction. That formula provides that the amount of the disallowed interest deduction is determined by multiplying the total interest on the indebtedness by a fraction, the numerator of which is the average amount during the taxable year of the taxpayer's tax-exempt obligations (valued at their adjusted bases), and the denominator of which is the average amount during the taxable year of the taxpayer's total assets (valued at their adjusted bases) minus the amount of any indebtedness the interest deduction on which is not subject to disallowance to any extent under Rev. Proc. 72–18.

In *H Enterprises International, Inc.* v. *Commissioner*, 75 T.C.M. (CCH) 1948 (1998), *aff'd*, 183 F.3d 907 (8th Cir. 1999), a parent and a subsidiary were members of the same consolidated group of corporations. The subsidiary declared a dividend and, a few days later, borrowed funds and immediately used part of those funds to make the dividend distribution to the parent. A portion of the distributed funds was disbursed to two investment divisions of the parent, which used the funds to acquire investments including tax-exempt obligations.

The court held that a portion of the subsidiary's indebtedness was incurred for the purpose of purchasing or carrying tax-exempt obligations (held in the parent's investment divisions) and, therefore, no deduction was allowed for the interest on this portion of the indebtedness under section 265(a)(2). To establish the required purposive connection under section 265(a)(2), the court reasoned that the activities of the parent corporation were relevant in determining the subsidiary's purpose for borrowing the funds. The court stated that if the analysis only focused on the borrower and not the transferee, then the purpose of the borrower corporation would always be acceptable, frustrating the legislative intent of section 265(a)(2).

Rev. Rul. 2004–47 (2004–21 I.R.B.) provides guidance on the application of section 265(a)(2) in a number of situations in which a member of an affiliated group borrows money from an unrelated party and transfers funds to another member of the group that is a dealer in tax-exempt obligations. In *Situation 4*, P and S are members of the same affiliated group but file separate tax returns. P borrows funds from L, an unrelated bank, and lends the borrowed funds to S, a dealer in tax-exempt obligations. S uses the borrowed funds in its business. The ruling examines the obligation from L to P and the obligation from P to S for the application of section 265(a)(2). With regard to the loan from L to P, P uses the borrowed funds to make a loan to S, and P separately

accounts for the taxable interest income from the obligation. The ruling concludes that P does not have a purpose of using the borrowed funds to purchase or carry tax-exempt obligations within the meaning of section 265(a)(2). With regard to the loan from P to S, although the borrowed funds are not directly traceable to S's purchase or carry of tax-exempt obligations, the ruling concludes that section 265(a)(2) applies to disallow a deduction for a portion of S's interest expense. The portion of S's interest deduction that is disallowed is determined pursuant to the formula of section 7 of Rev. Proc. 72–18.

The Intercompany Transaction Regulations

Section 1.1502–13 prescribes rules relating to the treatment of transactions between members of a consolidated group. With respect to intercompany obligations, the intercompany transaction rules generally operate to match the debtor member's items with the lending member's items from the intercompany obligation.

Under § 1.1502–13(c)(6)(i), if section 265(a)(2) permanently and explicitly disallows a debtor member's interest deduction with respect to a debt to another member, the lending member's interest income is treated as excluded from gross income. See § 1.1502–13(g)(5), *Example 1*(d). In cases when a member of the group borrows from another member to purchase or carry tax-exempt obligations, and the lending member has not borrowed from sources outside of the group to fund the intercompany obligation, the result reached under the § 1.1502–13(c)(6)(i) exclusion rule is appropriate in that it reflects that intercompany lending transactions do not alter the net worth of the group and, thus, should not affect consolidated taxable income.

However, when the lending member borrows from a nonmember, the lending member lends those funds to the debtor member, and the debtor member uses those funds to purchase or carry tax-exempt obligations, the application of the § 1.1502–13(c)(6)(i) exclusion rule may produce inappropriate results. For example, assume P borrows $100 from L, a nonmember, for the purpose of lending the $100 to S under the same terms, and S's purpose for borrowing $60 of the intercompany loan from P is to purchase $60 of tax-exempt obligations. Under section 265(a)(2), a deduction would be disallowed for a portion of S's interest expense on the intercompany obligation and a portion of P's interest income would be excluded from P's gross income under § 1.1502–13(c)(6)(i). Accordingly, section 265(a)(2) may have no effect on the group's taxable income, even though the group has borrowed to purchase tax-exempt obligations.

Explanation of Provisions

The IRS and Treasury Department believe that, when a member's indebtedness to a nonmember is directly traceable to an intercompany obligation and another member of the group uses the funds borrowed from the nonmember to purchase or carry tax-exempt obligations, the net tax effect of these transactions for the group should be a disallowance of a deduction for interest under section 265(a)(2).

These proposed regulations reflect that when a member (P) borrows funds from a nonmember and lends all of those funds to another member (S) that uses those funds to purchase tax-exempt obligations, section 265(a)(2) will apply to disallow a deduction for the interest on S's obligation to P, not P's obligation to the nonmember. These proposed regulations provide that, if a member of a consolidated group incurs or continues indebtedness to a nonmember, that indebtedness to the nonmember is directly traceable to all or a portion of an intercompany obligation extended to a member of the group (the borrowing member) by another member of the group (the lending member), and section 265(a)(2) applies to disallow a deduction for all or a portion of the borrowing member's interest expense incurred with respect to the intercompany obligation, then § 1.1502–13(c)(6)(i) will not apply to exclude an amount of the lending member's interest income with respect to the intercompany obligation that equals the amount of the borrowing member's disallowed interest deduction. This override of the exclusion rule is subject, however, to a limitation. In particular, the amount of interest income not excluded cannot exceed the interest expense on the portion of the nonmember indebtedness that is directly traceable to the intercompany obligation. This limitation ensures that applying section 265(a)(2) to disallow an interest deduction with respect to an intercompany obligation that can be directly traced to nonmember indebtedness does not result in a worse overall tax position for the group than applying section 265(a)(2) to disallow a deduction for the interest paid to the nonmember.

Therefore, subject to the limitation discussed above, if the proceeds of P's borrowing from a nonmember can be directly traced to a P–S intercompany obligation and all or a portion of S's interest expense on the P–S intercompany obligation is disallowed as a deduction under section 265(a)(2), these proposed regulations require that all or a portion of P's interest income on the intercompany obligation not be excluded under § 1.1502–13(c)(6)(i).

In an Advance Notice of Proposed Rulemaking (REG–128572–03) in this issue of the **Federal Register**, the IRS and Treasury Department are soliciting comments regarding whether regulations under section 7701(f) should address the application of sections 265(a)(2) and 246A in transactions involving related parties, pass-thru entities, or other intermediaries, and suggestions as to the approach that should be taken by those regulations. It is possible that those comments and any regulations proposed under section 7701(f) will result in amendments to the rules set forth in these proposed regulations.

Proposed Effective Date

These regulations are proposed to apply to taxable years beginning on or after the date these regulations are published as final regulations in the **Federal Register**.

Special Analysis

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based upon the fact that these regulations will primarily affect affiliated groups of corporations that have elected to file consolidated returns, which tend to be larger businesses. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury Department request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be

available for public inspection and copying. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these proposed regulations is Frances L. Kelly, Office of the Associate Chief Counsel (Corporate). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

1. The authority citation for part 1 is amended by adding an entry in numerical order to read in part as follows:

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

Section 1.265–2 also issued under 26 U.S.C. 1502 and 7701(f). * * *

2. In § 1.265–2, paragraph (c) is added to read as follows:

§ 1.265–2 Interest relating to tax-exempt income.

* * * * *

(c) *Special rule for consolidated groups*—(1) *Treatment of intercompany obligations—(i) Direct tracing to nonmember indebtedness.* If a member of a consolidated group incurs or continues indebtedness to a nonmember, that indebtedness is directly traceable to all or a portion of an intercompany obligation (as defined in § 1.1502–13(g)(2)(ii)) extended to a member of the group (B) by another member of the group (S), and section 265(a)(2) applies to disallow a deduction for all or a portion of B's interest expense incurred with respect to the intercompany obligation, then § 1.1502–13(c)(6)(i) will not apply to exclude an amount of S's interest income with respect to the intercompany obligation that equals the amount of B's disallowed interest deduction.

(ii) *Limitation.* The amount of interest income to which § 1.1502–13(c)(6)(i) will not apply as a result of the application of paragraph (c)(1)(i) of this section cannot exceed the interest expense on the portion of the indebtedness to the nonmember that is directly traceable to the intercompany obligation.

(2) *Examples.* The rules of this paragraph (c) are illustrated by the following examples. For purposes of these examples, unless otherwise stated, P and S are members of a consolidated group of which P is the common parent. P owns all of the outstanding stock of S. The taxable year of the P group is the calendar year and all members of the P group use the accrual method of accounting. L is a bank unrelated to any member of the consolidated group. All obligations are on the same terms and conditions, remain outstanding at the end of the applicable year, and provide for payments of interest on December 31 of each year that are greater than the appropriate applicable Federal rate (AFR). The examples are as follows:

Example 1. (i) *Facts.* On January 1, 2005, P borrows $100x from L and lends the entire $100x of borrowed proceeds to S. S uses the $100x of borrowed proceeds to purchase tax-exempt securities. P's indebtedness to L is directly traceable to the intercompany obligation between P and S. In addition, there is direct evidence that the proceeds of S's intercompany obligation to P were used to fund S's purchase or carrying of tax-exempt obligations. During the 2005 taxable year, P incurs $10x of interest expense on its loan from L, and S incurs $10x of interest expense on its loan from P. Under section 265(a)(2), the entire $10x of S's interest expense on the intercompany obligation to P is disallowed as a deduction.

(ii) *Analysis.* Because section 265(a)(2) permanently and explicitly disallows $10x of S's interest expense, ordinarily $10x of P's interest income on the intercompany obligation would be redetermined to be excluded from P's gross income under § 1.1502–13(c)(6)(i). However, under this paragraph (c), § 1.1502–13(c)(6)(i) will not apply to exclude P's interest income with respect to the intercompany obligation in an amount that equals S's disallowed interest deduction with respect to the intercompany obligation. Accordingly, § 1.1502–13(c)(6)(i) will not apply to exclude P's $10x of interest income on the intercompany obligation and P must include in income $10x of interest income from the intercompany obligation.

Example 2. (i) *Facts.* The facts are the same as in Example 1, except that P incurs only $8x of interest expense on its loan from L.

(ii) *Analysis.* Section 1.1502–13(c)(6)(i) will apply to exclude only a portion of P's $10x of interest income on the intercompany obligation. Under paragraph (c)(1)(ii) of this section, the amount of P's interest income that § 1.1502–13(c)(6)(i) will not apply to exclude is $8x, the total interest expense incurred by P on its indebtedness to L. Consequently, P must include in income $8x of interest income from the intercompany obligation and § 1.1502–13(c)(6)(i) will apply to exclude $2x of interest income from the intercompany obligation.

(3) *Effective date.* The provisions of this section shall apply to taxable years beginning on or after the date these regulations are published as final regulations in the **Federal Register**.

3. Section 1.1502–13 is amended by:

1. Adding a sentence after the second sentence of paragraph (c)(6)(ii)(A).

2. Adding paragraph (c)(6)(iii).

3. Revising the first sentence of *Example 1*(d) of paragraph (g)(5).

The revisions and additions read as follows:

§ 1.1502–13 Intercompany transactions.

* * * * *

(c) * * *

(6) * * *

(ii) * * *

(A) * * * However, see § 1.265–2(c) for special rules related to the application of paragraph (c)(6)(i) of this section to interest income with respect to certain intercompany obligations the interest deduction on which is disallowed under section 265(a)(2). * * *

* * * * *

(iii) *Effective date.* The third sentence of paragraph (c)(6)(ii)(A) of this section shall apply to taxable years beginning on or after the date these regulations are published as final regulations in the **Federal Register**.

* * * * *

(g) * * *

(5) * * *

Example 1 * * *

* * * * *

(d) *Tax-exempt income.* The facts are the same as in paragraph (a) of this *Example 1*, except that B's borrowing from S is allocable under section 265 to B's purchase of state and local bonds to which section 103 applies and § 1.265–2(c) does not apply. * * *

* * * * *

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 04–10477 Filed 5–6–04; 8:45 am]

BILLING CODE 4830–01–P

Notices

Federal Register
Vol. 69, No. 89
Friday, May 7, 2004

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

DEPARTMENT OF AGRICULTURE

Agricultural Research Service

Notice of Federal Invention Available for Licensing and Intent To Grant Exclusive License

AGENCY: Agricultural Research Service, USDA.

ACTION: Notice of availability and intent.

SUMMARY: Notice is hereby given that Plant Variety Protection Certificate Number 200300172, for the forage soybean variety designated "Tara," is available for licensing and that the U.S. Department of Agriculture, Agricultural Research Service, intends to grant Southern States Cooperative, Inc. of Richmond, Virginia an exclusive license to this variety.

DATES: Comments must be received within ninety (90) calendar days of the date of publication of this notice in the **Federal Register**.

ADDRESSES: Send comments to: USDA, ARS, Office of Technology Transfer, 5601 Sunnyside Avenue, Room 4–1174, Beltsville, Maryland 20705–5131.

FOR FURTHER INFORMATION CONTACT: June Blalock of the Office of Technology Transfer at the Beltsville address given above; telephone: 301–504–5989.

SUPPLEMENTARY INFORMATION: The Federal Government's intellectual property rights to this invention are assigned to the United States of America, as represented by the Secretary of Agriculture. It is in the public interest to so license this invention as Southern States Cooperative, Inc. has submitted a complete and sufficient application for a license. The prospective exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless, within ninety (90) days from the date of this published Notice, the Agricultural Research Service receives written evidence and argument which establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Michael D. Ruff,

Assistant Administrator.

[FR Doc. 04–10445 Filed 5–6–04; 8:45 am]

BILLING CODE 3410–03–P

DEPARTMENT OF AGRICULTURE

Farm Service Agency

Request for Revision and Extension of a Currently Approved Information Collection; Request for Aerial Photography

AGENCY: Farm Service Agency, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the intention of the Farm Service Agency (FSA) to request a revision and extension of an information collection currently used in support of the FSA Aerial Photography Program. The FSA Aerial Photography Field Office (APFO) uses the information from this form to collect the customer and photography information needed to produce and ship the various products ordered.

DATES: Comments on this notice must be received on or before July 6, 2004, to be assured consideration.

FOR FURTHER INFORMATION CONTACT: Contact Kenneth Koehler, Chief, USDA, Farm Service Agency, APFO Management Operations Branch, 2222 West 2300 South Salt Lake City, Utah 84119–2020 (801) 975–3500; e-mail *kenneth.koehler@apfo.usda.gov*.

SUPPLEMENTARY INFORMATION:

Title: Request for Aerial Photography.

OMB Control Number: 0560–0176.

Expiration Date: March 31, 2005.

Type of Request: Revision and extension of a currently approved information collection.

Abstract: The information collected under OMB Control Number 0560–0176. as identified above, is needed to enable the Department of Agriculture to effectively administrate the Aerial Photography Program. APFO has the authority to coordinate aerial photography and remote sensing programs and the aerial photography flying contract programs. The film secured by FSA is public domain and reproductions are available at cost to any customer with a need. All receipts from the sale of aerial photography products and services are retained by FSA. The FSA–441, Request for Aerial Imagery, is the form FSA supplies to its customers for placing an order for aerial photography products and services.

Estimate of Burden: Public reporting burden for this information collection is estimated to average 3.3 hours per response.

Respondents: Farmers, ranchers and other USDA customers who wish to purchase photography products and services.

Estimated Number of Respondents: 12,000.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 8,000 hours.

Proposed topics for comment include: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information from those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments should be sent to the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, and to Kenneth Koehler at the address listed above.

All comments will become a matter of public record.

Signed in Washington, DC, on April 29, 2004.

James R. Little,

Administrator, Farm Service Agency.

[FR Doc. 04–10402 Filed 5–6–04; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

[Docket No. 00–026N]

Residue Policy; Response to Comments

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Notice.

SUMMARY: The Food Safety and Inspection Service (FSIS) is implementing the modified approach to the testing of meat carcasses for the presence of violative new animal drug residues, and disposition of product thereafter, as was announced in an August 6, 2001, **Federal Register** notice (66 FR 40964). This action will make FSIS' testing and disposition procedures consistent with the target tissue/marker residue policy of the Food and Drug Administration (FDA). FSIS is modifying its approach to ensure that meat containing unsafe levels of animal drug residues is not released into commerce.

DATES: *Effective Date:* June 7, 2004.

FOR FURTHER INFORMATION CONTACT: Carole Thomas, Technical Analysis Staff, Office of Policy and Program Development, FSIS, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Room 405, Cotton Annex, Washington, DC 20250–3700, (202) 205–0210.

SUPPLEMENTARY INFORMATION:

Background

Under the Federal Food, Drug, and Cosmetic Act, FDA determines whether new animal drugs proposed for use in food producing animals are safe for those animals, and establishes tolerances for residues of such drugs that remain in the edible tissues of treated animals. The term "new animal drug" is defined in FDA's regulation in Title 21 of the Code of Federal Regulations (21 CFR 510.3(g). For new animal drugs approved prior to 1976, FDA established residue tolerances for each edible tissue of food producing animals. Since 1976, however, FDA has been establishing tolerances for new animal drugs using a marker residue. In a guideline published by FDA's Center for Veterinary Medicine (CVM), "General Principles for Evaluating the Safety of Compounds Used in Food-Producing Animals" (CVM Guideline #3, *http://www.fda.gov/cvm/guidance/guideline3toc.html*), the term "marker residue" is defined as the residue selected for assay whose concentration is in a known relationship to the total residue of toxicological concern in the last tissue to deplete to its permitted concentration.

Marker residues serve as sentinels for levels of residues of toxicological concern associated with a drug (parent and metabolites) in edible tissues of a food producing animal. In more general terms, a marker residue is the residue that reflects the depletion of animal drug residues in edible tissues. A target tissue (typically the liver or kidney or, more rarely, the muscle or fat) is the edible tissue from which residues deplete most slowly, and the tissue used for regulatory surveillance. When the concentration of the marker residue in the target tissue is equal to or less than the target tissue tolerance, the residue concentration reached in each edible tissue will be at a safe concentration.

If FSIS inspection personnel identify an animal as suspect for any condition where animal drug misuse is possible, and a suitable in-plant test is available, an initial screen test is performed at the federal establishment to determine whether the animal drug is present. If the screen test is positive, the target tissue of the animal is analyzed in a FSIS laboratory to verify that the drug is present, as well as to quantify the amount of the drug that is present. If the target tissue contains violative levels of the animal drug, FSIS tests the muscle tissue of the animal to determine whether it also contains a violative residue level. If the target tissue is found to contain a violative residue level, but the muscle tissue is not found to contain a violative residue level, FSIS condemns only the target tissue and releases the muscle tissue for human consumption. Likewise, if the target tissue does not contain violative levels of residue, but the muscle tissue does, only the muscle tissue is condemned.

On August 6, 2001, FSIS issued a **Federal Register** notice (66 FR 40964) that announced its intent to harmonize its procedures with those of FDA with respect to applying FDA's target tissue/marker residue policy regarding the testing of meat carcasses for residues of new animal drugs and disposition of tissues thereafter. In the notice, FSIS stated that it had reviewed its approach regarding the testing of meat carcasses for new animal drug residues and the disposition of meat carcasses containing violative residues and had determined that it was not consistent with FDA's approach. FSIS is now implementing the approach discussed in its August 2001 notice.

For the new animal drugs for which FDA has established a marker residue tolerance in a specific target tissue without also establishing a tolerance for a residue in muscle tissue or an official analytical method for muscle residues, FSIS will only test the target tissue that is identified in FDA's regulations (21 CFR Part 556 Subpart B—Specific Tolerances for Residues of New Animal Drugs). If the residue concentration in the target tissue exceeds the FDA's established tolerance, FSIS will consider the entire carcass to be adulterated, and condemn it, and not allow it to be distributed for human food purposes. If, however, FDA has established an animal drug residue tolerance in muscle tissue and an official analytical method for detecting muscle residues, FSIS will test the muscle tissue using the official analytical method to determine whether the concentration of residue in the muscle is at or below the established muscle tolerance. If the residue concentration in the muscle does not exceed the tolerance, FSIS will release the muscle tissue and allow it to be distributed in commerce for human consumption.

For the new animal drugs where tolerances have been established for all edible tissues, but for which a target tissue has not been identified, FSIS will continue to collect and monitor multiple edible tissues and allow those that have animal drug residue levels equal to or less than the established tolerances to be distributed in commerce for human consumption.

FSIS received several comments about the intended change that it announced on August 6, 2001. FSIS has carefully considered the comments and is now responding to them.

Several commenters asked whether the intended change had a scientific rationale. They stated that it was important that the change be based on public health concerns, and that FSIS not discard safe tissues or place unnecessary burdens on producers and processors. Others stated that the change would not enhance public health.

FDA's Center for Veterinary Medicine (CVM) has the primary responsibility for establishing and codifying tolerances for new animal drugs. In establishing tolerances, FDA relies on human food safety studies, including analysis of toxicological, total residue depletion, and metabolic data submitted by individual new animal drug sponsors. In a letter from the Office of New Animal Drug Evaluation (NADE), Center for Veterinary Medicine, CVM states that a tolerance represents the concentration of an indicator (marker residue) of the total residues in all edible tissue below which FDA has a reasonable certainty that no harm will

occur to a consumer through daily exposure to the residues in food over a lifetime. Thus, all of the animal drug tolerances established in 21 CFR part 556 are based on human safety considerations. When the tolerance in the target tissue is exceeded, FDA considers the entire carcass to be adulterated because the residue in the target tissue is imputed to the rest of the animal.[1]

FSIS does not establish animal drug tolerances. However, it does have authority over a food animal once it is presented for slaughter at an official federal establishment. FSIS conducts ante-mortem inspections of animals. The ante-mortem inspections screen for visible diseases and pathological conditions in an animal that could pose a public health risk if the meat from the animal entered the food supply. FSIS also conducts post-mortem inspection of animals. On post-mortem inspection, FSIS inspectors check an animal carcass for indications of animal drug use, including examining the carcass for injection sites, septicemia, endocarditis, mastitis, pneumonia, or other conditions that may indicate the animal was medicated. If such conditions are identified, the carcass and parts of the animal are retained, and appropriate tissue samples are submitted to a FSIS Food Service Laboratory for further testing. FSIS believes that these procedures, and the modifications it is now implementing, will ensure that meat containing unsafe levels of chemical residues are not being released into commerce.

Many commenters asked why FSIS does not use the "maximum residue limit" (MRL) established by CODEX for the drugs that do not have established tolerances for muscle tissue. They stated that FSIS should harmonize its procedures with CODEX.

FDA has the authority to regulate veterinary drugs and to establish and codify animal drug tolerance levels. FDA has determined that its method for establishing tolerance levels for muscle tissue is more reflective of consumption patterns in the U.S. than the MRLs established by CODEX. FSIS does not establish or codify animal drug tolerance levels. FSIS enforces the tolerances established by FDA and relies upon FDA's determination of what are appropriate tolerance levels.

One commenter stated that it is important that FSIS develop beef muscle residue testing methods since the European Union is requiring testing of beef for violative residues before entry into the European beef market.

FSIS does not itself develop residue testing methods. The Agency does not believe that it needs to develop them itself since there are validated methods available for its use. The tests for beef muscle residues that are used by FSIS are based on the testing methods developed by drug sponsors as part of the FDA approval process. These methods are used for tissue residue determinations once the FDA method trial has validated their use for this purpose.

A commenter stated that imported beef should be subjected to a limited amount of residue testing to verify that the beef is free of violative residues.

Through its National Residue Program (NRP), FSIS tests meat and poultry products imported into the United States for violative residues. In addition, every country that exports meat or poultry to the United States is required to have a residue control program that is equivalent to that of the United States. This program needs to include laws and regulations that control the use of animal drugs, pesticides, and environmental contaminants and an organizational structure to implement those requirements; a residue sampling and testing program equivalent to the United States' residue program (the National Residue Program); and the ability to take enforcement actions when residue violations are detected.

A few commenters suggested that muscle tissue should be tested to see if it contains residues that exceed the science-based standards set by FDA. They argued that if the muscle tissue is not tested, or if FDA has not established an official analytical method for testing, a "blanket" condemnation of carcasses could occur.

Muscle tissue will be tested if there is an FDA established tolerance for muscle tissue and an analytical method for detection established by FDA. If not, action on the carcass will be based on the marker residue findings in the target tissue. Carcasses will be condemned only if the residue in the target tissue exceeds the applicable tolerance. This is an appropriate outcome because if a violative animal drug residue level is found in a target tissue for a drug for which there is no muscle tolerance established, FSIS cannot determine that the carcass is not adulterated.

FSIS does not believe that its approach will result in a blanket condemnation of carcasses. FSIS has reviewed the potential impact of its modified testing approach and has concluded that the percentage of carcass condemnation as a result of this change will be only 2% (see economic review). Additionally, there are only seven commonly used veterinary drugs that do not have established muscle tolerances or an analytical method for detection.

One commenter stated that FSIS' current procedure of testing muscle tissue meets FSIS statutory obligations.

FSIS has tried to maintain an equitable residue program. While the Agency considered its approach appropriate, the Agency has now determined that the better, more scientific approach is to harmonize its residue policy procedures with those of FDA with respect to target tissue/marker residues.

One commenter expressed concerns about the downstream discovery of residues after slaughter and the lack of responsibility and traceback.

In a November 28, 2000, **Federal Register** notice (65 FR 70809), FSIS discussed meetings that it had held with a coalition of industry members, trade associations, and other interested parties to discuss concerns related to residue violations and laboratory reporting procedures. As a result of those meetings and FSIS' response, several slaughter establishments indicated that they would begin to explore how to effectively institute the best preventive practices available to slaughterers. These included ensuring, through the use of a receiving critical control point in their HACCP Plans, that all animals brought into an establishment for slaughter were identified so they would be traced back to the producer; notifying animal producers in writing of violative levels of residue findings, making clear the issues involved, the purchaser's expectations, and the fact that repeat violators would not be future suppliers; exploring the possibility of establishing state-certified, and possibly USDA Cooperative State Research, Education and Extension Service-verified, voluntary residue avoidance programs comparable to those developed by major producer trade organizations, and requiring suppliers to participate in such programs and to supply certifications to that effect; and exploring the possibility of live animal testing. FSIS believes that adoption of these types of practices by packers will facilitate accountability and traceback.

Two commenters suggested that if a tolerance and analytical methodology for muscle have been developed for one species, it should be used for other species when there are no tolerances or detection methods developed for them.

Tolerance levels are derived from an evaluation of residue and metabolism studies for each species for which data

[1] Dr. S.D. Vaughn, Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine, June 2003.

are provided to FDA. Because there are significant differences among species, applying a tolerance level established for one species to another species without metabolic studies would be inappropriate.

One commenter suggested that it is premature to change existing rules until other tasks have been completed.

FSIS is not changing any rules in this proceeding. Rather, it is announcing a change in how it will determine whether a product is not adulterated and thus eligible to bear the mark of inspection.

One commenter asked whether FSIS will issue a directive or provide additional training to all inspectors.

FSIS will issue a new directive to its inspectors that clearly explains this procedural change and their responsibilities.

Two commenters requested that the procedural change be implemented at a later time. One argued that it needed sufficient time to discuss the feasibility of muscle tolerances for certain compounds with a pharmaceutical company and FDA. Another stated that there is a lack of a strategy within FDA for establishing tolerances for drugs for which muscle tolerances are currently not established.

In the August 6, 2001, **Federal Register** notice (66 FR 40964; confirmed 68 FR 540 (1/6/03)), FSIS asked for comments on its intent to change its current procedures to be consistent with FDA's marker residue/target tissue policy for new animal drugs. In a November 8, 2001, **Federal Register** notice (66 FR 56533), FSIS reopened the comment period on this issue for an additional thirty days. More than two years have passed since FSIS published its initial notice. FSIS believes that it has allowed adequate time for comments on, and consideration of, this change. Therefore, FSIS will begin operating in accordance with the marker residue/target tissue policy on June 7, 2004.

One commenter stated that FSIS' changed approach does not give producers an incentive to stop inappropriately administering veterinary drugs, while it continues to punish the packer. Another commenter stated that packers do not have the option of buying food animals that have been pre-screened for veterinary drugs.

On August 6, 2001, FSIS published "Residue Testing Procedures; Response to Comments" (66 FR 40965), which announced its policy effective as of September 5, 2001, on repeat chemical residue violators and announced the public availability of the list of repeat violators on the Agency's Web site (*http://www.fsis.usda.gov*). This list will enable slaughter establishments to incorporate into their purchasing practices control measures that are designed to decrease the likelihood of purchasing animals from producers and sellers that violate the Federal law by inappropriately administering veterinary drugs.

FSIS received a comment from the Small Business Administration (SBA) that raised four specific concerns. First, SBA asserted that FSIS' August 6, 2001, residue policy notice (66 FR 40964) did not simply announce a change in FSIS' procedures but in fact was a rulemaking action that FSIS needed to publish in the **Federal Register** and give interested persons an opportunity to comment upon, in accordance with the Administrative Procedure Act (APA). Second, SBA stated that FSIS had to comply with the Regulatory Flexibility Act (RFA) and certify, as well as provide a factual basis for the certification, that the procedural changes would not have a significant economic impact on a substantial number of small entities. Third, based on their calculations, SBA contended that FSIS" intended action had a potential to be economically significant under Executive Order 12866, and that FSIS needed to prepare a Regulatory Impact Analysis. Lastly, SBA stated that it believed FSIS should suspend the August 6, 2001, notice and republish it as a proposed rule.

FSIS does not agree with any of SBA's statements. The action announced in the August 6, 2001, **Federal Register** notice is not a rulemaking. It does not impose any regulatory requirements on industry. FSIS' residue policy notice simply provides information on the procedures the Agency will use to ensure that meat establishments do not distribute meat containing unsafe levels of animal drug residues. Thus, there is no reason for FSIS to republish its August 6, 2001, notice as a proposed rule. Further, although not required, FSIS has, in fact, employed a notice and comment procedure in adopting its residue policy. The policy was not implemented when it was announced in August of 2001. Rather, at that time, the Agency simply announced how it intended to proceed. It is only now after FSIS solicited, received, and has responded to comments that the announced policy is being implemented. In regard to SBA's RFA and E.O. 12866 concerns about the economic impact of the procedural changes FSIS is implementing, FSIS does not expect its action will have a significant economic impact on a substantial number of small entities or will be economically significant.

Economic Review

Of the veterinary drugs commonly used in swine and cattle there are only seven for which the FDA has established a marker residue tolerance in a specific target tissue without also establishing a tolerance for the residue of the drug in the muscle tissue or an analytical method for detecting muscle animal drug residues. These seven drugs are: apramycin, carbadox, fenbendazole, melengestrol acetate, morantel tartrate, oxfendazole, and tiamulin. Four of these are ones that the FDA has established and codified tolerances for the liver; two are ones for which the FDA has established and codified tolerances for the kidney; and one is one for which the FDA has established and codified tolerances for fat (See Tables 1 and 2).

TABLE 1.—VETERINARY DRUGS AND UNAVOIDABLE CONTAMINANTS WITH A TOLERANCE IN BOTH ORGAN AND/OR MUSCLE FOR CATTLE [1] [2]

Substance	Liver	Kidney	Muscle	Fat
Apramycin	None	None	None	None.
Carbadox	None	None	None	None.
Fenbendazole	Yes (0.8)	None	None	None.
Melengestrol acetate	None	None	None	Yes (0.025).
Morantel tartrate	Yes (0.7)	None	None	None.
Oxfendazole	Yes (0.8)	None	None	None.
Tiamulin	None	None	None	None.

[1] Tolerances are expressed in parts per billion (ppm).
[2] Source: 2000 FSIS Red Book.

Thus, the modified testing procedure FSIS is implementing would be utilized for only a very small number of meat carcasses. In turn, only very small amount of meat carcasses would be expected to be condemned as a result of any findings of violative drug residues.

TABLE 2.—VETERINARY DRUGS AND UNAVOIDABLE CONTAMINANTS WITH A TOLERANCE IN BOTH ORGAN AND/OR MUSCLE FOR SWINE [1] [2]

Substance	Liver	Kidney	Muscle	Fat
Apramycin	None	Yes (0.1)	None	None.
Carbadox	None	Yes (0.03)	None	None.
Fenbendazole	None	None	None	None.
Melengestrol acetate	None	None	None	None.
Morantel tartrate	None	None	None	None.
Oxfendazole	None	None	None	None.
Tiamulin	Yes (0.6)	None	None	None.

[1] Tolerances are expressed in parts per billion (ppm).
[2] Source: 2000 FSIS Red Book.

This fact is supported by two results of FSIS" drug residue testing in prior years. In these prior years, 2000–2002, as is the case each year, FSIS only tests for residues of certain animal drugs based on risk analysis and past experiences. In the years 2000–2001, FSIS conducted residue testing for only two of the seven drugs, melengesterol acetate and carbadox, for which FSIS is implementing a modified testing approach. In 2002, FSIS only tested for melengesterol acetate. All of FSIS' test results (29) for this drug in 2002 indicated that there were no violative residue levels for the drug. In the previous two years (2000 and 2001), only 19 of 925 tests for melengestrol acetate resulted in a finding of violative drug residues. During that same time period, 2000–2001, FSIS also conducted tests for carbadox. Only one of the 322 carbadox tests conducted resulted in a finding of a violative drug residue. Thus, between 2000 and 2002, only 20 of the 1,276 tests conducted for drug residues resulted in a finding of violative animal drug residues. Therefore, only 2 percent of the meat carcasses prepared at establishments during the years 2000 through 2002 would have been condemned under FSIS" modified procedures, as a result of a finding of a violative level of animal drug residue. Therefore, FSIS believes no significant economic impact upon small entities or any other entities can be expected to be generated by the issuance of this notice.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to better ensure that the public, and in particular minorities, women, and persons with disabilities, are aware of this notice, FSIS will announce it on-line through the FSIS Web page located at *http://www.fsis.usda.gov*.

The Regulations.gov Web site is the central online rulemaking portal of the United States government. It is being offered as a public service to increase participation in the Federal government's regulatory activities. FSIS participates in Regulations.gov and will accept comments on documents published on the site. The site allows visitors to search by keyword or Department or Agency for rulemakings that allow for public comment. Each entry provides a quick link to a comment form so that visitors can type in their comments and submit them to FSIS. The Web site is located at *http://www.regulations.gov*.

FSIS also will make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, recalls, and other types of information that could affect or would be of interest to our constituents and stakeholders. The update is communicated via Listserv, a free e-mail subscription service consisting of industry, trade, and farm groups, consumer interest groups, allied health professionals, scientific professionals, and other individuals who have requested to be included. The update also is available on the FSIS web page. Through Listserv and the web page, FSIS is able to provide information to a much broader, more diverse audience.

For more information contact the Congressional and Public Affairs Office, at (202) 720–9113. To be added to the free e-mail subscription service (Listserv) go to the "Constituent Update" page on the FSIS Web site at *http://www.fsis.usda.gov/oa/update/update.htm*. Click on the "Subscribe to the Constituent Update Listserv" link, then fill out and submit the form.

Done at Washington, on May 3, 2004.

Barbara Masters,

Acting Administrator.

[FR Doc. 04–10443 Filed 5–6–04; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Forest Service

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[OR–930–6334–DT]

Notice of Availability (NOA) Record of Decision (ROD) To Remove or Modify the Survey and Manage Mitigation Measure Standards and Guidelines

AGENCIES: Forest Service, USDA; Bureau of Land Management, USDI.

ACTION: Notice of availability of record of decision.

SUMMARY: In accordance with the National Environmental Policy Act, the Federal Land Policy and Management Act, and the National Forest Management Act, the USDI Bureau of Land Management and the USDA Forest Service announce the decision to amend selected portions of the 1994 Record of Decision for the Northwest Forest Plan by removing the Survey and Manage Mitigation Measure Standards and Guidelines. Survey and Manage provided conservation measures for rare and little known species associated with late successional, old growth forests. These Standards and Guidelines were frustrating the Agencies' ability to meet the other resource management goals of the Northwest Forest Plan (timber harvest, hazardous fuels treatment, forest restoration). Although the Survey

and Manage Standards and Guidelines will be removed with this decision, conservation of rare and little known species will continue to be accomplished through the other elements of the Northwest Forest Plan and the Agencies' Special Status Species Policies. This ROD also complies with the Settlement Agreement between the Secretaries of Agriculture and Interior and Douglas Timber Operators and American Forest Resource Council.

ADDRESSES: To request copies of the document, contact: Survey and Manage ROD, 333 SW., First Avenue, P.O. Box 2965, Portland, Oregon 97208; fax: (503) 326–2396 (please address fax to: "Survey and Manage ROD"). The ROD may also be accessed on line at *http://www.or.blm.gov/nwfpnepa.*

FOR FURTHER INFORMATION CONTACT: Jerry Hubbard, Survey & Manage ROD Team Logistics Coordinator; telephone (503) 326–2355; or e-mail: *oregon_smnepa_mail@or.blm.gov.*

SUPPLEMENTARY INFORMATION: A limited number of individual copies of the Draft or Final SEIS may also be obtained by contacting Jerry Hubbard. Copies are also available for inspection at public libraries and Forest Service or BLM offices in western Washington, western Oregon, and northwestern California.

Three alternatives, including no action, were considered in detail in the Final Supplemental Environmental Impact Statement (SEIS). The decision in the ROD selects Alternative 2, which would remove the Survey and Manage Mitigation Measure. The additional mitigation that was identified in the Final SEIS for Alternative 2 is not selected. This decision amends the management direction in all 28 Forest Service land and resource management plans and BLM resource management plans in the Northwest Forest Plan area as well as for the Coquille Forest (managed by the Coquille Tribe).

Readers should note that the Under Secretary of Agriculture for Natural Resources and the Environment and the Assistant Secretary of the Interior for Land and Minerals Management are the responsible officials for this proposed action. Therefore, no administrative review ("appeal") through the Forest Service will be available on the Record of Decision under 36 CFR part 217 and no administrative review ("protest") through the BLM was available on the Proposed Decision under 43 CFR 1610.5–2.

Dated: April 6, 2004.

Elaine M. Brong,

State Director, OR/WA, USDI Bureau of Land Management.

Dated: April 6, 2004.

Linda Goodman,

Regional Forester, Region 6, USDA Forest Service.

[FR Doc. 04–10235 Filed 5–6–04; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Southwest Idaho Resource Advisory Committee Meeting

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

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

DATES: Wednesday, May 19, 2004, beginning at 10:30 a.m.

ADDRESSES: The meeting will be held at the American Legion Post, 105 East Mill, Cascade, Idaho.

FOR FURTHER INFORMATION CONTACT: Randy Swick, Designated Federal Officer, at (208) 634–0401 or electronically at *rswick@fs.fed.us.*

SUPPLEMENTARY INFORMATION: Agenda topics include review and approval of project proposals, and an open public forum. The meeting is open to the public.

Mark J. Madrid,

Forest Supervisor, Payette National Forest.

[FR Doc. 04–10522 Filed 5–6–04; 8:45 am]

BILLING CODE 3410–11–M

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 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 6, 2004.

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 on the proposed actions.

Additions

If the Committee approves the proposed additions, the entities of the Federal Government identified in the notice for each service will be required to procure the services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

Regulatory Flexibility Act Certification

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 services to the Government.

2. If approved, 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. Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

End of Certification

The following services are proposed for addition to Procurement List for production by the nonprofit agencies listed:

Services

Service Type/Location: Administrative Service, Directorate of Contracting, Fort Carson, Colorado.

NPA: Bayaud Industries, Inc., Denver, Colorado.

Contract Activity: Directorate of Contracting, Army-Carson, Fort Carson, Colorado.

Service Type/Location: Custodial & Grounds Maintenance, Navy/Marine Corps Reserve Center, Richmond, Virginia.
NPA: Richmond Area Association for Retarded Citizens, Richmond, Virginia.
Contract Activity: Naval Facilities Engineering Command Contracts, Norfolk, Virginia.
Service Type/Location: Custodial Services, GSA, Federal Buildings, 201 N. Vermillion Street, Danville, Illinois,201 S. Vine Street, Urbana, Illinois.
NPA: Child-Adult Resource Services, Inc., Green Castle, Indiana.
Contract Activity: GSA, Public Buildings Service (5P), Chicago, Illinois.
Service Type/Location: Custodial Services, U.S. Geological Survey, Willamette Research Station, Corvallis, Oregon.
NPA: Willamette Valley Rehabilitation Center, Inc., Lebanon, Oregon.
Contract Activity: U.S. Geological Survey, Menlo Park, California.
Service Type/Location: Mailing Services,Government Printing Office, Washington, DC.
NPA: Mt. Vernon-Lee Enterprises, Inc., Springfield, Virginia,
Contract Activity: Government Printing Office, Washington, DC.

Sheryl D. Kennerly,

Director, Information Management.

[FR Doc. 04–10488 Filed 5–6–04; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List Additions and Deletion

AGENCY: Committee for Purchase from People Who Are Blind or Severely Disabled.

ACTION: Additions to and Deletion from Procurement List.

SUMMARY: This action adds to the Procurement List products and services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and to delete from the Procurement List a service previously furnished by such agencies.

DATES: *Effective Date:* June 6, 2004.

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 March 12, 2004, the Committee for Purchase From People Who Are Blind or Severely Disabled published notices (69 FR 11833) of proposed additions to the Procurement List. After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the products and services and impact of the additions and deletion on the current or most recent contractors, the Committee has determined that the products and services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and CFR 51–2.4.

Regulatory Flexibility Act Certification

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 products and services to the Government.
2. 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 additions and deletion to the Procurement List.

End of Certification

Accordingly, the following products and services are added to the Procurement List:

Products

Product/NSN: Paper, Toilet Tissue (Camp French, CA Depot), 8540–00–530–3770, 8540–01–380–0690.
NPA: Outlook-Nebraska, Incorporated, Fremont, Nebraska.
Contract Activity: Office Supplies & Paper Products Acquisition Center, New York, New York.

Services

Service Type/Location: Custodial Services, Air National Guard Base—Reserve Buildings (Bldgs 300, 304, 315, 320, 310, 360, 365, 355, 373, 375, 380, 494, 485, 491, 370), Portland, Oregon.
NPA: The Port City Development Center, Portland, Oregon.
Contract Activity: AF-Portland, Portland IAP, Oregon.
Service Type/Location: Janitorial/ Custodial, Navy Exchange Buildings, Newport, Rhode Island; Fort Adams, Building 402, Greenelane/Mini Mart Building 1283, Main Store and Barbershop, Building 1250,Package Store, Building 1901, Service Station/Home Mart, Building 1285, Uniform Shop/Tailor Shop, Building 1903.
NPA: CranstonArc, Cranston, Rhode Island.
Contract Activity: Navy Exchange Service Command (NEXCOM), Virginia Beach, Virginia.

Deletion

On March 19, 2004, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice (69 F.R.13019) of a proposed deletion to the Procurement List. After consideration of the relevant matter presented, the Committee has determined that the service listed below is no longer suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

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 result in additional reporting, recordkeeping or other compliance requirements for small entities.
2. The action may result in authorizing small entities to furnish the service 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 service deleted from the Procurement List.

End of Certification

Accordingly, the following service is deleted from the Procurement List:

Service

Service Type/Location: Janitorial/ Custodial, Social Security Administration Building, Rock Island, Illinois.
NPA: Alliance for the Mentally Ill of Rock Island and Mercer Counties, Rock Island, Illinois.
Contract Activity: General Services Administration (5P) Public Buildings, Chicago, Illinois.

Sheryl D. Kennerly,

Director, Information Management.

[FR Doc. 04–10489 Filed 5–6–04; 8:45 am]

BILLING CODE 6353–01–P

BROADCASTING BOARD OF GOVERNORS

Sunshine Act Meeting

DATE AND TIME: May 11, 2004; 1 p.m.–4:15 p.m.

PLACE: Cohen Building, Room 3321, 330 Independence Ave., SW., Washington, DC 20237.

CLOSED MEETING: The members of the Broadcasting Board of Governors (BBG)

will meet in closed session to review and discuss a number of issues relating to U.S. Government-funded non-military international broadcasting. They will address internal procedural, budgetary, and personnel issues, as well as sensitive foreign policy issues relating to potential options in the U.S. international broadcasting field. This meeting is closed because if open it likely would either disclose matters that would be properly classified to be kept secret in the interest of foreign policy under the appropriate executive order (5 U.S.C. 552b.(c)(1)) or would disclose information the premature disclosure of which would be likely to significantly frustrate implementation of a proposed agency action. (5 U.S.C. 552b.(c)(9)(B)). In addition, part of the discussion will relate solely to the internal personnel and organizational issues of the BBG or the International Broadcasting Bureau. (5 U.S.C. 552b.(c)(2) and (6)).

FOR FURTHER INFORMATION CONTACT: Persons interested in obtaining more information should contact either Brenda Hardnett or Carol Booker at (202) 401–3736.

Dated: May 5, 2004.

Carol Booker,

Legal Counsel.

[FR Doc. 04–10565 Filed 5–5–04; 1:40 pm]

BILLING CODE 8230–01–M

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–867]

Automotive Replacement Glass Windshields From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review

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

DATES: *Effective Date:* May 7, 2004.

FOR FURTHER INFORMATION CONTACT: Jonathan Herzog, Jon Freed or Nazak Nikakhtar, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–4271, (202) 482–3818, and (202) 482–9079 respectively.

Preliminary Determination

The Department of Commerce ("the Department") is conducting an administrative review of the antidumping duty order on automotive replacement glass windshields ("ARG") from the People's Republic of China ("PRC") in response to a request by Pilkington North America ("PNA") who requested a review of its Chinese joint ventures, Changchun Pilkington Safety Glass Company Limited ("Changchun"), Guilin Pilkington Safety Glass Company Limited ("Guilin"), Shanghai Yaohua Pilkington Autoglass Company Limited ("Shanghai"), and Wuhan Yaohua Pilkington Safety Glass Company Limited ("Wuhan") (collectively "the Pilkington JVs") (with PNA, collectively "Pilkington"), the Fuyao Group ("Fuyao"), Dongguan Kongwan Automobile Glass Limited ("Dongguan Kongwan"), and Peaceful City Limited ("Peaceful City"). The period of review ("POR") is September 19, 2001 through March 31, 2003.

We preliminarily determine that Pilkington, Fuyao, and Peaceful City have sold subject merchandise at less than normal value ("NV") during the POR. Further, we have preliminarily determined to apply an adverse facts available rate to all sales and entries of Peaceful City's subject merchandise during the POR. If these preliminary results are adopted in our final results of this administrative review, we will instruct U.S. Customs and Border Protection ("CBP") to assess antidumping duties on entries of subject merchandise during the POR for which the importer-specific assessment rates are above *de minimis*.

We invite interested parties to comment on these preliminary results. Parties who submit arguments in this segment of the proceeding are requested to submit with the argument: (1) A statement of the issue, and (2) a brief summary of the argument as provided in section 733 of the Tariff Act of 1930, as amended ("the Act"). The estimated margins of sales at LTFV are shown in the "Suspension of Liquidation" section of this notice.

Case History

On April 7, 2003, the Department published a notice of opportunity to request an administrative review of the antidumping duty order on ARG from the PRC for the period September 19, 2001 through March 31, 2003. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation: Opportunity to Request Administrative Review*, 68 FR 16761 (April 7, 2003). On April 15, 2003, Dongguan Kongwan and Peaceful City, requested an administrative review of their sales to the United States during the POR. On April 21, 2003, an importer, PNA, requested an administrative review of the sales of Changchun, Guilin, Shanghai, and Wuhan to the United States during the POR. On April 22, 2003, TCG International Inc. ("TCGI"), requested an administrative review of its sales to the United States during the POR. On April 30, 2003, Xinyi Automotive Glass (Shenzhen) Company, Limited ("Xinyi"), Shenzhen CSG Automotive Glass Company, Limited ("Shenzhen CSG") (reported to be the former company Shenzhen Benxun Auto Glass Company, Limited) ("Benxun"), and Fuyao requested an administrative review of their sales to the United States during the POR.

On May 21, 2003, the Department published in the **Federal Register** a notice of the initiation of the antidumping duty administrative review of ARG from the PRC for the period September 19, 2001 through March 31, 2003. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 68 FR 27781 (May 21, 2003). On June 3, 2003, the Department issued questionnaires to each Respondent. On September 8, 2003, the Department published a notice in the **Federal Register** rescinding the administrative reviews of TCGI, Xinyi, and Benxun.[1] *See Certain Automotive Replacement Glass Windshields from the People's Republic of China: Notice of Partial Rescission of the Antidumping Duty Administrative Review*, 68 FR 52893 (September 8, 2003).On October 24, 2003, the Department published a notice in the **Federal Register** extending the time limit for the preliminary results of review by 60 days. *See Certain Automotive Replacement Glass Windshields from the People's Republic of China: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review*, 68 FR 60911 (October 24, 2003). On January 30, 2004, the Department published a notice in the **Federal Register** extending the time limit for the preliminary results of review until April 29, 2004. *See Notice of Extension of Time Limit for Preliminary Results of the Antidumping Duty Administrative Review: Certain*

[1] During the investigation, the Department investigated a company called Benxun. When Shenzhen CSG requested review, it indicated it was the company formally known as Benxun, but that it had undergone a name change since the investigation. On July 8, 2003, Shenzhen CSG withdrew its request for review. However, because Shenzhen CSG withdrew its request for review, the Department did not have the information necessary to make a successor-in-interest determination. Therefore the Department did not determine that Shenzhen CSG is entitled to receive the same antidumping cash deposit rate accorded Benxun within the context of this review. On March 8, 2004, the Department initiated a change of circumstance review, and is currently in the process of completing that review.

Automotive Replacement Glass Windshields from the People's Republic of China, 69 FR 4488 (January 30, 2004).

Pilkington

On June 3, 2003, the Department issued its antidumping questionnaire to Pilkington. Pilkington submitted its Section A questionnaire response on June 25, 2003, and its Sections C and D responses on August 5, 2003. To address concerns about separate rates and certain expense and factors of production variables, the Department issued several Sections A, C, and D supplemental questionnaires. The Department issued a Section A supplemental questionnaire to Pilkington on July 31, 2003, to which Pilkington responded on August 28, 2003. The Department issued a Sections C through D supplemental questionnaire to Pilkington on September 9, 2003, to which Pilkington responded on September 30, 2003. The Department issued a second Sections A–D supplemental questionnaire to Pilkington on October 17, 2003, to which Pilkington responded on November 5, 2003. The Department issued a third Sections A–D supplemental questionnaire on December 16, 2003, to which Pilkington responded on January 9, 2004. The Department issued a fourth Section A supplemental questionnaire to Pilkington on January 5, 2004, to which Pilkington responded on January 12, 2004. The Department issued a fifth Section A supplemental questionnaire to Pilkington on January 26, 2004, to which Pilkington responded on February 6, 2004. The Department issued a sixth Section A supplemental questionnaire to Pilkington on February 4, 2004, to which Pilkington responded on February 9, 2004.

Fuyao

On June 3, 2003, the Department issued its antidumping questionnaire to Fuyao. On July 8, 2003, Fuyao reported that it made sales of subject merchandise to the United States during the POR in its response to Section A of the Department's questionnaire. On July 24, 2003, Fuyao submitted its response to Sections C and D of the Department's questionnaire. To address concerns about separate rates and certain expense and factors of production variables, the Department issued several Sections A, C, and D supplemental questionnaires. On July 31, 2003, the Department issued a Section A supplemental questionnaire to Fuyao. Fuyao submitted its response to the Department's Section A supplemental questionnaire on August 14, 2003. On September 22, 2003, the Department issued a Sections C and D supplemental questionnaire to Fuyao. Fuyao submitted its response to the Sections C and D supplemental questionnaire on October 17, 2003. The Department issued a second Sections A, C, and D supplemental questionnaire on December 16, 2003. Fuyao submitted its response to the Sections A, C, and D supplemental questionnaire on January 9, 2004. On January 6, 2004, the Department issued a third supplemental questionnaire regarding Fuyao's quantity and value of sales and its financial statements. On January 21, 2004, Fuyao submitted its response to the supplemental questionnaire regarding the quantity and value of sales. On February 4, 2004, the Department issued a third Section D supplemental questionnaire. Fuyao submitted its response to the Section D supplemental questionnaire on February 23, 2004.

Peaceful City and Dongguan Kongwan

On June 3, 2003, the Department issued its antidumping questionnaire to Peaceful City, the exporter of subject merchandise, and Dongguan Kongwan, the producer of subject merchandise, which is 100% owned by Peaceful City. Due to issues concerning affiliation and factors of production, we issued several supplemental questionnaires to Peaceful City and Dongguan Kongwan. On July 8, 2003, Peaceful City reported that it exported subject merchandise to the United States during the POR, and Dongguan Kongwan reported that it produced the subject merchandise in their respective responses to the Section A questionnaire. On July 22, 2003, the Department issued a Section A supplemental questionnaire to Peaceful City and Dongguan Kongwan. Peaceful City and Dongguan Kongwan submitted their responses to the Department's Section A supplemental questionnaire on August 6, 2003. On September 16, 2003, the Department issued a second Section A supplemental and Sections C and D supplemental questionnaire to Peaceful City and Dongguan Kongwan. On October 15, 2003, the Department received Peaceful City and Dongguan Kongwan's responses to the Section A second supplemental and Sections C and D supplemental questionnaires. On December 15, the Department issued a third Section A supplemental and a second Section C and D supplemental questionnaire to Peaceful City and Dongguan Kongwan, for which the Department received Peaceful City and Dongguan Kongwan's responses on January 5, 2004. On January 16, 2004, the Department issued to Dongguan Kongwan its third Section D supplemental questionnaire. On January 24, 2004, Dongguan Kongwan submitted its third Section D supplemental questionnaire response. On February 4, 2004, the Department issued to Dongguan Kongwan a fourth Section D supplemental questionnaire. On February 11, 2004, the Department received Dongguan Kongwan's fourth Section D supplemental questionnaire response. On February 23, 2004, the Department issued a fifth Section D supplemental questionnaire to Dongguan Kongwan addressing certain deficiencies in Dongguan Kongwan's fourth Section D supplemental questionnaire response. The Department received Dongguan Kongwan's fifth Section D supplemental questionnaire response on March 2, 2004. On March 3, 2004, the Department submitted to Dongguan Kongwan a third Section C supplemental questionnaire and a sixth Section D supplemental questionnaire. On March 5, 2004, the Department received Dongguan Kongwan's third Section C and sixth Section D supplemental questionnaire response. On March 15, 2004, the Department issued to Peaceful City a fourth Section A supplemental questionnaire, and the Department received Peaceful City's response on March 22, 2004, at the verification of Peaceful City and on March 23, 2004 at the Department.

Period of Review

The POR is September 19, 2001 through March 31, 2003.

Scope of Investigation

The products covered by this review are ARG windshields, and parts thereof, whether clear or tinted, whether coated or not, and whether or not they include antennas, ceramics, mirror buttons or VIN notches, and whether or not they are encapsulated. ARG windshields are laminated safety glass (*i.e.*, two layers of (typically float) glass with a sheet of clear or tinted plastic in between (usually polyvinyl butyral)), which are produced and sold for use by automotive glass installation shops to replace windshields in automotive vehicles (*e.g.*, passenger cars, light trucks, vans, sport utility vehicles, etc.) that are cracked, broken or otherwise damaged.

ARG windshields subject to this review are currently classifiable under subheading 7007.21.10.10 of the Harmonized Tariff Schedules of the United States (HTSUS). Specifically excluded from the scope of this investigation are laminated automotive windshields sold for use in original assembly of vehicles. While HTSUS subheadings are provided for

convenience and Customs purposes, our written description of the scope of this investigation is dispositive.

Verification

As provided in section 782(i) of the Act, we verified information provided by Pilkington, Fuyao, and Peaceful City. We used standard verification procedures, including on-site inspection of the manufacturers' and exporters' facilities, and examination of relevant sales and financial records.

The Department conducted a verification at Pilkington's facilities in both China and the United States. The Department conducted the U.S. verification at Pilkington's headquarters in Toledo, Ohio from March 10 through March 12, 2004. The Department conducted the verification at Pilkington's facilities in Changchun, China from February 16 through February 20, 2004.

The Department conducted a verification at Fuyao's facilities in both China and the United States. The Department conducted the U.S. verification at Greenville Glass Industry Inc. ("GGI") in Greenville, South Carolina from February 26 through February 27, 2004. The Department conducted the verification at Fuyao's facilities in Fuqing City, Fujian Province of China from March 22 through March 26, 2004.

The Department conducted a verification at Peaceful City's headquarters in Hong Kong, on March 22 and 23, 2004, and at Dongguan Kongwan's manufacturing plant in Dongguan City, China, on March 24, 25, and 26, 2004.

Our verification results are outlined in the verification report for each company. For further details see Verification of Sales and Factors of Production of Pilkington North America ("PNA") in the Antidumping Duty Administrative Review of Automotive Replacement Glass ("ARG") Windshields from the People's Republic of China ("PRC"), dated April 29, 2004 ("*Pilkington Chinese Verification Report*"); Verification of Sales of Pilkington North America ("PNA") in the Antidumping Duty Administrative Review of Automotive Replacement Glass ("ARG") Windshields from the People's Republic of China ("PRC"), dated April 29, 2004 ("*Pilkington U.S. Verification Report*"); Verification of Sales and Factors of Production of the Fuyao Group in the Antidumping Duty Administrative Review of Automotive Replacement Glass ("ARG") Windshields from the People's Republic of China ("PRC"), dated April 29, 2004 ("*Fuyao Verification Report*"); Verification of Sales of Greenville Glass Industries in the Antidumping Duty Administrative Review of Automotive Replacement Glass ("ARG") Windshields from the People's Republic of China ("PRC"), dated April 29, 2004 ("*Greenville Verification Report*"); and, Verification of Sales and Factors of Production of Peaceful City and Dongguan Kongwan in the Antidumping Duty Administrative Review of Automotive Replacement Glass ("ARG") Windshields from the People's Republic of China ("PRC"), dated April 29, 2004 ("*See Peaceful City and Dongguan Kongwan's Verification Report*").

Nonmarket Economy Country Status

In every case conducted by the Department involving the PRC, the PRC has been treated as a non-market economy ("NME") country. In accordance with to section 771(18)(C)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by the administering authority. *See also Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Preliminary Results 2001–2002 Administrative Review and Partial Rescission of Review*, 68 FR 7500 (February 14, 2003). None of the parties to this proceeding has contested such treatment. Accordingly, we calculated normal value ("NV") in accordance with section 773(c) of the Act, which applies to NME countries.

Surrogate Country

When the Department is investigating imports from an NME country, section 773(c)(1) of the Act directs it to base normal value on the NME producer's factors of production, valued in a surrogate market economy country or countries considered to be appropriate by the Department. In accordance with section 773(c)(4) of the Act, the Department, in valuing the factors of production, shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that: (1) Are at a level of economic development comparable to that of the NME country; and, (2) are significant producers of comparable merchandise. The sources of the surrogate factor values are discussed under the "normal value" section below and in *Preliminary Results of Review of the Order on Automotive Replacement Glass Windshields from the People's Republic of China: Factor Valuation, Memorandum from Jon Freed, Case Analyst, through Edward C. Yang, Program Manager; Office IX, to the File*, dated April 29, 2004 ("*Factor Valuation Memo*").

The Department has determined that India, Pakistan, Indonesia, Sri Lanka, and the Philippines are countries comparable to the PRC in terms of economic development. *See Memorandum from Ron Lorentzen to Robert Bolling: Antidumping Duty Administrative Review of Automotive Replacement Glass Windshields from the People's Republic of China (PRC): Request for a List of Surrogate Countries*, ("*Policy Letter*"), dated July 29, 2003. Customarily, we select an appropriate surrogate country based on the availability and reliability of data from the countries that are significant producers of comparable merchandise. For PRC cases, the primary surrogate country has often been India if it is a significant producer of comparable merchandise. In this case, we have found that India is a significant producer of comparable merchandise. *See Memo to File through Ed Yang from Robert Bolling and Nazak Nikahktar: Automotive Replacement Glass Windshields ("ARG") from the People's Republic of China; Selection of a Surrogate Country*, October 15, 2003, ("*Surrogate Country Memo*")

The Department used India as the primary surrogate country, and, accordingly, has calculated normal value using Indian prices to value the PRC producers' factors of production, when available and appropriate. *See Surrogate Country Memo* and *Factor Valuation Memo*. We have obtained and relied upon publicly available information wherever possible.

In accordance with 19 CFR 351.301(c)(3)(ii), for the final results in an antidumping administrative review, interested parties may submit publicly available information to value factors of production within 20 days after the date of publication of this preliminary results.

Affiliation/Collapsing—The Pilkington Joint Ventures ("JVs")

Affiliation—Pilkington JVs

Pilkington is comprised of several different corporations and joint ventures including PNA and the Pilkington JVs. During the POR, the Pilkington JVs made sales to PNA and another U.S. customer.

Section 771(33) of the Act, in part, states that the Department considers the following as affiliated: (E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization;

(F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person; or (G) Any person who controls any other person and such other person. Section 771(33) further provides that, "a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person". In order to find affiliation between companies, the Department must find that at least one of the criteria listed above is applicable to the respondents. To the extent that section 771(33) of the Act does not conflict with the Department's application of separate rates and enforcement of the non-market economy ("NME") provision, section 773(c) of the Act, the Department will determine that exporters and/or producers are affiliated if the facts of the case support such a finding. *See Certain Preserved Mushrooms From the People's Republic of China: Preliminary Results of Sixth New Shipper Review and Preliminary Results and Partial Rescission of Fourth Antidumping Duty Administrative Review*, 69 FR 10410, 10413 (March 5, 2004) ("*Mushrooms*").

The Department has analyzed the information regarding affiliation on the record in this administrative review, and considers the Pilkington JVs affiliated under sections 771(33)(E),(F) and (G) by virtue of Pilkington Plc's control over the four Pilkington JVs. Specifically, Pilkington reported that it controlled a majority interest or near parity-interest in all of the Pilkington JVs, either through outright ownership, or through its ownership share of its partner in the Pilkington JVs, Shanghai Yaohua Pilkington Glass Company Limited ("SYP"). Further, Pilkington also reported that it controls the Chairmanship or Vice-Chairmanship, and more than one director's positions on each of the boards of the Pilkington JVs. Additionally, Pilkington Plc's consolidated financial statements list the Pilkington JVs, as either an affiliated company, defined as a company in which Pilkington retains full control, or as an associated company, defined as a company in which Pilkington does not own a majority interest, but exercises control of the company. *See Pilkington Chinese Verification Report* at 6. Finally, Pilkington reported that sales to PNA by each of the Pilkington JVs were made through Pilkington (Asia) Limited ("Pilkington Asia"), which served as PNA's buying agent. While Pilkington reported that only the general managers of each of the Pilkington JVs had the authority to bind the Pilkington JVs to a sale, at verification, the Department found that Pilkington Asia's sales and marketing agent decided which of the Pilkington JVs would receive and order, and on occassion, could bind the Pilkington JVs to a sale. *See* Pilkington Section A response, dated June 25, 2003 ("*Pilkington Section A response*") at A–8. *See also Pilkington Chinese Verification Report* at 7.

The Department considers the affiliations provisions of Section 771(33)(E), (F), and (G) to be met because (1) Pilkington has majority or near-parity ownership in all four of the Pilkington JVs, and Pilkington controls the Chairmanship or Vice-Chairmanship, and more than one director, on each of the Pilkington JVs' Board of Directors, (2) Pilkington considers each of the Pilkington JVs as an affiliated or associated company for its financial report purposes, and (3) Pilkington, through Pilkington Asia, may exercise control over the export sales of each of the Pilkington JVs. Therefore, the Department considers the four Pilkington JVs to be affilated, because Pilkington exercises control over the Pilkington JVs through its ownership and ability to influence the sales of the Pilkington JVs. Due to the proprietary nature of the information involved in this analysis, please see *Antidumping Duty Administrative Review of Automotive Replacement Glass Windshields from the People's Republic of China: Collapsing of Affiliated Parties*, dated April 29, 2004 ("*Collapsing Memo*") for a full discussion of our determination.

Collapsing—the Pilkington JVs

The Department examined whether to collapse the Pilkington JVs for margin calculation purposes.

Pursuant to 19 CFR 351.401(f), the Department will collapse producers and treat them as a single entity where (1) those producers are affiliated, (2) the producers have production facilities for producing similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities, and (3) there is a significant potential for manipulation of price or production. In determining whether a significant potential for manipulation exists, 19 CFR 351.401(F)(2) provides that the Department may consider various factors, including (1) the level of common ownership, (2) the extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm, and (3) whether the operations of the affiliated firms are intertwined. *See Gray Portland Cement and Clinker From Mexico: Final Results of Antidumping Duty Administrative Review*, 63 FR 12764, 12774 (March 16, 1998); *Final Determination of Sales at Less Than Fair Value: Collated Roofing Nails from Taiwan*, 62 FR 51427, 51436 (October 1, 1997).

To the extent that this provision does not conflict with the Department's application of separate rates and enforcement of the NME provision, section 773(c) of the Act, the Department will collapse two or more affiliated entities in a case involving an NME country if the facts of the case warrant such treatment. Furthermore, the Department notes that the factors listed in 19 CFR 351.401(f)(2) are not exhaustive, and in the context of an NME investigation or administrative review, other factors unique to the relationship of business entities within in the NME may lead the Department to determine that collapsing is either warranted or unwarranted, depending on the facts of the case. *See Mushrooms*, 69 FR10414 (*citing Hontex Enterprises, Inc.* v. *United States*, Slip Op. 03–17, 36 (February 13, 2003) (noting that the application of collapsing in the NME context may differ from the standard factors listed in the regulation).

As discussed in the "affiliation" section above, the Department considers the Pilkington JVs to be affiliated due to Pilkington's control of the Pilkington JVs. Thus, the Department finds that the first collapsing criterion (*i.e.*, that companies be affiliated) to be met. Further, Pilkington reported that all four of the Pilkington JVs' production facilities produce similar or identical products, which would not require substantial retooling to restructure manufacturing priorities. *See Collapsing Memo* at 5. In fact, Pilkington reported at verification that it would likely shift its production to the Pilkington JV which receives the lowest dumping margin if the four Pilkington JVs are not collapsed. *See Pilkington Chinese Verification Report* at 5. *See also Collapsing Memo* at 5. Thus, because the Pilkington JVs produce similar or identical merchandise, which would not require substantial retooling to shift manufacturing priorities, the Department considers the second collapsing criterion under 19 CFR 351.401(f)(1) to be met. Finally, as discussed above in the "affiliation" section, Pilkington exercises control over the Pilkington JVs through its ownership positions on each of the Pilkington JVs' board of directors, and through the ability of Pilkington Asia to influence the export sales to PNA by the Pilkington JVs. Therefore, the Department finds there is a significant potential for manipulation of the

Pilkington JVs', price or production by Pilkington, due to the level of common ownership, the extent to which board members sit on the boards of each of the Pilkington JVs, and the intertwining of the operations of the Pilkington JVs through Pilkington. *See Collapsing Memo* at 5 and 6. Accordingly, the Department considers the third collapsing criterion under 19 CFR 351.401(f)(1) to be met. Due to the proprietary nature of the information provided, please *see Collapsing Memo* for a more detailed discussion of our decision.

The Department finds that the Pilkington JVs are affiliated and should be collapsed because (1) the Pilkington JVs are affiliated, (2) each has production facilities for producing similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities, and (3) there is a significant potential for manipulation of price or production. Nothing in this determination conflicts with the language of 773(c) of the Act ("the NME statute"). Due to the proprietary nature of the information involved in this determination, please *see Collapsing Memo* for a full discussion of our analysis.

Separate Rates

In an NME proceeding, the Department presumes that all companies within the country are subject to governmental control and should be assigned a single antidumping duty rate unless the respondent demonstrates the absence of both *de jure* and *de facto* governmental control over its export activities. *See Notice of Final Determination of Sales at Less Than Fair Value: Bicycles from the People's Republic of China*, 61 FR 19026 (April 30, 1996). The exporters that the Department selected to review, Pilkington, Fuyao, and Peaceful City, and the PRC producers of the exported goods each provided company-specific separate rates information and stated that they met the standards for the assignment of separate rates. In determining whether companies should receive separate rates, the Department focuses its attention on the exporter, in this case the Pilkington JVs, Fuyao, and Peaceful City, rather than the manufacturer (*i.e.*, Dongguan Kongwan), as our concern is the manipulation of dumping margins. *See Notice of Final Determination of Sales at Less Than Fair Value: Manganese Metal from the People's Republic of China*, 60 FR 56045 (November 6, 1995). Consequently, the Department analyzed whether the exporters of the subject merchandise, the Pilkington JVs, Fuyao and Peaceful City, should receive a separate rate.

The Department's separate rate test is not concerned, in general, with macroeconomic, border-type controls (*e.g.*, export licenses, quotas, and minimum export prices), particularly if these controls are imposed to prevent dumping. The test focuses, rather, on controls over the investment, pricing, and output decision-making process at the individual firm level. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from Ukraine*, 62 FR 61754 (November 19, 1997); *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China; Final Results of Antidumping Duty Administrative Review*, 62 FR 61276 (November 17, 1997); and *Notice of Preliminary Determination of Sales at Less than Fair Value: Honey from the People's Republic of China*, 60 FR 14725 (March 20, 1995).

To establish whether a firm is sufficiently independent from government control to be entitled to a separate rate, the Department analyzes each exporting entity under a test arising out of the *Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China*, 56 FR 20588, (May 6, 1991), as modified by *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 FR 22585, (May 2, 1994) ("*Silicon Carbide*"). Under the separate rates criteria, the Department assigns separate rates in NME cases only if the respondent can demonstrate the absence of both *de jure* and *de facto* governmental control over export activities. *See Silicon Carbide* and *Notice of Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol from the People's Republic of China*, 60 FR 22544 (May 8, 1995).

A. Absence of *De Jure* Control

The Department considers the following *de jure* criteria in determining whether an individual company may be granted a separate rate: (1) An absence of restrictive stipulations associated with an individual exporter's business and export licenses; and (2) any legislative enactments decentralizing control of companies.

B. Absence of *De Facto* Control

As stated in previous cases, there is some evidence that certain enactments of the PRC central government have not been implemented uniformly among different sectors and/or jurisdictions in the PRC. *See Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from the People's Republic of China*, 63 FR 72255 (December 31, 1998). Therefore, the Department has determined that an analysis of *de facto* control is critical in determining whether respondents are, in fact, subject to a degree of governmental control which would preclude the Department from assigning separate rates. The Department typically considers four factors in evaluating whether each respondent is subject to *de facto* governmental control of its export functions: (1) Whether the exporter sets its own export prices independent of the government and without the approval of a government authority; (2) whether the respondent has authority to negotiate and sign contracts, and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of its management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.

Pilkington

Pilkington placed on the record statements and documents to demonstrate absence of *de jure* control. In its questionnaire responses, Pilkington reported that it has no relationship with any level of the PRC government. Pilkington states that it has complete independence with respect to its export activities and that neither any PRC legislative enactments nor any other formal measures centralize any aspect of its export activities. Pilkington also reported that the subject merchandise is not subject to export quotas or export control licenses. Further, Pilkington reported that the subject merchandise does not appear on any government list regarding export provisions or export licensing. Furthermore, Pilkington stated that the local Chamber of Commerce in the PRC does not coordinate any export activities for the Pilkington JVs.

Pilkington reported that it is required to obtain a business license, which is issued by the Changchun Industrial and Commercial Administration Bureau for Changchun; the Guilin Industrial and Commercial Administration Bureau for Guilin; the Shanghai Industrial and Commercial Administrative Bureau for Shanghai; and, the Wuhan Industrial and Commercial Administrative Bureau for Wuhan. According to Pilkington, the business license allows a business entity, such as the Pilkington JVs, to operate in the PRC and facilitates the Pilkington JVs export and import

business based in the PRC. In addition, Pilkington submitted the Company Law of the People's Republic of China ("PRC Company Law"), which includes the laws governing joint ventures. *See Pilkington Chinese Verification Report* at Exhibit 5D. We examined each of these laws and determine that they demonstrate an authority for establishing the *de jure* decentralized control over the export activities and evidence in favor of the absence of government control associated with each Pilkington JV's business license. *See Memorandum to the File from Jonathan Herzog, Case Analyst to Edward C. Yang, Director, Office IX, Antidumping Duty Investigation of Automotive Replacement Glass Windshields from the People's Republic of China,* dated April 29, 2004 (*"Separate Rates Memo"*).

In support of an absence of *de facto* control, Pilkington has asserted the following: (1) The Pilkington JVs established their own export prices; (2) the Pilkington JVs negotiated contracts without guidance from any governmental entities or organizations; (3) the Pilkington JVs made their own personnel decisions; and (4) the Pilkington JVs retained the proceeds of their export sales and used profits according to their business needs. Additionally, Pilkington's questionnaire responses indicate that the Pilkington JVs do not coordinate with other exporters in setting prices or in determining which companies will sell to which markets. This information supports a preliminary finding that there is an absence of *de facto* governmental control of the export functions of the Pilkington JVs. Consequently, we preliminarily determine that Pilkington has met the criteria for the application of separate rates.

The evidence placed on the record of this administrative review by Pilkington demonstrates an absence of government control, both in law and in fact, with respect to the Pilkington JVs exports of the merchandise under review. As a result, for the purposes of these preliminary results, the Department is granting a separate, company-specific rate to the Pilkington JVs, the exporters which shipped the subject merchandise, ARG, to the United States during the POR. Due to the proprietary nature of the information considered, please see the *Separate Rates Memo* for a full discussion of the Department's separate rates determination.

Fuyao

Fuyao has placed on the record statements and documents to demonstrate absence of *de jure* control. In its questionnaire responses, Fuyao reported that it has no relationship with any level of the PRC government. Fuyao states that it has complete independence with respect to its export activities and that neither any PRC legislative enactments nor any other formal measures centralize any aspect of its export activities. Fuyao also reported that the subject merchandise is not subject to export quotas or export control licenses. Further, Fuyao reported that the subject merchandise does not appear on any government list regarding export provisions or export licensing. Furthermore, Fuyao stated that the local Chamber of Commerce in the PRC does not coordinate any export activities for Fuyao.

Fuyao reported that it is required to obtain a business license, which is issued by the Fuzhou Industrial and Commercial Administration Bureau. According to Fuyao, the business license gives a business entity, such as Fuyao, the right to open bank accounts, conduct business activities, and sign contracts. In addition, Fuyao submitted the *Foreign Trade Law of the PRC* and the *Administrative Regulations of the PRC Governing the Registration of Legal Corporations*. We examined each of these laws and determine that they demonstrate an authority for establishing the *de jure* decentralized control over the export activities and evidence in favor of the absence of government control associated with Fuyao's business license. *See Separate Rates Memo*.

In support of demonstrating an absence of *de facto* control, Fuyao has asserted the following: (1) Fuayo established their own export prices; (2) Fuyao negotiated contracts without guidance from any governmental entities or organizations; (3) Fuyao made their own personnel decisions; and (4) Fuyao retained the proceeds of their export sales and used profits according to their business needs. Additionally, Fuyao's questionnaire responses indicate that it does not coordinate with other exporters in setting prices. This information supports a preliminary finding that there is an absence of *de facto* governmental control of the export functions of Fuyao. Consequently, we preliminarily determine that Fuyao has met the criteria for the application of separate rates.

The evidence placed on the record of this administrative review by Fuyao demonstrates an absence of government control, both in law and in fact, with respect to its exports of the merchandise under review. As a result, for the purposes of these preliminary results, the Department is granting a separate, company-specific rate to Fuyao, the exporter which shipped the subject merchandise, ARG, to the United States during the POR. Due to the proprietary nature of the information considered, please see the *Separate Rates Memo* for a full discussion of the Department's separate rates determination.

Peaceful City and Dongguan Kongwan

Peaceful City has provided the requested company-specific separate rates information and has indicated that there is no element of government ownership or control over their export operations. We have considered whether the mandatory respondent is eligible for a separate rate as discussed below. Because Peaceful City is a privately owned Hong Kong corporation, having its place of business in Hong Kong and being registered in Hong Kong, and because Hong Kong is considered by the Department to be a market economy, the Department determined that a separate rates analysis was not necessary for Peaceful City. As Dongguan Kongwan is wholly owned by Peaceful City, a separate rate analysis is not necessary.

Facts Available

As further discussed below, pursuant to sections 776(a)(2)(A), (B), (C) and (D) and section 776(b) of the Act, the Department determines that the application of total adverse facts available is warranted for Peaceful City and Dongguan Kongwan.

I. Facts Otherwise Available

The Department finds that the use of facts otherwise available is warranted pursuant to section 776(a) of the Act. In general, section 776(a)(1) and (2) of the Act state that the Department may use facts otherwise available in reaching the applicable determination if: (1) The necessary information is not available on the record, or (2) an interested party or any other person (A) withholds information that has been requested by the administering authority or the Commission under this subtitle, (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, (C) significantly impedes a proceeding under this subtitle, or (D) provides such information but the information cannot be verified.

As discussed below, the Department determined that the use of total facts available is warranted because Peaceful City and Dongguan Kongwan withheld certain information that had been requested by the Department, failed to

provide certain information by the Department's and statutory deadlines, significantly impeded the Department's investigation, and failed to provide certain information that could be verified pursuant to section 776(a)(2)(A), (B), (C) and (D) of the Act. As a result of Peaceful City and Dongguan Kongwan's failure, the Department does not have sufficient information on the record to make its determination.

A. Withholding Information and Failure To Provide Certain Information Requested by the Department in a Timely Manner

The Department finds that facts available is warranted pursuant to sections 776(a)(2)(A) and (B) of the Act because Peaceful City and Dongguan Kongwan withheld certain information both before verification and during verification, and failed to provide information requested by the Department in a timely manner and in the form required for verification.

The Department submitted its verification outline to Peaceful City and Dongguan Kongwan on March 12, 2004, 10 days prior to the commencement of verification, thereby giving Peaceful City and Dongguan Kongwan sufficient time to prepare their verification exhibits. *See Peaceful City and Dongguan Kongwan's Verification Outline,* dated March 12, 2004 ("*Peaceful City and Dongguan Kongwan's Verification Outline*"). The purpose of submitting a verification outline to respondents is to give respondents sufficient notice about the types of source documents that the Department will seek to examine during verification, and to afford respondents sufficient time to compile source documents and prepare them as verification exhibits. Peaceful City and Dongguan Kongwan failed to follow the instructions detailed in the Department's verification outline and failed to present source documents in a timely manner for verification. At no time prior to the verification did Peaceful City or Dongguan Kongwan contact the Department with questions about verification procedures, documents to prepare for verification, or the verification outline.

Peaceful City

During verification, Peaceful City did not adequately present documents to demonstrate its corporate structure, accounting practices and sales process to the Department according to the instructions specified in the Department's verification outline. *See Peaceful City and Dongguan Kongwan's Verification Outline* at pp. 5–7, and 10–17. Certain source documents were not initially presented to the Department, and the Department found it necessary to make piecemeal requests for those documents in order to compile a verification record. *See Peaceful City and Dongguan Kongwan's Verification Report* at pp. 4–6, 10–11, and 13–14.

Peaceful City did not report a certain affiliate, which was owned by Peaceful City's shareholders prior to June 2002, in its questionnaire responses. Although Peaceful City stated that this affiliate is merely an automotive glass fitting service supplier and not an ARG producer, Peaceful City was unable to substantiate this claim through reliable evidence. *See Peaceful City and Dongguan Kongwan's Verification Report* at pp. 4–5 and Exhibit 1. Peaceful City also failed to report the brokerage and handling charge that it incurred for its U.S. sale during the POR. During verification, the Department discovered, among Peaceful City's U.S. sales trace documents, an invoice from a Chinese shipping company noting charges for hauling the subject merchandise from Dongguan Kongwan's facility to a certain PRC port, a customs charge for transporting subject merchandise from the certain PRC port to the PRC port of exit, and a handling charge for delivering the bill of lading from the shipping company to Peaceful City. *See Peaceful City and Dongguan Kongwan's Verification Report* at Exhibit 6. Peaceful City also failed to substantiate a related party accounting transaction reported in its Section A questionnaire response. The financial statements submitted in Peaceful City's questionnaire response references "purchases" from Peaceful City's reported affiliate, an automotive glass fitting service supplier. *See Peaceful City's Section A Questionnaire Response,* Exhibit 10, dated June 24, 2003. However, Peaceful City was unable to substantiate this purchase amount with source documents. As a result, the record is unclear as to whether Peaceful City purchased subject merchandise from its affiliate for shipment to the United States during the POR or whether it purchased certain raw materials for consumption in the manufacture of subject merchandise and did not report this purchase as a market economy purchase in Dongguan Kongwan's questionnaire responses. *See Peaceful City and Dongguan Kongwan's Verification Report* at pp. 5, 10–11.

Dongguan Kongwan

During verification, Dongguan Kongwan was unable to provide supporting documentation in a timely manner, to demonstrate its corporate structure, accounting practices, merchandise, sales process, production process, quantity and value of the U.S. sale of subject merchandise during the POR, certain factors of production usage rates, suppliers' freight distances, and certain market economy transportation charges. *See Peaceful City and Dongguan Kongwan's Verification Report.*

During verification, the Department discovered that Dongguan Kongwan failed to report its use of float glass of a certain color in the production of subject merchandise during the POR. Dongguan Kongwan reported that float glass of a certain color "was not used to produce the subject merchandise" and reported the market economy and nonmarket economy purchases of float glass of only one color. *See Dongguan Kongwan's Third Section D Supplemental Questionnaire response* at p. 2, dated January 27, 2004. During verification, the Department examined Dongguan Kongwan's work shift records for the production of subject merchandise and discovered that a significant quantity of float glass used to produce the subject merchandise was of the unreported color. *See Peaceful City and Dongguan Kongwan's Verification Report* at Exhibit I. Further, Dongguan Kongwan did not present the Department with any documents demonstrating the usage rate for the float glass of the unreported color and the usage rate for the float glass of the reported color separately. *See Peaceful City and Dongguan Kongwan's Verification Report* at Exhibit I. Because float glass is the primary component in producing the subject merchandise, the correct reporting of float glass usage rates is integral to establishing a constructed value for subject merchandise and in determining an accurate dumping margin calculation.

The Department's verification outline expressly requested source documents to corroborate Dongguan Kongwan's factor of production usage rates, as reported in its questionnaire responses. *See Peaceful City and Dongguan Kongwan's Verification Outline* at p. 17–21. However, Dongguan Kongwan did not provide the Department with source documents to reconcile the vast majority of its factor input usage rates, including one unreported factor of production and several unreported packing materials that the Department discovered during its plant tour of Dongguan Kongwan's production facility. Dongguan Kongwan also did not provide documents to substantiate the rate at which float glass by-products are derived from the glass cutting process and invoices to substantiate the sales of the float glass

by-products. *See Memorandum Detailing Peaceful City Limited ("Peaceful City") and Dongguan Kongwan Automobile Glass, Limited's ("Dongguan Kongwan") Lack of Preparation for Verification in the Antidumping Administrative Review of Automotive Replacement Glass ("ARG") Windshields from the People's Republic of China ("PRC")* at p. 5–7, dated April 29, 2004 (*"Verification Memorandum"); Peaceful City and Dongguan Kongwan's Verification Report* at p. 29. Also, Dongguan Kongwan's indirect labor hours used in the production of subject merchandise during July 2002, as reported in its questionnaire responses, were not consistent with the total labor hours detailed in its attendance records for production management personnel during July 2002. *See Verification Memorandum* at p. 6.

Additionally, Dongguan Kongwan failed to provide source documents to corroborate its market economy purchases of float glass of the reported color and of PVB. Moreover, certain factors of production were not reported in Dongguan Kongwan's questionnaire responses as being purchased from market economy or nonmarket economy suppliers. At verification, Dongguan Kongwan did not provide supporting documents to indicate whether these certain factors were purchased from market economy or nonmarket economy suppliers. *See Peaceful City and Dongguan Kongwan's Verification Report* at p. 25–27. Additionally, Dongguan Kongwan did not provide documents to demonstrate whether the unreported factors discovered during the plant tour were purchased from market economy or nonmarket economy suppliers. *See Verification Memorandum* at p. 7. Furthermore, during the plant tour, the Department noted that a significant amount of PVB was purchased from Japan, a market economy supplier that was not reported in Dongguan Kongwan's questionnaire responses, and the Department was unable to examine the market economy purchases of PVB during the POR because the Department was not presented with supporting documents identifying such purchases. The Department also learned from a Dongguan Kongwan official that a certain float glass supplier is located in India even though Dongguan Kongwan's questionnaire responses reported this supplier as located in Thailand. *See id.*

Moreover, Dongguan Kongwan failed to provide source documents to corroborate its purchase of market economy transportation services for the transportation of PVB from its supplier to Dongguan Kongwan's production facility. For the certain factors of production that were not identified as being purchased from market economy or nonmarket economy suppliers in Dongguan Kongwan's questionnaire responses, Dongguan Kongwan failed to provide documents to demonstrate whether these certain factors were transported to Dongguan Kongwan's facility using market economy transportation providers. Additionally, Dongguan Kongwan did not provide documents to indicate whether float glass of the unreported color was delivered to Dongguan Kongwan's facility by a market economy transportation provider, or whether the unreported factors discovered during the plant tour were delivered to Dongguan Kongwan by a market economy transportation provider. *See Verification Memorandum* at p. 27–29.

During verification, Dongguan Kongwan stated that it did not keep any production specification documents for the various models of windshields that it produces, which would have allowed the Department to examine Peaceful City's control number allocation of the various models of subject merchandise. However, the Department discovered that Dongguan Kongwan does in fact keep product specifications records labeled "processing requirements," which describe specific manufacturing techniques for producing windshields of various models. *See Verification Memorandum,* at p. 5.

Lastly, Dongguan Kongwan failed to prepare documents demonstrating its accounting practice, as requested in the Department's verification outline and by the Department during the course of Dongguan Kongwan's verification. *See Peaceful City and Dongguan Kongwan's Verification Outline* at p. 6–7. Specifically, Dongguan Kongwan did not present source documents to substantiate the manner in which expenses are booked throughout the accounting process. *See Verification Memorandum* at p. 4; *Peaceful City and Dongguan Kongwan's Verification Outline* at p. 6–7; *Peaceful City and Dongguan Kongwan's Verification Report* at p. 11.

B. Significantly Impeding Verification

The Department additionally finds that the use of facts otherwise available is warranted pursuant to section 776(a)(2)(C) of the Act, which states that the Department may use facts otherwise available in reaching the applicable determination if, among other factors, the respondent "significantly impedes a proceeding."

Peaceful City and Dongguan Kongwan were unprepared for verification and their unpreparedness significantly impeded the verification process. The Department afforded Peaceful City and Dongguan Kongwan sufficient opportunity to subject their documents to a full and complete verification by submitting the verification outline to Peaceful City and Dongguan Kongwan 10 days prior (*i.e.*, March 12, 2004) to the commencement of verification. *See Peaceful City and Dongguan Kongwan's Verification Outline.* At no time prior to the verification did Peaceful City or Dongguan Kongwan contact the Department with questions about verification procedures, documents to prepare for verification, or the verification outline, nor did either company indicate that the time allocated for the verification was insufficient.

During the first day of Peaceful City's two-day sales verification, the Department discovered that Peaceful City did not have many source documents prepared for review pertaining to its corporate structure, accounting process and sales process. The Department had specific instructions in its verification outline describing the items that will be subject to verification. As a result of Peaceful City's unpreparedness, the Department made piecemeal requests for documents in order to compile a verification record for each item subject to verification. *See Verification Memorandum* at p. 2.

On the first day of Dongguan Kongwan's factors of production verification, the Department asked Dongguan Kongwan's counsel whether source document evidentiary packages were prepared for the Department's review. Dongguan Kongwan's counsel responded affirmatively. However, upon beginning verification, the Department discovered that Dongguan Kongwan had few source documents prepared for review and no evidentiary packages to submit to the Department as verification exhibits, despite the specific instructions given in the verification outline. Again, the Department found it necessary to help Dongguan Kongwan compile a verification record by requesting Dongguan Kongwan to provide certain source documents individually. *See Peaceful City and Dongguan Kongwan's Verification Report* at p. 2–3. Often, when the Department requested to review general documents related to a specific verification item, Dongguan Kongwan did not openly or promptly disclose the types of documents it ordinarily retained in relation to the Department's request, but did produce certain documents that were related to the Department's request, after repeated

requests for relevant documents. As a result, Dongguan Kongwan's lack of prompt disclosure delayed the verification process, and hindered the Department's ability to obtain many documents necessary for review of certain verification items in a timely manner. *See Peaceful City and Dongguan Kongwan's Verification Report* at p. 3. Moreover, many times during Dongguan Kongwan's verification, the Department requested certain source documents and waited for significant amounts of time for Dongguan Kongwan officials to search for the requested documents in their business files. Upon retrieving company documents, Dongguan Kongwan officials also spent a considerable amount of time selecting the relevant data, from multiple data sets in the documents, to present to the Department pursuant to its request. *See id.* Since Dongguan Kongwan was unprepared for verification in the manner requested by the Department, and since Dongguan Kongwan used much of the time allotted for verification to retrieve and review source documentation, there remained insufficient time to complete Dongguan Kongwan's factors of production verification. *See Peaceful City and Dongguan Kongwan's Verification Report*, at p. 20–29.

C. Information Could Not Be Verified

The Department additionally finds that the use of facts otherwise available is warranted pursuant to section 776(a)(D) of the Act, which states that the Department may use facts otherwise available in reaching the applicable determination if, among other factors, the respondent "provides * * * information but the information cannot be verified." The Department was unable to verify the usage rates for the majority of Dongguan Kongwan's factors of production reported in its questionnaire responses because Dongguan Kongwan did not present source documents to substantiate its reported usage rates for these factors. *See Verification Memorandum.* In addition, Dongguan Kongwan did not provide source documents to substantiate its market economy purchase of PVB, its suppliers' freight distances, and its purchases of market economy transportation services for the transportation of PVB from the supplier to Dongguan Kongwan's production facility. As a result, the Department was unable to substantiate any of these data as reported in Dongguan Kongwan's questionnaire responses. *See Peaceful City and Dongguan Kongwan's Verification Report* at p. 20–29.

Moreover, as explained above, Peaceful City was unable to substantiate through source documents the amount paid to an affiliate for purchases that were reported in its audited financial statements, and Dongguan Kongwan did not provide source documents to demonstrate its accounting practices. *See Peaceful City and Dongguan Kongwan's Verification Report* at p. 9–11.

II. Adverse Facts Available

The Department finds that both Peaceful City and Dongguan Kongwan failed to act to the best of their ability in supplying the Department with the requested information. Section 776(b) of the Act states that if an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information by the Department, the Department may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available, in reaching the applicable determination.

Peaceful City

Peaceful City failed to act to the best of its ability in presenting documents, in the manner requested by the Department in its verification outline, to adequately demonstrate its corporate structure, accounting practices and sales process to the Department. *See Peaceful City and Dongguan Kongwan's Verification Outline.* The information necessary to prepare complete verification exhibits pertaining to corporate structure, accounting practices, and sales process was explained in the verification outline, and the verification outline was submitted to Peaceful City 10 days prior to Peaceful City's verification. However, despite having sufficient notice, Peaceful City failed to prepare its source documents prior to the commencement of verification. Peaceful City never contacted the Department with questions concerning the preparation of verification exhibits prior to the Department's verification. Further, the fact that Peaceful City was able to procure certain documents listed in the verification outline, after the Department's verbal requests for them during verification, evidences the fact that Peaceful City did have such documents available and had the ability to comply, but failed to promptly and voluntarily provide the necessary information to the Department. *See Verification Memorandum* at p. 2.

Furthermore, the Department's Section A Questionnaire required Peaceful City to report all companies with which it was affiliated during the POR, and Peaceful City failed to report an affiliate. References to Peaceful City's affiliate are made in Peaceful City's accounting documents and financial statements. *See Peaceful City and Dongguan Kongwan's Verification Report*, Exhibits 3 and 6. Therefore, it is clear that Peaceful City had knowledge of this affiliate. Also, Peaceful City was able to produce a document showing the cancellation of the unreported affiliates' business license in 2002, suggesting that the manager of Peaceful City, who was conducting Peaceful City's verification, had knowledge of the unreported affiliate but failed to disclose this information in either Peaceful City's questionnaire responses or as a pre-verification correction. Moreover, the unreported affiliate was owned by Peaceful City's shareholders, one of whom is a director of Peaceful City and was present during Peaceful City's verification. This director also failed to disclose the affiliation in Peaceful City's questionnaire responses or as a pre-verification correction. *See Verification Memorandum* at p. 3–6. The facts on the record demonstrate that Peaceful City had knowledge of this affiliate and had the ability to report the affiliate to the Department. Peaceful City's failure to report its affiliate evidences a failure to cooperate to the best of its ability.

Also, Peaceful City failed to act to the best of its ability when it failed to report the brokerage and handling charge that it incurred for its U.S. sale during the POR. The Department's Section C Questionnaire and the verification outline submitted to Peaceful City request documentation of brokerage and handling charges associated with the sale of subject merchandise during the POR. The Department discovered an invoice from a Chinese shipping company that referenced Peaceful City's brokerage and handling charges for the shipment of subject merchandise from Dongguan Kongwan to the port of exit. Although multiple references to this shipping company are made in Peaceful City's accounting records during the POR, this brokerage and handling charge was not reported in any of Peaceful City's responses or as a pre-verification correction. *See Verification Memorandum* at p. 19–20. Based on these failures, the Department determines that Peaceful City failed to cooperate to the best of its ability.

Dongguan Kongwan

The verification outline submitted to Dongguan Kongwan provided Dongguan Kongwan sufficient notice and time to prepare source documents to corroborate its questionnaire responses for verification, and Dongguan

Kongwan's failure to prepare source documents, despite having adequate notice, evidences its lack of cooperation with the Department's standard requests. Dongguan Kongwan failed to prepare documents in a timely manner to demonstrate its corporate structure. Dongguan Kongwan did not adequately prepare documents to demonstrate its accounting practices, the characteristics of merchandise produced, its sales and production process, its quantity and value of the U.S. sale of subject merchandise during the POR, certain factor of production usage rates, and certain market economy transportation charges. *See Peaceful City and Dongguan Kongwan's Verification Outline* at p. 17–21. Although information necessary to prepare complete verification exhibits pertaining to these verification topics was provided in the verification outline, Dongguan Kongwan did not comply with the requests to prepare all source documents prior to the commencement of verification. Additionally, Dongguan Kongwan never contacted the Department with questions concerning the preparation of verification exhibits prior to the Department's verification. *See Verification Memorandum* at p. 2. Furthermore, the fact that Dongguan Kongwan was able to procure certain documents listed in the verification outline, but only after the Department made a verbal request for them during verification, evidences the fact that Dongguan Kongwan had the ability to prepare the requested documentation, but failed to promptly and voluntarily provide it to the Department. *See Verification Memorandum* at p. 8–9. Therefore, the Department finds that Dongguan Kongwan failed to cooperate to the best of its ability by not providing adequate source documents prior to the commencement of verification.

Specifically, Dongguan Kongwan did not act to the best of its ability in reporting the usage rate of float glass, by color, in its production of subject merchandise during the POR. Dongguan Kongwan stated that it used its work shift records to prepare Dongguan Kongwan's questionnaire responses about its float glass usage rate, and Dongguan Kongwan reported that float glass of a certain color "was not used to produce the subject merchandise." *See Third Section D Supplemental Questionnaire response* at p. 2, dated January 27, 2004. However, during verification, the Department examined the same work shift records that Dongguan Kongwan used to prepare its questionnaire responses and discovered that a significant quantity of float glass used to produce subject merchandise during the POR was float glass of the unreported color. *See Verification Memorandum* at p. 5–6.

Dongguan Kongwan also failed to report in its questionnaire responses the use of several additional factors of production, which the Department discovered during its plant tour of Dongguan Kongwan's production facility. These unreported factors were in plain view and easily detectable when conducting a simple survey of Dongguan Kongwan's production facility. *See Verification Memorandum* at p. 6.

Although Dongguan Kongwan presumably used source documents to report its factors of production in its questionnaire responses, Dongguan Kongwan failed to prepare and present these source documents to the Department in a timely manner. *See id.* Dongguan Kongwan failed to present documents to reconcile the usage rates for 21 of 25 factors of production, including the unreported factors discovered during the course of verification. *See Peaceful City and Dongguan Kongwan's Verification Report* at p. 20–25. The Department requested to begin its verification of Dongguan Kongwan's factor usage rates and costs of production on the second day of verification. Upon learning that Dongguan Kongwan was unprepared for this segment of verification, the Department explained in detail the importance of having source documents with which to corroborate Dongguan Kongwan's questionnaire responses. The Department also explained to Dongguan Kongwan the process of compiling documents as verification exhibits. *See Verification Memorandum* at p. 9. The verification outline, which was submitted to Dongguan Kongwan 12 days prior to its verification, also detailed instructions on preparing verification packages and provided examples of source documents to be included in its verification package. As a result of its unpreparedness, Dongguan Kongwan had to use time during verification to compile source documents, and Dongguan Kongwan only provided documents to substantiate certain items from its questionnaire responses (*e.g.*, float glass and indirect labor hours) and did not present many source documents until the final day of verification. *See Verification Memorandum* at p. 5–7. Also, Dongguan Kongwan's verification exhibits were inadequate in two respects. First, Dongguan Kongwan did not attempt to explain or evidence its usage rate of the float glass of the reported color for the production of subject merchandise during the POR. Second, Dongguan Kongwan understated its usage rate of indirect labor hours in its questionnaire responses by approximately 3% when compared with the actual indirect labor hours detailed in Dongguan Kongwan's attendance records for production management personnel. *See Peaceful City and Dongguan Kongwan's Verification Report*, Exhibit L.

Dongguan Kongwan failed to follow the instructions detailed in the verification outline and comply with the Department's requests at verification by failing to substantiate its purchases of float glass of the reported color and of PVB from market economy suppliers. The Department's questionnaire also requires information about whether raw material inputs are purchased from market or nonmarket economy suppliers, and Dongguan Kongwan failed to report whether certain other inputs were purchased from market economy or nonmarket economy suppliers, in its questionnaire responses or as pre-verification correction. *See Peaceful City and Dongguan Kongwan's Verification Report* at p. 11. Further, Dongguan Kongwan never explained during verification nor provided source documents to evidence its usage rate of certain unreported factors, whether these factors were purchased from market economy or nonmarket economy suppliers, any market economy transportation costs paid for the shipment of the raw materials to Dongguan Kongwan's production facility, and the supplier's freight distances to Dongguan Kongwan. *See Peaceful City and Dongguan Kongwan's Verification Report* at p. 25–29.

Dongguan Kongwan also failed to prepare documents demonstrating its accounting practice, as requested in the Department's verification outline and by the Department during the course of Dongguan Kongwan's verification. Even though Dongguan Kongwan was able to prepare a flow chart illustrating its accounting flow of source documents from the invoice level up to its financial statements, Dongguan Kongwan failed to evidence its accounting process through specific source documents. Moreover, during verification, Dongguan Kongwan stated that it would prepare its chart of accounts for the Department's review, but ultimately failed to provide the document before the end of verification. *See Peaceful City and Dongguan Kongwan's Verification Report* at p. 11.

Additionally, Dongguan Kongwan did not cooperate with the Department's request during verification to examine its product specification documents,

which describe manufacturing techniques for producing various windshield models. Dongguan Kongwan replied that it did not possess such documents. However, the Department found that such documents did exist when it discovered product specification documents labeled "processing requirements" during its verification of indirect labor hour usage rates. *See Peaceful City and Dongguan Kongwan's Verification Report* at p. 5.

Dongguan Kongwan failed to follow instructions given in the verification outline to have company officials, who could discuss the production and sales processes of Dongguan Kogwan with the Department, available during verification. The Department also made this request during verification. *See Peaceful City and Dongguan Kongwan's Verification Outline* at p. 2–4; *Peaceful City and Dongguan Kongwan's Verification Report* at p. 15. However, Dongguan Kongwan's production and sales officials were not made available to speak to the Department until the afternoon of the first day and the morning of the second day of Dongguan Kongwan's verification. Although Dongguan Kongwan's accounting official and manager were available during the course of Dongguan Kongwan's entire verification, these officials refused to provide basic information about the manner in which orders arrive from Peaceful City, are relayed to the production department, and whether price lists or production specification lists exist in the ordinary course of business. *See Peaceful City and Dongguan Kongwan's Verification Report* at p. 5.

The result of Peaceful City's and Dongguan Kongwan's verifications was that both companies failed to submit source documents in a timely manner in support of the information reported in their questionnaire responses, impeded verification by being unprepared and therefore slowing the progress of their respective verifications considerably, and did not provide the Department with documents to substantiate the vast majority of its factor usage rates, market economy purchases, suppliers' distances, and purchases of market economy transportation service that were reported in the questionnaire responses. In all of their failures to provide sufficient documentation to support their responses to the Department's questionnaires, Department officials made observations throughout verification that the companies had the ability to comply with the Department's requests but failed to do so. *See Peaceful City and Dongguan Kongwan's Verification Report*. Based on these failures at verification, Peaceful City and Dongguan Kongwan failed to cooperate to the best of their ability with the Department's requests for information. Therefore, the Department determines that the application of total adverse facts available is warranted for Peaceful City and Dongguan Kongwan, pursuant to Section 776(a) and (b) of the Act.

D. Adverse Facts Available

In deciding which facts to use when an adverse inference is warranted under Section 776(b) of the Act, the Department is authorized to rely on information derived from (1) the petition, (2) a final determination in the investigation, (3) any previous review or determination, or (4) any information placed on the record. *See* 19 CFR 351.308(C)(1).

As adverse facts available, we have used the highest margin from any segment of the proceeding, which is the PRC-wide rate established in the less than fair value investigation. This was the highest rate calculated in the initiation stage of the investigation from information provided in the petition. The Department determines that this information is the most appropriate to use in assigning a dumping margin to respondents Peaceful City and Dongguan Kongwan, because the other rates from the investigation and this review are not adverse to the interests of respondents Peaceful City and Dongguan Kongwan, there is no information from a prior review, and the use of any other information placed on the record would yield distortive results, as explained below.

In reaching this decision to use total adverse facts available, the Department has considered the significance of the information that was missing or unverifiable. Usage rates for many factors of production could not be reviewed or corroborated during verification, market economy purchases of certain factors were not substantiated, market economy transportation of certain raw material purchases were not demonstrated, and the suppliers' freight distances to Dongguan Kongwan's production facility were not substantiated. Therefore, the Department could not reasonably construct a reliable and accurate margin using any of respondents' information given that a vast amount of information is missing from the record and information on the record is unsupported by documentary evidence.

III. Corroboration of Secondary Information

Section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation as facts available, it must, to the extent practicable, corroborate that information from independent sources reasonably at its disposal. Secondary information is defined in the SAA as "information derived from the petition that gave rise to the investigation or review, the final determination concerning subject merchandise, or any previous review under section 751 concerning the subject merchandise." *See* SAA at 870. The SAA provides that to "corroborate" means simply that the Department will satisfy itself that the secondary information to be used has probative value. *See Id.* The SAA also states that independent sources used to corroborate may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation. *See Id.* As noted in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 61 FR 57391, 57392 (November 6, 1996), to corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information used.

The adverse facts available rate we are applying for the current review was corroborated in the investigation. *See Memorandum from Jon Freed to Robert Bolling: Preliminary Results in the Antidumping Administrative Review of Automotive Replacement Glass Windshields from the People's Republic of China: First Administrative Review Corroboration Memorandum*, dated April 29, 2004, (*"First Review Corroboration Memo"*), with attached, *Memorandum from Edward Yang to Joseph Spetrini: Preliminary Determination in the Antidumping Investigation of Automotive Replacement Glass Windshields from the People's Republic of China: Total Facts Available Corroboration Memorandum for All Others Rate*, dated September 10, 2001 (*"Corroboration Memo"*). The Department received no information to date that warrants revisiting the issue of the reliability of the rate calculation itself. *See e.g.*,

Certain Preserved Mushrooms from the People's Republic of China: Final Results and Partial Rescission of the New Shipper Review and Final Results and Partial Rescission of the Third Antidumping Duty Administrative Review, 68 FR 41304, 41307–41308 (July 11, 2003) (The Department relied on the corroboration memorandum from the investigation to assess the reliability of the petition rate as the basis for an adverse facts available rate in the administrative review). No information has been presented in the current review that calls into question the reliability of this information. Thus, the Department finds that the information is reliable.

With respect to the relevance aspect of corroboration, the Department will consider information reasonably at its disposal to determine whether a margin continues to have relevance. Where circumstances indicate that the selected margin is not appropriate as adverse facts available, the Department will disregard the margin and determine an appropriate margin. For example, in *Fresh Cut Flowers from Mexico: Final Results of Antidumping Administrative Review*, 61 FR 6812 (February 22, 1996), the Department disregarded the highest margin in that case as adverse best information available (the predecessor to facts available) because the margin was based on another company's uncharacteristic business expense resulting in an unusually high margin. Similarly, the Department does not apply a margin that has been discredited. *See D&L Supply Co.* v. *United States*, 113 F.3d 1220, 1221 (Fed. Cir. 1997) (the Department will not use a margin that has been judicially invalidated).

To assess the relevancy of the rate used, the Department compared the margin calculations of other respondents in this administrative review with the petition rate. The Department found that the petition rate was within the range of the highest margins reported on the record of this administrative review. *See First Review Corroboration Memo* at Attachment 2. Since the record of this administrative review contains margins within the range of the petition margin, we determine that the rate from the petition continues to be relevant for use in this administrative review. Further, the rate used is currently applicable to all exporters subject to the PRC-wide rate.

As the petition rate is both reliable and relevant, we determine that it has probative value. As a result, the Department determines that the petition rate is corroborated for the purposes of this administrative review and may reasonably be applied to Peaceful City and Dongguan Kongwan as a total adverse facts available rate. Accordingly, we determine that the highest rate from any segment of this administrative proceeding (*i.e.*, the calculated rate of 124.50 percent) is in accord with section 776(c)'s requirement that secondary information be corroborated (*i.e.*, have probative value).

Consequently, we are applying a single antidumping rate—the highest rate from any segment of this administrative proceeding—to Peaceful City and Dongguan Kongwan's exports based on Peaceful City and Dongguan Kongwan's failure to be reasonably prepared during the verification and their resulting failure to substantiate the majority of their factors and costs of productions, which were reported in their questionnaire responses. *See, e.g., Final Determination of Sales at Less Than Fair Value: Synthetic Indigo from the People's Republic of China*, 65 FR 25706, 25707 (May 3, 2000).

Because this is a preliminary margin, the Department will consider all margins on the record at the time of the final results for the purpose of determining the most appropriate final margin based on total adverse facts available. *See Notice of Preliminary Determination of Sales at Less Than Fair Value: Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation*, 65 FR 1139 (January 7, 2000).

Date of Sale

Section 351.401(i) of the Department's regulations state that "in identifying the date of sale of the subject merchandise or foreign like product, the Secretary normally will use the date of invoice, as recorded in the exporter or producer's records kept in the normal course of business."

Pilkington

After examining the sales documentation placed on the record by the respondent, we preliminarily determine that invoice date is the most appropriate date of sale for this respondent. We made this determination based on evidence on the record which demonstrates that the contracts used by the respondent establish the material terms of sale to the extent required by our regulations in order to rebut the presumption that invoice date is the proper date of sale. *See Notice of Preliminary Determination of Sales at Less Than Fair Value: Saccharin From the People's Republic of China*, 67 FR 79054 (December 27, 2002).

Fuyao

After examining the questionnaire responses and the sales documentation placed on the record by this respondent, we preliminarily determine that invoice date is the most appropriate date of sale for the respondent. The purchase order date is the only other point on which the date of sale could be based for Fuyao's U.S. sales. However, the record of this administrative review indicates that the material terms of Fuyao's U.S. transactions do change between the purchase order date and the invoice date. Thus, the Department preliminarily determines that invoice date is the most appropriate date of sale for Fuyao.

Fair Value Comparisons

To determine whether sales of ARG to the United States by Pilkington and Fuyao were made at less than fair value, we compared export price ("EP") or constructed export price ("CEP") to normal value, as described in the "Export Price," "Constructed Export Price" and "Normal Value" sections of this notice.

Export Price

In accordance with section 772(a) of the Act, EP is the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under section 772(c) of the Act.

Constructed Export Price

In accordance with section 772(b) of the Act, CEP is the price at which the subject merchandise is first sold (or agreed to be sold) after the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under section 772(c) of the Act.

In accordance with section 772(a) of the Act, we used EP for those sales of Pilkington and Fuyao where the subject merchandise was sold directly to the unaffiliated customers in the United States prior to importation and because CEP was not otherwise indicated for those transactions. In accordance with section 772(b) of the Act, we used CEP for those sales of Pilkington and Fuyao where the subject merchandise was first sold to the unaffiliated U.S. customer after importation to the United States. We compared normal value to

individual EP and CEP transactions, in accordance with section 777A(d)(2) of the Act.

Pilkington

We calculated EP for Pilkington based on delivered prices to unaffiliated purchasers in the United States. We made deductions from the U.S. sale price for movement expenses in accordance with section 772(c)(2)(A) of the Act. These included foreign inland freight from the plant to the port of exportation.

For Pilkington's CEP sales, we based the CEP on FOB, or delivered, prices to unaffiliated purchasers in the United States and, where appropriate, we deducted discounts. In accordance with section 772(d)(1) of the Act, the Department deducted credit expenses, inventory carrying costs, and indirect selling expenses, which related to commercial activity in the United States. We also made deductions for movement expenses, which included foreign inland freight from the plant to the port of exportation, domestic brokerage, ocean freight, marine insurance, U.S. brokerage, and inland freight from warehouse to unaffiliated U.S. customer. Where appropriate, in accordance with sections 772(d)(3) and 772(f) of the Act, we deducted CEP profit. In addition, at the U.S. verification of PNA's sales data, the Department found that Pilkington had short-term loans and kept subject merchandise in a warehouse in the United States during the POR. Based on these findings, the Department has calculated U.S. credit expenses and U.S. inventory carrying costs from information provided by PNA during verification and deducted these expenses from the reported CEP sales price. *See Pilkington U.S. Verification Report* at pp 7 and 11, Analysis Memo at 2.

Fuyao

We calculated EP for Fuyao based on delivered prices to unaffiliated purchasers in the United States. We made deductions from the U.S. sale price for movement expenses in accordance with section 772(c)(2)(A) of the Act. These included foreign inland freight from the plant to the port of exportation, domestic brokerage, ocean freight, marine insurance, U.S. brokerage, inland freight from port to unaffiliated U.S. customer, and other freight revenue.

For Fuyao's CEP sales, we based the CEP on FOB, or delivered, prices to unaffiliated purchasers in the United States and, where appropriate, we deducted discounts. In accordance with section 772(d)(1) of the Act, the Department deducted credit expenses and indirect selling expenses, which related to commercial activity in the United States. We also made deductions for movement expenses, which included foreign inland freight from the plant to the port of exportation, domestic brokerage, ocean freight, marine insurance, U.S. brokerage, inland freight from port to unaffiliated U.S. customer, and other freight revenue. Finally, where appropriate, in accordance with sections 772(d)(3) and 772(f) of the Act, we deducted CEP profit.

Normal Value

Section 773(c)(1) of the Act provides that the Department shall determine the normal value using a factors-of-production methodology if: (1) The merchandise is exported from an non-market economy country; and (2) the information does not permit the calculation of normal value using home-market prices, third-country prices, or constructed value under section 773(a) of the Act. The Department will base normal value on factors of production because the presence of government controls on various aspects of these economies renders price comparisons and the calculation of production costs invalid under our normal methodologies.

Factors of production include: (1) Hours of labor required; (2) quantities of raw materials employed; (3) amounts of energy and other utilities consumed; and (4) representative capital costs. We used factors of production reported by respondents for materials, energy, labor, by-products, and packing.

In accordance with 19 CFR 351.408(c)(1), the Department will normally use publicly available information to value factors of production, but when a producer sources an input from a market economy and pays for it in market economy currency, the Department will normally value the factor using the actual price paid for the input. *See* 19 CFR 351.408(c)(1); *see also Lasko Metal Products* v. *United States*, 43 F. 3d 1442, 1445–1446 (Fed. Cir. 1994). However, when the Department has reason to believe or suspect that such prices may be distorted by subsidies, the Department will disregard the market economy purchase prices and use surrogate values to determine the normal value. *See Notice of Amended Final Determination of Sales at Less than Fair Value: Automotive Replacement Glass Windshields from the People's Republic of China ("PRC")*, 67 FR 11670 (March 15, 2002).

Fuyao and Pilkington reported that some of their inputs were sourced from market economies and paid for in a market economy currency. *See Factor Valuation Memorandum* for a listing of these inputs. Pursuant to section 351.408(c)(1) of our regulations, we used the actual price paid by respondents for inputs purchased from a market-economy supplier and paid for in a market-economy currency, except when prices may have been distorted by subsidies. Specifically, we did not include any market economy purchases from Indonesia, Thailand or South Korea (nor import statistics from the these countries, *i.e.*, for material inputs and packing materials, by-product credits) because the Department determined in the investigation that Indonesia, Korea, and Thailand maintain broadly available, non-industry specific export subsidies that may benefit all exporters to all markets. The Department is not in a position to verify whether or not the reported market economy purchases were distorted in fact by these non-industry specific export subsidies. However, the fact that each of these countries maintain non-industry specific export subsidies to all exporters gives rise to the Department's presumption that the exporters of float glass and other reported market economy inputs to Fuyao and Pilkington may have benefitted from these non-industry specific export subsidies. Therefore, we will not use export prices from these countries, either as market economy purchases or import statistics into India, the surrogate country. *See Final Determination of Sales at Less Than Fair Value: Certain Automotive Replacement Glass Windshields From The People's Republic of China*, 67 FR 6482 (February 12, 2002), and accompanying *Issues and Decision Memorandum* at Comment 1.

Factor Valuations

In accordance with section 773(c) of the Act, we calculated NV based on factors of production reported by respondents for the POR. To calculate NV, the reported per-unit factor quantities were multiplied by publicly available Indian surrogate values (except as noted below). In selecting the surrogate values, we considered the quality, specificity, and contemporaneity of the data. As appropriate, we adjusted input prices by including freight costs to make them delivered prices. Specifically, we added to Indian import surrogate values a surrogate freight cost using the shorter of the reported distance from the domestic supplier to the factory or the

distance from the nearest seaport to the factory where appropriate (*i.e.*, where the sales terms for the market economy inputs were not delivered to the factory). This adjustment is in accordance with the Court of Appeals for the Federal Circuit's decision in *Sigma Corp.* v. *United States*, 117 F. 3d 1401 (Fed. Cir. 1997). For a detailed description of all surrogate values used for respondents, *see Factor Valuation Memorandum*.

Except as noted below, we valued raw material inputs using the weighted-average unit import values derived from the World Trade Atlas® online ("Indian Import Statistics"). *See Factor Valuation Memorandum*. The Indian Import Statistics obtained from the World Trade Atlas were published by the DGCI&S, Ministry of Commerce of India in August 2003 and were reported in U.S. dollars. Where we could not obtain publicly available information contemporaneous to the POR with which to value factors, we adjusted the surrogate values using the Indian Wholesale Price Index ("WPI") as published in the International Financial Statistics of the International Monetary Fund.

Pilkington

Pilkington reported that it sourced all of its raw material inputs from market economy suppliers and paid for them in market economy currencies. Pilkington reported market economy purchases for clear float glass, colored float glass, PVB, ceramic ink, mirror buttons, silver paste, and powder. For these preliminary results, the Department has used the market economy prices for the inputs listed above, in accordance with 19 CFR 351.408(c)(1), with one exception. At verification, the Department found that Pilkington's reported market economy purchases of float glass were made from suppliers based in Thailand, and Indonesia. *See Pilkington Chinese Verification Report* at 18. Based on the fact that the Department has reason to believe or suspect that market economy prices from Indonesia, Thailand, and South Korea may be subsidized, we have disallowed the use of the companies' reported actual prices for float glass and have valued clear float glass and colored float glass using Indian Import Statistics.

Pilkington reported that it recovers shattered glass. The Department has offset the respondents' cost of production by the amount of a reported by-product (or a portion thereof) where respondents indicated that the by-product was sold and/or where the record evidence clearly demonstrates that the by-product was re-entered into the production process. *See Factor Valuation Memorandum* for a complete discussion of by-product credits given and the surrogate values used. To value recovered shattered glass, the Department inflated the values used in the investigation. In the investigation, the Department valued recovered scrap glass by using data from India Infoline for the period of April 1999–March 2000. *See Factor Valuation Memorandum* for a full discussion.

To value electricity, we used values from the International Energy Agency to calculate a surrogate value in India for 1997, and adjusted for inflation. The Department used these figures in the investigation. No interested parties submitted information or comments regarding surrogate values and the Department was unable to find a more contemporaneous surrogate value. Therefore, the Department inflated the values used in the investigation, which results in a surrogate value for electricity of $0.0759/kilowatt-hour.

To value water, we used the same information as used in the investigation. In the investigation, the Department used the average water tariff rate as reported in the Asian Development Bank's *Second Water Utilities Data Book: Asian and Pacific Region* (published in 1997), based on the average of the Indian rupee per cubic meter rate for three cities in India during 1997. No interested parties submitted information or comments regarding surrogate values and the Department was unable to find a more contemporaneous surrogate value. Therefore, the Department inflated the values used in the investigation, which results in a surrogate value for water of $0.4416/metric ton.

For direct, indirect, crate building labor, and packing labor, consistent with section 351.408(c)(3) of the Department's regulations, we used the PRC regression-based wage rate as reported on Import Administration's home page, Import Library, Expected Wages of Selected NME Countries, revised in September 2003, *http://ia.ita.doc.gov/wages/01wages/01wages.html*. The source of these wage rate data on the Import Administration's web site is the Yearbook of Labour Statistics 2002, ILO, (Geneva: 2002), Chapter 5B: Wages in Manufacturing. The years of the reported wage rates range from 1996 to 2001. Because this regression-based wage rate does not separate the labor rates into different skill levels or types of labor, we have applied the same wage rate to all skill levels and types of labor reported by the respondent.

To value factory overhead, and selling, general and administrative expenses ("SG&A"), we used the audited financial statements for the 2002 financial statement from an Indian producer of laminated and tempered automotive safety glass, Saint-Gobain Sekurit India Limited ("St.-Gobain"). *See Factor Valuation Memorandum* for a full discussion of the calculation of these ratios from St.-Gobain's financial statements.

To value profit, we used the profit experience of Asahi India Safety Glass Limited ("Asahi") for the period April 2002–March 2003, because St.-Gobain's 2002 financial statement shows that it experienced a loss for that time period. St.-Gobain's financial statement was the only surrogate financial statement submitted on the record of this administrative review by an interested party. In order to account for an element of profit in the normal value calculation, the Department obtained Asahi's financial statement from *http://www.asahiindia.com*. We note that the decision to use Asahi's profit experience only (*i.e.*, as opposed to using an average of all profit figures from the financial statements on the record) is in accordance with Department practice. *See Notice of Final Determination of Sales at Less Than Fair Value: Steel Concrete Reinforcing Bars from the People's Republic of China*, 66 FR 33522 (June 22, 2001) and accompanying Issues and Decision Memorandum at Comment 8. The Department disregarded the use of SAIL's financial statements in order to derive "an element of profit as intended by the Statement of Administrative Action (SAA) accompanying the Uruguay Agreements Act."). Furthermore, this practice has been affirmed by the Court of International Trade ("CIT"). *See also Rhodia Inc.* v. *United States*, 240 F. Supp. 2d 1247, 1251, 1254 (CIT 2002). For a further discussion of the surrogate value for profit, see *Factor Valuation Memorandum*.

Finally, we used *Indian Import Statistics* to value material inputs for packing. We used *Indian Import Statistics* data for the period September 2001 through March 31, 2003. *See Factor Valuation Memorandum*.

Fuyao

Fuyao reported that it sourced all of its raw material inputs from market economy suppliers and paid for them in market economy currencies. *See Factor Valuation Memorandum* at page 3. For these preliminary results, in accordance with 19 CFR 351.408(c)(1), the Department has used the market economy prices for Fuyao's inputs with

one exception. Specifically, based on the fact that the Department has reason to believe or suspect that market economy prices from Indonesia, Thailand, and South Korea may be subsidized, we have disallowed the use of the companies' reported actual prices for clear float glass and have valued it using Indian Import Statistics.

As explained in the preamble to 19 CFR 351.408(c)(1), where the quantity of the input purchased from market economy suppliers was insignificant, we do not rely on the price paid by an NME producer to a market economy supplier. *See Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27366 (May 19, 1997). Fuyao's reported information demonstrates that the quantity of one of its inputs which it sourced from market economy suppliers was so small as to be insignificant when compared to the quantity of the same input it sourced from PRC suppliers. *See Factor Valuation Memorandum* for Fuyao's reported percentage from market economy suppliers. Therefore, as the amount of this reported market economy input is insignificant, we did not use the price paid by Fuyao for this input and instead used *Indian Import Statistics* data.

Fuyao reported that it recovered scrap PVB, glass pieces, and shattered glass. The Department has offset the respondents' cost of production by the amount of a reported by-product (or a portion thereof) where Fuyao indicated that the by-product was sold and/or where the record evidence clearly demonstrates that the by-product was re-entered into the production process. *See Factor Valuation Memorandum* for a complete discussion of by-product credits given and the surrogate values used. To value recovered shattered glass and glass pieces, the Department inflated the values used in the investigation. In the investigation, the Department valued recovered scrap glass and glass pieces by using data from India Infoline for the period of April 1999–March 2000. *See Factor Valuation Memorandum* for a full discussion. In finding surrogate values for recovered scrap PVB, the Department used the HTS number for Recovered PVB that was used in the investigation to derive a surrogate value from Indian Import Statistics.

The surrogate values for packing, labor, electricity, water, overhead, SG&A, and profit were applied in the same manner as explained above in the Pilkington section.

Weighted-Average Dumping Margin

The weighted-average dumping margins are as follows:

AUTOMOTIVE REPLACEMENT GLASS WINDSHIELDS FROM THE PRC

Producer/manufacturer/exporter	Weighted-average margin (percent)
Fuyao	0.13
Peaceful City/Dongguan Kongwan	124.50
Pilkington	3.18

Disclosure

The Department will disclose calculations performed for these preliminary results to the parties within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b). Any interested party may request a hearing within 30 days of publication of these preliminary results. *See* 19 CFR 351.310(c). Any hearing, if requested, will be held two days after the scheduled date for submission of rebuttal briefs. *See* 19 CFR 351.310(d). Interested parties may submit case briefs and/or written comments no later than 30 days after the date of publication of these preliminary results of review. *See* 19 CFR 351.309(c)(ii). Rebuttal briefs and rebuttals to written comments, limited to issues raised in such briefs or comments, may be filed no later than 35 days after the date of publication. *See* 19 CFR 351.309(d). Further, we would appreciate that parties submitting written comments also provide the Department with an additional copy of those comments on diskette. The Department will issue the final results of this administrative review, which will include the results of its analysis of issues raised in any such comments, within 120 days of publication of these preliminary results, pursuant to section 751(a)(3)(A) of the Act.

Assessment Rates

Upon issuance of the final results, the Department will determine, and Customs and Border Protection shall assess, antidumping duties on all appropriate entries. The Department will issue appropriate assessment instructions directly to Customs and Border Protection upon completion of this review. If these preliminary results are adopted in our final results of review, we will direct Customs and Border Protection to assess the resulting rate against the entered customs value for the subject merchandise on each importer's/customer's entries during the POR.

Cash-Deposit Requirements

The following cash-deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for each of the reviewed companies will be the rate listed in the final results of review (except that if the rate for a particular company is *de minimis, i.e.*, less than 0.5 percent, no cash deposit will be required for that company); (2) for previously investigated companies not listed above, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original LTFV investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise; and (4) the cash deposit rate for all other manufacturers or exporters will continue to be the "PRC-wide" rate of 124.5 percent, which was established in the LTFV investigation. These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

Notification To Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

We are issuing and publishing these preliminary results of review in accordance with sections 751(a)(2)(B) and 777(i)(1) of the Act, and 19 CFR 351.221(b).

Dated: April 29, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. 04–10487 Filed 5–6–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–122–840]

Carbon and Certain Alloy Steel Wire Rod From Canada; Final Results of Antidumping Duty Changed Circumstances Review

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

ACTION: Notice of final results of antidumping duty changed circumstances review.

DATES: *Effective Date:* May 7, 2004.

SUMMARY: On February 25, 2004, the Department of Commerce (the Department) published a notice of initiation and preliminary results of changed circumstances review of the antidumping duty order on carbon and certain alloy steel wire rod from Canada. In it, the Department preliminary determined that only merchandise both produced and exported by the Stelco Group (Stelco, Inc. and Stelwire Ltd.) is excluded from the order. *See Notice of Initiation and Preliminary Results of Antidumping Duty Changed Circumstances Review*, 69 FR 8623 (February 25, 2004) (*Preliminary Results*). Interested parties were given an opportunity to comment on the preliminary results; the petitioners [1] submitted comments on March 26, 2004, endorsing our preliminary results. Since we received no other comments, the final results do not differ from the preliminary results of review.

FOR FURTHER INFORMATION CONTACT: Daniel O'Brien or Constance Handley, at (202) 482–1376 or (202) 482–0631, respectively; AD/CVD Enforcement Office 5, Group II, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW., Washington, DC 20230.

Background

The Stelco Group received a *de minimis* margin in the investigation and was excluded from the antidumping duty order. Several months after the publication of the antidumping duty order, the Department received requests for clarification regarding the Stelco Group's exclusion from the order. Specifically, parties inquired as to whether all products produced by the Stelco Group, or only those both produced and exported by the Stelco Group, are excluded from the antidumping order. These inquiries resulted from inconsistent language in the order and in our instructions to U.S. Customs and Border Protection (CBP), then known as the U.S. Customs Service, regarding the order.

On February 25, 2004, the Department published its preliminary results, finding that only merchandise both produced and exported by the Stelco Group is excluded from the order.

Scope of the Review

The merchandise covered by this order is certain hot-rolled products of carbon steel and alloy steel, in coils, of approximately round cross section, 5.00 mm or more, but less than 19.00 mm, in solid cross-sectional diameter.

Specifically excluded are steel products possessing the above-noted physical characteristics and meeting the Harmonized Tariff Schedule of the United States (HTSUS) definitions for (a) stainless steel; (b) tool steel; (c) high nickel steel; (d) ball bearing steel; and (e) concrete reinforcing bars and rods. Also excluded are (f) free machining steel products (*i.e.*, products that contain by weight one or more of the following elements: 0.03 percent or more of lead, 0.05 percent or more of bismuth, 0.08 percent or more of sulfur, more than 0.04 percent of phosphorus, more than 0.05 percent of selenium, or more than 0.01 percent of tellurium).

Also excluded from the scope are 1080 grade tire cord quality wire rod and 1080 grade tire bead quality wire rod. This grade 1080 tire cord quality rod is defined as: (i) Grade 1080 tire cord quality wire rod measuring 5.0 mm or more but not more than 6.0 mm in cross-sectional diameter; (ii) with an average partial decarburization of no more than 70 microns in depth (maximum individual 200 microns); (iii) "having no non-deformable inclusions greater than 20 microns and no deformable inclusions greater than 35 microns; (iv) having a carbon segregation per heat average of 3.0 or better using European Method NFA 04–114; (v) having a surface quality with no surface defects of a length greater than 0.15 mm; (vi) capable of being drawn to a diameter of 0.30 mm or less with 3 or fewer breaks per ton, and (vii) containing by weight the following elements in the proportions shown: (1) 0.78 percent or more of carbon, (2) less than 0.01 percent of aluminum, (3) 0.040 percent or less, in the aggregate, of phosphorus and sulfur, (4) 0.006 percent or less of nitrogen, and (5) not more than 0.15 percent, in the aggregate, of copper, nickel and chromium.

This grade 1080 tire bead quality rod is defined as: (i) Grade 1080 tire bead quality wire rod measuring 5.5 mm or more but not more than 7.0 mm in cross-sectional diameter; (ii) with an average partial decarburization of no more than 70 microns in depth (maximum individual 200 microns); (iii) "having no non-deformable inclusions greater than 20 microns and no deformable inclusions greater than 35 microns; (iv) having a carbon segregation per heat average of 3.0 or better using European Method NFA 04–114; (v) having a surface quality with no surface defects of a length greater than 0.2 mm; (vi) capable of being drawn to a diameter of 0.78 mm or larger with 0.5 or fewer breaks per ton; and (vii) containing by weight the following elements in the proportions shown: (1) 0.78 percent or more of carbon, (2) less than 0.01 percent of soluble aluminum, (3) 0.040 percent or less, in the aggregate, of phosphorus and sulfur, (4) 0.008 percent or less of nitrogen, and (5) either not more than 0.15 percent, in the aggregate, of copper, nickel and chromium (if chromium is not specified), or not more than 0.10 percent in the aggregate of copper and nickel and a chromium content of 0.24 to 0.30 percent (if chromium is specified).

For purposes of the grade 1080 tire cord quality wire rod and the grade 1080 tire bead quality wire rod, an inclusion will be considered to be deformable if its ratio of length (measured along the axis—that is, the direction of rolling—of the rod) over thickness (measured on the same inclusion in a direction perpendicular to the axis of the rod) is equal to or greater than three. The size of an inclusion for purposes of the 20 microns and 35 microns limitations is the measurement of the largest dimension observed on a longitudinal section measured in a direction perpendicular to the axis of the rod. This measurement methodology applies only to inclusions on certain grade 1080 tire cord quality wire rod and certain grade 1080 tire bead quality wire rod that are entered, or withdrawn from warehouse, for consumption on or after July 24, 2003.

The designation of the products as "tire cord quality" or "tire bead quality" indicates the acceptability of the product for use in the production of tire cord, tire bead, or wire for use in other rubber reinforcement applications such as hose wire. These quality designations are presumed to indicate that these products are being used in tire cord, tire bead, and other rubber reinforcement applications, and such merchandise intended for the tire cord, tire bead, or other rubber reinforcement applications

[1] The petitioners in this proceeding are Co-Steel Raritan, Inc., GS Industries, Inc., Keystone Consolidated Industries, Inc., and North Star Steel Texas, Inc.

is not included in the scope. However, should petitioners or other interested parties provide a reasonable basis to believe or suspect that there exists a pattern of importation of such products for other than those applications, end-use certification for the importation of such products may be required. Under such circumstances, only the importers of record would normally be required to certify the end use of the imported merchandise.

All products meeting the physical description of subject merchandise that are not specifically excluded are included in this scope.

The products under investigation are currently classifiable under subheadings 7213.91.3010, 7213.91.3090, 7213.91.4510, 7213.91.4590, 7213.91.6010, 7213.91.6090, 7213.99.0031, 7213.99.0038, 7213.99.0090, 7227.20.0010, 7227.20.0020, 7227.20.0090, 7227.20.0095, 7227.90.6051, 7227.90.6053, 7227.90.6058, and 7227.90.6059 of the HTSUS. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this proceeding is dispositive.

Final Results of Review

We find that only merchandise produced and exported by the Stelco Group is excluded from the antidumping duty order. For a complete discussion of the basis of this decision, see the *Preliminary Results*. Because we received no comments, other than those supporting the Department's preliminary results, we have adopted the same position in these final results.

Effective as of the date of these final results, we will instruct CBP to continue to liquidate without regard to antidumping duties subject merchandise produced and exported by the Stelco Group. For all merchandise produced but not exported by the Stelco Group we will instruct CBP to collect a cash deposit equal to the rate established for the exporter, or if the exporter does not have its own rate, the "All Others" rate of 8.11 percent. Furthermore, for the period prior to the effective date of the final results of this changed circumstances review, we will instruct CBP to liquidate any entries of merchandise produced by Stelco, regardless of exporter, without regard to antidumping duties.

We are issuing and publishing this finding and notice in accordance with sections 751(b)(1) and 777(i)(1) of the Act and sections 351.216 and 351.221(c)(3) of the Department's regulations.

Dated: April 30, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. 04–10483 Filed 5–6–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–557–812]

Notice of Amended Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers From Malaysia

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

DATES: *Effective Date:* May 7, 2004.

FOR FURTHER INFORMATION CONTACT: Mike Strollo or Gregory Kalbaugh at (202) 482–0629 and (202) 482–3693, respectively, AD/CVD Enforcement, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

Amendment to Final Results

In accordance with section 735 of the Tariff Act of 1930, as amended (the Act), on April 16, 2004, the Department published the final determination in the less-than-fair-value investigation on certain color televisions from Malaysia. *See Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers from Malaysia* (69 FR 20592). On April 16, 2004, we received an allegation, timely filed pursuant to 19 CFR 351.224(c)(2), from Funai Electric (Malaysia) Sdn. Bhd. (Funai Malaysia), the sole respondent, that the Department made a ministerial error in its final determination. We did not receive comments from the petitioners (*i.e.*, Five Rivers Electronic Innovations, LLC, the International Brotherhood of Electrical Workers, and the Industrial Division of the Communications Workers of America). After analyzing Funai Malaysia's submission, we have determined, in accordance with 19 CFR 351.224, that a ministerial error was made in our final margin calculation for Funai Malaysia. Specifically, we find that we failed to revise our surrogate direct and indirect selling expenses for the domestic market to use the company-specific data of Formosa Prosonic Industries, the same company from which the profit ratio was derived.

For a detailed discussion of the ministerial error noted above, as well as the Department's analysis, see the memorandum to Jeffrey May from the team, dated April 28, 2004.

Therefore, in accordance with 19 CFR 351.224(e), we are amending the final determination in the less-than-fair-value investigation on certain color television receivers from Malaysia. The margin for Funai Malaysia remains *de minimis*. The revised weighted-average dumping margin is as follows:

Manufacturer/exporter	Original margin (percent)	Revised margin (percent)
Funai Electric (Malaysia) Sdn. Bhd (Funai Malaysia)	0.75	0.47

Scope of the Investigation

For purposes of this investigation, the term "certain color television receivers" includes complete and incomplete direct-view or projection-type cathode-ray tube color television receivers, with a video display diagonal exceeding 52 centimeters, whether or not combined with video recording or reproducing apparatus, which are capable of receiving a broadcast television signal and producing a video image. Specifically excluded from this investigation are computer monitors or other video display devices that are not capable of receiving a broadcast television signal.

The color television receivers subject to this investigation are currently classifiable under subheadings 8528.12.2800, 8528.12.3250, 8528.12.3290, 8528.12.4000, 8528.12.5600, 8528.12.3600, 8528.12.4400, 8528.12.4800, and 8528.12.5200 of the *Harmonized Tariff Schedule of the United States* ("HTSUS"). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the merchandise under investigation is dispositive.

This investigation and notice are in accordance with sections 735(d) and 777(i) of the Act.

Dated: April 30, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. 04–10482 Filed 5–6–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–357–810]

Notice of Rescission of Antidumping Duty Administrative Review; Oil Country Tubular Goods, Other Than Drill Pipe, From Argentina

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

ACTION: Notice of rescission of antidumping duty administrative review.

SUMMARY: In response to a request from the petitioner, the Department of Commerce (the Department) initiated an administrative review of the antidumping duty order on oil country tubular goods from Argentina. This review covers one manufacturer/exporter of the subject merchandise, Siderca S.A.I.C. (Siderca). The Department is now rescinding this review based on record evidence indicating that the respondent had no entries of subject merchandise during the period of review (POR). The POR is August 1, 2002 through July 31, 2003.

DATES: *Effective Date:* May 7, 2004.

FOR FURTHER INFORMATION CONTACT: Fred Baker or Robert James, AD/CVD Enforcement Group III, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–2924 (Baker), (202) 482–0649 (James).

SUPPLEMENTARY INFORMATION:

Background

On August 11, 1995, the Department published the antidumping duty order on oil country tubular goods from Argentina. *See Antidumping Duty Order: Oil Country Tubular Goods from Argentina*, 60 FR 41055 (August 11, 1995). On September 2, 2003, United States Steel Corporation (petitioner) requested that the Department conduct an administrative review of sales of the subject merchandise made by Siderca.

On September 30, 2003, the Department initiated the administrative review. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews, Requests for Revocation in Part and Deferral of Administrative Review*, 68 FR 56262 (September 30, 2003).

On September 30, 2003, the Department issued its antidumping duty questionnaire to Siderca. In response, Siderca stated in an October 22, 2003 submission that it had no consumption entries of subject merchandise during the POR, and requested that the Department rescind the review with respect to Siderca.

On March 11, 2004 the Department issued a supplemental questionnaire to Siderca. In our March 11, 2004 supplemental questionnaire the Department attached a list of shipments of OCTG from Argentina that entered the United States during the POR that the Department had reason to believe had been manufactured by Siderca or its affiliates. We obtained this list by doing an IM–115 run of entries recorded by the U.S. Customs and Border Protection. We asked Siderca to explain why it believed these entries were not subject to this administrative review. Siderca submitted its response on March 22, 2004. Siderca explained that all of the entries were merchandise that were either no longer covered under the antidumping duty order or were not entries for consumption. Siderca submitted supporting documentation along with its explanation. We asked interested parties to submit any comments by April 23, 2004. We received no comments.

Period of Review

The POR is August 1, 2002 through July 31, 2003.

Scope of the Review

Oil country tubular goods (OCTG) are hollow steel products of circular cross-section, including oil well casing and tubing of iron (other than cast iron) or steel (both carbon and alloy), whether seamless or welded, whether or not conforming to American Petroleum Institute (API) or non-API specifications, whether finished or unfinished (including green tubes and limited service OCTG products).

This scope does not cover casing or tubing pipe containing 10.5 percent or more of chromium. Drill pipe was excluded from this order beginning August 11, 2001. *See Continuation of Countervailing and Antidumping Duty Orders on Oil Country Tubular Goods From Argentina, Italy, Japan, Korea and Mexico, and Partial Revocation of Those Orders From Argentina and Mexico With Respect to Drill Pipe*, 66 FR 38630 (July 25, 2001).

The OCTG subject to this order are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under item numbers: 7304.29.10.10, 7304.29.10.20, 7304.29.10.30, 7304.29.10.40, 7304.29.10.50, 7304.29.10.60, 7304.29.10.80, 7304.29.20.10, 7304.29.20.20, 7304.29.20.30, 7304.29.20.40, 7304.29.20.50, 7304.29.20.60, 7304.29.20.80, 7304.29.30.10, 7304.29.30.20, 7304.29.30.30, 7304.29.30.40, 7304.29.30.50, 7304.29.30.60, 7304.29.30.80, 7304.29.40.10, 7304.29.40.20, 7304.29.40.30, 7304.29.40.40, 7304.29.40.50, 7304.29.40.60, 7304.29.40.80, 7304.29.50.15, 7304.29.50.30, 7304.29.50.45, 7304.29.50.60, 7304.29.50.75, 7304.29.60.15, 7304.29.60.30, 7304.29.60.45, 7304.29.60.60, 7304.29.60.75, 7305.20.20.00, 7305.20.40.00, 7305.20.60.00, 7305.20.80.00, 7306.20.10.30, 7306.20.10.90, 7306.20.20.00, 7306.20.30.00, 7306.20.40.00, 7306.20.60.10, 7306.20.60.50, 7306.20.80.10, and 7306.20.80.50.

The HTSUS subheadings are provided for convenience and customs purposes. Our written description of the scope of this order is dispositive.

Rescission of Review

On October 22, 2003, Siderca informed the Department that it did not ship OCTG to the United States during the POR, and requested rescission of the administrative review. Furthermore, in response to a subsequent inquiry from the Department, Siderca presented documentation demonstrating that none of the sales the Department had identified as manufactured by Siderca or its affiliates and entered into U.S. Customs territory during the POR were subject to the order. Based upon Siderca's explanation and the evidence on the record, we are satisfied that Siderca has not made any consumption entries, exports, or sales of subject merchandise during the POR. Accordingly, we are rescinding the review.

Pursuant to 19 CFR 351.213(d)(3), the Department may rescind an administrative review, in whole or with respect to a particular exporter or producer, if the Secretary concludes that, during the period covered by the review, there were no entries, exports, or sales of the subject merchandise. Since the evidence shows that there were no entries of OCTG made by Siderca during the POR, the Department is rescinding this review in accordance with 19 CFR 351.213(d)(3).

We are issuing and publishing this notice in accordance with sections 751(a)(1) of the Tariff Act and 19 CFR 351.213(d)(4).

Dated: April 30, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. 04–10484 Filed 5–6–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–588–068]

Prestressed Concrete Wire Strand From Japan; Final Results of Expedited Sunset Review of Antidumping Finding

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

ACTION: Notice of final results of expedited sunset review of antidumping finding on prestressed concrete wire strand from Japan.

SUMMARY: On January 2, 2004, the Department of Commerce ("the Department") published the notice of initiation of sunset review on Prestressed Concrete Wire Strand from Japan. On the basis of the notice of intent to participate, and the adequate substantive comments filed on behalf of a domestic interested party and inadequate response (in this case, no response) from respondent interested party, we determined to conduct an expedited 120-day, sunset review. As a result of this review, we find that revocation of the antidumping duty finding would be likely to lead to continuation or recurrence of dumping at the levels listed below in the section entitled "Final Results of Review."

DATES: *Effective Date:* May 7, 2004.

FOR FURTHER INFORMATION CONTACT: Alessandra Cortez or Ozlem Koray, Office of Policy for Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC, 20230; telephone: (202) 482–5925 or (202) 482–3675.

SUPPLEMENTARY INFORMATION:

Background

On January 2, 2004, the Department published the notice of initiation of a sunset review of the antidumping finding on Prestressed Concrete Wire Strand from Japan pursuant to section 751(c) of the Tariff Act of 1930, as amended (the "Act").[1] On January 16, 2004, the Department received the Notice of Intent to Participate on behalf of American Spring Wire Corporation, Insteel Wire Products Company and Sumiden Wire Products Corporation (collectively, "the domestic interested parties"), within the deadline specified in section 351.218(d)(1)(i) of the Department's regulations. The domestic interested parties claimed interested party status under section 771(9)(C) of the Act, as U.S. producers of a domestic like product. We received a complete substantive response in the sunset review from the domestic interested parties within the 30-day deadline specified in the Department's regulations under section 351.218(d)(3)(i).

We did not receive a substantive response from any respondent interested party to this proceeding. As a result, pursuant to section 751(c)(3)(B) of the Act and section 351.218(e)(1)(ii)(C) of the Department's regulations, the Department conducted an expedited, 120-day review of this finding.

Scope of Review

The products covered in this sunset review are shipments of steel wire strand, other than alloy steel, not galvanized, which are stress-relieved and suitable for use in prestressed concrete. Such merchandise is currently classifiable under Harmonized Tariff Schedule (HTS) item number 7312.10.30.12. The HTS item number is provided for convenience and Customs purposes. The written description remains dispositive.

Analysis of Comments Received

All issues raised in this case by the domestic interested parties are addressed in the "Issues and Decision Memorandum" ("Decision Memo") from Ronald K. Lorentzen, Acting Director, Office of Policy, Import Administration, to James J. Jochum, Assistant Secretary for Import Administration, dated May 3, 2004, which is hereby adopted by this notice. The issues discussed in the Decision Memo include the likelihood of continuation or recurrence of dumping and the magnitude of the margin likely to prevail if the finding was to be revoked. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this public memorandum, which is on file in room B–099, Central Records Unit of the Department.

In addition, a complete version of the Decision Memo can be accessed directly on the Web at *http://ia.ita.doc.gov/frn*, under the heading "May 2004." The paper copy and electronic version of the Decision Memorandum are identical in content.

Final Results of Review

We determine that revocation of the antidumping finding on Prestressed Concrete Wire Strand from Japan would be likely to lead to continuation or recurrence of dumping at the following percentage weighted-average margins:

Japan manufacturers/exporters	Weighted-average margin percent
Shinko Wire Co., Ltd	13.3.
Suzuki Metal Industry Co., Ltd	6.9.
Tokyo Rope Manufacturing Co., Ltd.	4.5.
Sumitomo	Revoked.
Kawasaki Steel Techno-Wire	Revoked.
All Others	9.76.

This notice also serves as the only reminder to parties subject to administrative protective orders ("APO") of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with section 351.305 of the Department's regulations. Timely notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing the results and notice in accordance with sections 751(c), 752, and 777(i)(1) of the Act.

Dated: May 3, 2004.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. 04–10485 Filed 5–6–04; 8:45 am]

BILLING CODE 3510–DS–P

[1] *Initiation of Five-Year (Sunset) Reviews*, 69 FR 50 (January 2, 2004) ("Initiation Notice"). Although the initiation notice states that the sunset review is "of antidumping duty orders," the Department hereby corrects the inadvertent misstatement to reference the original "finding" on steel wire strand from Japan, as originally stated in the Treasury Decision. *See Treasury Decision 78–478* (Finding of Dumping), 43 FR 57599 (December 8, 1978).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–475–824]

Notice of Extension of Time Limit of the Preliminary Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils From Italy

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

ACTION: Notice of extension of time limit of the preliminary results of the antidumping duty administrative review of stainless steel sheet and strip in coils from Italy.

SUMMARY: The Department of Commerce ("the Department") is extending the time limit of the preliminary results of the antidumping duty administrative review of stainless steel sheet and strip in coils from Italy.

EFFECTIVE DATE: May 7, 2004.

FOR FURTHER INFORMATION CONTACT: Jonathan Herzog, AD/CVD Enforcement, Group III, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–4271.

Background

On July 2, 2003, the Department published a notice of opportunity to request an administrative review of the antidumping duty order on stainless steel sheet and strip in coils from Italy. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 68 FR 39511 (July 2, 2003). On July 31, 2003, Thyssen Krupp Acciai Speciali S.p.A. ("TKAST"), an Italian producer of subject merchandise requested that the Department conduct an administrative review. Additionally, on July 31, 2003, Petitioners requested that the Department conduct an administrative review of TKAST. On August 22, 2003, the Department published a notice of initiation of an administrative review of the antidumping duty order on stainless steel sheet and strip in coils, for the period July 1, 2002 through June 30, 2003. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 68 FR 50750 (August 22, 2003). On March 1, 2004, the Department published a notice extending the preliminary results for this administrative review by 60 days. *See Notice of Extension of Time Limit of Preliminary Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from Italy*, 69 FR 9590 (March 1, 2004). The preliminary results of this administrative review are currently due no later than May 31, 2004.

Extension of Time Limit for Preliminary Results

Pursuant to section 751(a)(3)(A) of the Act, and section 351.213(h)(2) of the Department's regulations, the Department may extend the deadline for completion of the preliminary results of a review if it determines that it is not practicable to complete the preliminary results within the statutory time limit of 245 days from the date on which the review was initiated. Due to the complexity of issues present in this administrative review, such as issues concerning credit expense calculations and home market downstream sales the Department has determined that it is not practicable to complete this review within the original time period provided in section 751(a)(3)(A) of the Act and section 351.213(h)(2) of the Department's regulations.

Therefore, we are extending the due date for the preliminary results by 60 days, until no later than July 30, 2004. The final results continue to be due 120 days after the publication of the preliminary results.

Dated: May 3, 2004.

Joseph A. Spetrini,

Deputy Assistant Secretary for Import Administration, Group III.

[FR Doc. 04–10486 Filed 5–6–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Exporters' Textile Advisory Committee; Notice of Open Meeting

A meeting of the Exporters' Textile Advisory Committee will be held on Tuesday, June 8, 2004. The meeting will be from 2 p.m. to 4 p.m. in Training Room A, Trade Information Center, Ronald Reagan Building, 1300 Pennsylvania Avenue, NW, Washington, DC, 20229.

The Committee provides advice and guidance to Department officials on the identification and surmounting of barriers to the expansion of textile exports, and on methods of encouraging textile firms to participate in export expansion.

The Committee functions solely as an advisory body in accordance with the provisions of the Federal Advisory Committee Act.

The meeting will be open to the public with a limited number of seats available. For further information or copies of the minutes, contact Rachel Alarid, telephone: (202) 482-5154. Dated: May 4, 2004.

D. Michael Hutchinson,

Acting Deputy Assistant Secretary for Textiles, Apparel and Consumer Goods Industries.

[FR Doc.04–10462 Filed 5–6–04; 8:45 am]

BILLING CODE 3510–DR–S

DEPARTMENT OF COMMERCE

International Trade Administration

Healthcare Technologies Trade Mission

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notice to announce Healthcare Technologies Trade Mission, the Czech Republic, Hungary, and the Slovak Republic, September 13–17, 2004.

SUMMARY: The United States Department of Commerce, International Trade Administration, U.S. Commercial Service, Office of Export Promotion Services, is organizing a Healthcare Technologies Trade Mission to the Czech Republic, Hungary, and the Slovak Republic, September 13–17, 2004. The Trade Mission will target a broad range of sectors within the healthcare industry. The focus of the delegation will be to match participating U.S. companies with qualified agents, distributors, representatives, licensees, and joint venture partners in these markets, which are all slated to become European Union (E.U.) member countries in May 2004.

FOR FURTHER INFORMATION CONTACT: Office of Business Liaison; Room 5062; Department of Commerce; Washington, DC 20230; tel: (202) 482–1360; fax: (202) 482–4054.

SUPPLEMENTARY INFORMATION: Healthcare Technologies Trade Mission, the Czech Republic, Hungary, and the Slovak Republic, September 13–17, 2004.

Mission Statement

I. Description of the Mission

The United States Department of Commerce, International Trade Administration, U.S. Commercial Service, Office of Export Promotion Services, is organizing a Healthcare Technologies Trade Mission to the Czech Republic, Hungary, and the

Slovak Republic, September 13–17, 2004. The Trade Mission will target a broad range of sectors within the healthcare industry. The focus of the delegation will be to match participating U.S. companies with qualified agents, distributors, representatives, licensees, and joint venture partners in these markets, which are all slated to become European Union (E.U.) member countries in May 2004.

II. Commercial Setting for the Mission

The Czech Republic

The Czech Republic's medical devices market was valued at U.S. $450 million in 2002. Domestic production accounts for only 35 percent, providing excellent opportunities for U.S. exporters of medical products. Germany accounts for 25 percent of the medical products imported into the Czech Republic, followed by the United States, which claims a 17 percent share. Syringes, needles, catheters, electrical diagnostic equipment, x-ray equipment, irradiators, and orthopedic aids account for the largest volume of medical products exported to the Czech Republic. Best current sales prospects include computer-processed visual systems, laser equipment, retinal tomography technology, defibrillators, implants, medicine infusion pumps, mammogram systems, endoscopes and laparoscopes, although there is demand in the Czech Republic for an even wider range of medical products.

The home healthcare sector has been growing since its introduction to the Czech Republic in 1991 to reduce the demand for hospitalization and improve the quality of life of patients, usually the elderly. Further expansion of home healthcare is inevitable, given the high costs of hospital healthcare delivery and the shortage of financial resources in the Czech healthcare system. Since the Czech home healthcare sector is still in its infancy, there is potential for U.S. firms, especially those offering a wide variety of home care products, high-quality mobility equipment and other high demand products, including thermometers, blood pressure monitors, stethoscopes, glucometers, and aids for daily living.

Hungary

The Hungarian medical market, estimated at U.S. $200 million, is very competitive and is dominated by imports, with about 85–90 percent of the market comprised of foreign products. U.S. medical products account for approximately 10–15 percent of this market and are very well received in Hungary due to their high quality. The Hungarian medical market is expected to grow five percent annually for the next three years. There are few barriers to entry for medical products into Hungary.

Currently most purchases are by publicly owned institutions, but Hungary's new health care privatization law is designed to create more public-private healthcare facilities. Privatization of health services has proceeded most rapidly in the delivery of healthcare services by family physicians, and in the pharmaceutical and dentistry areas. Private sector development has moved relatively quickly for ambulatory and diagnostic imaging services, and has been negligible for outpatient and in-hospital care (areas where both costs and reimbursement mechanisms have thus far remained largely within the public sector). In 2001 about 20 percent of the total expenditures of the National Health Insurance Fund (NHIF) went to private service providers.

Medical products are marketed in Hungary through authorized distributors. Major foreign companies have their own offices while others operate through local distributors. Most distributors handle several brands of the same type of equipment and/or several lines of medical equipment. There are small firms, however, that represent only one or two foreign companies. Pricing is a key factor in selling a medical product in Hungary, as the market is very price sensitive. When purchasing medical equipment, customers also look for established companies with reliable after-sales service and customer support.

Hospitals and other health care providers usually buy equipment directly from distributors.

The Slovak Republic

In 2003 The Slovak Republic, more commonly known as Slovakia, imported U.S. $135 million of medical/healthcare products and equipment, an eight percent increase from 2002. This trend, combined with a $69 million World Bank loan for modernization of the Slovak medical sector, provides increased opportunities for U.S. medical/healthcare exporters.

The Slovak health care system consists of the National Health Service, including 141 home healthcare agencies and a large number of private medical facilities. The home healthcare sector in Slovakia was launched in 1996 and has been growing by 28 percent on an annual basis. Since home healthcare agencies in Slovakia provide better quality care and more comfort to patients at only a slightly higher cost than hospital-based care, and since healthcare delivery from theses agencies is also partially covered by health insurance, the Slovakian home healthcare sector is expected to continue growing. This trend bodes well for U.S. firms offering home care products, including general hygiene products and aids for daily living.

In Slovakia, medical products are sold through sales representatives or through distributors. There are local distributors who represent only one or two foreign companies, but usually they market several brands of the same type of medical equipment/devices. Price, service, training and overall customer support are factors that are considered by Slovak consumers of medical products and services, with cost competitiveness and after-sales service being the key factors.

III. Goals for the Mission

The Trade Mission's goal is to gain first-hand market information and provide access to key government officials and potential business partners for new-to-market, and/or new-to-export U.S. healthcare firms desiring to enter these three promising markets.

IV. Scenario for the Mission

The trade mission will spend two days in Prague, one day in Bratislava, and two days in Budapest. At each stop, the U.S. Commercial Service will:

- Provide a market briefing highlighting opportunities in the healthcare technologies sector;
- Schedule one-on-one appointments with potential business partners for each participant;
- Arrange hospitality events to introduce participants to key business and industry officials (with the possible exception of Bratislava, the spin-off stop).

Tentative Timetable

Sunday, September 12: Arrive in Prague, Czech Republic.

Monday, September 13: Market Breakfast Briefing in Prague; Trade Mission Meetings; Evening Reception.

Tuesday, September 14: Trade Mission Meetings in Prague; For companies participating in the spin-off to Slovakia, depart Prague for Bratislava by train.

Wednesday, September 15: Market Breakfast Briefing in Bratislava; Trade Mission Meetings in Bratislava; Depart Bratislava for Budapest. Companies not participating in the spin-off to Bratislava can schedule their time as they wish but will be requested to arrive in Budapest by Wednesday evening.

Thursday, September 16: Market Breakfast Briefing in Budapest; Trade Mission Meetings in Budapest; Evening Reception.

Friday, September 17: Trade Mission Meetings in Budapest; Conclusion of Trade Mission.

V. Criteria for Participant Selection

- Relevance of the company's business line to the mission scope and goals.
- Potential for business in the selected markets.
- Timeliness of the company's completed application, participation agreement, and payment of the mission participation fee.
- Provision of adequate information on the company's products and/or services and communication of the company's primary objectives to facilitate appropriate matching with potential business partners.
- Certification that the company's products and/or services are manufactured or produced in the United States or if manufactured/produced outside of the United States, the product/service must be marketed under the name of a U.S. firm and have U.S. content representing at least 51 percent of the value of the finished good or service.

The mission will be promoted through the following venues: Export Assistance Centers and the healthcare team; industry newsletters; the **Federal Register**; relevant trade publications; relevant trade associations; past Commerce trade mission participants; various in-house and purchased industry lists, and on the Commerce Department trade missions calendar—*http://www.ita.doc.gov/doctm/tmcal.html*.

Any partisan political activities of an applicant, including political contributions, will be entirely irrelevant to the selection process. The trade mission participation fee will be $2,500 for The Czech Republic and Hungary, and $500 for the optional spin-off to Slovakia. Participation fee does not include the cost of travel and lodging. Participation is open to the first 10 qualified U.S. companies. Recruitment will begin immediately and will close on June 30, 2004. Applications received after that date will be considered only if space and scheduling constraints permit.

Contact Information: Bill Kutson, Project Manager, U.S. Commercial Service, Export Promotion Services, U.S. Department of Commerce, Room 2117, Washington, DC 20230. Tel: (202) 482–2839; fax: (202) 482–2718; e-mail: *William.Kutson@mail.doc.gov*.

Dated: April 27, 2004.

John Klingelhut,

Senior Advisor, Export Promotion Services.

[FR Doc. 04–10417 Filed 5–6–04; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

International Trade Administration

Textile, Furniture, and Modular Housing Trade Mission

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notice to announce textile, furniture, and modular housing trade mission, Amman, Jordan, May 23–24, 2004.

SUMMARY: The Office of Textiles and Apparel (OTEXA), of the International Trade Administration, United States Department of Commerce (USDOC), will sponsor a trade mission to Jordan for technical, industrial, contract and hospitality fabrics, furniture, and modular housing. The mission will include a Commerce staff member from OTEXA, and representatives from U.S. industry interested in selling their products in Jordan and Iraq.

FOR FURTHER INFORMATION CONTACT: Office of Business Liaison; Room 5062; Department of Commerce; Washington, DC 20230; tel: (202) 482–1360; fax: (202) 482–4054.

SUPPLEMENTARY INFORMATION:

Textile, Furniture, and Modular Housing Trade Mission Amman, Jordan—May 23–24, 2004

Mission Statement

I. Description of the Mission

The Office of Textiles and Apparel (OTEXA), of the International Trade Administration, United States Department of Commerce (USDOC), will sponsor a trade mission to Jordan for technical, industrial, contract and hospitality fabrics, furniture, and modular housing. The mission will include a Commerce staff member from OTEXA, and representatives from U.S. industry interested in selling their products in Jordan and Iraq.

U.S. suppliers are internationally recognized for high quality products in technical, industrial, contract and hospitality fabric, furniture, and modular housing. These highly engineered products will be used in ongoing and planned commercial and industrial projects throughout Jordan and Iraq. Iraqi buyers will be invited to Amman, Jordan for appointments with the mission participants.

In addition there is a need for these products in order for the Iraqi government to build up their hospitality and commercial markets to accelerate infrastructure development, the spin off from the sale of such products provides jobs, training and state of the art material.

Mission participants will meet with private sector developers, specifiers, and buyers of such products.

II. Commercial Setting for the Mission

This is an opportunity for U.S. manufacturers and suppliers of technical and industrial fabrics, contract/hospitality fabrics, furniture, and modular housing to increase their sales and expand their customer base in relatively new markets for the United States. Rapid development throughout the Middle East and the rebuilding of Iraq's basic infrastructure are leading catalysts for a genuine "boom" in the Middle East. Jordan and Iraq are key markets in the Middle East that have seen an increase in commercial infrastructure resulting from improving economies and, in the case of Iraq, the need to rebuild housing, hospitality, institutional government, and other public and private sector projects. However, there are certain risks, which need to be evaluated and considered by each prospective participant. These risks are noted in the following sections.

III. Goals for the Mission

The Mission will seek to promote exports of U.S. technical fabrics, contract/hospitality fabrics, furniture, and furnishings to Jordan, Iraq and other countries in the region, and to secure representation agreements for mission members with pre-screened agents and distributors.* This unique opportunity will also give mission participants the opportunity to conduct market research, and evaluate market opportunities in this region.

IV. Scenario for the Mission

Ten companies are expected to participate in this mission. The Department of Commerce reserves the right to adjust this number due to market or logistical constraints.

Matchmaking appointments will take place in Amman, Jordan. Mission participants will meet individually by appointment with pre-screened buyers, agents, and distributors. The Department will make every effort to

* Due to the security condition in Iraq the Department of Commerce cannot guarantee the attendance of the invited participants from Iraq.

schedule appropriate appointments with each mission participant. There will be a mission briefing for participants on local market conditions and selling opportunities.

We anticipate that the mission cost will be approximately $2,900 per company, excluding travel, hotel accommodation, ground transportation and meals.

Timetable

The Mission is scheduled to occur May 23–24, 2004.

Participants are scheduled to arrive in Amman, Jordan on May 22, 2004. On Sunday, May 23, 2004, following set-up and a briefing, appointments will be scheduled from 9 a.m.–6 p.m. On Sunday evening, May 22, 2004, a reception is tentatively scheduled from 7–9 p.m. at the mission site. On Monday, May 24, 2004, appointments will be scheduled from 9–6 p.m. On Monday, May 24, 2004, following the last appointment the Mission will conclude.

Members will depart individually from the mission on Thursday, May 25, 2004.

Recruitment will begin immediately and will conclude on May 14, 2004. For logistical and security reasons, applications received after the deadline will not be considered.

V. Criteria for Participant Selection

- Relevance of a company's product line to mission goals.
- Timeliness of signed application and participation agreement by company.
- Maximum of 10 companies on the mission.
- Potential for business in the Middle East.

Mission recruitment will be conducted in an open and public manner, including publication in the **Federal Register**, posting on the Internet, press releases to the general and trade media, direct mail and fax, notices by industry trade associations and other multiplier groups, and industry meetings, conferences, trade shows, etc.

A company's products must be either manufactured or produced in the United States. If manufactured or produced outside the United States, each product displayed must be marketed under the name of a U.S. firm and have U.S. content representing at least 51 percent of the value of the finished product.

Any partisan political activities (including political contributions) of an applicant are entirely irrelevant to the selection process.

Contact: Mary Lynn Landgraf at (202) 482–7909, *Mary-Lynn_Landgraf@ita.doc.gov* or Lawrence Brill at (202) 482–1856, *Lawrence_Brill@ita.doc.gov*.

Or mail to: U.S. Department of Commerce/OTEXA, 1401 Constitution Ave., NW., Room 3100, Washington, DC 20230.

Dated: April 27, 2004.

John Klingelhut,

Senior Advisor, Export Promotion Services.

[FR Doc. 04–10418 Filed 5–6–04; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Availability of Seat for the Olympic Coast National Marine Sanctuary Advisory Council

AGENCY: National Marine Sanctuary Program (NMSP), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Notice and request for applications.

SUMMARY: The Olympic Coast National Marine Sanctuary (OCNMS or Sanctuary) is seeking applicants for the following vacant seat on its Sanctuary Advisory Council (Council): Education. Applicants are chosen based upon their particular expertise and experience in relation to the seat for which they are applying; community and professional affiliations; philosophy regarding the protection and management of marine resources; and possibly the length of residence in the area affected by the Sanctuary. Applicants who are chosen as members should expect to serve three-year terms, pursuant to the Council's Charter.

DATES: Applications are due by May 30, 2004.

ADDRESSES: Application kits may be obtained from Andrew Palmer, Olympic Coast National Marine Sanctuary, 115 East Railroad Ave., Port Angeles, WA 98362–2925. Completed applications should be sent to the same address.

FOR FURTHER INFORMATION CONTACT: Andrew Palmer, Olympic Coast National Marine Sanctuary, 115 East Railroad Ave., Port Angeles, WA 98362–2925, (360) 457–6622 ext. 15, or e-mail at *andrew.palmer@noaa.gov*.

SUPPLEMENTARY INFORMATION: The Olympic Coast National Marine Sanctuary was established in 1994. The Sanctuary contains highly productive marine habitats and is home to a wide variety of marine mammals, fish, and seabirds. The Sanctuary seeks to protect these marine resource while, at the same, allowing for compatible uses.

The Sanctuary Advisory Council provides NOAA with advice on the management of the Sanctuary. Members provide advice to the Olympic Coast Sanctuary Superintendent on Sanctuary issues. The Council, through its members, also serve as liaisons to the community regarding Sanctuary issues and act as a conduit, relaying the community's interests, concerns, and management needs to the Sanctuary.

The Sanctuary Advisory Council members represent public interest groups, local industry, commercial and recreational user groups, academia, conservation groups, government agencies, and the general public.

Authority: 16 U.S.C. 1431, *et seq.*

(Federal Domestic Assistance Catalog Number 11.429 Marine Sanctuary Program)

Dated: April 30, 2004.

Jamison S. Hawkins,

Deputy Assistant Administrator for Management, Ocean Services and Coastal Zone Management, National Oceanic and Atmospheric Administration.

[FR Doc. 04–10419 Filed 5–6–04; 8:45 am]

BILLING CODE 3510–NF–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 050304D]

Pacific Fishery Management Council, Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The economic and groundfish subcommittees of the Pacific Fishery Management Council's (Council) Scientific and Statistical Committee (SSC) will hold a work session to review analytical portions of the Environmental Impact Statement (EIS) for Groundfish Essential Fish Habitat (EFH). The work session is open to the public.

DATES: The subcommittees will meet from 1 p.m. until 5 p.m. on Monday, May 24, 2004. The meeting will continue on Tuesday, May 25, 2004 from 9 a.m. until business for the day is completed.

ADDRESSES: The work session will be held at NMFS Alaska Fisheries Science Center, Room 2039, 7600 Sand Point Way N.E., Building 4, Seattle, WA 98115; telephone: 206–526–4000.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 200, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Mr. Dan Waldeck, Staff Officer: 503–820–2280.

SUPPLEMENTARY INFORMATION: The purpose of this work session is to review technical components of the EIS for EFH under the Pacific Coast Groundfish Fishery Management Plan. NMFS, in cooperation with the Council, is developing an EIS for EFH under the Pacific Coast Groundfish Fishery Management Plan. As a precursor to the EFH EIS, a risk assessment is being developed. The Council's Ad Hoc Technical Review Committee has facilitated development of the risk assessment process through a series of public meetings. A significant output of the risk assessment is an analytical tool composed of geo-referenced Bayesian Network models designed to assist the Council in developing (and comparing the consequences of) management alternatives related to the EFH EIS. The EFH identification component of the risk assessment model was reviewed by the SSC in February and April 2004. Currently, as the Council prepares for actions related to the EFH EIS, the SSC, in their role of ensuring Council decisions are informed by the best available science, will review the fishing impacts component of the EFH risk assessment process and model. The SSC will report their findings at the June 2004 Council meeting.

Entry to the Alaska Fisheries Science Center requires identification with a photograph (such as a student ID, state drivers license, etc.) A security guard will review the identification and issue a Visitor's Badge valid for the date of the meeting.

Although nonemergency issues not contained in this notice may come before the SSC subcommittees for discussion, those issues may not be the subject of formal action during this meeting. SSC subcommittee action will be restricted to those issues specifically listed in this notice, and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the subcommittees' intent to take final action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Ms. Carolyn Porter at 503–820–2280 at least 5 days prior to the meeting date.

Dated: May 4, 2004.

Alan D. Risenhoover,

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

[FR Doc. E4–1033 Filed 5–6–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 050304E]

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Pacific Fishery Management Council's (Council) Ad Hoc Groundfish Trawl Individual Quota Enforcement Group (TIQ Enforcement Group) will hold a working meeting which is open to the public.

DATES: The TIQ Enforcement Group working meeting will begin Tuesday, May 25, 2004 at 8:30 a.m. and may go into the evening until business for the day is completed. The meeting will reconvene from 8 a.m. and continue until business for the day is complete on Wednesday, March 26, 2004.

ADDRESSES: The meeting will be held at: NMFS, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802; telephone: (562)980–4050.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 200, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Mr. Jim Seger, Staff Officer (Economist), telephone: (503) 820–2280.

SUPPLEMENTARY INFORMATION: The purpose of the TIQ Enforcement Group meeting is to conduct preliminary scoping on the types of enforcement programs that would be necessary for a groundfish trawl individual fishing quota (IFQ) program and related enforcement needs for information from IFQ and landings tracking and monitoring systems.

Although non-emergency issues not contained in the TIQ Enforcement Group meeting agenda may come before the group for discussion, those issues may not be the subject of formal committee action during these meetings. TIQ Enforcement Group action will be restricted to those issues specifically listed in this notice and to any issues arising after publication of this notice requiring emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the group's intent to take final action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Ms. Carolyn Porter at (503) 820–2280 at least 5 days prior to the meeting date.

Dated: May 4, 2004.

Alan D. Risenhoover,

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

[FR Doc. E4–1034 Filed 5–6–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF DEFENSE

Department of the Army

Availability of the Final Environmental Impact Statement for the Digital Multi-Purpose Range Complex at Fort Benning, GA

AGENCY: Department of the Army, DoD.

ACTION: Notice of availability.

SUMMARY: The Digital Multi-Purpose Range Complex (DMPRC) would provide gunnery training facilities for the Bradley Fighting Vehicle (BFV) and the Abrams M1A1 Tank System (Tank), providing the capability for both active and reserve components to train to required standards under realistic conditions. Fort Benning proposes to construct, operate, and maintain a DMPRC. The DMPRC would provide a state-of-the-art range facility to meet the Army's training needs for soldiers to conduct gunnery courses in a realistic training environment by expanding the Installation's training capacity. The current ranges on Fort Benning do not meet modern gunnery standards and are inadequate to support full gunnery training and qualifications, requiring training to modified standards. The project would include construction of the firing and target area, installation of fiber optics, construction of support facilities, upgrading and construction of associated roadways, installation of utilities to support the site, construction of a helipad, construction of other related equipment and facilities, and operation and maintenance of the DMPRC.

DATES: To be considered in preparation for the Record of Decision (ROD), comments must be received not later than June 7, 2004.

ADDRESSES: Please direct written comments or requests for copies of the Final Environmental Impact statement (FEIS) to Mr. Richard McDowell, Public Affairs Officer, U.S. Army Infantry Center, ATTN: ATZB–PO, Fort Benning, GA 31905–5122 or e-mail to *mcdowellr@benning.army.mil.* Comments may also be submitted via the Fort Benning Web site: *www-benning.army.mil/EMD/dmprcLegal&PublicNotices.htm* (where the FEIS is also available for review).

FOR FURTHER INFORMATION CONTACT: Mr. Richard McDowell, Public Affairs Officer, U.S. Army Infantry Center, ATTN: ATZB–PO, Fort Benning, GA 31905–5122, (706) 545–2211, or e-mail to *mcdowellr@benning.army.mil.*

SUPPLEMENTARY INFORMATION: Fort Benning is the "Home of the Infantry" and conducts training for elements of Mechanized Infantry Division units. Tank and BFV crews must train and qualify at different skill levels (gunnery tables) that are designed to develop and test the proficiency level of individuals, crews, and platoons. Existing facilities at Fort Benning do not currently meet training standards for advanced gunnery qualification. Specifically, the existing range targetry is antiquated; the natural terrain features of Hastings Range hamper training effectiveness and efficiency; the nearness to the Installation boundary restricts training due to noise; and the lack of digital components on the existing range delays the analysis of the training exercise.

The Army proposes to construct, operate, and maintain a DMPRC. The FEIS analyzes the No Action/Status Quo and two action alternatives. The notice of intent to prepare an EIS for the DMPRC included another alternative, Transport to Fort Stewart; however, further analysis determined that this alternative was not reasonable. Alternatives considered in detail in the FEIS are:

1. No Action—Continue to conduct gunnery training on existing ranges on Fort Benning, utilizing existing facilities.

2. Construct, operate and maintain a DMPRC in Training Compartment K21 on Fort Benning. The range dimensions would be approximately 1,500 meters by 4,500 meters and cover about 1,800 acres plus support facilities; however these dimensions would be subject to site-specific design requirements and may be modified. The DMRPC would include a firing and target area with 3 tank trails, numerous stationary and moving targets, trenches and berms, maintenance roads; a helipad; utilities and communication systems; and support facilities on about 25 acres including control and instruction buildings, maintenance and storage buildings. The DMPRC would include a safety zone that is inaccessible during operation of the range.

3. Preferred Alternative—Construct, operate and maintain a DMPRC in Training Compartment D13 on Fort Benning with the same approximate dimensions and facilities as described for Alternative 2.

Both Alternatives 2 and 3 would also include changes in training on other ranges (Cactus, Carmouche, and Hastings) to incorporate the new DMPRC into the training regime.

The DMPRC FEIS includes analyses of the potential environmental consequences, including cumulative impacts that each alternative may have on many environmental and socioeconomic resources or topics, including: Soils and vegetation, water quality, wetlands and streambanks, unique ecological areas, Federally and state listed species, migratory birds, socioeconomics, land use, cultural resources, utilities, noise, air quality, public health and safety, hazardous materials and wastes, and transportation. The findings indicate that the No Action alternative has the fewest potential impacts because no construction is proposed; however, noise concerns would continue and the needed improvement in range facilities would not be achieved. Alternatives 2 and 3 would have some potential adverse impacts to several of the studied resources; however, mitigations to either avoid or reduce those impacts are identified in the FEIS, and both alternatives would result in less noise disturbance from BFV and tank weaponry firing.

Joseph H. Plunkett,

Director, Southeast Region, U.S. Army Installation Management Agency.

[FR Doc. 04–10448 Filed 5–6–04; 8:45 am]

BILLING CODE 3710–08–M

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Idaho National Engineering and Environmental Laboratory

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), Idaho National Engineering and Environmental Laboratory (INEEL). The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Tuesday, May 18, 2004, 8 a.m.–6 p.m.Wednesday, May 19, 2004, 8 a.m.–5 p.m.

Opportunities for public participation will be held Wednesday, May 19, from 11:45 to 12 noon and 3 to 3:15 p.m. Additional time may be made available for public comment during the presentations.

These times are subject to change as the meeting progresses, depending on the extent of comment offered. Please check with the meeting facilitator to confirm these times.

ADDRESSES: Willard Arts Center, 498 "A" Street,Idaho Falls, ID 83402.

FOR FURTHER INFORMATION CONTACT: Ms. Peggy Hinman, INEEL CABAdministrator, North Wind, Inc., P.O. Box 51174, Idaho Falls, ID 83405, Phone (208) 557–7885, or visit the Board's Internet home page at *http://www.ida.net/users/cab.*

SUPPLEMENTARY INFORMATION: *Purpose of the Board:* The purpose of the Board is to make recommendations to DOE in the areas of future use, cleanup levels, waste disposition and cleanup priorities at the INEEL.

Tentative Agenda

Optional tour providing an overall orientation to the site and an opportunity to visit the Advanced Mixed Waste Treatment Project before it goes radioactive. Please contact Ms. Peggy Hinman, listed above, if you would like to participate.

Tuesday, May 18

8 a.m.—Welcome and Introductions
8:45 a.m.—Welcome to New Members
9:30 a.m.—Orientation to the INEEL SSAB
11:15 a.m.—Agenda Priority Setting for the Next 12 Months
12:15 p.m.—Public Participation
1:30 p.m.—Election of New INEEL Officers
2 p.m.—Agenda Priority Setting for the Next 12 Months (continued)
3 p.m.—Orientation to the INEEL SSAB (continued)
4:15 p.m.—Member and Committee Reports
4:45 p.m.—Orientation to the INEEL SSAB (continued)
5:45 p.m.—Election of New INEEL SSAB officers (continued)
6 p.m.—Adjourn

Wednesday, May 19

8 a.m.—Agenda Priority Setting for the New Annual Work Plan
8:30 a.m.—Environmental Management (EM) Program Status of INEEL
9:30 a.m.—Potential Impacts of INEEL Mission on the Cleanup Program
10:45 a.m.—Potential Impacts of INEEL Mission on the Cleanup Program (continued)
11:30 a.m.—Member and Committee Reports
11:45 a.m.—Public Participation
1 p.m.—Calcine Treatment
1:45 p.m.—Election of New INEEL SSAB Officers (continued)
2:15 p.m.—Results of the Final Report on the Glovebox Excavator Method Project
2:45 p.m.—Orientation to the INEEL SSAB (continued)
3 p.m.—Public Participation
3:15 p.m.—Agenda Priority Setting for the Next 12 Months (continued)
4 p.m.—Status of Annual Work Plan; Topics for July Meeting; Committee Schedule
4:25 p.m.—Action Items; Meeting Evaluation for May Meeting; Success Stories
5 p.m.—Adjourn

Public Participation: This meeting is open to the public. Written statements may be filed with the Board facilitator either before or after the meeting. Individuals who wish to make oral presentations pertaining to agenda items should contact the Board Chair at the address or telephone number listed above. Request must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer, Richard Provencher, Assistant Manager for Environmental Management, Idaho Operations Office, U.S. Department of Energy, is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Every individual wishing to make public comment will be provided equal time to present their comments. This **Federal Register** notice is being published less than 15 days prior to the meeting date due to programmatic issues that had to be resolved prior to the meeting date.

Minutes: The minutes of this meeting will be available for public review and copying at the Freedom of Information Public Reading Room, 1E–190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585 between 9 a.m. and 4 p.m., Monday through Friday except Federal holidays. Minutes will also be available by writing to Ms. Peggy Hinman,INEEL CAB Administrator, at the address and phone number listed above.

Issued at Washington, DC, on May 3, 2004.

Rachel Samuel,

Deputy Advisory Committee Management Officer.

[FR Doc. 04–10446 Filed 5–6–04; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[OAR–2003–0017; FRL–7359–9]

Protection of Stratospheric Ozone; Process for Exempting Critical Uses of Methyl Bromide

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of solicitation of applications and information on alternatives.

SUMMARY: EPA is soliciting applications for the Critical Use Exemption from the phaseout of methyl bromide. This application process offers users of methyl bromide the opportunity to provide technical and economic information to support a "critical use" claim. Methyl bromide is a chemical pesticide that has been identified under the *Montreal Protocol on Substances that Deplete the Ozone Layer* and the Clean Air Act, as an ozone-depleting substance. It is scheduled for complete phaseout by January 1, 2005. The Critical Use Exemption is designed to allow continued production and import of methyl bromide after the phaseout for those uses that have no technically and economically feasible alternatives. Today's solicitation is for the third round of applications for Critical Use Exemptions beyond the January 1, 2005 methyl bromide phaseout, specifically for 2006 and 2007 calendar years. Applicants for the exemption are requested to submit technical and economic information to EPA for U.S. review. The U.S. will then create a national nomination for review by the Parties to the Montreal Protocol. EPA encourages users with similar circumstances of use to submit a single application. Please contact your state regulatory agency to receive information about their involvement in the process.

DATES: Applications for the Critical Use Exemption must be postmarked on or before August 8, 2004. The response period is now 90 days reflecting the clarifications and reduction of burden in the application.

ADDRESSES: Applications for the methyl bromide Critical Use Exemption should be submitted in triplicate (three copies):

1. *By mail*: U.S. Environmental Protection Agency, Office of Air and Radiation, Global Programs Division (6205J), Attention: Methyl Bromide Review Team, 1200 Pennsylvania Ave., NW., Washington, DC 20460, or

2. *By courier delivery (other than U.S. Post Office overnight)*: U.S. Environmental Protection Agency, Office of Air and Radiation, Global Programs Division, Attention: Methyl Bromide Review Team, 1310 L St., NW., Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT:

General information: U.S. EPA Stratospheric Ozone Information Hotline, 1–800–296–1996.

Technical information: Bill Chism, U.S. Environmental Protection Agency, Office of Pesticide Programs, Biological and Economic Analysis Division (7503C), 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 703–308–8136.

Economic information: Jin Kim, U.S. Environmental Protection Agency, Office of Pesticide Programs, Biological and Economic Analysis Division (7503C), 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 703–308–8134.

Regulatory information: Marta Montoro, U.S. Environmental Protection Agency, Office of Atmospheric Programs, Global Programs Division (6205J), 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: 202–343–9321.

SUPPLEMENTARY INFORMATION:

I. What Do I Need to Know to Respond to this Request for Applications?

A. Who Can Respond to this Request for Information?

The Application Form may be submitted either by a consortium representing multiple users or by individual users who anticipate needing methyl bromide in 2005 and believe there are no technically and economically feasible alternatives. EPA encourages users with similar circumstances of use to submit a single application (e.g., any number of pre-plant users with similar soil, pest, and climactic conditions can join together to submit a single application). In some instances, state agencies will assist users with the application process (see discussion of voluntary state involvement in Unit I.B.).

In addition to requesting information from applicants for the Critical Use Exemption, this solicitation for information provides an opportunity for any interested party to provide EPA with information on methyl bromide alternatives (e.g., technical and/or economic feasibility research). The Application Form for the methyl

bromide Critical Use Exemption and other information on research relevant to alternatives must be sent to the addresses listed under **ADDRESSES**.

B. Who Can I Contact to Find Out If a Consortium is Submitting an Application Form for My Methyl Bromide Use?

Please contact your local, state, regional or national commodity association to find out if they plan on submitting an application on behalf of your commodity group.

Additionally, you should contact your state regulatory agency (generally this will be the State Department of Agriculture or State Environmental Protection Agency) to receive information about their involvement in the process. If your state agency has chosen to participate, EPA encourages all applicants to first submit their applications to the state regulatory agency, which will then forward them to EPA. The National Pesticide Information Center website is one resource available for identifying the lead pesticide agency in your state (*http://ace.orst.edu/info/npic/state1.htm*).

C. How Do I Obtain an Application Form for the Methyl Bromide Critical Use Exemption?

An Application Form for the methyl bromide Critical Use Exemption can be obtained either in electronic or hard-copy form. EPA encourages use of the electronic form. Applications can be obtained in the following ways:

1. PDF format at EPA website: *http://www.epa.gov/ozone/mbr.*
2. Microsoft Excel and other electronic spreadsheet formats at EPA website: *http://www.epa.gov/ozone/mbr.*
3. Mailed hard-copy ordered through the Stratospheric Ozone Protection Hotline at 1–800–296–1996.
4. Hard-copy format at Air Docket No. OAR–2003–0017. The docket is located in room B-102, EPA West Building, U.S. Environmental Protection Agency, 1301 Constitution Ave., NW., Washington, DC 20460. The Docket Office is open from 8:30 a.m. until 4:30 p.m., Monday through Friday. A reasonable fee may be charged by EPA for copying docket materials.

D. What Alternatives Must Applicants Address When Applying for a Critical Use Exemption?

To support the assertion that a specific use of methyl bromide is "critical," applicants are expected to demonstrate that there are no technically and economically feasible alternatives available to the user of methyl bromide. The Parties to the Montreal Protocol have developed an "International Index" of Methyl Bromide Alternatives which lists chemical and non-chemical alternatives, by crop(*http://www.epa.gov/ozone/mbr/in_alt_in.html*). The chemicals and non-chemical practices included on this index were identified by the international technical advisory groups under the Montreal Protocol: the Methyl Bromide Technical Options Committee (MBTOC) and the Technical and Economic Assessment Panel (TEAP). The MBTOC and the TEAP determined that alternatives in the International Index have the "technical potential" to replace methyl bromide in at least one circumstance of use on the identified crop (Report of the Technical and Economic Assessment Panel, 1997)(*http://www.teap.org/html/teap_reports.html*). A corresponding U.S. Index of alternatives (also listed by crop) has been developed by the U.S. government regarding chemical alternatives(*http://www.epa.gov/ozone/mbr/us_alt_in.html*). This U.S. Index reflects whether chemical alternatives included in the International Index have been registered for use in the U.S.

Applicants must address technical, regulatory, and economic issues that limit the adoption of "chemical alternatives" and combinations of "chemical" and "non-chemical alternatives" listed for their crop within the "U.S. Index" of Methyl Bromide Alternatives. Applicants must also address technical, regulatory, and economic issues that limit the adoption of "non-chemical alternatives" and combinations of "chemical" and "non-chemical alternatives" listed for their crop in the "International Index."

E. What Portions of the Applications will be Considered Confidential Business Information?

The person submitting information to EPA in response to this Notice may assert a business confidentiality claim covering part of the information by placing on (or attaching to) the information, at the time it is submitted to EPA, a cover sheet, stamped or typed legend, or other suitable form of notice employing language such as trade secret, proprietary, or company confidential. Allegedly confidential portions of otherwisenon-confidential documents should be clearly identified by the applicant, and may be submitted separately to facilitate identification and handling by EPA. If the applicant desires confidential treatment only until a certain date or until the occurrence of a certain event, the notice should so state. Information covered by a claim of confidentiality will be disclosed by EPA only to the extent, and by means of the procedures, set forth under 40 CFR part 2, subpart B; 41 FR 36902, 43 FR 40000, 50 FR 51661. If no claim of confidentiality accompanies the information when it is received by EPA, it may be made available to the public by EPA without further notice to the applicant.

If you are asserting a business confidentiality claim covering part of the information in the application, please submit a non-confidential version that EPA can place in the public docket for reference by other interested parties. Do not include on the "Worksheet Six: Application Summary" page of the application any information that you wish to claim as confidential business information (CBI). These application information summary sheets will be posted on the EPA website (*http://www.epa.gov/ozone/mbr*) and included in Air Docket No. OAR–2003–0017. Applications that are not CBI will be placed in the Docket in their entirety. Please note, providing CBI may delay the ability of EPA to review your application.

F. Must I Submit a "Notice of Intent to Apply"?

A "Notice of Intent to Apply" is not required, but would facilitate the organization of the application review during the Critical Use Exemption Process. If EPA is aware of the consortia and the individuals who intend to submit applications 30 days before the application deadline, the technical experts will be better positioned to review the application. This Notice may be submitted to Marta Montoro via e-mail at *montoro.marta@epa.gov.* or via mail at U.S. Environmental Protection Agency, Office of Air and Radiation, Global Programs Division (6205J), 1200 Pennsylvania Ave., NW., Washington, DC 20460 or by courier at U.S. Environmental Protection Agency, Office of Air and Radiation, Global Programs Division, 1310 L St., NW., Washington, DC 20005; telephone number: 202–343–9321.

G. What if I Submit an Incomplete Application?

If EPA determines that an application is lacking sufficient information needed in order to be processed by the technical reviewers, applicants will be notified by telephone or in writing. If the required information is not submitted 30 days after the request, the application will not be processed. However, reviewers may also call applicants for further

elaboration about their application, even if it is complete.

H. What if I Already Applied in 2002 and/or 2003?

In March 2004, the Parties decided that exemptions would be granted for 1 year. As a result, anyone wishing to obtain a CUE to use methyl bromide in 2007 must re-apply. The data required for updating applications will be noted in the 2004 CUE application. Additional guidance will be available at *http://www.EPA.gov/ozone/mbr.*

II. What is the Legal Authority for the Critical Use Exemption?

A. What is the Clean Air Act (CAA) Authority for Implementing the Critical Use Exemption to the Methyl Bromide Phaseout?

In October 1998, the U.S. Congress amended the Clean Air Act by adding CAA sections 604(d)(6), 604(e)(3), and 604(h) (section 764 of the 1999 Omnibus Consolidated and Emergency Supplemental Appropriations Act (Public Law No. 105–277; October 21, 1998)). The amendment requires EPA to conform the U.S. phaseout schedule for methyl bromide to the provisions of the Montreal Protocol for industrialized countries. Specifically, the amendment requires EPA to make regulatory changes to implement the following phaseout schedule:

- 25% reduction (from 1991 baseline) in 1999
- 50% reduction in 2001
- 70% reduction in 2003
- 100% reduction in 2005

EPA published regulations in the **Federal Register** of June 1, 1999 (64 FR 29240) (FRL–6351–6), and November 28, 2000 (65 FR 70795) (FRL–6906–4), instituting the phaseout reductions in the production and import of methyl bromide in accordance with the schedule listed above. Additionally, the 1998 amendment allowed EPA to exempt the production and import of methyl bromide from the phaseout for critical uses starting January 1, 2005 "to the extent consistent with the Montreal Protocol" (section 764 of the 1999 Omnibus Consolidated and Emergency Supplemental Appropriations Act (Public Law 105–277, October 21, 1998) (section 604(d)(6) of the Clean Air Act).

B. What is the Montreal Protocol Authority for Granting a Critical Use Exemption After the Methyl Bromide Phaseout?

The Montreal Protocol provides an exemption to the phaseout of methyl bromide for critical uses in Article 2H, paragraph 5. The Parties to the Protocol included provisions for such an exemption in recognition that substitutes for methyl bromide may not be available by 2005 for certain uses of methyl bromide agreed by the Parties to be "critical uses."

In their Ninth Meeting (1997), the Parties to the Protocol agreed to Decision IX/6, setting forth the following criteria for a "critical use" determination:

(a) That a use of methyl bromide should qualify as 'critical' only if the nominating Party (e.g., U.S.) determines that:

(i) The specific use is critical because the lack of availability of methyl bromide for that use would result in a significant market disruption; and

(ii) There are no technically and economically feasible alternatives or substitutes available to the user that are acceptable from the standpoint of environment and health and are suitable to the crops and circumstances of the nomination.

(b) That production and consumption, if any, of methyl bromide for a critical use should be permitted only if:

(i) All technically and economically feasible steps have been taken to minimize the critical use and any associated emission of methyl bromide;

(ii) Methyl bromide is not available in sufficient quantity and quality from existing stocks of banked or recycled methyl bromide, also bearing in mind the developing countries need for methyl bromide;

(iii) It is demonstrated that an appropriate effort is being made to evaluate, commercialize and secure national regulatory approval of alternatives and substitutes, taking into consideration the circumstances of the particular nomination . . . . Non-Article 5 Parties [e.g., the U.S.] must demonstrate that research programmes are in place to develop and deploy alternatives and substitutes. . . .

In the context of the phaseout program, the use of the term "consumption" may be misleading. Consumption does not mean the "use" of a controlled substance, but rather is defined as the formula: consumption = production + imports - exports, of controlled substances (Article 1 of the Protocol and section 601 of the CAA). Class I controlled substances that were produced or imported through the expenditure of allowances prior to their phaseout date can continue to be used by industry and the public after that specific chemical's phaseout under EPA's phaseout regulations, unless otherwise precluded under separate regulations.

In addition to the language quoted above, the Parties further agreed to request the TEAP to review nominations and make recommendations for approval based on the criteria established in paragraphs (a)(ii) and (b) of Decision IX/6.

III. How Will the U.S. Implement the Critical Use Exemption?

A. When Will the Exemption Become Available to U.S. Users of Methyl Bromide?

Under the provisions of both the CAA and the Montreal Protocol, the Critical Use Exemption will be available to approved uses on January 1, 2005. Until that date, all production and import of methyl bromide (except for those quantities that qualify for the quarantine and preshipment exemption) must conform to the phasedown schedule listed above (see Unit II.A.). For more information on the quarantine and preshipment exemption, please refer to 68 FR 238 (January 2, 2003) (FRL–7434–1).

B. What is the Projected Timeline for the Critical Use Exemption Application Process?

There is both a domestic and international component to the Critical Use Exemption process. The following table represents a projected timeline for the process; note that this year's application and nomination cycle overlaps with the beginning of the phaseout:

May 7, 2004	Solicit applications for the methyl bromide Critical Use Exemption for 2006 and 2007
August 8, 2004	Deadline for submitting Critical Use Exemption applications to EPA

Late 2004	U.S. government (EPA, Department of State, U.S. Department of Agriculture, and other interested federal agencies) create U.S. Critical Use nomination package
January 31, 2005	Deadline for U.S. government to submit U.S. nomination package to the Protocol Parties
Early 2005	Review of the nominations packages for Critical Use Exemptions by the Technical and Economic Assessment Panel (TEAP) and Methyl Bromide Technical Options Committee (MBTOC)
Mid 2005	Parties consider TEAP/MBTOC recommendations
Late 2005	Parties authorize Critical Use Exemptions for methyl bromide for production and consumption in 2007
Mid 2004	EPA publishes proposed rule for allocating Critical Use Exemptions in the U.S.
Late 2004	EPA publishes final rule allocating Critical Use Exemptions in the U.S.
January 1, 2005	Critical Use Exemption permits the limited production and import of methyl bromide beyond the phaseout date for specific uses

Authority: 42 U.S.C. 7414, 7601, 7671–7671q.

List of Subjects

Environmental protection, Critical Use Exemption, Methyl bromide, Pesticide.

Dated: May 4, 2004.

Brian J. McLean,

Director, Office of Atmospheric Programs.

[FR Doc. 04–10474 Filed 5–6–04; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6651–1]

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 2, 2004 (69 FR 17403).

Draft EISs

ERP No. D–AFS–J65404–UT Rating EC2, Trout Slope West Timber Project, Harvesting Timber, Ashley National Forest, Vernal Ranger District, Uintah County, UT.

Summary: EPA expressed environmental concerns regarding direct and cumulative impacts to aquatic and terrestrial resources in the project area.

ERP No. D–AFS–J65406–MT Rating EC2, West Troy Project, Proposes Timber Harvesting, Natural Fuels Reduction Treatments, Pre-Commercial Thining, and Watershed Rehabilitation (Decommissioning) Work, Kootenai National Forest, Three River Ranger District, Lincoln County, MT.

Summary: While EPA supports the project purpose and need to manage vegetation for a fire-adapted ecosystem, EPA expressed concerns that necessary watershed restoration actions do not have guaranteed funding.

ERP No. D–AFS–J65409–MT Rating EC2, Lower Big Creek Project, To Implement Timber Harvest and Prescribed Burning, Kootenai National Forest Plan, Rexford Ranger District, Lincoln County, MT.

Summary: EPA expressed environmental concerns regarding impacts to water quality from potential sediment production and transport associated with tractor logging and associated road reconstruction. EPA also expressed concerns that there may not be adequate funding to implement road-related watershed restoration work.

ERP No. D–FHW–G40180–TX Rating EC2, Grand Parkway (State Highway TX–99) Segment F–2 from TX–249 to Interstate Highway (IH) 45 Construction of a New Location Facility, Right-of-Way Permit and U.S. Army COE Section 404 Permit, City of Houston, Harris County, TX.

Summary: EPA expressed environmental concerns relating to wetlands impacts/mitigation and air quality impacts.

ERP No. D–NOA–L91021–AK Rating EC2, Essential Fish Habitat Identification and Conservation, Implementation, North Pacific Fishery Management Council, Magnuson-Stevens Fishery Conservation and Management Act, AK.

Summary: EPA expressed concerns for rescinding Habitat Areas of Particular Concern. EPA requested additional information on an ecosystem approach for identifying Essential Fish Habitat, the potential for increasing the Observer Program and Environmental Justice/Tribal Consultation.

Final EISs

ERP No. F–AFS–J65268–CO, North Fork of the South Platte and the South Platte Rivers, Wild and Scenic River Study, ToDetermine their Suitability for Inclusion into the National Wild and Scenic Rivers System, Pike and San Isabel National Forests, Comache and Cimarron National Grasslands, Douglas, Jefferson, Park and Teller Counties, CO.

Summary: EPA expressed environmental concerns and recommended that the lead agency add specific protections in the Record of Decision to preserve the "free flowing" character and other "outstandingly remarkable values" until Wild and

Scenic River designation decisions are made.

ERP No. F–AFS–L65385–WA, Stimson Access Project, To Access their Private Property through National Forest System Lands, Idaho Panhandle National Forests, Priest Lake Ranger District, Pend Oreille County, WA.

Summary: No formal comment letter was sent to the preparing agency.

ERP No. F–AFS–L65437–OR, Toolbox Fire Recovery Project, Promote the Recovery of the Toolbox Complex Fires of July 2002, Fremont-Winema National Forest, Silver LakeRanger District, Lake County, OR.

Summary: No formal comment letter was sent to the preparing agency.

ERP No. F–COE–E39063–NC, Bogue Inlet Channel Erosion Response Project, Relocation of the Main Ebb Channel to Eliminate the Erosive Impact to the Town of Emerald Isle, Carteret and Onslow Counties, NC.

Summary: EPA continues to have environmental concerns about the proposal to establish a given channel alignment and beach profile in a dynamic near shore ecosystem.

ERP No. F–FHW–D40319–PA, Mon/Fayette Transportation Project, Improvements from PA–51 to I–376 in Monroeville and Pittsburg, Funding, U.S. Coast Guard Bridge Permit and USArmy COE Section 404 Permit Issuance, Allegheny County, PA.

Summary: EPA continues to have environmental concerns relating to wetland impacts and open space habitat mitigation.

ERP No. F–IBR–K39081–CA, Freeport Regional Water Project, To Construct and Operate a Water Supply Project to Meet Regional Water Supply Needs, Sacramento County Water Agency (SCWA) and the East Bay Municipal Utility District (EBMUD), Alameda, Contra Costa, San Joaquin, Sacramento Counties, CA.

Summary: EPA expressed concerns regarding potential cumulative impacts to habitat, water quality, and water supply reliability. EPA requested additional information regarding the applicability of a Clean Water Act 404 Permit for impacts to wetlands.

ERP No. F–USA–G11042–LA, 2nd Armored Cavalry Regiment Transformation and Installation Mission Support, Joint Readiness Training Center (JRTC) Stryker Brigade Combat Team, Long-Term Military Training Use of Kisatchie National Forest Lands, Fort Polk, LA.

Summary: No formal comment letter was sent to the preparing agency.

ERP No. F–USN–K11108–CA, China Lake Naval Air Weapons Station, Proposed Military Operational Increases and Implementation of Associated Comprehensive Land Use and Integrated Natural Resources Management Plans, Located on the North and South Ranges, Inyo, Kern and San Bernardino Counties, CA.

Summary: No formal comment letter was sent to the preparing agency.

ERP No. FS–NOA–K91008–00, Pelagic Fisheries of the Western Pacific Region, Fishery Management Plan, Regulatory Amendment,Management Measures to Implement New Technologies for the Western Pacific Pelagic Longline Fisheries, Hawaii, American Samoa, Guam and Commonwealth of the Northern Mariana Island.

Summary: EPA supports the objectives of the proposed amendments to the FMP for Pelagic Fisheries, and has no objections to the proposed project.

Dated: May 4, 2004.

Ken Mittelholtz,

Environmental Protection Specialist, Office of Federal Activities.

[FR Doc. 04–10452 Filed 5–6–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6650–9]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–7167 or *http://www.epa.gov/compliance/nepa/.*

Weekly receipt of Environmental Impact Statements

Filed April 26, 2004, through April 30, 2004,

Pursuant to 40 CFR 1506.9.

EIS No. 040203, DRAFT EIS, NPS, AR, MS, LA, TN, Vicksburg Campaign Trail (VCT) Feasibility Study, To Examine and Evaluate a Number of Sites, Implementation, Mississippi River, AR, LA, TN and MS, Comment Period Ends: July 7, 2004, Contact: Richard Sussman (404) 562–3124.

EIS No: 040204, DRAFT EIS, FHW, NJ, Cross Harbor Freight Movement Project, Improve the Movements of Goods Throughout Northern New Jersey and Southern New York, Funding, Kings, Richmond, Queens, New York Counties, NJ, Comment Period Ends: July 6, 2004, Contact: Richard Backlund (FHW)–212–668–2205, Christopher Bonanti (FRA)–202–493–6383. The Department of Transportation's Federal Highway Administration and Federal Railroad Administration are Joint Lead Agencies for the above Project.

EIS No. 040205, FINAL EIS, AFS, UT, Fox and Cresent Reservoirs Maintenance Project, Dam Structures Operation and Maintenance, Special Use Permit Issuance, High Uintas Wilderness, Ashley National Forest, Uinta Basin, Duchesne County, UT, Wait Period Ends: June 7, 2004, Contact: Clark Tucker (435) 738–2482. This document is available on the Internet at: *http://www.fs.fed.us/r4/ashley.*

EIS No. 040206, DRAFT EIS, COE, FL, Central and Southern Florida Project, Comprehensive Everglades Restoration Plan, Aquifer Storage andRecovery (ASR) Pilot Operation, Aquifer Storage and Recovery Pilot Project, To Test the Feasibility Utilizing ASR Technology for Water Storage at Seven Well Sites, Right-of-Way and NPDES Permits, Several Counties, Comment Period Ends: June 21, 2004, Contact: Rebecca J. Weiss (904) 232–1577.

EIS No. 040207, DRAFT EIS, NPS, CA, Sequoia and Kings Canyon National Parks, Middle and South Forks of the Kings River and North Fork of the Kern River, General Management Plan, Tulare and Fresno Counties, CA, Comment Period Ends: August 5, 2004, Contact: Susan Spain (303) 969–2280.

EIS No. 040208, DRAFT EIS, NPS, CO, Colorado National Monument General Management Plan, Implementation, Mesa County, CO, Comment Period Ends: June 30, 2004, Contact: Palma Wilson (907) 858–3617 Ext 301.

EIS No. 040209, FINAL EIS, COE, FL, Central and Southern Project, Indian River Lagoon-South Feasibility Study, Final Integrated Project Implementation Report, Comprehensive Everglades Restoration Plan, (CERP), Martin and St. Lucie Counties, FL, Wait Period Ends: June 7, 2004, Contact: Michael Dupes (904) 232–1689. This document is available on the Internet at: *http://www.evergladesplan.org/pm/studies/irl_south.cfm.*

EIS No. 040210, DRAFT SUPPLEMENT, AFS, ID, Frank Church-River of No Return Wilderness (FR–RONRW), Noxious Weed Treatments, UpdatedInformation to Supplement the 1999 Final EIS for FR–RONRW, Implementation, Bitterroot, Boise, Nez Perce, Payette and Salmon-Challis NationalForests, ID, Comment Period Ends: June 21, 2004, Contact: Howard Lyman (208) 839–2211.

EIS No. 040211, FINAL EIS, USA, GA, Digital Multi-Purpose Range Complex at Fort Benning, Construction,

Operation and Maintenance, Gunnery Training Facilities for the Bradley Fighting Vehicle (BFV) and the Abrams M1A1 Tank System (Tank), Fort Benning, GA, Wait Period Ends: June 7, 2004, Contact: Richard McDowell (706) 545–2211.

EIS No. 040212, FINAL EIS, FTA, NY, Second Avenue Subway Project, Improve Transit Access to Manhattan's East Side and Reduce Excess Crowds on the Lexington Avenue Subway, Metropolitan Transportation Authority (MTC) New York City Transit (NYCT), New York, NY, Wait Period Ends: June 7, 2004, Contact: Irwin B. Kessman (212) 668–2170.

EIS No. 040213, DRAFT EIS, FHW, CA, South Orange County Transportation Infrastructure Improvement Project, To Locate, Construct and Operate Transportation Improvements, Orange and San Diego Counties, CA, Comment Period Ends: July 7, 2004, Contact: Maiser Khaled (949) 754–3481.

EIS No. 040214, DRAFT EIS, FTA, CA, Gold Line Phase II—Pasadena to Montclair—Foothill Extension, To Address Transportation Problems and Deficiencies, Cities of Pasadena, Arcadia, Monrovia, Durate, Irwindale, Azusa, Glendora, San Dimas, La Verne, Pomona and Claremont in Los Angeles County and Cities of Montclair and Upland in San Bernardino County, CA, Comment Period Ends: June 21, 2004, Contact: Erv Poka (213) 202–3950. This document is available on the Internet at: *http//www.metrogoldline.org.*

EIS No. 040215, DRAFT EIS, COE, AZ, Va Shly'ay Akimel Salt River Ecosystem Restoration Feasibility Study, Increase and Improve Native Vegetation, in Portions of the Salt River Pima-Maricopa Indian Community (SRPMIC) and the City of Mesa, Maricopa County, AZ, Comment Period Ends: June 21, 2004, Contact: Kayla Eckert (602) 640–2003.

Amended Notices

EIS No. 040056, DRAFT EIS, FRA, CA, California High-Speed Train System, Proposes a High-Speed Train (HST) System for Intercity Travel, Extending from Sacramento and the San Francisco Bay Area in the north, through Central Valley, to Los Angeles and San Diego in the south, Orange County, CA, Comment Period Ends: August 31, 2004, Contact: David Valenstein (202) 493–6368.Revision of **Federal Register** notice published on 2/13/2004: CEQ Comment Period Ending 5/14/2004 has been Extended to 8/31/2004.

EIS No. 0240195, DRAFT SUPPLEMENT, NOA, Monkfish Fishery Management Plan (FMP) Amendment 2, Implementation, New England and Mid-Atlantic Coast, Comment Period Ends: July 28, 2004, Contact: Paul Howard (978) 465–0492. Revision of **Federal Register** notice published on 4/30/2004: Correction to Telephone Number.

Dated: May 4, 2004.

Ken Mittelholtz,

Environmental Protection Specialist, Office of Federal Activities.

[FR Doc. 04–10453 Filed 5–6–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7658–7]

National Environmental Justice Advisory Council's (NEJAC) Puerto Rico Subcommittee; Notification of Public Comment Meeting—Cancellation of Meeting (All Times Are Eastern Standard Time)

On April 15, 2004 at (69 FR 20007) EPA issued a **Federal Register** notice announcing the National Environmental Justice Advisory Council (NEJAC) Puerto Rico Subcommittee Public Meeting on Cumulative Risks and Impacts. The meeting which was scheduled for May 7, 2004, in Ponce, Puerto Rico is cancelled due to a scheduling conflict. However, the NEJAC Puerto Rico Subcommittee will be accepting written comments related to cumulative risks and impacts.

Members of the public who wish to submit comments must submit them by Friday, May 7, 2004, to: Tere Rodriguez, Designated Federal Official (DFO) of the NEJAC Puerto Rico Subcommittee, Caribbean Environmental Protection Division, U. S. Environmental Protection Agency, Centro Europa Building, Suite 417, 1492 Ponce De Leon Avenue, Stop 22, San Juan, PR 00907–4127. Written comments must not exceed 10 pages. For more information please call (787) 977–5864.

Dated: April 27, 2004.

Tere Rodríguez,

Designated Federal Official, NEJAC—Puerto Rico Subcommittee.

[FR Doc. 04–10456 Filed 5–6–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7658–6]

Third Meeting of the World Trade Center Expert Technical Review Panel To Continue Evaluation on Issues Relating To Impacts of the Collapse of the World Trade Center Towers

AGENCY: Environmental Protection Agency.

ACTION: Notice of meeting.

SUMMARY: The World Trade Center Expert Technical Review Panel will hold its third meeting intended to provide for greater input from individuals on ongoing efforts to monitor the situation for New York residents and workers impacted by the collapse of the World Trade Center. The panel members will help guide the EPA's use of the available exposure and health surveillance databases and registries to characterize any remaining exposures and risks, identify unmet public health needs, and recommend any steps to further minimize the risks associated with the aftermath of the World Trade Center attacks. The panel will meet several times over the course of approximately two years. These panel meetings will be open to the public, except where the public interest requires otherwise. Information on the panel meeting agendas, documents (except where the public interest requires otherwise), and public registration to attend the meetings will be available from an Internet Web site. EPA has established an official public docket for this action under Docket ID No. ORD–2004–0003.

DATES: The third meeting of this panel will be held on May 24, 2004 from 10 a.m. to 5 p.m., Eastern Daylight Savings Time. On-site registration will begin at 9 a.m.

ADDRESSES: The meeting will be held at St. John's University, Saval Auditorium, 101 Murray Street (between Greenwich Street and West Side Highway), New York City (Manhattan). The auditorium is located on the second floor of the building and is handicap accessible. A government-issued identification (*e.g.*, driver's license) is required for entry.

SUPPLEMENTARY INFORMATION:

I. Meeting Information

Eastern Research Group, Inc., (ERG), an EPA contractor, will coordinate the meeting. To attend the meeting as an observer, please register by visiting the Web site at: *http://www.epa.gov/wtc/panel.* You may also register for the meeting by calling ERG's conference

registration line between the hours of 9 a.m. and 5:30 p.m. EDST at (781) 674–7374 or toll free at 1–800–803–2833, or by faxing a registration request to (781) 674–2906 (include full address and contact information). Pre-registration is strongly recommended as space is limited, and registrations are accepted on a first-come, first-served basis. The deadline for pre-registration is May 20, 2004. Registrations will continue to be accepted after this date, including on-site registration, if space allows. There will be a limited time at the meeting for oral comments from the public. Oral comments will be limited to five (5) minutes each. If you wish to make a statement during the observer comment period, please check the appropriate box when you register at the web site. Please bring a copy of your comments to the meeting for the record or submit them electronically via e-mail to *meetings@erg.com*, subject line: WTC.

FOR FURTHER INFORMATION CONTACT: For meeting information, registration and logistics, please see the Web site *http://www.epa.gov/wtc/panel* or contact ERG at (781) 674–7374. The meeting agenda and logistical information will be posted on the web site and will also be available in hard copy. For further information regarding the technical panel only, contact Mr. Michael Brown, EPA Office of Research & Development, telephone (202) 564–6766 or e-mail *brown.michael@epa.gov*.

II. Background Information

Immediately following the September 11, 2001, terrorist attack on New York City's World Trade Center, many federal agencies, including the EPA, were called upon to focus their technical and scientific expertise on the national emergency. EPA, other federal agencies, New York City, and New York State public health and environmental authorities focused on numerous cleanup, dust collection and ambient air monitoring activities to ameliorate and better understand the human health impacts of the disaster. Detailed information concerning the environmental monitoring activities that were conducted as part of this response is available at the EPA Response to 9–11 Web site at *http://www.epa.gov/wtc/*.

In addition to environmental monitoring, EPA efforts also included toxicity testing of the dust, as well as the development of a human exposure and health risk assessment. This risk assessment document, *Exposure and Human Health Evaluation of Airborne Pollution from the World Trade Center Disaster*, is available on the Web at *www.epa.gov/ncea/wtc.htm*. Numerous additional studies by other Federal and State agencies, universities, and other organizations have documented impacts to both the outdoor and indoor environments, and to human health.

While these monitoring and assessment activities were ongoing, and the cleanup at Ground Zero itself was occurring, EPA began planning for a program to clean and monitor residential apartments. From June 2002 until December 2002, residents impacted by World Trade Center dust and debris in an area of about 1 mile by 1 mile south of Canal Street were eligible to request either federally-funded cleaning and monitoring for airborne asbestos or monitoring of their residences. The cleanup continued into the summer of 2003, by which time the EPA had cleaned and monitored 3,400 apartments and monitored 800 apartments. Detailed information on this portion of the EPA response is also available at *http://www.epa.gov/wtc/*.

A critical component of understanding long-term human health impacts is the establishment of health registries. The World Trade Center Health Registry is a comprehensive and confidential health survey of those most directly exposed to the contamination resulting from the collapse of the World Trade Center towers. It is intended to give health professionals a better picture of the health consequences of 9/11. It was established by the Agency for Toxic Substances and Disease Registry (ATSDR) and the New York City Department of Health and Mental Hygiene (NYCDHMH) in cooperation with a number of academic institutions, public agencies and community groups. Detailed information about the registry can be obtained from the registry Web site at: *http://www.nyc.gov/html/doh/html/wtc/index.html*.

In order to obtain individual advice on the effectiveness of these programs, unmet needs and data gaps, the EPA has convened a technical panel of experts who have been involved with World Trade Center assessment activities. Dr. Paul Gilman, EPA Science Advisor, serves as Chair of the panel, and Dr. Paul Lioy, Professor of Environmental and Community Medicine at the Environmental and Occupational Health Sciences Institute of the Robert Wood Johnson Medical School-UMDNJ and Rutgers University, serves as Vice Chair. A full list of the panel members, a charge statement and operating principles for the panel are available from the panel web site listed above. Panel meetings typically will be one- or two-day meetings, and they will occur over the course of approximately a two-year period. Panel members will provide individual advice on issues the panel addresses. These meetings will occur in New York City and nearby locations. All of the meetings will be announced on the web site and by a **Federal Register** Notice, and they will be open to the public for attendance and brief oral comments. The focus of the third meeting is to discuss a sampling plan to evaluate the incidence of contamination in buildings around the World Trade Center site and beyond. The panel will also discuss which contaminants of concern should be sampled. Future meetings will address planned activities by EPA regarding monitoring, assessment and health registries. Further information on these meetings can be found at the Web site identified earlier: *http://www.epa.gov/wtc/panel*.

III. How to Get Information on E-DOCKET

EPA has established an official public docket for this action under Docket ID No. ORD–2004–0003. 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 Office of Environmental Information (OEI) Docket in the Headquarters EPA Docket Center, (EPA/DC) EPA West Building, Room B102, 1301 Constitution Avenue, NW., Washington, DC 20460. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752; facsimile: (202) 566–1753; or e-mail: *ORD.Docket@epa.gov*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the appropriate docket identification number.

Dated: May 4, 2004.

William Farland,

Chief Scientist, Office of the Science Advisor, U.S. EPA.

[FR Doc. 04–10458 Filed 5–6–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OPP–2004–0131; FRL–7358–1]

Notice of Receipt of Requests to Voluntarily Cancel Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, EPA is issuing a notice of receipt of request by registrants to voluntarily cancel certain pesticide registrations.

DATES: Unless a request is withdrawn by June 7, 2004, for EPA Registration Number(s): 264–577, 264–576 and 264–580, orders will be issued canceling these registrations.

FOR FURTHER INFORMATION CONTACT: Ann Sibold, Registration Division 7505C, Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–6502; e-mail address:*sibold.ann@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. Although this action may be of particular interest to persons who produce or use pesticides, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the information in this notice, 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–2004–0131. 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.

II. What Action is the Agency Taking?

This notice announces receipt by the Agency of applications from registrants to cancel three pesticide products registered under section 3 or 24(c) of FIFRA. These registrations are listed in sequence by registration number (or company number and 24(c) number) in Table 1 of this unit:

TABLE 1.—REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

Registration No.	Product name	Chemical name
264–577	Icon 6.2 FS	fipronil
264–576	Icon 80WG	fipronil
264–580	Icon 6.2 SC	fipronil

Unless a request is withdrawn by the registrant within 30 days of publication of this notice, orders will be issued canceling all of these registrations. Users of these pesticides or anyone else desiring the retention of a registration should contact the applicable registrant directly during this 30–day period.

Table 2 of this unit includes the names and addresses of record for all registrants of the products in Table 1 of this unit, in sequence by EPA company number:

TABLE 2.—REGISTRANTS REQUESTING VOLUNTARY CANCELLATION

EPA Company No.	Company name and address
264	Bayer CropScience 2 T.W. Alexander Drive Research Triangle Park, NC 27709

III. What is the Agency's Authority for Taking this Action?

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, the Administrator may approve such a request.

IV. Procedures for Withdrawal of Request

Registrants who choose to withdraw a request for cancellation must submit such withdrawal in writing to the person listed under **FOR FURTHER INFORMATION CONTACT**, postmarked before June 7, 2004. This written withdrawal of the request for cancellation will apply only to the applicable FIFRA section 6(f)(1) request listed in this notice. If the product(s) have been subject to a previous cancellation action, the effective date of cancellation and all other provisions of any earlier cancellation action are controlling. The withdrawal request must also include a commitment to pay any reregistration fees due, and to fulfill any applicable unsatisfied data requirements.

V. Provisions for Disposition of Existing Stocks

The effective date of cancellation will be the date of the cancellation order. The orders effecting these requested cancellations will generally permit a registrant to sell or distribute existing stocks for 1 year after the date the cancellation request was received. This policy is in accordance with the Agency's statement of policy as prescribed in the **Federal Register** of June 26, 1991 (56 FR 29362) (FRL–3846–4). Exceptions to this general rule will be made if a product poses a risk concern, or is in noncompliance with reregistration requirements, or is subject to a data call-in. In all cases, product-specific disposition dates will be given in the cancellation orders.

Existing stocks are those stocks of registered pesticide products which are currently in the United States and which have been packaged, labeled, and released for shipment prior to the effective date of the cancellation action. Unless the provisions of an earlier order apply, existing stocks already in the hands of dealers or users can be distributed, sold, or used legally until they are exhausted, provided that such further sale and use comply with the EPA-approved label and labeling of the affected product. Exception to these general rules will be made in specific cases when more stringent restrictions on sale, distribution, or use of the products or their ingredients have already been imposed, as in a Special Review action, or where the Agency has identified significant potential risk concerns associated with a particular chemical.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: April 29, 2004.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 04–10551 Filed 5–6–04; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7657–1]

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. 07–2004–0023

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: Notice is hereby given that a proposed administrative order on consent between six potentially responsible parties (Respondents) at the PCB Treatment, Inc. Superfund Site (Site) and the United States Environmental Protection Agency (EPA) was signed by the EPA on January 21, 2004, and approved by the United States Department of Justice (DOJ) on April 14, 2004. The Respondents are: District of Columbia/Blue Plains Waste Water Treatment, East Point Electric, Flowserv Corporation, Newberry Water and Light, St. Rose Convent, and Tilton Terrace.

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. 07–2004–0023.*

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 the Respondents, as *de minimis* parties. EPA offered settlements to the *de minimis* parties based on their allocated share of the waste plus a premium. EPA previously settled with 542 *de minimis* parties. Through this settlement, and subject to certain reopeners, EPA covenants not to sue Respondents for injunctive relief or response costs concerning the Site. In addition, Respondents receive contribution protection for matters addressed in the settlement.

Settlement funds received through this proposed administrative order on consent, totaling $301,969.53, will be placed in the special account for the Site, with the other *de minimis* settlement funds, and used, primarily, to pay for cleanup of the Site.

Dated: April 21, 2004.

Mark Hague,

Acting Regional Administrator, United States Environmental Protection Agency, Region VII.

[FR Doc. 04–10457 Filed 5–6–04; 8:45 am]

BILLING CODE 6560–50–P

FARM CREDIT ADMINISTRATION

Farm Management and Agricultural Trust

AGENCY: Farm Credit Administration.

ACTION: Notice.

SUMMARY: The Farm Credit Administration (FCA or we) publishes this notice to inform the public of its decision to deny a request by a Farm Credit System (System or FCS) institution for approval to offer farm management and agricultural trust services as authorized related services.

The proposed services were published for public comment on August 19, 2003.

EFFECTIVE DATE: April 22, 2004.

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
Joy Strickland, Senior Counsel, Regulatory Enforcement Division, Office of the General Counsel, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4020, TTY (703) 883–2020.

SUPPLEMENTARY INFORMATION:

I. Objective

Consistent with law and safety and soundness principles, the objective of this notice is to inform the public of the FCA's decision on a request from an FCS institution to offer farm management and agricultural trust services as authorized related services.

II. Background

FCA published a notice and request for public comment on the institution's related services request in the **Federal Register** on August 19, 2003, and provided a 60-day comment period. (*See* 68 FR 49773) On October 23, 2003, FCA reopened the comment period until December 22, 2003. (*See* 68 FR 60689) In this notice, we are providing a summary of the comments we received and informing the public of FCA's decision on the related services request.

Related service, as defined in 12 CFR 618.8000(b), means "any service or type of activity provided by a System bank or association that is appropriate to the recipient's on-farm, aquatic, or cooperative operations, including control of related financial matters." Any new service not previously authorized and placed on the Related Services List in 12 CFR part 618 requires a prior determination that the service is legally authorized. The FCA also must evaluate whether the service presents excessive risk to the requesting institution or the System as a whole, including whether the service could result in significant conflicts of interest or expose the institution or the System as a whole to significant liability.

In its evaluation of a proposed service, the FCA must focus on its application System-wide rather than on institution-specific factors. If we authorize a new related service, any System bank or association may develop a program and subsequently offer the same related service(s) to eligible recipients, subject to any special conditions or limitations imposed by the FCA. We may, at the time of approval, impose such special conditions or limitations on any approved service to ensure safety and soundness or compliance with law or regulation. These programs would be subject to review during the examination process.

III. Proposed Related Services

The following services were proposed as services that an individual institution would offer to its customers:

- Farm Management Services—Professionals familiar with the market would provide management of agricultural properties for real estate owners in the service area. Farm management includes defining ownership goals, identifying problems, analyzing alternatives, and making recommendations for achieving business goals. Farm managers would present the customer with a full spectrum of lease or custom farming alternatives and help the owner decide how to ultimately get the best return on assets. Key factors of the service would include developing a comprehensive farm operating plan, securing operators and negotiating leases, providing property reporting, including annual budgets and projections, analyzing government programs, formulating and implementing capital improvements and repairs, and handling commodity sales.
- Agricultural Trust Services—The institution would assist customers in creating a trust and managing the assets of the trust. As the trustee, the institution would handle the responsibilities involved in settling the estate, including recordkeeping, asset management, asset disposition, tax filings, and income distributions.

IV. Comments

Because of the complex nature of these proposed services, the FCA solicited public comment, in accordance with 12 CFR 618.8010(b)(3). We believe that evaluation of the proposal has been aided by the public comments we received. FCA received 390 comments, four of which asked for an extension of the original comment period or clarification of FCA's process. Commenters included FCS institutions, the Farm Credit Council, the American Bankers Association, the Independent Community Bankers Association, state banking associations, the National Association of Realtors, realtors, property managers, appraisers, and members of the public.

We received 19 comments in support of the proposal. Supporters commented that farm management and agricultural trust services would allow FCS institutions to become more comprehensive providers of financial services. Also, the proposed services would greatly benefit and parallel FCA's Young, Beginning and Small (YBS) farmer initiative by allowing YBS farmers to have highly regarded expert advice about specialized services available. Commenters stated that these services could provide retiring farmers with the alternatives and valuable business tools that would allow the transfer of assets from one generation to another, thus allowing for the continuation of the family farm business. The services could also benefit absentee and non-active farmland owners who do not want to actively farm the land, but want to continue land ownership and need assistance in farm management. Supporters also commented that the proposed services would meet the growing market demand in areas where the private sector providers are underserving the public or not offering such services at all.

Supporters also commented that a System institution offering the proposed services should demonstrate that appropriate risk management practices are in place and that safeguards are specifically identified in the agreement with the customer. Commenters asserted that risks could be adequately addressed by written programs establishing detailed operating procedures, staff qualifications, training, licensing, and insurance requirements, contractual provisions with clients, and "firewalls" between other institution operations. An organizational structure that provides for a separation of duties from the credit function would minimize potential conflicts associated with borrowers with distressed loans. Commenters further noted that an institution's board and management could implement internal controls through the development of policies and procedures, which would be monitored through internal and FCA regulatory examinations.

FCA received 367 comments in opposition to this proposal, many of which were identical in content. Commenters stated that the proposal would create an unfair competitive advantage because the proposed farm management and trust services are widely available to farmers throughout the country from existing service providers, and an FCS institution would be able to charge less for these services because of its Government-sponsored enterprise status. Many commented that farm management is a low margin business with high start-up costs due to the training and expertise requirements.

Several commenters asserted that the proposed services are contradictory to Congressional intent and legislative history. Commenters in opposition also believe that FCS institutions cannot legally offer trust services because state law governs who can be deemed a corporate trustee, and most laws only include banks, savings and loan institutions, and trust companies. Further, the commenters noted that farm management, like any property management, is a commercial activity that most nationally chartered banks and savings and loan institutions are prohibited from offering.

The majority of comments in opposition to this proposal noted that there are significant conflicts of interest, particularly when the institution serves as farm manager, lender, and trustee of the same property. Financing farm operators and absentee landowners, while having a fiduciary position of negotiating leases and selecting farm operators, has built-in conflicts of interest. It would be difficult to negotiate lease terms as a farm manager if the farm operator were also a borrower. Commenters suggested that conflicts would also develop if potential farm management clients needed to borrow money. In addition, commenters stated that institutions offering farm management and trust services could expect to be involved in frequent litigation. As a result, some commenters felt that the services pose too great a financial risk to the System.

V. FCA's Action on the Proposal

After thoroughly considering the proposal and the comments received, the FCA concluded that farm management and agricultural trust services could come within the definition of related services as authorized in 12 CFR 618.8000 and the Farm Credit Act of 1971, as amended. The services are related to on-farm operations, which FCA has defined to include control of related financial matters. The proposed services are also similar to several other services that have been approved by the FCA, provided by FCS institutions for a number of years, and ratified through a notice and comment rulemaking process. Those services include appraisal services, estate planning services, farm recordkeeping services, and farm business consulting services.

Although the proposed services come within the statutory and regulatory parameters of a related service, farm management and agricultural trust services as proposed introduce significant risks and potential conflicts of interest for System institutions. An institution participating in farm management and agricultural trust services could face legal liability to its customers for certain management decisions, as well as third-party liability, including environmental liability. The financial risks associated with liability could significantly affect an institution's capital and financial condition. In addition, these services would likely involve substantial start-up and maintenance costs. If many institutions began offering these services, the risks and conflicts involved could adversely impact the System's viability.

Performing farm management and agricultural trust services for customers who are also borrowers of the offering institution poses potentially significant conflicts of interest. The conflicts would be magnified if a borrower's loan became distressed. Foreclosing on a loan, including providing distressed loan restructuring rights, would be difficult if the institution foreclosing on the loan were also managing the farm. Significant potential for conflicts would also exist in management and trust situations where owners and lessees were also borrowers of the institution. The potential conflicts of interests would increase the financial risk of offering these services because they are likely to give rise to frequent litigation, including creating defenses to foreclosures of managed properties and properties in trust. FCA believes that the conflicts of interest that this proposal presents are too great and cannot be satisfactorily resolved.

FCA recognizes that farm management and agricultural trust services can be beneficial to farmers and ranchers, particularly YBS farmers and ranchers. In some areas, these services may be provided through existing entities, while other areas may be underserved by existing entities. Notwithstanding the potential need for and benefits of these services, FCA believes that the conflicts and financial risks when one institution serves as both lender and manager/trustee outweigh the benefits that could be derived. FCA also notes that many of the benefits of these services, particularly the benefits to YBS farmers and ranchers, could be gained by System institutions more fully utilizing farm business consulting, which is an authorized related service on the Related Services List in 12 CFR part 618. Through farm business consulting, FCS institutions can provide critical advice to young and beginning farmers and advice on alternatives available to retiring farmers. Because FCS institutions that offer farm business consulting are not authorized to make management decisions for a customer, conflicts of interest and liability concerns are alleviated. For the foregoing reasons, the FCA Board has decided that farm management and agricultural trust services, as proposed, should not be authorized as related services.

Dated: May 3, 2004.

Jeanette C. Brinkley,

Secretary, Farm Credit Administration Board.

[FR Doc. 04–10408 Filed 5–6–04; 8:45 am]

BILLING CODE 6705–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Proposed Information Collection; Comment Request

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice and request for comment.

SUMMARY: The FDIC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on the proposed renewal of an information collection, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). Currently, the FDIC is soliciting comments concerning a proposed information collection titled "Depositor Claims for Increased Insurance."

DATES: Comments must be submitted on or before July 6, 2004.

ADDRESSES: Interested parties are invited to submit written comments to Thomas Nixon, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429. All comments should refer to "Depositor Claims for Increased Insurance." Comments may be hand-delivered to the guard station at the rear of the 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m. Comments may also be submitted to the OMB desk officer for the FDIC: Mark Menchik, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Thomas Nixon, (202) 898–8766, or at the address above.

SUPPLEMENTARY INFORMATION: Proposal to renew the following currently approved collection of information:

Title: Depositor Claims for Increased Insurance.

OMB Number: New collection.

Frequency of Response: On occasion.

Affected Public: Depositors of failed insured institutions who own or have an interest in a testamentary deposit account, a trust account, a defined benefit plan, or other retirement account will be required to complete one or more forms.

Estimated Annual Number of Respondents: 5025.

Estimated Time per Response: The time per response will range from one-half hour to one hour depending on the form required.

Estimated Total Annual Burden: 2739 hours.

General Description of Collection: When a bank is closed by the primary regulatory authority, the FDIC has the responsibility to pay the insured claims of the failed bank depositors. When determining insured and uninsured amounts it is often necessary to obtain information from the depositors to ensure adherence to the FDIC's Deposit Insurance Rules and Regulations. The proposed collection will place 15 forms on the FDIC's Web site that will expedite depositors' making insurance claims.

Request for Comment

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the collection should be modified prior to submission to OMB for review and approval. Comments submitted in response to this notice also will be summarized or included in the FDIC's requests to OMB for renewal of this collection. All comments will become a matter of public record.

Dated at Washington, DC, this 4th day of May, 2004.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 04–10478 Filed 5–6–04; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL HOUSING FINANCE BOARD

Sunshine Act Meeting Notice; Announcing a Closed Meeting of the Board of Directors

TIME AND DATE: The meeting of the Board of Directors is scheduled to begin at 10 a.m. on Wednesday, May 12, 2004.

PLACE: Board Room, Second Floor, Federal Housing Finance Board, 1777 F Street, NW., Washington, DC 20006.

STATUS: The entire meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Periodic Update of Examination Program Development and Supervisory Findings.

CONTACT PERSON FOR MORE INFORMATION: Mary Gottlieb, Paralegal Specialist, Office of General Counsel, by telephone at (202) 408–2826 or by electronic mail at *gottliebm@fhfb.gov.*

Dated: May 4, 2004.

By the Federal Housing Finance Board.

Mark J. Tenhundfeld,

General Counsel.

[FR Doc. 04–10593 Filed 5–5–04; 3:36 pm]

BILLING CODE 6725–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/.*

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than June 1, 2004.

A. Federal Reserve Bank of Richmond (A. Linwood Gill, III, Vice President) 701 East Byrd Street, Richmond, Virginia 23261-4528:

1. Premier Community Bankshares, Inc., Winchester, Virginia; to acquire 100 percent of the voting shares of Premier Bank, Inc. (in organization), Martinsburg, West Virginia.

Board of Governors of the Federal Reserve System, May 3, 2004.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 04–10405 Filed 5–6–04; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Notice of Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies that are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y (12 CFR Part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/.*

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than May 21, 2004.

A. Federal Reserve Bank of Chicago (Patrick M. Wilder, Assistant Vice

President) 230 South LaSalle Street, Chicago, Illinois 60690-1414:

1. *Marshall & Ilsley Corporation*, Milwaukee, Wisconsin; through its subsidiary, Metavante Corporation, to acquire 100 percent of the voting shares of The Kirchman Corporation, Altamonte Springs, Florida, and thereby engage in data processing activities and management consulting, pursuant to section 225.28(b)(9)(i)(A)(1) and (b)(14)(i) of Regulation Y.

Board of Governors of the Federal Reserve System, May 3, 2004.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc.04–10404 Filed 5–6–04; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL TRADE COMMISSION

[File No. 041 0020]

American Air Liquide, Inc., et al.; Analysis to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint that accompanies the consent agreement and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before May 29, 2004.

ADDRESSES: Comments should refer to "American Air Liquide, Inc., *et al.*, File No. 041 0020," to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H–159, 600 Pennsylvania Avenue, NW., Washington, DC 20580. Comments containing confidential material must be filed in paper form, as explained in the Supplementary Information section. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions. Comments filed in electronic form (except comments containing any confidential material) should be sent to the following e-mail box: *consentagreement@ftc.gov*.

FOR FURTHER INFORMATION CONTACT: Christina Perez, FTC, Bureau of Competition, 600 Pennsylvania Avenue, NW., Washington, DC 20580, (202) 326–2048.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and Section 2.34 of the Commission's Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for April 29, 2004), on the World Wide Web, at "*http://www.ftc.gov/os/2004/04/index.htm.*" A paper copy can be obtained from the FTC Public Reference Room, Room 130–H, 600 Pennsylvania Avenue, NW., Washington, DC 20580, either in person or by calling (202) 326–2222.

Public comments are invited, and may be filed with the Commission in either paper or electronic form. Written comments must be submitted on or before May 29, 2004. Comments should refer to "American Air Liquide, Inc., *et al.*, File No. 041 0020," to facilitate the organization of comments. A comment filed in paper form should include this reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission/Office of the Secretary, Room H–159, 600 Pennsylvania Avenue, NW., Washington, DC 20580. If the comment contains any material for which confidential treatment is requested, it must be filed in paper (rather than electronic) form, and the first page of the document must be clearly labeled "Confidential." [1] The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions. Comments filed in electronic form should be sent to the following e-mail box: *consentagreement@ftc.gov*.

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

Analysis of Agreement Containing Consent Orders To Aid Public Comment

I. Introduction

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from L'Air Liquide, S.A., which is designed to remedy the anticompetitive effects resulting from L'Air Liquide, S.A.'s acquisition of the entire share capital of Messer Griesheim GmbH ("Messer") and the subsequent transfer of Messer Griesheim Industries, Inc. ("MGI") to its wholly-owned subsidiary American Air Liquide.

Under the terms of the Consent Agreement, American Air Liquide is required to divest the air separation units ("ASUs") and related assets currently owned and operated by MGI in the following six locations: (1) Vacaville, California; (2) Irwindale, California; (3) San Antonio, Texas, (4) Westlake, Louisiana; (5) DeLisle, Mississippi; and (6) Waxahachie, Texas. The divestiture will take place no later than six months from the date the Consent Agreement becomes final. The Consent Agreement also includes an Agreement to Hold Separate that requires American Air Liquide to preserve the ASUs as viable, competitive and ongoing operations until the divestiture is achieved.

The proposed Consent Agreement has been placed on the public record for thirty (30) days to solicit comments from interested persons. Comments received during this period will become part of the public record. After thirty

[1] Commission Rule 4.2(d), 16 CFR 4.2(d). The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. See Commission Rule 4.9(c), 16 CFR 4.9(c).

(30) days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the proposed Consent Agreement or make it final.

Pursuant to a sale and purchase agreement dated January 19, 2004, L'Air Liquide, S.A. agreed to acquire the entire share capital of Messer. The aggregate purchase price of the transaction is approximately $3.5 billion and includes $1.3 billion of Messer's debt that L'Air Liquide, S.A. has agreed to assume. As a result of this agreement, L'Air Liquide, S.A. will immediately transfer MGI, a wholly-owned subsidiary of Messer, which produces and sells industrial gases in the United States, to American Air Liquide. The Commission's complaint alleges that the proposed acquisition and subsequent transfer of MGI, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by lessening competition in the market for liquid argon in the continental United States and certain regional markets in the United States for liquid oxygen and nitrogen.

II. The Parties

L'Air Liquide, S.A. is a world leader in industrial and medical gases and related equipment. American Air Liquide is the parent corporation of the United States subsidiary that produces and supplies oxygen, nitrogen, and argon as well as many other industrial gases to customers for numerous applications in a variety of industries, including the petrochemical, manufacturing and fabrication industries as well as the medical field. American Air Liquide's subsidiary is the fourth largest supplier of industrial gases in the United States, with twenty seven (27) ASUs throughout the United States, most of which are in Texas and the Gulf Coast region.

Messer's U.S. subsidiary, MGI, is currently the fifth largest producer of liquid atmospheric gases (oxygen, nitrogen and argon) in the United States. MGI owns and operates twenty four (24) ASUs, including several located in Texas and the Gulf Coast region, as well as in northern and southern California.

III. Liquid Oxygen, Liquid Nitrogen, and Liquid Argon

Both American Air Liquide and MGI own and operate ASUs in the United States to provide customers with liquid atmospheric gases, including liquid oxygen, liquid nitrogen, and liquid argon. Each gas has specific properties that make it uniquely suited for the applications in which it is used. For most of these applications, there is no substitute for the use of oxygen, nitrogen, or argon. Customers would not switch to another gas or product even if the price of liquid oxygen, liquid nitrogen or liquid argon increased by five to ten percent.

Additionally, customers have three distinct distribution methods to choose from in receiving oxygen, nitrogen, or argon. These gases are available in cylinders, in liquid form, and through an on-site ASU or a pipeline. Customers choose a distribution method based on the volume of gas required. Customers who use liquid oxygen, liquid nitrogen, or liquid argon generally require volumes of these gases that are too large to purchase economically in cylinders, but too small to justify the expense of an on-site ASU or pipeline. In fact, even if the price of liquid oxygen, liquid nitrogen or liquid argon increased by five to ten percent, customers would not switch to another method of distribution.

Due to high transportation costs, liquid oxygen and liquid nitrogen may only be purchased economically from a supplier with an ASU located within one hundred and fifty (150) to two hundred and fifty (250) miles of the customer. Therefore, it is appropriate to analyze the competitive effects of the proposed acquisition using local geographic markets for liquid oxygen and liquid nitrogen. The relevant local markets in which to analyze the effects of this proposed acquisition are: Southern California, Northern California, Southern Texas, Western Louisiana, and the Central Gulf Coast. Because liquid argon is a more rare and more expensive gas than liquid oxygen and liquid nitrogen, it may be economically transported much greater distances. Therefore, the continental United States and regions of the United States are the appropriate geographic markets in which to analyze the competitive effects of the proposed acquisition for liquid argon.

The markets for liquid oxygen and liquid nitrogen are highly concentrated. In three of the five relevant geographic markets (Southern California, Northern California, and the Central Gulf Coast) American Air Liquide and MGI are two of only five companies supplying liquid oxygen and liquid nitrogen to customers. Additionally, MGI has been an aggressive participant in the market for these gases, offering low prices to customers and serving as a price restraint on the other suppliers. As a result, the proposed acquisition would enhance the likelihood of collusion or coordinated action between or among the remaining firms in each market. Furthermore, in the Southern Texas and Western Louisiana markets, MGI and American Air Liquide are the only producers capable of supplying liquid oxygen and liquid nitrogen to customers in those markets economically. By eliminating competition between these two suppliers in these areas, the proposed acquisition would allow American Air Liquide to exercise market power unilaterally, thereby increasing the likelihood that purchasers of liquid oxygen or liquid nitrogen would be forced to pay higher prices in these areas.

The market for liquid argon is also highly concentrated, with only five suppliers producing sufficient amounts of liquid argon to supply customers around the United States. The remaining firms are very small and local in nature, and produce liquid argon primarily to meet internal needs. Additionally, the five large suppliers of liquid argon all transport the product from ASUs in the middle and eastern part of the United States to customers on the West Coast, where the ASUs owned and operated by these suppliers do not produce enough argon to meet customers' demands. Over the past few years, MGI has had excess capacity in liquid argon which it has used to win new customers by offering low prices, especially to customers in Texas, Gulf Coast and California. By eliminating MGI as a competitor in the liquid argon market, particularly on the West Coast, the proposed acquisition would enhance the likelihood of coordinated action or collusion between or among the remaining firms, and could result in customers paying higher prices for liquid argon.

Significant impediments to new entry exist in the markets for liquid oxygen, liquid nitrogen, and liquid argon. In order to be cost competitive in these markets, an ASU must produce at least two hundred and fifty (250) to three hundred (300) tons per day of liquid product. The cost to construct a plant of this size can be thirty ($30) to forty ($40) million, most of which is sunk and cannot be recovered. While an ASU can theoretically be constructed within two years, it is not economically justifiable to build an ASU before contracting to sell a substantial portion of the plant's daily capacity, either to an on-site customer or to several liquid customers. On-site customers normally sign long-term contracts, and as such opportunities to contract with these customers are rare, it is uncertain whether such an opportunity would arise at any time in the near future in

any of the areas affected by the acquisition. It is even more difficult and time-consuming for a potential new entrant to try to contract with enough liquid gas customers to justify building a new ASU in a market. These customers are generally locked into contracts with existing suppliers that typically last between five (5) and seven (7) years. Even if the new entrant was able to contract with enough liquid customers to justify constructing a new ASU in any of the affected markets, the new entrant would still need to rely on suppliers already in the market to obtain liquid gases to service the new entrant's customers while the ASU was constructed. Given the difficulties of entering the market, it is unlikely that new entry could be accomplished in a timely manner in any of the markets for liquid oxygen or liquid nitrogen, and even more unlikely that entry would occur in a timely manner in all of the relevant markets. Additionally, as an ASU must produce large amounts of oxygen and nitrogen in order to produce any argon, a new entrant into the liquid argon market would not be able to economically build an ASU to produce only liquid argon, rather it would need to find customers to purchase all three gases. Therefore, it is unlikely that new entry would occur in the liquid argon market absent concurrent new entry in the liquid oxygen and nitrogen markets.

IV. The Consent Agreement

The Consent Agreement effectively remedies the acquisition's anticompetitive effects in the markets for liquid oxygen, liquid nitrogen and liquid argon. Pursuant to the Consent Agreement, American Air Liquide will divest the six (6) air separation units listed in Section I to a single purchaser that will operate the ASUs as a going concern. The Consent Agreement provides that American Air Liquide must find a buyer for the assets, at no minimum price, that is acceptable to the Commission, no later than six (6) months from the date the Consent Agreement becomes final. If the Commission determines that American Air Liquide has not provided an acceptable buyer within this time period or that the manner of the divestiture is not acceptable, the Commission may appoint a trustee to divest the assets. The trustee will have the exclusive power and authority to accomplish the divestiture.

The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the acquisition. A proposed buyer of divested assets must not itself present competitive problems. Numerous entities are interested in purchasing the divested assets, including industrial gas suppliers that currently have a regional presence in the industry, but do not compete in the areas affected by the acquisition, as well as entities in related fields that are interested in entering into the production and sale of industrial gases. The Commission is therefore satisfied that sufficient potential buyers for the divested assets exist.

The Consent Agreement also contains an Agreement to Hold Separate. This will serve to protect the viability, marketability, and competitiveness of the divestiture asset package until it is divested to a buyer approved by the Commission. The Agreement to Hold Separate became effective on the date the Commission accepted the Consent Agreement for placement on the public record and will remain in effect until American Air Liquide successfully divests the divestiture asset package according to the terms of the Decision and Order.

The Consent Agreement contains a provision for the Commission to appoint a monitor-trustee to oversee the management of the divestiture asset package until the divestiture is complete, and for a brief transition period after the sale. In order to ensure that the Commission remains informed about the status of the asset package pending divestiture, about the efforts being made to accomplish the divestiture, and the provision of services and assistance during the transition period, the Consent Agreement requires the monitor-trustee to file periodic reports with the Commission until the divestiture is accomplished and the transition period has ended.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Decision and Order or the Agreement to Hold Separate, or to modify their terms in any way.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 04–10409 Filed 5–6–04; 8:45 am]

BILLING CODE 6750–01–P

GENERAL SERVICES ADMINISTRATION

[FMR Bulletin 2004–B1]

Federal Management Regulation; Federal Property Profile Summary Report

AGENCY: General Services Administration.

ACTION: Notice.

SUMMARY: In furtherance of FMR Bulletin 2003–B2, this notice announces the release of the FY 2003 version of the Federal Real Property Profile (FRPP) Summary Report, which provides an overview of the United States Government's owned and leased real property as of September 30, 2003. The FRPP Summary Report for FY 2003 is now available and is an update of the FRPP Summary Report for FY 2002.

EFFECTIVE DATE: May 7, 2004.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Stanley C. Langfeld, General Services Administration, Real Property Policy Division, (MPR), Washington, DC 20405; *stanley.langfeld@gsa.gov*, (202) 501–1737. Please cite FMR Bulletin 2004–B1.

SUPPLEMENTARY INFORMATION: The FRPP Summary Report is a summary of the Government's real property assets, as reported to the General Services Administration's (GSA's) Federal Real Property Profile Internet Application (FRPP–IA) reporting system. It provides an overview of Federal real property assets categorized in three major areas—buildings, land, and structures. The FRPP–IA reporting system is a redesign of the formerWorldwide Inventory data collection and reporting system which was discontinued after FY 2001.

Dated: April 15, 2004.

G. Martin Wagner,

Associate Administrator, Office of Governmentwide Policy.

General Services Administration

[FMR Bulletin 2004–B1]

Real Property

To: Heads of Federal Agencies

Subject: Federal Real Property Profile Summary Report

1. *What is the purpose of this bulletin?* This bulletin announces the release of the Fiscal Year 2003 version of the Federal Real Property Profile (FRPP) Summary Report, which provides an overview of the United States Government's owned and leased real property as of September 30, 2003.

2. *What is the background?*

a. This annual publication is a summary report of the Federal

Government's real property assets, as reported to the General Services Administration's (GSA's) Federal Real Property Profile Internet Application (FRPP–IA) reporting system. The report provides an overview of Federal real property assets categorized in three major areas—buildings, land, and structures. Descriptions of specific use classifications are located in the Appendix of the report.

b. The detailed information for this summary report is held in a password-protected Web-based database. This database allows agency representatives to update data on-line in real time, and to produce ad hoc reports. The FRPP–IA reporting system provides information regarding Federal real property holdings to stakeholders including OMB, the Congress, the Federal community, and the public. Its purpose is to assist Federal asset managers with their stewardship responsibilities by offering a real-time environment for on-line updates.

c. To ensure accuracy, GSA requested that agencies confirm their FY 2003 data summary figures prior to publication of the FRPP Summary Report. Most agencies provided data based on their real property holdings as of September 30 of each year. In a few instances, data provided in previous years has been used where updated information was unavailable. This is noted on the list of contributing agencies. The agency list and status of updates and confirmations is provided as part of the FRPP Summary Report.

3. *How can we obtain a copy of the FRPP summary report?* You will find the FY 2003 version of the FRPP Summary Report on the GSA Web site at *http://www.gsa.gov/realpropertyprofile.* There you will be able to read, print, or download this report. You can also obtain a copy from the Real Property Policy Division (MPR), General Services Administration, 1800 F Street, NW., Washington, DC 20405.

4. *Who should we contact for further information regarding the FRPP?* For further information, contact Stanley C. Langfeld, Director, Real Property Policy Division, Office of Governmentwide Policy, General Services Administration, by phone (202) 501–1737, or by e-mail at *stanley.langfeld@gsa.gov.*

[FR Doc. 04–10414 Filed 5–6–04; 8:45 am]

BILLING CODE 6820–RH–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Funding Opportunity Title: Conference Support Grant Program for Family Planning Public Education and Information Activities

Announcement Type: Competitive Grant—Initial.

CFDA Number: 93.217.

DATES: To receive consideration, applications must be received by the Office of Public Health and Science (OPHS) Office of Grants Management no later than July 6, 2004.

SUMMARY: The Office of Family Planning (OFP), Office of Population Affairs (OPA), announces the availability of fiscal year (FY) 2004 funds for a grant program for family planning public education and information conference support. Three to five grants will be awarded to provide partial support for non-Federal conference activities in topic areas relevant to the delivery of family planning services. Successful applicants will conduct public education and information activities (as part of a larger conference) that will enhance and support the mission of the Title X family planning program.

I. Funding Opportunity Description

This announcement seeks proposals from public and private non-profit entities for the purpose of providing partial support for specific non-Federal one-time conference program activities in the area of family planning and related preventive health. A conference is a symposium, seminar, workshop, or any other organized and formal meeting lasting one day or more, where persons assemble to exchange information and views, explore, or clarify a defined subject, problem, or area of knowledge, whether or not a published report results from such meeting. The OFP will not consider applications which seek funding for a series of conferences. The funding conference program activity or activities should support OFP principles in furtherance of the family planning program mission.

Title X of the Public Health Service Act, 42 U.S.C. 300, *et seq.*, authorizes grants for projects to provide family planning services to persons from low-income families and others. Section 1001 of the Act, as amended, authorizes grants "to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services, and services for adolescents)." Section 1005 of the Act, as amended, authorizes the Secretary to make grants to public or nonprofit private entities "to assist in developing and making available family planning and population growth information (including educational materials) to all persons desiring such information (or materials)."

Conference support by the OFP creates the appearance of OFP co-sponsorship. Therefore, there will be active participation by OFP in the development and approval of the conference agenda. OFP funds will be expended only for approved portions of the funded conference program activity.

OFP provides grant support to public and private non-profit agencies to support the delivery of family planning and related preventive health services to those in need of such services. In addition, OFP supports public information and education activities, as well as applied research in order to support effective, evidence-based public health strategies and practices by its service grantees. Through the support of conferences and meetings, including symposia, seminars and workshops (not as part of series) in the area of family planning research, education, program development and prevention application, OFP is meeting its overall training goals. OFP believes that conferences and similar meetings permit individuals who are engaged in family planning service delivery, related research, and policy to interact. This is critical for the development and implementation of effective family planning programs.

Conference Support Topics of Interest

Applications for conference support activities must address topic areas that are consistent with the goals and mission of the Title X family planning program and should reflect HHS' Departmental Priorities. Examples of possible topics include (but are not limited to) the following:

- Program coordination with adolescent abstinence education programs and/or approaches for effective integration of adolescent abstinence education and counseling services in the family planning clinic setting;
- Models for implementation of the "ABC" approach to HIV/AIDS prevention, education and counseling in family planning settings. That is, for adolescents and unmarried individuals, the message is "A" for abstinence; for married or individuals in committed relationships, the message is "B" for being faithful; and, for individuals who

engage in behavior that puts them at risk for HIV, the message is "C" for condom use;

• Couples-based service delivery and counseling, including services to improve communication for effective and consistent family planning method use;

• Linkages with other public health delivery systems—integration of family planning with primary care in community health centers, alcohol and substance abuse prevention and treatment programs, family and intimate family violence prevention, community-based abstinence education services, HIV and STD prevention and treatment services, or training on infant adoption counseling;

• Parental involvement in the delivery of services to adolescents, including approaches to counseling that involve families in assisting adolescent decision-making and in avoiding coercive sexual relationships;

• Use of electronic technologies to improve or support family planning program activities and management;

• Use of evidence-based information, including findings from recent research, to improve or support the delivery of family planning services;

• Best practice approaches to specific issues relevant to the delivery of family planning clinical services and related preventive health care, *e.g.*, cervical cancer screening and patient management, or the delivery of reproductive health services to HIV positive individuals;

• The development and implementation of quality assurance and performance measurement systems in family planning programs;

• Training, counseling or other program approaches to ensure compliance with state reporting laws regarding child abuse, child molestation, sexual abuse, rape or incest; and

• Population specific issues in the delivery of family planning services—women's reproductive health, men's reproductive health, contraceptive updates, hard-to-serve populations, sexually active adolescents, or populations with Limited English Proficiency.

Conference Requirements

Grantees must meet the following requirements:

1. The conference organizer(s) may use OFP's name only in factual publicity for the conference. The materials developed as part of the conference program activities supported under this grant announcement need to include a statement clarifying that OFP funding of the conference activity does not constitute OFP's endorsement of the organizer's general policies, activities, products, or the content of speakers' presentations.

2. Any conference co-sponsored under this announcement shall be held in facilities that are fully accessible to the public as required by the Americans with Disabilities Act Accessibility Guidelines (ADAAG).

3. Manage all activities related to program content (*e.g.*, objectives, topics, attendees, session design, workshops, special exhibits, speaker's fees, agenda composition, and printing). Many of these items may be developed in concert with assigned OFP project personnel.

4. Provide draft copies of the conference agenda, and proposed program content as described in item #3 to OFP for approval 45 days prior to the conference event. All but 10 percent of the total funds awarded for the proposed conference will be initially restricted pending OFP approval of a full, final agenda. The remaining 90 percent of funds will be released by letter to the grantee upon approval of the final agenda. OFP reserves the right to terminate co-sponsorship at any time.

5. Determine and manage all promotional activities (*e.g.*, title, logo, announcements, mailers, press, etc.). OFP must review and approve any materials with reference to OFP involvement or support.

6. Manage all registration processes with participants, invitees, and registrants (*e.g.*, travel, reservations, correspondence, conference materials and handouts, badges, registration procedures, etc.).

7. Plan, negotiate, and manage conference site arrangements, including all audio-visual needs.

8. Analyze data from conference activities that pertain to OFP funded activities, and submit a written report to the OFP project officer within 60 after the completion of the conference.

Use of Funds

1. Funds may be used for direct cost expenditures: Salaries; speaker fees (for services rendered); rental of necessary conference—related equipment; registration fees; and transportation costs (not to exceed economy class fare) for non-Federal individuals.

2. Funds may be used for only those parts of the conference specifically supported by OPA/OFP as documented in the grant award.

3. Funds may not be used for the purchase of equipment; payments of honoraria (for conferring distinction); alterations or renovations; organizational dues; support entertainment or personal expenses; cost of travel and payment of a Federal employee; per diem or expenses for local participants (other than local mileage). Travel for Federal employees will be supported by the employees' Federal agency.

4. Funds may not be used for reimbursement of indirect costs.

5. OPA/OFP will not fund a conference after it has taken place.

6. Federal funds may not be used to fund novelty items or souvenirs.

Application Content

Applications must include the following information:

1. Summary of conference format—projected agenda (including list of principal areas or topics to be addressed), including speakers or facilitator. Information should also be provided about all other national, regional, and local conferences held on the same or similar subject during the last three years. The summary should include a one-page cover sheet with the following information:

a. Name of organization (Primary contact person's name, mailing address, telephone number, and fax number and e-mail address, if available).

b. Name of conference.

c. Location of conference.

d. Date(s) of conference.

e. Intended audience and number of conference attendees.

f. Dollar amount requested.

g. Total conference budget amount.

2. A clear statement of the need for and purpose of the conference, and the principal area(s) or topic(s) to be addressed in the conference, as well as the specific conference program activity for which support is being sought. Justification for the conference should describe the issues it intends to clarify and the developments it may stimulate, and a full description of your organization's purpose, mission and experience related to the proposed conference topic.

3. A proposed or final conference agenda must be included. Include information about the location of city, state, and physical facilities required for the conduct of the meeting, as well as the title of the proposed conference (conference, symposium, workshop, or similar designation) and the scope of the conference (national, regional, local).

4. An elaboration on the overall conference objectives, the objectives for the conference program activities for which OFP support is being sought, the target audience, and expected products (*e.g.*, conference proceedings or final report) should be included. This statement should describe any issues or

problems the conference will address or seek to solve, and the action items or resolutions it may stimulate. Include information on the expected registration, the intended audience, approximate number, and profession of persons expected to attend.

5. A clear description of the evaluation for the specific conference program activities being supported under the grant award, and how it will assess the accomplishments of the conference program objectives should be included. A sample of the evaluation instrument that will be used must be included and a step-by-step schedule and detailed operation plan of major conference planning activities necessary to attain specified objectives.

6. Biographical sketches are required for the individuals responsible for planning and implementing the conference. Experience and training related to conference planning and implementation as it relates to the proposed topic should be noted.

7. Letters of endorsement or support—Letters of endorsement or support for the sponsoring organization and its capability to perform the proposed conference activity should be included.

8. Budget plan and justification—A clearly justified budget narrative that is consistent with the purpose, objectives, and operation plan of the conference must be included. The narrative will consist of a budget that includes the share requested from this grant as well as those funds from other sources, including organizations, institutions, conference income, and/or registration fees. The application must include the estimated total cost of the conference program activity and the percentage of the total cost (which must be less than 100 percent) being requested from OFP. Requests for 100 percent funding will be considered non-responsive to this program announcement and will be returned to the applicant without review.

II. Award Information

Funding Instrument Type: Grant.
Anticipated Total Funding: $300,000.
Anticipated Number of Awards: 3–5.
Expected Amounts of Individual Awards: Range of $30,000 to 80,000.
Project Periods for Awards: 12 months.

III. Eligibility Information

1. Eligible Applicants

Any public or nonprofit private entity located in a State (which includes one of the 50 United States, the District of Columbia, Commonwealth of Puerto Rico, U.S. Virgin Islands, Commonwealth of the Northern Mariana Islands, American Samoa, Guam, Republic of Palau, Federated States of Micronesia, and the Republic of the Marshall Islands) is eligible to apply for a grant under this announcement. Faith-based organizations are eligible to apply for family planning public education and information conference support. Awards will be made only to those organizations or agencies which have met all applicable requirements and which demonstrate the capability of providing the proposed services.

2. Cost Sharing

OPA/OFP will not fund 100 percent of any conference proposed under this announcement. Part of the cost of the proposed conference must be supported with other private or Federal funds.

3. Other

Applicants are required to have a Dun and Bradstreet Data Universal Numbering System (DUNS) number to apply for a grant or cooperative agreement from the Federal government. Organizations should verify that they have a DUNS number or take the steps needed to obtain one. The DUNS number is a nine-digit identification number, which uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. To obtain a DUNS number, access *http://www.dunandbradstreet.com* or call 1–866–705–5711. Instructions for obtaining a DUNS number are also included in the application package, and may be downloaded from the OPA Web site. For more information, *see* the OPA Web site at: *http://opa.osophs.dhhs.gov/duns.html.*

IV. Application and Submission Information

1. Address To Request Application Package

Application kits may be requested from, and applications submitted to: OPHS Office of Grants Management, 1101 Wootton Parkway, Suite 550, Rockville, MD 20852: 301–594–0758. Application kits are also available online at the OPA Web site at *http://opa.osophs.dhh.gov,* may be requested by fax at 301–594–9399, or may be obtained through the electronic grants management system, e-Grants. (Instructions for the use of the e-Grants system can be found on the OPA Web site or requested from the OPHS Office of Grants Management.)

2. Content and Form of Application Submission

Applications must be submitted on the Form OPHS–1 (Revised 6/01) and in the manner prescribed in the application kit. Applications are limited to 50 double-spaced pages, not including appendices and required forms, using an easily readable, 12-point font. All pages, charts, figures and tables should be numbered. Appendices may provide curriculum vitae, organizational structure, examples of organizational capabilities, or other supplemental information that supports the application. All information that is critical to the proposed project should be included in the body of the application. Appendices are for supportive information only and should be clearly labeled.

Applications must include a one-page abstract of the proposed project. The abstract will be used to provide reviewers with an overview of the application, and will form the basis for the application summary in grants management documents.

A copy of the legislation and regulations governing the family planning program will be included as part of the application kit package. Applicants should use the legislation, regulations, and other information included in this announcement to guide them in developing their applications. Copies of the Title X statute, regulations, and Program Guidelines may be downloaded from the Office of Population Affairs Web site at *http://opa.osophs.dhhs.gov.* In responding to this announcement, applicants should also familiarize themselves with:

1. Title X Family Planning Priorities, Legislative Mandates, and Key Issues;
2. Department of Health and Human Services Departmental Priorities; and
3. *Healthy People 2010*—Chapter 9, "Family Planning;" Chapter 11, "Health Communication;" Chapter 13, "Sexually Transmitted Diseases;" and Chapter 25, "HIV."

Copies of these documents are included in the application kit for this announcement.

3. Submission Dates and Times

The OFP/OPA provides multiple mechanisms for submission of applications.

Electronic Submission

The electronic grants management system, e-Grants, provides for applications to be submitted electronically. While applications are accepted in hard copy, the use of the e-Grants system is encouraged. Instructions for use of this system are available on the OPA Web site, *http://opa.osophs.dhhs.gov,* or may be requested from the OPHS Office of Grants Management at 301–594–0758.

The body of the application and required forms can be submitted using the e-Grants system. In addition to electronically submitted materials, applicants are required to provide a hard copy of the application face page (Standard Form 424 [Revised 7–97]) with the original signature of an individual authorized to act for the applicant agency or organization and to assume for the organization the obligations imposed by the terms and conditions of the grant award. The application is not considered complete until both the electronic application and the hard copy face page with original signature are received. Both must be received on or before the due date listed in the **DATES** section of this announcement.

Mailed Hard Copy Applications

Applications submitted in hard copy are required to submit an original and two copies of the application. The original application must be signed by an individual authorized to act for the applicant agency or organization and to assume for the organization the obligations imposed by the terms and conditions of the grant award. Mailed applications will be considered as meeting the deadline if they are received by the OPHS Office of Grant Management on or before the deadline listed in the **DATES** section of this announcement. The application due date requirement specified in this announcement supercedes the instructions in the OPHS–1. Applications that do not meet the deadline will be returned to the applicant unread.

Hand-Delivered Applications

Hand-delivered applications must be received by the OPHS Office of Grants Management, 1101 Wootton Parkway, Suite 550, Rockville, Maryland 20852, not later than 4:30 p.m. eastern standard time on the application due date. Hand-delivered applications must include an original and two copies of the application. The original application must be signed by an individual authorized to act for the applicant agency or organization and to assume for the organization the obligations imposed by the terms and conditions of the grant award.

Applications delivered to the OPHS Office of Grants Management after the deadlines described above will not be accepted for review. Applications which do not conform to the requirements of this program announcement will not be accepted for review and will be returned to the applicant.

4. Intergovernmental Review

Applicants under this announcement are subject to the requirements of Executive Order 12372, "Intergovernmental Review of Federal Programs," as implemented by 45 CFR part 100, "Intergovernmental Review of Department of Health and Human Services Programs and Activities." As soon as possible, the applicant should discuss the project with the State Single Point of Contact (SPOC) for the state in which the applicant is located. The application kit contains the currently available listing of the SPOCs that have elected to be informed of the submission of applications. For those states not represented on the listing, further inquiries should be made by the applicant regarding the submission to the relevant SPOC. The SPOC's should forward any comments to the OPHS Office of Grants Management, 1101 Wootton Parkway, Suite 550, Rockville, Maryland 20852. The SPOC has 60 days from the closing date of this announcement to submit any comments. For further information, contact the OPHS Office of Grants Management at 301–594–0758.

5. Funding Restrictions

The allowability, allocability, reasonableness and necessity of direct and indirect costs that may be charged to OPHS grants are outlined in the following documents: OMB Circular A–21 (Institutions of Higher Education); OMB Circular A–87 (State and Local Governments); OMB Circular A–122 (Nonprofit Organizations); and 45 CFR part 74, Appendix E (Hospitals). Copies of the Office of Management and Budget (OMB) Circulars are available on the Internet at *http://www.whitehouse.gov/omb/grants/grants_circulars.html.*

V. Application Review Information

1. Criteria

Eligible competing grant applications will be assessed according to the following criteria:

1. Proposed Program and Technical Approach (25 Points)

a. The public health significance of the proposed conference program activities for which OFP funding is being sought.

b. The applicant's description of the proposed conference as it relates to specific non-Federal conferences in the areas of family planning and related preventive health, including the public health need of the proposed conference and the degree to which the conference can be expected to influence public health practices. Evaluation will also be based on the extent of the applicant's collaboration with other organizations serving the intended audience. The applicant's description of conference objectives in terms of quality, specificity, and the feasibility of the conference based on the operational plan will also be evaluated.

2. Applicant's Capability and Qualifications of Program Personnel (25 Points)

The applicant's capability includes the adequacy of the applicant's resources (additional sources of funding, organization's strengths, staff time, proposed physical facilities, etc.) available for conducting conference activities.

a. The qualifications, experience, and commitment of the principal staff person, and their ability to devote adequate time and effort to provide effective leadership.

b. The competence of associate staff persons, discussion leaders, speakers, and presenters to accomplish conference objectives.

c. The degree to which the applicant demonstrates the knowledge of nationwide and educational efforts currently underway which may affect, and be affected by, the proposed conference.

3. Conference Program Objectives (25 Points)

a. The overall quality, reasonableness, feasibility, and logic of the designed conference program objectives, including the overall work plan and timetable for accomplishment.

b. The likelihood of accomplishing conference program objectives as they relate to family planning program priorities and missions and the feasibility of the project in terms of the operational plan.

4. Evaluation Methods (10 Points)

Evaluation instrument(s) for the conference should adequately assess increased knowledge, attitudes, and behaviors of the target audience.

5. Budget Justification and Adequacy of Facilities (15 Points)

The proposed budget will be evaluated on the basis of its reasonableness, concise and clear justification, and consistency with the intended use of grant funds. The application will also be reviewed as to the adequacy of existing or proposed facilities and resources for conducting conference activities.

2. Review and Selection Process

Each application submitted will be screened to determine whether it was

received by the closing date and time. Applications, which meet the initial screening requirements will be reviewed by a panel of independent reviewers and will be assessed according to the criteria published in this announcement.

Final award decisions will be made by the Deputy Assistant Secretary for Population Affairs (DASPA). In making these decisions, the DASPA will take into consideration: Recommendations of the review panel; reviews for programmatic and grants management compliance; the reasonableness of the estimated cost to the government considering the available funding and anticipated results; and the likelihood that the proposed project will result in the benefits expected. Awards will be made only to those organizations or agencies which have demonstrated the capability of providing the proposed services, and which have met all applicable requirements.

VI. Award Administration Information

1. Award Notices

OPA does not release information about individual applications until final funding decisions have been made. When final decisions have been made, applicants will be notified by letter regarding the outcome of their applications. The official document notifying an applicant that a project application has been approved for funding is the Notice of Grant Award, signed by the Director of the OPHS Office of Grants Management, which specifies to the grantee the amount of money awarded, the purposes of the grant, the length of the project period, and the terms and conditions of the grant award.

2. Administrative and National Policy Requirements

In accepting this award, the grantee stipulates that the award and any activities thereunder are subject to all provisions in 45 CFR parts 74 (non-governmental) and 92 (governmental) currently in effect or implemented during the period of the grant.

The Buy American Act of 1933, as amended (41 U.S.C. 10a–10d), requires that Government agencies give priority to domestic products when making purchasing decisions. Therefore, to the greatest extent practicable, all equipment and products purchased with grant funds should be American-made.

A notice providing information and guidance regarding the "Government-wide Implementation of the President's Welfare-to-Work Initiative for Federal Grant Programs" was published in the **Federal Register** on May 16, 1997. This initiative was designated to facilitate and encourage grantees and their subrecipients to hire welfare recipients and to provide additional needed training and/or mentoring as needed. The text of the notice is available electronically on the OMB home page at *http://www.whitehouse.gov/omb.*

The HHS Appropriations Act requires that when issuing statements, press releases, requests for proposals, bid solicitations, and other documents describing projects or programs funded in whole or in part with Federal money, grantees shall clearly state the percentage and dollar amount of the total costs of the program or project which will be financed with Federal money and the percentage and dollar amount of the total costs of the project or program that will be financed by non-governmental sources.

3. Reporting

A successful applicant under this notice will submit: (a) Progress reports; (b) annual Financial Status Reports; and (c) a final progress report and Financial Status Report. Reporting formats are established in accordance with provisions of the general regulations, which apply under 45 CAR parts 74 and 92. Applicants must submit all required reports in a timely manner, in recommended formats (to be provided) and submit a final report on the project, including any information on evaluation results, at the completion of the project period. Agencies receiving $500,000 or more in total Federal funds are required to undergo an annual audit as described in OMB Circular A–133, "Audits of States, Local Governments, and Non-Profit Organizations."

VI. Agency Contacts

OPHS Office of Grants Management Contact: Karen Campbell, Office of Grants Management, Office of Public Health and Science, Department of Health and Human Services, 1101 Wootton Parkway, Suite 550, Rockville, Maryland, 20852. E-mail: *Kcampbell@osophs.dhhs.gov;* telephone: 301–594–0758.

Program Office Contact: Susan Moskosky, Director, Office of Family Planning, Office of Population Affairs, Office of Public Health and Science, Department of Health and Human Services, 1101 Wootton Parkway, Suite 750, Rockville, Maryland, 20852. E-mail: *SMoskosky@osophs.dhhs.gov;* telephone: 301–594–4008.

Dated: April 21, 2004.

Alma L. Golden,

Deputy Assistant Secretary for Population Affairs, Office of Population Affairs.

[FR Doc. 04–10451 Filed 5–6–04; 8:45 am]

BILLING CODE 4150–34–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–04–51]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call the CDC Reports Clearance Officer on (404) 498–1210.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Send comments to Seleda Perryman, CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS–E11, Atlanta, GA 30333. Written comments should be received within 60 days of this notice.

Proposed Project

Preventing Community-Associated Methicillin-Resistant *Staphylococcus aureus* (CA–MRSA) in Hawaii: Risk Factors and Outcomes for Infection in Children—New—National Center for Infectious Diseases (NCID), Centers for Disease Control and Prevention (CDC).

CDC, National Center for Infectious Diseases is planning to implement a research study to identify: (1) Risk factors for CA–MRSA infections in children, (2) modifiable risks factors, and (3) culture-specific issues to use in

the prevention of CA–MRSA infections among Pacific Islanders.

S. aureus is one of the most common causes of serious skin and soft-tissue infections worldwide. Infections can be minor boils or abscesses, but often can progress to severe infections of muscle, bone, lung, or heart valves. Drug-resistant staphylococcal infections (MRSA) occur commonly among persons in hospitals and healthcare facilities. However, in the past few years these drug-resistant infections have caused illness in persons outside of healthcare setting in several states including Texas, Illinois, Minnesota, California, Georgia, Alaska, and most recently Hawaii.

In 2002, the Hawaii Department of Health detected a high prevalence of MRSA using laboratory-based surveillance and began receiving reports from local clinicians of an increase of skin and soft tissue infections associated with MRSA among persons in the community. In September 2003, an epidemiologic investigation in Hawaii demonstrated there was an increase in the number of CA–MRSA infections between 2001 and 2003 with higher prevalence of these infections among Pacific Islanders, especially children. Likewise, reports from outside the United States have indicated that CA–MRSA infections may be more frequent in Pacific Islander populations; however, there are no appreciable Native Hawaiian/Pacific Islander groups represented at the sites conducting CDC-supported population-based surveillance for CA–MRSA. Identification of the risks factors in this population will greatly assist efforts to implement activities for prevention of CA–MRSA infections among Pacific Islanders. There will be no cost to the respondents.

Forms	No. of respondents	No. of responses per respondents	Avg. burden per response (in hours)	Total burden hours
Telephone interview form 1 (cases and controls)	240	1	30/60	120
Follow-up telephone interview form (cases only)	120	1	15/60	30
Total				150

Dated: April 29, 2004.

Alvin Hall,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 04–10420 Filed 5–6–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Program Announcement 04083]

Collaboration for Global Cancer and Tobacco Control Notice of Intent To Fund Single Eligibility Award

A. Purpose

The Centers for Disease Control and Prevention (CDC) announces the intent to fund fiscal year (FY) 2004 funds for a cooperative agreement program to support Center for Disease Control National Center for Chronic Disease Prevention and Health Promotion's (CDC/NCCDPHP) cancer prevention and tobacco control efforts. The Catalog of Federal Domestic Assistance number for this program is 93.945.

B. Eligible Applicant

Assistance will be provided only to the International Union against Cancer (UICC). Unique to UICC is its large, global volunteer member network, which can provide effective and maximal use of government resources. UICC is the only international non-governmental organization dedicated solely to the global control of cancer. UICC is the largest, independent, non-profit association of 280 cancer-fighting organizations in 90 countries. As such, UICC brings together a wide range of agencies including patient and survivor support networks, voluntary cancer societies, public health authorities, and research and treatment centers.

Globally, and through its partners and volunteer experts, UICC is well placed to disseminate knowledge and foster best practices on a wide scale. UICC's strategic focus is on four key directions which are consistent with the intended strategy for this project. UICC's strategic focus includes cancer prevention and early detection, tobacco control, knowledge transfer, and capacity building.

UICC has grown since its inception in 1933 to become a forum for and of professionals interested in all aspects of cancer control. UICC's journal, The International Journal of Cancer, publishes 30 issues per year. GLOBALINK Tobacco is the largest online network of tobacco control professionals with over 3500 members. UICC's World Cancer Congresses bring together leading experts in different fields from cancer research to cancer care.

The UICC World Cancer Congress will take place in July 2006 in Washington DC. In addition, the UICC is strategically positioned as the secretariat for the 13th World Conference on Tobacco or Health which will be held immediately following the World Cancer Congress also in Washington, DC.

The UICC is uniquely positioned as the only agency with an international network of non-governmental organizations in health and medical care focused solely on cancer and tobacco control. With its voluntary network in numerous countries, it is ideally positioned to address these linked issues in a cost effective way.

C. Funding

Approximately $450,000 is available in FY 2004 to fund this award. It is expected that the award will begin on or before June 15, 2004, and will be made for a 12-month budget period within a project period of up to three years. Funding estimates may change.

D. Where to Obtain Additional Information

For general comments or questions about this announcement, contact: Technical Information Management, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341–4146, Telephone: 770–488–2700.

For technical questions about this program, contact: Myra Wisotzsky, Project Officer, 4770 Buford Highway, MS K–50, Atlanta, GA 30341, E-mail: *mwisotzy@cdc.gov.*

Dated: May 3, 2004.

William P. Nichols,

Acting Director, Procurement and Grants Office, Centers for Disease Control and Prevention.

[FR Doc. 04–10423 Filed 5–6–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Varicella and Viral Vaccine Preventable Disease Surveillance & Epidemiologic Studies, Program Announcement Number 04116 and Enhanced Surveillance for New Vaccine Preventable Diseases, Program Announcement Number 04117

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the following meeting:

Name: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Varicella and Viral Vaccine Preventable Disease Surveillance & Epidemiologic Studies, Program Announcement Number 04116 and Enhanced Surveillance for New Vaccine Preventable Diseases, Program Announcement Number 04117.

Times and Dates: 6 p.m.–7 p.m., June 17, 2004 (Open). 7 p.m.–9 p.m., June 17, 2004 (Closed). 8 a.m.–5 p.m., June 18, 2004 (Closed).

Place: Renaissance Hotels and Resorts, One Hartsfield Centre Parkway, Atlanta, GA 30354, Telephone (404) 209–9999.

Status: Portions of the meeting will be closed to the public in accordance with provisions set forth in section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

Matters To Be Discussed: The meeting will include the review, discussion, and evaluation of applications received in response to Program Announcement Numbers 04116 and 04117.

Contact Person for More Information: Beth Gardner, National Immunization Program, CDC, 1600 Clifton Road, NE, MS–E05, Atlanta, GA 30333, Telephone (404) 639–6101.

The Director, Management Analysis and Services Office has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: May 3, 2004.

Alvin Hall,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 04–10421 Filed 5–6–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Evaluation of Parents Claiming Exemptions to School Entry Immunization Requirements, Program Announcement Number 04091

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the following meeting:

Name: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Evaluation of Parents Claiming Exemptions to School Entry Immunization Requirements, Program Announcement Number 04091.

Times and Dates: 6 p.m.–7 p.m., June 27, 2004 (Open). 7 p.m.–9 p.m., June 27, 2004 (Closed). 8 a.m.–5 p.m., June 28, 2004 (Closed).

Place: Renaissance Hotels and Resorts, One Hartsfield Centre Parkway, Atlanta, GA 30354, Telephone 404.209.9999.

Status: Portions of the meeting will be closed to the public in accordance with provisions set forth in sSection 552b(c) (4) and (6), Title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

Matters To Be Discussed: The meeting will include the review, discussion, and evaluation of applications received in response to Program Announcement Number 04091.

Contact Person for More Information: Beth Gardner, National Immunization Program, CDC, 1600 Clifton Road, NE., MS–E05, Atlanta, GA 30333, Telephone (404) 639–6101.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: May 3, 2004.

Alvin Hall,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 04–10422 Filed 5–6–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare and Medicaid Services

[Document Identifier: CMS–R–268, CMS–10072, and CMS–R–312]

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 (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:* Survey Tool for Medicare.gov website; *Form No.:* CMS–R–268 (OMB# 0938–0756); *Use:* CMS has developed a survey tool using MSInteractive to obtain feedback from users accessing medicare.gov website to guide future improvements; *Frequency:* On Occasion; *Affected Public:* Individuals or households and business or other for-profit; *Number of Respondents:* 5,000; *Total Annual Responses:* 5,000; *Total Annual Hours:* 417.

2. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Survey Tool for Medicare.gov website; *Form No.:* CMS–10072 (OMB# 0938–0900); *Use:* CMS has developed a survey tool using MSInteractive to obtain feedback from users accessing cms.hhs.gov website to guide future improvements; *Frequency:* On Occasion; *Affected Public:* Individuals or households and business or other for-profit; *Number of*

Respondents: 5,000; *Total Annual Responses:* 5,000; *Total Annual Hours:* 417.

3. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Conflict of Interest and Ownership and Control Information; *Form No.:* CMS–R–312 (OMB# 0938–0795); *Use:* This information is required by Public Law 95–142 as a condition of participation in the Medicare program. The Fiscal Intermediaries and Carriers are contractually required as a condition for renewal of their contracts to submit to CMS any ownership and control interest information; *Frequency:* Annually; *Affected Public:* Not-for-profit institutions and business or other for-profit; *Number of Respondents:* 37; *Total Annual Responses:* 37; *Total Annual Hours:* 11,100.

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: Melissa Musotto, Room C5–14–03, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: April 29, 2004.

John P. Burke, III,

Paperwork Reduction Act Team Leader, Office of Strategic Operations and Strategic Affairs, Division of Regulations Development and Issuances.

[FR Doc. 04–10388 Filed 5–6–04; 8:45 am]

BILLING CODE 4120–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare and Medicaid Services

[Document Identifier: CMS–R–53, CMS–R–118 and CMS–10107]

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:* Imposition of Cost Sharing Charges Under Medicaid and Supporting Regulations contained in 42 CFR 447.53; *Form No.:* CMS–R–53 (OMB# 0938–0429); *Use:* The information collection requirements contained in 42 CFR 447.53 require the States to include in their Medicaid State Plan their cost sharing provisions for the medically and categorically needy. The State Plan is the method in which States inform staff of State policies, standards, procedures and instructions; *Frequency:* Occasionally; *Affected Public:* State, Local or Tribal Government; *Number of Respondents:* 52; *Total Annual Responses:* 2; *Total Annual Hours:* 20.

2. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Quality Improvement (formerly Peer Review) Organization Contracts: Solicitation of Statements of Interest from In-State Organizations, General Notice and Supporting Regulations in 42 CFR 475.102, 475.103, 475.104, 475.105 and 475.106; *Form No.:* CMS–R–118 (OMB# 0938–0526); Use: This notice is a solicitation of sources for the procurement of medical review services. The information is required for potential contractors to demonstrate that they meet the statutory requirements as Peer Review Organizations (also known as Quality Improvement Organizations). Compliance with these requirements is voluntary; *Frequency:* Other: As needed, not recurring; *Affected Public:* Business or other for-profit; *Number of Respondents:* 53; *Total Annual Responses:* 53; *Total Annual Hours:* 1.

3. *Type of Information Collection Request:* New Collection; *Title of Information Collection:* Instrument/Tool for Refinement of a Prospective Payment System for Patints in Inpatient Psychiatric Hospitals, and units: a pilot test; *Form No.:* CMS–10107 (OMB# 0938–NEW); *Use:* This is a request to pilot test an instrument to refine the PPS for inpatient psychiatric facilities. This testing will include assessing the feasibility of administering this instrument, and testing the reliability, validity, time and process of administration.; *Frequency:* Other: per stay per diem; *Affected Public:* Business or other for-profit, not-for-profit institutions, and State, Local or Tribal Government; *Number of Respondents:* 1,120; *Total Annual Responses:* 1,120; *Total Annual Hours:* 2,464.

4. *Type of Information Request:* New Collection; *Title of Information Collection:* Evaluation of PACE as a Permanent Program and a For-Profit Demonstration; *Form No.:* CMS–10103 (OMB #0938–NEW); *Use:* The Balanced Budget Act of 1997 (BBA) established PACE as a permanent Medicare program and a state option under Medicaid. It also mandated a for-profit demonstration and a study of the "quality and cost" of the permanent program "under the Medicare and Medicaid programs." All PACE Demonstration sites must convert to permament program sites in 2003. This evaluation will build on the efforts made in the first PACE evaluation (final reports in 2000). Data will be gathered to assess changes in access to care, patient satisfaction, mortality, organizational/operational changes, patient characteristics, outcomes, quality, etc. that have resulted from the BBA legislation. Patient surveys, site syrveys, and claims and utilization data gathered at 12 sites will help answer these study questions. Mathematics Policy Research, Inc. is awarded a contract (No. 500–00–0033) to perform this evaluation. A final report is expected in the summer of 2006;

Frequency: Other: One-time; *Affected Public:* Individuals or households, not-for-profit institutions; *Number of Respondents:* 2,753; *Total Annual Responses:* 2,753; *Total Annual Hours:* 1,330.

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.

Dated: April 29, 2004.

John P. Burke, III,

Paperwork Reduction Act Team Leader, CMS Reports Clearance Officer, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development and Issuances.

[FR Doc. 04–10389 Filed 5–6–04; 8:45 am]

BILLING CODE 4120–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. 2003M–0337, 2003M–0332, 2003M–0343, 2003M–0242, 2003M–0333, 2003M–0339, 2003M–0320, 2003M–0356, 2003M–0305, 2003M–0352, 2003M–0381, 2003M–0375, 2003M–0427]

Medical Devices; Availability of Safety and Effectiveness Summaries for Premarket Approval Applications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is publishing a list of premarket approval applications (PMAs) that have been approved. This list is intended to inform the public of the availability of safety and effectiveness summaries of approved PMAs through the Internet and the agency's Division of Dockets Management.

ADDRESSES: Submit written requests for copies of summaries of safety and effectiveness to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Please cite the appropriate docket number as listed in table 1 of this document when submitting a written request. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the summaries of safety and effectiveness.

FOR FURTHER INFORMATION CONTACT: Thinh Nguyen, Center for Devices and Radiological Health (HFZ–402), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–2186.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of January 30, 1998 (63 FR 4571), FDA published a final rule that revised 21 CFR 814.44(d) and 814.45(d) to discontinue individual publication of PMA approvals and denials in the **Federal Register**. Instead, the agency now posts this information on the Internet on FDA's home page at *http://www.fda.gov*. FDA believes that this procedure expedites public notification of these actions because announcements can be placed on the Internet more quickly than they can be published in the **Federal Register**, and FDA believes that the Internet is accessible to more people than the **Federal Register**.

In accordance with section 515(d)(4) and (e)(2) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360e(d)(4) and (e)(2)), notification of an order approving, denying, or withdrawing approval of a PMA will continue to include a notice of opportunity to request review of the order under section 515(g) of the act. The 30-day period for requesting reconsideration of an FDA action under § 10.33(b) (21 CFR 10.33(b)) for notices announcing approval of a PMA begins on the day the notice is placed on the Internet. Section 10.33(b) provides that FDA may, for good cause, extend this 30-day period. Reconsideration of a denial or withdrawal of approval of a PMA may be sought only by the applicant; in these cases, the 30-day period will begin when the applicant is notified by FDA in writing of its decision.

The regulations provide that FDA publish a quarterly list of available safety and effectiveness summaries of PMA approvals and denials that were announced during that quarter. The following is a list of approved PMAs for which summaries of safety and effectiveness were placed on the Internet from July 1, 2003, through September 30, 2003. There were no denial actions during this period. The list provides the manufacturer's name, the product's generic name or the trade name, and the approval date.

TABLE 1.—LIST OF SAFETY AND EFFECTIVENESS SUMMARIES FOR APPROVED PMAS MADE AVAILABLE FROM JULY 1, 2003, THROUGH SEPTEMBER 30, 2003

PMA No./Docket No.	Applicant	Trade Name	Approval Date
P000013/2003M–0337	Howmedica Ostenonics Corp.	OSTEONICS ABC SYSTEM & TRIDENT SYSTEM HIP PROSTHESIS	February 3, 2003
P010001/2003M–0332	Ceramtec AgWright Medical Technology	CERAMIC TRANSCEND HIP ARTICULATION SYSTEM	February 3, 2003
P020052/2003M–0343	St. Jude Medical, Daig Division, Inc.	RESPONSE CV CATHETER SYSTEM	May 7, 2003

TABLE 1.—LIST OF SAFETY AND EFFECTIVENESS SUMMARIES FOR APPROVED PMAS MADE AVAILABLE FROM JULY 1, 2003, THROUGH SEPTEMBER 30, 2003—Continued

PMA No./Docket No.	Applicant	Trade Name	Approval Date
P020018/2003M–0242	Cook, Inc.	ZENITH AAA ENDOVASCULAR GRAFT AND H&L–B ONE–SHOT INTRODUCTION SYSTEM	May 23, 2003
P930016(S16)/2003M–0333	Visx, Inc.	STAR S4 ACTIVE TRAK EXCIMER LASER SYSTEM AND WAVE SCAN WAVE FRONT SYSTEM	May 23, 2003
P020002/2003M–0339	Cytyc Corp.	THINPREP IMAGING SYSTEM	June 6, 2003
P020037/2003M–0320	X Technologies	FX MINIRAIL RX PTCA CATHETER	June 11, 2003
P030027/2003M–0356	Wright Cremascoli Ortho, SA	CERAMIC TRANSCEND HIP ARTICULATION SYSTEM	July 7, 2003
H020004/2003M–0305	Smith & Nephew Wound Management	DERMAGRAFT	July 7, 2003
P020049/2003M–0352	Hancock/Jaffe Laboratories	PROCOL VASCULAR BIOPROSTHESIS	July 29, 2003
P020036/2003M–0381	Cordis Corp.	SMART AND SMART CONTROL NITINOL STENT SYSTEM	August 12, 2003
P020033/2003M–0375	Independence Technology, LLC	INDEPENDENCE IBOT 3000 MOBILITY SYSTEM	August 13, 2003
P020025/2003M–0427	Boston Scientific	EP TECHNOLOGIES EPT 1000 XP RF ABLATION SYSTEM	August 25, 2003

II. Electronic Access

Persons with access to the Internet may obtain the documents at *http://www.fda.gov/cdrh/pmapage.html.*

Dated: April 26, 2004.

Linda S. Kahan,

Deputy Director, Center for Devices and Radiological Health.

[FR Doc. 04–10450 Filed 5–6–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket Nos. 2003M–0532, 2003M–0487, 2003M–0488, 2003M–0499, 2003M–0490, 2003M–0491, 2003M–0492, 2003M–0533, 2003M–0524, 2003M–0536, 2003M–0569, 2003M–0560]

Medical Devices; Availability of Safety and Effectiveness Summaries for Premarket Approval Applications

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is publishing a list of premarket approval applications (PMAs) that have been approved. This list is intended to inform the public of the availability of safety and effectiveness summaries of approved PMAs through the Internet and the agency's Division of Dockets Management.

ADDRESSES: Submit written requests for copies of summaries of safety and effectiveness to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Please cite the appropriate docket number as listed in table 1 of this document when submitting a written request. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the summaries of safety and effectiveness.

FOR FURTHER INFORMATION CONTACT: Thinh Nguyen, Center for Devices and Radiological Health (HFZ–402), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–2186.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of January 30, 1998 (63 FR 4571), FDA published a final rule that revised 21 CFR 814.44(d) and 814.45(d) to discontinue individual publication of PMA approvals and denials in the **Federal Register**. Instead, the agency now posts this information on the Internet on FDA's home page at *http://www.fda.gov*. FDA believes that this procedure expedites public notification of these actions because announcements can be placed on the Internet more quickly than they can be published in the **Federal Register**, and FDA believes that the Internet is accessible to more people than the **Federal Register**.

In accordance with section 515(d)(4) and (e)(2) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360e(d)(4) and (e)(2)), notification of an order approving, denying, or withdrawing approval of a PMA will continue to include a notice of opportunity to request review of the order under section 515(g) of the act. The 30-day period for requesting reconsideration of an FDA action under § 10.33(b) (21 CFR 10.33(b)) for notices announcing approval of a PMA begins on the day the notice is placed on the Internet. Section 10.33(b) provides that FDA may, for good cause, extend this 30-day period. Reconsideration of a denial or withdrawal of approval of a PMA may be sought only by the applicant; in these cases, the 30-day

period will begin when the applicant is notified by FDA in writing of its decision.

The regulations provide that FDA publish a quarterly list of available safety and effectiveness summaries of PMA approvals and denials that were announced during that quarter. The following is a list of approved PMAs for which summaries of safety and effectiveness were placed on the Internet from October 1, 2003, through December 31, 2003. There were no denial actions during this period. The list provides the manufacturer's name, the product's generic name or the trade name, and the approval date.

TABLE 1.—LIST OF SAFETY AND EFFECTIVENESS SUMMARIES FOR APPROVED PMAS MADE AVAILABLE FROM OCTOBER 1, 2003, THROUGH DECEMBER 31, 2003

PMA No./Docket No.	Applicant	Trade Name	Approval Date
P000028/2003M–0532	Medtronic, Inc. (Sofamor Danek)	AFFINITY CAGE SYSTEM (INTERVERTEBRAL CERVICAL DEVICE)	June 13, 2002
P020007/2003M–0487	Medtronic AVE, Inc.	MEDTRONIC AVE BRIDGE EXTRA SUPPORT OVER–THE–WIRE RENAL STENT SYSTEM	December 18, 2002
P020041/2003M–0488	Femcap, Inc.	FEMCAP BARRIER CONTRACEPTIVE DEVICE	March 28, 2003
P020047/2003M–0499	Guidant Corp.	MULTI-LINK RX/OTW VISION CORONARY STENT SYSTEM	July 16, 2003
P030009/2003M–0490	Medtronic Vascular	DRIVER OVER–THE–WIRE, RAPID EXCHANGE, AND MULTI-EXCHANGE CORONARY STENT SYSTEM	October 1, 2003
P020050/2003M–0491	Wavelight Laser Technologies (SurgiVision Refractive Consultants, LLC)	WAVELIGHT ALLEGRETTO WAVE EXCIMER LASER SYSTEM	October 7, 2003
P030008/2003M–0492	Wavelight Laser Technologies (SurgiVision Refractive Consultants, LLC)	WAVELIGHT ALLEGRETTO WAVE EXCIMER LASER SYSTEM	October 10, 2003
P9900027(S6)/2003M–0533	Bausch & Lomb Surgical, Inc.	BAUSCH & LOMB TECHNOLAS 217Z ZYOPTIX SYSTEM FOR PERSONALIZED VISION CORRECTION	October 10, 2003
P020040/2003M–0524	Medinol Ltd.	NIRFLEX PRE–MOUNTED CORONARY STENT SYSTEM	October 24, 2003
H020003/2003M–0536	Medtronic, Inc.	CONTEGRA PULMONARY VALVED CONDUIT	November 21, 2003
D980003/2003M–0569	Encore Medical, LP	KERAMOS CERAMIC/CERAMIC TOTAL HIP SYSTEM	November 26, 2003
P030039/2003M–0560	Baxter Bio Science (Baxter Healthcare)	COSEAL SURGICAL SEALANT	December 12, 2003

II. Electronic Access

Persons with access to the Internet may obtain the documents at *http://www.fda.gov/cdrh/pmapage.html.*

Dated: April 26, 2004.

Linda S. Kahan,

Deputy Director, Center for Devices and Radiological Health.

[FR Doc. 04–10459 Filed 5–6–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Strategies for Developing Therapeutics That Directly Target Anthrax and Its Toxins; Public Workshop

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop.

The Food and Drug Administration (FDA) is announcing a public workshop entitled "Strategies for Developing Therapeutics That Directly Target Anthrax and Its Toxins." The goals of the public workshop are to provide a forum for sharing information and discussing strategies for safety and efficacy testing of therapeutics that target anthrax and its toxins in order to expedite the development of these FDA-regulated products; and to address the optimal studies for product characterization, proof of concept, and demonstration of safety and efficacy in postexposure prophylaxis and/or in the treatment of established disease. The workshop will cover therapies that

involve monoclonal antibodies, other recombinant proteins, polyclonal immune globulin (human or animal) and small molecules that inhibit toxins. The workshop will not cover the use of vaccines and antimicrobial drugs targeting anthrax and its toxins.

Date and Time: This 2-day public workshop will be held on June 10, 2004, from 8:30 a.m. to 5 p.m., and June 11, 2004, from 8:30 a.m. to 3 p.m.

Location: The public workshop will be held at the National Institutes of Health (NIH), Natcher Auditorium, Bldg. 45, 45 Center Dr., Bethesda, MD 20894.

The NIH campus is accessible via the Washington, DC Metro Transit System, Red Line, at the Medical Center Station. The Natcher Conference Center is a short walk from the metro station, or you may take a shuttle bus that runs from the metro station to the various buildings on the campus. Because of security measures, visitors' parking is extremely limited and use of private vehicles may cause significant delays in entering the campus. Additionally, you will be required to show a photo ID upon entry to the campus and the Natcher Conference Center.

Contact Person: Melanie Whelan, Center for Biologics Evaluation and Research (HFM–43), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448, 301–827–3841, FAX: 301–827–3079, e-mail: *Whelan@cber.fda.gov*.

Registration: Send registration information (including name, title, firm name, address, telephone number, e-mail address, and FAX number) to the contact person by Friday, May 21, 2004. There is no registration fee for the public workshop. Because seating is limited, we recommend early registration. There will be no onsite registration.

If you need special accommodations due to a disability, please contact Melanie Whelan (see *Contact Person*) at least 7 days in advance.

SUPPLEMENTARY INFORMATION: FDA, Center for Biologics Evaluation and Research and Center for Drug Evaluation and Research; the National Institutes of Health, National Institute of Allergy and Infectious Diseases; the Centers for Disease Control and Prevention; and the Department of Health and Human Services, Office of Research and Development Coordination are cosponsoring a public workshop. The public workshop will provide a forum for sharing information and discussing strategies for safety and efficacy testing of therapeutics, including monoclonal antibody-based therapies, other recombinant proteins, polyclonal immune globulins (human and animal derived), and small molecules, that target anthrax and its toxins in order to expedite the development of these FDA-regulated products. The use of vaccines and antimicrobial drugs targeting anthrax and its toxins will not be covered. The public workshop is intended to address the optimal studies for product characterization, proof of concept, and demonstration of safety and efficacy in postexposure prophylaxis and/or in the treatment of established disease.

Mail or fax your issues and questions to Melanie Whelan (see *Contact Person*) by Friday, May 28, 2004. (There will be an opportunity to raise additional questions and issues for discussion at the public workshop.) The agenda for this public workshop, when finalized, will be posted on the Center for Biologics Evaluation and Research's Web site at *http://www.fda.gov/cber/scireg.htm*.

Transcripts: Transcripts of the workshop may be requested in writing from the Freedom of Information Office (HFI–35), Food and Drug Administration, 5600 Fishers Lane, rm. 12A–16, Rockville, MD 20857, approximately 15 working days after the public workshop at a cost of 10 cents per page. In addition, the transcript will be placed on FDA's Internet at *http://www.fda.gov/cber/minutes/workshop-min.htm*.

Dated: April 28, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–10460 Filed 5–6–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (301) 443–7978.

SAMHSA Application for Peer Grant Reviewers (OMB No. 0930–0255, revision)—Section 501(h) of the Public Health Service (PHS) Act [42 U.S.C. 290aa] directs the Administrator of the Substance Abuse and Mental Health Services Administration (SAMHSA) to establish such peer review groups as are needed to carry out the requirements of Title V of the PHS Act. SAMHSA administers a large discretionary grants program under authorization of Title V, and for many years SAMHSA has funded grants to provide prevention and treatment services related to substance abuse and mental health.

SAMHSA efforts to make improvements in the grants process have been shown by the restructuring of discretionary award announcements. In support of these efforts, SAMHSA desires to expand the types of reviewers it uses on these grant review committees. To accomplish that end, SAMHSA has determined that it is important to proactively seek the inclusion of new and qualified representatives on its peer review groups, and accordingly SAMHSA has developed an application form for use by individuals who wish to apply to serve as peer reviewers.

The application form has been developed to capture the essential information about the individual applicants. Although consideration was given to requesting a resume from interested individuals, it is essential to have specific information from all applicants about their qualifications; the most consistent method to accomplish this is completion of a standard form by all interested persons. SAMHSA will use the information about knowledge, education and experience provided on the applications to identify appropriate peer grant reviewers. Depending on their experience and qualifications, applicants may be invited to serve as either grant reviewers or review group chairpersons. Revisions are the addition of: a check item to identity the address to which grant applications to be reviewed should be mailed, and allowance for individuals who are consumers or family members of consumers to choose two rather than one professional affiliation. The following table shows the estimated annual response burden.

Number of respondents	Responses/respondent	Burden/response (hrs.)	Total burden hours
500	1	1.5	750

Written comments and recommendations concerning the proposed information collection should be sent by June 7, 2004, to: SAMHSA Desk Officer, Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; due to potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, respondents are encouraged to submit comments by fax to: 202–395–6974.

Dated: April 30, 2004.

Anna Marsh,

Executive Officer, SAMHSA.

[FR Doc. 04–10424 Filed 5–6–04; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4910–N–11]

Notice of Proposed Information Collection for Public Comment; Annual Lead-Based Paint (LBP) Activity Report

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments due date:* July 6, 2004.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name/or OMB Control number and should be sent to: Sherry Fobear McCown, Reports Liaison Officer, Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street, SW., Room 4116, Washington, DC 20410–5000.

FOR FURTHER INFORMATION CONTACT: Sherry Fobear McCown, (202) 708–0713, extension 7651, for copies of the proposed forms and other available documents. (This is not a toll-free number).

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) enhance the quality, utility, and clarity of the information to be collected; and (4) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology; *e.g.*, permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Annual Lead-Based Paint Activity Report.

OMB Control Number: 2577–0090.

Description of the need for the information and proposed use: HUD needs the information to assure statutory and regulatory compliance with The Lead-Based Paint Poisoning Prevention Act (LBPPA), as amended (42 U.S.C. 4821–4846) which requires public and Indian housing agencies (HAs) to randomly sample their pre-1978 developments for the presence of LBP. Congress directed HUD to establish an adequate management information system for measuring and reporting on HAs' performance on LBP activities. HUD revised the tracking system for collecting lead-based paint data. The system collects less, but different data. HAs use the Form HUD–52850 to submit information on LBP. HUD reports the information to Congress as required by statute.

Agency form number: HUD–52850.

Members of affected public: State, Local or Tribal government.

Estimation of the total number of hours needed to prepare the information collection including number of respondents: 3,100 respondents; one response per respondent annually; one hour average per response, 3,100 total reporting burden hours per year.

Status of the proposed information collection: Extension of currently approved collection.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: April 29, 2004.

Michael M. Liu,

Assistant Secretary for Public and Indian Housing.

[FR Doc. 04–10479 Filed 5–6–04; 8:45 am]

BILLING CODE 4210–33–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4904–N–04]

Notice of Proposed Information Collection for Public Comment; Floodplain Management and Protection of Wetlands

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Development is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* July 6, 2004.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Sheila Jones, Reports Liaison Officer, Community Planning and Development, Department of Housing and Urban Development, 451 7th Street, SW., Room 7232, Washington, DC 20410–7000.

FOR FURTHER INFORMATION CONTACT: Richard H. Broun, Director, Office of Environment and Energy, Department of Housing and Urban Development, Room 7244, 451 Seventh Street, SW., Washington, DC 20410–7000. For telephone communication, contact Walter Prybyla, Deputy Director for Policy, Environmental Review Division, (202) 708–1201 x4466 or e-mail; *Walter_Prybyla@hud.gov.* This phone number is not toll-free. 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: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Floodplain Management and Protection of Wetlands.

OMB Control Number: 2506–0151.

Description of the need for the information and proposed use: The purpose of this information collection is to document regulatory compliance with Executive Order 11988, "Floodplain Management" and Executive Order 11990, "Protection of Wetlands." Each respondent that proposes to use HUD assistance to benefit a property located within a floodplain or wetland must establish and maintain sufficient records to enable the Secretary of HUD to determine whether the floodplain management requirements of 24 CR part 55, especially subpart C, and the protection of wetlands requirements of Executive Order 11990 have been met. The record, together with other environmental compliances that a proposed project may require under the National Environmental Policy Act and related laws, will serve to obtain the approval of an application under 24 CFR part 50 or will allow the use of grant funds or assistance already awarded under 24 CFR part 58.

Agency form numbers, if applicable: Not applicable.

Members of affected public: Primary: Local, State, or Tribal Governments. Others: Public housing agencies, and private non- and for-profit entities.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: Annual reporting and recordkeeping hour burden estimate is a total of 2,700 hours. Estimates are 300 respondents, 1 frequency, and 9 hours of response. Total of 300 hours is estimated for notification of floodplain hazard (regulatory reference is Sec. 55.21). Total of 2,400 hours is estimated for documentation of compliance with Sec. 55.20 (regulatory reference is Sec. 55.27).

Status of the proposed information collection: Extension of a currently approved collection whose expiration date: August 31, 2004.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: April 30, 2004.

Roy Bernardi,

Assistant Secretary for Community Planning and Development.

[FR Doc. 04–10480 Filed 5–6–04; 8:45 am]

BILLING CODE 4210–29–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4904–N–05]

Notice of Proposed Information Collection for Public Comment; Environmental Review Procedures for Entities Assuming HUD Environmental Responsibilities

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as acquired by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* July 6, 2004.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Sheila Jones, Reports Liaison Officer, Community Planning and Development, Department of Housing and Urban Development, 451 7th Street, SW., Room 7232, Washington, DC 20410–7000.

FOR FURTHER INFORMATION CONTACT: Richard H. Broun, Director, Office of Environment and Energy, Department of Housing and Urban Development, Room 7244, 451 Seventh Street, SW., Washington, DC 20410–7000. For telephone communication, contact Walter Prybyla, Deputy Director for Policy, Environmental Review Division, (202) 708–1201 x4466 or e-mail: *Walter_Prybyla@hud.gov*. This phone number is not toll-free. 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: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Environmental Review Procedures for Entities Assuming HUD Environmental Responsibilities.

OMB Control Number: 2506–0087.

Description of the need for the information and proposed use: The purpose of this information collection is to document regulatory compliance with the National Environmental Policy Act (NEPA) and related environmental statutes. This is performed by recipients of HUD financial assistance who are required to assume HUD's environmental responsibilities and/or who are required to submit requests for release of funds and certify full compliance with NEPA and the related statutes using the procedures identified in 24 CFR part 58. Recipients establish and maintain sufficient records to enable the Secretary of HUD to

determine whether the requirements of 24 CFR part 58 have been met. The records serve to allow the use of grant funds or financial assistance already awarded under 24 CFR part 58.

Agency form numbers: Form HUD 7015.15, "Request for Release of Funds and Certification."

Members of affected public: Primary: Local, State, or Tribal Governments. Others: Public housing agencies, and private non- and for-profit entities.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: Annual reporting and recordkeeping hour burden estimate is a total of 13,860 hours. Estimates are 18,785 respondents, 1 frequency of response, and 0.6 hours per response (regulatory references are Secs. 58.1 and 58.71 for form HUD–7015.15).

Status of the proposed information collection: Extension of a currently approved collection whose expiration date: November 30, 2004.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: April 30, 2004.

Roy Bernardi,

Assistant Secretary for Community Planning and Development.

[FR Doc. 04–10481 Filed 5–6–04; 8:45 am]

BILLING CODE 4210–29–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4901–N–19]

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.

EFFECTIVE DATE: May 7, 2004.

FOR FURTHER INFORMATION CONTACT: Kathy Burruss, Department of Housing and Urban Development, Room 7262, 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 the December 12, 1988, court order in *National Coalition for the Homeless* v. *Veterans Administration*, No. 88–2503–OG (D.D.C.), HUD publishes a notice, on a weekly basis, identifying unutilized, underutilized, excess and surplus Federal buildings and real property that HUD has reviewed for suitability for use to assist the homeless. Today's Notice is for the purpose of announcing that no additional properties have been determined suitable or unsuitable this week.

Dated: April 29, 2004.

Mark R. Johnston,

Acting Director, Office of Special Needs Assistance Programs.

[FR Doc. 04–10110 Filed 5–6–04; 8:45 am]

BILLING CODE 4210–29–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Proposed Safe Harbor Agreement for the Introduction of Nene to Piiholo Ranch, Maui, HI

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability and receipt of application.

SUMMARY: Piiholo Ranch (Applicant) has applied to the U.S. Fish and Wildlife Service (Service) for an enhancement of survival permit pursuant to section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1533 *et seq.*) (ESA). As part of that application package, a Safe Harbor Agreement (Agreement) is proposed by the Applicant and the State of Hawaii Department of Land and Natural Resources (DLNR). The proposed Agreement provides for the introduction of the endangered nene, or Hawaiian goose (*Branta sandvicensis*), and for management, habitat enhancement, and monitoring for nene within approximately 600 acres of short grass ranch lands on private property on the island of Maui, Hawaii. The duration of the proposed Agreement is 10 years, enabling introduction and establishment of a population of nene. The proposed permit duration is 50 years. At any time after the expiration of the Agreement and prior to expiration of the permit, the property owner may return the property to its original baseline condition described in the Agreement. The Agreement and permit application are available for public comment.

The proposed Agreement and ESA enhancement of survival permit may be eligible for categorical exclusion under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) (NEPA). This is evaluated in an Environmental Action Statement, which is also available for public review.

DATES: Written comments must be received by 5 p.m. on June 7, 2004.

ADDRESSES: Comments should be addressed to Ms. Gina M. Shultz, Acting Field Supervisor, Pacific Islands Fish and Wildlife Office, 300 Ala Moana Blvd., PO Box 50088, Honolulu, Hawaii 96850, facsimile number (808) 792–9580 (*see* **SUPPLEMENTARY INFORMATION**, Public Review and Comments).

FOR FURTHER INFORMATION CONTACT: Ms. Arlene Pangelinan, Supervisory Fish and Wildlife Biologist, at the above address or by calling (808) 792–9400.

SUPPLEMENTARY INFORMATION:

Public Review and Comments

Individuals wishing copies of the permit application, the Environmental Action Statement, or copies of the full text of the proposed Agreement, including a map of the proposed permit area, references, and legal descriptions of the proposed permit area, should contact the office and personnel listed in the **ADDRESSES** section. Documents also will be available for public inspection, by appointment, during normal business hours at this office (*see* **ADDRESSES**).

The Service provides this notice pursuant to section 10(c) of the Act and NEPA regulations (40 CFR 1506.6). All comments received on the permit application and proposed Agreement, including names and addresses, will become part of the administrative record and may be released to the public. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, are available for public inspection in their entirety.

Background

The biological objective of the proposed Agreement is to introduce a population of nene to a mid-elevation site on Maui, Hawaii, and thereby establish a self-sustaining population. An additional objective, which benefits both the nene and the Applicant, is to assure regulatory stability to the Applicant by relieving him/her of any additional section 9 liability under the ESA beyond that which exists at the time the Agreement is signed ("regulatory baseline"). Safe Harbor Agreements encourage landowners to

conduct voluntary conservation activities and assure them that they will not be subjected to increased endangered species restrictions should their beneficial stewardship efforts result in increased endangered species populations. Application requirements and issuance criteria for enhancement of survival permits through Safe Harbor Agreements are found in 50 CFR 17.22(c). As long as the landowners maintain their baseline responsibilities, they may make any other lawful use of the property during the permit term, even if such use results in the take of individual nene or harm to nene habitat.

The proposed Agreement was developed by the Applicant and the DLNR Division of Forestry and Wildlife (DOFAW) with technical assistance from the Service. The Agreement proposes the introduction of nene to Piiholo Ranch by the DOFAW, in addition to allowing the DOFAW and the Service to monitor the nene and improve nene habitat. Under the proposed Agreement, the Applicant will: (1) Construct and maintain a release pen for the nene with the assistance of the DOFAW; (2) fence and maintain an area of several acres around the release pen to allow for planting of native food plants for nene; (3) conduct predator control in and around the nene release pen; (4) allow the DOFAW and the Service access to private property for monitoring and maintaining the nene at Piiholo Ranch; and (5) allow and perform habitat maintenance activities to ensure nene survival at Piiholo Ranch. The DOFAW will: (1) Introduce nene to Piiholo Ranch following an agreed upon protocol over the course of several introductions; (2) assist with construction of the release pen and with predator control; and (3) assist with managing and monitoring nene, including conducting an annual survey of nene on Piiholo Ranch.

The proposed Agreement stipulates that nene nests will not be disturbed until after the birds have hatched their eggs and left the nest with their young to the maximum extent practicable and that nene will not be fed outside the release pen in order to maintain their wildness.

We anticipate that this proposed Agreement will result in the following benefits to nene: (1) Establish a new, self-sustaining population of nene on Maui in a mid-elevation site; (2) reduce the risk of catastrophic loss of nene due to their increased range in the wild; (3) increase the number of nene in the wild (it is anticipated that a population of 75 nene could become established within the term of the Agreement on Piiholo Ranch); (4) increase our understanding of the effectiveness of management techniques for nene; and (5) provide an additional source of nene for future management activities. Nene were likely extirpated from the island of Maui by around 1900 and there have been no known sightings of nene on Piiholo Ranch, therefore, the baseline for this proposed Agreement is zero.

Consistent with the Safe Harbor policy (64 FR 32717), Piiholo Ranch has applied to the Service for issuance of an enhancement of survival permit under section 10(a)(1)(A) of the ESA to authorize incidental take of nene introduced to the enrolled lands, and their progeny, as a result of lawful activities at Piiholo Ranch. These activities include unintentional take of nene from: (1) Cattle ranching; (2) tourism; (3) cultivation of agricultural crops; and (4) harvesting and processing non-native trees. We expect that the maximum level of incidental take authorized under the proposed Agreement will never be realized. Piiholo Ranch has no plans to change land uses. The Agreement provides that any nene taken when the Agreement expires will not be injured or harmed, but will be relocated, with permission from the landowners, to other suitable lands. We fully expect that the release of nene on Piiholo Ranch will result in the establishment of a self-sustaining population of nene. Therefore, the cumulative impact of the proposed Agreement and the activities it covers, which are facilitated by the allowable incidental take, will provide a net conservation benefit to the nene.

We will evaluate the permit application, the proposed Agreement, and comments submitted thereon to determine whether the application meets the requirements of section 10(a) of the ESA and NEPA regulations. If the requirements are met, the Service will sign the proposed Agreement and issue an enhancement of survival permit under section 10(a)(1)(A) of the ESA to the Applicant for take of the nene incidental to otherwise lawful activities of the project. The Service will not make a final decision without full consideration of all comments received during the comment period.

Dated: May 3, 2004.

David J. Wesley,

Deputy Regional Director, Region 1, U.S. Fish and Wildlife Service, Portland, Oregon.

[FR Doc. 04–10425 Filed 5–6–04; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Southern Idaho Ground Squirrel Programmatic Candidate Conservation Agreement With Assurances and Related Draft Environmental Assessment

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability and receipt of application.

SUMMARY: The Idaho Department of Fish and Game (Department) has applied to the Fish and Wildlife Service (Service) for an enhancement of survival permit pursuant to section 10(a)(1)(A) of the Endangered Species Act of 1973 (ESA), as amended (16 U.S.C. 1531 *et seq.*). The permit application includes a proposed Programmatic Southern Idaho Ground Squirrel Candidate Conservation Agreement with Assurances (Agreement) between the Service, the Idaho Department of Fish and Game, and the Idaho Governor's Office of Species Conservation.

Under the proposed Agreement, the parties would implement conservation measures for southern Idaho ground squirrels (*Spermophilus brunneus endemicus*) over approximately 1,046,569 acres in Adams, Washington, Payette, and Gem counties, Idaho. The intent of the Agreement is to conserve southern Idaho ground squirrels (SIGS) by protecting and enhancing SIGS habitat and populations, and reintroducing SIGS into currently unoccupied suitable habitat, in a manner that is consistent with the non-Federal landowner's land use activities and the Agreement. The proposed term of the Agreement and the permit is 20 years. The Service has prepared a draft Environmental Assessment for approval of the Agreement and issuance of the permit. We request comments from the public on the permit application, the Agreement, and the draft Environmental Assessment.

DATES: Written comments should be received on or before June 7, 2004.

ADDRESSES: You may submit comments by postal mail/commercial delivery or facsimile. Please address your written comments to Carmen Thomas, Project Biologist, Fish and Wildlife Service, 1387 S. Vinnell Way, Room 368, Boise, Idaho 83709 (facsimile: (208) 378–5262).

FOR FURTHER INFORMATION CONTACT: Carmen Thomas at the above address or telephone (208) 378–5243.

SUPPLEMENTARY INFORMATION:

Document Availability

You may obtain copies of the documents for review by contacting the individual named above or by making an appointment to view the documents at the above address during normal business hours.

All comments we receive, including names and addresses, will become part of the administrative record and may be released to the public. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. All submissions from organizations or companies, or from individuals representing organizations or companies, are available for public inspection in their entirety.

Background

Under a Candidate Conservation Agreement with Assurances (CCAA), participating landowners voluntarily implement conservation activities on their property to benefit species that are proposed or candidates for listing, or for which listing under the ESA is warranted but precluded, or other sensitive species. CCAAs encourage private and other non-Federal property owners to implement conservation efforts and reduce threats to unlisted species by assuring them they would not be subjected to increased property use restrictions, beyond those identified in the agreement, if species are listed in the future under the ESA.

Under the Final Policy for CCAAs (64 FR 32726), the Service must determine that the benefits of the conservation measures implemented by the property owner, when combined with those benefits that would be achieved if it is assumed that the conservation measures would also be implemented on other necessary properties, would preclude or remove the need to list the covered species. Application requirements and issuance criteria for enhancement of survival permits through CCAAs are found in 50 CFR 17.22(d) and 17.32(d).

On October 30, 2001, the Service formally identified the southern Idaho ground squirrel as a candidate for listing under the ESA (66 FR 54808). SIGS are currently found within an approximately 1,046,569-acre area comprised of lower elevation shrub/steppe habitat in the Weiser and Payette river basins in southwest Idaho. The species appears to have undergone a substantial population decline throughout its range since 1985. SIGS are largely dependent on private lands: 85 percent of the occupied ground squirrel sites are located on private lands, mostly ranches and farms; 12 percent are under federal management by the Bureau of Land Management; and 3 percent of the sites are on lands managed by the Idaho Department of Lands. Conservation measures implemented on private lands are important for the long-term survival of the species.

Landowners may be willing to implement measures that enhance populations of sensitive species on their property, but reluctant to do so because of potential land-use restrictions that could occur should the species eventually be listed under the ESA. As a result of this potential regulatory concern, the Department developed the Agreement, in cooperation with the Service, and is applying to the Service for a permit under section 10(a)(1)(A) of the ESA to enhance the propagation or survival of the species and to authorize incidental take of SIGS should the species be listed during the term of the permit.

Description of Proposed Action

Under the Agreement and permit, the Department, the Service, and participating non-Federal landowners would implement various conservation measures over the range of the SIGS, depending on present and future occupancy of sites by SIGS. The conservation measures under the Agreement are intended to reduce all threats to the SIGS that are controllable by participating landowners within the project area. Within the project area, enrolled lands must be specifically identified in each participating landowner's site-specific plan. Each site-specific plan would identify in detail how the applicable conservation measures would be implemented on an individual landowner's property considering baseline SIGS populations and habitat conditions, and the landowner's planned use activities. For a participating landowner's site-specific plan to be approved, the site-specific plan must contain all conservation measures identified in the Agreement that are within the participating landowner's control, and result in a net improvement in SIGS habitat or populations on the enrolled lands.

Conservation measures that may be implemented on private lands within the project area that are enrolled in the Agreement include: (1) Implement habitat maintenance or enhancement measures such as seeding native vegetation species, fertilizing vegetation, prescribed burning, and providing escape cover; (2) prohibit shooting, trapping, or poisoning of SIGS; (3) minimize direct mortality from ground disturbing activities; (4) allow translocation of SIGS into unoccupied, suitable habitat; (5) control Columbian ground squirrels and badgers to reduce competition and predation; (6) monitor ground squirrel populations and habitat characteristics to monitor effectiveness and compliance with the Agreement; (7) actively pursue funding to implement the site-specific plan; and (8) coordinate/cooperate with non-federal third parties that hold conservation easements on or adjacent to enrolled lands, and that wish to participate in the Agreement. Should the species be listed under the ESA during the 20-year term of the permit, the permit would authorize incidental take of SIGS as a result of participating landowners' covered land-use activities, which include crop cultivation and harvesting, livestock grazing and production, farm equipment operation, and recreational activities.

A draft Environmental Assessment has been prepared to address the impacts of permit issuance. The draft Environmental Assessment evaluates the environmental impacts that may result from implementation of the conservation measures described in the Agreement. The draft Environmental Assessment describes alternatives to the proposed action including the no action alternative.

We provide this notice pursuant to section 10(c) of the ESA and implementing regulations for the National Environmental Policy Act (40 CFR 1506.6). We will evaluate the permit application, associated documents, and comments submitted thereon to determine whether the permit application meets the requirements of section 10(a) of the ESA and National Environmental Policy Act regulations. If we determine that the requirements are met, we will sign the Agreement and issue an enhancement of survival permit under section 10(a)(1)(A) of the ESA to the Department for take of SIGS, should it become listed during the term of the permit, incidental to otherwise lawful activities in accordance with the terms of the Agreement. The Service will not make a final decision until after the end of the 30-day comment period and will fully consider all comments received during the comment period.

Dated: May 4, 2004.

David J. Wesley,

Deputy Regional Director, Region 1, Portland, Oregon.

[FR Doc. 04–10426 Filed 5–6–04; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CO–921–04–1320–EL; COC 67643]

Notice of Invitation for Coal Exploration License Application, Oxbow Mining, LLC COC 67643; Colorado.

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of invitation for coal exploration license application, Oxbow Mining, LLC.

SUMMARY: Pursuant to the Mineral Leasing Act of February 25, 1920, as amended, and to title 43, Code of Federal Regulations, subpart 3410, members of the public are hereby invited to participate with Oxbow Mining, LLC, in a program for the exploration of unleased coal deposits owned by the United States of America containing approximately 2,016.42 acres in Gunnison County, Colorado.

DATES: Written Notice of Intent to Participate should be addressed to the attention of the following persons and must be received by them within 30 days after publication of this notice of Invitation in the **Federal Register**.

ADDRESSES: Karen Purvis, CO–921, Solid Minerals Staff, Division of Energy, Lands and Minerals, Colorado State Office, Bureau of Land Management, 2850 Youngfield Street, Lakewood, Colorado 80215; and Jim Kiger, Oxbow Mining, LLC, P.O. Box 535, 3737 Highway 133, Somerset, Colorado 81434.

SUPPLEMENTARY INFORMATION: The application for coal exploration license is available for public inspection during normal business hours under serial number COC 67643 at the Bureau of Land Management, Colorado State Office, 2850 Youngfield Street, Lakewood, Colorado 80215, and at the Uncompahgre Field Office, 2505 South Townsend Avenue, Montrose, Colorado 81401. Any party electing to participate in this program must share all costs on a pro rata basis with Oxbow Mining, LLC, and with any other party or parties who elect to participate.

Dated: March 29, 2004.

Karen Purvis,

Solid Minerals Staff, Division of Energy, Lands and Minerals.

[FR Doc. 04–10438 Filed 5–6–04; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT–030–1320–EL, NDM 91535]

Notice of Availability of a Draft Environmental Impact Statement To Lease a Coal Tract In North Dakota

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability of a Draft Environmental Impact Statement to lease a coal tract in Mercer Co., North Dakota.

SUMMARY: Under the National Environmental Policy Act (NEPA) implementing regulations and other applicable statutes and regulations, the Bureau of Land Management (BLM) announces the availability of a Draft Environmental Impact Statement (DEIS) that has been prepared for coal resources administered by the BLM. The BLM is considering leasing approximately 5,600 acres of Federal coal adjacent to the Freedom Mine, Mercer County, North Dakota. The public is invited to review and comment on proposed alternatives and associated environmental impacts.

DATES: The comment period will end 60 days after the Environmental Protection Agency's Notice of Availability (NOA) is published in the **Federal Register** announcing release of this DEIS.

ADDRESSES: Written comments should be sent to: Coal Team, Bureau of Land Management, North Dakota Field Office, 2933 3rd Ave W, Dickinson, ND 58601; or via telefax to (701) 227–8510. Review copies will be available at the following locations:

BLM North Dakota Field Office (701) 227–7700;
Bismarck Veterans Memorial Public Library (701) 222–6410;
Beulah Public Library (701) 873–2884;
Dickinson Public Library (701) 456–7700;
Hazen Public Library (701) 748–2977;
Mandan Public Library (701) 667–3255;
Fort Berthold Cultural Preservation Office (701) 627–4399;
Standing Rock Cultural Preservation Office (701) 854–2120;
Fort Peck Cultural Preservation Office (406) 768–5478.

The DEIS may also be viewed online at the North Dakota Field Office Web site: *http://www.mt.blm.gov/ndfo.*

FOR FURTHER INFORMATION CONTACT: Lee Jefferis, Project Manager, at (701) 227–7713, or Doug Burger, Field Manager, at (701) 227–7703.

Public Comment Procuedures: Comments must be received on or before the end of the comment period at the address or fax number listed above. For comments to be most helpful, they should relate to specific concerns or conflicts within the legal responsibility of the BLM. Comments, including names and street addresses of respondents, will be available for public review at the North Dakota Field Office during regular business hours, 7:45 a.m. to 4:30 p.m., Monday through Friday, except holidays. Responses to the comments will be published as part of the Final Environmental Impact Statement. 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 and businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be available for public inspection in their entirety.

SUPPLEMENTARY INFORMATION: Coteau Properties Company applied to lease 5,571 acres of Federal coal beneath private surface in Mercer County, west-central North Dakota. The DEIS analyzes the environmental consequences of three alternatives, including a No-Action (No Leasing) Alternative, which were developed with public involvement during the scoping process. Potential concerns include impacts to cultural resources, air quality, water resources, soils, land use, vegetation, wildlife, environmental justice, and socio-economics.

The Freedom Mine, which is adjacent to the proposed expansion area, is approved to remove 15–16 million tons of coal per year. Addition of Federal coal would extend the life of Freedom Mine by about 6 years.

Public meetings will be held as folows:

June 1, 2004	Public Meeting	4 Bears Casino & Lodge, 202 Frontage Road, New Town, ND, 6:30 p.m.—8 p.m., Mandan and Hidatsa Rooms.	6:30 p.m.–8 p.m.
June 2, 2004	Public Meeting	Civic Center, 120 7 Av NE., Beulah, ND	6:30 p.m.–8 p.m.

June 3, 2004	Public Meeting	Prairie Knights Casino & Lodge, 7932 Highway 24, Fort Yates, ND, Room 801 (main floor).	6:30 p.m.–8 p.m.
June 23, 2004	Hearing on DEIS/Maximum Economic Recovery/Fair Market Value.	State Capital Grounds, Heritage Center, 612 East Boulevard Avenue, Bismarck, ND.	7 p.m.–10 p.m.

Meetings and the Hearing will also be announced through public notices, media news releases, and on the North Dakota Web site at *http://www.mt.blm.gov/ndfo.*

After comments are reviewed and relevant adjustments made, a Final Environmental Impact Statement will be prepared and is expected to be available in late 2004.

Dated: March 31, 2004.

Douglas J. Burger,

Field Manager.

[FR Doc. 04–10439 Filed 5–6–04; 8:45 am]

BILLING CODE 4310–$$–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–100–04–1610–DR]

Notice of Availability of the Record of Decision for Snake River Resource Management Plan Final Environmental Impact Statement

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability of the Record of Decision (ROD) for the Snake River Resource Management Plan (RMP), Teton County, Wyoming.

SUMMARY: In accordance with the National Environmental Policy Act of 1969, and the Federal Land Policy and Management Act of 1976, the Bureau of Land Management (BLM) announces the availability of the ROD for the Snake River RMP and Final Environmental Impact Statement (FEIS).

The ROD and FEIS present the RMP for the Snake River planning area, containing approximately 1000 acres of public land and 15,123 acres of Federal mineral estate in Teton County, northwestern Wyoming. The completed RMP fulfills the obligations set forth by the Federal Land Policy and Management Act (FLPMA), the National Environmental Policy Act (NEPA), and Federal regulations. The FEIS was available for protest from October 3, 2003, through November 3, 2003. All protests and comments received were considered during the preparation of the ROD.

ADDRESSES: The document will be available electronically on the following Web site: *http://www.wy.blm.gov/srrmp/.* Copies of the ROD are available for public inspection at the following BLM office locations:

- Bureau of Land Management, Wyoming State Office, 5353 Yellowstone Road, Cheyenne, Wyoming, 82009.
- Bureau of Land Management, Pinedale Field Office, 432 East Mill Street, Pinedale, Wyoming, 82941.

FOR FURTHER INFORMATION: Contact Ms. Kellie Roadifer, Project Manager, P.O. Box 768, Pinedale, WY 82941, or electronically *kellie_roadifer@blm.gov.* Ms. Roadifer may also be reached at 307–367–5309.

SUPPLEMENTARY INFORMATION: A copy of the ROD has been sent to affected Federal, State, and local government agencies and interested parties. The Snake River planning area includes almost 1,000 acres of public lands administered by the BLM Pinedale Field Office and approximately 15,123 acres of Federal mineral estate near the Snake River, Teton County, Wyoming.

The Snake River RMP ROD is in conformance with the BLM's National Fire Plan. The National Energy Policy was also considered. The potential for energy development in the Snake River planning area is very low, to the extent that energy development in support of the National Energy Policy is not practical.

The RMP provides for transfer and management of the parcels to another public land-managing agency or entity. The actual land surface could be retained by BLM or transferred, as long as certain stipulations for its future management are met.

The transfer of lands or resources management will take place within 15 years. BLM will retain all mineral rights. It is the goal of the RMP to ensure the entities acquiring these parcels or taking over management responsibility are obligated under the terms of the transaction to apply the management prescriptions described.

Dated: January 28, 2004.

Alan L. Kesterke,

Associate State Director.

Editorial Note: This document was received at the Office of the Federal Register on April 21, 2004.

[FR Doc. 04–9365 Filed 5–6–04; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

Notice of Public Meeting: Resource Advisory Council to the Lower Snake River District, Bureau of Land Management, U.S. Department of the Interior

AGENCY: Bureau of Land Management, U.S. Department of the Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Lower Snake River District Resource Advisory Council (RAC), will meet as indicated below.

DATES: The meeting will be held May 26, 2004, beginning 9 a.m. at the Bureau of Land Management, Lower Snake River District Office Sage Brush Conference Room, located at 3948 Development Ave, Boise, Idaho 83705. Public comment periods will be held after topics on the agenda. The meeting will adjourn at 4:30 p.m.

FOR FURTHER INFORMATION CONTACT: MJ Byrne, Public Affairs Officer and RAC Coordinator, Lower Snake River District, 3948 Development Ave., Boise, ID 83705, Telephone (208) 384–3393.

SUPPLEMENTARY INFORMATION: The 15-member Council advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of planning and management issues associated with public land management in southwestern Idaho. At this meeting, the following actions will occur/topics will be discussed:

- Review 2004 Work Plan;
- Report on National RAC Chair's Meeting;
- Native American Laws, Regulations and Trust Obligations—Training
- Presentation on Ranch Level Socioeconomic Impacts of Public Land Grazing Policy Alternatives in Owyhee and Other Rural Counties of Idaho, by J.D. Wulfhorst, University of Idaho;
- Update on BLM-Idaho Organizational Refinement;
- BLM-LSRD Report to Judge Winmill—Status of 67 Court-Ordered Environmental Assessments conducted on Priority Grazing Allotments in the

Owyhee Field Office (OFO), by Jenna Whitlock, OFO Manager;

• Hot Topics—Settlement Issues; Snail Lawsuit; July 22, 2004, RAC-Hosted Community Discussion on Juniper Management; Report on Review of Implementation of Idaho Rangeland Standards and Guidelines;

• Update on status of District's Fire Management Plan;

• Subcommittee Reports

• Off-Highway Vehicles (OHV) and Transportation Management, Resource Management Plans, Sage Grouse Habitat Management, River and Recreation Management, and Fire and Fuels Management;

• Three Field Office Managers and District Fire Manager provide updates on current issues and planned activities in their Field Offices and the District.

Agenda items may change due to changing circumstances. All meetings are open to the public. The public may present written comments to the Council. Each formal Council meeting will also have time allocated for hearing public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited. Individuals who plan to attend and need special assistance, such as sign language interpretation, tour transportation or other reasonable accommodations, should contact the BLM as provided below. Expedited publication is requested to give the public adequate notice.

Dated: May 3, 2004.

Glen M. Secrist,

District Manager.

[FR Doc. 04–10427 Filed 5–6–04; 8:45 am]

BILLING CODE 4310–AG–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ID–080–1640–PH]

Notice of Public Meeting, Upper Columbia-Salmon Clearwater Resource Advisory Council Meeting; ID

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act (FLPMA) and the Federal Advisory Committee Act of 1972 (FACA), the U.S. Department of the Interior, Bureau of Land Management (BLM) Upper Columbia-Salmon Clearwater (UCSC) District Resource Advisory Council (RAC) will meet as indicated below.

DATES: June 10 and 11, 2004. The meeting will take place from 1 to 5 p.m. on June 10 and from 8 a.m. to about 2 p.m. on June 11th. The public comment period will be from 8 a.m. to 9 a.m. on June 11, 2004. The meeting will be held at the Grant Creek Inn, 5280 Grant Creek Road, Missoula, Montana, because Missoula is centrally located for Council members traveling from the northern and south-central parts of Idaho.

FOR FURTHER INFORMATION CONTACT: Stephanie Snook, RAC Coordinator, BLM UCSC District, 1808 N. Third Street, Coeur d'Alene, Idaho 83814 or telephone (208) 769–5004.

SUPPLEMENTARY INFORMATION: The 15-member Council advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of planning and management issues associated with public land management in Idaho. The agenda items for the June 10 and 11, 2004 meeting include:

• Off-Highway-Vehicle Management—update on the Idaho BLM Strategy and proposed Challis OHV loop.

• Endangered Species Act and consultation process.

• On-going and upcoming planning efforts.

All meetings are open to the public. The public may present written comments to the Council. Each formal Council meeting will also have time allocated for hearing public comments. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited. Individuals who plan to attend and need special assistance, such as sign language interpretation, tour transportation or other reasonable accommodations, should contact the BLM as provided above.

Dated: May 4, 2004.

Jenifer L. Arnold,

Acting District Manager.

[FR Doc. 04–10521 Filed 5–6–04; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CA–930–1430–ET; CA 13314]

Public Land Order No. 7601; Revocation of Public Land Order No. 6369; California

AGENCY: Bureau of Land Management, Interior.

ACTION: Public land order.

SUMMARY: This order revokes, in its entirety, a Public Land Order which withdrew islands, reefs, rocks, and pinnacles off the coast of California from surface entry, mining, and mineral leasing, for establishment of the California Islands Wildlife Sanctuary. The lands are located within the California Coastal National Monument which is withdrawn from mining and all forms of disposition other than exchange by Presidential Proclamation No. 7264.

DATES: *Effective Date:* May 7, 2004.

FOR FURTHER INFORMATION CONTACT: Nancy Alex, BLM California State Office, 2800 Cottage Way, Sacramento, California 95825, 916–978–4674.

SUPPLEMENTARY INFORMATION: Since the land is withdrawn by Presidential Proclamation, this revocation is a record clearing action only.

Order

By virtue of the authority vested in the Secretary of the Interior by section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (2000), it is ordered as follows:

Public Land Order No. 6369 (48 FR 16684, April 19, 1983), which withdrew islands, reefs, rocks, and pinnacles off the coast of California from surface entry, mining, and mineral leasing for establishment of the California Islands Wildlife Sanctuary, is hereby revoked in its entirety.

Dated: April 21, 2004.

Rebecca W. Watson,

Assistant Secretary—Land and Minerals Management.

[FR Doc. 04–10434 Filed 5–6–04; 8:45 am]

BILLING CODE 4310–40–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[MT–050–1430–ET; MTM 91719]

Public Land Order No. 7602: Withdrawal of Public Land for the Axolotl Lakes Area; MT

AGENCY: Bureau of Land Management, Interior.

ACTION: Public land order.

SUMMARY: This order withdraws 400.92 acres of public land from surface entry and mining for a period of 50 years for the Bureau of Land Management to protect wetland, riparian, fishery, recreation, and scenic values acquired in the Axolotl Lakes Area.

DATES: *Effective Date:* May 7, 2004.

FOR FURTHER INFORMATION CONTACT: Angela Brown, BLM Dillon Field Office, 100 Selway Drive, Dillon, Montana 59725, 406–683–2337, or Sandra Ward,

BLM Montana State Office, P.O. Box 36800, Billings, Montana 59107, 406–896–5052.

Order

By virtue of the authority vested in the Secretary of the Interior by Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (2000), it is ordered as follows:

1. Subject to valid existing rights, the following described land is hereby withdrawn from settlement, sale, location or entry under the general land laws, including the United States mining laws 30 U.S.C. Ch. 2 (2000), but not from leasing under the mineral leasing laws, to protect resources acquired in the Axolotl Lakes area:

Principal Meridian, Montana

T. 7 S., R. 2 W.,
sec. 8, S½SE¼ and NW¼SE¼;
sec. 17, N½NE¼.

Tract C, as shown on Perrault No. 1 Minor Subdivision Plat filed in Book 4 of Plats, Page 267, in the records of Madison County, Montana, and being a tract of land located in the S½NE¼ of sec. 8of T. 7 S., R. 2 W., and;

Tract D, as shown on Certificate of Survey No. 1277, filed in Book 7 of Surveys, Page 1277, in the records of Madison County, Montana, and being a tract of land located in S½NE¼ of sec. 8 and the S½N½ and SE¼ of sec. 9 of T. 7 S., R. 2 W.The area described contains 400.92 acres in Madison County.

2. The withdrawal made by this order does not alter the applicability of those public land laws governing the use of the lands under lease, license, or permit, or governing the disposal of their mineral or vegetative resources other than under the mining laws.

3. This withdrawal will expire 50 years from the effective date of this order unless, as a result of a review conducted before the expiration date pursuant to section 204(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714(f) (2000), the Secretary determines that the withdrawal shall be extended.

Dated: April 21, 2004.

Rebecca W. Watson,

Assistant Secretary—Land and Minerals Management.

[FR Doc. 04–10435 Filed 5–6–04; 8:45 am]

BILLING CODE 4310–DN–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[OR–958–1430–ET; HAG–04–0037; WAOR–22434 et al.]

Public Land Order No. 7603; Modification of Secretarial Orders Dated October 9, 1905 and August 13, 1908; Washington

AGENCY: Bureau of Land Management, Interior.

ACTION: Public land order.

SUMMARY: This order modifies two Secretarial orders insofar as they affect 80 acres of public lands withdrawn for the Bureau of Reclamation's Yakima and Chelan Reclamation Projects. This action will open the lands to exchange only.

DATES: *Effective Date:* May 7, 2004.

FOR FURTHER INFORMATION CONTACT: Charles R. Roy, BLM Oregon/Washington State Office, P.O. Box 2965, Portland, Oregon 97208–2965, 503–808–6189.

SUPPLEMENTARY INFORMATION: The land is no longer needed by the Bureau of Reclamation for reclamation purposes.

Order

By virtue of the authority vested in the Secretary of the Interior by Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (2000), it is ordered as follows:

1. The Secretarial Orders dated October 9, 1905, and August 13, 1908, which withdrew lands for the Bureau of Reclamation's Yakima and Chelan Reclamation Projects, are hereby modified to allow for exchange in accordance with Section 206 of the Federal Land Policy and Management Act of October 21, 1976, as amended, 43 U.S.C. 1716 (2000), insofar as they affect the following described public lands:

Willamette Meridian

T. 14 N., R. 17 E.,
sec. 34, E½E½NE¼.
T. 27 N., R. 23 E.,
sec. 17, NW¼SE¼.

The area described aggregates 80 acres in Yakima and Chelan Counties.

2. The lands described in Paragraph 1 are hereby made available for exchange in accordance with Section 206 of the Federal Land Policy and Management Act of October 21, 1976, 43 U.S.C. 1716 (2000), subject to valid existing rights, the provisions of existing withdrawals, other segregations of record, and the requirements of applicable law.

Dated: April 21, 2004.

Rebecca W. Watson,

Assistant Secretary, Land and Minerals Management.

[FR Doc. 04–10436 Filed 5–6–04; 8:45 am]

BILLING CODE 4310–33–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ES–032–04–1610–DU]

Notice of Availability of Lower Potomac River Proposed Coordinated Management Plan, Charles County, MD

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: The Bureau of Land Management (BLM), in cooperation with the Maryland Department of Natural Resources (MD DNR), has prepared the Lower Potomac River Proposed Coordinated Management Plan (CMP) to determine the appropriate uses of Federal and state land located in Charles County, Maryland. The planning area encompasses approximately 32,000 acres in Charles County, and includes approximately 1,300 acres of public land managed by the BLM-Eastern States Office and MD DNR.

When approved, the CMP will provide land use planning level decisions for BLM-administered lands in the region and set criteria for possible future land acquisitions. The State of Maryland will also use the CMP to provide a context for management decisions and site-specific planning for the properties under its jurisdiction. An environmental assessment (EA) prepared under the National Environmental Policy Act of 1969 (NEPA) accompanies the Proposed CMP.

This notice is issued pursuant to Title 43 CFR 1610.2(f)(3). The Proposed CMP followed the procedures set forth in 43 CFR 1610.5–5.

Public Participation: The draft CMP was available for public review and comment from August 5, 2003, to October 5, 2003. Written comments were received from individuals, agencies, and interest groups. All comments received during the comment period were considered in the preparation of the Proposed CMP. A public meeting on the Draft CMP was held in La Plata, MD, on August 20, 2003.

Protest Instructions: The CMP serves the planning needs of both the BLM and the Maryland DNR. The BLM planning

process includes an opportunity for review of the BLM State Director's proposed decisions through the mechanism of a plan protest to the BLM Director. Any person or organization that participated in the planning process and has an interest which is, or may be, adversely affected by approval of the Proposed CMP may protest the plan. Careful adherence to the following guidelines will assist in preparing a protest:

1. Protests may only relate to proposals affecting BLM lands and the environmental analysis included in the CMP.

2. Comments received by BLM that pertain to, or are relevant to the State-owned lands discussed in the CMP, will be forwarded to MD DNR for its review and consideration.

3. Only those persons or organizations that participated in the planning process may file a protest.

4. A protesting party may only raise those issues that were raised or commented on during the planning process.

In order to be considered complete, a protest must contain at a minimum, the following information:

1. The name, mailing address, telephone number, and the interest of the person filing the protest.

2. A statement of the issue being protested.

3. A statement of the portion of the plan being protested. To the extent possible, this should be done by reference to specific pages, paragraphs, sections, tables, and maps in the Proposed CMP.

4. A copy of all documents addressing the issue submitted during the planning process or a reference to the date the issue was discussed for the record.

5. A concise statement explaining why the BLM Director's decision is believed to be incorrect is a critical part of the protest. Take care to document all relevant facts and reference and/or cite the planning documents, environmental analysis documents and available planning records (summaries, correspondence). A protest without any supporting data will not provide the BLM with sufficient information; the Director's review will be based on existing analysis and supporting data.

E-mail and faxed protests will not be accepted as valid protests unless the protesting party also provides the original letter by either regular or overnight mail postmarked by the close of the protest period. Under these conditions, BLM will consider the e-mail or faxed protest as an advance copy and it will receive full consideration. If you wish to provide BLM with such advance notification, please direct faxed protests to the attention of the BLM protest coordinator at 202–452–5112, by e-mail to *Brenda_Hudgens-Williams@blm.gov*. A commenter/protestor may request confidentiality of his/her personal information (*i.e.*, name and home address) and BLM will honor such requests to the extent allowed by law. Organizations or businesses may not request confidentiality. Generally, the names and business addresses of individuals listed as representatives or officials of organizations or businesses are not protected and are always available for public review.

DATES: This notice begins the 30-day public protest period for the Lower Potomac River Proposed CMP. All protest letters must be postmarked by June 7, 2004. There is no provision for any extension of time. Although not a requirement, sending a protest by certified mail, return receipt requested, is recommended. Comment letters regarding State of Maryland lands and its management responsibilities should be postmarked by the date above.

Protest Filing Addresses: Protests submitted electronically will not be accepted. All protest letters must be sent to one of the following addresses: Director (210), Attention: Brenda Williams, P.O. Box 66538, Washington, DC 20035 or overnight mail, Director (210), Attention: Brenda Williams, 1620 L Street, NW., Room 1075, Washington, DC 20036. Comment letters regarding proposals affecting State of Maryland lands and properties and its management responsibilities should be mailed to Barbara Grey, Maryland Department of Natural Resources, Tawes State Office Building, E–4, 580 Taylor Avenue, Annapolis, MD 21401.

FOR FURTHER INFORMATION CONTACT: For further information, you may contact Howard Levine, Milwaukee Field Office, 626 East Wisconsin Avenue, Suite 200, Milwaukee, WI 53202, (414) 297–4463, or by electronic mail at *Howard.Levine@blm.gov*. For information related specifically to state lands you may contact Barbara Grey, MD DNR at (410) 260–8408, or by electronic mail at *bgrey@dnr.state.md.us*. You may view or download an electronic version of the Proposed CMP from the BLM-Eastern States Web site at *http://www.es.blm.gov*.

SUPPLEMENTARY INFORMATION: In 2001, BLM and the MD DNR acquired a tract of land along the Potomac River at Douglas Point in Charles County. This and other State and BLM properties and lands in the region are located 30 miles south of the Washington Beltway and represent some of the last remaining undeveloped lands in the fast growing Washington, DC metropolitan region. The BLM and MD DNR partnership serves to protect the study area's varied cultural, historical and natural resources. A key goal of the planning process is to identify ways in which public land management may contribute to local economic development. The Proposed CMP was developed in collaboration with Charles County and with significant local community involvement.

The four Alternatives analyzed in the CMP presented a reasonable range of management options to address the issues raised during planning: Alternative 1—No action; Alternative 2—Heritage; Alternative 3—Nature Tourism; Alternative 4—Community Vision. The Proposed Plan is essentially Alternative 4 with the addition of a boat ramp on the State's Wilson Farm tract and selective timber harvesting on State lands pending a Forest Management Plan. The environmental impacts of each alternative, including the Proposed Plan, are discussed in the Proposed CMP. A copy of the Proposed CMP will be sent to all individuals, agencies and organizations that have expressed interest in the project.

Dated: December 16, 2003.

Michael D. Nedd,

State Director, BLM-Eastern States.

Editorial Note: This document was received in the Office of the Federal Register on May 4, 2004.

[FR Doc. 04–10442 Filed 5–6–04; 8:45 am]

BILLING CODE 4310–$$–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 17, 2004. Pursuant to § 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 May 24, 2004.

Carol D. Shull,

Keeper of the National Register of Historic Places.

ARIZONA

Pinal County

Brockway, Dr. George M. and Esther A., House, 501 S. Central Ave., Florence, 04000485

Douglass, James S. Melquides E., House, 850 S. Park St., Florence, 04000486

McGee, James and Mary, House, 330 E. Butte Ave., Florence, 04000487

Yavapai County

Bell, Don, House, 2530 Anapaya Ln., Camp Verde, 04000513

Mountain States Telephone and Telegraph Exchange Building, 116 N. Marina St., Prescott, 04000512

Seligman Commercial Historic District, Roughly bounded by First and Lamport Sts, and Picacho and Railroad Aves., Seligman, 04000511

ARKANSAS

Benton County

Putnam Cemetery, (Benton County MRA) 3504 Magellan Blvd., Bentonville, 04000510

Chicot County

Chicot County Training School, Jct. of Hazel and N. School St., Dermott, 04000490

Harden Family Cemetery, (Ethnic and Racial Minority Settlement of the Arkansas Delta MPS) Hardin Rd., Jennie, 04000508

Clark County

McNeely Creek Bridge,(Historic Bridges of Arkansas MPS)Cty Rd. 12,Beirne, 04000495

Cleburne County

Brewer School,Brewer Rd.,Brewer, 04000506

Conway County

Cove Creek Bridge,AR 124,Martinville, 04000499

Solgohachia Bridge,(Historic Bridges of Arkansas MPS)Cty Rd. 67,Solgohachia, 04000498

Garland County

Lyell, Van, House,130 Van Lyell Terrace,Hot Springs, 04000504

Taylor Rosamond Motel Historic District, (Arkansas Highway History and Architecture MPS)316 Park Ave.,Hot Springs, 04000497

Hot Spring County

Bethel African Methodist Episcopal Church,519 W. Page St.,Malvern, 04000496

Izard County

Mount Olive Cumberland Presbyterian Church, Jct. of Izard Cty Rds. 12 and 18,Mount Olive, 04000503

Jefferson County

Community Theatre,207 W. 2nd Ave.,Pine Bluff, 04000507

Lawrence County

Imboden Methodist Episcopal Church, South,113 Main St.,Imboden, 04000505

Little River County

Old U.S. 71—Wilton Segment,(Arkansas Highway History and Architecture MPS)E of U.S. 71 from Old U.S. 71 and U.S. 71 jct. N to the S bank of the LittleRiver,Wilton, 04000492

Perry County

Bigelow Rosenwald School, Jct. of AR 60 and Bethel AME Rd.,Toad Suck, 04000491

Pulaski County

Wolf Bayou Bridge,(Historic Bridges of Arkansas MPS)Pulaski County Road 85,Scott, 04000502

Saline County

Independent Order of Odd Fellows Building,123–125 North Market,Benton, 04000509

Sebastian County

Old U.S. 71—Devil's Backbone Segment,(Arkansas Highway History and Architecture MPS)S. Coker St. from just SW of Stewart Court to current U.S. 71,Greenwood, 04000488

St. Louis San Francisco (Frisco) Railway Steam Locomotive #4003,100 S 4th St.,Fort Smith, 04000500

Sevier County

Hale Creek Bridge,(Historic Bridges of Arkansas MPS)Cty Rd. 271,Red Wing, 04000489

Oak Grove Rosenwald School,Oak Grove Rd.,Oak Grove, 04000494

Old U.S. 71—Little River Approach,(Arkansas Highway History and Architecture MPS)Ashely Camp Rd. from the N bank of the Little R to S of the old U.S. 71 andAR 27,Ben Lomond, 04000493

Wingo, Otis Theodore and Effiegene Locke, House,510 W. De Queen Ave.,De Queen, 04000501

GEORGIA

Richmond County

Augusta Downtown Historic District,Roughly bounded by 13th St., Gordon Hwy., Walton Way and the Savannah R.,Augusta, 04000515

Terrell County

Parrott Historic District,Roughly centered on the jct. of Main St. and GA Hwy 55/GA Hwy 520,Parrott, 04000528

IOWA

Davis County

West Grove United Methodist Church,21944 Echo Ave.,West Grove, 04000514

LOUISIANA

Catahoula Parish

Paul's Camp South,Address Restricted,Jonesville, 04000529

MASSACHUSETTS

Berkshire County

Maple Street Cemetery,Maple St.,Adams, 04000536

Nantucket County

Engine House No. 6,480 Howard St.,Lawrence, 04000533

Norfolk County

Milton Cemetery,211 Centre St.,Milton, 04000537

Suffolk County

Hibernian Hall,182–186 Dudley St.,Boston, 04000534

Worcester County

Moore State Park Historic District,Address Restricted,Paxton, 04000535

MINNESOTA

Crow Wing County

Cole, A.L., Memorial Building,(Federal Relief Construction in Minnesota MPS)4285 Tower Square,Pequot Lakes, 04000530

Hennepin County

Neils, Frieda and Henry J., House,2801 Burnham Blvd.,Minneapolis, 04000531

Koochiching County

Baker, Alexander, School and E.W. Backus Junior High School,(Federal Relief Construction in Minnesota MPS)900 5th St.,International Falls, 04000538

Sherburne County

Elkhi Stadium,(Federal Relief Construction in Minnesota MPS)Main St. and Norfolk Ave.,Elk River, 04000540

St. Louis County

Virginia City Hall,327 First St. S,Virginia, 04000539

Stevens County

Morris High School,600 Columbia Ave.,Morris, 04000532

MISSOURI

Jackson County

Hyde Park East Historic District, Old,Roughly bounded Armour Blvd., Walnut St., 39th St., and Gillham Rd.,Kansas City, 04000527

Hyde Park West Historic District, Old,Roughly bounded by Linwood Blvd., Central, 39th St., and Baltimore St.,Kansas City, 04000526

NEW JERSEY

Union County

Fanwood Park Historic District,North Ave. and North Martine Ave.,Borough of Fanwood, 04000516

NEW YORK

Bronx County

Rieger's, C., Sons Factory,450–452 E. 148th St.,Bronx, 04000543

New York County

Building at 315–325 West 36th Street,315–325 W. 36th St.,New York, 04000542

Treadwell Farm Historic District, E. 61st and 62nd Sts. bet. Second and Third Aves.,New York, 04000541

Richmond County

Christ Church New Brighton (Episcopal),76 Franklin Ave.,Staten Island, 04000544

OKLAHOMA

Beckham County

West Winds Motel,(Route 66 and Associated Resources in Oklahoma AD MPS)623 Roger Miller,Erick, 04000520

Craig County

McDougal Filling Station,(Route 66 and Associated Resources in Oklahoma AD MPS)443956 E. OK 60,Vinita, 04000521

Creek County

Beard Motor Company,(Route 66 and Associated Resources in Oklahoma AD MPS)210 E. 9th,Bristow, 04000522

Custer County

Y Service Station and Cafe,(Route 66 and Associated Resources in Oklahoma AD MPS)1733 Neptune Dr.,Clinton, 04000523

Lincoln County

Davenport Broadway Avenue Brick Street,1–600 Broadway St.,Davenport, 04000518

Oklahoma County

Paseo Neighborhood Historic District, Roughly by NW, 30th St., North Western Ave., NW, 24th St., and N. Walker Ave., Oklahoma City, 04000517

Ottawa County

Riviera Courts—Motel, (Route 66 and Associated Resources in Oklahoma AD MPS) 1 mi. W of Main on U.S. 69A, Miami, 04000524

Payne County

Oklahoma A & M College Agronomy Barn and Seed House, 2902 W. 6th St. Building #610, Stillwater, 04000519

Rogers County

Chelsea Motel, (Route 66 and Associated Resources in Oklahoma AD MPS) Jct. First and OK 66, Chelsea, 04000525

TENNESSEE

Blount County

Calderwood Hydroelectric Development, (Tapoco Hydroelectric Project MPS) 314 Growdon Blvd., Calderwood, 04000545

Chillowee Hydroelectric Development,

(Tapoco Hydroelectric Project MPS) 6102 TN 129, Tallassee, 04000546

TEXAS

Harris County

Willow Street Pump Station, 811 N. San Jacinto, Houston, 04000547

Taylor County

Burlington Railroad Station, (Abilene MPS) 189 Locust St., Abilene, 04000556

Virginia

Charlotte County

Watkins House, 3115 Briery Rd., Keysville, 04000549

Fauquier County

Crooked Run Valley Rural Historic District, Roughly bounded by Fauquier Cty Line, I–66, VA 712, Naked Mountain, and VA 55, Paris, 04000550

Mt. Bleak—Skye Farm (030–0283),

11012 Edmonds Ln., Delaplane, 04000552

Greene County

Stanardsville Historic District, Roughly along Main St., from Monroe Ave. to Lambs Ln., including parts of Madison Rd., Stanardsville, 04000555

Isle Of Wight County

Rand, William, Tavern, 112 W. Main St., Smithfield, 04000548

Page County

Shenandoah Historic District, Parts of First, Second, Third, Fourth, Fith, Sixth, Seventh, Eight Denver, Long, H, Sts, Central, Maryland, Penn, and Virg. Aves., Shenandoah, 04000554

Rockbridge County

Buffalo Forge (081–0003), 2694 Forge Rd., Glasgow, 04000551

Rockingham County

Mannheim (082–0005), 4713 Wengers Mill Rd., Linville, 04000553

A request for removal has been made for the following resource(s):

Arkansas

Washington County

Washington County Road 80F Bridge, (Historic Bridges of Arkansas MPS) Co. Rd. 80F over Muddy Fork of the Illinois R., Viney Grove vicinity, 95000565

Waters-Pierce Oil Company Building, (Thompson, Charles L., Design Collection TR) West St., Fayetteville, 88002821

Texas

Tarrant County

Bucks Oaks Farm, 6312 White Settlement Rd., Westworth, 87000995

A request for a MOVE has been made for the following resource: Dallas County Ellis, James H. And Molly, House, (East and South Dallas MPS) 2426 Pine, Dallas, 95000323

[FR Doc. 04–10403 Filed 5–6–04; 8:45 am]

BILLING CODE 4312–51–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–508]

Certain Absorbent Garments; Notice of Investigation

AGENCY: International Trade Commission.

ACTION: Institution of investigation pursuant to 19 U.S.C. 1337.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on April 5, 2004 under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Tyco Healthcare Retail Group, Inc. and Paragon Trade Brands, Inc. A supplement to the complaint was filed on April 26, 2004. The complaint, as supplemented, alleges violations of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain absorbent garments by reason of infringement of claims 1, 9, 12–13 of U.S. Patent No. 5,275, 590, claims 1–2 of U.S. Patent No. 5,403,301, and claims 8–9 of U.S. Patent No. 4,892,528. The complaint further alleges that there exists an industry in the United States as required by subsection (a)(2) of section 337.

The complainant requests that the Commission institute an investigation and, after the investigation, issue a permanent general exclusion order and permanent cease and desist orders.

ADDRESSES: The complaint and supplemental letter, except for any confidential information contained therein, are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Room 112, Washington, DC 20436, telephone 202–205–2000. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov*. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

FOR FURTHER INFORMATION CONTACT: Thomas S. Fusco, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone 202–205–2571.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2003).

Scope of Investigation: Having considered the complaint, the U.S.

International Trade Commission, on April 30, 2004 *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain absorbent garments by reason of infringement of claims 1, 9, 12, or 13 of U.S. Patent No. 5,275,590, claims 1 or 2 of U.S. Patent No. 5,403,301, or claims 8 or 9 of U.S. Patent No. 4,892,528, and whether an industry in the United States exists as required by subsection (a)(2) of section 337.

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainants are—

Tyco Healthcare Retail Group, Inc., 601 Allendale Road, King of Prussia, Pennsylvania 19406;

Paragon Trade Brands, Inc., 601 Allendale Road, King of Prussia, Pennsylvania 19406.

(b) The respondents are the following companies alleged to be in violation of Section 337 and upon which the complaint is to be served—

Grupo ABS Internacional, S.A. de C.V., Humberto Lobo 9013, Ciudad Mitras, N.L., Mexico 66400;

Absormex S.A. de C.V., Humberto Lobo 9013, Ciudad Mitras, N.L., Mexico 66400;

Absormex USA, Inc., 4401 San Francisco Avenue, Laredo, Texas 78041.

(c) Thomas S. Fusco, Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Room 401–E, Washington, DC 20436, who shall be the Commission investigative attorney, party to this investigation; and

(3) For the investigation so instituted, the Honorable Charles E. Bullock is designated as the presiding administrative law judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d) and 210.13(a), such responses will be considered by the Commission if received no later than 20 days after the date of service by the Commission of the complaint and notice of investigation. Extensions of time for submitting responses to the complaint will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter both an initial determination and a final determination containing such findings, and may result in the issuance of a limited exclusion order or a cease and desist order or both directed against such respondent.

Issued: May 2, 2004.

By order of the Commission.

Marilyn Abbott,

Secretary to the Commission.

[FR Doc. 04–10411 Filed 5–6–04; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–507]

Certain Medical Devices Used to Compact Inner Bone Tissue and Products Containing Same; Notice of Investigation

AGENCY: International Trade Commission.

ACTION: Institution of investigation pursuant to 19 U.S.C. 1337.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on April 5, 2004, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Kyphon Inc. of Sunnyvale, California. A supplement to the complaint was filed on April 20, 2004. The complaint, as supplemented, alleges violations of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain medical devices used to compact inner bone tissue and products containing same by reason of infringement of claims 1, 3, 7–9, 11, and 14 of U.S. Patent No. 4,969,888, claims 1, 3, 8–10, 12, and 15 of U.S. Patent No. 5,108,404, claims 2, 17, 20, and 23–28 of U.S. Patent No. 6,235,043, and claims 3, 5, 6, 8, and 9 of U.S. Patent No. 6,248,110. The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainant requests that the Commission institute an investigation and, after the investigation, issue a permanent limited exclusion order and permanent cease and desist orders.

ADDRESSES: The complaint and supplement, except for any confidential information contained therein, are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Room 112, Washington, DC 20436, telephone 202–205–2000. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *http://www.usitc.gov*. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

FOR FURTHER INFORMATION CONTACT: Anne Goalwin, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone 202–205–2574.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2003).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on April 30, 2004, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain medical devices used to compact inner bone tissue or products containing same by reason of infringement of claims 1, 3, 7–9, 11, or 14 of U.S. Patent No. 4,969,888, claims 1, 3, 8–10, 12, or 15 of U.S. Patent No. 5,108,404, claims 2, 17, 20, or 23–28 of U.S. Patent No. 6,235,043, or claims 3, 5, 6, 8, or 9 of U.S. Patent No. 6,248,110, and whether an industry in the United States exists as required by subsection (a)(2) of section 337.

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which

this notice of investigation shall be served:

(a) The complainant is—

Kyphon Inc., 1221 Crossman Avenue, Sunnyvale, CA 94089.

(b) The respondents are the following companies alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Disc-O-Tech Medical Technologies, Ltd., 3 Hasadnaot St., Herzliya 46728, Israel;

Disc Orthopaedic Technologies Inc.,7 Centre Dr., Suite 1,Monroe Township, NJ 08831.

(c) Anne Goalwin, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Room 401–P, Washington, DC 20436, who shall be the Commission investigative attorney, party to this investigation; and

(3) For the investigation so instituted, the Honorable Delbert R. Terrill, Jr. is designated as the presiding administrative law judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d) and 210.13(a), such responses will be considered by the Commission if received no later than 20 days after the date of service by the Commission of the complaint and notice of investigation. Extensions of time for submitting responses to the complaint will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter both an initial determination and a final determination containing such findings, and may result in the issuance of a limited exclusion order or a cease and desist order or both directed against such respondent.

Issued: May 2, 2004.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 04–10410 Filed 5–6–04; 8:45 am]

BILLING CODE 7020–02–P

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 date 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 previsions 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 statues 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 Determination 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

New Jersey
NJ030002 (Jun. 13, 2003)
NJ030003 (Jun. 13, 2003)
Vermont
VT030001 (Jun. 13, 2003)
VT030007 (Jun. 13, 2003)
VT030042 (Jun. 13, 2003)

Volume II

Virginia
VA030014 (Jun. 13, 2003)

Volume III

Alabama
AL030004 (Jun. 13, 2003)
AL030006 (Jun. 13, 2003)
AL030008 (Jun. 13, 2003)
AL030017 (Jun. 13, 2003)
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Mississippi
MS030001 (Jun. 13, 2003)
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Illinois

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IL030013 (Jun. 13, 2003)
IL030014 (Jun. 13, 2003)
IL030015 (Jun. 13, 2003)
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IL030024 (Jun. 13, 2003)
IL030027 (Jun. 13, 2003)
IL030028 (Jun. 13, 2003)
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IL030042 (Jun. 13, 2003)
IL030043 (Jun. 13, 2003)
IL030044 (Jun. 13, 2003)
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IL030047 (Jun. 13, 2003)
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IL030062 (Jun. 13, 2003)
IL030063 (Jun. 13, 2003)
IL030064 (Jun. 13, 2003)
IL030066 (Jun. 13, 2003)
IL030067 (Jun. 13, 2003)
IL030068 (Jun. 13, 2003)
IL030069 (Jun. 13, 2003)
IL030070 (Jun. 13, 2003)

Volume V

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Iowa
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Volume VII

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CA030004 (Jun. 13, 2003)
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CA030030 (Jun. 13, 2003)
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CA030033 (Jun. 13, 2003)

General Wage Determination 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 determination issued under the Davis-Bacon and related Acts are available electronically at no cost on the Government Printing Office site at *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 29th day of April, 2004.

Terry Sullivan,

Acting Chief, Branch of Construction Wage Determinations.

[FR Doc. 04–10164 Filed 5–6–04; 8:45 am]

BILLING CODE 4510–27–M

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. ICR 1218–0180(2004)]

Bloodborne Pathogens Standard; Extension of the Office of Management and Budget's (OMB) Approval of Information-Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comment.

SUMMARY: OSHA solicits comments concerning its request for an extension of the information-collection requirements contained in the Bloodborne Pathogens Standard (29 CFR 1910.1030). Included in this request are information-collection requirements that are currently approved under OMB control number 1218–0246, Bloodborne Pathogens Standard (Needlestick Safety and Prevention Act).

DATES: Comments must be submitted by the following dates:

Hard Copy: Your comments must be submitted (postmarked or received) by July 6, 2004.

Facsimile and electronic transmission: Your comments must be received by July 6, 2004.

ADDRESSES:

I. Submission of Comments

Regular mail, express delivery, hand-delivery, and messenger service: Submit your comments and attachments to the OSHA Docket Office, Docket No. ICR 1218–0180 (2004), Room N–2625, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. OSHA Docket Office and Department of Labor hours of operation are 8:15 a.m. to 4:45 p.m., e.s.t.

Fscsimile: If your comments, including any attachments, are 10 pages or fewer, you may fax them to the OSHA Docket Office at (202) 693–1648. You must include the docket number, ICR 1218–0180 (2004), in your comments.

Electronic: You may submit comments, but not attachments, through the Internet at *http://ecomments.osha.gov*.

II. Obtaining Copies of the Supporting Statement for the Information Collection Request

The Supporting Statement for the Information Collection Request is available for downloading from OSHA's Web site at *www.osha.gov*. The supporting statement is available for inspection and copying in the OSHA Docket Office, at the address listed

above. A printed copy of the supporting statement can be obtained by contacting Todd Owen at (202) 693–2222.

FOR FURTHER INFORMATION CONTACT: Todd Owen, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, Room N–3609, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document by (1) hard copy, (2) FAX transmission (facsimile), or (3) electronically through the OSHA Web page. Please note you cannot attach materials such as studies or journal articles to electronic comments. If you have additional materials, you must submit three copies of them to the OSHA Docket Office at the address above. The additional materials must clearly identify your electronic comments by name, date, subject and docket number so that we can attach them to your comments. Because of security-related problems, there may be a significant delay in the receipt of comments by regular mail. Please contact the OSHA Docket Office at (202) 693–2350 for information about security procedures concerning the delivery of material by express delivery, hand delivery and messenger service.

II. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (*i.e.*, employer) burden, conducts a preclearance program to provide the public and Federal agencies with an opportunity to comment on proposed and continuing information-collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA–95) (44 U.S.C. 3506(c)(2)(A)).

This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information-collection burden is correct. The Occupational Safety and Health Act of 1970 (the "Act") authorizes information collection by employers as necessary or appropriate for enforcement of the Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657).

Currently the information-collection requirements contained in the Bloodborne Pathogens Standard (29 CFR 1910.1030) are approved by OMB under two separate OMB control numbers. Initially, there was one Information Collection Request (ICR) for the Bloodborne Pathogens Standard titled "Bloodborne Pathogens Standard (29 CFR 1910.1030)," approved under OMB control number 1218–0180. On January 18, 2001, the Agency revised the Bloodborne Pathogens Standard (66 FR 5318) in conformance with the requirements of the Needlestick Safety and Prevention Act (NSPA) (Pub. L. 106–430, Nov. 6, 2000). This revision contained new information-collection requirements including requiring employers who have exposure control plans in accordance with § 1910.1030(c)(1)(iv) to: (a) Review and update such plans to reflect changes in technology that eliminate or reduce exposure to bloodborne pathogens; (b) Document consideration and implementation of appropriate commercially available and effective safe medical devices designed to eliminate or minimize occupational exposure; and (c) Solicit input from non-managerial employees responsible for direct patient care who are potentially exposed to injuries from contaminated sharps in the identification, evaluation, and selection of effective engineering and work practice controls, and to document the solicitation in the Exposure Control Plans.

In addition, the NSPA required employers who currently maintain a log of occupational injuries and illnesses under 29 CFR 1904 to "establish and maintain a sharps injury log for the recording of percutaneous injuries from contaminated sharps. The information in the sharps injury log must be recorded and maintained so that the confidentiality of the injured worker is protected. The log must contain at least the following information: "(A) The type and brand of device involved in the incident; (B) The department or work area where the exposure incident occurred; and (C) An explanation of how the incident occurred."

These NSPA information-collection requirements were approved in the ICR titled "Bloodborne Pathogens Standard (Needlestick Safety and Prevention Act)," OMB control number 1218–0246. These information-collection requirements are now being incorporated into the existing Bloodborne Pathogens Standard (29 CFR 1910.1030), OMB control number 1218–0180.

The major information-collection provisions currently approved under 1218–0180 require employers to: Develop and maintain exposure control plans; develop a housekeeping schedule; provide employees with HBV vaccinations, as well as post-exposure medical evaluations and follow-ups; provide employees with information and training; maintain medical and training records for specified periods; and provide OSHA, the National Institute for Occupational Safety and Health, employees and their authorized representatives with access to these records. In addition, HIV and HBV research laboratories and production facilities must also adopt or develop, and review at least once a year, a biosafety manual.

III. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

—Whether the proposed information-collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;

—The accuracy of the Agency's estimate of the burden (time and costs) of the information-collection requirements, including the validity of the methodology and assumptions used;

—The quality, utility, and clarity of the information collected; and

—Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information-collection and -transmission techniques.

IV. Proposed Actions

OSHA is incorporating the "Bloodborne Pathogens Standard (Needlestick Safety and Prevention Act)" information-collection requirements into the Bloodborne Pathogens Standard (29 CFR 1910.1030), OMB Control number 1218–0180. The total burden for the Bloodborne Pathogens Standard is 14,071,556 hours. This is an increase of 115,730 hours from the existing total of 13,955,826 hours for the two separate ICRs of 13,955,826 hours. The Bloodborne Pathogens Standard (29 CFR 1910.1030) totals 12,719,062 hours and Bloodborne Pathogens Standard (Needlestick Safety and Prevention Act) totals 1,236,764 hours. The increase is primarily the result of increasing the number of establishments contained in the ICR.

OSHA will summarize the comments submitted in response to this notice, and will include this summary in the request to OMB to extend the approval of the information-collection requirements.

Type of Review: Extension of currently approved information-collection requirements.

Title: Bloodborne Pathogens Standard (29 CFR 1910.1030).

OMB Number: 1218–0180.

Affected Public: Business or other for-profit organizations; Not-for-profit institutions; Federal, State, local, or tribal governments.

Number of Respondents: 630,021.

Frequency: On occasion.

Average Time per Response: Varies from 5 minutes (.08 hour) to maintain records to 1.5 hours for employees to receive training or medical evaluations.

Responses: 7,362,173.

Estimated Total Burden Hours: 14,071,556.

Estimated Cost (Operation and Maintenance): $27,373,738.

V. Authority and Signature

John L. Henshaw, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506) and Secretary of Labor's Order No. 5–2002 (67 FR 65008).

Signed at Washington, DC, on May 3, 2004.

John L. Henshaw,

Assistant Secretary of Labor.

[FR Doc. 04–10468 Filed 5–6–04; 8:45 am]

BILLING CODE 4510–26–M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (04–060)]

Privacy Act of 1974; Proposed Revisions to a Privacy Act System of Records

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of proposed revisions to an existing Privacy Act system of records.

SUMMARY: The National Aeronautics and Space Administration proposes to revise an existing system of records titled "Inspector General Investigations Case Files" (NASA 10IGIC), last published on December 13, 1999 (64 FR 69561). This system of records is being revised to comply with requirements established by the Homeland Security Act of 2002 (Pub. L. 107–296, Nov. 25, 2002) and to update routine uses. The new routine uses allow the disclosure of information to authorized officials within the President's Council on Integrity and Efficiency (PCIE), who are charged with the responsibility for conducting qualitative assessment reviews of OIG operations for the purpose of reporting to the President and Congress on the activities of the OIG; disclosure of information to the public under certain enumerated circumstances; and disclosure of information to the news media and the public when there is a genuine public interest or when necessary for protection from imminent threat to life or property. Minor changes are the addition of grantee employees to the categories of individuals covered by the system, addition of research misconduct and whistleblower protection investigations to the categories of records in the system, elimination of inapplicable authorities for maintenance of the system, a revision to routine use 1 to add the Office of Management and Budget and other organizations in the Executive Office of the President; removal of one subsystem manager because the position is no longer part of the Office of Inspector General as well as addition of new subsystem managers; and correcting the address for Location 16 in Appendix A.

DATES: This proposed action will be effective without further notice on July 6, 2004, unless comments are received which result in a contrary determination.

ADDRESSES: Elizabeth Richardson, Associate Counsel to the Inspector General, Office of Inspector General, National Aeronautics and Space Administration Headquarters, Washington, DC 20456–0001.

FOR FURTHER INFORMATION CONTACT: Elizabeth Richardson, Associate Counsel to the Inspector General, Office of the Inspector General, National Aeronautics and Space Administration Headquarters, Washington, DC 20546–0001, (202) 358–2548.

SUPPLEMENTARY INFORMATION: This publication is in accordance with the Privacy Act requirement that agencies publish their amended systems of records in the **Federal Register** when there is a revision, change, or addition. NASA's Office of Inspector General (OIG) has reviewed its systems of records notices and has determined that its record system, Inspector General Investigations Case Files (NASA 10IGIC), must be revised to add a routine use in order to comply with the Homeland Security Act of 2002. Specifically, section 812, subsection (7) of that Act reads as follows: "To ensure the proper exercise of the law enforcement powers authorized by this subsection, the Offices of Inspector General described under paragraph (3) shall, not later than 180 days after the date of enactment of this subsection, collectively enter into a memorandum of understanding to establish an external review process for ensuring that adequate internal safeguards and management procedures continue to exist within each Office and within any Office that later receives an authorization under paragraph (2). The review process shall be established in consultation with the Attorney General, who shall be provided with a copy of the memorandum of understanding that establishes the review process. Under the review process, the exercise of the law enforcement powers by each Office of Inspector General shall be reviewed periodically by another Office of Inspector General or by a committee of Inspectors General. The results of each review shall be communicated in writing to the applicable Inspector General and to the Attorney General." The additional routine use would allow the disclosure of information to authorized officials within the PCIE, the Department of Justice, and the Federal Bureau of Investigation, as necessary, for the purpose of conducting qualitative assessment reviews of the OIG's investigative operations to ensure that adequate internal safeguards and management procedures are maintained.

Patti F. Stockman,

NASA Privacy Act Officer.

NASA 10IGIC

SYSTEM NAME:

Inspector General Investigations Case Files.

SECURITY CLASSIFICATION:

Some of the material contained in the system has been classified in the interests of national security pursuant to Executive Order 11652.

SYSTEM LOCATION:

Locations 1 through 11, 14, 16 and 17 as set forth in Appendix A.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Current and former employees of NASA, contractors, and subcontractors, and others whose actions have affected NASA.

CATEGORIES OF RECORDS IN THE SYSTEM:

Case files pertaining to matters including, but not limited to, the following classifications of cases: (1) Fraud against the Government, (2) theft of Government property, (3) bribery, (4) lost or stolen lunar samples, (5) misuse of Government property, (6) conflict of interest, (7) waiver of claim for overpayment of pay, (8) leaks of Source Evaluation Board information; (9) improper personal conduct, (10) irregularities in awarding contracts; (11) computer crimes; (12) research

misconduct; and (13) whistleblower protection under the Federal Acquisition Simplification Act and the Federal Acquisition Regulation.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

42 U.S.C. 2473; 44 U.S.C. 3101; 5 U.S.C. Appendix 3.

PURPOSE(S):

Information in this system of records is collected in the course of investigating alleged crimes and other violations of law or regulation that affect NASA. The information is used by prosecutors, Agency managers, law enforcement agencies, Congress, NASA contractors, and others to address the crimes and other misconduct discovered during investigations.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

The following are routine uses: (1) Responding to the White House, the Office of Management and Budget, and other organizations in the Executive Office of the President regarding matters inquired of; (2) disclosure to a congressional office from the record of an individual in response to a written inquiry from the congressional office made at the request of that individual; (3) providing data to Federal intelligence elements; (4) providing data to any source from which information is requested in the course of an investigation, to the extent necessary to identify the individual, inform the source of the nature and purpose of the investigation, and to identify the type of information requested; (5) providing personal identifying data to Federal, State, local, or foreign law enforcement representative seeking confirmation of identity of persons under investigations; (6) disclosing, as necessary, to a contractor, subcontractor, or grantee firm or institution, to the extent that the disclosure is in NASA's interest and is relevant and necessary in order that the contractor, subcontractor, or grantee is able to take administrative or corrective action; (7) disclosing to any official (including members of the President's Council on Integrity and Efficiency and staff and authorized officials of the Department of Justice and Federal Bureau of Investigation) charged with the responsibility to conduct qualitative assessment reviews of internal safeguards and management procedures employed in OIG operations; (8) disclosing to members of the President's Council on Integrity and Efficiency for the preparation of reports to the President and Congress on the activities of the Inspectors General; (9) disclosing to the public when: the matter under investigation has become public knowledge, or when the Inspector General determines that such disclosure is necessary to preserve confidence in the integrity of the OIG investigative process, or to demonstrate the accountability of NASA officers, or employees, or other individuals covered by this system, unless the Inspector General determines that disclosure of the specific information in the context of a particular case would constitute an unwarranted invasion of personal privacy; (10) disclosing to the news media and public when there exists a legitimate public interest (*e.g.*, to provide information on events in the criminal process, such as indictments), or when necessary for protection from imminent threat to life or property; (11) standard routine uses 1 through 4 inclusive as set forth in Appendix B.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Hard-copy documents and electronic media.

RETRIEVABILITY:

Information is retrieved by name of the individual.

SAFEGUARDS:

Information is kept in locked cabinets and in secured vaults and computer rooms. Information stored on computers is on a restricted-access server and is protected by an official password and user identification. Access is limited to Inspector General personnel with an official need to know.

RETENTION AND DISPOSAL:

Records are maintained in Agency files and destroyed in accordance with NASA Procedures and Guidelines (NPR) 1441.1, NASA Records Retention Schedules, Schedule 9. Files containing information of an investigative nature but not related to a specific investigation are destroyed in accordance with NPR 1441.1. Significant case files are scheduled for disposition with the National Archives and Records Administration when closed. All other case files are destroyed 10 years after file is closed.

SYSTEM MANAGER(S) AND ADDRESS:

Assistant Inspector General for Investigations, Location 1.

Subsystem Managers: Special and Resident Agents in Charge, Location 2, 4 through 11 inclusive, 14, 16, and 17 as set forth in Appendix A.

NOTIFICATION PROCEDURE:

None. System is exempt (see below).

RECORD ACCESS PROCEDURES:

None. System is exempt (see below).

CONTESTING RECORD PROCEDURES:

None. System is exempt (see below).

RECORD SOURCE CATEGORIES:

Exempt.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

(1) The Inspector General Investigations Case Files systems of records is exempt from any part of the Privacy Act (5 U.S.C. 552a), EXCEPT the following subsections: (b) relating to conditions of disclosure; (c)(1) and (2) relating to keeping and maintaining a disclosure accounting; (e)(4)(A)–(F) relating to publishing a system notice setting forth name, location, categories of individuals and records, routine uses, and policies regarding storage, retrievability, access controls, retention and disposal of the records; (e)(6), (7), (9), (10), and (11) relating to dissemination and maintenance of records; (i) relating to criminal penalties. This exemption applies to those records and information contained in the system of records pertaining to the enforcement of criminal laws.

(2) To the extent that there may exist noncriminal investigative files within this system of records, the Inspector General Investigations Case Files system of records is exempt from the following subsections of the Privacy Act (5 U.S.C. 552a): (c)(3) relating to access to disclosure accounting, (d) relating to access to reports, (e)(1) relating to the type of information maintained in the records; (e)(4)(G), (H), and (I) relating to publishing the system notice information as to agency procedures for access and amendment and information as to the categories of sources of records, and (f) relating to developing agency rules for gaining access and making corrections.

The determination to exempt this system of records has been made by the Administrator of NASA in accordance with 5 U.S.C. 552a (j) and (k) and subpart 5 of the NASA regulations appearing in 14 CFR part 1212, for the reason that a component of the Office of Inspector General, NASA, performs as its principal function activities pertaining to the enforcement of criminal laws, within the meaning of 5 U.S.C. 552a(j)(2). * * *

Appendix A—Location Numbers and Mailing Addresses of NASAInstallations at Which Records Are Located

Location 1

NASA Headquarters, National Aeronautics and Space Administration,Washington, DC 20546–0001.

Location 2

Ames Research Center, National Aeronautics and Space Administration, Moffett Field, CA 94035–1000.

Location 3

Dryden Flight Research Center, National Aeronautics and SpaceAdministration, PO Box 273, Edwards, CA 93523–0273.

Location 4

Goddard Space Flight Center, National Aeronautics and SpaceAdministration, Greenbelt, MD 20771–0001.

Location 5

Lyndon B. Johnson Space Center, National Aeronautics and SpaceAdministration, Houston, TX 77058–3696.

Location 6

John F. Kennedy Space Center, National Aeronautics and SpaceAdministration, Kennedy Space Center, FL 32899–0001.

Location 7

Langley Research Center, National Aeronautics and SpaceAdministration, Hampton, VA 23681–2199.

Location 8

John H. Glenn Research Center at Lewis Field, NationalAeronautics and Space Administration, 21000 Brookpark Road, Cleveland, OH 44135–3191.

Location 9

George C. Marshall Space Flight Center, National Aeronautics andSpace Administration, Marshall Space Flight Center, AL 35812–0001.

Location 10

HQ NASA Management Office—JPL, National Aeronautics and SpaceAdministration, 4800 Oak Grove Drive, Pasadena, CA 91109–8099.

Location 11

John C. Stennis Space Center, National Aeronautics and SpaceAdministration, Stennis Space Center, MS 39529–6000.

Location 12

JSC White Sands Test Facility, National Aeronautics and SpaceAdministration, PO Drawer MM, Las Cruces, NM 88004–0020.

Location 13

GRC Plum Brook Station, National Aeronautics and SpaceAdministration, Sandusky, OH 44870.

Location 14

MSFC Michoud Assembly Facility, National Aeronautics and SpaceAdministration, PO Box 29300, New Orleans, LA 70189.

Location 15

NASA Independent Verification and Validation Facility (NASAIV&V), 100 University Drive, Fairmont, WV 26554.

Location 16

New Jersey Post of Duty, 402 E. State Street, Suite 3036, Trenton, NJ 08608.

Location 17

Western Field Office, Glenn Anderson Federal Building, 501 WestOcean Blvd., Long Beach, CA 90802–4222.

[FR Doc. 04–10400 Filed 5–6–04; 8:45 am]
BILLING CODE 7510–13–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. They authorize the preservation of records of continuing value in the National Archives of the United States and the destruction, after a specified period, of records lacking administrative, legal, research, or other value. Notice is published for records schedules in which agencies propose to destroy records not previously authorized for disposal or reduce the retention period of records already authorized for disposal. NARA invites 1 public comments on such records schedules, as required by 44 U.S.C. 3303a(a).

DATES: Requests for copies must be received in writing on or before June 21, 2004. Once the appraisal of the records is completed, NARA will send a copy of the schedule. NARA staff usually prepare appraisal memorandums that contain additional information concerning the records covered by a proposed schedule. These, too, may be requested and will be provided once the appraisal is completed. Requesters will be given 30 days to submit comments.

ADDRESSES: You may request a copy of any records schedule identified in this notice by contacting the Life Cycle Management Division (NWML) using one of the following means:

Mail: NARA (NWML), 8601 Adelphi Road, College Park, MD 20740–6001.

E-mail: records.mgt@nara.gov.

FAX: 301–837–3698.

Requesters must cite the control number, which appears in parentheses after the name of the agency which submitted the schedule, and must provide a mailing address. Those who desire appraisal reports should so indicate in their request.

FOR FURTHER INFORMATION CONTACT: Paul M. Wester, Jr., Director, Life Cycle Management Division (NWML), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740–6001. Telephone: 301–837–3120. E-mail: *records.mgt@nara.gov.*

SUPPLEMENTARY INFORMATION: Each year Federal agencies create billions of records on paper, film, magnetic tape, and other media. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval, using the Standard Form (SF) 115, Request for Records Disposition Authority. These schedules provide for the timely transfer into the National Archives of historically valuable records and authorize the disposal of all other records after the agency no longer needs them to conduct its business. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

No Federal records are authorized for destruction without the approval of the Archivist of the United States. This approval is granted only after a thorough consideration of their administrative use by the agency of origin, the rights of the Government and of private persons directly affected by the Government's activities, and whether or not they have historical or other value.

Besides identifying the Federal agencies and any subdivisions requesting disposition authority, this public notice lists the organizational unit(s) accumulating the records or indicates agency-wide applicability in the case of schedules that cover records that may be accumulated throughout an agency. This notice provides the control number assigned to each schedule, the total number of schedule items, and the number of temporary items (the records proposed for destruction). It also

includes a brief description of the temporary records. The records schedule itself contains a full description of the records at the file unit level as well as their disposition. If NARA staff has prepared an appraisal memorandum for the schedule, it too includes information about the records. Further information about the disposition process is available on request.

Schedules Pending

1. Department of Health and Human Services, Health Resources and Services Administration (N1–512–04–1, 5 items, 5 temporary items). Case files relating to applications for payment submitted to the Ricky Ray Hemophilia Relief Fund Program. Included are paper and electronic versions of such records as correspondence, affidavits, marriage licenses, birth certificates, and medical records. Data in an electronic tracking system is included as are electronic copies of records created using electronic mail and word processing.

2. Department of Justice, National Drug Intelligence Center (N1–523–04–1, 37 items, 32 temporary items). Records relating to such subjects as agency strategic plans and annual performance plans, staffing levels, budget matters, the preparation of studies, and assistance to other agencies. Also included are electronic copies of records created using electronic mail and word processing. Proposed for permanent retention are recordkeeping copies of such records as strategic plans, annual performance plans, approved copies of organizational charts, and published reports and studies.

3. Department of the Treasury, Bureau of Engraving and Printing (N1–318–04–21, 8 items, 8 temporary items). Records relating to public tours of agency facilities and educational campaigns. Included are such records as files relating to planning tours, electronic tracking systems used for scheduling tours, and materials prepared for public distribution concerning new currency designs. Also included are electronic copies of records created using electronic mail and word processing.

4. Department of Veterans Affairs, Veterans Health Administration (N1–15–02–3, 9 items, 9 temporary items). Electronic patient medical records, including electronic and non-electronic data input files, outputs, master files, back-up files, system documentation, and electronic copies of records created using electronic mail and word processing. Paper copies of these records were previously scheduled for disposal.

5. Commission to Assess the Threat to the United States from Electromagnetic Pulse Attack, Agency-wide (N1–220–04–1, 8 items, 3 temporary items). The Commission's internal web site, which consists of housekeeping records and copies of records available elsewhere. Also included are electronic copies of records created using electronic mail and word processing. Proposed for permanent retention are recordkeeping copies of such records as the Commission's final report and recommendations, research documents, briefing materials, meeting agendas, and staff papers.

6. National Archives and Records Administration, Government-wide (N1GRS–04–2, 6 items, 6 temporary items). Addition to General Records Schedule 1, Civilian Personnel Records, for records relating to reasonable accommodation requests under the Rehabilitation Act of 1973 and Executive Order 13164. Included are general files, case files, and tracking systems. Also included are electronic copies of records created using electronic mail and word processing.

7. Small Business Administration, Office of Financial Assistance (N1–309–04–6, 9 items, 9 temporary items). Inputs, outputs, master files, and documentation associated with the Risk Lender System, which is used to monitor lender performance in loan servicing. Also included are electronic copies of documents created using word processing and electronic mail.

8. White House Commission on the National Moment of Remembrance, Agency-wide (N1–220–04–3, 12 items, 7 temporary items). Commission member files consisting of nomination and appointment information, financial disclosure statements, and related records, public mail, working papers relating to reports and other projects, extra copies of publications, copies of procurement records, and records relating to the Commission's web site, including its contents. Also included are electronic copies of records created using electronic mail and word processing. Proposed for permanent retention are recordkeeping copies of such files as Commission correspondence, press releases, Commission meeting minutes and testimony, posters, flyers, and other educational materials, reports, and motion pictures.

Dated: May 3, 2004.

Michael J. Kurtz,

Assistant Archivist for Records Services—Washington, DC.

[FR Doc. 04–10449 Filed 5–6–04; 8:45 am]

BILLING CODE 7515–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 40–6940]

Finding of No Significant Impact and Notice of Availability of the Environmental Assessment Addressing License Renewal, Cabot Corporation, Boyertown, PA

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of availability of Environmental Assessment and Finding of No Significant Impact.

FOR FURTHER INFORMATION CONTACT: Elaine Brummett, Fuel Cycle Facilities Branch, Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Mail Stop T8–A33, Washington, DC 20555–0001, telephone (301) 415–6606 and e-mail *esb@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) is considering the issuance of an amendment for the renewal of Source Material License SMB–920 for the Cabot Corporation (through its subsidiary, Cabot Supermetals (CSM)) for continued operations. The facility uses ore containing source material (uranium and thorium) to produce tanalium and niobium at the Boyertown, Pennsylvania site. All the processes in the plant and most of the radiological procedures have remained unchanged, except for the detailed procedures for monitoring and analyzing radiological conditions. Also, Cabot has modified the radiation safety programs in order to strengthen and improve the levels of management and the employee involvement. The licensee's revised application for license renewal was received electronically on March 24, 2004, and the CSM transmittal letter was dated March 29, 2004. The original application was previously noticed in the **Federal Register** on June 5, 2002 (67 FR 38679), with an opportunity to provide written comments or to request a hearing.

II. Summary of the Environmental Assessment

The EA was prepared to evaluate the environmental impacts associated with continued operation of the Boyertown facility. In the conduct of its evaluation, the NRC considered the following: (1) The CSM revised application; (2) information contained in prior

environmental evaluations of the facility; (3) information in the Cabot environmental monitoring reports; (4) information derived from the NRC site visits and inspections of the site; and (5) from communications with CSM, the Pennsylvania Department of Environmental Protection, the State Historic Preservation Office, and the U.S. Fish and Wildlife Service. In preparing the EA, the NRC evaluated the potential impacts to cultural resources, threatened and endangered species, ambient air quality, surface waters, and groundwater at the Boyertown site. Additionally, the NRC evaluated the potential impacts to members of the public from the plant activities, including the potential radiological impacts. The results of the staff's evaluation are documented in an EA which is available electronically for public inspection or from the Publicly Available Records (PARS) component of NRC's document system (ADAMS). The safety aspects of the Boyertown operations are discussed separately in a Safety Evaluation Report that will accompany the agency's final licensing action on CSM's request to renew Source Materials License SMB–920.

III. Finding of No Significant Impact

Pursuant to 10 CFR part 51, the NRC has prepared the EA, summarized above. The NRC staff has concluded that current operation and the proposed licensing action of continued operation of the Cabot facility will not have a significant impact on the environment. The proposed NRC approval of the action, when combined with known effects on resource areas at the site, is not anticipated to result in any cumulative impacts. Therefore, the NRC staff has concluded that there will be no significant environmental impacts on the quality of the human environment and, accordingly, the staff has determined that preparation of an Environmental Impact Statement is not warranted.

IV. Further Information

The EA for this proposed action, as well as the licensee's request, as revised, are available electronically for public inspection in the NRC's Public Document Room or from the Publicly Available Records (PARS) component of NRC's document system (ADAMS). ADAMS is accessible from the NRC Web site at *http://www.nrc.gov/reading-rm/adams.html*. The ADAMS Accession Numbers for the licensee's revised application is: ML040860628 and ML040860633, March 23, 2004 (Form 313 dated February 6, 2004), and ML040930203, March 29, 2004. The ADAMS Accession Number for the EA is: ML041030379, April 12, 2004. Most of the documents referenced in the EA are also available through ADAMS. Documents can also be viewed electronically on the public computers located at the NRC's Public Document Room, O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, MD 20852.

The PDR reproduction contractor will copy documents for a fee. Persons who do not have access to ADAMS, should contact the NRC PDR Reference staff by telephone at 1 (800) 397–4209, or (301) 415–4737, or by e-mail to *pdr@nrc.gov*.

Dated in Rockville, Maryland, this 29th day of April, 2004.

For the Nuclear Regulatory Commission.

Elaine Brummett,

Project Manager, Fuel Cycle Facilities Branch, Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Material Safety and Safeguards.

[FR Doc. E4–1035 Filed 5–6–04; 8:45 am]

BILLING CODE 7590–01–P

OVERSEAS PRIVATE INVESTMENT CORPORATION

Submission for OMB Review; Comment Request

AGENCY: Overseas Private Investment Corporation.

ACTION: Request for comments.

SUMMARY: Under the provisions 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 the Agency is preparing an information collection request for OMB review and approval and to request public review and comment on the submission. OPIC published its first **Federal Register** Notice on this information collection request on March 4, 2004, in Vol. 69, No. 43 FR 10273, at which time a 60-day comment period was announced. This comment period ended May 3, 2004. No comments were received in response to this notice.

This information collection submission has now been submitted to OMB for review. Comments are again being solicited on the need for the information; the accuracy of the Agency's burden estimate; the quality, practical utility and clarity of the information to be collected; and on ways to minimize the reporting burden, including automated collection techniques and uses of other forms of technology. The proposed form, OMB control number 3420–0011, under review is summarized below.

DATES: Comments must be received within 30 calendar days of this Notice.

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 OMB Reviewer.

FOR FURTHER INFORMATION CONTACT:

OPIC Agency Submitting Officer: Bruce I. Campbell, Records Management Officer, Overseas Private Investment Corporation, 1100 New York Avenue, NW., Washington, DC 20527; (202) 336–8563.

OMB Reviewer: David Rostker, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Docket Library, Room 10102, 725 17th Street, NW., Washington, DC 20503; (202) 395–3897.

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.

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 projects' eligibility for political risk insurance, assess the environmental impact and the developmental effects of the project, measure the economic effects for the U.S. and the host country economy, and collect information for the insurance underwriting analysis.

Dated: May 4, 2004.

Eli Landy,

Senior Counsel, Administrative Affairs, Department of Legal Affairs.

[FR Doc. 04–10415 Filed 5–6–04; 8:45 am]

BILLING CODE 3210–01–M

RAILROAD RETIREMENT BOARD

Agency Forms Submitted for OMB Review

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44

U.S.C. Chapter 35), the Railroad Retirement Board (RRB) has submitted the following proposal(s) for the collection of information to the Office of Management and Budget for review and approval.

Summary of Proposal(s)

(1) *Collection title:* Supplement to Claim of Person Outside the United States.

(2) *Form(s) submitted:* G–45.

(3) *OMB Number:* 3220–0155.

(4) *Expiration date of current OMB clearance:* 7/31/2004.

(5) *Type of request:* Extension of a currently approved collection.

(6) *Respondents:* Individuals or households.

(7) *Estimated annual number of respondents:* 100.

(8) *Total annual responses:* 100.

(9) *Total annual reporting hours:* 17.

(10) *Collection description:* Under Public Law 98–21, the Tier I or overall minimum portion of an annuity and Medicare benefits payable under the Railroad Retirement Act to certain beneficiaries living outside the United States may be withheld. The collection obtains the information needed by the Railroad Retirement Board to implement the benefit withholding provisions of Public Law 98–21.

FOR FURTHER INFORMATION CONTACT: Copies of the forms and supporting documents can be obtained from Charles Mierzwa, the agency clearance officer(312–751–3363) or *Charles.Mierzwa@rrb.gov*.

Comments regarding the information collection should be addressed to Ronald J. Hodapp, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois, 60611–2092 or *Ronald.Hodapp@rrb.gov* and to the OMB Desk Officer for the RRB, at the Office of Management and Budget, Room 10230, New Executive Office Building, Washington, DC 20503.

Charles Mierzwa,

Clearance Officer.

[FR Doc. 04–10390 Filed 5–6–04; 8:45 am]

BILLING CODE 7905–01–P

SECURITIES AND EXCHANGE COMMISSION

[LLC File No. 1–16341]

Issuer Delisting; Notice of Application of Shelbourne Properties II, Inc. To Withdraw Its Common Stock, $.01 Par Value, From Listing and Registration on the American Stock Exchange LLC

April 30, 2004.

Shelbourne Properties II, Inc., a Delaware corporation ("Issuer"), has filed an application with the Securities and Exchange Commission ("Commission"), pursuant to section 12(d) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 12d2–2(d) thereunder,[2] to withdraw its Common Stock, $.01 par value ("Security"), from listing and registration on the American Stock Exchange LLC ("Amex" or "Exchange").

The Board of Directors ("Board") of the Issuer unanimously approved a resolution on March 12, 2004 to withdraw the Issuer's Security from listing on the Amex. The Board states that it is taking such action because, pursuant to the Issuer's previously adopted Plan of Liquidation, the remaining assets of the Issuer, other than its interest in certain assets held for the benefit of the holder of the Class A Units of Limited Partnership Interest in the Issuer's opening partnership, will be transferred to a liquidating trust on April 23, 2004.

The Issuer stated in its application that it has met the requirements of Amex Rule 18 by complying with all applicable laws in the State of Delaware, in which it is incorporated, and with the Amex's rules governing an issuer's voluntary withdrawal of a security from listing and registration.

The Issuer's application relates solely to the withdrawal of the Security from listing on the Amex and from registration under section 12(b) of the Act,[3] and shall not affect its obligation to be registered under section 12(g) of the Act.[4]

Any interested person may, on or before May 21, 2004 comment on the facts bearing upon whether the application has been made in accordance with the rules of the Amex and what terms, if any, should be imposed by the Commission for the protection of investors. All comment letters may be submitted by either of the following methods:

Electronic Comments

- Send an e-mail to *rule-comments@sec.gov*. Please include the File Number 1–16341 or;

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number 1–16341. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/delist.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

Jonathan G. Katz,

Secretary.

[FR Doc. 04–10393 Filed 5–6–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[LLC File No. 1–16343]

Issuer Delisting; Notice of Application of Shelbourne Properties III, Inc. To Withdraw Its Common Stock, $.01 Par Value, From Listing and Registration on the American Stock Exchange LLC

April 30, 2004.

Shelbourne Properties III, Inc., a Delaware corporation ("Issuer"), has filed an application with the Securities and Exchange Commission ("Commission"), pursuant to section 12(d) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 12d2–2(d) thereunder,[2] to withdraw its Common

[1] 15 U.S.C. 78*l*(d).
[2] 17 CFR 240.12d2–2(d).
[3] 15 U.S.C. 78*l*(b).
[4] 15 U.S.C. 78*l*(g).
[5] 17 CFR 200.30–3(a)(1).
[1] 15 U.S.C. 78*l*(d).
[2] 17 CFR 240.12d2–2(d).

Stock, $.01 par value ("Security"), from listing and registration on the American Stock Exchange LLC ("Amex" or "Exchange").

The Board of Directors ("Board") of the Issuer unanimously approved a resolution on March 12, 2004 to withdraw the Issuer's Security from listing on the Amex. The Board states that it is taking such action because, pursuant to the Issuer's previously adopted Plan of Liquidation, the remaining assets of the Issuer, other than its interest in certain assets held for the benefit of the holder of the Class A Units of Limited Partnership Interest in the Issuer's opening partnership, will be transferred to a liquidating trust on April 23, 2004.

The Issuer stated in its application that it has met the requirements of Amex Rule 18 by complying with all applicable laws in the State of Delaware, in which it is incorporated, and with the Amex's rules governing an issuer's voluntary withdrawal of a security from listing and registration.

The Issuer's application relates solely to the withdrawal of the Security from listing on the Amex and from registration under section 12(b) of the Act,[3] and shall not affect its obligation to be registered under section 12(g) of the Act.[4]

Any interested person may, on or before May 21, 2004 comment on the facts bearing upon whether the application has been made in accordance with the rules of the Amex and what terms, if any, should be imposed by the Commission for the protection of investors. All comment letters may be submitted by either of the following methods:

Electronic Comments

- Send an e-mail to rule-comments@sec.gov. Please include the File Number 1–16343 or;

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number 1–16343. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/delist.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority. [5]

Jonathan G. Katz,

Secretary.

[FR Doc. 04–10394 Filed 5–6–04; 8:45 am]

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[3] 15 U.S.C. 78*l*(b).

[4] 15 U.S.C. 78*l*(b).

[5] 17 CFR 200.30–3(a)(1).

SECURITIES AND EXCHANGE COMMISSION

[File No. 1–16345]

Issuer Delisting; Notice of Application of Shelbourne Properties I, Inc. To Withdraw Its Common Stock, $.01 Par Value, From Listing and Registration on the American Stock Exchange LLC

April 30, 2004.

Shelbourne Properties I, Inc., a Delaware corporation ("Issuer"), has filed an application with the Securities and Exchange Commission ("Commission"), pursuant to section 12(d) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 12d2–2(d) thereunder,[2] to withdraw its Common Stock, $.01 par value ("Security"), from listing and registration on the American Stock Exchange LLC ("Amex" or "Exchange").

The Board of Directors ("Board") of the Issuer unanimously approved a resolution on March 12, 2004 to withdraw the Issuer's Security from listing on the Amex. The Board states that it is taking such action because, pursuant to the Issuer's previously adopted Plan of Liquidation, the remaining assets of the Issuer, other than its interest in certain assets held for the benefit of the holder of the Class A Units of Limited Partnership Interest in the Issuer's opening partnership, will be transferred to a liquidating trust on April 23, 2004.

The Issuer stated in its application that it has met the requirements of Amex Rule 18 by complying with all applicable laws in the State of Delaware, in which it is incorporated, and with the Amex's rules governing an issuer's voluntary withdrawal of a security from listing and registration.

The Issuer's application relates solely to the withdrawal of the Security from listing on the Amex and from registration under section 12(b) of the Act,[3] and shall not affect its obligation to be registered under section 12(g) of the Act.[4]

Any interested person may, on or before May 21, 2004 comment on the facts bearing upon whether the application has been made in accordance with the rules of the Amex and what terms, if any, should be imposed by the Commission for the protection of investors. All comment letters may be submitted by either of the following methods:

Electronic Comments

- Send an e-mail to *rule-comments@sec.gov*. Please include the File Number 1–16345 or;

Paper Comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number 1–16345. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/delist.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

[1] 15 U.S.C. 78*l*(d).

[2] 17 CFR 240.12d2–2(d).

[3] 15 U.S.C. 78*l*(b).

[4] 15 U.S.C. 78*l*(g).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

Jonathan G. Katz,

Secretary.

[FR Doc. 04–10395 Filed 5–6–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–26440; 812–12839]

Wachovia Bank National Association, et al.; Notice of Application May 3, 2004.

AGENCY: Securities and Exchange Commission ("Commission").

ACTION: Notice of an application for an order under (a) section 12(d)(1)(J) of the Investment Company Act of 1940 ("Act") for an exemption from sections 12(d)(1)(A) and (B) of the Act, (b) sections 6(c) and 17(b) for an exemption from section 17(a) of the Act, (c) section 6(c) for an exemption from section 17(e) of the Act, and (d) section 17(d) of the Act and rule 17d–1 under the Act for an order permitting certain joint transactions.

Applicants: Wachovia Bank National Association ("Wachovia Bank"); Evergreen Money Market Trust and Evergreen Select Money Market Trust, and their series (the "Evergreen Money Market Funds"); Evergreen Investment Management Company, LLC ("Advisor"); and Wachovia Securities, LLC. ("Wachovia Securities").

Summary of Application: Applicants request an order that would permit certain registered management investment companies, and series thereof ("Registered Lending Funds") (a) to invest cash collateral that is received in connection with a securities lending program ("Cash Collateral") in shares of the Evergreen Money Market Funds beyond the limits set forth in sections 12(d)(1)(A) and (B) of the Act, (b) to pay a lending agent, which may become an affiliated person of a Registered Lending Fund solely as a result of the Registered Lending Fund investing Cash Collateral in the Evergreen Money Market Funds, a fee based on a share of the revenue derived from securities lending activities, (c) to lend portfolio securities to broker-dealers, which may become affiliated persons of the Registered Lending Fund solely as a result of the Registered Lending Fund investing Cash Collateral in the Evergreen Money Market Funds, and (d) to engage in principal transactions with, and pay brokerage commissions to, broker-dealers that are affiliated persons of the Registered Lending Fund solely as a result of the Registered Lending Fund investing Cash Collateral in the Evergreen Money Market Funds.

FILING DATES: The application was filed on June 21, 2002, and amended on November 20, 2003.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on June 1, 2004, and should be accompanied by proof of service on applicants, in the form of an affidavit, or for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Applicants, c/o Catherine F. Kennedy, Evergreen Funds, 200 Berkeley Street, Boston, MA 02116–9000.

FOR FURTHER INFORNATION CONTACT: Stacy L. Fuller, Senior Counsel, or Todd F. Kuehl, Branch Chief, at 202–942–0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Branch, 450 Fifth Street, NW., Washington, DC 20549–0102 (telephone 202–942–8090).

Applicants' Representations

1. Wachovia Bank is a national banking association chartered by the Office of the Comptroller of the Currency and a banking subsidiary of Wachovia Corporation, a publicly held financial holding company. Wachovia Securities is a wholly owned subsidiary of Wachovia Corporation that is registered as a broker-dealer under the Securities Exchange Act of 1934; Wachovia Securities and other broker-dealers that are controlling, controlled by or under common control with Wachovia Securities are each referred to as an "Affiliated Broker-Dealer" and collectively referred to as the "Affiliated Broker-Dealers." The Advisor is an indirect wholly owned subsidiary of Wachovia Corporation and of Wachovia Bank that is registered as an investment adviser under the Investment Advisers Act of 1940. Each Registered Lending Fund has as its investment adviser an entity that is not affiliated with Wachovia Corporation. Registered Lending Funds may participate from time to time as lenders in the securities lending program, described below, with Wachovia Bank as lending agent (the "Program").[1]

2. The Evergreen Money Market Funds, which are series of Delaware statutory trusts, are open-end management investment companies that are registered under the Act. The Evergreen Money Market Funds are money market funds that comply with rule 2a–7 under the Act. The Advisor serves as investment adviser to all of the Evergreen Money Market Funds. Shares of the Evergreen Money Market Funds ("Shares") will not be subject to any sales load, redemption fee, asset-based sales charge under a plan adopted in accordance with rule 12b–1 under the Act or service fee (as defined in rule 2830(b)(9) of the Conduct Rules of the National Association of Securities Dealers ("Rule 2830")).

3. The Program will be administered by Wachovia Bank. Wachovia Bank will enter into a securities lending agency agreement ("Agency Agreement") with each Registered Lending Fund (a) appointing Wachovia Bank to serve as the Registered Lending Fund's agent in connection with lending portfolio securities held in a custody account for the benefit of the Registered Lending Fund, (b) authorizing Wachovia Bank, as agent for the Registered Lending Fund, to enter into a master securities loan agreement ("SLA") with each entity designated by the Registered Lending Fund as an eligible borrower ("Borrower"), and lend securities to Borrowers in exchange for Cash Collateral and other permitted types of collateral, and (c) instructing Wachovia Bank to invest any Cash Collateral in Shares of an Evergreen Money Market Fund or otherwise pursuant to instructions from the Registered Lending Fund or its investment adviser.

4. The duties to be performed by Wachovia Bank as lending agent with respect to any Registered Lending Fund will not exceed the parameters

[5] 17 CFR 200.30–3(a)(1).

[1] All existing investment companies that are advised by the Advisor and currently intend to rely on the requested relief have been named as applicants. Any existing or future Registered Lending Fund, Affiliated Broker-Dealer or Evergreen Money Market Fund may rely on the requested relief only in accordance with the terms and conditions of the application.

described in Norwest Bank, Minnesota, N.A., SEC No-Action Letter (Pub. Avail. May 25, 1995), except to the extent that the staff or the Commission may amend, modify or withdraw that letter.

5. With respect to securities loans that are collateralized by Cash Collateral, the Borrower will receive a fixed return based on the amount of cash held as collateral for the term of the loan; the Registered Lending Fund will be compensated on the spread between the net amount earned on the investment of the Cash Collateral and the return fixed for the Borrower. In the case of collateral other than Cash Collateral, the Registered Lending Fund will receive a loan fee paid by the Borrower equal to the agreed upon fee times the percentage of the market value of the loaned securities specified in the SLA.

6. Applicants request relief to permit the Registered Lending Funds (a) to invest Cash Collateral in Shares of the Evergreen Money Market Funds beyond the limits set forth in sections 12(d)(1)(A) and (B), (b) to pay Wachovia Bank, a lending agent that may become an affiliated person of the Registered Lending Fund solely as a result of the Registered Lending Fund investing Cash Collateral in the Evergreen Money Market Funds, a fee based on a share of the revenue derived from securities lending activities, (c) to lend portfolio securities to the Affiliated Broker-Dealers, which are affiliated persons of the Registered Lending Fund solely as a result of the Registered Lending Fund investing Cash Collateral in the Evergreen Money Market Funds, and (d) to engage in principal transactions with, and pay brokerage commissions to, the Affiliated Broker-Dealers.

Applicants' Legal Analysis

A. Investment of Cash Collateral in the Evergreen Money Market Funds

1. Section 12(d)(1)(A) of the Act provides that no registered investment company may acquire securities of another investment company representing more than 3% of the acquired company's outstanding voting stock, more than 5% of the acquiring company's total assets, or, together with the securities of other investment companies, more than 10% of the acquiring company's total assets. Section 12(d)(1)(B) of the Act provides that no registered open-end investment company may sell its securities to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or if the sale will cause more than 10% of the acquired company's voting stock to be owned by investment companies. Applicants propose that the Registered Lending Funds acquire Shares of the Evergreen Money Market Funds, and the Evergreen Money Market Funds sell Shares to Registered Lending Funds, beyond the limits set forth in sections 12(d)(1)(A) and (B) of the Act.

2. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person or transaction from any provision of section 12(d)(1) if and to the extent that the exemption is consistent with the public interest and the protection of investors. Applicants request an exemption under section 12(d)(1)(J) to permit each Registered Lending Fund to use Cash Collateral to acquire Shares of an Evergreen Money Market Fund in excess of the limits imposed by section 12(d)(1)(A), and each Evergreen Money Market Fund to sell its Shares to the Registered Lending Funds in excess of the limits imposed by section 12(d)(1)(B).

3. Applicants state that the abuses meant to be addressed by section 12(d)(1) of the Act, including undue influence and the layering of fees, are not created by the proposed investment of the Registered Lending Funds' Cash Collateral in the Evergreen Money Market Funds. With respect to undue influence, applicants state that each Evergreen Money Market Fund is managed to maintain a high degree of liquidity; accordingly, no Registered Lending Fund will be in a position to gain undue influence over portfolio management due to the threat of redemption. Applicants also state that the proposed arrangement will not result in an inappropriate layering of fees because the Money Market Funds will not charge a sales load, redemption fee, asset-based sales charge or service fee (as defined in Rule 2830). Applicants further state that access to the Evergreen Money Market Funds will enhance each Registered Lending Fund's ability to manage and invest Cash Collateral. Finally, applicants represent that no Evergreen Money Market Fund will acquire securities of any other investment company in excess of the limits contained in section 12(d)(1)(A), except that an Evergreen Money Market Fund may (a) acquire securities of a registered open-end investment company in the same group of investment companies as the Evergreen Money Market Fund to the extent permitted by section 12(d)(1)(E) of the Act and (b) purchase shares of an affiliated money market fund for short-term cash management purposes to the extent permitted by an exemptive order.[2]

4. Sections 17(a)(1) and (2) of the Act prohibit an affiliated person of, or principal underwriter for, a registered investment company, or any affiliated person of the affiliated person or principal underwriter ("Second Tier Affiliate"), acting as principal, from selling any security to, or purchasing any security from, the registered investment company. Section 2(a)(3) of the Act defines an "affiliated person" of another person to include any person directly or indirectly owning, controlling, or holding with power to vote 5% or more of the outstanding voting securities of the other person; any person 5% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by such other person; any person directly or indirectly controlling, controlled by, or under common control with, the other person; and, in the case of an investment company, its investment adviser. Control is defined in section 2(a)(9) of the Act to mean "the power to exercise a controlling influence over the management or policies of a company."

5. Applicants state that if a Registered Lending Fund acquires 5% or more of the Shares of an Evergreen Money Market Fund, the Evergreen Money Market Fund may be deemed to be an affiliated person of the Registered Lending Fund. As a result, section 17(a) may prohibit each Evergreen Money Market Fund from selling its Shares to, and redeeming its Shares from, the Registered Lending Funds.

6. Section 17(b) of the Act authorizes the Commission to exempt a transaction from section 17(a) if the terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, and the proposed transaction is consistent with the policy of each registered investment company concerned and with the general purposes of the Act. Section 6(c) of the Act authorizes the Commission to exempt any person or transaction, or any class or classes of persons or transactions, from any provision of the Act if the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

[2] Evergreen Select Fixed Income Trust, *et al.*, ICA Rel. Nos. 24213 (Dec. 21, 1999) (notice) and 24260 (Jan. 24, 2000) (order).

7. Applicants request an order under sections 6(c) and 17(b) of the Act to permit the Registered Lending Funds to use Cash Collateral to purchase Shares of the Evergreen Money Market Funds and to redeem those Shares. Applicants maintain that the terms of the proposed transactions are reasonable and fair because the Registered Lending Funds will purchase and sell Shares based on net asset value determined in accordance with the Act. Applicants represent that Wachovia Bank will not purchase Shares, as agent for a Registered Lending Fund in the Program, unless an officer of the Registered Lending Fund has certified to Wachovia Bank that its policies generally permit the Registered Lending Fund to engage in securities lending transactions, and the Registered Lending Fund has represented to Wachovia Bank that (a) such transactions are conducted in accordance with the guidelines of the Commission and/or its staff, (b) its policies permit the Registered Lending Fund to purchase Shares with Cash Collateral, and (c) its securities lending activities will be conducted in accordance with all representations and conditions in this application.

8. Section 17(d) of the Act and rule 17d–1 under the Act prohibit any affiliated person of, or principal underwriter for, a registered investment company or any Second Tier Affiliate, acting as principal, from effecting any transaction in connection with any joint enterprise or other joint arrangement or profit sharing plan in which the investment company participates, without an order of the Commission.

9. Applicants state that if a Registered Lending Fund owns 5% or more of the Shares of an Evergreen Money Market Fund, the Registered Lending Funds (by purchasing and redeeming shares of the Evergreen Money Market Funds), the Advisor (by acting as investment adviser to the Evergreen Money Market Funds), Wachovia Bank (by acting as lending agent, investing Cash Collateral in Shares, and receiving a portion of the revenue generated by securities lending transactions), and the Evergreen Money Market Funds (by selling Shares to and redeeming Shares from the Registered Lending Funds) could be deemed to be participants in a joint enterprise or other joint arrangement within the meaning of section 17(d) and rule 17d–1. Applicants request an order under section 17(d) and rule 17d–1 to permit the transactions incident to the investment of Cash Collateral in the Evergreen Money Market Funds.

10. Under rule 17d–1, in passing on applications for orders under section 17(d), the Commission considers whether the investment company's participation in the joint enterprise is consistent with the provisions, policies, and purposes of the Act, and the extent to which such participation is on a basis different from or less advantageous than that of other participants. Applicants submit that the proposed transactions satisfy the standards of section 17(d) and rule 17d–1.

11. Applicants state that the Registered Lending Funds will purchase and sell Shares of the Evergreen Money Market Funds based on their net asset value determined in accordance with the Act. Applicants also maintain that, to the extent that any Registered Lending Fund invests in the Evergreen Money Market Funds as proposed, each Registered Lending Fund will participate on a fair and reasonable basis, relative to the size of its investment, in the returns and expenses of the Evergreen Money Market Funds.

B. Payment of Lending Agent Fees to Wachovia Bank

12. Applicants state that to the extent a Registered Lending Fund acquires 5% or more of the Shares of an Evergreen Money Market Fund (and thereby becomes a Second Tier Affiliate of Wachovia Bank), the Agency Agreement, under which compensation is paid to Wachovia Bank based on the revenue generated for the Registered Lending Fund by the Program, could be deemed a joint enterprise or other joint arrangement in violation of section 17(d). Applicants accordingly seek an order under section 17(d) and rule 17d–1, to the extent necessary, to permit Registered Lending Funds to pay, and Wachovia Bank to accept, fees in connection with Wachovia Bank acting as lending agent. Applicants state that the nature of the affiliation between Wachovia Bank and the Registered Lending Funds would be such as not to give rise to any potential for overreaching and that the transactions between Wachovia Bank and the Registered Lending Funds would be on an arm's length basis.

13. Applicants submit that the proposed lending fee meets the standard of rule 17d–1. Applicants state that the lending agent fee will be negotiated on an arm's length basis by and between the Registered Lending Fund and Wachovia Bank. Applicants further state that Wachovia Bank will not purchase Shares of an Evergreen Money Market Fund for a Registered Lending Fund unless an officer of the Registered Lending Fund has certified in writing that (a) participation in the Program has been approved by a majority of its directors (or trustees) who are not interested persons, as defined by section 2(a)(19) of the Act, of the Registered Lending Fund ("Independent Directors"), and (b) the Independent Directors of the Registered Lending Fund will evaluate the Program no less frequently than annually to determine that the investment of Cash Collateral in the Evergreen Money Market Funds is in the best interests of the Registered Lending Fund's shareholders.

C. Lending Portfolio Securities to the Affiliated Broker-Dealers

14. Section 17(a)(3) of the Act makes it unlawful for any affiliated person, or Second Tier Affiliate, of a registered investment company acting as principal, to borrow money or other property from the registered investment company. Applicants state that to the extent a Registered Lending Fund acquires 5% or more of the Shares of an Evergreen Money Market Fund, the Affiliated Broker-Dealers will be Second Tier Affiliates of the Registered Lending Fund. Accordingly, section 17(a)(3) could prohibit the Affiliated Broker-Dealers from borrowing securities from the Registered Lending Funds.

15. Applicants seek relief under sections 6(c) and 17(b) from the above-described application of section 17(a)(3). Applicants submit that the requested relief meets the standards of sections 6(c) and 17(b) of the Act. Applicants state that each Registered Lending Fund will have an investment adviser that is not affiliated with the Affiliated Broker-Dealers. Applicants state that such investment adviser will have pecuniary interests directly aligned with those of the Registered Lending Fund, and that such adviser will have an opportunity to monitor the Registered Lending Fund's transactions with Affiliated Broker-Dealers and to compare such transactions to those effected with other Borrowers. Applicants further state that the board of directors (or trustees) of each Registered Lending Fund will have an opportunity to impose conditions or limitations on borrowing activities between the Registered Lending Fund and Affiliated Broker-Dealers.

16. To the extent a Registered Lending Fund acquires 5% or more of the Shares of an Evergreen Money Market Fund, applicants state that the Registered Lending Fund and Affiliated Broker-Dealers may be prohibited by section 17(d) and rule 17d–1 from entering into securities lending transactions. Accordingly, applicants seek relief under rule 17d–1. For the reasons discussed above, applicants assert that the requested relief meets the standards of section 17(d) and rule 17d–1.

D. Transactions With the Affiliated Broker-Dealers

17. Sections 17(a)(1) and (2), as noted above, prohibit certain principal transactions between a registered investment company and its affiliates, including any Second Tier Affiliates. Applicants state that to the extent that the Affiliated Broker-Dealers and the Evergreen Money Market Funds are deemed to be under common control, an Affiliated Broker-Dealer could be considered to be an affiliated person of an Evergreen Money Market Fund and a Second Tier Affiliate of a Registered Lending Fund that acquires 5% or more of the Shares of an Evergreen Money Market Fund. Accordingly, applicants state, sections 17(a)(1) and (2) could prohibit the Affiliated Broker-Dealers, on a principal basis, from selling securities to and purchasing securities from the Registered Lending Funds.

18. Applicants seek relief under sections 6(c) and 17(b) from section 17(a) to permit principal transactions between Registered Lending Funds and Affiliated Broker-Dealers where the affiliation between the parties arises solely as a result of an investment by the Registered Lending Fund in Shares of an Evergreen Money Market Fund. Applicants submit that the requested relief meets the standards of sections 6(c) and 17(b). Applicants assert that each Registered Lending Fund will have an investment adviser that is not affiliated with the Affiliated Broker-Dealers (and that in reality may be a competitor of the Affiliated Broker-Dealers). Accordingly, applicants maintain, the Affiliated Broker-Dealers will have no influence over decisions made by Registered Lending Funds, each transaction between a Registered Lending Fund and an Affiliated Broker-Dealer will be the product of arm's length bargaining, and there will be no element of self-dealing. Applicants further contend that, because the interests of a Registered Lending Fund's investment adviser will be directly and solely aligned with the Registered Lending Fund, it is reasonable to conclude that the consideration paid to, or received by, a Registered Lending Fund in connection with a principal transaction with an Affiliated Broker-Dealer will be reasonable and fair.

19. Section 17(e)(2)(A) makes it unlawful for any affiliated person of a registered investment company, or any Second Tier Affiliate, acting as broker in connection with the sale of securities to or by that registered investment company, to receive from any source a commission for effecting the transaction that exceeds, with respect to sales effected on a securities exchange, the usual and customary broker's commission. Rule 17e–1 provides that a commission shall be deemed not to exceed the usual and customary commission if certain procedures are followed by the registered investment company.

20. Applicants seek relief under section 6(c) from section 17(e) to permit the Affiliated Broker-Dealers to (continue to) engage in brokerage transactions with, and to receive commissions from, Registered Lending Funds that become Second Tier Affiliates of the Affiliated Broker Dealers solely by reason of a Registered Lending Fund's investment in Shares of an Evergreen Money Market Fund. Applicants contend that the proposal meets the standards of section 6(c). Applicants submit that the proposed brokerage transactions raise no possibility of self-dealing or any concern that the Registered Lending Funds will be managed in the interests of the Affiliated Broker-Dealers. Applicants believe that each transaction between a Registered Lending Fund and an Affiliated Broker-Dealer will be the product of arm's length bargaining because no investment adviser to a Registered Lending Fund will have an interest in benefiting an Affiliated Broker-Dealer at the expense of the Registered Lending Fund.

Applicants' Conditions

Applicants agree that any order granting the requested relief will be subject to the following conditions:

General

1. The securities lending program of each Registered Lending Fund will comply with all present and future applicable guidelines of the Commission and/or its staff regarding securities lending arrangements.

2. No Registered Lending Fund will purchase Shares of an Evergreen Money Market Fund unless an officer of the Registered Lending Fund certifies in writing that (a) participation in the Program has been approved by a majority of the Independent Directors of the Registered Lending Fund and (b) the Independent Directors of the Registered Lending Fund will evaluate the Program no less frequently than annually to determine that the investment of Cash Collateral in the Evergreen Money Market Funds is in the best interests of the shareholders of the Registered Lending Fund.

Investment of Cash Collateral in an Evergreen Money Market Fund

3. No Registered Lending Fund will be permitted to invest its Cash Collateral in Shares of an Evergreen Money Market Fund unless an officer of the Registered Lending Fund certifies in writing that such investment complies with the Registered Lending Fund's investment objectives and policies.

4. Investment in Shares of an Evergreen Money Market Fund by a particular Registered Lending Fund will be in accordance with the guidelines regarding the investment of Cash Collateral specified by the Registered Lending Fund in the Agency Agreement. A Registered Lending Fund's Cash Collateral will be invested in a particular Evergreen Money Market Fund only if (a) an officer of the Registered Lending Fund certifies in writing that the Evergreen Money Market Fund has been approved for investment by the Registered Lending Fund and (b) the Evergreen Money Market Fund invests in the types of instruments that the Registered Lending Fund has authorized for the investment of its Cash Collateral.

5. Shares of an Evergreen Money Market Fund sold to and redeemed by a Registered Lending Fund will not be subject to a sales load, redemption fee, any asset based sales charge or service fee (as defined by Rule 2830).

6. An Evergreen Money Market Fund will not acquire securities of any other investment company in excess of the limits of section 12(d)(1)(A) of the Act, except that an Evergreen Money Market Fund may (a) acquire securities of a registered open-end investment company in the same group of investment companies as the Evergreen Money Market Fund to the extent permitted by section 12(d)(1)(E) of the Act and (b) purchase shares of an affiliated money market fund for short-term cash management purposes to the extent permitted by an exemptive order.

For the Commission, by the Division of Investment Management, under delegated authority.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04–10465 Filed 5–6–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 35–27841]

Filings Under the Public Utility Holding Company Act of 1935, as Amended ("Act")

April 30, 2004.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated under the Act. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendment(s) is/are available for public inspection through the Commission's Branch of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by May 25, 2004, to the Secretary, Securities and Exchange Commission, Washington, DC 20549–0609, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in the case of an attorney at law, by certificate) should be filed with the request. Any request for hearing should identify specifically the issues of facts or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After May 25, 2004, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

Interstate Power and Light Company (70–9375)

Interstate Power and Light Company ("IP&L"), Alliant Energy Tower, 200 First Street, S.E., Cedar Rapids, IA 52401, a wholly-owned public-utility subsidiary of Alliant Energy Corporation ("Alliant Energy"), a registered holding company, has filed a post-effective amendment to a previously filed declaration under sections 6(a), 7 and 12(b) of the Act and rules 45 and 54 under the Act.

I. Current Authority

By orders dated November 25, 1998 (Holding Co. Act Release No. 26945) and December 15, 2000 (Holding Co. Act Release No. 27306), as subsequently modified by order dated October 24, 2001 (Holding Co. Act Release No. 27456 and collectively, "Prior Orders"), the Commission authorized IP&L to: (1) Issue and sell through June 30, 2004 ("Prior Authorization Period"), in one or more series, any combination of (a) collateral trust bonds ("Trust Bonds"), (b) senior unsecured debentures ("Senior Debentures"), and (c) unsecured subordinated debentures ("Subordinated Debentures"); and (2) enter into an agreement or agreements for the issuance and sale of one or more series of tax-exempt bonds ("Tax-Exempt Bonds") for the financing or refinancing of air and water pollution control facilities and sewage and solid waste disposal facilities ("Facilities"). As security for IP&L's obligations under any agreement relating to the Tax-Exempt Bonds, IP&L is authorized to (1) issue its non-negotiable promissory note or notes to evidence the loan to IP&L of the proceeds of the Tax-Exempt Bonds by the issuer thereof, (2) convey a subordinated security interest in any Facilities that are financed through the issuance of Tax-Exempt Bonds, (3) issue and pledge one or more new series of Trust Bonds ("Tax-Exempt Collateral Bonds"), (4) acquire and deliver letters of credit guaranteeing payment of the Tax-Exempt Bonds and enter into reimbursement agreements with respect to any such letters of credit, (5) acquire insurance policies guaranteeing payment of the Tax-Exempt Bonds, and (6) provide a direct guarantee of payment of the principal of and premium, if any, and interest on the Tax-Exempt Bonds.

Under the Prior Orders, the aggregate principal amount of the Trust Bonds, Senior Debentures, Subordinated Debentures, and Tax-Exempt Bonds issued during the Prior Authorization Period shall not exceed $300 million, provided that such amount excludes the principal amount of any Tax-Exempt Collateral Bonds issued as collateral security for Tax-Exempt Bond obligations and any other forms of collateral related to the Tax-Exempt Bonds. IP&L may not issue any long-term debt securities unless such securities are rated at the investment grade level as established by at least one nationally recognized statistical rating organization, as that term is used in paragraphs (c)(2)(vi)(E), (F) and (H) of Rule 15c3–1 under the Securities Exchange Act of 1934. Under the October 24, 2001 order, the Commission reserved jurisdiction over the issuance by IP&L of any such securities that are rated below investment grade.

Through December 31, 2003, IP&L had issued and sold a total of $200 million principal amount of long-term debt securities in accordance with the authorization under the Prior Orders. IP&L plans to issue an additional $100 million principal amount of Trust Bonds or Senior Debentures in the second quarter of 2004, the proceeds of which would be used to repay short-term debt that was incurred principally to finance IP&L's construction program and for other corporate purposes. Assuming the completion of this offering and an additional $100 million common equity investment by Alliant Energy, IP&L's projected capitalization ratios at December 31, 2004 would be 45.9% common equity, 7.5% preferred stock, 41.6% long-term debt (including current portion), and 5.0% short-term debt. In addition, IP&L plans to cause the redemption of approximately $20 million principal amount of Tax-Exempt Bonds, also during the second quarter of 2004.

The Prior Orders provide that no series of Trust Bonds will be issued at interest rates in excess of the lower of 15% per annum or those interest rates generally obtainable at the time of pricing for first mortgage bonds having reasonably similar maturities, issued by companies of the same or reasonably comparable credit quality and having reasonably similar terms, conditions and features ("Ceiling Rate"). Further, the Prior Orders provide that no series of Senior Debentures or Subordinated Debentures will be sold if their fixed interest rate or initial adjustable interest rate exceeds the Ceiling Rate.

II. Requested Authority

IP&L requests that the Commission issue a further supplemental order that: (1) Extends the Prior Authorization Period under the Prior Orders from June 30, 2004 to December 31, 2004 ("New Authorization Period"); (2) increases the maximum aggregate principal amount of the Trust Bonds, Senior Debentures, Subordinated Debentures, and Tax-Exempt Bonds that IP&L may issue through the New Authorization Period from $300 million to $350 million, such that, taking into account previous issuances of such securities (totaling $200 million), IP&L would have authority to issue up to an additional $150 million of long-term debt securities during the remainder of 2004; (3) authorizes IP&L to enter into and perform interest rate hedging transactions in order to manage interest rate risk associated with outstanding long-term indebtedness and anticipated long-term debt offerings; and (4) modifies the investment grade criteria applicable to any securities issued by IP&L in reliance upon the authorization in this proceeding.

IP&L requests a six-month extension in the Prior Authorization Period to make the expiration date under the Prior

Orders coterminous with the expiration of its authority to issue and sell short-term indebtedness. *See* Holding Co. Act Release No. 27542 (June 21, 2002); Holding Co. Act Release No. 27575 (October 10, 2002); Holding Co. Act Release No. 27615 (December 13, 2002). The extension would also provide IP&L greater financing flexibility in the event that its currently planned offering of Trust Bonds or Senior Debentures and redemption of Tax-Exempt Bonds are delayed beyond the second quarter of 2004.

The proposed $50 million increase in the limit on new long-term debt securities that IP&L may issue (from $300 million to $350 million) would allow IP&L to complete in 2004 both its planned offering of Trust Bonds or Senior Debentures ($100 million) and redemption of approximately $20 million Tax-Exempt Bonds.

IP&L requests authorization to enter into interest rate hedging transactions with respect to its outstanding long-term indebtedness ("Interest Rate Hedges") to reduce or manage interest rate cost. Interest Rate Hedges would involve the use of financial instruments commonly used in today's capital markets, such as futures, interest rate swaps, caps, collars, floors, and structured notes (*i.e.*, a debt instrument in which the principal and/or interest payments are indirectly linked to the value of an underlying asset or index), or transactions involving the purchase or sale, including short sales, of U.S. Treasury or Agency (*e.g.*, FNMA) obligations or London Inter-Bank Offer Rate-based swap instruments. The transactions would be for fixed periods and stated notional amounts. In no case would the notional principal amount of any Interest Rate Hedge exceed that of the underlying debt instrument and related interest rate exposure.

In addition, IP&L requests authorization to enter into interest rate hedging transactions with respect to anticipated debt offerings ("Anticipatory Hedges"). Anticipatory Hedges would be utilized to fix and/or limit the interest rate risk associated with any new issuance through (1) a forward sale of exchange-traded U.S. Treasury futures contracts, U.S. Treasury obligations and/or a forward swap (each, "Forward Sale"); (2) the purchase of put options on U.S. Treasury obligations ("Put Options Purchase"); (3) a Put Options Purchase in combination with the sale of call options on U.S. Treasury obligations ("Collar"); (4) transactions involving the purchase or sale, including short sales, of U.S. Treasury obligations; or (5) some combination of a Forward Sale, Put Options Purchase, Collar and/or other derivative or cash transactions, including, but not limited to structured notes, caps and collars, appropriate for the Anticipatory Hedges.

Interest Rate Hedges and Anticipatory Hedges may be executed on-exchange ("On-Exchange Trades") with brokers through the opening of futures and/or options positions traded on the Chicago Board of Trade ("CBOT") or other designated contract markets, the establishment of over-the-counter positions with one or more counterparties ("Off-Exchange Trades"), or a combination of On-Exchange Trades and Off-Exchange Trades. IP&L would determine the optimal structure of each Interest Rate Hedge or Anticipatory Hedge transaction at the time of execution. Interest Rate Hedges and Anticipatory Hedges in the over-the-counter market would only be entered into with counterparties ("Approved Counterparties") whose senior debt ratings, or the senior debt ratings of the parent companies of the counterparties, as published by Standard and Poor's Ratings Group, are equal to or greater than BBB, or an equivalent rating from Moody's Investors Service or Fitch, Inc. Fees, commissions and other amounts payable to a counterparty or exchange (excluding, however, the swap or option payments) in connection with any Interest Rate Hedge or Anticipatory Hedge would not exceed those generally obtainable in competitive markets for parties of comparable credit quality.

IP&L would comply with Statement of Financial Accounting Standard ("SFAS") 133 (Accounting for Derivative Instruments and Hedging Activities) and SFAS 138 (Accounting for Certain Derivative Instruments and Certain Hedging Activities) or other standards relating to accounting for derivative transactions as are adopted and implemented by the Financial Accounting Standards Board ("FASB"). IP&L represents that each Interest Rate Hedge and each Anticipatory Hedge would qualify for hedge accounting treatment under the current FASB standards in effect and as determined as of the date such Interest Rate Hedge or Anticipatory Hedge is entered into. IP&L would also comply with any future FASB financial disclosure requirements associated with hedging transactions.

Lastly, IP&L requests that the Commission modify the investment grade criteria applicable to any securities issued by IP&L. IP&L represents that, except for securities issued for the purpose of funding money pool operations, no securities may be issued in reliance upon the authorization granted by the Commission pursuant to this application/declaration, as amended, unless: (1) The security to be issued, if rated, is rated investment grade; (2) all outstanding securities of IP&L that are rated are rated investment grade; and (3) all outstanding securities of Alliant Energy that are rated are rated investment grade ("Investment Grade Condition"). For purposes of the Investment Grade Condition, a security will be deemed to be rated "investment grade" if it is rated investment grade by at least one nationally recognized statistical rating organization, as that term is used in paragraphs (c)(2)(vi)(E), (F) and (H) of Rule 15c3–1 under the 1934 Act.[1]

Ameren Corporation, et al. (70–10180)

Ameren Corporation ("Ameren"), a registered holding company, Union Electric Company ("Union Electric"), a direct public-utility company subsidiary of Ameren, both at 1901 Chouteau Avenue, St. Louis, Missouri 63103, and Central Illinois Public Service Company ("CIPSCO" and collectively, "Applicants"), 607 East Adams Street, Springfield, Illinois 62739, another direct public-utility company subsidiary of Ameren, have filed an application-declaration with the Commission under sections 6(a), 7, 9(a), 10, 12(b), 12(c), 12(f) of the Act and rules 43, 44, 45, 46 and 54 under the Act.

I. Background

A. Ameren System

Ameren holds, directly or indirectly, all of the issued and outstanding common stock of the following public-utility companies (collectively, "Utility Subsidiaries"): Union Electric, CIPSCO, and Central Illinois Light Company ("CILCO").[2] Together, the Utility Subsidiaries provide retail and wholesale electric service to approximately 1.7 million customers and retail natural gas service to approximately 500,000 customers in portions of Missouri and Illinois. Ameren is a member of the Mid-America Interconnected Network ("MAIN"), one of the ten regional electric reliability councils organized to coordinate the planning and operation of the nation's bulk power supply. In addition, Ameren is engaged in various

[1] IP&L requests that the Commission reserve jurisdiction over the issuance at any time of securities if the Investment Grade Condition is not satisfied.

[2] Ameren holds all of the common stock of CILCO indirectly, through CILCORP, Inc. ("CILCORP"), an exempt holding company by order. *See Ameren*, Holding Co. Act Release No. 27645 (January 29, 2003)(granting 3(a)(1) exemption).

exempt and authorized nonutility businesses, which it holds through Ameren Energy Resources Company, a wholly owned intermediate nonutility holding company.

Union Electric provides electric service to about 1.2 million retail and wholesale customers in Missouri and in parts of Illinois, and provides natural gas service to approximately 130,000 customers in those states. Union Electric also provides wholesale full requirements service to certain municipal electric utilities in Missouri. Union Electric's peak load in 2003 was 8,298 MW. Union Electric currently owns approximately 8,021 MW of generation capacity. Power from these generation resources, as supplemented by power purchased by Union Electric from others, is used to supply the demands of its electric service customers. Union Electric is subject to regulation with respect to retail sales of natural gas and electricity in Missouri by the Missouri Public Service Commission ("MoPSC") and with respect to retail sales of natural gas and electricity in Illinois by the Illinois Commerce Commission ("ICC").

Union Electric and CIPSCO provide open access transmission service over their combined transmission facilities pursuant to a single Open Access Transmission Tariff ("OATT") on file at the Federal Energy Regulatory Commission ("FERC"). The companies have received conditional authorization from the FERC to join the Midwest Independent Transmission System Operator, Inc. ("Midwest ISO") through GridAmerica LLC, a new independent transmission company, and they expect to begin participating in the Midwest ISO in May of 2004, pending receipt of further regulatory approvals.

In a 20,000 square-mile area of central and southern Illinois, CIPSCO, a direct subsidiary company of Ameren, provides electric transmission service to approximately 325,000 customers and natural gas transmission and distribution service to approximately 170,000 customers. In May of 2000, CIPSCO transferred all of its electric generation facilities to Ameren Energy Generating Company ("GenCo"), an affiliated generation-only company.

GenCo, an exempt wholesale generator ("EWG"), has continued to acquire additional generation capacity since that time. Power generated by GenCo is sold to wholesale purchasers under both cost-based and market-based rates that are subject to the jurisdiction of the FERC. As of December 31, 2003, GenCo had approximately 4,749 MW of total installed generating capacity. The generation facilities of Union Electric and GenCo, are dispatched in a coordinated manner in accordance with the terms of a joint dispatch agreement on file at the FERC. That agreement requires each company to serve its load requirements from its own least-cost generation first, but then allows the other company to have access to any available excess generating capacity at cost.

CILCO is also authorized to participate in the Midwest ISO as a transmission owner. Through its participation in the Midwest ISO, CILCO provides open access transmission services over its transmission facilities pursuant to the Midwest ISO OATT, which is on file at the FERC. Power generated from CILCO's generating units is not subject to the Joint Dispatch Agreement, but instead is dispatched separately from CILCO's control area, which is separate from, and adjacent to, the Ameren control area.

B. Obligations of Union Electric

As a regulated electric utility in Missouri, Union Electric must have sufficient generating capacity with which to serve the forecasted demands of its electric service customers and to maintain an adequate reserve margin. Standards established by MAIN require Union Electric to meet certain minimum short-term and long-term planning reserve requirements, which currently are 15% for 2003 and 17% for 2006.

In July 2002, Union Electric entered into a Stipulation and Agreement to resolve certain retail rate issues in Missouri. The Stipulation and Agreement fixes retail electric service rates for Union Electric in Missouri that, except under certain specified conditions, will remain in place without modification through June 30, 2006. Union Electric also agreed to undertake commercially reasonable efforts to make energy infrastructure investments totaling $2.25 billion to $2.75 billion from January 1, 2002 through June 30, 2006. This includes the obligation to acquire 700 MW of new generating capacity, which may be satisfied by the purchase of generation facilities from an affiliate "at net book value." The Stipulation and Agreement also requires Union Electric to make enhancements to its transmission infrastructure.

II. Asset Transfers

A. Transmission and Distribution Assets

Applicants intend to effect certain transactions ("Illinois Asset Transfer") that would result in CIPSCO acquiring two sets of assets owned by Union Electric (collectively, "Acquired Assets"): (1) Union Electric's electricity transmission and distribution assets in Illinois, with the exception of those associated with Union Electric's Venice, Illinois generating plant, its Keokuk, Iowa generating plant, and minor amounts of property in Illinois to be retained by Union Electric to ensure the smooth operation of its electric utility system in Missouri ("Retained Assets"); and (2) Union Electric's retail gas distribution facilities in Illinois.

Union Electric would transfer the Acquired Assets to CIPSCO at their net book value. In connection with this transaction, CIPSCO would not assume any indebtedness of Union Electric. Approximately one-half of the Acquired Assets ("Transferred Assets") to CIPSCO would be transferred in consideration for a promissory note issued by CIPSCO in a principal amount equal to approximately fifty percent of the total net book value of the Acquired Assets, approximately $69 million, net of liabilities, as of December 31, 2003. Union Electric would hold the note and receive payments including interest from CIPSCO. The remaining balance (approximately fifty percent) of the net book value of the Acquired Assets (approximately $69 million as of December 31, 2003, net of liabilities) would be transferred to CIPSCO through a dividend in kind from Union Electric to Ameren, and Ameren would then contribute the remaining Acquired Assets ("Dividend Assets") to CIPSCO. Under the governing agreement, Union Electric would prepare a schedule to be delivered at the time of closing that identifies the assets, properties and rights to be acquired by CIPSCO and designates whether the specific assets are to be conveyed as Dividend Assets or Transferred Assets. The percentages of Acquired Assets to be conveyed as Transferred Assets and Dividend Assets would be determined by Ameren immediately prior to the closing.

By the Illinois Asset Transfer, Ameren would consolidate in CIPSCO the responsibility to serve electric and gas utility customers in Illinois. CIPSCO would acquire Union Electric's electric transmission and distribution and gas distribution assets and associated general plant assets and related liabilities in Illinois,[3] and Union Electric would also assign all related obligations to CIPSCO, including the certificates of public convenience and necessity granted by the ICC authorizing Union Electric to provide electric utility service and gas utility service in Illinois, environmental permits and obligations,

[3] As mentioned above, Union Electric would continue to own and operate the Retained Assets.

all municipal and county franchises, labor agreements (as applicable), and any other relevant agreements that exist as of the transfer date. Subsequently, CIPSCO would succeed Union Electric's Illinois retail utility operations and provide the retail electric and gas services currently provided by Union Electric under the ICC-approved tariffs currently in effect for Union Electric. After the Illinois Asset Transfer, Union Electric would be regulated as a public utility only in Missouri.

B. Generation Assets

Additionally, Union Electric intends to acquire from GenCo four 44 MW combustion turbine generator ("CTG") units and four 35 MW CTG units located at GenCo's Pinckneyville, Illinois facility ("Pinckneyville Plant") [4] and two 116 MW CTG units located at GenCo's Kinmundy, Illinois generation facility ("Kinmundy Plant") [5] and, correspondingly, to assume certain liabilities and obligations of GenCo related to those units ("Generation Transfer"). The generation assets also would be transferred for cash at their net book value as of the closing date. Union Electric must obtain the approval of the ICC to consummate the Generation Transfer.

Applicants state that the Generation Transfer is intended to enable Union Electric to meet its generation capacity obligations under the Stipulation and Agreement and under the MAIN standards. Union Electric needs 991 MW of additional generation resources by 2006 in order to meet the applicable MAIN generation capacity requirements. The Generation Transfer would provide Union Electric with a total of 548 MW of additional generating capacity.[6]

III. Requests for Authority

Applicants request authority for: (1) Union Electric to sell the Transferred Assets to CIPSCO, its affiliate; (2) CIPSCO to issue a promissory note to Union Electric in connection with the acquisition of the Transferred Assets; (3) Union Electric to declare an in-kind dividend of the Dividend Assets to Ameren; (4) Ameren to contribute the Dividend Assets to CIPSCO; (5) CIPSCO to acquire the Acquired Assets; (6) CIPSCO to assume the obligations of Union Electric in connection with Illinois Asset Transfer; (7) Union Electric to acquire the Pinckneyville Plant and Kinmundy Plant from its affiliate, AmerenGenCo; and (8) Union Electric to assume the obligations of AmerenGenCo relating to the Pinckneyville Plant and Kinmundy Plant.

Ameren Corporation, et al. (70–10206)

Ameren Corporation ("Ameren"), a registered holding company under the Act, and its wholly owned public-utility subsidiary Union Electric Company, d/b/a AmerenUE ("AmerenUE"), both located at 1901 Chouteau Avenue, St. Louis, Missouri 63103, and another of its wholly owned public-utility subsidiaries, Central Illinois Public Service Company, d/b/a AmerenCIPS ("AmerenCIPS"), 607 East Adams Street, Springfield, Illinois 62739 (collectively, "Applicants"), have filed an application-declaration, as amended ("Application") under sections 6(a), 7, 9(a), 10 and 12(b) and rules 45 and 54.

Applicants request authorization to engage in financing and other related transactions, as described below, during the period commencing with the effective date of this requested Commission order and ending June 30, 2007 ("Authorization Period"). Upon the effective date of the Commission's order in this proceeding, Ameren will relinquish its authority to issue securities and engage in the other transactions authorized under its current October 5, 2001, financing order.[7] In the Current Financing Order, Ameren is authorized to issue and sell: (1) in public or private offerings, up to $2.5 billion at any time outstanding of its capital stock, which consists of 400,000,000 shares of common stock, $0.01 par value ("Common Stock") or options, warrants or other stock purchase rights exercisable for Common Stock, its preferred stock, which consists of 100,000,000 shares, $0.01 par value ("Preferred Stock") and other forms of preferred securities (including, without limitation, trust preferred securities) ("Preferred Securities"), equity-linked securities ("Equity-linked Securities") and unsecured long-term debt securities ("Long-term Debt"); (2) in addition to the transactions described above, up to 25 million shares of Common Stock through stock-based plans maintained for shareholders (including new investors), officers, employees and non-employee directors, and (3) up to $1.5 billion principal amount at any time outstanding of commercial paper and/or other forms of unsecured short-term indebtedness ("Short-term Debt"). Ameren is also authorized to provide guarantees and other forms of credit support ("Guarantees") for its nonutility subsidiaries in an aggregate amount at any one time outstanding not to exceed $1.5 billion and to enter into interest rate hedging transactions with respect to its outstanding indebtedness and anticipated debt offerings.

I. Background

AmerenUE, AmerenCIPS and Central Illinois Light Company d/b/a AmerenCILCO ("AmerenCILCO"), together, provide retail and wholesale electric service to approximately 1.7 million customers and retail natural gas service to approximately 500,000 customers in a 49,000 square-mile area of Missouri and Illinois, including the St. Louis, Missouri and Peoria and Springfield, Illinois metropolitan areas.[8] In addition, on February 2, 2004, Ameren entered into a definitive stock purchase agreement to acquire all of the securities of Illinois Power Company from Illinova Corporation, an exempt holding company and a subsidiary of Dynegy Inc. Ameren intends to seek Commission approval for that acquisition and other related transactions.

Ameren directly owns CILCORP, an exempt holding company, which owns AmerenCILCO.[9] Ameren also has five other direct wholly owned nonutility subsidiaries, in addition to CILCORP.[10] AmerenUE has one direct wholly owned nonutility subsidiary, Union Electric

[4] As of December 31, 2003, those eight units had a collective net book value of approximately $155.3 million.

[5] As of December 31, 2003, those two units had a net book value of approximately $93.3 million.

[6] Both the Pinckneyville Plant and the Kinmundy Plant are already connected directly to the Ameren transmission system with no operating guide restrictions.

[7] *Ameren Corporation*, Holding Co. Act Release No. 27449 (Oct. 5, 2001) ("Current Financing Order"). At this time, the Current Financing Order is effective through September 30, 2004.

[8] AmerenCILCO, a subsidiary of CILCORP Inc. ("CILCORP"), owns AmerenEnergy Resources Generating Company (f/k/a Central Illinois Generation, Inc.) ("AERG"), an electric public-utility subsidiary. AERG is a generating company only, formed by AmerenCILCO in November 2001 to facilitate AmerenCILCO's restructuring, required by the Illinois Electric Service Customer Choice and Rate Relief Law of 1997. In October 2003, AmerenCILCO transferred substantially all of its generating assets (in the aggregate approximately 1,100 megawatts of generating capacity) to AERG.

[9] CILCORP was acquired pursuant to Commission order dated January 29, 2003). *See Ameren Corporation, et al.*, Holding Co. Act Release Nos. 27645 and 27835 (Jan. 29, 2003 and Apr. 15, 2004, respectively). The acquisition was completed on Jan. 31, 2003. In the Jan. 29, 2003 order, the Commission also reserved jurisdiction over Ameren's retention of certain indirect nonutility subsidiaries and investments of CILCORP and, in the Apr. 15, 2004 order, addressed their retention and certain divestitures.

[10] The five wholly owned nonutility subsidiaries are: Ameren Services Company (a service company), Ameren Development Company (an intermediate nonutility holding company), Ameren Energy Resources Company (an intermediate nonutility holding company), Ameren Energy, Inc. (a rule 58 "energy-related company") and CIPSCO Investment Company.

Development Corporation, which holds investments in affordable housing projects that qualify for federal income tax credits and other passive investments, and also directly holds 40% of Electric Energy, Inc. ("EEI"), an exempt wholesale generator ("EWG") under section 32 of the Act, that owns and operates an electric generating station and transmission facilities in Joppa, Illinois.[11]

CILCORP directly owns three nonutility subsidiaries.[12] AmerenCILCO also directly owns two nonutility subsidiaries, neither of which conducts any significant business at this time.[13]

AmerenUE, AmerenCIPS, AmerenCILCO, and AERG are referred to collectively as the "Utility Subsidiaries." The nonutility subsidiaries (other than CILCORP) are referred to collectively as "Nonutility Subsidiaries." The Utility Subsidiaries and Nonutility Subsidiaries are referred to collectively as the "Subsidiaries." The term Subsidiaries is also intended to include any other subsidiaries that may be acquired, directly or indirectly, by Ameren in a transaction that is exempt under the Act or the rules or that has otherwise been approved by the Commission.

II. The Proposed Authorizations

Applicants request authorization for the following transactions during the Authorization Period:

(1) For Ameren, to issue and sell, from time to time, directly, Common Stock, Preferred Stock,[14] Equity-linked Securities[15] and, directly or indirectly, through one or more of its financing subsidiaries ("Financing Subsidiaries"), Preferred Securities and/or unsecured Long-term Debt in an aggregate amount at any time outstanding not to exceed $2.5 billion;

(2) For Ameren, to issue up to 25 million shares of Common Stock pursuant to its dividend reinvestment and stock purchase plan and employee savings and incentive compensation plans maintained for its officers and employees, or other similar stock-based plans adopted in the future, such shares to be in addition to any shares of Common Stock issued under the authority requested in (1) above;

(3) For Ameren, to issue and sell, from time to time, Short-term Debt in an aggregate principal amount at any time outstanding not to exceed $1.5 billion;

(4) For Ameren, to provide Guarantees on behalf, or for the benefit, of its Subsidiaries in an aggregate principal or nominal amount not to exceed $1.5 billion at any one time outstanding, *provided that* the amount of any securities issued by a Financing Subsidiary of Ameren that are guaranteed or supported by other forms of credit enhancement provided by Ameren will not count against this limitation but will instead be counted against the limitation on long-term securities proposed in (1) above;

(5) For Ameren, directly or indirectly through any of its Financing Subsidiaries, to enter into hedging transactions ("Interest Rate Hedges") with respect to existing indebtedness, in order to manage and minimize interest rate costs, and to enter into hedging transactions ("Anticipatory Hedges") with respect to anticipatory debt issuances, in order to lock-in current interest rates and/or manage interest rate risk exposure; and

(6) For AmerenUE and AmerenCIPS, (a) to acquire the equity securities of one or more Financing Subsidiaries to facilitate the issuance of long-term debt and/or preferred securities (including, without limitation, trust preferred securities) and (b) for any of AmerenUE's and AmerenCIPS' Financing Subsidiaries to engage in Interest Rate Hedges with respect to existing indebtedness, in order to manage and minimize interest rate costs, and Anticipatory Hedges with respect to anticipatory debt issuances, in order to lock-in current interest rates and/or manage interest rate risk exposure, as described in subparagraph (5) above.

A. Use of Proceeds

Ameren states that it will utilize the proceeds of the authorized financing for general and corporate purposes including: (a) Financing, in part, of the capital expenditures of Ameren and its Subsidiaries; (b) financing working capital requirements and capital spending of the Subsidiaries, including by making contributions to the Ameren System Utility Money Pool and Ameren System Non-State Regulated Subsidiary Money Pool; (c) financing exempt acquisitions of interests in EWGs and "foreign utility companies" ("FUCOs"), subject to the limitations of rule 53; (d) financing exempt acquisitions of interests in "energy-related companies," as defined in rule 58, subject to the limitations of that rule; (e) the acquisition, retirement, refinancing or redemption of securities of which Ameren is the issuer under rule 42; and/or (f) the acquisition of the securities or assets of other companies, as may be authorized by the Commission in a separate proceeding.

B. Parameters Applicable to External Financing Transactions

Applicants state that the following general terms will be applicable to the proposed external financing activities where appropriate (including, without limitation, securities issued for the purpose of refinancing or refunding outstanding securities of the issuer).

1. Effective Cost of Money. The effective cost of capital on Long-term Debt, Preferred Stock, Preferred Securities, Equity-linked Securities and Short-term Debt will not exceed competitive market rates available at the time of issuance for securities having the same or reasonably similar terms and conditions issued by similar companies of reasonably comparable credit quality; *provided, that,* in no event will the effective cost of capital: (1) On any series of Long-term Debt exceed 500 basis points over a U.S. Treasury security having a remaining term equal to the term of such series; (2) on any series of Preferred Stock, Preferred Securities or Equity-linked Securities exceed 700 basis points over a U.S. Treasury security having a remaining term equal to the term of such series; and (3) on Short-term Debt exceed 300 basis points over the London Interbank Offered Rate for maturities of less than one year.

2. Maturity. The maturity of Long-term Debt will be between one and 50 years after issuance. Preferred Securities and Equity-linked Securities will be redeemed no later than 50 years after issuance, unless converted into Common Stock. Preferred Stock issued directly by Ameren may be perpetual in duration.

3. Issuance Expenses. The underwriting fees, commissions or other similar remuneration paid in connection with the non-competitive issue, sale or distribution of securities proposed in this Application will not exceed the greater of: (1) 6% of the principal or total amount of the securities being issued; or (2) issuance expenses that are generally paid at the time of the pricing for sales of the particular issuance, having the same or reasonably similar terms and conditions issued by similar companies of reasonably comparable credit quality.

4. Common Equity Ratio. At all times during the Authorization Period, Ameren and each Utility Subsidiary will maintain common equity of at least 30% of its consolidated capitalization (common equity, preferred stock, long-term debt and short-term debt); *provided that* Ameren will in any event be authorized to issue Common Stock (including through stock-based plans

[11] Twenty percent (20%) of EEI is directly held by Ameren Energy Resources Company, as well.

[12] CILCORP Investment Management Inc., CILCORP Ventures Inc. and QST Enterprises Inc.

[13] The two nonutility subsidiaries are: CILCO Exploration and Development Company (exploration and development of gas, oil and other mineral resources) and CILCO Energy Corporation (research and develop new energy sources).

[14] Applicants state that any shares of Preferred Stock issued under the authorization requested in this proceeding would be in addition to any Preferred Stock that may be issued under Ameren's shareholder rights plan, as authorized by the Commission in SEC File No. 70–9383. *See Ameren Corporation,* Holding Co. Act Release No. 26961 (Dec. 29, 1998).

[15] Any Equity-linked Security would be linked only to a security that Ameren is otherwise authorized to issue directly.

maintained for shareholders (including new investors, officers, employees and non-employee directors)) to the extent authorized in this proceeding.

5. Investment Grade Ratings. Applicants further represent that, except for securities issued to fund intrasystem financings, no guarantees or other securities, other than Common Stock, may be issued in reliance upon the authorization granted by the Commission pursuant to this Application, unless: (1) The security to be issued, if rated, is rated investment grade; and (2) all outstanding securities of the issuer, that are rated, are rated investment grade; and (3) all outstanding securities of all the registered holding companies, that are rated, are rated investment grade. For purposes of this provision, a security will be deemed to be rated "investment grade" if it is rated investment grade by at least one nationally recognized statistical rating organization, as that term is used in paragraphs (c)(2)(vi)(E), (F) and (H) of rule 15c3–1 under the Securities Exchange Act of 1934, as amended. Applicants request that the Commission reserve jurisdiction over the issuance of any such securities that are rated below investment grade.[16] Applicants further request that the Commission reserve jurisdiction over the issuance of any guarantee or other securities at any time that the conditions set forth in clauses (1) through (3) above are not satisfied.

6. Authorization Period. No security will be issued pursuant to the proposed authorization after the last day of the Authorization Period, June 30, 2007.

III. The Specific Transactions

Ameren contemplates that Common Stock (including options, warrants and/or forward equity purchase contracts), Preferred Stock, Preferred Securities, Equity-linked Securities and Long-term Debt will be issued directly to one or more purchasers in privately-negotiated transactions or to one or more investment banking or underwriting firms or other entities who would resell such securities without registration under the Securities Act of 1933, as amended, in reliance upon one or more applicable exemptions from registration, or to the public.[17]

A. Common Stock

Ameren proposes that it may issue and sell Common Stock through underwriters or dealers, through agents, or directly to a limited number of purchasers or a single purchaser. If underwriters are used in the sale of Common Stock, the securities will be acquired by the underwriters for their own account and may be resold from time to time in one or more transactions, including negotiated transactions, at a fixed public offering price or at varying prices determined at the time of sale.[18]

Ameren also proposes that it be permitted to issue Common Stock or options, warrants or other stock purchase rights exercisable for Common Stock in public or privately-negotiated transactions as consideration for the equity securities or assets of other companies, *provided that* the acquisition of those equity securities or assets has been authorized in a separate proceeding or is exempt under the Act or the rules (specifically rule 58).

B. Preferred Stock, Preferred Securities, Equity-Linked Securities and Long-Term Debt

Ameren proposes to issue, directly, Preferred Stock and Equity-linked Securities, or, directly or indirectly, through one or more Financing Subsidiaries, Long-Term Debt, and Preferred Securities.

Ameren proposes that Preferred Stock, Preferred Securities and Equity-linked Securities may be issued in one or more series with any rights, preferences, and priorities as may be designated in the instrument creating each series. These securities will be redeemed no later than 50 years after issuance, unless converted into Common Stock, except that Preferred Stock may be perpetual in duration.[19]

With respect to Long-term Debt, Ameren also proposes that Long-term Debt of a particular series (1) will be unsecured; (2) will have a maturity ranging from one to 50 years; (3) may be subject to optional and/or mandatory redemption, in whole or in part, at par or at various premiums above the principal amount; (4) may be entitled to mandatory or optional sinking fund provisions; (5) may provide for reset of the coupon as provided for in a remarketing or auction arrangement; and (6) may be called from existing investors by a third party. The maturity dates, interest rates, and redemption and sinking fund provisions, if any, with respect to the Long-term Debt of a particular series, as well as any associated placement, underwriting or selling agent fees, commissions and discounts, if any, will be established by negotiation or competitive bidding.

C. Short-term Debt

Ameren proposes to issue and sell from time to time Short-term Debt in an aggregate principal amount at any time outstanding not to exceed $1.5 billion. Short-term Debt may include commercial paper notes, bank notes and other forms of short-term indebtedness.[20] All Short-term Debt will be unsecured and will have maturities of less than one year from the date of issuance.

Ameren also proposes to establish and maintain back-up credit lines with banks or other institutional lenders to support its commercial paper program(s) and other credit arrangements and/or borrowing facilities generally available to borrowers with comparable credit ratings as it may deem appropriate in light of its needs and existing market conditions. Only the amounts drawn and outstanding under these agreements and facilities will be counted against the proposed limit on Short-term Debt.

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[16] *See also Ameren Corporation, et al.*, Holding Co. Act Release Nos. 27645 and 27835 (Jan. 29, 2003 and Apr. 15, 2004, respectively) (recently, for CILCORP and AERG, the Commission modified these investment grade requirements for, respectively, certain refinancing transactions and long-term securities transactions).

[17] Ameren states that issuance may occur either (1) through underwriters selected by negotiation or competitive bidding; or (2) through selling agents acting either as agent or as principal for resale to the public either directly or through dealers. All securities sales will be at rates or prices and under conditions negotiated or based upon, or otherwise determined by, competitive capital markets.

[18] Common Stock may be offered to the public either through underwriting syndicates (which may be represented by a managing underwriter or underwriters designated by Ameren) or directly by one or more underwriters acting alone. Common Stock may be sold directly by Ameren or through agents designated by Ameren from time to time. If dealers are utilized in the sale of Common Stock, Ameren will sell such securities to the dealers, as principals. Any dealer may then resell the Common Stock to the public at varying prices to be determined by such dealer at the time of resale. If Common Stock is being sold in an underwritten offering, Ameren may grant the underwriters a "green shoe" option permitting the purchase from Ameren at the same price of additional shares.

[19] Dividends or distributions on Preferred Stock, Preferred Securities or Equity-linked Securities will be made periodically and to the extent funds are legally avaialble for the purpose, but may be made subject to terms that allow the issuer to defer dividend payments or distributions for specified periods. Preferred Securities and Equity-linked Securities may be convertible or exchangeable into shares of Common Stock and may be issued in the form of shares or units.

[20] Commercial paper will be sold in established domestic or European commercial paper markets. Commercial paper would typically be sold to dealers at the discount rate per annum prevailing at the date of issuance for commercial paper of comparable quality and maturities sold to commercial paper dealers generally. It is expected that the dealers acquiring commercial paper will reoffer it at a discount to coporate, institutional and, with respect to European commercial paper, individual investors. It is anticipated that commercial paper will be reoffered to investors such as commercial banks, insurance companies, pension funds, investment trusts, foundations, colleges and universities, finance companies and and nonfinancial corporations.

D. Common Stock Issued Under Stock-Based Plans

Ameren also proposes to issue up to 25 million shares of Common Stock under stock-based plans that it or any of its subsidiaries maintain for shareholders, investors, employees and nonemployee directors. Ameren currently maintains a dividend reinvestment plan, the Ameren Long-term Incentive Plan, the Ameren Corporation Savings Investment Plan (formerly the Union Electric Savings Investment Plan) and the Ameren Corporation Employee Long-term Savings Plan.

E. Guarantees

Ameren requests authorization to provide Guarantees with respect to financial or contractual obligations of any Subsidiary as may be appropriate in the ordinary course of such subsidiary's business, in an aggregate principal or nominal amount not to exceed $1.5 billion outstanding at any one time, *provided however,* that the amount of any Guarantees in respect of obligations of any Nonutility Subsidiaries shall also be subject to the limitations of rule 53(a)(1) and rule 58(a)(1), as applicable, and *provided further,* that any Guarantee that is outstanding, on the last day of the Authorization Period, will expire or terminate in accordance with the stated terms of the Guarantee. In addition to providing direct parent guarantees, Ameren may also provide Guarantees in the form of formal credit enhancement agreements, including but not limited to "keep well" agreements and reimbursement undertakings under letters of credit. The proposed limitation on Guarantees shall not include the amount of any guarantees or other forms of credit support provided with respect to securities issued by any Financing Subsidiary of Ameren (the amounts of which would count only against the proposed limitations on the amounts of debt and equity securities that Ameren may issue). Guarantees may, in some cases, be provided to support obligations of Subsidiaries that are not readily susceptible of exact quantification or that may be subject to varying quantification. In such cases, Ameren will determine the exposure under the guarantee for purposes of measuring compliance with the proposed limitation on Guarantees by appropriate means, including estimation of exposure based on loss experience or projected potential payment amounts. If appropriate, estimates will be made in accordance with generally accepted accounting principles in the United States of America, *i.e.,* U.S. GAAP. The estimations will be reevaluated periodically.[21]

F. Hedging Transactions

Ameren, as well as AmerenUE and AmerenCIPS (these two, only to the extent described in subsection III.G. below), request authorization, directly or indirectly, through any of its Financing Subsidiaries, to enter into interest rate hedging transactions with respect to outstanding indebtedness ("Interest Rate Hedges"), subject to certain limitations and restrictions, in order to reduce or manage the effective interest rate cost.[22] In no case will the notional amount of any Interest Rate Hedge exceed the principal amount of the underlying debt instrument. Transactions will be entered into for a fixed or determinable period. Applicants state that it will not engage in speculative transactions.

Ameren, as well as AmerenUE and AmerenCIPS (these two, to the extent described in subsection III.G. below), also propose, directly or indirectly through any Financing Subsidiary, to enter into interest rate hedging transactions with respect to anticipated debt offerings ("Anticipatory Hedges"), subject to certain limitations and restrictions, in order to fix the interest rate and/or limit the interest rate risk associated with any new issuance.[23]

Interest Rate Hedges and Anticipatory Hedges (other than exchange-traded interest rate futures contracts) would only be entered into with counterparties ("Approved Counterparties") whose senior debt ratings, or the senior debt ratings of any credit support providers who have guaranteed the obligations of such counterparties, as published by S&P, are equal to or greater than BBB, or an equivalent rating from Moody's or Fitch, Inc.

Statement of Financial Accounting Standard ("SFAS") 133 (Accounting for Derivative Instruments and Hedging Activities) and SFAS 138 (Accounting for Certain Derivative Instruments and Certain Hedging Activities) or other standards applicable to accounting for derivative transactions as are adopted and implemented by the Financial Accounting Standards Board ("FASB") will be complied with. Applicants represent that each Interest Rate Hedge and each Anticipatory Hedge will qualify for hedge accounting treatment under the current FASB standards in effect and as determined as of the date such Interest Rate Hedge or Anticipatory Hedge is entered into. Applicants will also comply with any future FASB financial disclosure requirements associated with hedging transactions.

G. Financing Subsidiaries

In connection with the issuance of long-term debt and preferred securities, AmerenUE and AmerenCIPS request authorization to acquire, directly or indirectly, the common stock or other equity securities of one or more Financing Subsidiaries formed exclusively for the purpose of facilitating the issuance of long-term debt securities and/or preferred securities (including, without limitation, trust preferred securities) and for the loan or other transfer of the resulting proceeds to AmerenUE or AmerenCIPS, as applicable. In connection with any of this kind of financing transactions, AmerenUE and AmerenCIPS may enter into one or more Guarantees in favor of its Financing Subsidiary. AmerenUE and AmerenCIPS also request authorization to enter into expense agreements with

[21] Ameren may charge any Subsidiary a fee for each Guarantee provided on its behalf that is not greater than the cost, if any, of obtaining the liquidity necessary to perform the guarantee (for example, bank line commitment fees or letter of credit fees, plus other transactional expenses) for the period of time the Guarantee remains outstanding.

[22] Interest Rate Hedges will involve the use of financial instruments commonly used in today's capital markets, such as exchange traded interest rate futures contracts and over the counter interest rate swaps, options, caps, collars, floors, and structured notes (*i.e,* a debt instrument in which the principl and/or interest payments are indirectly linked to the value of an underlying asset or index), or transactions involving the purchase or sale, including short sales, of U.S. Treasury Securities. The transactions would be for fixed periods and stated notional amounts. Fees, commissions and other amounts payable to the counterparty or exchange (excluding, however, the swap or option payments) in connection with an Interest Rate Hedge will not exceed those generally obtainable in competitive markets for parties of comparable credit quality.

[23] Anticipatory Hedges may be executed on-exchange ("On-Exchange Trades") through brokers by the opening of futures and/or options positions traded on the Chicago Board of Trade, Chicago Mercantile Exchange or other financial exchange, the opening of over-the-counter positions with one or more counterparties ("Off-Exchange Trades"), or a combination of On-Exchange Trades and Off-Exchange Trades. The optimal; structure of each Anticipatory hedge transaction will be determined at the time of execution. Anticipatory hedges would be utilized to fix the interest rate and/or limit the interest rate risk associated with any new issuance through: (1) A forward sale of exchange-traded U.S. Treasury futures contracts, U.S. Treasury Securities and/or a forward swap (each a "Forward Sale"); (2) the purchase of put options on U.S. Treasury Securities (a "Put Options Purchase"); (3) a Put Options Purchase in combination with the sale of call options on U.S. Treasury Securities (A "Zero Cost Collar"), (4) transactions involving the purcahse or sale, including short sales, of U.S. Treasury Securities; or (5) some combination of a Forward Sale, Put Options Purchase, Zero Cost Collar and/or other derivative or cash transactions, including, but limited to, structred notes, caps and collars, appropriate for the Anticipatory Hedges.

its respective Financing Subsidiary, in which each company would agree to pay all expenses of the Financing Subsidiary.

Applicants state that the proposed Financing Subsidiaries shall be organized only if, in management's opinion, the creation and utilization of a Financing Subsidiary will likely result in tax savings, increased access to capital markets and/or lower cost of capital for AmerenUE or AmerenCIPS, as the case may be. They state, further, that no Financing Subsidiary shall acquire or dispose of, directly or indirectly, any interest in any "utility asset," as that term is defined under the Act.

AmerenUE and AmerenCIPS also request authorization to issue to any Financing Subsidiary, at any time or from time to time in one or more series, unsecured debentures, unsecured promissory notes or other unsecured debt instruments or preferred securities (individually, a "Note" and, collectively, the "Notes") governed by an indenture or indentures or other documents, and the Financing Subsidiary will apply the proceeds of any external financing by it, plus the amount of any equity contribution made to it, from time to time, to purchase the Notes. The terms (*e.g.*, interest rate, maturity, amortization, prepayment terms, default provisions, *etc.*) of any the Notes would generally be designed to parallel the terms of the securities issued by the Financing Subsidiary to which the Notes relate.

In addition, AmerenUE and AmerenCIPS request that any of their Financing Subsidiaries be authorized to engage in Interest Rate Hedges with respect to existing indebtedness, in order to manage and minimize interest rate costs, and Anticipatory Hedges with respect to anticipatory debt issuances, in order to lock-in current interest rates and/or manage interest rate risk exposure, as described in subsection III.F. above.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–10396 Filed 5–6–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 35–27843]

Filings Under the Public Utility Holding Company Act of 1935, as Amended ("Act")

May 3, 2004.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated under the Act. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendment(s) is/are available for public inspection through the Commission's Branch of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by May 24, 2004, to the Secretary, Securities and Exchange Commission, Washington, DC 20549–0609, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in the case of an attorney at law, by certificate) should be filed with the request. Any request for hearing should identify specifically the issues of facts or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After May 24, 2004, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

Enron Corp., et al. (70–10200)

Enron Corp. ("Enron"), Four Houston Center, 1221 Lamar, Suite 1600, Houston, Texas 77010–1221, a registered holding company, on its behalf and on behalf of its subsidiaries, including Portland General Electric Company ("Portland General"), a public utility company, 121 Salmon Street, Portland, Oregon 97204 (collectively, "Applicants") has filed a post-effective amendment to an application-declaration ("Application") under sections 6(a), 7, 12(b), 12(c) of the Act and rule 45, 46 and 54 under the Act.[1]

On February 6, 2004, as amended on March 9, 2004, Applicants filed with the Commission an application-declaration on Form U–1 under File No. 70–10200 (the "Omnibus Application").[2] On March 9, 2004, the Commission issued an order granting the relief requested by Applicants in the Omnibus Application. In this Application, Applicants seek a supplemental order authorizing: Revisions to the list of Applicants and Enron to issue letters of credit in connection with the expiration of the second amended debtor in possession credit agreement.

Enron states that some of its subsidiaries were inadvertently excluded from the list of Applicants in Exhibit H of the Omnibus Application ("Omitted Subsidiaries"). Enron requests that the Commission issue a supplemental order confirming that these nonutility subsidiaries of Enron also are entitled to the relief granted to other Enron nonutility subsidiaries in connection with the Omnibus Application. Enron also is submitting an amended Exhibit H, which includes the companies below as Applicants. Amended Exhibit H also reflects the deletion of companies which have been dissolved or sold and the reorganization of certain subsidiaries in connection with various reorganizations.

The Omitted Subsidiaries are Dais-Analytic, Inc., Encorp, Inc., FSMx.com, Inc., Serveron, Corp., Venoco, Inc., 217 State Street, Inc., Ellwood Pipeline Inc., Whittier Pipeline Corporation, Inc., BMC, Ltd., Advanced Mobile Power Systems, LLC, Unkwang Gas Industry Co., Ltd, and PEI Venezuela Services LLC.

The second amended debtor in possession credit agreement will expire on June 3, 2004. Enron may decide against renewing/extending the second amended debtor in possession credit agreement; however, Enron would have to extend or replace the letters of credit that are currently outstanding under the second amended debtor in possession credit agreement.

Applicants request authority for Enron to (i) obtain up to $25,000,000.00, in the aggregate, in new, cash collateralized letters of credit to replace the letters of credit currently outstanding under the second amended debtor in possession credit agreement, (ii) to obtain a new debtor in possession credit agreement that would allow Enron to issue letters of credit in an amount not to exceed $25,000,000.00 in the event that Enron elects not to renew or extend the second amended debtor in possession credit agreement, or (iii) a combination of items (i) and (ii) above that would not, in the aggregate exceed an amount of $25,000,000.00. Any new letters of credit issued either as a stand

[1] Applicants include both debtor and non-debtor subsidiaries of Enron.

[2] Holding Co. Act Release No. 27809.

alone obligation or pursuant to a new debtor in possession credit agreement would be obligations of Enron or obligations of Enron's nonutility subsidiaries (if a letter of credit is issued on behalf of such a subsidiary) and would not be guaranteed by Portland General or any other Enron subsidiary (other than a nonutility subsidiary on behalf of which a letter of credit is issued).

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–10464 Filed 5–6–04; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release Nos. 33–8418; 34–49634/April 30, 2004]

Order Making Fiscal Year 2005 Annual Adjustments to the Fee Rates Applicable Under Section 6(b) of the Securities Act of 1933 and Sections 13(e), 14(g), 31(b) and 31(c) of the Securities Exchange Act of 1934

I. Background

The Commission collects fees under various provisions of the securities laws. Section 6(b) of the Securities Act of 1933 ("Securities Act") requires the Commission to collect fees from issuers on the registration of securities.[1] Section 13(e) of the Securities Exchange Act of 1934 ("Exchange Act") requires the Commission to collect fees on specified repurchases of securities.[2] Section 14(g) of the Exchange Act requires the Commission to collect fees on proxy solicitations and statements in corporate control transactions.[3] Finally, sections 31(b) and (c) of the Exchange Act require national securities exchanges and national securities associations, respectively, to pay fees on transactions in specified securities to the Commission.[4]

The Investor and Capital Markets Fee Relief Act ("Fee Relief Act")[5] amended section 6(b) of the Securities Act and sections 13(e), 14(g), and 31 of the Exchange Act to require the Commission to make annual adjustments to the fee rates applicable under these sections for each of the fiscal years 2003 through 2011, and one final adjustment to fix the fee rates under these sections for fiscal year 2012 and beyond.[6]

II. Fiscal Year 2005 Annual Adjustment to the Fee Rates Applicable Under Section 6(b) of the Securities Act and Sections 13(e) and 14(g) of the Exchange Act

Paragraph 6(b)(5) of the Securities Act requires the Commission to make an annual adjustment to the fee rate applicable under paragraph 6(b) of the Securities Act in each of the fiscal years 2003 through 2011.[7] In those same fiscal years, paragraphs 13(e)(5) and 14(g)(5) of the Exchange Act require the Commission to adjust the fee rates under Sections 13(e) and 14(g) to a rate that is equal to the rate that is applicable under Section 6(b). In other words, the annual adjustment to the fee rate under section 6(b) of the Securities Act also sets the annual adjustment to the fee rates under sections 13(e) and 14(g) of the Exchange Act.

Paragraph 6(b)(5) sets forth the method for determining the annual adjustment to the fee rate under Section 6(b) for fiscal year 2005. Specifically, the Commission must adjust the fee rate under Section 6(b) to a "rate that, when applied to the baseline estimate of the aggregate maximum offering prices for [fiscal year 2005], is reasonably likely to produce aggregate fee collections under [Section 6(b)] that are equal to the target offsetting collection amount for [fiscal year 2005]." That is, the adjusted rate is determined by dividing the "target offsetting collection amount" for fiscal year 2005 by the "baseline estimate of the aggregate maximum offering prices" for fiscal year 2005.

Paragraph 6(b)(11)(A) specifies that the "target offsetting collection amount" for fiscal year 2005 is $570,000,000.[8]

Paragraph 6(b)(11)(B) defines the "baseline estimate of the aggregate maximum offering price" for fiscal year 2005 as "the baseline estimate of the aggregate maximum offering price at which securities are proposed to be offered pursuant to registration statements filed with the Commission during [fiscal year 2005] as determined by the Commission, after consultation with the Congressional Budget Office and the Office of Management and Budget. * * *"

To make the baseline estimate of the aggregate maximum offering price for fiscal year 2005, the Commission is using the same methodology it developed in consultation with the Congressional Budget Office ("CBO") and Office of Management and Budget ("OMB") to project aggregate offering price for purposes of the fiscal year 2004 annual adjustment. Using this methodology, the Commission determines the "baseline estimate of the aggregate maximum offering price" for fiscal year 2005 to be $4,842,692,718,337.[9] Based on this estimate, the Commission calculates the annual adjustment for fiscal 2005 to be $117.70 per million. This adjusted fee rate applies to Section 6(b) of the Securities Act, as well as to sections 13(e) and 14(g) of the Exchange Act.

III. Fiscal Year 2005 Annual Adjustment to the Fee Rates Applicable Under Sections 31(b) and (c) of the Exchange Act

Section 31(b) of the Exchange Act requires each national securities exchange to pay the Commission a fee at a rate, as adjusted by our order pursuant to paragraph 31(j)(2), which currently is $23.40 per million of the aggregate dollar amount of sales of specified securities transacted on the exchange.[10] Similarly, Section 31(c) requires each national securities association to pay the Commission a fee at the same adjusted rate on the

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[1] 15 U.S.C. 77f(b).

[2] 15 U.S.C. 78m(e).

[3] 15 U.S.C. 78n(g).

[4] 15 U.S.C. 78ee(b) and (c). In addition, section 31(d) of the Exchange Act requires the Commission to collect assessments from national securities exchanges and national securities associations for round turn transactions on security futures. 15 U.S.C. 78ee(d).

[5] Pub. L. 107–123, 115 Stat. 2390 (2002).

[6] *See* 15 U.S.C. 77f(b)(5), 77f(b)(6), 78m(e)(5), 78m(e)(6), 78n(g)(5), 78n(g)(6), 78ee(j)(1), and 78ee(j)(3). Paragraph 31(j)(2) of the Exchange Act, 15 U.S.C. 78ee(j)(2), also requires the Commission, in specified circumstances, to make a mid-year adjustment to the fee rates under Sections 31(b) and (c) of the Exchange Act in fiscal years 2002 through 2011.

[7] The annual adjustments are designed to adjust the fee rate in a given fiscal year so that, when applied to the aggregate maximum offering price at which securities are proposed to be offered for the fiscal year, it is reasonably likely to produce total fee collections under Section 6(b) equal to the "target offsetting collection amount" specified in Section 6(b)(11)(A) for that fiscal year.

[8] Congress determined the target offsetting collection amounts by applying reduced fee rates to the CBO's January 2001 projections of the aggregate maximum offering prices for fiscal years 2002 through 2011. In any fiscal year through fiscal year 2011, the annual adjustment mechanism will result in additional fee rate reductions if the CBO's January 2001 projection of the aggregate maximum offering prices for the fiscal year proves to be too low, and fee rate increases if the CBO's January 2001 projection of the aggregate maximum offering prices for the fiscal year proves to be too high.

[9] Appendix A explains how we determined the "baseline estimate of the aggregate maximum offering price" for fiscal year 2005 using our methodology, and then shows the purely arithmetical process of calculating the fiscal year 2005 annual adjustment based on that estimate. The appendix includes the data used by the Commission in making its "baseline estimate of the aggregate maximum offering price" for fiscal year 2005.

[10] Order Making Fiscal 2004 Mid-Year Adjustment to the Fee Rates Applicable Under Sections 31(b) and (c) of the Securities Exchange Act of 1934, Rel. No. 34–49332 (February 27, 2004), 69 FR 10278 (March 4, 2004).

aggregate dollar amount of sales of specified securities transacted by or through any member of the association otherwise than on an exchange. Paragraph 31(j)(1) requires the Commission to make annual adjustments to the fee rates applicable under Sections 31(b) and (c) for each of the fiscal years 2003 through 2011.[11]

Paragraph 31(j)(1) specifies the method for determining the annual adjustment for fiscal year 2005. Specifically, the Commission must adjust the rates under Sections 31(b) and (c) to a "uniform adjusted rate that, when applied to the baseline estimate of the aggregate dollar amount of sales for [fiscal year 2005], is reasonably likely to produce aggregate fee collections under [Section 31] (including assessments collected under [Section 31(d)]) that are equal to the target offsetting collection amount for [fiscal year 2005]."

Paragraph 31(l)(1) specifies that the "target offsetting collection amount" for fiscal year 2005 is $1,220,000,000.[12] Paragraph 31(l)(2) defines the "baseline estimate of the aggregate dollar amount of sales" as "the baseline estimate of the aggregate dollar amount of sales of securities * * * to be transacted on each national securities exchange and by or through any member of each national securities association (otherwise than on a national securities exchange) during [fiscal year 2005] as determined by the Commission, after consultation with the Congressional Budget Office and the Office of Management and Budget. * * *"

To make the baseline estimate of the aggregate dollar amount of sales for fiscal year 2005, the Commission is using the same methodology it developed in consultation with the CBO and OMB to project dollar volume for purposes of prior fee adjustments.[13] Using this methodology, the Commission calculates the baseline estimate of the aggregate dollar amount of sales for fiscal year 2005 to be $37,902,443,515,254. Based on this estimate, and an estimated collection of $61,356 in assessments on securities futures transactions under section 31(d) in fiscal year 2005, the uniform adjusted rate is $32.90 per million.[14]

IV. Effective Dates of the Annual Adjustments

Subparagraph 6(b)(8)(A) of the Securities Act provides that the fiscal year 2005 annual adjustment to the fee rate applicable under section 6(b) of the Securities Act shall take effect on the later of October 1, 2004, or five days after the date on which a regular appropriation to the Commission for fiscal year 2005 is enacted.[15] Subparagraphs 13(e)(8)(A) and 14(g)(8)(A) of the Exchange Act provide for the same effective date for the annual adjustments to the fee rates applicable under sections 13(e) and 14(g) of the Exchange Act.[16]

Subparagraph 31(j)(4)(A) of the Exchange Act provides that the fiscal year 2005 annual adjustments to the fee rates applicable under sections 31(b) and (c) of the Exchange Act shall take effect on the later of October 1, 2004, or thirty days after the date on which a regular appropriation to the Commission for fiscal year 2005 is enacted.

V. Conclusion

Accordingly, pursuant to section 6(b) of the Securities Act and sections 13(e), 14(g) and 31 of the Exchange Act,[17]

It is hereby ordered that the fee rates applicable under section 6(b) of the Securities Act and sections 13(e) and 14(g) of the Exchange Act shall be $117.70 per million effective on the later of October 1, 2004, or five days after the date on which a regular appropriation to the Commission for fiscal year 2005 is enacted; and

It is further ordered that the fee rates applicable under sections 31(b) and (c) of the Exchange Act shall be $32.90 per million effective on the later of October 1, 2004, or thirty days after the date on which a regular appropriation to the Commission for fiscal year 2005 is enacted.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

Appendix A

With the passage of the Investor and Capital Markets Relief Act, Congress has established a target amount of monies to be collected from fees charged to issuers based on the value of their registrations. This appendix provides the formula for determining such fees, which the Commission adjusts annually. Congress has mandated that the Commission determine these fees based on the "aggregate maximum offering prices," which measures the aggregate dollar amount of securities registered with the SEC over the course of the year. In order to maximize the likelihood that the amount of monies targeted by Congress will be collected, the fee rate must be set to reflect projected aggregate maximum offering prices. As a percentage, the fee rate equals the ratio of the target amounts of monies to the projected aggregate maximum offering prices.

For 2005, the Commission has estimated the aggregate maximum offering prices by projecting forward the trend established in the previous decade. More specifically, an ARIMA model was used to forecast the value of the aggregate maximum offering prices for months subsequent to March 2004, the last month for which the Commission has data on the aggregate maximum offering prices.

The following sections describe this process in detail.

A. Baseline Estimate of the Aggregate Maximum Offering Prices for Fiscal Year 2005

First, calculate the aggregate maximum offering prices (AMOP) for each month in the sample (March 1994–March 2004). Next, calculate the percentage change in the AMOP from month-to-month.

Model the monthly percentage change in AMOP as a first order moving average process. The moving average approach allows one to model the effect that an exceptionally high (or low) observation of AMOP tends to be followed by a more "typical" value of AMOP.

Use the estimated moving average model to forecast the monthly percent change in AMOP. These percent changes can then be applied to obtain forecasts of the total dollar value of registrations. The following is a more formal (mathematical) description of the procedure:

1. Begin with the monthly data for AMOP. The sample spans ten years, from March 1994 to March 2004. There are 4 months in the sample for which the data are omitted because of the impact of extraordinary events (*e.g.*, the 1995 government shutdown).

2. Divide each month's AMOP (column C) by the number of trading days in that month (column B) to obtain the average daily AMOP (AAMOP, column D).

[11] The annual adjustments, as well as the mid-year adjustments required in specified circumstances under paragraph 31(j)(2) in fiscal years 2002 through 2011, are designed to adjust the fee rates in a given fiscal year so that, when applied to the aggregate dollar volume of sales for the fiscal year, they are reasonably likely to produce total fee collections under Section 31 equal to the "target offsetting collection amount" specified in Section 31(l)(1) for that fiscal year.

[12] Congress determined the target offsetting collection amounts by applying reduced fee rates to the CBO's January 2001 projections of dollar volume for fiscal years 2002 through 2011. In any fiscal year through fiscal year 2011, the annual and, in specified circumstances, mid-year adjustment mechanisms will result in additional fee rate reductions if the CBO's January 2001 projection of dollar volume for the fiscal year proves to be too low, and fee rate increases if the CBO's January 2001 projection of dollar volume for the fiscal year proves to be too high.

[13] Appendix B explains how we determined the "baseline estimate of the aggregate dollar amount of sales" for fiscal year 2005 using our methodology, and then shows the purely arithmetical process of calculating the fiscal year 2005 annual adjustment based on that estimate. The appendix also includes the data used by the Commission in making its "baseline estimate of the aggregate dollar amount of sales" for fiscal year 2005.

[14] The calculation of the adjusted fee rate assumes that the current fee rate of $23.40 per million will apply through October 31st due to the operation of the effective date provision contained in subparagraph 31(j)(4)(A) of the Exchange Act.

[15] 15 U.S.C. 77f(b)(8)(A).

[16] 15 U.S.C. 78m(e)(8)(A) and 78n(g)(8)(A).

[17] 15 U.S.C. 77f(b), 78m(e), 78n(g), and 78ee(j).

3. For each month t, the natural logarithm of AAMOP is reported in column E.

4. Calculate the change in log(AAMOP) from the previous month as $\Delta_t = \log(AAMOP_t) - \log(AAMOP_{t-1})$. This approximates the percentage change.

5. Estimate the first order moving average model $\Delta_t = \alpha + \beta e_{t-1} + e_t$, where e_t denotes the forecast error for month t. The forecast error is simply the difference between the one-month ahead forecast and the actual realization of Δ_t. The forecast error is expressed as $e_t = \Delta_t - \beta_{t-1}$. The model can be estimated using standard commercially available software such as SAS or Eviews. Using least squares, the estimated parameter values are α=0.01112 and β = 0.76742.

6. For the month of April 2004, forecast $\Delta_{t=4/04} = \alpha + \beta_{e=3/04}$. For all subsequent months, forecast $\Delta_t = \alpha$.

7. Calculate forecasts of log(AAMOP). For example, the forecast of log(AAMOP) for June 2004 is given by $FLAAMOP_{t=6/04} = \log(AAMOP_{t=3/04}) + \Delta_{t=4/04} + \Delta_{t=5/04} + \Delta_{t=6/04}$.

8. Under the assumption that e_t is normally distributed, the n-step ahead forecast of AAMOP is given by $\exp(FLAAMOP_t + \sigma_n^2/2)$, where σ_n denotes the standard error of the n-step ahead forecast.

9. For June 2004, this gives a forecast AAMOP of $16.8 Billion (Column I), and a forecast AMOP of $368.9 Billion (Column J).

10. Iterate this process through September 2005 to obtain a baseline estimate of the aggregate maximum offering prices for fiscal year 2005 of $4,842,692,718,337.

B. Using the Forecasts From A to Calculate the New Fee Rate

1. Using the data from Table A, estimate the aggregate maximum offering prices between 10/1/04 and 9/30/05 to be $4,842,692,718,337.

2. The rate necessary to collect the target $570,000,000 in fee revenues set by Congress is then calculated as: $570,000,000 ÷ $4,842,692,718,337 = 0.00011770 (or $117.70 per million.).

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Table A. Estimation of baseline of aggregate maximum offering prices .

Fee rate calculation.

a. Baseline estimate of the aggregate maximum offering prices, 10/1/04 to 9/30/05 ($Millions)	4,842,693
b. Implied fee rate ($570 Million / a)	$117.70

Data

(A) Month	(B) # of Trading Days in Month	(C) Aggregate Maximum Offering Prices, in $Millions	(D) Average Daily Aggregate Max. Offering Prices (AAMOP) in $Millions	(E) log(AAMOP)	(F) Change in AAMOP	(G) Forecast log(AAMOP)	(H) Standard Error	(I) Forecast AAMOP	(J) Forecast Aggregate Maximum Offering Prices, in $Millions
Mar-94	23	105,914	4,605	22.250					
Apr-94	19								
May-94	21	78,564	3,741	22.043					
Jun-94	22	94,814	4,310	22.184	0.141				
Jul-94	20	65,628	3,281	21.912	-0.273				
Aug-94	23	75,874	3,299	21.917	0.005				
Sep-94	21	139,422	6,639	22.616	0.699				
Oct-94	21	144,953	6,903	22.655	0.039				
Nov-94	21	73,625	3,506	21.978	-0.677				
Dec-94	21	74,903	3,567	21.995	0.017				
Jan-95	21	86,714	4,129	22.141	0.146				
Feb-95	19	102,999	5,421	22.414	0.272				
Mar-95	23	91,561	3,981	22.105	-0.309				
Apr-95	19	62,518	3,290	21.914	-0.190				
May-95	22	106,333	4,833	22.299	0.385				
Jun-95	22	117,557	5,344	22.399	0.100				
Jul-95	20	65,127	3,256	21.904	-0.495				
Aug-95	23	124,662	5,420	22.413	0.510				
Sep-95	20	131,774	6,589	22.609	0.195				
Oct-95	22	132,141	6,006	22.516	-0.093				
Nov-95	21	110,646	5,269	22.385	-0.131				
Dec-95	20								
Jan-96	22								
Feb-96	20								
Mar-96	21	117,780	5,609	22.448					
Apr-96	21	158,005	7,524	22.741	0.294				
May-96	22	142,452	6,475	22.591	-0.150				

Jun-96	20	122,598	6,130	22.536	-0.055				
Jul-96	22	113,637	5,165	22.365	-0.171				
Aug-96	22	128,154	5,825	22.485	0.120				
Sep-96	20	108,763	5,438	22.417	-0.069				
Oct-96	23	171,507	7,457	22.732	0.316				
Nov-96	20	164,574	8,229	22.831	0.098				
Dec-96	21	214,241	10,202	23.046	0.215				
Jan-97	22	136,615	6,210	22.549	-0.496				
Feb-97	19	317,624	16,717	23.540	0.990				
Mar-97	20	140,809	7,040	22.675	-0.865				
Apr-97	22	182,657	8,303	22.840	0.165				
May-97	21	163,702	7,795	22.777	-0.063				
Jun-97	21	162,111	7,720	22.767	-0.010				
Jul-97	22	168,007	7,637	22.756	-0.011				
Aug-97	21	153,705	7,319	22.714	-0.042				
Sep-97	21	179,559	8,550	22.869	0.155				
Oct-97	23	260,719	11,336	23.151	0.282				
Nov-97	19	219,618	11,559	23.171	0.020				
Dec-97	22	228,605	10,391	23.064	-0.106				
Jan-98	20	228,030	11,402	23.157	0.093				
Feb-98	19	250,266	13,172	23.301	0.144				
Mar-98	22	378,185	17,190	23.568	0.266				
Apr-98	21	242,310	11,539	23.169	-0.399				
May-98	20	298,454	14,923	23.426	0.257				
Jun-98	22	328,994	14,954	23.428	0.002				
Jul-98	22	272,957	12,407	23.242	-0.187				
Aug-98	21	392,104	18,672	23.650	0.409				
Sep-98	21	325,144	15,483	23.463	-0.187				
Oct-98	22	139,786	6,354	22.572	-0.891				
Nov-98	20	269,065	13,453	23.322	0.750				
Dec-98	22	248,596	11,300	23.148	-0.174				
Jan-99	19	253,448	13,339	23.314	0.166				
Feb-99	19	217,433	11,444	23.161	-0.153				
Mar-99	23	415,145	18,050	23.616	0.456				

Apr-99	21	431,280	20,537	23.746	0.129				
May-99	20	229,082	11,454	23.162	-0.584				
Jun-99	22	367,943	16,725	23.540	0.379				
Jul-99	21	332,623	15,839	23.486	-0.054				
Aug-99	22	240,157	10,916	23.114	-0.372				
Sep-99	21	236,011	11,239	23.143	0.029				
Oct-99	21	216,883	10,328	23.058	-0.085				
Nov-99	21	372,582	17,742	23.599	0.541				
Dec-99	22	319,846	14,538	23.400	-0.199				
Jan-00	20	282,165	14,108	23.370	-0.030				
Feb-00	20	665,367	33,268	24.228	0.858				
Mar-00	23	550,107	23,918	23.898	-0.330				
Apr-00	19	244,510	12,869	23.278	-0.620				
May-00	22	269,774	12,262	23.230	-0.048				
Jun-00	22	406,409	18,473	23.640	0.410				
Jul-00	20	230,894	11,545	23.169	-0.470				
Aug-00	23	257,797	11,209	23.140	-0.030				
Sep-00	20	332,120	16,606	23.533	0.393				
Oct-00	22	362,493	16,477	23.525	-0.008				
Nov-00	21	317,653	15,126	23.440	-0.086				
Dec-00	20	246,006	12,300	23.233	-0.207				
Jan-01	21	462,726	22,035	23.816	0.583				
Feb-01	19	388,304	20,437	23.741	-0.075				
Mar-01	22	523,443	23,793	23.893	0.152				
Apr-01	20	289,212	14,461	23.395	-0.498				
May-01	22	274,298	12,468	23.246	-0.148				
Jun-01	21	348,268	16,584	23.532	0.285				
Jul-01	21	264,590	12,600	23.257	-0.275				
Aug-01	23	245,591	10,678	23.091	-0.165				
Sep-01	15	178,524	11,902	23.200	0.108				
Oct-01	23	260,719	11,336	23.151	-0.049				
Nov-01	21	286,199	13,629	23.335	0.184				
Dec-01	20	395,230	19,762	23.707	0.372				
Jan-02	21	401,290	19,109	23.673	-0.034				

Feb-02	19	476,837	25,097	23.946	0.273				
Mar-02	20	380,160	19,008	23.668	-0.278				
Apr-02	22	282,947	12,861	23.277	-0.391				
May-02	22	215,645	9,802	23.006	-0.272				
Jun-02	20	277,757	13,888	23.354	0.348				
Jul-02	22	208,638	9,484	22.973	-0.381				
Aug-02	22	265,750	12,080	23.215	0.242				
Sep-02	20	109,565	5,478	22.424	-0.791				
Oct-02	23	179,374	7,799	22.777	0.353				
Nov-02	20	243,590	12,179	23.223	0.446				
Dec-02	21	212,838	10,135	23.039	-0.184				
Jan-03	21	201,839	9,611	22.986	-0.053				
Feb-03	19	144,642	7,613	22.753	-0.233				
Mar-03	21	444,331	21,159	23.775	1.022				
Apr-03	21	142,373	6,780	22.637	-1.138				
May-03	21	328,792	15,657	23.474	0.837				
Jun-03	21	281,580	13,409	23.319	-0.155				
Jul-03	22	304,383	13,836	23.351	0.031				
Aug-03	21	328,351	15,636	23.473	0.122				
Sep-03	21	459,563	21,884	23.809	0.336				
Oct-03	23	285,039	12,393	23.240	-0.569				
Nov-03	19	257,779	13,567	23.331	0.091				
Dec-03	22	244,998	11,136	23.133	-0.197				
Jan-04	20	369,784	18,489	23.640	0.507				
Feb-04	19	221,517	11,659	23.179	-0.461				
Mar-04	23	448,543	19,502	23.694	0.514				
Apr-04	21					23.467	0.312	16,314	342,594
May-04	20					23.478	0.320	16,540	330,798
Jun-04	22					23.489	0.328	16,769	368,917
Jul-04	21					23.500	0.336	17,001	357,025
Aug-04	22					23.511	0.344	17,237	379,206
Sep-04	21					23.522	0.351	17,475	366,982
Oct-04	21					23.533	0.359	17,717	372,064
Nov-04	21					23.545	0.366	17,963	377,216

Dec-04	22					23.556	0.373	18,211	400,65
Jan-05	20					23.567	0.380	18,464	369,27
Feb-05	19					23.578	0.387	18,719	355,66
Mar-05	22					23.589	0.394	18,979	417,52
Apr-05	21					23.600	0.400	19,241	404,06
May-05	21					23.611	0.407	19,508	409,66
Jun-05	22					23.622	0.413	19,778	435,11
Jul-05	20					23.634	0.420	20,052	401,03
Aug-05	23					23.645	0.426	20,330	467,57
Sep-05	21					23.656	0.432	20,611	432,83

Figure A

Aggregate Maximum Offering Prices Subject to Securities Act Section 6(b)

(Dashed Line Indicates Forecast Values)

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Appendix B

With the passage of the Investor and Capital Markets Relief Act, Congress has established a target amount of monies to be collected from fees charged to investors based on the value of their transactions. This appendix provides the formula for determining such fees, which the Commission adjusts annually, and may adjust semi-annually.[1] In order to maximize the likelihood that the amount of monies targeted by Congress will be collected, the fee rate must be set to reflect projected dollar transaction volume on the securities exchanges and the Nasdaq over the course of the year. As a percentage, the fee rate equals the ratio of the target amounts of monies to the projected dollar transaction volume.

For 2005, the Commission has estimated dollar transaction volume by projecting forward the trend established in the previous decade. More specifically, dollar transaction volume was forecasted for months subsequent to March 2004, the last month for which the Commission has data on transaction volume.

The following sections describe this process in detail.

A. Baseline Estimate of the Aggregate Dollar Amount of Sales for Fiscal Year 2005

First, calculate the average daily dollar amount of sales (ADS) for each month in the sample (March 1994–March 2004). The data obtained from the exchanges and the NASD are presented in Table B. The monthly aggregate dollar amount of sales (exchange plus Nasdaq) is contained in column E.

Next, calculate the change in the natural logarithm of ADS from month-to-month. The average monthly percentage growth of ADS over the entire sample is 0.014 and the standard deviation 0.118. Assuming the monthly percentage change in ADS follows a random walk, calculating the expected monthly percentage growth rate for the full sample is straightforward. The expected monthly percentage growth rate of ADS is 2.2 percent.

Now, use the expected monthly percentage growth rate to forecast total dollar volume. For example, one can use the ADS for March 2004 ($114,370,494,465) to forecast ADS for April 2004 ($116,834,236,575 = $114,370,494,465 × 1.022)[2]. Multiply by the number of trading days in April 2004 (21) to obtain a forecast of the total dollar volume for the month ($2,453,518,968,084). Repeat the method to generate forecasts for subsequent months.

The forecasts for total dollar volume are in column I of Table A. The following is a more formal (mathematical) description of the procedure:

1. Divide each month's total dollar volume (column E) by the number of trading days in that month (column B) to obtain the average daily dollar volume (ADS, column F).

2. For each month t, calculate the change in ADS from the previous month as $\Delta_t = \log(ADS_t / ADS_{t-1})$, where log (x) denotes the natural logarithm of x.

3. Calculate the mean and standard deviation of the series $\{\Delta_1, \Delta_2, \ldots, \Delta_{120}\}$. These are given by $\sigma = 0.014$ and $\sigma = 0.118$, respectively.

4. Assume that the natural logarithm of ADS follows a random walk, so that Δ_s and Δ_t are statistically independent for any two months s and t.

5. Under the assumption that Δ_t is normally distributed, the expected value of ADS_t / ADS_{t-1} is given by $\exp(\mu + {}^2/_2)$, or on average $ADS_t = 1.022 \times ADS_{t-1}$.

6. For April 2004, this gives a forecast ADS of 1.022 × $114,370,494,465 = $116,834,236,575. Multiply this figure by the 21 trading days in April 2004 to obtain a total dollar volume forecast of $2,453,518,968,084.

7. For May 2004, multiply the April 2004 ADS forecast by 1.022 to obtain a forecast ADS of $119,351,052,035. Multiply this figure by the 20 trading days in May 2004 to obtain a total dollar volume forecast of $2,387,021,040,703.

8. Repeat this procedure for subsequent months.

B. Using the Forecasts From A to Calculate the New Fee Rate

1. Use Table B to estimate fees collected for the period 10/1/04 through 10/31/04. The projected aggregate dollar amount of sales for this period is $2,788,214,479,378. Projected fee collections at the current fee rate of 0.0000234 are $65,244,219.

2. Estimate the amount of assessments on securities futures products collected during 10/1/04 and 9/30/05 to be $61,356 by projecting a 2.2% monthly increase from a base of $3,884 in March 2004.

3. Subtract the amounts $65,244,219 and $61,356 from the target offsetting collection amount set by Congress of $1,220,000,000 leaving $1,154,694,425 to be collected on dollar volume for the period 11/1/04 through 9/30/05.

4. Use Table B to estimate dollar volume for the period 11/1/04 through 9/30/05. The estimate is $35,114,229,035,876. Finally, compute the fee rate required to produce the additional $1,154,694,425 in revenue. This rate is $1,154,694,425 divided by $35,114,229,035,876 or .0000328839.

5. Consistent with the system requirements of the exchanges and the NASD, round the result to the seventh decimal point, yielding a rate of .0000329 (or $32.90 per million).

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[1] Congress requires that the Commission make a mid-year adjustment to the fee rate if 4 months into the fiscal year it determines that its forecasts of aggregate dollar volume are reasonably likely to be off by 10% or more.

[2] The value 1.022 has been rounded. All computations are done with the unrounded value.

Table B. Estimation of baseline of the aggregate dollar amount of sales.
(Methodology developed in consultation with the Office of Management and Budget and the Congressional Budget Office.)

Fee rate calculation.

a. Baseline estimate of the aggregate dollar amount of sales, 10/1/04 to 10/31/04 ($Millions)	2,788,214
b. Baseline estimate of the aggregate dollar amount of sales, 11/1/04 to 9/30/05 ($Millions)	35,114,229
c. Estimated collections in assessments on securities futures products in FY 2005 ($Millions)	0.061
d. Implied fee rate (($1,220,000,000 - 0.0000234*a - c) /b)	$32.9

Data

(A) Month	(B) # of Trading Days in Month	(C) Exchange-Listed Dollar Amount of Sales	(D) Nasdaq Dollar Amount of Sales	(E) Aggregate Dollar Amount of Sales	(F) Average Daily Dollar Amount of Sales (ADS)	(G) Change in LN of ADS	(H) Forecast ADS	(I) Forecast Aggregate Dollar Amount of Sales
Mar-94	23	316,713,498,173	151,177,373,000	467,890,871,173	20,343,081,355	-		
Apr-94	19	289,365,151,226	114,834,515,000	404,199,666,226	21,273,666,643	0.045		
May-94	21	241,278,516,490	112,318,747,000	353,597,263,490	16,837,964,928	-0.234		
Jun-94	22	245,067,967,632	112,555,736,000	357,623,703,632	16,255,622,892	-0.035		
Jul-94	20	221,511,138,952	100,563,525,000	322,074,663,952	16,103,733,198	-0.009		
Aug-94	23	255,511,795,450	127,675,353,000	383,187,148,450	16,660,310,802	0.034		
Sep-94	21	273,589,300,476	111,984,539,000	385,573,839,476	18,360,659,023	0.097		
Oct-94	21	266,363,537,805	129,089,800,000	395,453,337,805	18,831,111,324	0.025		
Nov-94	21	267,314,618,799	121,827,668,000	389,142,286,799	18,530,585,086	-0.016		
Dec-94	21	265,184,891,948	106,839,641,000	372,024,532,948	17,715,453,950	-0.045		
Jan-95	21	253,958,524,771	125,092,685,000	379,051,209,771	18,050,057,608	0.019		
Feb-95	19	263,486,075,035	125,574,811,000	389,060,886,035	20,476,888,739	0.126		
Mar-95	23	330,806,034,718	161,066,575,000	491,872,609,718	21,385,765,640	0.043		
Apr-95	19	285,586,213,818	149,741,420,000	435,327,633,818	22,911,980,727	0.069		
May-95	22	340,254,177,379	191,600,883,000	531,855,060,379	24,175,230,017	0.054		
Jun-95	22	376,703,055,609	197,629,158,000	574,332,213,609	26,106,009,710	0.077		
Jul-95	20	346,809,496,831	229,239,839,000	576,049,335,831	28,802,466,792	0.098		
Aug-95	23	327,435,391,060	243,203,335,000	570,638,726,060	24,810,379,394	-0.149		
Sep-95	20	352,176,019,676	225,957,920,000	578,133,939,676	28,906,696,984	0.153		
Oct-95	22	386,892,948,035	255,297,230,000	642,190,178,035	29,190,462,638	0.010		
Nov-95	21	340,868,134,565	255,556,416,000	596,424,550,565	28,401,169,075	-0.027		
Dec-95	20	386,356,222,037	238,254,219,000	624,610,441,037	31,230,522,052	0.095		
Jan-96	22	412,342,988,854	275,256,103,000	687,599,091,854	31,254,504,175	0.001		
Feb-96	20	432,110,721,273	255,121,750,000	687,232,471,273	34,361,623,564	0.095		
Mar-96	21	462,522,216,093	252,313,904,000	714,836,120,093	34,039,815,243	-0.009		
Apr-96	21	419,529,647,022	284,880,671,000	704,410,318,022	33,543,348,477	-0.015		
May-96	22	444,864,509,489	323,514,998,000	768,379,507,489	34,926,341,250	0.040		
Jun-96	20	364,047,300,223	267,051,480,000	631,098,780,223	31,554,939,011	-0.102		
Jul-96	22	405,998,331,384	282,430,397,000	688,428,728,384	31,292,214,927	-0.008		
Aug-96	22	347,207,351,036	222,902,421,000	570,109,772,036	25,914,080,547	-0.189		

Sep-96	20	361,752,600,688	255,491,281,000	617,243,881,688	30,862,194,084	0.175		
Oct-96	23	450,138,412,454	314,131,029,000	764,269,441,454	33,229,106,150	0.074		
Nov-96	20	468,499,807,419	279,994,893,000	748,494,700,419	37,424,735,021	0.119		
Dec-96	21	475,791,378,753	288,688,118,000	764,479,496,753	36,403,785,560	-0.028		
Jan-97	22	578,613,348,586	378,819,289,000	957,432,637,586	43,519,665,345	0.179		
Feb-97	19	500,101,991,446	337,072,192,000	837,174,183,446	44,061,799,129	0.012		
Mar-97	20	526,670,517,788	312,522,211,000	839,192,728,788	41,959,636,439	-0.049		
Apr-97	22	541,016,966,315	321,782,247,000	862,799,213,315	39,218,146,060	-0.068		
May-97	21	560,712,670,647	365,021,182,000	925,733,852,647	44,082,564,412	0.117		
Jun-97	21	590,497,004,859	339,912,081,000	930,409,085,859	44,305,194,565	0.005		
Jul-97	22	665,142,486,898	420,540,220,000	1,085,682,706,898	49,349,213,950	0.108		
Aug-97	21	646,260,997,751	385,083,141,000	1,031,344,138,751	49,111,625,655	-0.005		
Sep-97	21	636,729,800,602	399,730,444,000	1,036,460,244,602	49,355,249,743	0.005		
Oct-97	23	795,309,593,718	534,343,839,000	1,329,653,432,718	57,811,018,814	0.158		
Nov-97	19	614,656,941,587	311,360,937,000	926,017,878,587	48,737,783,084	-0.171		
Dec-97	22	670,717,275,199	375,503,531,000	1,046,220,806,199	47,555,491,191	-0.025		
Jan-98	20	662,635,021,902	375,290,271,000	1,037,925,292,902	51,896,264,645	0.087		
Feb-98	19	672,828,859,396	408,876,474,000	1,081,705,333,396	56,931,859,652	0.093		
Mar-98	22	795,132,023,467	464,862,662,000	1,259,994,685,467	57,272,485,703	0.006		
Apr-98	21	819,690,018,253	478,804,341,000	1,298,494,359,253	61,833,064,726	0.077		
May-98	20	717,931,027,995	392,290,631,000	1,110,221,658,995	55,511,082,950	-0.108		
Jun-98	22	778,892,937,913	464,886,854,000	1,243,779,791,913	56,535,445,087	0.018		
Jul-98	22	837,582,352,748	561,429,081,000	1,399,011,433,748	63,591,428,807	0.118		
Aug-98	21	812,804,954,442	494,696,509,000	1,307,501,463,442	62,261,974,450	-0.021		
Sep-98	21	899,449,779,083	452,978,456,000	1,352,428,235,083	64,401,344,528	0.034		
Oct-98	22	941,206,761,926	519,628,635,672	1,460,835,397,598	66,401,608,982	0.031		
Nov-98	20	763,668,070,478	534,735,697,587	1,298,403,768,065	64,920,188,403	-0.023		
Dec-98	22	832,619,360,060	610,078,427,246	1,442,697,787,306	65,577,172,150	0.010		
Jan-99	19	1,002,792,782,534	881,762,273,376	1,884,555,055,910	99,187,108,206	0.414		
Feb-99	19	884,236,683,650	771,821,519,115	1,656,058,202,765	87,160,958,040	-0.129		
Mar-99	23	1,063,644,002,718	845,323,661,356	1,908,967,664,074	82,998,594,090	-0.049		
Apr-99	21	1,202,755,130,954	974,846,639,668	2,177,601,770,622	103,695,322,411	0.223		
May-99	20	1,055,752,423,736	728,648,483,251	1,784,400,906,987	89,220,045,349	-0.150		
Jun-99	22	968,672,852,262	728,666,375,241	1,697,339,227,503	77,151,783,068	-0.145		
Jul-99	21	971,377,415,431	795,657,683,556	1,767,035,098,986	84,144,528,523	0.087		
Aug-99	22	910,143,257,265	782,763,893,461	1,692,907,150,726	76,950,325,033	-0.089		
Sep-99	21	887,751,464,814	842,754,416,364	1,730,505,881,178	82,405,041,961	0.068		
Oct-99	21	1,078,637,908,317	938,836,857,225	2,017,474,765,542	96,070,226,931	0.153		
Nov-99	21	1,129,374,113,398	1,218,999,895,936	2,348,374,009,334	111,827,333,778	0.152		
Dec-99	22	1,214,245,992,515	1,472,542,539,476	2,686,788,531,991	122,126,751,454	0.088		

Jan-00	20	1,298,320,930,164	1,759,510,466,949	3,057,831,397,113	152,891,569,856	0.225			
Feb-00	20	1,242,939,925,885	1,730,179,962,177	2,973,119,888,063	148,655,994,403	-0.028			
Mar-00	23	1,674,957,313,287	2,460,195,052,947	4,135,152,366,234	179,789,233,315	0.190			
Apr-00	19	1,435,035,900,103	1,739,658,625,584	3,174,694,525,687	167,089,185,562	-0.073			
May-00	22	1,275,173,133,440	1,374,100,073,878	2,649,273,207,318	120,421,509,424	-0.328			
Jun-00	22	1,288,821,230,447	1,594,692,767,334	2,883,513,997,781	131,068,818,081	0.085			
Jul-00	20	1,210,411,492,966	1,594,341,902,395	2,804,753,395,361	140,237,669,768	0.068			
Aug-00	23	1,212,084,264,128	1,508,704,131,703	2,720,788,395,832	118,295,147,645	-0.170			
Sep-00	20	1,266,743,469,149	1,663,445,339,863	2,930,188,809,012	146,509,440,451	0.214			
Oct-00	22	1,520,695,416,929	1,965,230,890,799	3,485,926,307,727	158,451,195,806	0.078			
Nov-00	21	1,293,925,005,931	1,501,853,870,956	2,795,778,876,887	133,132,327,471	-0.174			
Dec-00	20	1,372,200,223,377	1,437,717,126,473	2,809,917,349,851	140,495,867,493	0.054			
Jan-01	21	1,553,316,868,836	1,590,184,256,408	3,143,501,125,244	149,690,529,774	0.063			
Feb-01	19	1,229,720,673,393	1,142,699,849,893	2,372,420,523,286	124,864,238,068	-0.181			
Mar-01	22	1,459,253,562,636	1,095,165,522,477	2,554,419,085,113	116,109,958,414	-0.073			
Apr-01	20	1,320,145,219,933	1,004,204,287,812	2,324,349,507,745	116,217,475,387	0.001			
May-01	22	1,321,526,084,016	1,031,653,304,287	2,353,179,388,303	106,962,699,468	-0.083			
Jun-01	21	1,247,283,258,199	864,638,855,037	2,111,922,113,236	100,567,719,678	-0.062			
Jul-01	21	1,242,431,937,109	761,952,097,446	2,004,384,034,554	95,446,858,788	-0.052			
Aug-01	23	1,126,055,224,969	677,510,112,826	1,803,565,337,795	78,415,884,252	-0.197			
Sep-01	15	1,047,626,761,645	525,858,184,738	1,573,484,946,383	104,898,996,426	0.291			
Oct-01	23	1,349,118,916,636	798,119,956,408	2,147,238,873,044	93,358,211,871	-0.117			
Nov-01	21	1,172,054,711,429	767,372,506,089	1,939,427,217,518	92,353,677,025	-0.011			
Dec-01	20	1,163,934,125,870	757,164,612,243	1,921,098,738,113	96,054,936,906	0.039			
Jan-02	21	1,295,560,129,211	853,683,183,221	2,149,243,312,432	102,344,919,640	0.063			
Feb-02	19	1,265,596,423,330	663,234,172,254	1,928,830,595,585	101,517,399,768	-0.008			
Mar-02	20	1,391,686,235,846	610,530,138,668	2,002,216,374,514	100,110,818,726	-0.014			
Apr-02	22	1,425,803,762,869	636,298,103,636	2,062,101,866,506	93,731,903,023	-0.066			
May-02	22	1,389,712,534,140	596,147,222,417	1,985,859,756,557	90,266,352,571	-0.038			
Jun-02	20	1,346,347,183,249	535,838,197,360	1,882,185,380,609	94,109,269,030	0.042			
Jul-02	22	1,785,869,953,351	563,694,536,838	2,349,564,490,189	106,798,385,918	0.126			
Aug-02	22	1,366,263,208,686	427,166,695,393	1,793,429,904,079	81,519,541,095	-0.270			
Sep-02	20	1,142,597,400,966	376,346,966,238	1,518,944,367,204	75,947,218,360	-0.071			
Oct-02	23	1,598,092,211,882	529,782,736,090	2,127,874,947,972	92,516,302,086	0.197			
Nov-02	20	1,282,210,858,888	498,605,599,233	1,780,816,458,122	89,040,822,906	-0.038			
Dec-02	21	1,145,194,968,127	415,897,247,519	1,561,092,215,646	74,337,724,555	-0.180			
Jan-03	21	1,248,793,946,741	474,904,883,673	1,723,698,830,414	82,080,896,686	0.099			
Feb-03	19	1,070,048,068,849	341,674,336,507	1,411,722,405,357	74,301,179,229	-0.100			
Mar-03	21	1,293,340,642,585	406,242,999,932	1,699,583,642,517	80,932,554,406	0.085			
Apr-03	21	1,310,080,563,238	449,316,319,231	1,759,396,882,469	83,780,803,927	0.035			

May-03	21	1,451,830,957,154	419,562,973,291	1,871,393,930,445	89,113,996,688	0.062		
Jun-03	21	1,656,129,355,959	466,098,458,761	2,122,227,814,720	101,058,467,368	0.126		
Jul-03	22	1,622,749,852,799	478,067,675,641	2,100,817,528,440	95,491,705,838	-0.057		
Aug-03	21	1,407,923,702,993	358,605,215,318	1,766,528,918,312	84,120,424,681	-0.127		
Sep-03	21	1,615,383,245,929	448,201,176,011	2,063,584,421,939	98,265,924,854	0.155		
Oct-03	23	1,828,085,746,139	490,992,492,650	2,319,078,238,789	100,829,488,643	0.026		
Nov-03	19	1,538,248,661,152	358,360,077,946	1,896,608,739,098	99,821,512,584	-0.010		
Dec-03	22	1,692,590,388,413	344,449,615,057	2,037,040,003,469	92,592,727,430	-0.075		
Jan-04	20	1,929,842,015,739	482,284,281,048	2,412,126,296,786	120,606,314,839	0.264		
Feb-04	19	1,840,581,043,697	355,213,320,825	2,195,794,364,522	115,568,124,449	-0.043		
Mar-04	23	2,060,077,787,798	570,443,584,895	2,630,521,372,693	114,370,494,465	-0.010		
Apr-04	21						116,834,236,575	2,453,518,968,084
May-04	20						119,351,052,035	2,387,021,040,703
Jun-04	22						121,922,084,138	2,682,285,851,026
Jul-04	21						124,548,500,805	2,615,518,516,899
Aug-04	22						127,231,495,118	2,799,092,892,592
Sep-04	21						129,972,285,859	2,729,418,003,041
Oct-04	21						132,772,118,066	2,788,214,479,378
Nov-04	21						135,632,263,595	2,848,277,535,485
Dec-04	22						138,554,021,701	3,048,188,477,426
Jan-05	20						141,538,719,629	2,830,774,392,582
Feb-05	19						144,587,713,213	2,747,166,551,049
Mar-05	22						147,702,387,495	3,249,452,524,889
Apr-05	21						150,884,157,353	3,168,567,304,405
May-05	21						154,134,468,143	3,236,823,831,007
Jun-05	22						157,454,796,359	3,464,005,519,902
Jul-05	20						160,846,650,299	3,216,933,005,988
Aug-05	23						164,311,570,754	3,779,166,127,344
Sep-05	21						167,851,131,705	3,524,873,765,799

Figure B.
Aggregate Dollar Amount of Sales Subject to Exchange Act Sections 31(b) and 31(c)[1]
Methodology Developed in Consultation With OMB and CBO
(Dashed Line Indicates Forecast Values)

[1]Forecasted line is not smooth because the number of trading days varies by month.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49643; File No. SR–CBOE–2004–24]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the Chicago Board Options Exchange, Incorporated Allowing a New Type of Designated Primary Market-Maker—e-DPMs

April 30, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 22, 2004, the Chicago Board Options Exchange, Incorporated ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in items I, II, and III below, which items have been prepared by the CBOE. On April 30, 2004, the CBOE filed Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The CBOE proposes to amend its rules to allow remote competing Designated Primary Market-Makers ("DPMs").

Below is the text of the proposed rule change, as amended.[4] Proposed new language is *italicized.*

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Chicago Board Options Exchange, Incorporated

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Rules

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Rule 1.1 Definitions

(a)–(ff) Unchanged.

(gg) The term "lessee" means an individual or organization that has leased a transferable membership from the owner thereof in accordance with the provisions of Rule 3.17. For the duration of the lease agreement, a lessee shall be deemed to be a member[,]. *Except as otherwise expressly provided in the Constitution or Rules, a lessee shall* be subject to all of the provisions of the Constitution and Rules that are applicable to the owner of an Exchange membership[, except that the provisions of the Constitution and Rules, which] *other than those provisions that* concern the ownership of membership [are not applicable to a lessee].

(hh)–(yy) Unchanged.

.01–05 Unchanged.

* * * * *

Rule 3.3 Qualifications and Membership Statuses of Member Organizations

(a)–(d) Unchanged.

Interpretation and Policies:

.02 Member organization membership statuses that are approved by Exchange bodies other than the Membership Committee (along with the primary Exchange Rule that provides for such approval) include: Designated Primary Market-Maker (Rule 8.83), *Electronic DPMs (Rule 8.92)*, SBT Designated Primary Market-Makers and SBT Lead Market-Makers (Rule 42.1).

* * * * *

Rule 6.23A Member Electronic Connectivity

The Exchange may limit the number of messages sent by members accessing the Exchange electronically in order to protect the integrity of the Hybrid trading system. In addition, the Exchange may impose restrictions on the use of a computer connected through an API if it believes such restrictions are necessary to ensure the proper performance of the system. Any such restrictions shall be objectively determined and submitted to the Commission for approval pursuant to a rule change filing under Section 19(b) of the Exchange Act.

* * * * *

Rule 6.45A Priority and Allocation of Trades for CBOE Hybrid System

Generally: The rules of priority and order allocation procedures set forth in this rule shall apply only to option classes designated by the Exchange to be traded on the CBOE Hybrid System. *The term "market participant" as used throughout this rule refers to an in-crowd Market-Maker, a Market-Maker complying with the in-person requirements of Rule 8.7.03(B)(1) who submits quotes from off of the floor of the Exchange through the facilities of the Exchange, an in-crowd DPM, an e-DPM, and a floor broker representing orders in the trading crowd. The term "in-crowd market participant" only includes an in-crowd Market-Maker, in-crowd DPM, or floor broker representing orders in the trading crowd.*

(a) Allocation of Incoming Electronic Orders: The Exchange shall apply, for each class of options, the following rules of trading priority.

(i) Ultimate Matching Algorithm ("UMA"): Under this method, [an in-crowd market maker, in-crowd DPM, or in-crowd floor broker representing orders ("market participant")] *a market participant* who enters a quotation and whose quote is represented by the disseminated CBOE best bid or offer ("BBO") shall be eligible to receive allocations of incoming electronic orders for up to the size of its quote, in accordance with the principles described below. As an initial matter, if the number of contracts represented in the disseminated quote is less than the number of contracts in an incoming electronic order(s), the incoming electronic order(s) shall only be entitled to receive a number of contracts up to the size of the disseminated quote, in accordance with Rule 6.45A(a)(i)(B). The balance of the electronic order will be eligible to be filled at the refreshed quote either electronically (in accordance with paragraph (a)(i)(B) below) or manually (in accordance with Rule 6.45A(b)) and, as such, may receive a split price execution.

(A)–(B) No change.

(C) DPM Participation Entitlement: If a DPM *or e-DPM* is eligible for an allocation pursuant to the operation of the Algorithm described in paragraph (a) of Rule 6.45A, the DPM or *e-DPM* shall be entitled to receive an allocation (not to exceed the size of the DPM's *or e-DPM's* quote) equal to either:

(1) The greater of the amount [he] *it* would be entitled to pursuant to the [DPM] participation right established pursuant to Rule 8.87 (and Regulatory Circulars issued thereunder) or the amount [he] *it* would otherwise receive pursuant to the operation of the Algorithm described above *provided, however, that in calculating the DPM's allocation under the Algorithm, DPMs utilizing more than one membership in the trading crowd where the subject class is traded shall count as two market participants for purposes of Component A of the Algorithm;* or

(2) the amount [he] *it* would be entitled to pursuant to the [DPM] participation right established pursuant to Rule 8.87 (and Regulatory Circulars issued thereunder).

The appropriate FPC shall determine which of the preceding two entitlement formulas will be in effect for all classes under its jurisdiction. All

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Amendment No. 1 replaces and supercedes the CBOE's original 19b–4 filing in its entirety.

[4] Upon the Exchange's request, the Commission made a technical corrections to the proposed rule text. Telephone conversation between Angelo Evangelou, Senior Attorney, Legal Division, CBOE, and Deborah L. Flynn, Assistant Director, Division of Market Regulation, Commission, on April 30, 2004.

pronouncements regarding the entitlement formula shall be made via Regulatory Circular. The [DPM's] *participation* entitlement percentage is expressed as a percentage of the remaining quantity after all public customer orders in the electronic book have been executed.

(b)–(d)No change.

Interpretations and Policies:

* * *

No change.

* * * * *

Rule 8.87 Participation Entitlements of DPMs *and e-DPMs*

(a) Subject to the review of the Board of Directors, the MTS Committee may establish from time to time a participation entitlement formula that is applicable to all DPMs.

(b) [To the extent established pursuant to paragraph (a) of this Rule, each DPM shall have a right to participate for its own account with the Market-Makers present in the trading crowd in transactions in securities allocated to the DPM that occur at the DPM's previously established principal bid or offer.]

The participation entitlement for DPMs and e-DPMs (as defined in Rule 8.92) shall operate as follows:

(1) Generally.

(i) To be entitled to a participation entitlement, the DPM/e-DPM must be quoting at the best bid/offer on the Exchange.

(ii) A DPM/e-DPM may not be allocated a total quantity greater than the quantity that the DPM/e-DPM is quoting at the best bid/offer on the Exchange.

(iii) The participation entitlement is based on the number of contracts remaining after all public customer orders in the book at the best bid/offer on the Exchange have been satisfied.

(2) Participation Rates applicable to DPM Complex. The collective DPM/e-DPM participation entitlement shall be: 50% when there is one Market-Maker also quoting at the best bid/offer on the Exchange; 40% when there are two Market-Makers also quoting at the best bid/offer on the Exchange; and, 30% when there are three or more Market-Makers also quoting at the best bid/offer on the Exchange.

(3) Allocation of Participation Entitlement Between DPMs and e-DPMs. The participation entitlement shall be as follows: If the DPM and one or more e-DPMs are quoting at the best bid/offer on the Exchange, the e-DPM participation entitlement shall be one-half (50%) of the total DPM/e-DPM entitlement and shall be divided equally by the number of e-DPMs quoting at the best bid/offer on the Exchange. The remaining half shall be allocated to the DPM. If the DPM is not quoting at the best bid/offer on the Exchange and one or more e-DPMs are quoting at the best bid/offer on the Exchange, then the e-DPMs shall be allocated the entire participation entitlement (divided equally between them). If no e-DPMs are quoting at the best bid/offer on the Exchange and the DPM is quoting at the best bid/offer on the Exchange, then the DPM shall be allocated the entire participation entitlement. If only the DPM and/or e-DPMs are quoting at the best bid/offer on the Exchange (with no Market-Makers at that price), the participation entitlement shall not be applicable and the allocation procedures under Rule 6.45A shall apply.

* * * * *

Rule 8.92 Electronic DPM Program

(a) Definition. An Electronic DPM ("e-DPM") is a member organization that is approved by the Exchange to remotely function in allocated option classes as a DPM and to fulfill certain obligations required of DPMs except for Floor Broker and Order Book Official obligations. The DPM provisions of Rules 8.81 through 8.91 only apply to e-DPMs to the extent they are specifically referenced in Rules 8.92 through 8.94.

(b) No change.

(c) Allocation of Option Classes. The Board of Directors or a committee designated by the Board of Directors shall grant e-DPMs allocations in option classes. Factors to be considered in granting allocations include performance, capacity, performance commitments, efficiency, competitiveness, and operational factors. In addition, the following shall apply:

(i) More than one e-DPM may be allocated to the same option class;

(ii) Option classes that have been allocated to a DPM may be concurrently allocated to e-DPMs.

(iii) An e-DPM's allocation in an option class or group of classes is non-transferable unless approved by the Exchange.

(iv) The Exchange may impose a minimum number of option classes for which an e-DPM may be allocated.

(v) An e-DPM may not be allocated an option class for which the e-DPM organization serves as DPM on the trading floor.

(d) Membership Requirement. Until [insert date 3 years from Commission approval of program], each e-DPM organization is required to (i) own one Exchange membership for every 30 products allocated to the e-DPM; or (ii) lease one Exchange membership for every 20 products allocated to the e-DPM. After [insert same date] each e-DPM organization is required to own one Exchange membership for every 30 products allocated to the e-DPM. An Exchange membership shall include a transferable regular membership or a Chicago Board of Trade full membership that has effectively been exercised pursuant to Article Fifth(b) of the Certificate of Incorporation. Memberships used to satisfy this requirement may not be used for any other purpose including being leased to another member, to comply with the DPM membership ownership requirement of Rule 8.85(e), or for trading on the trading floor. For purposes of this Rule, the term "product" refers to all options of the same single underlying security/value.

(e) Trade Participation. e-DPMs shall participate in trades as set forth in Rules 6.45A and 8.87.

* * * * *

Rule 8.93. e-DPM Obligations

Each e-DPM shall fulfill all of the obligations of a Market-Maker and of a DPM under the Rules (except those contained in Rules 8.85(a)(iv) and (vii)–(x), 8.85(b), 8.85(c)(i) and (v), and 8.85(e)), and shall satisfy each of the following requirements:

(i) provide continuous two-sided quotations in at least 90% of the series of each allocated class, or alternatively, respond to 98% of Requests for Quotes (RFQs) if RFQ functionality is enabled as determined by the Exchange;

(ii) assure that its market quotations are accurate;

(iii) comply with the bid/ask differential requirements of Rule 8.7(b)(iv);

(iv) assure that its market quotations comply with the minimum size requirements prescribed by the Exchange which shall be no less than 10 contracts;

(v) continue to act as an e-DPM and to fulfill all of the e-DPM's obligations as an e-DPM until the Exchange relieves the e-DPM of its approval and obligations to act as an e-DPM;

(vi) make competitive markets on the Exchange and otherwise to promote the Exchange in a manner that is likely to enhance the ability of the Exchange to compete successfully for order flow in the classes it trades;

(vii) as part of a pilot program until [insert 18 months after date of approval], not allow more than one market-maker affiliated with the e-DPM organization to trade on CBOE's trading floor in any specific option class allocated to the e-DPM and provided

such market-maker is trading on a separate membership (absent the pilot program, an e-DPM may not allow any market-makers affiliated with the e-DPM organization to trade on CBOE's trading floor in any class allocated to the e-DPM);

(viii) immediately notify the Exchange of any material operational or financial changes to the e-DPM organization as well as obtain the Exchange's approval prior to effecting changes to the ownership, capital structure, voting authority, distribution of profits/losses, or control of the e-DPM organization;

(ix) provide members with telephone access to a designated employee at all times during market hours for purposes of resolving problems involving trading on the Exchange; and

(x) maintain information barriers that are reasonably designed to prevent the misuse of material, non-public information with any affiliates that may conduct a brokerage business in option classes allocated to the e-DPM or act as specialist or market maker in any security underlying options allocated to the e-DPM, and otherwise comply with the requirements of Rule 4.18 regarding the misuse of material non-public information.

* * * * *

Rule 8.94. Review of e-DPM Operations and Performance

(a) Review. The Exchange may conduct a review of an e-DPM's operations or performance at any time. Such review may include, among other things, an evaluation of the extent to which the e-DPM has satisfied its obligations under Rule 8.93. An e-DPM shall submit to the Exchange such information requested by the Exchange in connection with a review of the e-DPM's operations or performance on the Exchange.

(b) Revocation of Fee Rate. The Exchange may, pursuant to a rule change filed with the Commission under Section 19(b) of the Exchange Act, adopt rules detailing objective criteria upon which e-DPMs' fee rates shall be reviewed. The criteria may include average quote size, average quote width, the percentage of time an e-DPM is quoting at the NBBO, and other objective performance related measurements. e-DPMs that fail to meet the objective standards may be summarily required to adhere to fee rates applicable to non-e-DPM Market-Makers.

(c) Termination and other limitations. The Exchange may terminate, place conditions upon, or otherwise limit a member organization's approval to act as an e-DPM on the same basis that DPM privileges may be terminated and/or conditioned under Rules 8.60 and 8.90. If a member organization's approval to act as an e-DPM is terminated, conditioned, or otherwise limited by the Exchange pursuant to this Rule, the member organization may seek review of that decision under Chapter XIX of the Rules.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the CBOE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. The CBOE has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

In 2003, CBOE introduced the Hybrid Trading System, an electronic trading platform integrated with CBOE's floor-based open-outcry auction market.[5] CBOE now proposes to enhance the liquidity base of the Hybrid platform by adding a new category of CBOE market making participant-electronic DPMs ("e-DPMs"). e-DPMS will be member organizations appointed to operate on CBOE as competing DPMs in a broad number of option classes. e-DPMs will act as specialists on CBOE by entering bids and offers electronically from locations other than the trading crowds where the applicable options classes are traded, and will not be required to have traders physically present in the trading crowd. As specialists, e-DPMs will share in the DPM participation right in their allocated classes.

e-DPMs will be expected to attract order flow to the Exchange in allocated securities and to quote competitively. They will have special eligibility requirements and will have to meet market performance standards and certain obligations including quoting requirements. e-DPMs will be evaluated on how well they fulfill their market-making obligations as specialists, as well as on how successful they are at attracting order flow to the Exchange in allocated securities. e-DPMs may apply for and be granted an appointment in any option classes on the Hybrid Trading System other than those in which they are already operating as the DPM on the floor of the Exchange.[6]

e-DPM Allocated Classes

e-DPMs will be required to accept allocations in a broad number of options classes, as determined by the Exchange. All classes allocated by the Exchange to an e-DPM shall constitute the e-DPM's appointment. e-DPMs will have specific quoting obligations governing all classes comprising their appointment, as discussed below.

e-DPM Quoting Obligations

e-DPMs must continuously quote 90% of the series in each of their allocated classes, with a minimum size of at least 10 contracts. If an electronic request-for-quote ("RFQ") functionality is activated for Hybrid classes,[7] e-DPMs will have additional or alternative obligations regarding RFQs. For example, they will be obligated to respond to at least 98% of RFQs in their appointed classes (as is the standard for SBT DPMs under CBOE Rule 44.14). All e-DPM quotations must be firm and must comply with the maximum bid-ask width requirements contained in CBOE Rule 8.7(b)(iv).

Participation Entitlement

CBOE proposes to modify certain aspects of the DPM participation entitlement to accommodate the e-DPM program. Participation rights are granted to a DPM when the DPM is quoting on the prevailing bid or offer. CBOE's current DPM participation rights are 30%, 40%, or 50%.[8] Under this proposal, DPMs and e-DPMs (the "DPM Complex") will share in the existing DPM participation entitlement with the e-DPM participation right coming out of the existing DPM participation right established under CBOE Rule 8.87. CBOE proposes to codify the revised participation right applicable to the DPM Complex.

The allocation of the DPM participation entitlement shall be shared as follows: If the DPM and one or more

[5] *See* Securities Exchange Act Release No. 47959 (May 30, 2003), 68 FR 34441 (June 9, 2003).

[6] The process and rules by which e-DPMs would be appointed was submitted to the Commission under a separate rule filing (SR–CBOE–2004–17). *See* Securities Exchange Act Release 49577 (April 19, 2004), 69 FR 22576 (April 26, 20040).

[7] The RFQ functionality exists for trading on CBOE*direct*, the Exchange's purely screen-based trading platform.

[8] If there is one Market-Maker quoting with the DPM, the DPM entitlement is 50%. If there are two Market-Makers quoting with the DPM, the DPM entitlement is 40%. If there are three or more Market-Makers quoting with the DPM, the DPM entitlement is 30%.

e-DPMs are quoting at the best bid/offer on CBOE, the e-DPM participation entitlement shall be one-half (50%) of the total DPM Complex entitlement and shall be divided equally by the number of e-DPMs quoting at the best bid/offer on CBOE. The DPM shall retain the other half of the entitlement. As proposed in CBOE Rule 6.45A, e-DPMs would receive allocations based on the greater of the participation entitlement or what the e-DPM would otherwise receive via CBOE's Ultimate Matching Algorithm ("UMA") (an e-DPM will never receive an allocation greater than the size of the e-DPM's quote). If, however, only the DPM and/or e-DPMs are quoting at the best bid/offer on CBOE and there are no Market-Makers quoting with them, there shall be no DPM/e-DPM participation entitlement and instead the allocation procedures under CBOE Rule 6.45A shall apply.

Other Considerations

CBOE proposes, as a pilot program for an 18-month period commencing on Commission approval of this proposal, that an e-DPM may choose to have up to one separate affiliated Market-Maker physically present in trading crowds where it operates as an e-DPM (such Market-Maker would be required to trade on a separate membership).[9] This Market-Maker will be allowed all the privileges of any other Market-Maker and will have all of the responsibilities of any other Market-Maker. Because non-DPM Market-Makers do not receive guarantees in connection with participation on orders, this in no way will impact the guaranteed participation percentages applicable to e-DPMs.

Because DPMs will receive a smaller participation entitlement (but will continue to need multiple memberships to effectively operate a DPM trading crowd and will continue to fulfill agency and other obligations), the Exchange proposes to allow DPMs that use more than one membership in any given trading crowd to increase their ability to participate via UMA. This will be effected by increasing the DPM's "A" component in the UMA calculation by one.[10] CBOE believes this will have no impact on the DPM's participation guarantees.

On many exchanges the specialist receives a 40% guarantee when there are at least three other market makers present and quoting in a security. 40% appears to be the maximum guaranteed percentage allowed by the Commission at this time (provided at least three market makers are quoting). On CBOE, the DPM is only entitled to 30% in such cases. To the extent this extra "A" component could be considered a "guarantee" (and even though a DPM would not receive an allocation on any trade pursuant to both the participation entitlement and UMA), CBOE represents that it would not allow the incremental amount a DPM receives because of a second "A" component to cause the DPM to exceed a 40% "guarantee" threshold. For example: assume a DPM and three Market-Makers are each quoting the same size at the NBBO and a 100-contract order is received. The DPM participation entitlement in that case is 30% (or 30 contracts). Currently (using just one "A" component for the DPM), the "A" component would account for 12.5 contracts (half of ¼). By giving the DPM an extra "A" component, the total contracts due to the DPM as a result of the "A" component would equal 20 (half of ⅖). Thus, the incremental gain attributable to the second "A" component is 7.5 contracts (20 minus 12.5). The additional 7.5% plus the 30% guarantee does not exceed 40%, and the 37.5% figure can only decrease as the number of Market-Makers on the quote increases (*i.e.* the example given is the most drastic scenario).

Message Traffic

Recognizing that multiple entities remotely streaming continuous quotes to CBOE in the same products will increase message traffic, the Exchange is also adding proposed CBOE Rule 6.23A (which is based on CBOE Rule 44.6 applicable to CBOE's screen-based trading system, CBOE*direct*) providing that the Exchange may limit the number of messages sent by members accessing the Exchange electronically to ensure proper performance of the system.

Membership Ownership Requirement

As proposed, e-DPMs must own or lease CBOE or Chicago Board of Trade (exercised) memberships as follows. Each membership that an e-DPM owns will entitle the e-DPM to stream quotes into 30 classes. Each membership that an e-DPM leases will entitle the e-DPM to stream quotes into 20 classes. For example, an e-DPM quoting 420 classes needs to own 14 seats, lease 21 seats, or use some combination of owned and leased seats sufficient to make the e-DPM eligible to quote 420 classes. At the end of three years, every e-DPM will be required to own seats to satisfy this requirement and thereafter the e-DPM may no longer be allowed to use leased seats for this purpose.

Review of Operations and Performance

Reviews of e-DPM performance would be conducted under proposed CBOE Rule 8.94. Furthermore, proposed CBOE Rule 8.94 would provide that the Exchange may, pursuant to a rule change filed with the Commission under section 19(b) of the Exchange Act, adopt rules detailing objective criteria upon which e-DPMs' fee rates shall be reviewed. The criteria may include average quote size, average quote width, the percentage of time an e-DPM is quoting at the NBBO, and other objective performance related measurements. e-DPMs that fail to meet the objective standards could be summarily required to adhere to fee rates applicable to certain non-e-DPM Market-Makers.

Lastly, proposed CBOE Rule 8.94 provides that the Exchange may terminate, place conditions upon, or otherwise limit a member organization's approval to act as an e-DPM on the same basis that DPM privileges may be terminated and/or conditioned under CBOE Rules 8.60 and 8.90, and that if a member organization's approval to act as an e-DPM is terminated, conditioned, or otherwise limited by the Exchange pursuant to this Rule, the member organization may seek review of that decision under Chapter XIX of the Rules.

2. Statutory Basis

By expanding CBOE's liquidity base and market making possibilities on the Exchange to include remote market making by e-DPMs, the Exchange believes the proposed rule change, as amended, is consistent with section 6(b) of the Act[11] in general and furthers the objectives of sections 6(b)(5)[12] of the Act in particular in that that it should promote just and equitable principles of trade, serve to remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest.

[9] As part of the pilot program, CBOE will confidentially provide the Commission with data on (1) the size or orders that 3-DPMs and affilaited Market-Makers both trade with electronically; (2) the price and size of the e-DPM's and the affiliated Market-Maker's respective quotes; (3) the price and size of quotes of other participants in classes where an e-DPM and an affilaite are quoting; and, (4) a brakdown of how orders are allocated to the e-DPM, the affilaited Maket-Maker, and any other participants.

[10] The "A" componet of UMA represents 1 over the total number of market participants on the market. UMA currently gives weighting to the "A" and "B" components. When the DPM is given credit for the additional seat both the numerator and the denominator are increased (*e.g.*, ¼ becomes ⅖).

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(5).

B. Self-Regulatory Organization's Statement on Burden on Competition

The CBOE believes that the proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CBOE–2004–24 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–CBOE–2004–24. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2004–24 and should be submitted on or before May 28, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–10466 Filed 5–6–04; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49628; File No. SR–NASD–2004–023]

Self-Regulatory Organizations; Order Approving Proposed Rule Change and Amendment No. 1 Thereto by the National Association of Securities Dealers, Inc. To Amend the Order Audit Trail System Rules Relating to Execution Reports

April 29, 2004.

On February 5, 2004, the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend NASD Rule 6954(d) to require that members record and report the execution price and firm capacity (*e.g.*, agency, principal or riskless principal) in Order Audit Trail System ("OATS") Execution Reports. On March 11, 2004, NASD filed Amendment No. 1 to the proposed rule change.[3] The proposed rule change, as amended, was published for comment in the **Federal Register** on March 24, 2004.[4] The Commission received no comments on the proposal. This order approves the proposed rule change, as amended.

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.[5] In particular, the Commission believes that the proposal is consistent with section 15A(b)(6) of the Act[6] which requires, among other things, that the rules of an association be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade and, in general, to protect investors and the public interest.

The Commission believes that NASD's proposal to require its members to record and report the execution price and firm capacity as part of the OATS Execution Report should allow NASD to address potential gaps in the audit trail information currently collected by NASD. Consequently, the Commission believes that the proposed rule change should enhance OATS information and improve NASD's ability to conduct surveillance and investigations relating to compliance with NASD and other applicable rules.

It is therefore ordered, pursuant to section 19(b)(2) of the Act[7], that the proposed rule change, as amended, (SR–NASD–2004–023) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–10397 Filed 5–6–04; 8:45 am]

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[13] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Barbara Z. Sweeney, Senior Vice President and Corporate Secretary, NASD to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated March 10, 2004 ("Amendment No. 1"). Amendment No. 1 replaced the proposed rule change in its entirety.

[4] *See* Securities Exchange Act Release No. 49439 (March 17, 2004), 69 FR 13927.

[5] In approving this proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[6] 15 U.S.C. 78*o*–3(b)(6).

[7] 15 U.S.C. 78s(b)(2).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49636; File No. SR–NASD–2003–69]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. Regarding Failure To Pay Arbitration Awards

April 30, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 7, 2003, the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("SEC" or "Commission") a proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD. On March 5, 2004, NASD filed Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASD is proposing to (1) amend Article V, Section 4 of the NASD By-Laws to permit NASD to suspend for failure to pay an arbitration award or settlement, for a period of two years after the award is entered, former associated persons who terminated their registration before the award was entered; and (2) amend Article VI, Section 3 of the NASD By-Laws to clarify that NASD may suspend the association, and not just the registration, of any person who fails to pay an arbitration award. Below is the text of the proposed rule change. Proposed new language is in *italics;* proposed deletions are in [brackets].

* * * * *

Article V

REGISTERED REPRESENTATIVES AND ASSOCIATED PERSONS

* * * * *

Retention of Jurisdiction

Sec. 4.(*a*) A person whose association with a member has been terminated and is no longer associated with any member of [the] NASD or a person whose registration has been revoked or canceled shall continue to be subject to the filing of a complaint under the *NASD* Rules [of the Association] based upon conduct [which] *that* commenced prior to the termination, revocation, or cancellation or upon such person's failure, while subject to [the] NASD's jurisdiction as provided herein, to provide information requested by [the] NASD pursuant to the *NASD* Rules [of the Association], but any such complaint shall be filed within:

[(a)](*i*) two years after the effective date of termination of registration pursuant to Section 3, provided, however that any amendment to a notice of termination filed pursuant to Section 3(b) that is filed within two years of the original notice [which] *that* discloses that such person may have engaged in conduct actionable under any applicable statute, rule, or regulation shall operate to recommence the running of the two-year period under this subsection;

[(b)](*ii*) two years after the effective date of revocation or cancellation of registration pursuant to the *NASD* Rules [of the Association]; or

[(c)](*iii*) in the case of an unregistered person, [within] two years after the date upon which such person ceased to be associated with the member.

(b) A person whose association with a member has been terminated and is no longer associated with any member of NASD shall continue to be subject to a proceeding to suspend, consistent with Article VI, Section 3 of the By-Laws, his or her ability to associate with a member based on such person's failure to comply with an arbitration award or a written and executed settlement agreement obtained in connection with an arbitration or mediation submitted for disposition pursuant to the NASD Rules, provided that such proceeding is instituted within two years after the date of entry of such award or settlement.

* * * * *

Article VI

DUES, ASSESSMENTS, AND OTHER CHARGES

* * * * *

Suspension or Cancellation [of Membership or Registration

Sec. 3.(*a*) [The] NASD after 15 days notice in writing, may suspend or cancel the membership of any member or the registration of any person in arrears in the payment of any fees, dues, assessments, or other charges or for failure to furnish any information or reports requested pursuant to Section 2 [, or for failure to comply with an award of arbitrators properly rendered pursuant to the Rules of the Association, where a timely motion to vacate or modify such award has not been made pursuant to applicable law or where such a motion has been denied, or for failure to comply with a written and executed settlement agreement obtained in connection with an arbitration or mediation submitted for disposition pursuant to the Rules of the Association].

(b) NASD after 15 days notice in writing, may suspend or cancel the membership of any member or suspend from association with any member any person, for failure to comply with an award of arbitrators properly rendered pursuant to the NASD Rules, where a timely motion to vacate or modify such award has not been made pursuant to applicable law or where such a motion has been denied, or for failure to comply with a written and executed settlement agreement obtained in connection with an arbitration or mediation submitted for disposition pursuant to the NASD Rules.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASD has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Amendment Regarding Former Associated Persons Who Fail To Pay Arbitration Awards

Article VI, Section 3 of the NASD By-Laws (Dues, Assessments and Other Charges) allows NASD to seek suspensions or cancellations for failure to comply with an award or settlement agreement relating to an arbitration or mediation.[4] If a person becomes subject to an arbitration award or enters into a

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] See letter from Kosha K. Dalal, Assistant General Counsel, NASD, to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, dated March 5, 2004.

[4] The Rule 9510 Series describes the process by which NASD may suspend or cancel the membership of any member or the registration of any person for failure to pay an arbitration award or settlement agreement executed in connection with an arbitration or medication occurring under NASD Rules.

settlement agreement in arbitration while associated with a member, then terminates his or her association with the member before paying the arbitration award or settlement, NASD may bring an action against that former associated person based on his or her failure to pay. Such actions are permissible because Article V, Section 4 of the NASD By-Laws (Retention of Jurisdiction) provides that a person whose association with a member has terminated continues to be subject to NASD proceedings based on conduct that began before the termination, provided such proceeding is brought within two years after the termination. The word "termination" as used in Article V, Section 4 shall mean the following: (1) When applied to associated persons who are registered with NASD, that time when a Form U5 with respect to such person is filed with NASD; or (2) when applied to associated persons who are not registered with NASD, that time when such person ceases to be associated with a member, regardless of whether, in the case of (1) or (2), such termination is voluntary or involuntary, or with or without cause.

In 1998, the NASD Board of Governors directed the Office of Hearing Officers to dismiss, for lack of jurisdiction, a proceeding alleging failure to pay an arbitration award against a person who terminated his association after the arbitration proceeding commenced but before an arbitration award was entered against him.[5] The Board held that because the conduct underlying the proceeding (*i.e.* the failure to pay an arbitration award) did not begin until after the person's association terminated, NASD did not have jurisdiction over the person under Article V, Section 4 of NASD By-Laws.

NASD is concerned that a person associated with a member will terminate his or her association with the member once aware that an arbitration award may be entered against him or her in order to avoid sanction by NASD for failure to pay any award or settlement agreement resulting from the proceeding. Accordingly, the proposed rule change provides that for the limited purpose of instituting proceedings for failure to pay arbitration awards or settlements, NASD retains, for a period of two years after the entry of the award or settlement, jurisdiction to impose suspensions against former associated persons if the award or settlement resulted from a claim submitted for arbitration or mediation pursuant to the NASD Rules. Suspending these persons will prevent them from re-entering the industry until the award is paid. Proposed Subsection 4(b) does not limit in any manner the authority of NASD to act pursuant to Subsection 4(a).

Amendment Regarding Sanctions Against Associated Persons Who Fail To Pay Arbitration Awards

The Rule 9510 Series, which provides a procedural framework for actions taken pursuant to Article VI, Section 3 of the NASD By-Laws, states that NASD may seek a suspension or cancellation for failure to comply with an award or settlement agreement relating to an arbitration or mediation pursuant to Article VI, Section 3 of the NASD By-Laws. Article VI, Section 3 specifies that NASD may suspend or cancel the registration of any person for failure to comply with arbitration awards or settlements. Persons suspended from registration with NASD for failing to pay arbitration awards arguably may seek to associate with member firms in unregistered capacities. NASD proposes amending Article VI, Section 3 of the NASD By-Laws to clarify that NASD may suspend any person from associating with a member in any capacity for failure of such person to comply with an arbitration award or settlement.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of section 15A(b)(6) of the Act,[6] which requires, among other things, that NASD rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. Specifically, the proposed rule change strengthens NASD's ability to prevent persons who fail to honor securities-related arbitration awards from seeking to re-enter the securities business, and clarifies that persons who fail to honor such awards may be suspended from associating with NASD members in any capacity.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received. NASD issued *Notice to Members 03–04* on January 10, 2003 soliciting its members to vote on the proposed rule change. NASD members approved the proposed rule change by vote completed on February 10, 2003.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register**, or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NASD–2003–69.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–NASD–2003–69. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written

[5] *See Department of Enforcement* v. *Jonathan Winston*, Non-Summary Proceeding No. ARB980006 (Office of Hearing Officers, December 15, 1998).

[6] 15 U.S.C. 78o–3(b)(6).

communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASD–2003–69 and should be submitted on or before May 28, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[7]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–10398 Filed 5–6–04; 8:45 am]

BILLING CODE 8010–01–P

DEPARTMENT OF STATE

[Public Notice 4701]

ITAC Meetings in Preparation for CITEL "Steering Group Meetings"

SUMMARY: A meeting of the International Telecommunication Advisory Committee to prepare for CITEL "Steering Group Meetings" has been scheduled. The International Telecommunication Advisory Committee (ITAC) will meet on May 13, 2004 from 9:30 a.m.–noon to prepare for the Organization of American States/CITEL "Steering Group Meetings." The location and detailed agenda will be published on the following e-mail reflector: *pcci-citel@eblist.state.gov*. People desiring to attend the meeting who are not on this list may request the information from the Secretariat at *minardje@state.gov*.

Dated: April 29, 2004.

Marian R. Gordon,

Director, Telecommunication & Information Standardization, Department of State.

[FR Doc. 04–10563 Filed 5–6–04; 8:45 am]

BILLING CODE 4710–45–P

[7] 17 CFR 200.30–3(a)(12).

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Determination Regarding Waiver of Discriminatory Purchasing Requirements With Respect to Goods and Services of New Member States of the European Communities

AGENCY: Office of the United States Trade Representative.

ACTION: Determination regarding waiver of discriminatory purchasing requirements under the Trade Agreements Act of 1979.

FOR FURTHER INFORMATION CONTACT: Jean Heilman Grier, Senior Procurement Negotiator, Office of the United States Trade Representative, (202) 395–9476, or Jason E. Kearns, Assistant General Counsel, Office of the United States Trade Representative, (202) 395–3581.

SUPPLEMENTARY INFORMATION: The European Communities ("EC") is a party to the World Trade Organization ("WTO") Agreement on Government Procurement ("GPA") and has assumed rights and obligations under the GPA on behalf of its Member States. On May 1, 2004, the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, and the Slovak Republic (collectively, the "new Member States") acceded to the EC. In light of that accession, the EC has committed to assume rights and obligations on behalf of these new Member States under the GPA. On April 23, 2004, the WTO Committee on Government Procurement approved the application of the GPA to the new Member States. The United States, which is also a party to the GPA, has agreed to waive discriminatory purchasing requirements for eligible products and suppliers of the new Member States. An advance notice on this subject was published in the **Federal Register** on April 5, 2004.

Section 1–201 of Executive Order 12260 of December 31, 1980 delegated the functions of the President under sections 301 and 302 of the Trade Agreements Act of 1979 ("the Trade Agreements Act") (19 U.S.C. 2511, 2512) to the United States Trade Representative.

Determination

In conformity with sections 301 and 302 of the Trade Agreements Act, and in order to carry out U.S. obligations under the GPA, I hereby determine that:

1. The European Communities, including its new Member States, is an instrumentality that (A) is a party to the GPA and (B) will provide appropriate reciprocal competitive government procurement opportunities to United States products and services and suppliers of such products and services. In accordance with section 301(b)(1) of the Trade Agreements Act, the European Communities is so designated for purposes of section 301(a) of the Trade Agreements Act.

2. Accordingly, with respect to eligible products (namely, those goods and services covered under the GPA for procurement by the United States) of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, and the Slovak Republic and suppliers of such products, the application of any law, regulation, procedure, or practice regarding government procurement that would, if applied to such products and suppliers, result in treatment less favorable than that accorded—(A) To United States products and suppliers of such products, or (B) To eligible products of another foreign country or instrumentality which is a party to the GPA and suppliers of such products, shall be waived. This waiver shall be applied by all entities listed in United States Annexes 1 and 3 of GPA Appendix 1. I have informed the relevant U.S. procurement authorities of this decision and requested that they make the necessary changes to U.S. procurement regulations as expeditiously as possible in order to implement this decision. This decision shall become effective on the date of amendment of the applicable regulations.

3. The Trade Representative may modify or withdraw the designation in paragraph 1 and the waiver in paragraph 2.

4. This notice shall not affect the treatment to be accorded to eligible products of any country that was a Member State of the European Communities before the accession of the new Member States.

Dated: May 3, 2004.

Robert B. Zoellick,

United States Trade Representative.

[FR Doc. 04–10461 Filed 5–6–04; 8:45 am]

BILLING CODE 3190–W4–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Aviation Proceedings, Agreements Filed the Week Ending April 23, 2004

The following Agreements were filed with the Department of Transportation under the provisions of 49 U.S.C. 412 and 414. Answers may be filed within 21 days after the filing of the application.

Docket Number: OST–2004–17591.
Date Filed: April 19, 2004.
Parties: Members of the International Air Transport Association.
Subject: Mail Vote 368, PTC 0744 dated 20 April 2004,Special Passenger Amending Resolution 010o between Japan and Chinese Taipei r1–r10, Intended effective date: 1 May 2004.

Docket Number: OST–2004–17622.
Date Filed: April 23, 2004.
Parties: Members of the International Air Transport Association.
Subject: Mail Vote 371, PTC2 ME 0132 dated 27 April 2004,Special Passenger Amending Resolution 010s, Within Middle East r1–r3,Intended Effective Date 1 May 2004.

Maria Gulczewski,
Supervisory Dockets Officer, Alternate Federal Register Liaison.
[FR Doc. 04–10470 Filed 5–6–04; 8:45 am]
BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (Formerly Subpart Q) During the Week Ending April 23, 2004

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural Regulations (See 14 CFR 301.201 *et seq.*). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: OST–2004–17594.
Date Filed: April 19, 2004.
Due Date for Answers, Conforming Applications, or Motion to Modify Scope: May 10, 2004.

Description: Application of Express.Net Airlines, LLC, requesting a certificate of public convenience and necessity to engage in scheduled foreign air transportation of property and mail between any point or points in the U.S. and any point or points in Mexico, and to integrate such authority with Express.Net's existing authority.

Maria Gulczewski,
Supervisory Dockets Officer, Alternate Federal Register Liaison.
[FR Doc. 04–10471 Filed 5–6–04; 8:45 am]
BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Rockingham County, VA

AGENCY: Federal Highway Administration (FHWA), DOT.
ACTION: Notice of intent.

SUMMARY: The Federal Highway Administration is issuing this notice to advise the public of its intent to prepare an Environmental Impact Statement (EIS) in cooperation with the Virginia Department of Transportation for potential transportation improvements in a study area located between Interstate 81 and U.S. Route 33 immediately southeast of the City of Harrisonburg. The project is located in Rockingham County and is intended to address growing regional transportation needs.

FOR FURTHER INFORMATION CONTACT: John Simkins, Environmental Protection Specialist, Federal Highway Administration, Post Office Box 10249, Richmond, Virginia 23240–0249. Telephone: (804) 775–3342.

SUPPLEMENTARY INFORMATION: The Federal Highway Administration (FHWA), in cooperation with the Virginia Department of Transportation (VDOT), will prepare an EIS for the Harrisonburg Southeast Connector Location Study in Rockingham County, Virginia. The EIS will include a range of alternatives that will meet the purpose and need including a no-build alternative as well as alternatives consisting of transportation system management strategies, mass transit, improvements to existing roadways, and/or new alignment facilities.

The FHWA and VDOT are seeking input as part of the scoping process to assist in determining and clarifying issues relative to the study. Letters describing the study and soliciting input will be sent to the appropriate federal, state, and local agencies, and other interested parties as part of the scoping process. An agency scoping meeting as well as a public scoping meeting are planned and will be announced by VDOT. Notices of public meetings and public hearings will be given through various forums providing the time and place of the meeting along with other relevant information. The Draft EIS will be available for public and agency review and comment prior to the public hearings.

To ensure that the full range of issues related to this study is identified and taken into account, comments and suggestions are invited from all interested parties. Comments and questions concerning this study should be directed to FHWA at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this proposed action)

Authority: 23 U.S.C. 315; 49 CFR 1.48.

Issued on: April 30, 2004.

John Simkins,
Environmental Protection Specialist.
[FR Doc. 04–10391 Filed 5–6–04; 8:45 am]
BILLING CODE 4910–22–M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2004–17623; Notice 1]

Cooper Tire & Rubber Company, Receipt of Petition for Decision of Inconsequential Noncompliance

Cooper Tire & Rubber Company (Cooper), has determined that certain tires it manufactured during 2004 do not comply with S6.5(f) of Federal Motor Vehicle Safety Standard (FMVSS) No. 119, "New pneumatic tires for vehicles other than passenger cars." Cooper has filed an appropriate report pursuant to 49 CFR Part 573, "Defect and Noncompliance Reports."

Pursuant to 49 U.S.C. 30118(d) and 30120(h), Cooper has petitioned for an exemption from the notification and remedy requirements of 49 U.S.C. chapter 301 on the basis that this noncompliance is inconsequential to motor vehicle safety.

This notice of receipt of Cooper's petition is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercise of judgment concerning the merits of the petition.

Cooper produced approximately 148 size 11R24.5 Cooper and Mastercraft brand tubeless radial tires during the period from February 29, 2004 through March 6, 2004, that do not comply with FMVSS No. 119, S6.5(f). These tires were marked "tread 5 plies steel; sidewall 1 ply steel," when they should have been marked "tread 4 plies steel; sidewall 1 ply steel."

S6.5(f) of FMVSS No. 119 requires that each tire shall be marked with "[t]he actual number of plies * * * in the sidewall and, if different, in the tread area." Cooper states that the incorrect number of steel tread plies was removed from the molds by buffing and the correct number of steel tread plies inserted; however, prior to the molds being correctly stamped, 148 tires were inadvertently shipped.

Cooper states that the incorrect number of steel tread plies on each tire does not present a safety issue. Cooper explains:

> The involved tires have been redesigned by Cooper, and the fifth steel belt removed. This change was done to improve tread wear resistance and has no effect on the tire's ability to meet all applicable DOT testing standards. The certification data from the redesigned four steel ply construction showed no remarkable difference when compared to the equivalent certification data for the previous five ply steel construction. Both sets of data are well in excess of DOT requirements.

Cooper states that the involved tires comply with all other requirements of FMVSS No. 119.

Interested persons are invited to submit written data, views, and arguments on the petition described above. Comments must refer to the docket and notice number cited at the beginning of this notice and be submitted by any of the following methods. Mail: Docket Management Facility, U.S. Department of Transportation, Nassif Building, Room PL–401, 400 Seventh Street, SW., Washington, DC, 20590–0001. Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC. It is requested, but not required, that two copies of the comments be provided. The Docket Section is open on weekdays from 10 a.m. to 5 p.m. except Federal Holidays. Comments may be submitted electronically by logging onto the Docket Management System Web site at *http://dms.dot.gov*. Click on "Help" to obtain instructions for filing the document electronically. Comments may be faxed to 1–202–493–2251, or may be submitted to the Federal eRulemaking Portal: go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.

The petition, supporting materials, and all comments received before the close of business on the closing date indicated below will be filed and will be considered. All comments and supporting materials received after the closing date will also be filed and will be considered to the extent possible. When the petition is granted or denied, notice of the decision will be published in the **Federal Register** pursuant to the authority indicated below.

Comment closing date: June 7, 2004.

Authority: 49 U.S.C. 30118, 30120: delegations of authority at CFR 1.50 and 501.8.

Issued on: May 4, 2004.

Kenneth N. Weinstein,

Associate Administrator for Enforcement.

[FR Doc. 04–10472 Filed 5–6–04; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[Docket No. RSPA–04–16964 (Notice No. 04–3)]

Hazardous Materials: Regulations for the Safe Transport of Radioactive Material (TS–R–1); Solicitation of Proposed Changes

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Solicitation of proposals for changes to the International Atomic Energy Agency Regulations.

SUMMARY: RSPA and the U.S. Nuclear Regulatory Commission (NRC) are jointly seeking proposed changes to the International Atomic Energy Agency (IAEA) Regulations for the Safe Transport of Radioactive Material (referred to as TS–R–1). The proposed changes that are submitted by the U.S. and other IAEA member states and International Organizations might necessitate subsequent domestic compatibility rulemakings by both DOT and NRC.

DATES: Proposals will be accepted June 7, 2004. Proposals received after this date will be considered if it is practical to do so, however we are only able to assure consideration only for proposals received on or before this date.

ADDRESSES: You may submit proposed changes identified by the docket number (RSPA–04–16964 (Notice No. 04–3)) by any of the following methods:

- *Web site: http://dms.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management System; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–402, Washington, DC 20590–001.
- *Hand Delivery:* To the Docket Management System; Room PL–402 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this notice. For detailed instructions on submitting proposals and additional information on the rulemaking process, *see* the Public Participation heading of the Supplementary Information section of this document. Note that all proposals received will be posted without change to *http://dms.dot.gov* including any personal information provided. Please *see* the Privacy Act heading under **SUPPLEMENTARY INFORMATION.**

Docket: For access to the docket to read background documents or proposals received, go to *http://dms.dot.gov* at any time or to the Docket Management System (*see* **ADDRESSES**).

FOR FURTHER INFORMATION CONTACT: Mr. Rick Boyle, Office of Hazardous Material Technology, U.S. Department of Transportation, Nassif Building, 400 Seventh Street, SW., Washington DC, 20590–0001; (202) 366–2993; *rick.boyle@rspa.dot.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The IAEA periodically revises its Regulations for the Safe Transport of Radioactive Material to reflect new information and accumulated experience. The DOT is the U.S. competent authority before the IAEA for radioactive material transportation matters. The NRC provides technical support to the DOT in this regard, particularly with regard to Type B and fissile packages.

The IAEA recently initiated the review cycle for the 2007 edition of its regulations. The IAEA's review process calls for Member States and International Organizations to provide proposed changes to the IAEA by July 15, 2004. The objective is publication of revised regulations in 2007, nominally

to become effective worldwide in 2009. To assure opportunity for public involvement in the international regulatory development process, the DOT and the NRC are soliciting proposals for changes to the IAEA Regulations at this time. This information will assist the DOT and the NRC in having a full range of views as the agencies develop the proposed changes the U.S. will submit to the IAEA.

II. Public Participation

Proposed changes should identify the docket number (RSPA–04–16964 (Notice No. 04–3)) and if by mail proposed changes are to be submitted in two copies. Persons wishing to receive confirmation of receipt of their proposals should include a self-addressed stamped postcard. Internet users may access all proposals received by the U.S. Department of Transportation at *http://dms.dot.gov.*

Proposed changes must be submitted in writing (electronic file on disk in Microsoft Word format preferred) and are to include:

Name;
Address;
Telephone no.;
E-mail address;

Objective of change/regulatory problem (*e.g.*, a description of the problem being addressed and its consequences);

Justification for change (*e.g.*, the proposed change maintains safety in transport, is risk-informed, and is effective and efficient (*e.g.*, does not impose an undue burden on shippers or carriers));

Paragraphs of the current regulations (TS–R–1) affected (existing text, and proposed new text); and

Modification of or additional guidance material (existing text, and proposed new text); and reference(s) and/or reference material as needed.

The DOT and the NRC will review the proposed changes and rationales. Based in part on the information received, the U.S. will propose changes to be submitted to the IAEA by July 15, 2004.

Proposals for changes from all Member States and International Organizations will be considered at an IAEA Review Panel Meeting to be convened by IAEA on September 27–October 1, 2004, in Vienna, Austria. Prior to that meeting, the DOT and the NRC anticipate holding a public meeting to solicit comment on all (including U.S.) proposed changes submitted to the IAEA.

III. Privacy Act

Anyone is able to search the electronic form of all proposed changes received into any of our dockets by the name of the individual submitting the proposed change (or signing the proposed change, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or may visit *http://dms.dot.gov.*

Issued in Washington, DC on May 4, 2004.

Robert A. McGuire,

Associate Administrator for Hazardous Materials Safety.

[FR Doc. 04–10473 Filed 5–6–04; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34499]

Union Pacific Railroad Company-Temporary Trackage Rights Exemption-The Burlington Northern and Santa Fe Railway Company

The Burlington Northern and Santa Fe Railway Company (BNSF) has agreed to grant temporary overhead trackage rights to Union Pacific Railroad Company (UP) over BNSF's rail lines between BNSF milepost 6.1 near Fort Worth, TX, and BNSF milepost 218.1 near Temple, TX, a distance of approximately 129.2 miles.[1]

The transaction was scheduled to be consummated on April 27, 2004,[2] and the temporary trackage rights are intended to expire on or about May 8, 2004. The purpose of the temporary rights is to facilitate maintenance work on UP lines.

As a condition to this exemption, any employee affected by the acquisition of the temporary trackage rights will be protected by the conditions imposed in *Norfolk and Western Ry. Co.—Trackage Rights—BN,* 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate,* 360 I.C.C. 653 (1980), and, in accordance with the decision of the United States Court of Appeals for the District of Columbia Circuit in *United Transportation Union-General Committee of Adjustment (GO–386)* v. *Surface Transportation Board,* No. 03–1212, 2004 U.S. App. LEXIS 6496 (D.C. Cir. Apr. 6, 2004), any employee affected by the discontinuance of those trackage rights will be protected by the conditions set out in *Oregon Short Line R. Co—Abandonment—Goshen,* 360 I.C.C. 91 (1979).

This notice is filed under 49 CFR 1180.2(d)(8). If it contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34499, must be filed with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Robert T. Opal, 1416 Dodge St., Room 830, Omaha NE 68179.

Board decisions and notices are available on our Web site at *www.stb.dot.gov.*

Decided: May 3, 2004.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 04–10440 Filed 5–6–04; 8:45 am]

BILLING CODE 4915–01–P

[1] The trackage rights involve BNSF track segments with non-contiguous mileposts. Therefore, total mileage does not correspond to the milepost designations of the endpoints.

[2] While UP indicated a proposed consummation date of April 26, 2004, consummation could not take place prior to April 27, 2004, 7 days after the filing of the notice. *See* 49 CFR 1180.4(g).

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34284]

Southwest Gulf Railroad Company—Construction and Operation Exemption—Medina County, TX

AGENCY: Surface Transportation Board, Transportation.

ACTION: Notice of availability of the final scope of study for the Environmental Impact Statement.

SUMMARY: On February 27, 2003, Southwest Gulf Railroad Company (SGR) filed a petition with the Surface Transportation Board (Board) pursuant to 49 U.S.C. 10502 for authority to construct and operate a new rail line in Medina County, Texas. The proposed project would involve the construction and operation of approximately seven miles of new rail line. Because the effects of the proposed project on the quality of the human environment are likely to be highly controversial, the Board's Section of Environmental Analysis (SEA) has determined that the preparation of an Environmental Impact Statement (EIS) is appropriate. SEA issued a Notice of Intent to Prepare an EIS; Notice of Initiation of the Scoping

Process; Notice of Availability of Draft Scope of Study for the Environmental Impact Statement and Request for Comments on January 28, 2004. Comments were requested by February 26, 2004. However, comments that were received after February 26, 2004 have been accepted and considered in the Final Scope of study (Final Scope) of the EIS. Changes made to the Draft Scope of study (Draft Scope) are detailed in the Response to Comments section of this notice. The Final Scope, which is included at the end of this notice, adopts the Draft Scope and reflects any changes to the Draft Scope as a result of the comments.

FOR FURTHER INFORMATION CONTACT: Ms. Rini Ghosh, Section of Environmental Analysis, Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001, or 512–419–5941 (the project information line). Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339. The Web site for the Surface Transportation Board is *www.stb.dot.gov*.

SUPPLEMENTARY INFORMATION:

Background: By petition filed on February 27, 2003, SGR sought an exemption from the Board under 49 U.S.C. 10502 from the formal application procedures of 49 U.S.C. 10901 for authority to construct and operate an approximately seven mile line of railroad in Medina County, TX. The proposed rail line would connect a proposed Vulcan Construction Materials, LP (VCM) quarry and the Del Rio subdivision of the Union Pacific Railroad Company (UP) at milepost 250, near Dunlay, Texas.[1] SGR would use the new rail line to transport limestone from the proposed quarry to the UP rail line, for shipment to markets in the Houston area, as well as other markets in the Southeast, Gulf Coast, and Rio Grande Valley regions of Texas. Although the primary purpose of the proposed construction is to provide rail service to the quarry site, SGR would hold itself out as a common carrier and provide service to other industries that might locate in the area in the future. In a decision served on May 19, 2003, the Board issued a decision finding that, from a transportation perspective, the proposed construction met the standards of 49 U.S.C. 10502. The Board will issue a final decision as to whether the exemption authority should be allowed to go into effect after completion of the environmental review process.

Environmental Review Process: The National Environmental Policy Act (NEPA) is intended to assist the Board and the public in identifying and assessing the potential environmental consequences of a proposed action before a decision on the proposed action is made. SEA is the office within the Board responsible for carrying out the Board's responsibilities under NEPA and related environmental laws, such as the National Historic Preservation Act (NHPA).

SEA has begun the environmental review of SGR's proposal by consulting with appropriate Federal, state, and local agencies, as well as SGR, and conducting technical surveys and analyses. SEA issued a Preliminary Cultural Resources Assessment report on October 10, 2003 to the then-identified consulting parties, pursuant to Section 106 of NHPA, for review and comment. The Texas Historical Commission, the consulting parties, and other individuals submitted comment letters in response to the report; many of the comments addressed environmental concerns not related to cultural resources. SEA also solicited written comments from the public during an informational Open House held in Hondo, Texas on June 12, 2003. Approximately 200 people attended the Open House and over 100 comment letters were received in response to the Open House. Based on the nature and content of the numerous public and agency comments received, SEA determined that the effects of the proposed project on the quality of the human environment are likely to be highly controversial, and that, thus, preparation of an EIS is appropriate.

The first stage of the EIS process is scoping. Scoping is an open process for determining the scope of environmental issues to be addressed in the EIS. SEA developed the Draft Scope, incorporating the issues and concerns raised in the comment letters SEA had then received, and issued the Draft Scope for public review and comment. SEA received approximately 100 comment letters in response to the Draft Scope. Although some of the comment letters expressed support for the proposed project, the majority of the comment letters expressed strong opposition to the proposed project and identified numerous concerns and questions. SEA has taken these comment letters into consideration in preparing the Final Scope.

SEA is currently preparing a Draft EIS (DEIS) for the project. The DEIS will address those environmental issues and concerns identified during the scoping process. It will also contain SEA's preliminary recommendations for environmental mitigation measures. Upon its completion, the DEIS will be made available for public and agency review and comment for at least 45 days. A public meeting will also be held during the comment period for the DEIS. The details of the public meeting, including the specific format, location, and date, will be available in the DEIS. SEA will then prepare a Final EIS (FEIS) that addresses the comments on the DEIS from the public and agencies. Then, in reaching its final decision in this case, the Board will take into account the DEIS, the FEIS, and all environmental comments that are received.

Response to Comments

The discussion below summarizes and addresses the principal environmental concerns raised by the comments, and presents additional discussion to further clarify the Final Scope, which is included at the end of this notice.

Many of the comment letters were written on behalf of an organization or a family and many of the comment letters raised the same or similar issues. Thus, SEA has used the plural term "commenters" to refer to all persons submitting comments, including individuals.

A. Proposed Action and Alternatives

In the Draft Scope, SEA described the proposed action as the construction and operation of a single-track rail line to connect VCM's proposed quarry and UP's Del Rio subdivision line. SGR would use the rail line to transport limestone from the proposed quarry to the UP rail line, for shipment to markets in the Houston area, as well as other markets in the Southeast, Gulf Coast, and Rio Grande Valley regions of Texas. Although the primary purpose of the proposed rail line construction would be to provide rail service to the quarry site, SGR would hold itself out as a common carrier and provide service to other industries that might locate in the area in the future. SEA stated in the Draft Scope that the reasonable and feasible alternatives that would be evaluated in the EIS were (1) construction and operation of the proposed project along SGR's proposed alignment (including a rail loading facility, consisting of a loading loop or a series of parallel tracks, that would be constructed and operated on the quarry property and is not subject to the Board's jurisdiction), (2) three alternative routes that have been

[1] VCM is a subsidiary of Vulcan Materials Company (Vulcan), which is affiliated through common ownership with SGR.

developed to date, as well as other alternatives that might be identified during the scoping process, and (3) the no-action or no-build alternative (which would involve transportation of the limestone by truck from the proposed quarry to the UP rail line, instead of by rail). SEA received numerous comments requesting that the environmental review be expanded to include other actions and other alternatives, which have been summarized below.

Comments Regarding VCM's Proposed Quarry

- Commenters stated that VCM's proposed quarry and SGR's proposed rail line are connected actions that should be examined together in the EIS.
- Commenters requested that the EIS examine alternatives to the quarry, as well as conduct an analysis of all potential direct impacts from quarry development and operations.
- Commenters requested that the EIS include analysis of the following different phases of the quarry: Phase 1 (which is pre-rail, though it will ultimately use the rail and deliver rock to the rail from the crushing unit); Phase 2 (rail connection and first expansion of the quarry); and full build-out (quarry operations at maximum production capacity).
- Commenters stated that because development and operation of the proposed quarry would take place regardless of whether the proposed rail line were constructed and operated, the quarry and the rail line were not connected actions, and the EIS should only consider the quarry as part of the cumulative impacts analysis.
- Commenters requested that the EIS include detailed information on how the quarry will be designed, including the exact equipment to be used and all operations that will be conducted.

Response: SEA is continuing to gather information to determine the proper level of analysis for VCM's proposed quarry, based on established Board precedent, NEPA regulations, and court decisions, and appreciates the information that has been provided in the comment letters. Other agencies also will play a role in how the quarry is developed. The quarry would not require any Federal permits that would necessitate NEPA review; however, the quarry would require an air emissions permit from the Texas Commission on Environmental Quality (TCEQ) for stack and fugitive air pollution emissions, a water discharge permit from TCEQ for stormwater and process wastewater discharges, and be required to comply with the provisions of the Edwards Aquifer Rule at Title 30 Texas Administrative Code Chapter 213. Operations at the quarry would also be required to comply with appropriate Federal, state, and local regulations. The DEIS will include an appropriate discussion and analysis of VCM's proposed quarry, which will be made available for public review and comment.

Range of Alternatives

- Commenters requested that the EIS study the rail line route that was used to facilitate the construction of the Medina Dam in the early 1900s as a possible alternative rail route. Commenters stated that this rail line began at Dunlay, Texas, near the origin of the proposed route and Alternative 3. According to commenters, the route traversed north over level terrain and avoided the major part of Quihi Creek and its floodplain, passing near the proposed quarry site. Commenters suggested that this route could be advantageous because it would avoid the main portion of the Quihi Creek floodplain and its artesian creek beds, the floodplains of Cherry and Elm Creek, the historic areas of Quihi, the Texas Heritage Lands, and the major areas of buried artifacts. Commenters stated that the route would cross fewer roads and the crossings of FM 2676 and County Road 4516 could be located at safer points. Although the route would be longer and would involve more property owners, according to commenters, some of the property owners along the route are known to favor the quarry and would be expected to support this route. Commenters requested that the route be evaluated assuming that a grade-separated crossing would be constructed across U.S. Highway 90, and that the cost of constructing this route should be compared to the costs of constructing the proposed route.
- Commenters suggested that moving the rail line a little further in either direction or to a completely different location could cause much less damage and destruction.
- Commenters stated that the EIS should consider an alternative route that would bypass Cherry Creek, Elm Creek and the lower portion of Quihi Creek and accompanying floodplains.
- Commenters requested that the EIS include at a minimum an analysis of the following: Proposed route; Alternative 1; Alternative 2; Alternative 3; a trucking-only alternative; and a no-action alternative of no quarry, no rail line and no trucks.
- Commenters suggested that the EIS include the alternative of using trucks to transport 15 percent of the limestone and rail to transport 85 percent of the limestone.
- Commenters expressed opposition to the trucking-only alternative, noting the possible adverse environmental effects of this alternative.
- Commenters stated that alternatives should not be excluded from further consideration because a grade-separated crossing or other mitigation could be required.
- Commenters stated that perhaps a quarry site could be found that would not impact the major regional water supply and would have a shorter distance to a rail line.
- Commenters requested that all alternatives be equally addressed and compared in the EIS and that reasonable and viable alternatives be analyzed in the same manner as the proposed action.
- Commenters questioned the financial relationship between the quarry and the mitigation or exclusion of certain alternatives.

Response: The Council on Environmental Quality's (CEQ) guidance and regulations for implementing NEPA set forth an agency's responsibilities for analyzing alternatives to the proposed action in the environmental review process. An agency must evaluate all reasonable alternatives and the no-action alternative, and briefly discuss reasons for eliminating any unreasonable alternatives from further consideration. 42 U.S.C. 4332(2)(C)(iii). The reasonable alternatives considered in detail, including the proposed action, should be analyzed in enough depth for reviewers to evaluate their comparative merits.[2] The goals of an action delimit the universe of the action's reasonable alternatives.[3] The objectives must not be defined so narrowly that all alternatives are effectively foreclosed, nor should they be defined so broadly that an "infinite number" of alternatives might further the goals and the project would "collapse under the weight" of the resulting EIS analysis.[4] An alternative that does not effectuate the project's purposes is, by definition, unreasonable, and the agency need not evaluate it in detail.[5]

SEA appreciates the comments received regarding possible additional alternatives to the proposed project. As required by NEPA, the DEIS will

[2] *See* 40 CFR 1502.14.

[3] *Citizens Against Burlington* v. *Busey*, 938 F.2d 190, 195 (D.C. Cir. 1990).

[4] *Id.* at 196. *See also Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 FR 18026 (1981), Question 1.

[5] *Ringsred* v. *Dole*, 828 F.2d 1300, 1304 (8th Cir. 1987).

include appropriate analysis of all reasonable alternatives, and the no-action alternative, and discuss reasons for eliminating any unreasonable alternatives from detailed study. SEA is currently gathering information regarding the old rail route that led to the Medina Dam and will include an appropriate discussion of this alternative in the DEIS. SEA has also requested more information from SGR regarding the feasibility of the trucking-only alternative, as discussed below. SEA will assess the potential environmental impacts of this alternative, as appropriate, in the DEIS.

Feasibility of Truck Transportation

• Commenters questioned the feasibility of using truck transportation as an alternative to rail transportation.

Response: SGR has submitted information stating that if the rail line were not built, VCM would use trucks to transport the limestone from the quarry to the UP rail line. SEA has requested additional information from SGR regarding the feasibility of using trucks as an alternative to rail. SEA will discuss this issue in the DEIS.

B. Purpose and Need

• Commenters questioned the purpose and need for SGR's proposed rail line.

• Commenters requested that SEA obtain information regarding the financial dependence of the rail line on the quarry and the profitability of rail versus truck transport, as well as information on when the quarry may need rail transport to be profitable.

• Commenters questioned the economic feasibility of developing and operating the quarry without the rail line.

Response: SGR has stated that the primary purpose of rail line construction and operation would be to transport limestone from VCM's quarry to the UP rail line, for shipment to markets in the Houston area, as well as other markets in the Southeast, Gulf Coast, and Rio Grande Valley regions of Texas. SGR would also hold itself out as a common carrier and provide service to other industries that might locate in the area in the future. According to SGR, if the proposed rail line were not built, VCM would use trucks to transport the limestone to the UP rail line, which would require the construction of a remote truck-to-rail loading facility near the UP rail line, and the number of truck trips that would be required to transport the limestone would far exceed the number of train trips. As stated above, SEA has requested additional information from SGR regarding the feasibility of using truck transportation as an alternative to rail transportation. SEA will discuss this issue in the DEIS. SEA does not believe that a detailed cost-benefit analysis of rail versus truck transport (if feasible) would be appropriate. CEQ regulations state that in an EIS "the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations." [6]

C. Transportation and Traffic Safety

Grade Crossings

• Commenters expressed concern about at-grade rail crossings of roadways and requested that a grade-separated crossing be built for the crossings of FM 2676 and County Road 4516, suggesting that the EIS include a study by the Texas Department of Transportation (TxDOT) regarding a grade-separated crossing of FM 2676. Commenters stated that FM 2676 and County Road 4516 are heavily traveled and County Road 4516 has been studied for state highway status; FM 2676 is the only road Quihi, Texas residents can use to reach Hondo, and FM 2676 and County Road 4516 are the only roads these residents can use to reach San Antonio. Commenters stated that County Road 4516 has curves and hills and an at-grade rail line crossing of this road would be dangerous, because of the low visibility, proximity to Cherry Creek, and the unstable condition of the roadbed.

• Commenters stated that alternative routes for the roads that would be crossed are miles out of the way.

• Commenters requested that the effects of rail operations on transportation and traffic safety be studied with projections made for the next 50 years, taking into consideration population growth patterns and the additional traffic generated by the quarry and resulting industrialization.

• Commenters expressed concern about traffic delays for emergency vehicles, school buses, and regular traffic, and requested that the EIS include a study of traffic delays and stopping distance times for trains.

• Commenters requested that the EIS study the risks of rail-related accidents both with and without grade separations.

• Commenters stated that since no accident data exists for the new crossings, the EIS cannot use the familiar Federal Railroad Administration model that it has used in the past and will need to find some other way of conducting an analysis of risk of accidents.

• Commenters requested that the EIS use the most recent road traffic data available from TxDOT to analyze road traffic and grade crossing impacts and field verify the data to make sure that it is up to date and accurate.

• Commenters stated that SGR should have to pay for the costs of the crossings, not local taxpayers.

• Commenters requested that the EIS consider the costs of replacing grade-level crossings with grade-separated crossings, if the crossings are initially constructed at-grade and then later changed.

• Commenters stated that at-grade rail crossings would not cause traffic hazards, due to the low level of traffic on the roadways, and accidents from derailment would be unlikely.

Response: As stated in the Draft Scope, the DEIS will assess the potential impacts of the proposed new rail line construction and operation on the existing transportation network in the project area, including vehicular delays at grade crossings; describe the potential for train derailments or accidents from proposed rail operations; and propose mitigative measures to minimize or eliminate potential project impacts to transportation and traffic safety, as appropriate. SEA appreciates the suggestions and concerns raised in the comment letters and will take these comments into consideration, as appropriate, in the environmental review of transportation and traffic safety issues in the EIS. Although SEA has been in consultation with TxDOT and will provide TxDOT a copy of the DEIS for review and comment, SEA cannot require TxDOT to undertake a study of a grade-separated crossing of FM 2676.

Analysis of Truck Traffic

Commenters requested that the EIS examine air, noise, and traffic congestion from the trucking-only alternative, as well as traffic safety concerns and roadway maintenance.

• Commenters suggested that a divided highway be built along the rail line going directly to U.S. Highway 90, and that VCM should be required to absorb the costs of any roadway upgrades, instead of local taxpayers.

• Commenters stated that the EIS assess the impacts from the increased traffic on area roadways that would occur regardless of whether the rail line were built (truck traffic from the quarry to local markets and traffic from quarry employee cars.)

Response: As stated above, SEA is continuing to gather information

[6] 40 CFR 1502.23.

regarding the feasibility of the trucking-only alternative and the appropriate level of analysis of the quarry. SEA will assess potential impacts from the trucking-only alternative and other quarry-generated traffic, as appropriate, in the EIS.

Pipeline Crossings

• Commenters requested that the EIS examine impacts of the proposed rail line crossing gas and oil pipelines.

Response: As stated in the Draft Scope, the DEIS will describe potential pipeline safety issues at rail/pipeline crossings as appropriate, and propose mitigative measures to minimize or eliminate potential project impacts to such crossings, as appropriate.

Other Issues

• Commenters requested that the EIS include information on whether rail cars would be parked or pre-positioned along the rail line and whether hazardous materials would be stored along the line.

• Commenters stated that fire routes would be needed.

• Commenters requested information on whether and where rail traffic would be switched when it reaches the UP rail line.

• Commenters stated that the analysis of rail traffic must include the level of traffic that would occur at full build-out (maximum production capacity) of the quarry.

Response: SEA appreciates these comments and will take these requests into consideration, as appropriate, in the environmental review of transportation and traffic safety issues.

D. Public Health and Worker Health and Safety

• Commenters requested that the dust-related impacts of the rail line construction and operation and quarry development and operation be examined to understand how people with lung diseases would be affected.

• Commenters stated that sources of food would be contaminated by dust from trains and trucks.

• Commenters stated that workers should be careful, since hunting activities are prevalent in the area.

• Commenters stated that cement could be manufactured at the quarry in the future, which could lead to health hazards, since there is a possible link between cement factories and Creutzfeldt-Jakob disease.

• Commenters stated that appropriate safety measures would include posting warning signs for construction hazards, fencing the right-of-way of the rail line, maintaining flashing lights and barrier-arms at grade crossings, and proper maintenance of the tracks and trains.

• Commenters requested information about possible spills of chemicals, diesel fuels, or any other hazardous materials being transported.

Response: As stated in the Draft Scope, the EIS will describe potential public health impacts from the proposed new rail line construction and operation, describe potential impacts to worker health and safety from the proposed new rail line construction and operation, and propose mitigative measures to minimize or eliminate potential project impacts to public health and worker health and safety, as appropriate. As stated above, SEA is continuing to gather information to determine the appropriate level of analysis of the quarry. SEA appreciates the suggestions and concerns raised in the comment letters and will take these comments into consideration, as appropriate, in the environmental review of public health and worker health and safety impacts.

E. Water Resources

Impacts to Groundwater

• The Edwards Aquifer Authority (EAA) submitted comments requesting that Impact Category 3.a. in the Draft Scope be changed to read as follows: "Describe the existing groundwater resources within the project area, such as aquifers and springs, and the potential impacts on these resources resulting from construction and operation of the proposed new rail line. Locate all water wells in the project area and identify the aquifer in which they are completed."

• Commenters stated that rail operations could contaminate the Edwards Aquifer and disturb natural water runoff. Commenters requested that the EIS examine the effect of the rail line on underground water supplies, including wells, the Leona Gravel aquifer and the Edwards Aquifer.

• Commenters stated that the EIS should study potential impacts from quarry development and operation to the Edwards Aquifer and compliance with the Edwards Aquifer Protection Plan.

• Commenters requested that the EIS study the present condition of the wells that are within two miles of the proposed quarry for documentation should the wells be damaged, as well as consider having an independent third party monitor wells for nitrate contamination and study VCM's policies regarding removing pollutants from wells.

• Commenters requested that the EIS include monitoring the quality and flow of all existing water wells within two miles of the quarry perimeter and that VCM install permanent water monitoring stations around the quarry for periodic testing by unbiased certified water quality testing laboratories, which would be paid for by VCM.

• Commenters questioned whether test wells should be required to detect any contamination or damage to the Edwards Aquifer or the Leona Gravel Aquifer and suggested that seismographs be installed in the area for several miles.

• Commenters requested that the EIS examine impacts to springs in the area, including the main spring that supplies water to Quihi Creek from County Road 4512.

• Commenters said that impacts to agricultural water pipelines should be examined, as well as impacts to water tanks.

• Commenters stated that dust from rail operations would pollute waterways and shallow water wells.

• Commenters requested that the EIS study impacts to water quality from quarry blasting and mining activities and impacts to water quality from chemicals used at the quarry.

• Commenters stated that the EIS should study the lowering of the water table due to quarry excavation.

• Commenters requested information regarding the exact location of the fuel storage area to determine whether it is on the Edwards Aquifer recharge zone.

Response: As stated in the Draft Scope, the EIS will describe the existing groundwater resources within the project area, such as aquifers and springs, and the potential impacts on these resources resulting from construction and operation of the proposed new rail line. As indicated above, SEA is continuing to gather information to determine the appropriate level of analysis of the quarry. SEA appreciates the suggestions and concerns raised in the comment letters and will take these comments into consideration, as appropriate, in the environmental review of groundwater resources. SEA will also provide the EAA with a copy of the DEIS for review and comment.

Creek Crossings and Flooding Concerns

• Commenters stated that the area is prone to flash flooding events and residents are greatly concerned about impacts from the rail line on flooding.

• Commenters expressed concern about the type of rail crossings at creeks. Commenters indicated that crossings would be likely to create flooding

hazards and could lead to the destruction of homes, historic resources, and other facilities and establishments.

• Commenters requested that a full flood analysis be performed for all rail routes.

• Commenters stated that analysis of potential flood impacts should be an integral part of the elimination of alternatives from consideration, and such analysis should include detailed modeling. Such modeling should include a basin model (defining the watershed with all of its paramenters), a design rainfall (the statistical level of rainfall over a given time span), a runoff output, a water surface elevation, and floodplain analysis. The most up-to-date methodology should be used and commenters recommended employing certain specific methodology that is currently being used throughout Texas. Reliance on Federal Emergency Management Agency (FEMA) floodplain maps would not be sufficient, since these maps have not been updated since 1980 and modeling technology would likely lead to different results.

• Commenters requested that the crossing of Quihi Creek be elevated to prevent water from being impounded, and to prevent flooding impacts to County Road 365, nearby homes and historic structures. Commenters stated that residents are trapped in their homes two or three times per year due to the flooding of Quihi Creek, and the rail crossing of the creek would increase these flooding problems.

• Commenters requested that the EIS compare the use of trestles to the use of wide span bridges with respect to flooding and other surface water issues.

• Commenters questioned how many trestle bridges SGR could afford to build.

• Commenters expressed concern that the wooden trestles, pilings, cross ties and piers to be used in the rail line construction would be treated with creosote or pressure-treated arsenic based chemicals, which would introduce toxic chemicals into the soil and water.

• Commenters expressed concern that railroad berms would cause flooding hazards.

• Commenters stated that the EIS should include all relevant flood data, including data collected by the EAA, the U.S. Army Corps of Engineers (Corps), and FEMA.

• Commenters stated that the rail line would cause increased water flow, which would lead to erosion problems.

• Commenters requested information on the conditions of roadways after flooding, and the amount of time and money needed to restore roadways to pre-flood conditions.

• Commenters requested that the EIS conduct detailed analysis of flooding impacts from quarry development and operations and disclose where there would be alterations of and additions to runoff flows. Commenters questioned what the buffer plan would be for the streams in each quarry development phase, whether any streams would be filled at the quarry, and how drainage would be handled from the excavated areas of the quarry. Commenters requested that detailed flood modeling be done to determine the flooding impact of increased runoff entering the streams from the quarry and whether the construction of a detention pond at the quarry site to decrease peak flood flows would be a necessary or appropriate mitigation tool.

• Commenters stated that the area is generally dry and flooding in the area is rare.

Response: As stated in the Draft Scope, the EIS will describe the existing surface water resources within the project area, including watersheds, streams, rivers, and creeks, and the potential impacts on these resources resulting from construction and operation of the proposed rail line; describe the existing regulatory requirements that exist to protect stream and river crossings (including floodplains) in the event the proposed line is constructed and operated, water quality, and erosion control; and propose mitigative measures to minimize or eliminate potential project impacts to water resources, as appropriate. As stated above, SEA is continuing to gather information to determine the appropriate level of analysis of the quarry. SEA appreciates the suggestions and concerns raised in the comment letters and will take these comments into consideration, as appropriate, in the environmental review of surface water resources (including creek crossings and flooding concerns). SEA has consulted with EAA, the Corps, and FEMA and will provide these agencies a copy of the DEIS for review and comment.

Wetlands and U.S. Army Corps of Engineers' Permits

• The Corps stated that a Corps permit pursuant to Section 404 of the Clean Water Act could be required for the proposed rail line construction. The Corps provided specific information regarding permitting requirements and procedures, and requested that impacts to streams, wetlands, and other waters of the United States be minimized.

• Commenters stated that the EIS should include a map of both jurisdictional and nonjurisdictional wetlands in the area of each alternative and indicate the volume and area of and map the stream fills necessary for bridge construction. Commenters suggested that the entire wetlands delineation be included as an appendix to the EIS.

Response: The location and nature of the creek crossings will determine whether a Section 404 Corps permit would be required. Thus, a determination by the Corps regarding permitting requirements would likely be made after completion of the environmental review process and only if the Board's final decision approves SGR's proposal to construct and operate the rail line along a route where the Section 404 permitting requirements would be triggered. However, SEA will provide the Corps a copy of the DEIS for review and comment.

As stated in the Draft Scope, the EIS will describe existing wetlands in the project area and potential impacts on these resources resulting from construction and operation of the proposed new rail line; describe the permitting requirements that are appropriate for the proposed new rail line construction and operation regarding wetlands, stream and river crossings (including floodplains), water quality, and erosion control; and propose mitigative measures to minimize or eliminate potential project impacts to water resources, as appropriate. As stated above, SEA is continuing to gather information to determine the appropriate level of analysis of the quarry. SEA appreciates the comments received and will take them into consideration, as appropriate, in the environmental review of wetlands and other water resources.

F. Biological Resources

• The U.S. Fish and Wildlife Service (FWS) submitted comments stating that the proposed rail line may impact two endangered species, the golden-cheeked warbler (*Dendroica chrysoparia*) and the black-capped vireo (*Vireo atricapillus*). FWS requested information including habitat assessment and survey results to determine the presence of these species in the rail loading area on the proposed quarry site.

• Commenters expressed concern about impacts to cattle and wildlife. Commenters expressed concern about impacts to songbirds that nest in the area. Commenters stated the rail line would destroy blue bonnets, wine cups, agaritas, and cactus, and affect rabbits, racoons, squirrels, quail, doves, deer, bass, floridas, shad, and catfish.

• Commenters requested that the EIS include a detailed assessment of the actual types of plants and animals that are present in the project area, based on field surveys that focus on streambeds, riparian areas, and bridge construction areas.

• Commenters stated that the EIS should study how the rail line would change water flow patterns and impact fish, birds, bobcats, deer, crayfish, and other animals that depend on streams in the area.

• Commenters stated that SEA should undertake a Biological Assessment (BA) of both the quarry and the rail line, pursuant to the requirements of Section 7 of the Endangered Species Act (ESA), and that the phased approach that Vulcan has developed to conduct field surveys of the quarry area violates the ESA.

• Commenters stated that SEA does not need to undertake a BA of the quarry.

• Commenters stated that three years of focused counting of endangered species along the rail line alternatives be conducted to prepare a sufficient BA. The BA should be included in the EIS for public review and comment.

• Commenters requested that the EIS study the migration of birds to and from Mexico and how the quarry and the rail line would comply with the Migratory Bird Treaty Act.

• Commenters requested that the EIS study impacts to nocturnal animals from the quarry operations.

• Commenters requested that the EIS study impacts from the quarry to bats, wild turkeys, and sources of food.

Response: SEA has consulted with FWS regarding its recommendations and the provisions of the ESA, and FWS has indicated that if the EIS includes the information specified at 50 CFR 402.12(f), a separate BA need not be prepared. SEA will ensure that the appropriate information is included in the DEIS for FWS" review and comment and review and comment by the public. As stated in the Draft Scope, the EIS will describe existing biological resources within the project area, including vegetative communities, wildlife and fisheries, and the Federal and state threatened or endangered species, and the potential impacts to these resources resulting from the proposed new rail line construction and operation, and propose mitigative measures to minimize or eliminate potential project impacts to biological resources, as appropriate. As stated above, SEA is continuing to gather information to determine the appropriate level of analysis of the quarry. SEA appreciates the suggestions and concerns raised in the comment letters and will take these comments into consideration, as appropriate, in the environmental review of biological resources.

G. Air Quality Impacts

• Commenters expressed concern about air pollution from rail operations.

• Commenters stated that transporting the limestone by rail would affect air quality less than transporting the limestone by trucks.

• Commenters suggested that the EIS assess air quality impacts from the quarry development and operation and the rail line construction and operation by modeling Particulate Matter 10 and Particulate Matter 2.5 and determining how far from the quarry site and rail line any impacts would occur. The EIS should also include calculations of the atmospheric particle formation that may occur from reactions with volatile organic compounds from the quarry development and operation and the rail line construction and operation. The information should be presented graphically and all assumptions used in the model should be disclosed. The EIS should also include an analysis of particulate emissions from uncovered rail cars.

• Commenters requested that VCM be required to provide dust abatement equipment at each dust emitting location and a minimum of eight air quality monitoring stations be installed around the proposed quarry perimeter for continuous air monitoring for a three year period prior to operating the quarry.

• Commenters requested that one air quality monitoring station be installed for each mile of rail line for continuous air monitoring for a three year period prior to operating the quarry.

• Commenters requested that the EIS study impacts on machinery from quarry-generated dust.

Response: As stated in the draft scope, the EIS will describe potential air quality impacts resulting from the proposed new rail line construction and operation and propose mitigative measures to minimize or eliminate potential project impacts to air quality, as appropriate. As stated above, SEA is continuing to gather information to determine the appropriate level of analysis of the quarry. SEA appreciates the suggestions and concerns raised in the comment letters and will take these comments into consideration, as appropriate, in the environmental review of air quality impacts.

H. Geology and Soils

• Commenters requested that the EIS conduct a survey of geologic and soil features in the area and consult with agencies with jurisdiction over the Edwards Aquifer to obtain an inventory of these features; the inventory should be presented in map form in the EIS.

• Commenters requested that the EIS include an evaluation of karst topography in the area as well as an analysis of construction and operation impacts to geology and soils. The EIS should be provided to agencies with jurisdiction over the Edwards Aquifer for review and concurrence.

• Commenters requested that the geologic impacts of water withdrawal from the quarry be examined.

• Commenters requested information on the depth of mining activities at the quarry in relation to the depth of the Edwards Aquifer.

• Commenters said the EIS should study the loss of top soil due to the rail line crossing creeks and flood zones.

• Commenters stated that soil erosion could be prevented by planting native grasses and shrubs.

Response: As stated in the Draft Scope, the EIS will describe the native soils and geology of the proposed project area; describe the existing karst features of the project area, if any, and the potential impacts to karst features from the proposed new rail line construction and operation; and propose mitigative measures to minimize or eliminate potential project impacts on soils and geology and to karst features, as appropriate. As stated above, SEA is continuing to gather information to determine the appropriate level of analysis of the quarry. SEA appreciates the suggestions and concerns raised in the comment letters and will take these comments into consideration, as appropriate, in the environmental review of geology and soils. SEA has consulted with and received comments from the EAA and will provide the EAA with a copy of the DEIS for review and comment.

I. Land Use

• Commenters expressed concern that the rail line would divide private property and ranches, including ranches that have been recognized as Texas Family Land Heritage properties, and adversely affect the operation of these ranches.

• Commenters stated that the rail line would divide farmland and destroy established soil erosion control systems, as well as divide hay fields and cattle pastures.

• Commenters suggested that SEA contact all of the landowners along each

rail route to determine where ranching, agriculture and hunting activities currently occur, where residences are located, and the distance of the residences from the rail line alternatives and quarry site. Each category of land use should be analyzed separately.

• Commenters questioned the use of condemnation authority or eminent domain to acquire land for the rail line and asked why Medina County should be required to support a project that is designed to meet the needs of distant places.

• Commenters requested information regarding impacts to vegetable farms.

• Commenters requested that the EIS study how weeds and vegetation would be controlled along railroad tracks and assess the use of pesticides.

• Commenters requested that the EIS consider how to prevent and control flash fires along the rail line during times of dry vegetation.

• Commenters requested that the EIS include a study of what will happen to the land on the quarry site after it has been mined.

• Commenters requested that the EIS study the destruction of homesteads from the quarry.

Response: As stated in the Draft Scope, the EIS will describe existing land use patterns within the project area and identify those land uses that would be potentially impacted by the proposed new rail line construction and operation; describe the potential impacts associated with the proposed new rail line construction and operation to land uses identified within the project area; and propose mitigative measures to minimize or eliminate potential project impacts to land use, as appropriate. As stated above, SEA is continuing to gather information to determine the appropriate level of analysis of the quarry. SEA appreciates the suggestions and concerns raised in the comment letters and will take these comments into consideration, as appropriate, in the environmental review of land use impacts.

J. Environmental Justice

• Commenters questioned the need for an environmental justice study and requested that the EIS consider the concerns of the majority of residents in the area.

• Commenters requested that a detailed environmental justice analysis be conducted for each alternative. According to commenters, Census 2000 data indicates that Medina County is 45.5 percent Hispanic.

Response: Executive Order No. 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," sets forth recommendations to Federal agencies for conducting environmental justice analyses. As stated in the Draft Scope, the EIS will describe the demographics of the communities potentially impacted by the construction and operation of the proposed new rail line; evaluate whether new rail line construction or operation would have a disproportionately high adverse impact on any minority or low-income group; and propose mitigative measures to minimize or eliminate potential project impacts on environmental justice communities of concern, as appropriate. As stated above, SEA is continuing to gather information to determine the appropriate level of analysis of the quarry. SEA appreciates the comments and will take these comments into consideration, as appropriate, in the environmental review of environmental justice issues.

K. Noise

• Commenters expressed concern about noise pollution from rail operations, particularly train whistles at crossings.

• Commenters requested that the EIS study the noise impacts of the rail interchange of the SGR rail line and the UP rail line at Dunlay, Texas.

• Commenters expressed concern about noise impacts to wildlife and cattle, as well as noise impacts to local churches.

• Commenters suggested that the following methodology be used for noise analysis: apply the nighttime weighting penalty if operations will occur at night; take background measurements on land crossed by rail alternatives and outside of the "buffer area" properties; locate all noise receptors; do computer modeling of noise from both the quarry and the rail line, accounting for all sources of rail construction, all sources of quarry construction and excavation, and all sources of noise at the quarry; disclose the results of the modeling as the cumulative noise impact, presenting all results graphically in the EIS and disclosing all modeling assumptions in the EIS; and discuss the rationale behind all mitigation measures or lack of mitigation measures.

• Commenters recommended that SGR be required to use the newly developed "Quiet Tracks" to reduce noise from train operations.

• Commenters requested that noise monitoring stations be installed around the proposed quarry perimeter for continuous monitoring for a three year period prior to operating the quarry or rail line.

• Commenters suggested that trucks should use noiseless "solar like" technology for signaling when they are moving and loading materials.

• Commenters stated that train operations would not affect schools, churches, parks or hospitals.

Response: As stated in the Draft Scope, the EIS will describe the existing noise environment of the project area and potential noise impacts from the proposed new rail line construction and operation, and propose mitigative measures to minimize or eliminate potential project impacts to noise receptors, as appropriate. As stated above, SEA is continuing to gather information to determine the appropriate level of analysis of the quarry. SEA appreciates the suggestions and concerns raised in the comment letters and will take these comments into consideration, as appropriate, in the environmental review of noise impacts.

L. Vibration

• Commenters requested that the EIS assess vibration impacts from train operations to wells, pipelines, water lines, springs, and old homes, as well as vibration impacts to sleep patterns and the gates at Medina Lake. Commenters requested that vibration impacts to the Medina Lake canals be studied.

• Commenters requested information about whether full trains or empty trains cause more vibrations, how far out vibration impacts would travel and whether vibrations would increase with added rail cars.

• Commenters expressed concern about vibration impacts to wildlife.

• Commenters requested that the EIS study vibration impacts from quarry blasting activities to nearby wells, septic tanks, open tanks of water for livestock, the Medina Dam (fault lines run from the quarry site to the dam), and historic structures.

Response: As stated in the Draft Scope, the EIS will describe the potential vibration impacts from the proposed new rail line construction and operation and propose mitigative measures to minimize or eliminate potential project impacts from vibration, as appropriate. As stated above, SEA is continuing to gather information to determine the appropriate level of analysis of the quarry. SEA appreciates the suggestions and concerns raised in the comment letters and will take these comments into consideration, as appropriate, in the environmental review of vibration impacts.

M. Recreation and Visual Resources

• Commenters requested that the EIS study impacts to the aesthetics of cultural resources.

• Commenters requested that the EIS study impacts to aesthetics from additional industry that may locate along the rail line and impacts to aesthetics from the quarry development and operation.

• Commenters stated that visitors desiring a nice drive in the county would be adversely impacted.

• Commenters stated that County Road 365 was originally the Upper Quihi Road and connected the homes of early Quihi settlers. A train crossing over County Road 365 would divide this historic district and would adversely affect the aesthetics of the area.

• Commenters stated that the quarry and the proposed rail line would affect stargazing activities. In particular, train operations over Alternative 1 would impact the activities of Trinity University Astronomy and Physics students.

• Commenters stated that quarry activities would cause light pollution.

• Commenters stated that the Quihi dance hall would be adversely affected, as well as fishing, swimming, family gatherings and hunting activities.

Response: As stated in the Draft Scope, the EIS will describe existing recreation and visual resources in the proposed project area and potential impacts to recreation and visual resources from construction and operation of the proposed new rail line, and propose mitigative measures to minimize or eliminate potential project impacts to recreation and visual resources, as appropriate. As stated above, SEA is continuing to gather information to determine the appropriate level of analysis of the quarry. SEA appreciates the suggestions and concerns raised in the comment letters and will take these comments into consideration, as appropriate, in the environmental review of recreation and visual resources.

N. Cultural Resources

• Commenters expressed interest in preserving cultural resources in the area and stated that numerous historic homes would be near the proposed rail line.

• Commenters requested that the areas of potential effect be defined for both rail construction and rail operation and impacts to cultural resources be thoroughly assessed, including flooding hazards, vibration from bridge construction, noise impacts, and aesthetic impacts.

• Commenters suggested that the option of creating buffer zones by the purchase of additional lands be explored.

• Commenters stated that County Road 4516 is a historic road and impacts to this road from a rail line crossing must be studied.

• Commenters requested that the EIS identify and document all the cultural, historic, and prehistoric sites in the area, as well as make recommendations to protect and preserve any sites that may be impacted by the rail line or the quarry.

• Commenters stated that approximately 60 historic homes and sites are in the area, and expressed concern about flooding impacts to these homes as well as impacts from blasting at the quarry.

• Commenters said the area may be eligible to become a Federal Historic District and stressed the importance of the preservation of the cultural resources of the area, including archeological sites.

• Commenters stated that two prehistoric tribal sites are in the area and more such sites could exist in the area as well.

• Commenters stated that the Schuele-Saathoff home that is listed on the National Register of Historic Places and is also a Texas State Historical Landmark would be impacted by train vibrations.

• Commenters stated that the proposed route would destroy portions of an old rock wall and the remaining wall would then be damaged by train vibrations.

• Commenters expressed concern that historic structures and homes would be adversely impacted by long term, low frequency ground vibration from rail operations.

• Commenters stated that First Lady Laura Bush recently recognized the Castroville, Texas area as a rich historical area.

• Commenters stated that cultural resources must be studied in detail by archeologists and historians who should conduct surface surveys, examine test excavations, and work with a geomorphologist, due to the unusual drainage of Quihi Creek.

• Commenters stated that two state archeological sites have the potential to be impacted by Alternative 3.

Response: As stated in the Draft Scope, the EIS will describe the cultural resources environment in the area of the proposed project and potential impacts to cultural resources from the proposed new rail line construction and operation; describe the ongoing NHPA Section 106 process for the proposed project; and propose mitigative measures to minimize or eliminate potential project impacts to cultural resources, as appropriate. As stated above, SEA is continuing to gather information to determine the appropriate level of analysis of the quarry. SEA is also developing a Draft Programmatic Agreement (PA), pursuant to 36 CFR 800.14(b), to govern part of the Section 106 process. Moreover, SEA has identified several tribes that may have interests in the project area and is formally inviting them to participate in the environmental review process and become official Section 106 consulting parties. The Draft PA will be made available for Section 106 consulting party and public review and comment in draft form as part of the DEIS. SEA appreciates the suggestions and concerns raised in the comment letters and will take these comments into consideration, as appropriate, in the environmental review of cultural resources.

O. Socioeconomics

• Commenters expressed concern about impacts from the quarry and the rail line to property values, impacts to hunting activities, and impacts to planned subdivisions.

• Commenters stated that there would be impacts to businesses that need quiet, rural settings to operate, such as sheep and goat embryo transplants.

• Commenters stated that the EIS should provide specific information regarding tax revenues, jobs and economics. This information should include whether any equipment would be owned or leased, whether any equipment would be subcontracted, and how the quarry and the rail would be taxed.

• Commenters requested that the EIS examine long term development impacts. According to commenters, the proposed rail line would physically divide Medina County and would directly influence the long-term growth of the county.

• Commenters requested that the EIS examine how residents would be protected or compensated for loss of health, quality of life, and livelihood from proposed quarry operations, and suggested that the EIS assess the costs from quarry operations to residents.

• Commenters requested that impacts to the Medina Oaks subdivision and Rocky Creek subdivision be studied.

• Commenters suggested that a fund be created to settle claims of loss due to quarry operations and a procedure be devised to adjudicate claims of loss due to quarry operations.

• Commenters expressed support for the economic development that would result from the quarry and the rail line, and stated that schools would benefit from the tax revenue generated by the quarry.

• Commenters stated that the quarry would bring more jobs to the county.

• Commenters stated that the rail line would increase property values because the availability of commercial transportation would make agricultural land more marketable.

Response: As stated in the Draft Scope, the EIS will describe the demographic characteristics of the project area and the current sources of income; describe the potential environmental impacts to employment and the local economy as a result of the proposed new rail line construction and operation; and propose mitigative measures to minimize or eliminate potential project adverse impacts to socioeconomic resources, as appropriate. As stated above, SEA is continuing to gather information to determine the appropriate level of analysis of the quarry. SEA appreciates the suggestions and concerns raised in the comment letters and will take these comments into consideration, as appropriate, in the environmental review of socioeconomic impacts.

P. Cumulative and Indirect Impacts

• Commenters requested that the EIS include a study of the cumulative effects of new industries that could be brought into the area by the quarry and the rail line, with a full cost/benefit study.

• Commenters requested that SEA's analysis of cumulative effects be conducted in the following manner: first identify the types of resources that could experience cumulative environmental impacts; then, for each resource, conduct an analysis of the additive effects of past, present, and reasonably foreseeable future actions to the no-action alternative (no quarry and no rail line) and to all possible combinations of action alternatives for the rail line and the quarry by adding their direct effects (using full build-out levels (maximum production capacity) of quarry and rail line operations).

• Commenters stated that presenting the cumulative impacts analysis in a matrix or table format would not be sufficient.

• Commenters stated that cumulative flood impacts may be significant and should be evaluated in as detailed a manner as direct flood impacts.

• Commenters stated that the cumulative vibration impacts from blasting at the quarry and train operations should be assessed.

• Commenters suggested that the EIS include a study of cumulative noise impacts from the following sources: rail shipments from expanded quarrying; added common carrier customers; and population expansion. The study should take into consideration winter north winds, prevailing southeast winds and temperature changes. Specific sources of noise include explosions from quarry operations, whistles, bells, warning signals, quarry loaders, trucks, conveyors, and crushers.

• Commenters requested that the cumulative impacts of industrialization along the rail line be studied and assessed for all categories of land use, including residential, hunting, ranching, and agriculture, as well as the combined impacts from the quarry and rail line on all land use categories. Commenters requested that the EIS make a determination of whether there would be a cumulatively negative effect to land values, and indicate precisely where any negative impacts would occur.

• Commenters requested that downstream air quality impacts of transporting limestone to distant cities be taken into consideration, particularly impacts to the Houston area, which has a nonattainment plan provision for railroads.

• Commenters requested that the EIS include a study of the capacity of UP rail lines to transport limestone into the already crowded rail traffic in the Houston/Galveston area.

• Commenters requested information on the final destination of the trains carrying the aggregate (rail yard or transloading facility or other). Commenters also requested that the EIS assess the road traffic impacts of the increased rail traffic in Houston, when combined with other reasonably foreseeable future actions.

• Commenters expressed concern over possible future uses of the rail line by other types of industries, such as chemical plants.

• Commenters stated that SEA should not undertake an analysis of the impacts on the national rail system resulting from traffic originating on SGR's rail line, since such analysis would be speculative and require guesswork.

Response: Cumulative impacts are the impacts on the environment which result from the incremental impact of the proposed action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such actions. 40 CFR 1508.7. In the Draft Scope, SEA stated that the EIS will address any identified potential cumulative impacts of the proposed new rail line construction and operation, as appropriate. As stated above, SEA is continuing to gather information to determine the appropriate level of analysis of the quarry, which, at a minimum, will be addressed as a cumulative impact. SEA appreciates the suggestions and concerns raised in the comment letters and will take these comments into consideration, as appropriate, in the environmental review of cumulative impacts.

Indirect impacts are impacts that are caused by the proposed action and are later in time or farther removed in distance, but are still reasonably foreseeable. 40 CFR 1508.8(b). In the Draft Scope, SEA stated that the EIS will address any identified potential indirect impacts of the proposed new rail line construction and operation, as appropriate. SEA appreciates the suggestions and concerns regarding potential indirect effects raised in the comment letters and will take these comments into consideration, as appropriate, in the environmental review of indirect impacts.

Q. Other Issues

Public Involvement

• Commenters stated that a meeting or a canvas of the area should be held to better accumulate public concerns.

• Commenters requested that the public be allowed to review and comment on the DEIS for a period of 60 days.

• Commenters requested that a public hearing with oral testimony be held no sooner than 45 days after the issuance of the DEIS. Commenters stated that the public hearing not be held between Thanksgiving and Christmas or on the Our Lady of Guadaloupe feast day. Commenters suggested holding the hearing on a Monday or Tuesday with an afternoon and evening session so that there would be no need for pre-registration. Commenters suggested holding the public hearing at the Bethany Lutheran Church Hall in Quihi, Texas or in a location in Hondo, Texas.

• Commenters stated that written communication is not adequate.

Response: SEA believes that the public has been provided with adequate opportunity to participate in the scoping process. SEA conducted an Open House in Hondo, Texas on June 12, 2003, and received over 100 comment letters in response to the Open House. SEA also received additional comment letters from the public regarding specific areas of concern. Based on the nature and extent of the numerous comment letters received, SEA determined that the effects of the proposed project on the

quality of the human environment are likely to be highly controversial, and that, thus, preparation of an EIS is appropriate. SEA then issued a Notice of Intent to Prepare an EIS (NOI) and Draft Scope for public review and comment.

SEA mailed the NOI and Draft Scope to over 200 parties, including Federal, state, and local agencies, tribes, elected officials, local organizations, and interested members of the public. The NOI described the EIS process and opportunities for public involvement. The Draft Scope incorporated the issues and concerns raised in the comment letters SEA had received thus far. SEA has received approximately 100 comment letters in response to the Draft Scope, which raise specific issues and concerns, as discussed in this notice.

SEA is currently preparing a DEIS for the project. The DEIS will address those environmental issues and concerns identified during the scoping process. It will also contain SEA's preliminary recommendations for environmental mitigation measures. Upon its completion, the DEIS will be made available for public and agency review and comment for at least 45 days. A public meeting will also be held during the comment period for the DEIS. The details of the public meeting, including the specific format, location, and date, will be available in the DEIS. SEA will then prepare a Final EIS (FEIS) that addresses the comments on the DEIS from the public and agencies. Then, in reaching its final decision in this case deciding whether to allow the exemption to become effective, the Board will take into account the DEIS, the FEIS, and all environmental comments that are received. In short, throughout the Board's process, there has and will continue to be ample opportunity for public participation and public comment.

Maps

- Commenters stated that detailed maps are needed for all potential rail routes.
- Commenters requested that the exact location of the proposed rail route and alternatives be released to the public at this time in Geographic Information System format.
- Commenters requested that the potential rail routes be staked and flagged in the field to assist public review of the routes.

Response: SEA appreciates the suggestions of the commenters and will take these comments into consideration, as appropriate, when preparing maps of the proposed project area. Appropriate maps will be included in the DEIS for public review and comment. SEA believes that requesting private landowners to maintain stakes and flags of the various rail routes on their properties would be unduly burdensome for these landowners and is not necessary for the environmental review process.

Other

- Commenters requested that the DEIS clearly present all methodology used to reach conclusions.
- Commenters stated that information should not be hidden from the administrative record and decisions regarding matters of agency discretion should be referenced and documented in the DEIS.
- Commenters stated that no analysis or information should appear in the FEIS that the public has not had a chance to comment on in a DEIS or a Supplemental EIS.

Response: SEA will ensure that all appropriate information for this proceeding is made available to the public, either as part of the EIS or separately as part of the administrative record. Environmental correspondence and other documents regarding this proceeding are already (and will continue to be) publicly available on the Board's Web site at *www.stb.dot.gov*. The EIS also will be available on the Board's Web site.

Final Scope of Study for the EIS: Proposed Action and Alternatives

The proposed project would involve the construction and operation of a single-track rail line to connect VCM's proposed quarry and UP's Del Rio subdivision line. The proposed rail line would extend about seven miles from the quarry site to approximately milepost 250 of the UP line, at a point near Dunlay, Texas. SGR would use the new rail line to transport limestone from the proposed quarry to the UP rail line, for shipment to markets in the Houston area, as well as other markets in the Southeast, Gulf Coast, and Rio Grande Valley regions of Texas. Although the primary purpose of the proposed construction is to provide rail service to the quarry site, SGR would hold itself out as a common carrier and provide service to other industries that might locate in the area in the future. SEA is continuing to gather information to determine the appropriate level of analysis of the quarry.

The alternatives that will be evaluated in detail in the EIS are (1) construction and operation of the proposed project along SGR's proposed alignment (including a rail loading facility, consisting of a loading loop or a series of parallel tracks, that would be constructed and operated on the quarry property and is not subject to the Board's jurisdiction), (2) three alternative rail routes, and (3) the no-action alternative. Other alternatives that may be evaluated in detail in the EIS, if SEA determines that they are reasonable and feasible, are (1) the old rail route leading to the Medina Dam, (2) the trucking-only alternative, and (3) any other alternatives SEA may identify in its appropriate analysis of the quarry. Depending on the appropriate level of analysis of the quarry, the no-action alternative may include the analysis of transportation of the limestone by truck from the proposed quarry to the UP rail line (if feasible).

Environmental Impact Analysis

Proposed New Construction

Analysis in the EIS will address the proposed activities associated with the construction and operation of the proposed new rail line and their potential environmental impacts, as appropriate. Because SEA has not yet determined the appropriate level of analysis of the quarry, SEA will not discuss the specifics of the environmental review of the quarry development and operation in this document. However, the EIS will include an appropriate discussion of the quarry.

Impact Categories

The EIS will address potential impacts from the proposed construction and operation of the new rail line on the human and natural environment. Impact areas addressed will include the effects of the proposal on transportation and traffic safety, public health and worker health and safety, water resources, biological resources, air quality, geology and soils (including any karst features), land use, environmental justice, noise, vibration, recreation and visual resources, cultural resources and socioeconomics. The EIS will include a discussion of each of these categories as they currently exist in the project area and will address the potential impacts from the proposed project on each category, as described below:

1. Transportation and Traffic Safety

The EIS will:

a. Describe the potential impacts of the proposed new rail line construction and operation on the existing transportation network in the project area, including vehicular delays at grade crossings.

b. Describe the potential for train derailments or accidents from proposed rail operations.

c. Describe potential pipeline safety issues at rail/pipeline crossings, as appropriate.

d. Propose mitigative measures to minimize or eliminate potential project impacts to transportation and traffic safety, as appropriate.

2. Public Health and Worker Health and Safety

The EIS will:

a. Describe potential public health impacts from the proposed new rail line construction and operation.

b. Describe potential impacts to worker health and safety from the proposed new rail line construction and operation.

c. Propose mitigative measures to minimize or eliminate potential project impacts to public health and worker health and safety, as appropriate.

3. Water Resources

The EIS will:

a. Describe the existing groundwater resources within the project area, such as aquifers and springs, and the potential impacts on these resources resulting from construction and operation of the proposed new rail line.

b. Describe the existing surface water resources within the project area, including watersheds, streams, rivers, and creeks, and the potential impacts on these resources resulting from construction and operation of the proposed new rail line.

c. Describe existing wetlands in the project area and the potential impacts on these resources resulting from construction and operation of the proposed new rail line.

d. Describe the permitting requirements that are appropriate for the proposed new rail line construction and operation regarding wetlands, stream and river crossings (including floodplains), water quality, and erosion control.

e. Propose mitigative measures to minimize or eliminate potential project impacts to water resources, as appropriate.

4. Biological Resources

The EIS will:

a. Describe the existing biological resources within the project area, including vegetative communities, wildlife and fisheries, and Federal and state threatened or endangered species and the potential impacts to these resources resulting from the proposed new rail line construction and operation.

b. Propose mitigative measures to minimize or eliminate potential project impacts to biological resources, as appropriate.

5. Air Quality Impacts

The EIS will:

a. Describe the potential air quality impacts resulting from the proposed new rail line construction and operation.

b. Propose mitigative measures to minimize or eliminate potential project impacts to air quality, as appropriate.

6. Geology and Soils

The EIS will:

a. Describe the native soils and geology of the proposed project area.

b. Describe the existing karst features of the project area, if any, and the potential impacts to karst features from the proposed new rail line construction and operation.

c. Propose mitigative measures to minimize or eliminate potential project impacts on soils and geology and to karst features, as appropriate.

7. Land Use

The EIS will:

a. Describe existing land use patterns within the project area and identify those land uses that would be potentially impacted by the proposed new rail line construction and operation.

b. Describe the potential impacts associated with the proposed new rail line construction and operation to land uses identified within the project area.

c. Propose mitigative measures to minimize or eliminate potential project impacts to land use, as appropriate.

8. Environmental Justice

The EIS will:

a. Describe the demographics of the communities potentially impacted by the construction and operation of the proposed new rail line.

b. Evaluate whether new rail line construction or operation would have a disproportionately high adverse impact on any minority or low-income group.

c. Propose mitigative measures to minimize or eliminate potential project impacts on environmental justice communities of concern, as appropriate.

9. Noise

The EIS will:

a. Describe the existing noise environment of the project area and potential noise impacts from the proposed new rail line construction and operation.

b. Propose mitigative measures to minimize or eliminate potential project impacts to noise receptors, as appropriate.

10. Vibration

The EIS will:

a. Describe the potential vibration impacts from the proposed new rail line construction and operation.

b. Propose mitigative measures to minimize or eliminate potential project impacts from vibration, as appropriate.

11. Recreation and Visual Resources

The EIS will:

a. Describe existing recreation and visual resources in the proposed project area and potential impacts to recreation and visual resources from construction and operation of the proposed new rail line.

b. Propose mitigative measures to minimize or eliminate potential project impacts to recreation and visual resources, as appropriate.

12. Cultural Resources

The EIS will:

a. Describe the cultural resources environment in the area of the proposed project and potential impacts to cultural resources from the proposed new rail line construction and operation.

b. Describe the ongoing NHPA section 106 process for the proposed project, and propose mitigative measures to minimize or eliminate potential project impacts to cultural resources, as appropriate.

13. Socioeconomics

The EIS will:

a. Describe the demographic characteristics of the project area and the current sources of income.

b. Describe the potential environmental impacts to employment and the local economy as a result of the proposed new rail line construction and operation.

c. Propose mitigative measures to minimize or eliminate potential project adverse impacts to socioeconomic resources, as appropriate.

14. Cumulative and Indirect Impacts

The EIS will:

a. Address any identified potential cumulative impacts of the proposed new rail line construction and operation, as appropriate. Cumulative impacts are the impacts on the environment which result from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such actions.

b. Address any identified potential indirect impacts of the proposed new rail line construction and operation, as appropriate. Indirect impacts are impacts that are caused by the action and are later in time or farther removed

in distance, but are still reasonably foreseeable.

Decided: April 30, 2004.

By the Board, Victoria Rutson, Chief, Section of Environmental Analysis.

Vernon A. Williams,

Secretary.

[FR Doc. 04–10441 Filed 5–6–04; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

April 28, 2004.

The Department of the Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before June 7, 2004 to be assured of consideration.

Internal Revenue Service IRS)

OMB Number: 1545–0042.

Form Number: IRS Form 970.

Type of Review: Extension.

Title: Application to Use LIFO Inventory Method.

Description: Form 970 is filed by individuals, partnerships, trusts, estates, or corporations to elect to use the LIFO inventory method or to extend the LIFO method to additional goods. The IRS uses Form 970 to determine if the election was properly made.

Respondents: Business or other for-profit, individuals or households.

Estimated Number of Respondents/ Recordkeepers: 3,000.

Estimated Burden Hours Respondent/ Recordkeeper:

Recordkeeping—7 hr., 53 min.

Learning about the law or the form—2 hr., 52 min.

Preparing and sending the form to the IRS—3 hr., 8 min.

Frequency of response: On occasion.

Estimated Total Reporting/ Recordkeeping Burden: 41,730 hours.

OMB Number: 1545–1070.

Regulation Project Numbers: TD 8223 Temporary, TD 8432 Final and Temporary, and TD 8657 Final and Temporary.

Type of Review: Extension.

Title:

TD 8223: Branch Tax;

TD 8432: Branch Profits Tax; and

TD 8657: Regulations on Effectively Connected Income and the Branch Profits Tax.

Description: The regulations explain how to comply with section 884, which imposes a tax on the earnings of a foreign corporation's branch that are removed from the branch, and which subject's interest paid by the branch, and certain interest deducted by the foreign corporation to tax.

Respondents: Business or other for-profit.

Estimated Number of Respondents/ Recordkeepers: 28,500.

Estimated Burden Hours Respondent/ Recordkeeper: 27 minutes.

Frequency of response: Annually.

Estimated Total Reporting/ Recordkeeping Burden: 12,694 hours.

OMB Number: 1545–1212.

Form Number: IRS Form 706–QDT.

Type of Review: Extension.

Title: U.S. Estate Tax Return for Qualified Domestic Trusts.

Description: Form 706–QDT is used by the trustee or the designated filer to compute and report the Federal estate tax imposed on qualified domestic trusts by Internal Revenue Code (IRC) section 2056A. IRS uses the information to enforce this tax and to verify that the tax has been properly computed.

Respondents: Individuals or households, business or other for-profit.

Estimated Number of Respondents/ Recordkeepers: 80.

Estimated Burden Hours Respondent/ Recordkeeper:

Recordkeeping—1 hr., 12 min.

Learning about the law or the form—42 min.

Preparing the form—1 hr., 30 min.

Copying, assembling, and sending the form to the IRS—1 hr., 3 min.

Frequency of response: Annually.

Estimated Total Reporting/ Recordkeeping Burden: 357 hours.

Clearance Officer: Glenn P. Kirkland (202) 622–3428, Internal Revenue Service, Room 6411–03, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Joseph F. Lackey, Jr. (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building,Washington, DC 20503.

Lois K. Holland,

Treasury PRA Clearance Officer.

[FR Doc. 04–10412 Filed 5–6–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

April 27, 2004.

The Department of the Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 11000, 1750 Pennsylvania Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before June 7, 2004 to be assured of consideration.

Internal Revenue Service (IRS)

OMB Number: 1545–0170.

Form Number: IRS Form 4466.

Type of Review: Extension.

Title: Corporation application for Quick Refund of Overpayment of Estimated Tax.

Description: Form 4466 is used by a corporation to file for an adjustment (quick refund) of overpayment of estimated income tax return for the tax year. This information is used to process the claim, so the refund can be issued.

Respondents: Business or other for-profit.

Estimated Number of Respondents/ Recordkeepers: 16,125.

Estimated Burden Hours Respondent/ Recordkeeper

Recordkeeping—4 hr., 4 min.

Learning about the law or the form—18 min.

Preparing, copying, and sending the form to the IRS—22 min.

Frequency of response: On occasion.

Estimated Total Reporting/ Recordkeeping Burden: 76,433 hours.

OMB Number: 1545–0213.

Form Number: IRS Form 5578.

Type of Review: Extension.

Title: Annual Certification of Racial Nondiscrimination for a Private School Exempt from Federal Income Tax.

Description: Form 5578 is used by private schools that do not file Schedule A (Form 990) to certify that they have a racially nondiscriminatory policy toward students as outlined in Revenue Procedure 75–50. The Internal Revenue Service uses the information to help ensure that the school is maintaining a nondiscriminatory policy in keeping with its exempt status.

Respondents: Not-for-profit institutions.

Estimated Number of Respondents/ Recordkeepers: 1,000.

Estimated Burden Hours Respondent/ Recordkeeper:

Recordkeeping—2 hr., 52 min.

Learning about the law or the form—24 min.

Preparing and sending the form to the IRS—27 min.

Frequency of response: Annually.

Estimated Total Reporting/ Recordkeeping Burden: 3,730 hours.

OMB Number: 1545–1308.

Regulation Project Number: PS–260–82 Final.

Type of Review: Extension.

Title: Election, Revocation, Termination, and Tax Effect of Subchapter S Status.

Description: Sections 1–1362 through 1.1362–7 of the Income Tax Regulations provide the specific procedures and requirements necessary to implement section 1362, including the filing of various elections and statements with the Internal Revenue Service.

Respondents: Individuals or households, business or other for-profit, farms.

Estimated Number of Respondents/ Recordkeepers: 133.

Estimated Burden Hours Respondent/ Recordkeeper: 2 hours, 25 minutes.

Frequency of response: On occasion.

Estimated Total Reporting/ Recordkeeping Burden: 322 hours.

OMB Number: 1545–1461.

Regulation Project Number: INTL–24–94 Final.

Type of Review: Extension.

Title: Taxpayer Identifying Numbers (TINs).

Description: This regulation relates to requirements for furnishing a taxpayer identifying number on returns, statements, or other documents. Procedures are provided for requesting a taxpayer identifying number for certain alien individuals for whom a social security number is not available. The regulation also requires foreign persons to furnish a taxpayer identifying number on their tax returns.

Respondents: Individuals or households.

Estimated Number of Respondents/ Recordkeepers: 1.

Estimated Burden Hours Respondent/ Recordkeeper: 1 hour.

Frequency of response: On occasion, annually.

Estimated Total Reporting/ Recordkeeping Burden: 1 hour.

OMB Number: 1545–1599.

Regulation Project Number: REG–208299–90 NPRM.

Type of Review: Extension.

Title: Allocation and Sourcing of Income and Deductions Among Taxpayers Engaged in a Global Dealing Operation.

Description: The information requested in sections 1.475(g)–2(b), 1.482–8(b)(3), (c)(3), (e)(5), (e)(6), (d)(3), and 1.863–3(h) is necessary for the Service to determine whether the taxpayer has entered into controlled transactions at an arm's length price.

Respondents: Business or other for-profit.

Estimated Number of Recordkeepers: 500.

Estimated Burden Hours Recordkeeper: 40 hours.

Estimated Total Recordkeeping Burden: 20,000 hours.

OMB Number: 1545–1859.

Notice Number: Notice 2004–11.

Type of Review: Extension.

Title: Research Credit Record Retention Agreements.

Description: The notice announces a pilot program in which the Internal Revenue Service and large and mid-size business taxpayers may enter into research credit recordkeeping agreements (RCRAs). If the taxpayer complies with the terms of RCRA, the Service will deem the taxpayer to satisfy the recordkeeping requirements of section 6001 for purposes of the credit for increasing research activities under section 41 of the Internal Revenue Code.

Respondents: Business or other for-profit.

Estimated Number of Respondents: 65.

Estimated Burden Hours Respondent: 18 hours.

Frequency of response: On occasion.

Estimated Total Reporting Burden: 1,170 hours.

OMB Number: 1545–1875.

Revenue Procedure Number: Revenue Procedure 2004–12.

Type of Review: Extension.

Title: Health Insurance Costs of Eligible Individuals.

Description: Revenue Procedure 2004–12 informs states how to elect a health program to be qualified health insurance for the purposes of the health coverage tax credit (HCTC) under section 35 of the Internal Revenue Code. The collection of information is voluntary. However, if a state does not make an election, eligible residents of the state may be impeded in their efforts to claim the HCTC.

Respondents: State, Local or Tribal Government.

Estimated Number of Respondents: 51.

Estimated Burden Hours Respondent: 30 minutes.

Frequency of response: Other (one-time election).

Estimated Total Reporting Burden: 26 hours.

OMB Number: 1545–1877.

Revenue Procedure Number: Revenue Procedure 2004–18.

Type of Review: Extension.

Title: Average Area Purchase Price Safe Harbors and Nationwide Purchase Prices under section 143.

Description: Revenue Procedure 2004–18 provides issuers of qualified mortgage bonds, as defined in section 143(a) of the Internal Revenue Code, and issuers of mortgage credit certificates, as defined in section 25(c), with (1) nationwide average purchase prices for residences located in the United States, and (2) average area purchase price safe harbors for residences located in statistical areas in each state, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, the Virgin Islands, and Guam.

Respondents: State, Local or Tribal Government.

Estimated Number of Recordkeepers: 60.

Estimated Burden Hours Recordkeeper: 15 minutes.

Estimated Total Recordkeeping Burden: 15 hours.

Clearance Officer: Glenn P. Kirkland, (202) 622–3428, Internal Revenue Service, Room 6411–03, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Joseph F. Lackey, Jr., (202) 395–7316, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Treasury PRA Clearance Officer.

[FR Doc. 04–10413 Filed 5–6–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Open Meeting of the Financial Literacy and Education Commission

AGENCY: Departmental Offices, Treasury.

ACTION: Notice of open meeting.

SUMMARY: This notice announces the second meeting of the Financial Literacy and Education Commission, established by the Financial Literacy and Education Improvement Act (Title V of the Fair and Accurate Credit Transactions Act of 2003).

DATES: The second meeting of the Financial Literacy and Education Commission will be held on Thursday, May 20, 2004, beginning at 10:30 a.m.

ADDRESSES: The Financial Literacy and Education Commission meeting will be held in the Cash Room at the U.S. Department of the Treasury, located at 1500 Pennsylvania Avenue, NW., Washington, DC. To be admitted to the Treasury building, an attendee must provide his or her name, organization, phone number, date of birth, and Social Security number to Verlene Joseph, Office of the Public Liaison, Department of the Treasury, by e-mail at verlene.joseph@do.treas.gov not later than 5 p.m. on Friday, May, 14 2004.

FOR FURTHER INFORMATION CONTACT: For additional information regarding admittance to the Treasury building, contact Verlene Joseph by e-mail at *verlene.joseph@do.treas.gov* or by telephone at (202) 622–1498 (not a toll-free number).

Additional information regarding the Financial Literacy and Education Commission and the Department of the Treasury's Office of Financial Education may be obtained through the Office of Financial Education's Web site at: *http://www.treas.gov/financialeducation.*

SUPPLEMENTARY INFORMATION: The Financial Literacy and Education Improvement Act, which is Title V of the Fair and Accurate Credit Transactions Act of 2003 (the "FACT Act") (Pub. L. 108–159), established the Financial Literacy and Education Commission (the "Commission") to improve financial literacy and education of persons in the United States. The Commission is composed of the Secretary of the Treasury and the head of the Office of the Comptroller of the Currency; the Office of Thrift Supervision; the Federal Reserve; the Federal Deposit Insurance Corporation; the National Credit Union Administration; the Securities and Exchange Commission; the Departments of Education, Agriculture, Defense, Health and Human Services, Housing and Urban Development, Labor, and Veterans Affairs; the Federal Trade Commission; the General Services Administration; the Small Business Administration; the Social Security Administration; the Commodity Futures Trading Commission; and the Office of Personnel Management. The Commission is required to hold meetings that are open to the public every four months, with its first meeting occurring within 60 days of the enactment of the FACT Act. The FACT Act was enacted on December 4, 2003.

The second meeting of the Commission, all of which will be open to the public, will be held in the Cash Room at the Department of the Treasury, 1500 Pennsylvania Avenue, NW., Washington, DC. The room will accommodate 80 members of the public. Seating is available on a first-come basis. Participation in the discussion at the meeting will be limited to Commission members and their staffs.

Dated: April 30, 2004.

Wayne A. Abernathy,

Assistant Secretary of the Treasury.

[FR Doc. 04–10475 Filed 5–6–04; 8:45 am]

BILLING CODE 4810–25–P

Corrections

Federal Register
Vol. 69, No. 89
Friday, May 7, 2004

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.

FEDERAL RESERVE SYSTEM

12 CFR Part 208

[Regulations H and Y; Docket No. R–1156]

Risk-Based Capital Guidelines; Capital Adequacy Guidelines; Capital Maintenance: Interim Capital Treatment of Consolidated Asset-Backed Comercial Paper Program Assets

Correction

In rule document 03–23756 beginning on page 56530 in the issue of Wednesday, October 1, 2003, make the following correction:

Appendix A to Part 208—[Corrected]

On page 56535, in the first column, in appendix A to part 208, in amendatory instruction 2.b.iii., in the last line, "section II. B" should read "section III. B".

[FR Doc. C3–23756 Filed 5–6–04; 8:45 am]
BILLING CODE 1505–01–D

Federal Register

Friday,
May 7, 2004

Part II

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Part 412

Medicare Program; Prospective Payment System for Long-Term Care Hospitals: Annual Payment Rate Updates and Policy Changes; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 412

[CMS–1263–F]

RIN 0938–AM84

Medicare Program; Prospective Payment System for Long-Term Care Hospitals: Annual Payment Rate Updates and Policy Changes

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

ACTION: Final rule.

SUMMARY: This final rule updates the annual payment rates for the Medicare prospective payment system (PPS) for inpatient hospital services provided by long-term care hospitals (LTCHs). The payment amounts and factors used to determine the updated Federal rates that are described in this final rule have been determined based on the LTCH PPS rate year. The annual update of the long-term care diagnosis-related group (LTC–DRG) classifications and relative weights remains linked to the annual adjustments of the acute care hospital inpatient diagnosis-related group system, and will continue to be effective each October 1. The outlier threshold for July 1, 2004 through June 30, 2005 is also derived from the LTCH PPS rate year calculations. In this final rule, we also are making clarifications to the existing policy regarding the designation of a satellite of a LTCH as an independent LTCH. In addition, we are expanding the existing interrupted stay policy and changing the procedure for counting days in the average length of stay calculation for Medicare patients for hospitals qualifying as LTCHs.

DATES: This final rule is effective July 1, 2004.

FOR FURTHER INFORMATION CONTACT:

Tzvi Hefter, (410) 786–4487 (General information).

Judy Richter, (410) 786–2590 (General information, transition payments, payment adjustments, and onsite discharges and readmissions, interrupted stays, co-located providers, and short-stay outliers).

Michele Hudson, (410) 786–5490 (Calculation of the payment rates, relative weights and case-mix index, market basket update, and payment adjustments).

Ann Fagan, (410) 786–5662 (Patient classification system).

Miechal Lefkowitz, (410) 786–5316 (High-cost outliers and budget neutrality).

Linda McKenna, (410) 786–4537 (Payment adjustments, interrupted stay, and transition period).

Kathryn McCann, (410) 786–7623 (Medigap).

Robert Nakielny, (410) 786–4466 (Medicaid).

SUPPLEMENTARY INFORMATION:

Availability of Copies and Electronic Access

Copies: To order copies of the **Federal Register** containing this document, send your request to: New Orders, Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250–7954. Specify the date of the issue requested and enclose a check or money order payable to the Superintendent of Documents, or enclose your Visa or Master Card number and expiration date. Credit card orders can also be placed by calling the order desk at (202) 512–1800 or by faxing to (202) 512–2250. The cost for each copy is $10. As an alternative, you can view and photocopy the **Federal Register** document at most libraries designated as Federal Depository Libraries and at many other public and academic libraries throughout the country that receive the **Federal Register**.

This **Federal Register** document is also available from the **Federal Register** online database through GPO Access, a service of the U.S. Government Printing Office. The Web site address is: *http://www.access.gpo.gov/nara/index.html.*

To assist readers in referencing sections contained in this preamble, we are providing the following table of contents.

Table of Contents

Acronyms

Because of the many terms to which we refer by acronym in this proposed rule, we are listing the acronyms used and their corresponding terms in alphabetical order below:

BBA Balanced Budget Act of 1997, Pub. L. 105–33
BBRA Medicare, Medicaid, and SCHIP [State Children's Health Insurance Program] Balanced Budget Refinement Act of 1999, Pub. L. 106–113
BIPA Medicare, Medicaid, and SCHIP [State Children's Health Insurance Program] Benefits Improvement and Protection Act of 2000, Pub. L. 106–554
CMS Centers for Medicare & Medicaid Services
COPS Medicare conditions of participation
DRGs Diagnosis-related groups
FY Federal fiscal year
HCRIS Hospital Cost Report Information System
HHA Home health agency
HIPAA Health Insurance Portability and Accountability Act, Pub. L. 104–191
IPPS Acute Care Hospital Inpatient Prospective Payment System
IRF Inpatient rehabilitation facility
LTC–DRG Long-term care diagnosis-related group
LTCH Long-term care hospital
MedPAC Medicare Payment Advisory Commission
MedPAR Medicare provider analysis and review file
OSCAR Online Survey Certification and Reporting (System)
PPS Prospective Payment System
QIO Quality Improvement Organization (formerly Peer Review organization (PRO))
SNF Skilled nursing facility
TEFRA Tax Equity and Fiscal Responsibility Act of 1982, Public Law 97–248

I. Background

A. Legislative and Regulatory Authority

The Medicare, Medicaid, and SCHIP [State Children's Health Insurance Program] Balanced Budget Refinement Act of 1999 (BBRA) (Public Law 106–113) and the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA) (Public Law 106–554) provide for payment for both the operating and capital-related costs of hospital inpatient stays in long-term care hospitals (LTCHs) under Medicare Part A based on prospectively set rates. The Medicare prospective payment system (PPS) for LTCHs applies to hospitals described in section 1886(d)(1)(B)(iv) of the Social Security Act (the Act), effective for cost reporting periods beginning on or after October 1, 2002.

Section 1886(d)(1)(B)(iv)(I) of the Act defines a LTCH as "a hospital which has an average inpatient length of stay (as determined by the Secretary) of greater than 25 days." Section 1886(d)(1)(B)(iv)(II) of the Act also provides an alternative definition of LTCHs: specifically, a hospital that first received payment under section 1886(d) of the Act in 1986 and has an average inpatient length of stay (as determined by the Secretary) of greater than 20 days and has 80 percent or more of its annual Medicare inpatient discharges with a principal diagnosis that reflects a finding of neoplastic disease in the 12-month cost reporting period ending in FY 1997.

Section 123 of Public Law 106–113 requires the PPS for LTCHs to be a per discharge system with a diagnosis-related group (DRG) based patient classification system that reflects the differences in patient resources and costs in LTCHs while maintaining budget neutrality.

Section 307(b)(1) of Public Law 106–554, among other things, mandates that the Secretary shall examine, and may provide for, adjustments to payments under the LTCH PPS, including adjustments to DRG weights, area wage adjustments, geographic reclassification, outliers, updates, and a disproportionate share adjustment.

In a **Federal Register** document issued on August 30, 2002 (67 FR 55954), we implemented the LTCH PPS authorized under Public Law 106–113 and Public Law 106–554. This system uses information from LTCH patient records to classify patients into distinct long-term care diagnosis-related groups (LTC–DRGs) based on clinical characteristics and expected resource needs. Payments are calculated for each LTC–DRG and provisions are made for appropriate payment adjustments. Payment rates under the LTCH PPS are updated annually and published in the **Federal Register**.

The LTCH PPS replaced the reasonable cost-based payment system under the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Public Law 97–248, for payments for inpatient services provided by a LTCH with a cost reporting period beginning on or after October 1, 2002. (The regulations implementing the TEFRA (reasonable cost-based) payment provisions are located at 42 CFR part 413.) With the implementation of the prospective payment system for acute care hospitals authorized by the Social Security Amendments of 1983 (Public Law 98–21), which added section 1886(d) to the Act, certain hospitals, including LTCHs, were excluded from the PPS for acute care hospitals and were paid their reasonable costs for inpatient services subject to a per discharge limitation or target amount under the TEFRA system. For each cost reporting period, a hospital-specific ceiling on payments was determined by multiplying the hospital's updated target amount by the number of total current year Medicare discharges. The August 30, 2002 final rule further details payment policy under the TEFRA system (67 FR 55954).

In the August 30, 2002 final rule, we presented an in-depth discussion of the LTCH PPS, including the patient classification system, relative weights, payment rates, additional payments, and the budget neutrality requirements mandated by section 123 of Public Law 106–113. The same final rule that established regulations for the LTCH PPS under 42 CFR part 412, subpart O, also contained provisions related to covered inpatient services, limitation on charges to beneficiaries, medical review requirements, furnishing of inpatient hospital services directly or under arrangement, and reporting and recordkeeping requirements.

We refer readers to the August 30, 2002 final (67 FR 55954) rule for a comprehensive discussion of the research and data that supported the establishment of the LTCH PPS.

On June 6, 2003, we published a final rule in the **Federal Register** (68 FR 34122) that set forth the 2004 annual update of the payment rates for the Medicare PPS for inpatient hospital services furnished by LTCHs. It also changed the annual period for which the payment rates are effective. The annual updated rates are now effective from July 1 to June 30 instead of from October 1 through September 30. We refer to this time period as a "long-term care hospital rate year" (LTCH PPS rate year). In addition, we changed the publication schedule for these updates to allow for an effective date of July 1. The payment amounts and factors used to determine the annual update of the Federal rates are based on a LTCH PPS rate year. The annual update of the LTC–DRG classifications and relative weights are linked to the annual adjustments of the acute care hospital inpatient diagnosis-related groups and are effective each October 1.

B. Criteria for Classification as a LTCH

1. Classification as a LTCH

Under the existing regulations at § 412.23(e)(1) and (e)(2)(i), which

implement section 1886(d)(1)(B)(iv)(I) of the Act, to qualify to be paid under the LTCH PPS, a hospital must have a provider agreement with Medicare and must have an average Medicare inpatient length of stay of greater than 25 days. Alternatively, for cost reporting periods beginning on or after August 5, 1997, a hospital that was first excluded from the PPS in 1986, and can demonstrate that at least 80 percent of its annual Medicare inpatient discharges in the 12-month cost reporting period ending in FY 1997 have a principal diagnosis that reflects a finding of neoplastic disease must have an average inpatient length of stay for all patients, including both Medicare and non-Medicare inpatients, of greater than 20 days (§ 412.23(e)(2)(ii)).

Existing § 412.23(e)(3) provides that the average Medicare inpatient length of stay is determined based on all covered and noncovered days of stay of Medicare patients as calculated by dividing the total number of covered and noncovered days of stay of Medicare inpatients (less leave or pass days) by the number of total Medicare discharges for the hospital's most recent complete cost reporting period. Fiscal intermediaries verify that LTCHs meet the average length of stay requirements. We note that the inpatient days of a patient who is admitted to a LTCH without any remaining Medicare days of coverage, regardless of the fact that the patient is a Medicare beneficiary, will not be included in the above calculation. Because Medicare would not be paying for any of the patient's treatment, the patient is not a "Medicare inpatient" and data on the patient's stay would not be included in the Medicare claims processing systems. In order for both covered and noncovered days of a LTCH hospitalization to be included, for purposes of the average length of stay calculation, a patient admitted to the LTCH must have at least one remaining benefit day as described in § 409.61.

The fiscal intermediary's determination of whether or not a hospital qualifies as an LTCH is based on the hospital's discharge data from its most recent cost reporting period and is effective at the start of the hospital's next cost reporting period (§ 412.22(d)). If a hospital does not meet the length of stay requirement, the hospital may provide the intermediary with data indicating a change in the hospital's average length of stay by the same method for the period of at least 5 months of the immediately preceding 6-month period (§ 412.23(e)(3)(ii)). (See 68 FR 45464, August 1, 2003.)

Requirements for hospitals seeking classification as LTCHs that have undergone a change in ownership, as described in § 489.18, are set forth in § 412.23(e)(3)(iii).

LTCHs that exist as hospitals-within-hospitals or satellite facilities of LTCHs must also meet the criteria set forth in § 412.22(e) or § 412.22(h), respectively, for the LTCH to be excluded from the acute care hospital inpatient prospective payment system (IPPS) and paid under the LTCH PPS.

2. Hospitals Excluded From the LTCH PPS

The following hospitals are paid under special payment provisions, as described in § 412.22(c) and, therefore, are not subject to the LTCH PPS rules:

- Veterans Administration hospitals.
- Hospitals that are reimbursed under State cost control systems approved under 42 CFR Part 403.
- Hospitals that are reimbursed in accordance with demonstration projects authorized under section 402(a) of Public Law 90–248 (42 U.S.C. 1395b–1) or section 222(a) of Public Law 92–603 (42 U.S.C. 1395b–1 (note)) (statewide all-payer systems, subject to the rate-of-increase test at section 1814(b) of the Act).
- Nonparticipating hospitals furnishing emergency services to Medicare beneficiaries.

C. Transition Period for Implementation of the LTCH PPS

In the August 30, 2002 final rule, we provided for a 5-year transition period from reasonable cost-based reimbursement to fully Federal prospective payment for LTCHs (67 FR 56038). During the 5-year period, two payment percentages are to be used to determine a LTCH's total payment under the PPS. The blend percentages are as follows:

Cost reporting periods beginning on or after	Prospective payment federal rate percentage	Reasonable cost-based reimbursement rate percentage
October 1, 2002	20	80
October 1, 2003	40	60
October 1, 2004	60	40
October 1, 2005	80	20
October 1, 2006	100	0

D. Limitation on Charges to Beneficiaries

In the August 30, 2002 final rule, we presented an in-depth discussion of beneficiary liability under the LTCH prospective payment system (67 FR 55974–55975). Under § 412.507, as consistent with other established hospital prospective payment systems, a LTCH may not bill a Medicare beneficiary for more than the deductible and coinsurance amounts as specified under §§ 409.82, 409.83, and 409.87 and for items and services as specified under § 489.30(a), if the Medicare payment to the LTCH is the full LTC–DRG payment amount. However, under the LTCH PPS, Medicare will only pay for days for which the beneficiary has coverage until the short-stay outlier threshold is exceeded. (See section V.C.4.b. of this preamble.) Therefore, if the Medicare payment was for a short-stay outlier case (§ 412.529) that was less than the full LTC–DRG payment amount because the beneficiary had insufficient remaining Medicare days, the LTCH could also charge the beneficiary for services delivered on those uncovered days (§ 412.507).

Since the origin of the Medicare system, the intent of our regulations has been to set limits on beneficiary liability and to clearly establish the circumstances under which the beneficiary would be required to assume responsibility for payment, that is, upon exhausting benefits described in 42 CFR part 409, subpart F. The discussion in the August 30, 2002 final rule was not meant to establish rates or payments for, or define, Medicare-eligible expenses. While we regulate beneficiary liability for coinsurance and deductibles for hospital stays that are covered by Medicare, payments from Medigap insurers to providers for inpatient hospital coverage after Medicare benefits are exhausted are not regulated by us. Furthermore, regulations

beginning at § 403.200 and the 1991 National Association of Insurance Commissioners (NAIC) Model Regulation for Medicare Supplemental Insurance, which was incorporated by reference into section 1882 of the Act, govern the relationship between Medigap insurers and beneficiaries.

E. Health Insurance Portability and Accountability Act Compliance

We note that as of October 16, 2002, a LTCH that was required to comply with the Administrative Simplification Standards under the Health Insurance Portability and Accountability Act (HIPAA) (Pub. L. 104–191) and that had not obtained an extension in compliance with the Administrative Compliance Act (Pub. L. 107–105) is obligated to comply with the standards for submitting claim forms to the LTCH's Medicare fiscal intermediary (45 CFR 162.1002 and 45 CFR 162.1102). Beginning October 16, 2003, LTCHs that obtained an extension and that are required to comply with the HIPAA Administrative Simplification Standards must start submitting electronic claims in compliance with the HIPAA regulations cited above, among others.

II. Publication of Proposed Rulemaking

On January 30, 2004, we published a proposed rule in the **Federal Register** (69 FR 4754–4817) that set forth the proposed annual update of the payment rates for the Medicare prospective payment system (PPS) for inpatient hospital services provided by long-term care hospitals (LTCHs) for the 2005 LTCH PPS rate year. (The annual update of the LTC–DRG classifications and relative weights for FY 2005 remains linked to the annual adjustments of the acute care hospital inpatient DRG system, which will be published by August 1, and will be effective October 1, 2004.)

In the January 2004 LTCH PPS proposed rule, we discussed and clarified existing policies regarding the classification of a satellite facility, or a remote location, of a LTCH as an independent LTCH and proposed new policies for certain satellite facilities and remote locations. (See section V.C.8. of this preamble.) We also proposed to revise the existing interrupted stay policy applicable under the LTCH PPS. (See section V.C.4.c. of this preamble.)

We also proposed a threshold amount for outlier payments for the 2005 LTCH PPS rate year as discussed in section V.C.3.b. of this preamble. We also proposed a change in the procedure for counting the days in the inpatient average length of stay for hospitals to qualify as LTCHs, as discussed in section V.C.7. of this preamble.

We received a total of 14 timely items of correspondence containing multiple comments on the proposed rule. The major issues addressed by the commenters included: Clarification of our policy regarding satellite facilities and remote locations becoming independent LTCHS, determining average length of stay based on the number of days of care for only the patients that were discharged during the hospital's fiscal year, and expanding the existing interrupted stay policy to include any discharges up to and including 3 days and requiring the LTCH to pay for services "under arrangement" during the interrupted stay.

Summaries of the public comments received and our responses to those comments are described below under the appropriate subject heading.

III. Summary of the Major Contents of This Final Rule

In this final rule, we set forth the annual update to the payment rates for the Medicare 2005 LTCH PPS rate year and make other policy changes. The following is a summary of the major areas that we are addressing in this final rule:

A. Update Changes

- In section IV. of this preamble, we discuss the annual update of the LTC–DRG classifications and relative weights and specify that they remain linked to the annual adjustments of the acute care hospital inpatient DRG system, which are based on the annual revisions to the International Classification of Diseases, Ninth Revision, Clinical Modification (ICD–9–CM) codes effective each October 1.
- In sections VI. through IX. of this preamble, we specify the factors and adjustments used to determine the LTCH PPS rates that are applicable to the 2005 LTCH PPS rate year, including revisions to the wage index, the excluded hospital with capital market basket that will be applied to the current standard Federal rate to determine the prospective payment rates, the applicable adjustments to payments, the outlier threshold, the short-stay outlier policy for certain LTCHs, the transition period, and the budget neutrality factor.

B. Policy Changes

- In section V.C.4.c. of this preamble, we discuss our extension of the definition of an interruption of a stay to include an interruption in which the patient is discharged from the LTCH, and returns to the LTCH within 3 days of the original discharge.
- Under section V.C.7. of the preamble to this final rule, we specify the procedure for calculating a hospital's inpatient average length of stay for purposes of classification as a LTCH when covered and noncovered days of the stay involve admission in one cost reporting period and discharge in another cost reporting period.
- In section V.C.8. of this preamble, we discuss our clarification of the procedures under which a satellite facility or a remote location of a hospital must meet the statutory and regulatory requirements to qualify as a distinct LTCH. We also provide for a clarification of the regulation text that incorporates procedures that are already established. That is, in our discussion, we are putting forth a reminder that even though the regulations governing provider-based entities did not specifically address LTCHs at the time, these regulations have always been applicable to these providers.

C. Monitoring

In section X. of this preamble, we discuss our continuing monitoring efforts to evaluate the LTCH PPS.

D. Impact

In section XII. of this preamble, we set forth an analysis of the impact of the policy and payment rate changes in this final rule on Medicare expenditures and on Medicare-participating LTCHs and Medicare beneficiaries.

IV. Long-Term Care Diagnosis-Related Group (LTC–DRG) Classifications and Relative Weights

A. Background

Section 123 of Public Law 106–113 specifically requires that the PPS for LTCHs be a per discharge system with a DRG-based patient classification system reflecting the differences in patient resources and costs in LTCHs while maintaining budget neutrality. Section 307(b)(1) of Public Law 106–554 modified the requirements of section 123 of Public Law 106–113 by specifically requiring that the Secretary examine "the feasibility and the impact of basing payment under such a system [the LTCH PPS] on the use of existing (or refined) hospital DRGs that have been modified to account for different resource use of LTCH patients as well as the use of the most recently available hospital discharge data."

In accordance with section 307(b)(1) of Public Law 106–554 and § 412.515 of our existing regulations, the LTCH PPS uses information from LTCH patient

records to classify patient cases into distinct LTC–DRGs based on clinical characteristics and expected resource needs. The LTC–DRGs used as the patient classification component of the LTCH PPS correspond to the hospital inpatient DRGs in the IPPS. We apply weights to the existing hospital inpatient DRGs to account for the difference in resource use by patients exhibiting the case complexity and multiple medical problems characteristic of LTCHs.

In a departure from the IPPS, we use low volume LTC–DRGs (less than 25 LTCH cases) in determining the LTC–DRG weights, since LTCHs do not typically treat the full range of diagnoses as do acute care hospitals. In order to deal with the large number of low volume DRGs (all DRGs with fewer than 25 cases), we group low volume DRGs into 5 quintiles based on average charge per discharge. (A listing of the composition of low volume quintiles appears in the August 30, 2002 LTCH PPS final rule at 67 FR 55986.) We also take into account adjustments to payments for cases in which the stay at the LTCH is five-sixths of the geometric average length of stay and classify these cases as short-stay outlier cases. (A detailed discussion of the application of the Lewin Group model that was used to develop the LTC–DRGs appears in the August 30, 2002 LTCH PPS final rule at 67 FR 55978.)

B. Patient Classifications Into DRGs

Generally, under the LTCH PPS, Medicare payment is made at a predetermined specific rate for each discharge; that payment varies by the LTC–DRG to which a beneficiary's stay is assigned. Cases are classified into LTC–DRGs for payment based on the following six data elements:

(1) Principal diagnosis.
(2) Up to eight additional diagnoses.
(3) Up to six procedures performed.
(4) Age.
(5) Sex.
(6) Discharge status of the patient.

Upon the discharge of the patient from a LTCH, the LTCH must assign appropriate diagnosis and procedure codes from the International Classification of Diseases, Ninth Revision, Clinical Modification (ICD–9–CM). As of October 16, 2002, a LTCH that was required to comply with the HIPAA Administrative Simplification Standards and that had not obtained an extension in compliance with the Administrative Compliance Act (Pub. L. 107–105) is obligated to comply with the standards at 45 CFR 162.1002 and 45 CFR 162.1102. Completed claim forms are to be submitted to the LTCH's Medicare fiscal intermediary.

Medicare fiscal intermediaries enter the clinical and demographic information into their claims processing systems and subject this information to a series of automated screening processes called the Medicare Code Editor (MCE). These screens are designed to identify cases that require further review before assignment into a DRG can be made. During this process, the following types of cases are selected for further development:

- Cases that are improperly coded. (For example, diagnoses are shown that are inappropriate, given the sex of the patient. Code 68.6, Radical abdominal hysterectomy, would be an inappropriate code for a male.)
- Cases including surgical procedures not covered under Medicare. (For example, organ transplant in a nonapproved transplant center.)
- Cases requiring more information. (For example, ICD–9–CM codes are required to be entered at their highest level of specificity. There are valid 3-digit, 4-digit, and 5-digit codes. That is, code 136.3, Pneumocystosis, contains all appropriate digits, but if it is reported with either fewer or more than 4 digits, the claim will be rejected by the MCE as invalid.)
- Cases with principal diagnoses that do not usually justify admission to the hospital. (For example, code 437.9, Unspecified cerebrovascular disease. While this code is valid according to the ICD–9–CM coding scheme, a more precise code should be used for the principal diagnosis.)

After screening through the MCE, each claim will be classified into the appropriate LTC–DRG by the Medicare LTCH GROUPER. The LTCH GROUPER is specialized computer software based on the same GROUPER used by the IPPS. The GROUPER software was developed as a means of classifying each case into a DRG on the basis of diagnosis and procedure codes and other demographic information (age, sex, and discharge status). Following the LTC–DRG assignment, the Medicare fiscal intermediary determines the prospective payment by using the Medicare PRICER program, which accounts for hospital-specific adjustments. As provided for under the IPPS, we provide an opportunity for the LTCH to review the LTC–DRG assignments made by the fiscal intermediary and to submit additional information within a specified timeframe (§ 412.513(c)).

The GROUPER is used both to classify past cases in order to measure relative hospital resource consumption to establish the DRG weights and to classify current cases for purposes of determining payment. The records for all Medicare hospital inpatient discharges are maintained in the MedPAR file. The data in this file are used to evaluate possible DRG classification changes and to recalibrate the DRG weights during our annual update. DRG weights are based on data for the population of LTCH discharges, reflecting the fact that LTCH patients represent a different patient-mix than patients in short-term acute care hospitals.

C. Organization of DRGs

The DRGs are organized into 25 Major Diagnostic Categories (MDCs), most of which are based on a particular organ system of the body; the remainder involve multiple organ systems (such as MDC 22, Burns). Accordingly, the principal diagnosis determines MDC assignment. Within most MDCs, cases are then divided into surgical DRGs and medical DRGs. Surgical DRGs are assigned based on a surgical hierarchy that orders operating room (O.R.) procedures or groups of O.R. procedures by resource intensity. The GROUPER does not recognize all ICD–9–CM procedure codes as procedures that affect DRG assignment, that is, procedures which are not surgical (for example, EKG), or minor surgical procedures (for example, 86.11, Biopsy of skin and subcutaneous tissue).

The medical DRGs are generally differentiated on the basis of diagnosis. Both medical and surgical DRGs may be further differentiated based on age, sex, discharge status, and presence or absence of complications or comorbidities (CC). We note that CCs are defined by certain secondary diagnoses not related to, or not inherently a part of, the disease process identified by the principal diagnosis. (For example, the GROUPER would not recognize a code from the 800.0x series, Skull fracture, as a CC when combined with principal diagnosis 850.4, Concussion with prolonged loss of consciousness, without return to preexisting conscious level.) In addition, we note that the presence of additional diagnoses does not automatically generate a CC, as not all DRGs recognize a comorbid or complicating condition in their definition. (For example, DRG 466, Aftercare without History of Malignancy as Secondary Diagnosis, is based solely on the principal diagnosis, without consideration of additional diagnoses for DRG determination.)

In its June 2000 Report to Congress, MedPAC recommended that the

Secretary "* * * improve the hospital inpatient prospective payment system by adopting, as soon as practicable, diagnosis-related group refinements that more fully capture differences in severity of illness among patients." (Recommendation 3A, p. 63). We have determined it is not practical at this time to develop a refinement to inpatient hospital DRGs based on severity due to time and resource requirements. However, this does not preclude us from development of a severity-adjusted DRG refinement in the future. That is, a refinement to the list of comorbidities and complications could be incorporated into the existing DRG structure. It is also possible a more comprehensive severity adjusted structure may be created if a new code set is adopted. That is, if ICD–9–CM is replaced by ICD–10–CM (for diagnostic coding) and ICD–10–PCS (for procedure coding) or by other code sets, a severity concept may be built into the resulting DRG assignments. Of course any change to the code set would be adopted through the process established in the HIPAA Administrative Simplification Standards provisions.

D. Update of LTC–DRGs

For FY 2004, the LTC–DRG patient classification system was based on LTCH data from the FY 2002 MedPAR file, which contained hospital bills data from the December 2002 update. The patient classification system consisted of 518 DRGs that formed the basis of the FY 2004 LTCH PPS GROUPER. The 518 LTC–DRGs included two "error DRGs." As in the IPPS, we included two error DRGs in which cases that cannot be assigned to valid DRGs will be grouped. These two error DRGs are DRG 469 (Principal Diagnosis Invalid as a Discharge Diagnosis) and DRG 470 (Ungroupable). (See the August 1, 2001, Medicare Program final rule, Changes to the Hospital Inpatient Prospective Payment Systems and Rates and Costs of Graduate Medical Education; Fiscal Year 2002 Rates (66 FR 40062).) The other 516 LTC–DRGs are the same DRGs used in the IPPS GROUPER for FY 2004 (Version 21.0).

In the health care industry, annual changes to the ICD–9–CM codes are effective for discharges occurring on or after October 1 each year. Thus, the manual and electronic versions of the GROUPER software, which are based on the ICD–9–CM codes, are also revised annually and effective for discharges occurring on or after October 1 each year. As discussed earlier, the patient classification system for the LTCH PPS (LTC–DRGs) is based on the IPPS patient classification system (CMS–DRGs), which is updated annually and effective for discharges occurring on or after October 1 through September 30 each year. The updated DRGs and GROUPER software are based on the latest revision to the ICD–9–CM codes, which are published annually in the IPPS proposed rule and final rule. The new or revised ICD–9–CM codes are not used by the industry for either the IPPS or the LTCH PPS until the beginning of the next Federal fiscal year (effective for discharges occurring on or after October 1 through September 30). (The use of the ICD–9–CM codes in this manner is consistent with current usage and the HIPAA regulations.) October 1 is also when the changes to the CMS–DRGs and the next version of the GROUPER software becomes effective.

As indicated in the June 6, 2003 LTCH PPS and the August 1, 2003 IPPS final rules (68 FR 34122 and 68 FR 45376, respectively), we make the annual update to the LTCH PPS effective from July 1 through June 30 each year. As a result, the LTCH PPS uses two GROUPERS during the course of a 12-month period: One GROUPER for 3 months (from July 1 through September 30); and an updated GROUPER for 9 months (from October 1 through June 30). The need to use two GROUPERs is based upon the October 1 effective date of the updated ICD–9–CM coding system. As previously discussed, new ICD–9–CM codes may result in changes to the structure of the DRGs. In order for the industry to be on the same schedule (for both the IPPS and the LTCH PPS) for the use of the most current ICD–9–CM codes, it is necessary for us to apply two GROUPER programs to the LTCH PPS. LTCHs will continue to code diagnosis and procedures using the most current version of the ICD–9–CM coding system.

Currently, for Federal FY 2004, we are using Version 21.0 of the GROUPER software for both the IPPS and the LTCH PPS. Discharges beginning on October 1, 2003 and before October 1, 2004 (Federal FY 2004) are using Version 21.0 of the GROUPER software for both the IPPS and the LTCH PPS. Thus, changes to the CMS–DRGs (the DRGs on which the LTC–DRGs are based) and their relative weights, as well as the LTC–DRGs and their relative weights, that will be effective for October 1, 2004 through September 30, 2005, will be presented in the FY 2005 IPPS proposed rule that will be published in the **Federal Register** in the spring of 2004 and finalized in a final rule to be published by August 1, 2004. Accordingly, we will notify LTCHs of any revised LTC–DRG relative weights based on the final DRGs and the applicable GROUPER version for the IPPS that will be effective October 1, 2004.

E. ICD–9–CM Coding System

1. Uniform Hospital Discharge Data Set (UHDDS) Definitions

Because the assignment of a case to a particular LTC–DRG will help determine the amount that will be paid for the case, it is important that the coding is accurate. Classifications and terminology used in the LTCH PPS are consistent with the ICD–9–CM and the UHDDS, as recommended to the Secretary by the National Committee on Vital and Health Statistics ("Uniform Hospital Discharge Data: Minimum Data Set, National Center for Health Statistics, April 1980") and as revised in 1984 by the Health Information Policy Council (HIPC) of the U.S. Department of Health and Human Services.

We point out that the ICD–9–CM coding terminology and the definitions of principal and other diagnoses of the UHDDS are consistent with the requirements of the HIPAA Administrative Simplification Act of 1996 (45 CFR part 162). Furthermore, the UHDDS has been used as a standard for the development of policies and programs related to hospital discharge statistics by both governmental and nongovernmental sectors for over 30 years. In addition, the following definitions (as described in the 1984 Revision of the UHDDS, approved by the Secretary of Health and Human Services for use starting January 1986) are requirements of the ICD–9–CM coding system, and have been used as a standard for the development of the CMS–DRGs:

- Diagnoses include all diagnoses that affect the current hospital stay.
- Principal diagnosis is defined as the condition established after study to be chiefly responsible for occasioning the admission of the patient to the hospital for care.
- Other diagnoses (also called secondary diagnoses or additional diagnoses) are defined as all conditions that coexist at the time of admission, that develop subsequently, or that affect the treatment received or the length of stay or both. Diagnoses that relate to an earlier episode of care that have no bearing on the current hospital stay are excluded.
- All procedures performed will be reported. This includes those that are surgical in nature, carry a procedural risk, carry an anesthetic risk, or require specialized training.

We provide LTCHs with a 60-day window after the date of the notice of

the initial LTC–DRG assignment to request review of that assignment. Additional information may be provided by the LTCH to the fiscal intermediary as part of that review.

2. Maintenance of the ICD–9–CM Coding System

The ICD–9–CM Coordination and Maintenance (C&M) Committee is a Federal interdepartmental committee, co-chaired by the National Center for Health Statistics (NCHS) and CMS, that is charged with maintaining and updating the ICD–9–CM system. The C&M Committee is jointly responsible for approving coding changes, and developing errata, addenda, and other modifications to the ICD–9–CM to reflect newly developed procedures and technologies and newly identified diseases. The C&M Committee is also responsible for promoting the use of Federal and non-Federal educational programs and other communication techniques with a view toward standardizing coding applications and upgrading the quality of the classification system.

The NCHS has lead responsibility for the ICD–9–CM diagnosis codes included in the Tabular List and Alphabetic Index for Diseases, while CMS has lead responsibility for the ICD–9–CM procedure codes included in the Tabular List and Alphabetic Index for Procedures.

The C&M Committee encourages participation by health-related organizations in the above process and holds public meetings for discussion of educational issues and proposed coding changes twice a year at the CMS Central Office located in Baltimore, Maryland. The agenda and dates of the meetings can be accessed on the CMS Web site at: *http://www.cms.gov/paymentsystems/icd9.*

Section 503(a) of Public Law 108–173 includes a requirement for updating ICD–9–CM codes twice a year instead of the current process of annual updates on October 1 of each year. These requirements are included as part of the amendments to the Act relating to recognition of new medical technology under the IPPS. Section 503(a) amended section 1886(d)(5)(K) of the Act by adding a new clause (vii) which states that "Under the mechanism under this subparagraph, the Secretary shall provide for the addition of new diagnosis and procedure codes in April 1 of each year, but the addition of such codes shall not require the Secretary to adjust the payment (or diagnosis-related group classification) * * * until the fiscal year that begins after such date." Because this new statutory requirement would have a significant impact on health care providers, coding staff, publishers, system maintainers, software systems, among others, we are soliciting comments on our proposed provisions. The description of these proposed provisions will be published in the **Federal Register** in the FY 2005 IPPS proposed rule.

All changes to the ICD–9–CM coding system affecting DRG assignment are addressed annually in the IPPS proposed and final rules. Because the DRG-based patient classification system for the LTCH PPS is based on the IPPS DRGs, these changes also affect the LTCH PPS LTC–DRG patient classification system.

As discussed above, the ICD–9–CM coding changes that have been adopted by the C&M Committee become effective at the beginning of each Federal fiscal year, October 1. Regardless of the annual update of the LTCH PPS on July 1 of each year, coders will use the most current updated ICD–9–CM coding book, which is effective from October 1 through September 30 of each year. This means that coders and LTCHs that use the updated ICD–9–CM coding system will be on the same schedule (effective October 1) as the rest of the health care industry. The newest version of ICD–9–CM is not available for use until October 1 of each year, which is 5 months after the date that we publish the LTCH annual payment rate update final rule. The new codes on which the LTC–DRGs are based will go into effect and be available for use for discharges occurring on or after October 1 through September 30 of each year. This annual schedule of the revision to the ICD–9–CM coding system and the change of the ICD–9–CM coding books or electronic coding programs has been in effect since the adoption of Revision 9 of the ICD in 1979.

Of particular note to LTCHs are the invalid diagnosis codes (Table 6C) and the invalid procedure codes (Table 6D) located in the annual proposed and final rules for the IPPS. Claims with invalid codes are not processed by the Medicare claims processing system.

3. Coding Rules and Use of ICD–9–CM Codes in LTCHs

We emphasize the need for proper coding by LTCHs. Inappropriate coding of cases can adversely affect the uniformity of cases in each LTC–DRG and produce inappropriate weighting factors at recalibration. We continue to urge LTCHs to focus on improved coding practices. Because of concerns raised by LTCHs concerning correct coding, we have asked the American Hospital Association (AHA) to provide additional clarification or instruction on proper coding in the LTCH setting. The AHA will provide this instruction via their established process of addressing questions through their publication "Coding Clinic for ICD–9–CM." Written questions or requests for clarification may be addressed to the Central Office on ICD–9–CM, American Hospital Association, One North Franklin, Chicago, IL 60606. A form for the question(s) is available to be downloaded and mailed on AHA's Web site at: *www.ahacentraloffice.org.* In addition, current coding guidelines are available at the National Center for Health Statistics (NCHS) Web site: *www.cdc.gov/nchs.icd9.htm.*

In conjunction with the cooperating parties (AHA, the American Health Information Management Association (AHIMA), and NCHS), we reviewed actual medical records and are concerned about the quality of the documentation under the LTCH PPS, as was the case at the beginning of the IPPS. We fully believe that, with experience, the quality of the documentation and coding will improve, just as it did for the IPPS. As noted above, the cooperating parties have plans to assist their members with improvement in documentation and coding issues for the LTCHs through specific questions and coding guidelines. The importance of good documentation is emphasized in the revised ICD–9–CM Official Guidelines for Coding and Reporting (October 1, 2002): "A joint effort between the attending physician and coder is essential to achieve complete and accurate documentation, code assignment, and reporting of diagnoses and procedures. The importance of consistent, complete documentation in the medical record cannot be overemphasized. Without such documentation, the application of all coding guidelines is a difficult, if not impossible, task." (Coding Clinic for ICD–9–CM, Fourth Quarter 2002, page 115)

To improve medical record documentation, LTCHs should be aware that if the patient is being admitted for continuation of treatment of an acute or chronic condition, guidelines at Section I.B.10 of the Coding Clinic for ICD–9–CM, Fourth Quarter 2002 (page 129) are applicable concerning selection of principal diagnosis. To clarify coding advice issued in the August 30, 2002 final rule (67 FR 55979–55981), we would like to point out that at Guideline I.B.12, Late Effects, a late effect is considered to be the residual effect (condition produced) after the acute phase of an illness or injury has

terminated (Coding Clinic for ICD–9–CM, Fourth Quarter 2002, page 129). Regarding whether a LTCH should report the ICD–9–CM code(s) for an unresolved acute condition instead of the code(s) for late effect of rehabilitation, we emphasize that each case must be evaluated on its unique circumstances and coded appropriately. Depending on the documentation in the medical record, either a code reflecting the acute condition or rehabilitation could be appropriate in a LTCH.

Since implementation of the LTCH PPS, our Medicare fiscal intermediaries have been conducting training and providing assistance to LTCHs in correct coding. We have also issued manuals containing procedures as well as coding instructions to LTCHs and fiscal intermediaries. We will continue to conduct such training and provide guidance on an as-needed basis. We also refer readers to the detailed discussion on correct coding practices in the August 30, 2002 LTCH PPS final rule (67 FR 55979–55981). Additional coding instructions and examples will be published in Coding Clinic for ICD–9–CM.

F. Method for Updating the LTC–DRG Relative Weights

As discussed in the June 6, 2003 LTCH PPS final rule (68 FR 34131), under the LTCH PPS, each LTCH will receive a payment that represents an appropriate amount for the efficient delivery of care to Medicare patients. The system must be able to account adequately for each LTCH's case-mix in order to ensure both fair distribution of Medicare payments and access to adequate care for those Medicare patients whose care is more costly. Therefore, in accordance with § 412.523(c), we adjust the standard Federal PPS rate by the LTC–DRG relative weights in determining payment to LTCHs for each case.

Under this payment system, relative weights for each LTC–DRG are a primary element used to account for the variations in cost per discharge and resource utilization among the payment groups (§ 412.515). To ensure that Medicare patients who are classified to each LTC–DRG have access to an appropriate level of services and to encourage efficiency, we calculate a relative weight for each LTC–DRG that represents the resources needed by an average inpatient LTCH case in that LTC–DRG. For example, cases in a LTC–DRG with a relative weight of 2 will, on average, cost twice as much as cases in a LTC–DRG with a weight of 1.

As we discussed in the August 1, 2003 IPPS final rule (68 FR 45374–45384), the LTC–DRG relative weights effective under the LTCH PPS for Federal FY 2004 were calculated using the December 2002 update of FY 2002 MedPAR data and Version 21.0 of the CMS GROUPER software. We use total days and total charges in the calculation of the LTC–DRG relative weights.

By nature, LTCHs often specialize in certain areas, such as ventilator-dependent patients and rehabilitation and wound care. Some case types (DRGs) may be treated, to a large extent, in hospitals that have, from a perspective of charges, relatively high (or low) charges. Such distribution of cases with relatively high (or low) charges in specific LTC–DRGs has the potential to inappropriately distort the measure of average charges. To account for the fact that cases may not be randomly distributed across LTCHs, we use a hospital-specific relative value method to calculate relative weights. We believe this method removes this hospital-specific source of bias in measuring average charges. Specifically, we reduce the impact of the variation in charges across providers on any particular LTC–DRG relative weight by converting each LTCH's charge for a case to a relative value based on that LTCH's average charge. (See the August 1, 2003 IPPS final rule (68 FR 45376) for further information on the hospital-specific relative value methodology.)

In order to account for LTC–DRGs with low volume (that is, with fewer than 25 LTCH cases), we grouped those low volume LTC–DRGs into one of five categories (quintiles) based on average charges, for the purposes of determining relative weights. For FY 2004 based on the FY 2002 MedPAR data, we identified 173 LTC–DRGs that contained between 1 and 24 cases. This list of low volume LTC–DRGs was then divided into one of the five low volume quintiles, each containing a minimum of 34 LTC–DRGs (173/5 = 34 with 1 LTC–DRG as a remainder). Each of the low volume LTC–DRGs grouped to a specific quintile received the same relative weight and average length of stay using the formula applied to the regular LTC–DRGs (25 or more cases), as described below. (See the August 1, 2003 final rule (68 FR 45376–45380) for further explanation of the development and composition of each of the five low volume quintiles for FY 2004.)

After grouping the cases in the appropriate LTC–DRG, we calculated the relative weights by first removing statistical outliers and cases with a length of stay of 7 days or less. Next, we adjusted the number of cases in each LTC–DRG for the effect of short-stay outlier cases under § 412.529. The short-stay adjusted discharges and corresponding charges were used to calculate "relative adjusted weights" in each LTC–DRG using the hospital-specific relative value method described above. (See the August 1, 2003 final rule (68 FR 45376–45385) for further details on the steps for calculating the LTC–DRG relative weights.)

We also adjusted the LTC–DRG relative weights to account for nonmonotonically increasing relative weights. That is, we made an adjustment if cases classified to the LTC–DRG "with comorbidities (CCs)" of a "with CC"/"without CC" pair had a lower average charge than the corresponding LTC–DRG "without CCs" by assigning the same weight to both LTC–DRGs in the "with CC"/"without CC" pair. (See August 1, 2003 final rule, 68 FR 45381–45382.) In addition, of the 518 LTC–DRGs in the LTCH PPS for FY 2004, based on the FY 2002 MedPAR data, we identified 167 LTC–DRGs for which there were no LTCH cases in the database. That is, no patients who would have been classified to those DRGs were treated in LTCHs during FY 2002 and, therefore, no charge data were reported for those DRGs. Thus, in the process of determining the relative weights of LTC–DRGs, we were unable to determine weights for these 167 LTC–DRGs using the method described above. However, since patients with a number of the diagnoses under these LTC–DRGs may be treated at LTCHs beginning in FY 2004, we assigned relative weights to each of the 167 "no volume" LTC–DRGs based on clinical similarity and relative costliness to one of the remaining 351 (518–167 = 351) LTC–DRGs for which we were able to determine relative weights, based on the FY 2002 claims data. (A list of the no-volume LTC–DRGs and further explanation of their relative weight assignment can be found in the August 1, 2003 IPPS final rule (68 FR 45374–45385).)

Furthermore, for FY 2004, we established LTC–DRG relative weights of 0.0000 for heart, kidney, liver, lung, pancreas, and simultaneous pancreas/kidney transplants (LTC–DRGs 103, 302, 480, 495, 512 and 513, respectively) because Medicare will only cover these procedures if they are performed at a hospital that has been certified for the specific procedures by Medicare and presently no LTCH has been so certified. If in the future, however, a LTCH applies for certification as a Medicare-approved transplant center, we believe that the application and approval procedure would allow sufficient time for us to propose appropriate weights for the LTC–DRGs affected. At the

present time, though, we included these six transplant LTC–DRGs in the GROUPER program for administrative purposes. As the LTCH PPS uses the same GROUPER program for LTCHs as is used under the IPPS, removing these DRGs would be administratively burdensome.

As we stated in the August 1, 2003 IPPS final rule, we will continue to use the same LTC–DRGs and relative weights for FY 2004 until October 1, 2004. Accordingly, Table 3 in the Addendum to this final rule lists the LTC–DRGs and their respective relative weights and arithmetic mean length of stay that we will continue to use for the period of July 1, 2004 through September 30, 2004. (This table is the same as Table 3 of the Addendum to the August 1, 2003 IPPS final rule (68 FR 45650–45658), except that it includes the five-sixth of the average length of stay for short-stay outliers under § 412.529.) As we noted earlier, the final DRGs and GROUPER for FY 2005 that will be used for the IPPS and the LTCH PPS, effective October 1, 2004, will be presented in the IPPS FY 2005 proposed and final rule in the **Federal Register**.

Accordingly, we will notify LTCHs of the revised LTC–DRG relative weights for use in determining payments for discharges occurring between October 1, 2004 and September 30, 2005, based on the final DRGs and the applicable GROUPER version that will be published in the IPPS rule by August 1, 2004.

V. Changes to the LTCH PPS Rates and Changes in Policy for the 2005 LTCH PPS Rate Year

A. Overview of the Development of the Payment Rates

The LTCH PPS was effective for a LTCH's first cost reporting period beginning on or after October 1, 2002. Effective with that cost reporting period, LTCHs are paid, during a 5-year transition period, on the basis of an increasing proportion of the LTCH PPS Federal rate and a decreasing proportion of a hospital's payment under reasonable cost-based payment system, unless the hospital makes a one-time election to receive payment based on 100 percent of the Federal rate (see § 412.533). New LTCHs (as defined at § 412.23(e)(4)) are paid based on 100 percent of the Federal rate, with no phase-in transition payments.

The basic methodology for determining LTCH PPS Federal prospective payment rates is set forth in the regulations at §§ 412.515 through 412.532. Below we discuss the factors used to update the LTCH PPS standard Federal rate for the 2005 LTCH PPS rate year that will be effective for LTCHs discharges occurring on or after July 1, 2004 through June 30, 2005.

When we implemented the LTCH PPS in the August 30, 2002 final rule (67 FR 56029–56031), we computed the LTCH PPS standard Federal payment rate for FY 2003 by updating the best available (FY 1998 or FY 1999) Medicare inpatient operating and capital costs per case data, using the excluded hospital market basket.

Section 123(a)(1) of Public Law 106–113 requires that the PPS developed for LTCHs be budget neutral. Therefore, in calculating the standard Federal rate under § 412.523(d)(2), we set total estimated LTCH PPS payments equal to estimated payments that would have been made under the reasonable cost-based payment methodology had the PPS for LTCHs not been implemented. Section 307(a) of Public Law 106–554 specified that the increases to the hospital-specific target amounts and cap on the target amounts for LTCHs for FY 2002 provided for by section 307(a)(1) of Public Law 106–554 shall not be taken into account in the development and implementation of the LTCH PPS. Furthermore, as specified at § 412.523(d)(1), the standard Federal rate is reduced by an adjustment factor to account for the estimated proportion of outlier payments under the LTCH PPS to total LTCH PPS payments (8 percent). For further details on the development of the FY 2003 standard Federal rate, see the August 30, 2002 final rule (67 FR 56027–56037) and for the 2004 LTCH PPS rate year rate, see the June 6, 2003 final rule (68 FR 34122–34190). Under the existing regulations at § 412.523(c)(3)(ii), we update the standard Federal rate annually to adjust for the most recent estimate of the projected increases in prices for LTCH inpatient hospital services.

B. Update to the Standard Federal Rate for the 2005 LTCH PPS Rate Year

As established in the June 6, 2003 final rule (68 FR 34122), based on the most recent estimate of the excluded hospital with capital market basket, adjusted to account for the change in the LTCH PPS rate year update cycle, the LTCH PPS standard Federal rate effective from July 1, 2003 through June 30, 2004 (the 2004 LTCH PPS rate year) is $35,726.18.

In the discussion that follows, we explain how we developed the standard Federal rate for the 2005 LTCH PPS rate year. The standard Federal rate for the 2005 LTCH PPS rate year is calculated based on the update factor of 1.031. Thus, the standard Federal rate for the 2005 LTCH PPS rate year will increase 3.1 percent compared to the 2004 LTCH PPS rate year standard Federal rate.

1. Standard Federal Rate Update

Under § 412.523, the annual update to the LTCH PPS standard Federal rate must be equal to the percentage change in the excluded hospital with capital market basket (described in further detail below). As we discussed in the August 30, 2002 final rule (67 FR 56087), in the future we may propose to develop a framework to update payments to LTCHs that would account for other appropriate factors that affect the efficient delivery of services and care provided to Medicare patients. As we discussed in the January 30, 2004 proposed rule (69 FR 4762), because the LTCH PPS has only been implemented for less than 2 years (that is, for cost reporting periods beginning on or after October 1, 2002), we have not yet collected sufficient data to allow for the analysis and development of an update framework under the LTCH PPS. Therefore, we are not addressing an update framework for the 2005 LTCH PPS rate year in this final rule. However, we noted that a conceptual basis for the proposal of developing an update framework in the future can be found in Appendix B of the August 30, 2002 final rule (67 FR 56086–56090).

a. *Description of the market basket for LTCHs for the 2005 LTCH PPS rate year.* A market basket has historically been used in the Medicare program to account for price increases of the services furnished by providers. The market basket used for the LTCH PPS includes both operating and capital-related costs of LTCHs because the LTCH PPS uses a single payment rate for both operating and capital-related costs. The development of the LTCH PPS standard Federal rate is discussed in further detail in the August 30, 2002 final rule (67 FR 56027–56037).

Under the reasonable cost-based payment system, the excluded hospital market basket was used to update the hospital-specific limits on payment for operating costs of LTCHs. Currently, the excluded hospital market basket is based on operating costs from cost report data from FY 1997 and includes data from Medicare-participating long-term care, rehabilitation, psychiatric, cancer, and children's hospitals. Since LTCHs' costs are included in the excluded hospital market basket, this market basket index, in part, also reflects the costs of LTCHs. However, in order to capture the total costs (operating and capital-related) of LTCHs, we added a capital component

to the excluded hospital market basket for use under the LTCH PPS. We refer to this index as the excluded hospital with capital market basket.

As we discussed in the August 30, 2002 final rule (67 FR 56016 and 56086), beginning with the implementation of the LTCH PPS in FY 2003, the excluded hospital with capital market basket, based on FY 1992 Medicare cost report data, has been used for updating payments to LTCHs. In the June 6, 2003 final rule (68 FR 34137), we revised and rebased the excluded hospital with capital market basket, using more recent data, that is, using FY 1997 base year data beginning with the 2004 LTCH PPS rate year. (For further details on the development of the FY 1997-based LTCH PPS market basket, see the June 6, 2003 final rule (68 FR 34134–34137)).

In the August 30, 2002 LTCH PPS final rule (67 FR 56016 and 56085–56086), we discussed why we believe the excluded hospital with capital market basket provides a reasonable measure of the price changes facing LTCHs. However, as we discussed in the June 6, 2003 final rule (68 FR 34137), we have been researching the feasibility of developing a market basket specific to LTCH services. This research has 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 LTCHs. Based on this research, we did not develop a market basket specific to LTCH services.

As we also discussed in the June 6, 2003 final rule (68 FR 34137), our analysis of the Medicare cost reports indicates that the distribution of costs among major cost report categories (wages, pharmaceuticals, capital) for LTCHs is not substantially different from the 1997-based excluded hospital with capital market basket. Data on other major cost categories (benefits, blood, contract labor) that we would like to analyze were excluded by many LTCHs in their Medicare cost reports. An analysis based on only the data available to us for these cost categories presented a potential problem since no other major cost category weight would be based on LTCH data.

Furthermore, as we also discussed in that same final rule (68 FR 34137), we conducted a sensitivity analysis of annual percent changes in the market basket when the weights for wages, pharmaceuticals, and capital in LTCHs were substituted into the excluded hospital with capital market basket. Other cost categories were recalibrated using ratios available from the IPPS market basket. On average between FY 1995 and FY 2002, the excluded hospital with capital market basket shows increases at nearly the same average annual rate (2.9 percent) as the market basket with LTCH weights for wages, pharmaceuticals, and capital (2.8 percent). This difference is less than the 0.25 percentage point criterion that determines whether a forecast error adjustment is warranted under the IPPS update framework.

As we discussed in the January 30, 2004 proposed rule (69 FR 4763), we continue to believe that an excluded hospital with capital market basket adequately reflects the price changes facing LTCHs. We continue to solicit comments about issues particular to LTCHs that should be considered in relation to the FY 1997-based excluded hospital with capital market basket and to encourage suggestions for additional data sources that may be available. We received no comments on the proposed market basket for determining the LTCH PPS standard Federal rate for the 2005 LTCH PPS rate year. Accordingly, in this final rule, we are using the FY 1997-based excluded hospital with capital market basket as the LTCH PPS market basket for determining the update to the LTCH PPS standard Federal rate for the 2005 LTCH PPS rate year.

b. *LTCH market basket increase for the 2005 LTCH rate year.* As we discussed in the June 6, 2003 final rule (68 FR 34137), for LTCHs paid under the LTCH PPS, we stated that the 2004 rate year update applies to discharges occurring from July 1, 2003 through June 30, 2004. Because we changed the timeframe of the LTCH PPS standard Federal rate annual update from October 1 to July 1, as we explained in that same final rule, we calculated an update factor that reflected that change in the update cycle. For the update to the 2004 LTCH PPS rate year, we calculated the estimated increase between FY 2003 and the 2004 LTCH PPS rate year (July 1, 2003 through June 30, 2004). Accordingly, based on Global Insight's forecast of the revised and rebased FY 1997-based excluded hospital with capital market basket using data from the fourth quarter of 2002, we used a market basket update of 2.5 percent for the 2004 LTCH PPS rate year (68 FR 34138).

Consistent with our historical practice of estimating market basket increases based on Global Insight's forecast of the FY 1997-based excluded hospital with capital market basket using more recent data from the fourth quarter of 2003, in this final rule, we are using a 3.1 percent update to the Federal rate for the 2005 LTCH PPS rate year. In accordance with § 412.523, this update represents the most recent estimate of the increase in the excluded hospital with capital market basket for the 2005 LTCH PPS rate year.

2. Standard Federal Rate for the 2005 LTCH PPS Rate Year

In the June 6, 2003 final rule (68 FR 34140), we established a standard Federal rate of $35,726.18 for the 2004 LTCH PPS rate year based on the best available data and policies established in that final rule. In the January 30, 2004 proposed rule (69 FR 4763), for the 2005 LTCH PPS rate year, we proposed a standard Federal rate of $36,762.24 based on the proposed update of 2.9 percent. Since the proposed 2005 LTCH PPS rate year standard Federal rate was already adjusted for differences in case-mix, wages, cost-of-living, and high-cost outlier payments, we did not propose to make any additional adjustments in the standard Federal rate for these factors.

In this final rule, in accordance with § 412.523, we are establishing a standard Federal rate of $36,833.69 based on the most recent estimate of the LTCH PPS market basket of 3.1 percent. Since the standard Federal rate for the 2005 LTCH PPS rate year has already been adjusted for differences in case-mix, wages, cost-of-living, and high-cost outlier payments, we did not make any additional adjustments in the standard Federal rate for these factors.

C. Calculation of LTCH Prospective Payments for the 2005 LTCH PPS Rate Year

The basic methodology for determining prospective payment rates for LTCH inpatient operating and capital-related costs is set forth in § 412.515 through § 412.532. In accordance with § 412.515, we assign appropriate weighting factors to each LTC–DRG to reflect the estimated relative cost of hospital resources used for discharges within that group as compared to discharges classified within other groups. The amount of the prospective payment is based on the standard Federal rate, established under § 412.523, and adjusted for the LTC–DRG relative weights, differences in area wage levels, cost-of-living in Alaska and Hawaii, high-cost outliers, and other special payment provisions (short-stay outliers under § 412.529 and interrupted stays under § 412.531).

In accordance with § 412.533, during the 5-year transition period, payment is based on the applicable transition blend percentage of the adjusted Federal rate and the reasonable cost-based payment rate unless the LTCH makes a one-time

election to receive payment based on 100 percent of the Federal rate. A LTCH defined as "new" under § 412.23(e)(4) is paid based on 100 percent of the Federal rate with no blended transition payments (§ 412.533(d)). As discussed in the August 30, 2002 final rule (67 FR 56038), and in accordance with § 412.533(a), the applicable transition blends are as follows:

Cost reporting periods beginning on or after	Federal rate percentage	Reasonable cost-based payment rate percentage
October 1, 2002	20	80
October 1, 2003	40	60
October 1, 2004	60	40
October 1, 2005	80	20
October 1, 2006	100	0

Accordingly, for cost reporting periods beginning during FY 2004 (that is, on or after October 1, 2003, and before September 30, 2004), blended payments under the transition methodology are based on 60 percent of the LTCH's reasonable cost-based payment rate and 40 percent of the adjusted LTCH PPS Federal rate. For cost reporting periods that begin during FY 2005 (that is, on or after October 1, 2004 and before September 30, 2005), blended payments under the transition methodology will be based on 40 percent of the LTCH's reasonable cost-based payment rate and 60 percent of the adjusted LTCH PPS Federal rate.

1. Adjustment for Area Wage Levels

a. *Background.* Under the authority of section 307(b) of Public Law 106–554, we established an adjustment to account for differences in LTCH area wage levels under § 412.525(c) using the labor-related share estimated by the excluded hospital market basket with capital and wage indices that were computed using wage data from inpatient acute care hospitals without regard to reclassification under section 1886(d)(8) or section 1886(d)(10) of the Act. Furthermore, as we discussed in the August 30, 2002 final rule (67 FR 56015–56019), we established a 5-year transition to the full wage adjustment. The applicable wage index phase-in percentages are based on the start of a LTCH's cost reporting period as shown in the following table:

Cost reporting periods beginning on or after	Phase-in percentage of the full wage index
October 1, 2002	1/5th (20 percent)
October 1, 2003	2/5ths (40 percent)
October 1, 2004	3/5ths (60 percent)
October 1, 2005	4/5ths (80 percent)
October 1, 2006	5/5ths (100 percent)

For example, for cost reporting periods beginning on or after October 1, 2004 and before September 30, 2005 (FY 2005), the applicable LTCH wage index value would be three-fifths of the applicable full wage index value without taking into account geographic reclassification under sections 1886(d)(8) and (d)(10) of the Act.

In that same final rule (67 FR 56018), we stated that we would continue to reevaluate LTCH data as they become available and would propose to adjust the phase-in if subsequent data support a change. As we discussed in the June 6, 2003 final rule (68 FR 34140), because the LTCH PPS has only been implemented for less than 2 years, sufficient new data have not been generated that would enable us to conduct a comprehensive reevaluation of the appropriateness of adjusting the phase-in. However, in that same final rule, we explained that we had reviewed the most recent data available at that time and did not find any evidence to support a change in the 5-year phase-in of the wage index.

In the January 30, 2004 proposed rule (69 FR 4764), we stated that because of the recent implementation of the LTCH PPS and the lag time in availability of cost report data, we still do not yet have sufficient new data to allow us to conduct a comprehensive reevaluation of the appropriateness of the phase-in of the wage index adjustment. As we discussed in that same proposed rule, we reviewed the most recent data available and did not find any evidence to support a change in the 5-year phase-in of the wage index. Accordingly, we did not propose a change in the phase-in of the wage index data. We received no comments, and therefore, at this time, we are not adjusting the phase-in of the wage index adjustment in this final rule.

b. *Wage Index Data.* In the June 6, 2003 final rule (68 FR 34142), for the 2004 LTCH PPS rate year, we established that we will use the same data that was used to compute the FY 2003 acute care hospital inpatient wage index without taking into account geographic reclassifications under sections 1886(d)(8) and (d)(10) of the Act because that was the best available data at that time. The acute care hospital inpatient wage index data is also used in the inpatient rehabilitation PPS (IRF PPS), the home health agency PPS (HHA PPS), and the skilled nursing facility PPS (SNF PPS). As we discussed in the August 30, 2002 final rule (67 FR 56019), since hospitals that are excluded from the IPPS are not required to provide wage-related information on the Medicare cost report and because we would need to establish instructions for the collection of such LTCH data in order to establish a geographic reclassification adjustment under the LTCH PPS, the wage adjustment established under the LTCH PPS is based on a LTCH's actual location without regard to the urban or rural designation of any related or affiliated provider.

In the January 30, 2004 proposed rule (69 FR 4764), for the 2005 LTCH PPS rate year, we proposed to use the same data used to compute the FY 2004 acute care hospital inpatient wage index without taking into account geographic reclassifications under sections

1886(d)(8) and (d)(10) of the Act to determine the applicable wage index values under the LTCH PPS, because these are the most recent available complete data. These data are the same wage data that were used to compute the FY 2004 wage indices currently used under the IPPS and SNF PPS. (We note that in the January 30, 2004 proposed rule, we mistakenly stated that these data are the same wage data that were used to compute the FY 2003 wage indices currently used under the IPPS and SNF PPS. We should have said that the proposed wage index values for the 2005 LTCH PPS rate year were computed from the same data used to calculate the FY 2004 wage indices currently used under the IPPS and SNF PPS. Also, in the January 30, 2004 proposed rule, in the example of how the proposed LTCH PPS wage index values for discharges occurring on or after July 1, 2004 through June 30, 2005 would be applied for LTCHs' cost reporting periods beginning during FY 2005, we mistakenly stated that the applicable wage index value would be three-fifths of the full FY 2005 acute care hospital inpatient wage index data, without taking into account geographic reclassification under sections 1886(d)(8) and (d)(10) of the Act. We should have said that the wage index values for the 2005 LTCH PPS rate year for LTCHs' cost reporting periods during FY 2005 would be three-fifths of the full FY 2004 acute care hospital inpatient wage index data, without taking into account geographic reclassification under sections 1886(d)(8) and (d)(10) of the Act. The proposed wage index values shown in Tables 1 and 2 in the Addendum of the January 30, 2004 proposed rule (69 FR 4790–4808) were correct.

We received no comments on the proposed wage index for the 2005 LTCH PPS rate year. Accordingly, in this final rule, we are establishing LTCH PPS wage index values for the 2005 LTCH PPS rate year calculated from the same data used to compute the FY 2004 acute care hospital inpatient wage index data without taking into account geographic reclassification under sections 1886(d)(8) and (d)(10) of the Act. The LTCH wage index values applicable for discharges occurring on or after July 1, 2004 through June 30, 2005 are shown in Table 1 (for urban areas) and Table 2 (for rural areas) in the Addendum to this final rule.

As noted above, the applicable wage index phase-in percentages are based on the start of a LTCH's cost reporting period beginning on or after October 1st of each year during the 5-year transition period. For cost reporting periods beginning on or after October 1, 2003 and before September 30, 2004 (FY 2004), the labor portion of the standard Federal rate will be adjusted by two-fifths of the applicable LTCH wage index value. Specifically, for a LTCH's cost reporting period beginning during FY 2004, for discharges occurring on or after July 1, 2004 through June 30, 2005, the applicable wage index value will be two-fifths of the full FY 2004 acute care hospital inpatient wage index data, without taking into account geographic reclassifications under sections 1886(d)(8) and (d)(10) of the Act as shown in Tables 1 and 2 in the Addendum to this final rule. Similarly, for cost reporting periods beginning on or after October 1, 2004 and before October 1, 2005 (FY 2005), the labor portion of the standard Federal rate will be adjusted by three-fifths of the applicable LTCH wage index value. Specifically, for a LTCH's cost reporting period beginning during FY 2005, for discharges occurring on or after July 1, 2004 through June 30, 2005, the applicable wage index value will be three-fifths of the full FY 2004 acute care hospital inpatient wage index data, without taking into account geographic reclassification under sections 1886(d)(8) and (d)(10) of the Act as shown in Tables 1 and 2 in the addendum to this final rule.

Because the phase-in of the wage index does not coincide with the LTCH PPS rate year (July 1st through June 30th), most LTCHs will experience a change in the wage index phase-in percentages during the LTCH PPS rate year. For example, during the 2005 LTCH PPS rate year, for a LTCH with a January 1st fiscal year, the two-fifths wage index will be applicable for the first 6 months of the 2005 LTCH PPS rate year (July 1, 2004 through December 31, 2004) and the three-fifths wage index will be applicable for the second 6 months of the 2005 LTCH PPS rate year (January 1, 2005 through June 30, 2005). We also note that some providers will still be in the first year of the 5-year phase-in of the LTCH wage index (that is, those LTCHs with cost reporting periods that began during FY 2003 and are ending during the first 3 months of the 2005 LTCH PPS rate year (July 1, 2004 through September 30, 2004). For the remainder of those LTCHs' FY 2003 cost reporting periods, for discharges occurring on or after July 1, 2004 through June 30, 2005, the applicable wage index value will be one-fifth of the full FY 2004 acute care hospital inpatient wage index data, without taking into account geographic reclassification under sections 1886(d)(8) and (d)(10) of the Act as shown in Tables 1 and 2 in the Addendum to this final rule. As noted above, we received no comments on the proposed wage index values for the 2005 LTCH PPS rate year, and, therefore, we have adopted them as final in this final rule.

c. *Labor-related share.* In the August 30, 2002 final rule (67 FR 56016), we established a labor-related share of 72.885 percent based on the relative importance of the labor-related share of operating and capital costs of the excluded hospital with capital market basket based on FY 1992 data. In the June 6, 2003 final rule (68 FR 34142), in conjunction with our revision and rebasing of the excluded hospital with capital market basket from an FY 1992 to an FY 1997 base year, we used a labor-related share that is determined based on the relative importance of the labor-related share of operating costs (wages and salaries, employee benefits, professional fees, postal services, and all other labor-intensive services) and capital costs of the excluded hospital with capital market basket based on FY 1997 data. While we adopted the revised and rebased FY 1997-based LTCH PPS market basket as the LTCH PPS update factor for the 2004 LTCH PPS rate year, we decided not to update the labor-related share under the LTCH PPS pending further analysis. Accordingly, the labor-share for the 2004 LTCH PPS rate year was 72.885 percent.

In the August 1, 2002 IPPS final rule (67 FR 50041–50042), we did not use a revised labor-related share for FY 2004 because we had not yet completed our research into the appropriateness of this updated measure. In that rule, we discussed two methods that we were reviewing for establishing the labor-related share—(1) updating the regression analysis that was done when the IPPS was originally developed and (2) reevaluating the methodology we currently use for determining the labor-related share using the hospital market basket. We also explained that we would continue to explore all options for alternative data and a methodology for determining the labor-related share, and would propose to update the IPPS and excluded hospital labor-related shares, if necessary, once our research is complete.

As we explained in the August 30, 2002 final rule, which implemented the LTCH PPS, the June 6, 2003 LTCH PPS final rule, and the June 9, 2003 high-cost outlier final rule, the LTCH PPS was modeled after the IPPS for short-term, acute care hospitals. Specifically, the LTCH PPS uses the same patient

classification system (CMS–DRGs) as the IPPS, and many of the case-level and facility-level adjustments explored or adopted for the LTCH PPS are payment adjustments under the IPPS (that is, wage index, high-cost outliers, and the evaluation of adjustments for indirect teaching costs and the treatment of a disproportionate share of low-income patients).

Furthermore, as discussed in greater detail in the August 30, 2002 LTCH PPS final rule (67 FR 55960), LTCHs are certified as acute care hospitals that meet the criteria set forth in section 1861(e) of the Act to participate as a hospital in the Medicare program, and in general, hospitals qualify for payment under the LTCH PPS instead of the IPPS solely because their inpatient average length of stay is greater than 25 days, in accordance with section 1886(d)(1)(B)(iv)(I) of the Act, implemented in § 412.23(e). In the June 6, 2003 LTCH PPS final rule (68 FR 34144), we explained that prior to qualifying as a LTCH under § 412.23(e)(2)(i), hospitals generally are paid as acute care hospitals under the IPPS during the period in which they demonstrate that they have an average Medicare inpatient length of stay of greater than 25 days.

The primary reason that we did not update the LTCH PPS labor-related share for the 2004 LTCH PPS rate year was due to the same reason that we explained for not updating the labor-related share under the IPPS for FY 2004 in the August 1, 2003 IPPS (68 FR 27226) which are equally applicable to the LTCH PPS. We did not revise the labor-related share under the IPPS based on the revised and rebased FY 1997 hospital market basket and the excluded hospital market basket because of data and methodological concerns. We indicated that we would conduct further analysis to determine the most appropriate methodology and data for determining the labor-related share.

Section 403 of the Medicare Prescription Drug and Modernization Act of 2003 (enacted December 8, 2003, Pub. L. 108–173) amends section 1886(d) of the Act to provide that for discharges occurring on or after October 1, 2004, the labor-related share under the IPPS is reduced to 62 percent if such a change would result in higher total payments to the hospital. While the statute provides the option to hospitals of using an alternative to the current IPPS labor-related share (71 percent), the statute does not address updating the current IPPS labor-related share. We intend to discuss the details of implementing this provision in the IPPS proposed rule for FY 2005.

As we discussed in the January 30, 2004 proposed rule (69 FR 4765), although section 403 of Public Law 108–173 provides for an alternative labor share percentage, this alternative only applies to hospitals paid under the IPPS and not to LTCHs. Consequently, since we have not yet implemented a change in the labor-share methodology used under the IPPS, and the alternative provided at section 403 does not apply to LTCHs, we did not propose to change the LTCH PPS labor-share for the 2005 LTCH PPS rate year. We received no comments on our proposal to retain the current labor-related share for the 2005 LTCH PPS rate year.

Accordingly, the labor-related share for the 2005 LTCH PPS rate year will remain at 72.885 percent. As is the case under the IPPS, once our research on the labor-related share is complete, any future revisions to the LTCH PPS labor-related share will be proposed and subject to public comment.

2. Adjustment for Cost-of-Living in Alaska and Hawaii

In the August 30, 2002 final rule (67 FR 56022), we established, under § 412.525(b), a cost-of-living adjustment (COLA) for LTCHs located in Alaska and Hawaii to account for the higher costs incurred in those States. (We note that the OFR inadvertently omitted § 412.525(b) in the current version of the CFR (revised as of October 1, 2003). The OFR is aware of this error and will be making the necessary correction in the near future.) In the January 30, 2004 proposed rule (69 FR 4765), for the 2005 LTCH PPS rate year, we proposed to make a COLA to payments for LTCHs located in Alaska and Hawaii by multiplying the standard Federal payment rate by the appropriate factor listed in Table I. below. These factors are obtained from the U.S. Office of Personnel Management (OPM) and are currently used under the IPPS. In addition, in that same proposed rule, we proposed that if OPM released revised COLAS factors before March 1, 2004, we would use them for the development of the payments and publish then in the LTCH PPS final rule.

The OPM has not released revised COLA factors for Alaska and Hawaii since the publication of the January 30, 2004 proposed rule. We received no comments on the proposed COLA factors for Alaska and Hawaii for the 2005 LTCH PPS rate year. Therefore, under § 412.525(b), we are finalizing the COLA factors for Alaska and Hawaii shown below in Table I for the 2005 LTCH PPS rate year.

TABLE I.—COST-OF-LIVING ADJUSTMENT FACTORS FOR ALASKA AND HAWAII HOSPITALS FOR THE 2005 LTCH PPS RATE YEAR

Alaska:	
All areas	1.25
Hawaii:	
Honolulu County	1.25
Hawaii County	1.165
Kauai County	1.2325
Maui County	1.2375
Kalawao County	1.2375

3. Adjustment for High-Cost Outliers

a. *Background.* Under § 412.525(a), we 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 LTCH PPS in determining resource costs at the patient and hospital 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. We set the outlier threshold before the beginning of the applicable rate year so that total outlier payments are projected to equal 8 percent of total payments under the LTCH PPS. Outlier payments under the LTCH PPS are determined consistent with the IPPS outlier policy.

Under § 412.525(a), we make outlier payments for any discharges if the estimated cost of a case exceeds the adjusted LTCH PPS payment for the LTC–DRG plus a fixed-loss amount. The fixed-loss amount is the amount used to limit the loss that a hospital will incur under an outlier policy. This results in Medicare and the LTCH sharing financial risk in the treatment of extraordinarily costly cases. The LTCH's loss is limited to the fixed-loss amount and the percentage of costs above the marginal cost factor. We calculate the estimated cost of a case by multiplying the overall hospital cost-to-charge ratio by the Medicare allowable covered charge. In accordance with § 412.525(a), we pay outlier cases 80 percent of the difference between the estimated cost of the patient case and the outlier threshold (the sum of the adjusted Federal prospective payment for the LTC–DRG and the fixed-loss amount).

We determine a fixed-loss amount, that is, the maximum loss that a LTCH can incur under the LTCH PPS for a case with unusually high costs before the LTCH will receive any additional payments. We calculate the fixed-loss amount by simulating aggregate

payments with and without an outlier policy. The fixed-loss amount would result in estimated total outlier payments being projected to be equal to 8 percent of projected total LTCH PPS payments.

Currently, under both the LTCH PPS and the IPPS, only a maximum cost-to-charge ratio threshold (ceiling) is applied to a hospital's cost-to-charge ratio and, as discussed in the June 9, 2003 high-cost outlier final rule (68 FR 34506–34507) for discharges occurring on or after August 8, 2003, a minimum cost-to-charge ratio threshold (floor) is no longer applicable. Thus, if a LTCH's cost-to-charge ratio is above the ceiling, the applicable statewide average cost-to-charge ratio is assigned to the LTCH. In addition, for LTCHs for which we are unable to compute a cost-to-charge ratio, we also assign the applicable statewide average cost-to-charge ratio. Currently, MedPAR claims data and cost-to-charge ratios based on the latest available cost report data from Hospital Cost Report Information System (HCRIS) and corresponding MedPAR claims data are used to establish a fixed-loss threshold amount under the LTCH PPS.

In the June 9, 2003 high-cost outlier final rule (68 FR 34507), consistent with the outlier policy changes for acute care hospitals under the IPPS discussed in that same final rule, we no longer assign the applicable statewide average cost-to-charge ratio when a LTCH's cost-to-charge ratio falls below the minimum cost-to-charge ratio threshold (floor). We made this policy change because, as is the case for acute care hospitals, we believe LTCHs 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), previously when a LTCH's actual cost-to-charge ratio fell below the floor, the LTCH's cost-to-charge ratio was raised to the applicable statewide average cost-to-charge ratio. This application of the statewide average resulted in inappropriately high outlier payments. Accordingly, for LTCH PPS discharges occurring on or after August 8, 2003, in making outlier payments under § 412.525 (and short-stay outlier payments under § 412.529), we apply the LTCH's actual cost-to-charge ratio to determine the cost of the case, even where the LTCH's actual cost-to-charge ratio falls below the floor.

Also, in the June 9, 2003 high-cost outlier final rule (68 FR 34507), consistent with the policy change for acute care hospitals under the IPPS, under § 412.525(a)(4), by cross-referencing § 412.84(i), we established that we will continue to apply the applicable statewide average cost-to-charge ratio when a LTCH's cost-to-charge ratio exceeds the maximum cost-to-charge ratio threshold (ceiling) by adopting the policy at § 412.84(i)(3)(ii). As we explained in that same final rule, cost-to-charge ratios above this range are probably due to faulty data reporting or entry. Therefore, these cost-to-charge ratios should not be used to identify and make payments for outlier cases because such data are clearly errors and should not be relied upon. In addition, we made a similar change to the short-stay outlier policy at § 412.529. Since cost-to-charge ratios are also used in determining short-stay outlier payments, the rationale for that change mirrors that for high-cost outliers.

b. *Establishment of the fixed-loss amount.* In the June 6, 2003 final rule (68 FR 34144), for the 2004 LTCH PPS rate year, we used the March 2002 update of the FY 2001 MedPAR claims data to determine a fixed-loss threshold that would result in outlier payments projected to be equal to 8 percent of total payments, based on the policies described in that final rule, because these data were the best data available. We calculated cost-to-charge ratios for determining the fixed-loss amount based on the latest available cost report data in HCRIS and corresponding MedPAR claims data from FYs 1998, 1999, and 2000.

In that same final rule, in determining the fixed-loss amount for the 2004 LTCH PPS rate year (using the outlier policy under § 412.525(a) in effect on July 1, 2003), we used the current combined operating and capital cost-to-charge ratio floor and ceiling under the IPPS of 0.206 and 1.421, respectively (as explained in the IPPS final rule (67 FR 50125, August 1, 2002)). As we discussed in the June 9, 2003 high-cost outlier final rule (68 FR 34508), we concluded that it was not necessary to recalculate a new fixed-loss amount once the changes to the outlier policy discussed in that final rule became effective because the difference between the fixed-loss amount determined with or without the application of the floor would be negligible.

If a LTCH's cost-to-charge ratio was below this floor or above this ceiling, we assigned the applicable IPPS statewide average cost-to-charge ratio. We also assigned the applicable statewide average for LTCHs for which we are unable to compute a cost-to-charge ratio, such as for new LTCHs. Therefore, based on the methodology and data described above, in the June 6, 2003 final rule (68 FR 34144), for the 2004 LTCH PPS rate year, we established a fixed-loss amount of $19,590. Thus, during the 2004 LTCH PPS rate year, we pay an outlier case 80 percent of the difference between the estimated cost of the case and the outlier threshold (the sum of the adjusted Federal LTCH payment for the LTC–DRG and the fixed-loss amount of $19,590).

Also, in the June 6, 2003 final rule (68 FR 34145), we established that beginning with the 2004 LTCH PPS rate year, we will calculate a single fixed-loss amount for each LTCH PPS rate year based on the version of the GROUPER that is in effect as of the beginning of the LTCH PPS rate year (that is, July 1, 2003 for the 2004 LTCH PPS rate year). Therefore, for the 2004 LTCH PPS rate year, we established a single fixed-loss amount based on the Version 20.0 of the GROUPER, which was in effect at the start of the 2004 LTCH PPS rate year (July 1, 2003). As we noted above, the fixed-loss amount for the 2004 LTCH PPS rate year is $19,590.

As we proposed in the January 30, 2004 proposed rule, in calculating the fixed-loss amount for the 2005 LTCH PPS rate year, we applied the current outlier policy under § 412.525(a); that is, we assigned the applicable statewide average cost-to-charge ratio only to LTCHs whose cost-to-charge ratios exceeded the ceiling (and not when they fell below the floor). Accordingly, we used the current IPPS combined operating and capital cost-to-charge ratio ceiling of 1.366 (as explained in the IPPS final rule (68 FR 45478, August 1, 2003)). We believed that using the current combined IPPS operating and capital cost-to-charge ratio ceiling for LTCHs is appropriate for the same reasons we stated above regarding the use of the current combined operating and capital cost-to-charge ratio ceiling under the IPPS.

As stated in the January 30, 2004 proposed rule (69 FR 4766–4767), for the 2005 LTCH PPS rate year, we used the December 2002 update of the FY 2002 MedPAR claims data to determine a proposed fixed-loss amount that would result in outlier payments projected to be equal to 8 percent of total payments, based on the policies described in that proposed rule, because those data were the best LTCH data available at that time. In that same proposed rule, we explained that we considered using claims data from the September 2003 update of the FY 2003 MedPAR to determine the proposed fixed-loss amount (and the proposed budget neutrality offset discussed in section V.C.6. of this preamble) for the 2005 LTCH PPS rate year. However, initial analysis has shown that the FY

2003 MedPAR data contain coding errors. As in the case with the FY 2002 MedPAR, we have learned that a large hospital chain of LTCHs had continued to consistently code diagnoses inaccurately on the claims it submitted, and these coding errors were reflected in the September 2003 update of the FY 2003 MedPAR data. Those coding inaccuracies in the MedPAR claims data could have caused significant skewing of the fixed-loss amount and would have impacted the determination of the budget neutrality offset.

While we have corrected the coding inaccuracies in the FY 2002 MedPAR, we were unable to correct the coding errors in the FY 2003 MedPAR in time for publication of the January 30, 2004 proposed rule since the correction process required extensive programming work. Accordingly, we used the December 2002 update of the FY 2002 MedPAR claims data to determine the proposed fixed-loss amount of $21,864 for the 2005 LTCH PPS rate year. Thus, we proposed to pay an outlier case 80 percent of the difference between the estimated cost of the case and the proposed outlier threshold (the sum of the proposed adjusted Federal LTCH PPS payment for the LTC–DRG and the proposed fixed-loss amount of $21,864). We also stated that we expected to be able to use FY 2003 MedPAR data (corrected, if necessary) to calculate the fixed loss amount for the 2005 LTCH PPS rate year in this final rule.

We have reviewed LTCH claims data from the December 2003 update of the FY 2003 MedPAR data and it appears that the coding errors that were found previously in the September 2003 update of the FY 2003 MedPAR (discussed in the January 30, 2004 proposed rule (69 FR 4774)) have been corrected. Specifically, upon discovering the coding errors, we notified the large chain of LTCHs whose claims contained the coding inaccuracies to request that they resubmit those claims with the correct diagnoses codes by December 31, 2003 so that those corrected claims would be contained in the December 2003 update of the FY 2003 MedPAR data. It appears that those claims were submitted timely with the correct diagnoses codes, therefore, it was not necessary for us to correct the FY 2003 MedPAR data for the development of the rates and factors established in this final rule. Accordingly, we are using the December 2003 update of the FY 2003 MedPAR data to determine the fixed-loss amount for the 2005 LTCH PPS rate year established in the this final rule, as it is the best available data at this time.

Comment: One commenter noted that CMS proposed a fixed-loss amount of $21,864 for the 2005 LTCH PPS rate year based on FY 2002 MedPAR claims data due to coding errors found in the FY 2003 MedPAR claims data, and that CMS plans on using the corrected FY 2003 MedPAR claims data to calculate the fixed-loss amount for the final rule. The commenter believed that, as a result of the fact that a large hospital chain of LTCHs continued to make coding errors, other LTCHs would be deprived of the opportunity to make meaningful comments. The commenter recommended that the revised fixed-loss amount should be published in an interim final rule in order to allow for meaningful comments.

Response: As with all other Medicare prospective payment systems, the data that we use both for the proposed and final rules, to determine the rates, adjustments and other factors under the LTCH PPS, including the fixed-loss amount, is always the best data available at the time we are determining a rate. As we stated in the January 30, 2004 proposed rule, we expected to use the FY 2003 MedPAR data to calculate the final fixed-loss amount for the 2005 LTCH PPS rate year in this final rule. Thus, the commenters were given adequate notice for meaningful comment on our proposal. In addition, we note that this data became available to the public at the end of February 2004, which was at least 3 weeks prior to the close of the 60-day public comment period that ended on March 23, 2004. We believe that this data was sufficiently available to those interested in accessing the data, and to ensure that we correctly applied the methodology that we established to compute the fixed-loss amount in the August 30, 2002 final rule when we implemented the LTCH PPS using the FY 2003 MedPAR data. Thus, because the methodology that we use to calculate the fixed-loss amount in both the proposed rule and in this final rule continues to be the same as the methodology established in the August 30, 2002 LTCH PPS final rule (67 FR 56022–56027) when the LTCH PPS was implemented (that is, we determine a fixed-loss amount that would result in outlier payments projected to be equal to 8 percent of total payments under the LTCH PPS), the public had the opportunity to use the most recently available FY 2003 MedPAR data to calculate of the applicable fixed-loss amount prior to the close of the comment period. To the extent that the public disagreed with the outcome, they could have written to us during the comment period, and we would have addressed their concerns. However, we did not receive any comments.

Accordingly, we do not believe it is necessary or appropriate to publish the final fixed-loss amount for the 2005 LTCH PPS rate year in a separate notice. However, if LTCHs have concerns regarding the calculation of the fixed-loss amount for the 2005 LTCH PPS rate year established in this final rule based on the FY 2003 MedPAR claims data, they may bring those concerns to our attention. Based on those concerns, if we determine that our established methodology for determining the fixed loss amount was applied incorrectly, we would take the necessary steps to correct the fixed-loss amount prospectively in accordance with the Administrative Procedure Act.

Furthermore, as noted above, we determined the fixed-loss amount for the 2005 LTCH PPS rate year established in this final rule based on the version of the GROUPER that will be in effect as of the beginning of the 2005 LTCH PPS rate year (July 1, 2004), that is, Version 21.0 of the LTCH PPS GROUPER (68 FR 45374–45385). Consistent with our historical practice of using the most recent available data, we computed cost-to-charge ratios for determining the fixed-loss amount for the 2005 LTCH PPS rate year based on the latest available cost report data in HCRIS and corresponding MedPAR claims data from FYs 1999, 2000, 2001 and 2002. (We note that FY 2002 data was not used to compute cost-to-charge ratios in the proposed rule because it was not available at the time of the development of the proposed rule. The limited amount of FY 2002 data available to use to compute the cost-to-charge ratios used for determining the fixed-loss amount established in this final rule has resulted in very little change in the cost-to-charge ratios used in the proposed rule compared to those used in this final rule. Our methodology for calculating the cost-to-charge ratios remains the same.) As we explained above, the current applicable IPPS statewide average cost-to-charge ratios were applied when a LTCH's cost-to-charge ratio exceeded the ceiling (1.366). In addition, we assigned the applicable statewide average to LTCHs for which we were unable to compute a cost-to-charge ratio. (Currently, the applicable IPPS statewide averages can be found in Tables 8A and 8B of the August 1, 2003 IPPS final rule (68 FR 45637–45638).)

Based on the data and policies described in this final rule, we are establishing a fixed-loss amount of $17,864 for the 2005 LTCH PPS rate

year. Thus, we will pay an outlier case 80 percent of the difference between the estimated cost of the case and the outlier threshold (the sum of the adjusted Federal LTCH payment for the LTC–DRG and the fixed-loss amount of $17,864).

The final fixed-loss amount of $17,864 for the 2005 LTCH PPS rate year is lower than the $21,864 fixed-loss amount we had proposed for the 2005 LTCH PPS rate year and lower than the current fixed-loss amount of $19,590 for the 2004 LTCH PPS rate year. Both the current fixed-loss amount for the 2004 LTCH PPS rate year and the proposed fixed-loss amount for the 2005 LTCH PPS rate year were computed using the December 2002 update of the FY 2002 MedPAR data (as explained in detail in the June 6, 2003 final rule (68 FR 34145) and the January 30, 2004 proposed rule (69 FR 4774), respectively). As discussed above, we used the December 2003 update of the FY 2003 MedPAR data to determine the final fixed-loss amount for the 2005 LTCH PPS rate year established in this final rule because it is the best available data at this time. Our methodology for calculating the fixed-loss amount remains the same.

c. *Reconciliation of outlier payments upon cost report settlement.* In the June 9, 2003 high-cost outlier final rule (68 FR 34508–34512), we made changes to the LTCH outlier policy consistent with those made for acute care hospitals under the IPPS because, as we discussed in that same final rule, we became aware that payment vulnerabilities existed in the previous IPPS outlier policy. Because the LTCH PPS high-cost outlier and short-stay policies are modeled after the outlier policy in the IPPS, we believe they were susceptible to the same payment vulnerabilities and, therefore, also merited revision. Consistent with the change made for acute care hospitals under the IPPS at § 412.84(m), we established under § 412.525(a)(4)(ii), by cross-referencing § 412.84(m), that effective for LTCH PPS discharges occurring on or after August 8, 2003, any reconciliation of outlier payments may be made upon cost report settlement to account for differences between the actual cost-to-charge ratio and the estimated cost-to-charge ratio for the period during which the discharge occurs. As is the case with the changes made to the outlier policy for acute care hospitals under the IPPS, the instructions for implementing these regulations are discussed in further detail in Program Memorandum Transmittal A–03–058. In addition, in that same final rule (68 FR 34513), we established a similar change to the short-stay outlier policy at § 412.529(c)(5)(ii).

We also discussed in the June 9, 2003 IPPS high-cost outlier final rule (68 FR 34507–34512) that only using cost-to-charge ratios based on the latest settled cost report does not reflect any dramatic increases in charges during the payment year when making outlier payments. Because a LTCH has the ability to increase its outlier payments through a dramatic increase in charges and because of the lag time in the data used to calculate cost-to-charge ratios, in that same final rule (68 FR 34494–34515), consistent with the policy change for acute care hospitals under the IPPS at § 412.84(i)(2), we established that, for LTCH PPS discharges occurring on or after October 1, 2003, fiscal intermediaries will use more recent data when determining a LTCH's cost-to-charge ratio. Therefore, by cross-referencing § 412.84(i)(2) under § 412.525(a)(4)(iii), we established that fiscal intermediaries will use either the most recent settled cost report or the most recent tentative settled cost report, whichever is from the later period. In addition, in that same final rule, we established a similar change to the short-stay outlier policy at § 412.529(c)(5)(iii).

d. *Application of outlier policy to short-stay outlier cases.* As we discussed in the August 30, 2002 final rule (67 FR 56026), under some rare circumstances, a LTCH discharge could qualify as a short-stay outlier case (as defined under § 412.529 and discussed in section V.B.4. of this preamble) and also as a high-cost outlier case. In such a scenario, a patient could be hospitalized for less than five-sixths of the geometric average length of stay for the specific LTC–DRG, and yet incur extraordinarily high treatment costs. If the costs exceeded the outlier threshold (that is, the short-stay outlier payment plus the fixed-loss amount), the discharge would be eligible for payment as a high-cost outlier. Thus, for a short-stay outlier case in the 2005 LTCH PPS rate year, the high-cost outlier payment will be 80 percent of the difference between the estimated cost of the case and the outlier threshold (the sum of the fixed-loss amount of $17,864 and the amount paid under the short-stay outlier policy).

Based on a comparison of the LTCH claims from the FY 2002 MedPAR data and the FY 2003 MedPAR data for the 266 LTCHs which had claims in both data sets, we found that the average LTC–DRG relative weight (based on the Version 21.0 GROUPER, as discussed above) assigned to each case increased 2.7 percent from FY 2002 to FY 2003. In addition, we found that the average covered charge per discharge (inflated to 2005 LTCH PPS rate year) increased 3.3 percent from FY 2002 to FY 2003 and total LTCH PPS payments per discharge (based on FY 2002 MedPAR data) increased 7.3 percent compared to total LTCH PPS payments per discharge estimated in this final rule (based on FY 2003 MedPAR data).

Our analysis indicates that this increase in LTCH PPS payments per discharge between the LTCH claims in the FY 2002 MedPAR data and the LTCH claims in the FY 2003 MedPAR data is largely attributable to the increase in the average LTC–DRG relative weight per discharge and the increase in the average covered charge per discharge. The increase in the average LTC–DRG relative weight assigned to each case from FY 2002 MedPAR compared to FY 2003 MedPAR data indicates that, on average, LTCH patients are being assigned to LTC–DRGs that have a higher relative weight, and, therefore, generally receive a higher LTCH PPS payment. This results in an increase in total LTCH PPS payments system-wide. In accordance with § 412.523(d)(1), we reduce the standard Federal rate by 8 percent for the estimated proportion of LTCH PPS outlier payments. Because the average payment per discharge has increased, thereby increasing total LTCH PPS payment, the fixed-loss amount must be lowered in order to maintain total outlier payments that are projected to equal 8 percent of total payments under the LTCH PPS.

As we noted above, because the LTCH PPS has only been implemented for less than 2 years, sufficient new data have not been generated that would enable us to conduct a comprehensive analysis to determine the factors contributing to the increase in the average LTC–DRG relative weight assigned to each case. As discussed in section X. of this preamble, we intend to monitor trends in the LTCHs' Medicare payments and costs once sufficient data under the LTCH PPS has been generated. For example, we may conduct medical record reviews of LTCH Medicare patients to ensure that proper coding practices are being employed.

4. Adjustments for Special Cases

a. *General.* As discussed in the August 30, 2002 final rule (67 FR 55995), under section 123 of Public Law 106–113, the Secretary generally has broad authority in developing the PPS for LTCHs, including whether (and how) to provide for adjustments to reflect variations in the necessary costs of treatment among LTCHs.

Generally, LTCHs, as described in section 1886(d)(1)(B)(iv) of the Act, are distinguished from other inpatient hospital settings by maintaining an average inpatient length of stay of greater than 25 days. However, LTCHs may have cases that have stays of considerably less than the average length of stay and that receive significantly less than the full course of treatment for a specific LTC–DRG. As we explained in the August 30, 2002 final rule (67 FR 55954), these cases would be paid inappropriately if the hospital were to receive the full LTC–DRG payment. Below we discuss the payment methodology for these special cases as implemented in the August 30, 2002 final rule (67 FR 56002–56010).

b. *Adjustment for short-stay outlier cases.* A short-stay outlier case may occur when a beneficiary receives less than the full course of treatment at the LTCH before being discharged. These patients may be discharged to another site of care or they may be discharged and not readmitted because they no longer require treatment. Furthermore, patients may expire early in their LTCH stay.

Generally, LTCHs are defined by statute as having an average inpatient length of stay of greater than 25 days. We believe that a payment adjustment for short-stay outlier cases results in more appropriate payments because these cases most likely would not receive a full course of treatment in this short period of time and a full LTC–DRG payment may not always be appropriate. Payment-to-cost ratios simulated for LTCHs, for the cases described above, show that if LTCHs receive a full LTC–DRG payment for those cases, they would be significantly "overpaid" for the resources they have actually expended.

Under § 412.529, in general, we adjust the per discharge payment to the least of 120 percent of the cost of the case, 120 percent of the LTC–DRG specific per diem amount multiplied by the length of stay of that discharge, or the full LTC–DRG payment, for all cases with a length of stay up to and including five-sixths of the geometric average length of stay of the LTC–DRG.

As we noted in section V.C.3. of this preamble, in the June 9, 2003 high-cost outlier final rule (68 FR 34494–34515), we revised the methodology for determining cost-to-charge ratios for acute care hospitals under the IPPS because we became aware that payment vulnerabilities existed in the previous IPPS outlier policy. As we also explained in that same final rule, because the LTCH PPS high-cost outlier and short-stay outlier policies are modeled after the outlier policy in the IPPS, we believe they were susceptible to the same payment vulnerabilities and, therefore, merited revision. Consistent with the policy established for acute care hospitals under the IPPS at § 412.84(i) and (m) in the June 9, 2003 high-cost outlier final rule (68 FR 34515), and similar to the policy change described above for LTCH PPS high-cost outlier payments at § 412.525(a)(4)(ii), we established under § 412.529(c)(5)(ii) that for discharges on or after August 8, 2003, short-stay outlier payments are subject to the provisions in the regulations at § 412.84(i)(1), (i)(3) and (i)(4), and (m). In addition, short-stay outlier payments are subject to the provisions in the regulations at § 412.84(i)(2) for discharges on or after October 1, 2003 in accordance with § 412.529(c)(5)(iii). Therefore, in the June 9, 2003 high-cost outlier final rule (68 FR 34508–34513), under § 412.529(c)(5)(ii), by cross-referencing § 412.84(i)(2), we established that fiscal intermediaries will use either the most recent settled cost report or the most recent tentative settled cost report, whichever is from the later period, in determining a LTCH's cost-to-charge ratio.

In addition, by cross-referencing § 412.84(i), we established that the applicable statewide average cost-to-charge ratio is only applied when a LTCH's cost-to-charge ratio exceeds the ceiling. Thus, the applicable statewide average cost-to-charge ratio is no longer applied when a LTCH's cost-to-charge ratio falls below the floor. Furthermore, by cross-referencing § 412.84(i)(4), we established that any reconciliation of payments for short-stay outliers may be made upon cost report settlement to account for differences between the estimated cost-to-charge ratio and the actual cost-to-charge ratio for the period during which the discharge occurs. As noted in the discussion of the high-cost outlier policy in section V.C.3. of this preamble, the instructions for implementing these regulations are discussed in further detail in Program Memorandum Transmittal A–03–058.

In the June 6, 2003 final rule (68 FR 34146–34148), for certain hospitals that qualify as LTCHs under section 1886(d)(1)(B)(iv)(II) of the Act ("subclause (II)" LTCHs) as added by section 4417(b) of Public Law 105–33, and implemented in § 412.23(e)(2)(ii), we established a temporary adjustment to the short-stay outlier policy during the 5-year transition period. Under § 412.529(c)(4), effective for discharges from a "subclause (II)" LTCH occurring on or after July 1, 2003, the short-stay outlier percentage is 195 percent during the first year of the hospital's 5-year transition. For the second cost reporting period, the short-stay outlier percentage is 193 percent; for the third cost reporting period, the percentage is 165 percent; for the fourth cost reporting period, the percentage is 136 percent; and for the final cost reporting period of the 5-year transition (and future cost reporting periods), the short-stay outlier percentage is 120 percent, that is, the same as it is for all other LTCHs under the LTCH PPS.

As we discussed in the June 6, 2003 final rule (68 FR 34147), we established this formula with the expectation that an adjustment to short-stay outlier payments during the transition will result in reducing the difference between payments and costs for a "subclause (II)" LTCH for the period of July 1, 2003 through the end of the transition period, when the LTCH PPS will be fully phased-in.

As we stated in that same final rule, we also expect that during this 5-year period, "subclause (II)" LTCHs will make every attempt to adopt the type of efficiency enhancing policies that generally result from the implementation of prospective payment systems in other health care settings. We did not propose any changes to the short-stay outlier policy in the January 30, 2004 proposed rule (69 FR 4768). We received no comments on the existing short-stay outlier policy at § 412.529.

c. *Extension of the interrupted stay policy.* At existing § 412.531(a), we define an "interruption of a stay" as a stay at a LTCH during which a Medicare inpatient is transferred upon discharge to an acute care hospital, an IRF, or a SNF for treatment or services that are not available in the LTCH and returns to the same LTCH within applicable fixed-day periods. (We also include transfers to swing beds under this interrupted stay policy for LTCH payment policy determinations, consistent with the SNF PPS payment policy. That is, a readmission to a LTCH from post-hospital SNF care being provided in a swing bed that is located either in the LTCH itself or in another onsite Medicare provider has the same policy consequence as a readmission to the LTCH from an onsite SNF (June 6, 2003, 68 FR 34149).)

As defined in the previous paragraph, an interrupted stay is treated as one discharge from the LTCH. The day-count of the applicable fixed-day period of an interrupted stay begins on the day of discharge from the LTCH (which is also the day of admission to the other site of care). For a discharge to an acute care hospital, the applicable fixed-day

period is 9 days, for an IRF, 27 days, and for a SNF 45 days. The counting of the days begins on the day of discharge from the LTCH and ends on the 9th, 27th, or 45th day for an acute care hospital, an IRF, or a SNF, respectively, after the discharge.

If the patient is readmitted to the LTCH within the fixed-day threshold, return to the LTCH is considered part of the first admission and only a single LTCH PPS payment will be made. For example, if a LTCH patient is discharged to an acute hospital and is readmitted to the LTCH on any day up to and including the 9th day following the original day of discharge from the LTCH, one LTC–DRG payment will be made. If the patient is readmitted to the LTCH from the acute care hospital on the 10th day after the original discharge or later, Medicare will pay for the second admission as a separate stay with an additional LTC–DRG assignment. In implementing this policy, we provide that, in the event a Medicare inpatient is discharged from a LTCH and is readmitted and the stay qualifies as an interrupted stay, the provider must cancel the claim generated by the original stay in the LTCH and submit one claim for the entire stay. (For further details, see Medicare Program Memorandum Transmittal A–02–093, September 2002.)

On the other hand, if the patient stay exceeds the total fixed-day threshold outside of the LTCH at another facility before being readmitted, two separate payments would be made. One would be based on the principal diagnosis and length of stay for the first admission and the other based on the principal diagnosis and length of stay for the second admission. Depending upon their lengths of stay, both stays could result in payments as a short-stay outlier (§ 412.529), a full LTC–DRG, or even a high-cost outlier. Further, if the principal diagnosis is the same for both admissions, the hospital could receive two similar payments. It is also important to note that under the existing interrupted stay policy, a separate Medicare payment is made to the intervening provider under that provider's payment system.

When we introduced the interrupted stay policy for LTCHs in the August 30, 2002 final rule (67 FR 56002–56006), we noted that we would consider expanding or revising the policy based on information received from the provider community or information gained from our ongoing monitoring activities. During the first year of the LTCH PPS, it has come to our attention, from both of these sources, that certain LTCHs are discharging patients during the course of their treatment for the sole purpose of receiving specific tests or procedures from another facility (that should have been furnished under arrangements by the LTCHs), and then readmitting the patient to the LTCH following the administration of the test or procedure. In other words, these patients do not stop receiving medical care that must be considered LTCH inpatient services during the period between their discharge from and readmission to the LTCH. On the contrary, they continue to receive care, often of a highly specialized type, from the other facility before being readmitted for further inpatient care at the LTCH. This sequence of care suggests that the original discharge from the LTCH may be motivated by financial considerations rather than by clinical judgment and, therefore, would be inappropriate.

Existing regulations at § 412.509(c) require a LTCH to furnish all necessary covered services for a Medicare beneficiary who is an inpatient of the hospital either directly or under arrangements (as defined in § 409.3). Under § 409.3, when services are furnished under arrangements, Medicare payments made to the provider that arranged for the services discharges the liability of the beneficiary or any other person to pay for those services. The "under arrangements" policy set forth in § 412.509 for LTCHs derives from the regulations at § 411.15(m), which implement section 1862(a)(14) of the Act. Section 1862(a) of the Act specifies the services for which no payment may be made under Medicare Part A and Part B and also specifies the exception for certain services to be furnished "under arrangements" by providers.

If a LTCH obtains, from another facility "under arrangements," a specific test or procedure for one of its inpatients that is not available on the LTCH's premises, as contemplated by § 412.509, a discharge and a subsequent readmission would be unnecessary and inappropriate. This is true even if it is necessary to transport the patient to another facility to receive the arranged-for service. Furthermore, no additional claim can be submitted to Medicare by the other entity that actually furnished the test or procedure because, under § 412.509(c), the LTCH must furnish all necessary covered services to the Medicare beneficiary who is an inpatient of the hospital either directly or under arrangements. In this situation, generally, the LTCH would include the medically necessary test or procedure on its patient claim to Medicare (which could have an effect on the assignment of the LTC–DRG and thus the Medicare payment to the LTCH) and the LTCH would be responsible for paying the provider directly for the test or procedure.

Patient discharges from the LTCH for tests or procedures that should have been provided under arrangements, followed by LTCH readmission, result in an inappropriate increase in Medicare costs in three ways:

First, the Medicare payment associated with the LTC–DRG that would be assigned to the patient's stay will typically already include the costs of the test or procedure. (The August 30, 2002 LTCH PPS final rule (67 FR 55977–55985), includes an in-depth description of the derivation of LTC–DRGs from ICD–9–CM codes on Medicare claims and a discussion of the development and calculation of LTC–DRG relative weights.) Second, the intervening provider will bill Medicare separately for the test or procedure. Thus, if services that should have been furnished directly or under arrangements by the LTCH are instead unbundled and billed separately, Medicare would pay the other provider for the service that should have been paid for "under arrangements" by the LTCH under § 412.509.

Third, a discharge for outpatient services and a subsequent readmission to the LTCH is not currently covered under the interrupted stay policy at existing § 412.531. Section 412.531(a) only includes discharges from a LTCH to an acute care hospital, an IRF, and a SNF for treatment or services not available in the LTCH and subsequent readmission to the same LTCH. If a patient is discharged and readmitted to the LTCH following an outpatient test or procedure, under current policy, after making a LTCH PPS payment for the first discharge, there would be a second Medicare payment to the LTCH when the patient is finally discharged.

In the January 30, 2004 proposed rule (69 FR 4769–4770), in order to address these concerns, we proposed to revise the definition of an interruption of a stay under § 412.531 to add situations in which a patient is discharged from the LTCH and readmitted to the same LTCH within 3 days of the discharge (revised § 412.531(a)(1)). We believe that if a patient is discharged from a LTCH for any reason to an acute care hospital, IRF, SNF, or home, and is then readmitted within 3 days, in general, the patient's original admitting diagnoses would not change significantly during those 3 days. Therefore, a readmission would not constitute a new episode of care. We questioned whether a patient

who was discharged home and then returned to the same LTCH within 3 days should have been discharged in the first place. Since LTCHs are designed to treat patients with a high level of acuity and multicomorbidities, we believed that a 3-day period was a reasonable window during which necessary offsite medical care might be delivered, under arrangements, as contemplated under § 412.509, without an appreciable change in the original admitting diagnoses. Moreover, this 3-day period is consistent with the policy under the IRF PPS under which the maximum period of time that a patient could be away from the IRF is 3 days before a new patient assessment is required. Therefore, under our proposal, if a patient were discharged on Monday to an acute care hospital, IRF, SNF, or home, and readmitted either on that Monday (the first day), Tuesday (the second day), or Wednesday (the third day), the subsequent readmission would not be considered a new admission and Medicare would pay the LTCH for only one discharge based on the combined length of stay for the period prior to, during, and after the absence from the LTCH. If a patient was readmitted to the LTCH at any time after Wednesday, (the third day), the 3-day interrupted stay policy would no longer be relevant and Medicare payments would be governed by the existing interrupted stay policy. Therefore, if following discharge from a LTCH, and treatment or services as an inpatient at an acute care hospital, IRF, or SNF for greater than 3-days, but less than the interrupted stay threshold for that provider type (9 days for an acute care hospital, 27 days for an IRF, 45 days for a SNF), when the patient is readmitted to the LTCH, only one payment would be made to the LTCH, but the intervening provider may also submit a Medicare claim for that patient. Moreover, if the patient's stay at the intervening provider exceeds the threshold, a readmission to the LTCH will be counted as a new stay for each provider, as noted above, a readmission to the LTCH will be counted as a new stay pursuant to § 412.531(a)(1). We reiterate that the provisions of the proposed 3-day or less interrupted stay policy would be only applicable for patients who are discharged from a LTCH to an acute care hospital, IRF, SNF, or home, and then are readmitted to the LTCH within 1, 2, or 3 days. After that point, when the interruption exceeds 3 days, but less than the fixed period threshold in the original interrupted stay policy, a separate payment will be made to the intervening facility under the appropriate PPS, but one payment would be made to the LTCH for one episode of care. We will hereafter refer to the original interruption of stay policy as "the greater than 3-day interruption of stay". This clarified and renamed policy, from day 4 forward, under revised § 412.531(a)(2), and the counting of days would begin on the first day of admission to the intervening provider (but not at day 4) for purposes of determining whether or not the episode is actually one LTCH stay with an interruption within the 9, 27, or 45 day threshold, or two separate LTCH stays that would be occasioned by a stay in excess of the applicable thresholds.

An example of when the proposed 3-day or less interrupted stay policy would govern is as follows: if a LTCH patient is discharged from the LTCH to an acute care hospital, stays at the acute care hospital for 3 days and then returns to the LTCH by midnight of the 3 days, Medicare would pay one LTC–DRG payment to the LTCH and the LTCH would be responsible for paying the acute care hospital for the costs of the tests which should have been provided under arrangements by the LTCH. In this case, the proposed payment policy was dictated by the presumption that the discharge to the acute care hospital was not warranted, but services should be provided to the LTCH patient under arrangements if the patient needed to be readmitted to the LTCH within 3 days of being discharged.

An example of when the existing greater than 3-day interruption of stay governs is as follows: A LTCH patient is discharged from the LTCH and admitted directly to an IRF where the patient remains for 16 days prior to being readmitted to the LTCH for further care. The interrupted stay threshold for IRFs is 27 days and since the stay at the IRF is within the 27 day threshold, both stays at the LTCH will be paid as one discharge under the LTCH PPS and Medicare will pay the IRF for the patient's treatment under the IRF PPS for days 1 through 16. In this case, payment policy is dictated by the presumption that the hospitalization at the intervening site was appropriate because the patient required treatment at the IRF for a number of days significantly in excess of 3 days, as specified in the less than 3-day interruption of stay policy. But the patient's readmission to the LTCH prior to reaching the 27 day threshold means that it is being paid as a continuation of the original hospitalization.

An example of a situation not governed by either of the interrupted stay policies is as follows: a LTCH patient is discharged to an acute care hospital and remains under treatment for 12 days (the greater than 3-day interrupted stay threshold for acute care hospitals is 9 days) prior to being readmitted to the LTCH. In this case, Medicare will pay the acute care hospital under the IPPS and the patient's readmission to the LTCH will be paid separately as a second bona fide admission. In this case, treatment at the acute care hospital is being paid under the IPPS and because the number of days away from the LTCH exceed the fixed threshold of 9 days under the greater than 3-day interruption of stay policy, the second admission is being seen as a separate episode of care. (§ 412.531(b)(4))

Under the proposed revision of the interruption of stay policy for LTCHs in the January 2004 proposed rule, we stated that any treatment or medical services furnished to the individual during the 3-day (or less) absence from the LTCH could not be billed separately to the Medicare program or to the beneficiary, but would be paid as "under arrangements" services to the LTCH. When we established the LTCH PPS (67 FR 55954, August 30, 2002), we calculated payments under the LTCH PPS using base year costs that include the numerous tests and procedures typical of the complicated medical conditions that characterize LTCH patients, including those furnished by other providers in order to satisfy the statutory requirements under section 123 of Public Law 106–113, for budget neutrality. Therefore, we believed that a readmission to the LTCH that triggers the 3-day or less interrupted stay policy should be treated as a continuation of the episode of care that occasioned the first admission. Further, we believe that the readmission to the LTCH within 3 days establishes the presumption that any treatment or services furnished during the intervening 3 (or less) days should have been provided by the LTCH "either directly or under arrangements" (§ 412.509(b)). The entire stay would generate one LTC–DRG payment under the LTCH PPS, which would be "payment in full for all inpatient hospital services, as defined in § 409.10." (§ 412.509(a)) Under § 409.10(a) inpatient hospital services means the following services furnished to an inpatient of a qualified hospital: (1) Bed and board; (2) nursing services and other related services; (3) use of hospital or CAH facilities; (4) medical social services; (5) drugs, biologicals, supplies, appliances, and equipment; (6) certain other diagnostic or therapeutic services; (7) medical or surgical services provided by certain interns or residents-

in-training; and (8) transportation services, including transport by ambulance.

As explained above, we proposed that a readmittance to the LTCH within 3 days after a discharge will result in one LTC–DRG payment for the entire stay. Since we are treating both, the stay at the LTCH that occurred before and after the discharge to the intervening provider, parts of the stay as one episode of care, we proposed that treatment or care provided during the "interruption" would be considered to have occurred during that single episode of care and that payment for such services are included in the LTC–DRG payment. We also proposed to include the days of the 3-day or less interruption of stay in counting LTCH days to determine the total length of stay of the patient at the LTCH if medical treatment or care were provided during the 3 days or less because these services would be considered to have been paid for as part of the total LTCH stay (§ 412.531(b)(1)(iii)). Furthermore, we proposed that if a patient is discharged home, and within a 3-day or less period received no additional medical treatment or service, but is readmitted to the LTCH, the days away from the LTCH would not be included in the length of stay calculation.

We also proposed that this policy would be applicable to all services or procedures provided to the patient either under Medicare Part A, or Part B, except for the services which are expressly excluded from bundling under section 1886(a)(1)(H)(i) of the Act and § 411.15(m), such as services furnished by physicians under § 415.102(a) and other specific health professionals. Failure to comply with this bundling requirement could lead to sanctions such as termination of the LTCH's Medicare provider agreement or civil money penalties (under section 1866(a)(1)(H)(i) of the Act).

Although we understand that, in good faith, a patient could be discharged from a LTCH, return home for a day or two, experience a setback, and then be readmitted to the LTCH, we believe that this type of a readmission to the LTCH must be considered an extension of the original hospitalization and that Medicare will not pay for two claims for what was, in effect, one episode of care. The 3-day or less interrupted stay policy takes into account the profile of most LTCH patients, as typically very sick individuals with multicomorbidities. We believe that it is reasonable to presume that if this type of patient is discharged and then readmitted to a LTCH within 3 days, the readmission signifies a continuation of the original hospital stay and not a new episode of care. Furthermore, we are concerned about reports of LTCHs discharging and readmitting patients who are still undergoing active treatment rather than obtaining services for these patients "under arrangements" in accordance with section 1862(a)(14) of the Act and the regulations at § 412.509.

In the January 2004 proposed rule, we indicated that we intend to collect data on any Medicare claims for outpatient services as well as inpatient services furnished during the time that the patients are away from the LTCH under the 3-day or less interrupted stay policy. We would review data to determine whether we will expand the 3-day time period and we will consider proposing this change in a future rule. Further, if it appears that additional patients are being discharged for the purpose of receiving tests or procedures at other Medicare settings, and then readmitted to the LTCH, in order for the LTCH to avoid paying for the procedure "under arrangements," we may find it appropriate for our Quality Improvement Organizations (QIO) to evaluate the medical basis for the original discharge. A patient discharge that is not clinically justifiable could constitute potential violation of the LTCH's conditions of participation in the Medicare program for inadequate discharge planning or an inappropriate discharge from the LTCH under § 482.43. Moreover, as noted above, if a separate bill is submitted by an entity other than the LTCH for services furnished during this period, this could also be a violation of the LTCH's provider agreement obligation regarding bundled services.

In proposing the policy in the January 2004 proposed rule, we did not attempt to restrict a LTCH from pursuing necessary or more appropriate clinical care from another facility. As we designed the PPS for LTCHs, the original interrupted stay policy was created for situations where sound clinical judgment could suggest a different treatment setting for LTCH patients: A patient requiring emergency surgery at an acute care hospital; a patient who would appear to benefit from a specific therapy regimen at an IRF; or a patient who had improved and, therefore, could be appropriately cared for at a SNF. The policy accounted for a readmission to the LTCH after the emergency care or in the event of a change in the patient's condition, that is, for sound clinical reasons. Fundamentally, the original interrupted stay policy resulted from our determination to allow considerable latitude to medical personnel in this regard without untoward payment consequences for the Medicare program.

We proposed a revision to the existing interrupted stay policy because we believed that 3 days in most instances represents an appropriate interval for establishing whether or not the reason for the patient's readmission is directly connected to the original episode of care and whether or not Medicare-covered services were obtained during the interruption that should have otherwise been provided "under arrangements" by the LTCH.

All inpatient services, under Medicare, fall within the purview of the requirement of section 1862(a)(14) of the Act, and, therefore, what we stated was not a departure from existing policy. Under section 1862(a)(14) of the Act, notwithstanding any other provision of this title, "no payment may be made under Part A or Part B for any expenses incurred for items or services which are other than physicians' services (as defined in regulations promulgated specifically for purposes of this paragraph), services described by section 1861(s)(2)(K) of the Act (certified nurse-midwife services, qualified psychologist services, and services of a certified registered nurse anesthetist) and which are furnished to an individual who is a patient of a hospital or critical access hospital by an entity other than the hospital or critical access hospital unless the services are furnished under arrangements (as defined in section 1861(w)(1) of the Act with the entity made by the hospital or critical access hospital." Section 1861(w)(1) of the Act states that "[t]he term "arrangements" is limited to arrangements under which receipt of payment by the hospital, critical access hospital, skilled nursing facility, home health agency, or hospice program (whether in its own right or as agent), for services for which an individual is entitled to have payment made under this title, discharges the liability of such individual or any other person to pay for the services." We believe the objective of these statutory provisions, which were implemented for inpatient acute care hospitals in regulations at § 411.15(m) and subsequently at § 412.509 for LTCHs, was to discharge financial liability for inpatients who may have received additional care off-premises and to assign payment responsibility for the care to the hospital that is being paid for that beneficiary's total care for that spell of illness. The total care delivered by the hospital may be provided "directly" or "under arrangements" with other facilities (§ 412.509(c)) and was included in Medicare's payment to the hospital.

Over the years, we have often referred to this as the "prohibition against unbundling" for purposes of emphasizing that if a Medicare provider "unbundles" specific components of a beneficiary's total inpatient care (provided either "directly" or "under arrangements") and sends separate claims to Medicare for those tests or treatments, the provider would be acting in violation of the statute and applicable regulations. Since LTCHs treat patients with multicomorbidities who are often in need of a wide range of diagnostic and treatment modalities and lengthy hospitalizations, we believe that in this particular setting, this statutory requirement is particularly vulnerable to gaming. For that reason, we proposed to clarify the existing general unbundling prohibition and to propose specific language on the unbundling prohibition as it applies to the interrupted stay policy under the LTCH PPS and proposed to codify it in regulations. As noted above, we were concerned that LTCH patients, under active treatment, are being inappropriately discharged to other treatment sites, receiving tests or procedures related to one of the diagnoses the patient being hospitalized and which otherwise should have been provided at the LTCH either directly or under arrangements under § 412.509 and then readmitted to the LTCH. Another claim is also being submitted to Medicare by the other treatment site for those tests or procedures. As stated earlier, under the LTCH PPS, payments associated with specific LTC–DRGs include all costs associated with rendering care to the type of patients treated in LTCHs and, therefore, additional Medicare payments for such services would be inappropriate.

We noted in the proposed rule that we understand that during a particular hospitalization, a typical LTCH patient, with multicomorbidities, could suddenly require emergency care at an acute care hospital. This would be the case, for example, if a patient who was admitted to the LTCH with a principal diagnosis of chronic obstructive pulmonary disease and respirator dependence, with secondary diagnoses of hypertension, Type II diabetes mellitus, history of coronary artery disease, and history of bladder cancer suddenly exhibits symptoms consistent with a pneumothorax (lung collapse) and requires treatment that is beyond the scope of the LTCH. Services obtained at an acute care hospital, under the proposed 3-day or less policy, would be considered related to the original diagnoses, and submission of a separate claim by the acute hospital is considered a violation of the unbundling requirement established by section 1862(a)(14) of the Act. Payment to the acute hospital for any services delivered would be the responsibility of the LTCH since the critical episode was directly related to the hospitalization at the LTCH. Conversely, if the same patient had instead suddenly suffered a myocardial infarction (heart attack) that requires a cardiac workup, evaluation, and possible implantation of a cardiac stent, it may be appropriate to discharge this patient for admission to an acute care facility for appropriate evaluation and the invasive cardiac procedure. Under these circumstances, the admission to the acute hospital was totally unrelated to the patient's diagnoses in the LTCH and arguably there may be no need to bundle the services. A discharge from the LTCH and a readmission following the procedure at the acute hospital in order to resume the treatment provided by the LTCH, for which the patient was originally hospitalized, could be entirely appropriate. (Notwithstanding the necessity of the discharge, under the 3-day or less interrupted stay policy, there would be no additional separate LTC–DRG payment generated to the LTCH if the patient returns to the LTCH within the 3-day period.) We also noted in the proposed rule that it could be argued that in this type of a subsequent admission to the acute hospital, the acute care hospital should be able to submit a claim to Medicare for the procedure. (This payment to the acute hospital may be subject to the postacute care policy at § 412.4, depending upon the DRG to which it is assigned (68 FR 45404 and 45412, August 1, 2003).)

We stated that we were aware that there could be exceptions, and that in the example cited above, sound medical judgment could have dictated that the patient who needed the cardiac stent should first be discharged to the acute hospital and then readmitted to the LTCH within 3-days in order to continue necessary treatment at the LTCH. In such a case, notwithstanding our 3-day interrupted stay policy, it would be arguable that the implantation of the cardiac stent did not fall within the category of services that should be paid for by the LTCH under arrangements, and that the acute hospital should be able to submit a claim to Medicare.

Accordingly, while arguably it may be appropriate to attempt to limit the unbundling requirement that services be provided under arrangement to those that are "related" to the admitting diagnoses of the LTCH patient, we did not propose a methodology that would be both administratively feasible and not subject to gaming, given the multiple comorbidities typical of LTCH patients. The prospective payment system for this particular setting was designed to capture all costs associated with treating these highly complicated cases, and we believed that it would be difficult to distinguish whether a particular critical episode could be seen as arising from one of the patient's many medical conditions for which the patient is presently at the LTCH. Therefore, in the January 2004 proposed rule, we solicited comments and suggestions that were consistent with the stated policy goals described above and that would be administratively feasible. We understood that any policy adopted would need to be issued with detailed instructions to fiscal intermediaries on implementation procedures to ensure a correct and consistent interpretation of our policy objectives.

Comment: We received a comment from a LTCH chain fully endorsing the proposed 3-day interrupted stay policy.

Response: We thank the commenter for supporting the proposed policy. In order to address the essential issues raised in the proposed rule, while taking into account legitimate concerns raised by the LTCH community in public comment, we are making certain modifications to the final policy. Under this final rule, if a LTCH discharges a patient to an acute care hospital, an IRF, SNF, or home for 3 days or less and the patient returns to the same LTCH within 3 days, Medicare will make only one LTC–DRG payment to the LTCH, as the stay is paid as a single episode of care. In addition, we will make no separate payment to the intervening acute care hospital, IRF, SNF, or in the case of a beneficiary who is discharged home and who receives outpatient treatment from an acute care hospital or an IRF for medical care or services provided to the LTCH patient during the 3-day or less interrupted stay. Payments for tests, treatments, or procedures provided to the LTCH patient during the "interruption" at an outpatient hospital setting or for treatment or care as an inpatient at an acute hospital, IRF, or SNF would be the responsibility of the LTCH as services provided "under arrangements'(§ 412.509(b) and (c)). Furthermore, this policy also governs if the LTCH patient receives care or treatment at more than one of these intervening sites during the 3-day or less period, that is, this policy applies if the patient is discharged from the LTCH on Monday morning, and on Monday afternoon receives an MRI at an outpatient department of an acute care

hospital then is admitted as an inpatient to the acute care hospital on Monday evening and finally is discharged home on Tuesday morning and readmitted to the LTCH on Wednesday. In response to several comments, which we will discuss in detail below, we have decided to establish a exception in this general 3-day or less rule for the 2005 LTCH PPS rate year to the payment policy discussed above in the event that during an up to 3-day interruption, a LTCH patient receives treatment in an acute care hospital that results in the case being grouped to a surgical DRG. For this limited instance we will allow the acute hospital to bill separately for the discharge that is grouped to a surgical DRG. During the 2005 LTCH PPS rate year, we will gather data on the impact of this exception in order to evaluate, among other effects, the frequency of this scenario during a 3-day interrupted stay at a LTCH, as well as what surgical DRGs are actually represented. Depending upon what information the data reveals, we may decide to propose to continue this exception or to propose appropriate policy revisions.

Therefore, the policy that we are finalizing in this final rule differs from our proposed policy. We had originally proposed that no payment would be made to intervening providers during a 3-day or less interruption in stay, but in this final rule, we are now providing a 1-year exception in the event that inpatient care provided at an acute care hospital is grouped to a surgical DRG. Under this finalized policy, where the LTCH is required to pay for care during any days of the 3-day or less interruption, all days of the 3-day or less interruption that the patient is away from the LTCH will be included in that patient's day count at the LTCH. If the LTCH patient goes home during the interruption and receives no additional medical care prior to being readmitted to the LTCH, the intervening days will not be included in the day count because the LTCH did not deliver any services to the patient during those days either directly or "under arrangement".

In the proposed rule, we proposed that outpatient services provided during the 3-day or less interruption of stay were considered to be part of the LTCH episode of care and, thus, are considered to be provided "under arrangements." We believe that our reference to outpatient services, tests, or procedures could have been clearer. So we are taking this opportunity to clarify, to the extent it was not already clear, that our policy applies to outpatient services provided in acute care hospitals and IRFs (these two sites of care were cited in our proposed rule). SNFs, which were also mentioned in the proposed rule, do not provide outpatient care and, thus, are excluded from the outpatient reference. We note that we are clarifying this at § 412.531.

We have reviewed the proposed § 412.531 and determined that it can be simplified and clarified so that it is less cumbersome to understand and more clearly describes the division of the original interrupted stay policy into a "3-days or less interruption of stay" and a "greater than 3-day interruption of stay." Thus, we have made significant revisions to the regulations text in an effort to accomplish this goal. Please note that the revised "interruption of stay" regulations text is not substantively different than the proposed interrupted stay regulations text, (except for the case of where, after further review and consideration of public comment, we have made an exception to our proposed policy for care grouped to a surgical DRG under the IPPS for the 2005 LTCH rate. We are providing, in this final rule, that under these unique circumstances, the intervening acute care hospital gets a separate Medicare payment). Consequently, we have replaced the general term "interruption of stay" with two definitions that reflect the division of our original policy into two specific concepts (3-days or less and greater than 3-days), as well as make conforming terminology changes throughout the section. Among other things, we have also more concisely outlined the method for determining the length of stay of the patient at a LTCH if the patient does not receive inpatient or outpatient medical care or treatment provided by an acute care hospital or IRF, or SNF services, during a 3-day or less interruption of stay. Moreover, we provided a more clear breakdown of how a LTCH and an intervening provider will be paid during a "3-day or less" or "greater than 3-day" interrupted stay. In addition, the original term "interruption of stay" appears throughout the existing regulation text at § 412.525 and § 412.532. We have made conforming changes to these regulations as well to reflect the two components of the interrupted stay terminology. These conforming terminology changes in § 412.525 and § 412.532 do not affect the substantive policy of these provisions.

Over the course of the first year of implementation of the revised 3-day or less interrupted stay policy, we will study relevant claims data in order to evaluate whether further proposed refinements to this policy would be warranted in next year's rule. Specifically, we will (1) analyze new data to determine whether problems associated with LTCH interrupted stays equally affected all settings to which LTCH patients may have been discharged and subsequently readmitted; and, (2) we will closely monitor patterns of discharges and readmissions under the first year of this policy using relevant claims data as soon as they become available to determine whether further proposed changes to the policy are required to ensure that beneficiary access to medically necessary services are not compromised by creating disincentives for other providers to accept patients discharged from LTCHs.

Comment: Two commenters asserted that CMS had presented no empirical evidence to support the position that the proposed expansion of the interrupted stay policy would prevent inappropriate "unbundling" of treatment and services or prevent "gaming" the system. The commenters noted that there are already processes in place for CMS to address a compliance problem (that is, QIOs, OIG investigations, fraud and abuse action). The commenters point out that CMS should take into account the fact that some QIOs are adopting medical necessity criteria and discharge standards. Furthermore, they believed that CMS was wrong to pursue a regulatory scheme that would penalize LTCHs for appropriate discharges to acute care hospitals in lieu of actually enforcing existing regulations. One commenter encouraged CMS to "precisely target" those LTCHs that are found to be engaging in patient discharge and readmissions policies for financial purposes rather than for clinical benefit.

Response: In the August 30, 2002 final rule that implemented the LTCH PPS, we stated that we would consider expanding or revising the interrupted stay policy based on information received from the provider community or information gained from our ongoing monitoring sources. The LTCH PPS was implemented for LTCHs beginning with the cost reporting periods beginning on or after October 1, 2002. Therefore, some LTCHs (for example, hospitals with cost reporting periods beginning August 1, 2002) may have been subject to the LTCH PPS for less than one year. Accordingly, we have only limited specific data on the impact of behavioral changes brought about by the LTCH PPS regarding patient treatment and movement among providers. However, we relied on the best information available to us when proposing and finalizing this policy. We relied on anecdotal information from the LTCH

provider community, regional offices, and fiscal intermediaries, as well as analyses of inpatient discharge records by the CMS Office of Research, Development, and Information (ORDI). In addition, it has always been our practice to rely on information from providers, regional offices, and fiscal intermediaries in determining what policies to propose, particularly when the issues we are concerned with have an unnecessarily negative impact on Medicare program expenditures.

In addition, based on the data analysis of inpatient discharge records performed by our ORDI, we believe that there is cause for concern regarding the appropriateness of many of these stays at the acute care hospital since they are of 3 or fewer days compared to the average inpatient length of stay of approximately 5.9 days. If it typically takes, on average, 5.9 days to resolve the condition chiefly responsible for an admission to an acute care hospital, we question the legitimacy of a patient discharge from a LTCH to an acute hospital for 1, 2, or at most 3 days, followed by a readmission to the LTCH. This pattern suggests that the "discharge" may not be legitimate and that the patient really did not need the level of care provided in an acute care hospital as evidenced by the short stay at the acute care hospital. If the "discharge" was "legitimate", we believe the length of stay at the acute care hospital would have been more reflective of a typical stay at an acute care hospital, that is, 5.9 days and not 1, 2, or 3 days. In other words, if it normally takes 5.9 days to stabilize and resolve the underlying condition requiring the admission, then stays that are far shorter than this could reasonably suggest that the patient's condition did not rise to the level of acuity of a true acute care hospital patient and that the admission to the acute care hospital was unnecessary. In this case, the LTCH should not have discharged the patient in the first place, but rather sent the patient to the acute care hospital for needed tests or procedures and paid for them "under arrangements". Consequently, the 3-day interrupted stay policy is a mechanism for ensuring that LTCHs do not circumvent the required "under arrangements" policy by "discharging" patients rather than sending them for isolated services or procedures. We are trying to make clear that "discharges" by a LTCH followed by "readmissions" of the same patient to the same LTCH within a 3 day or less window are not to be viewed as true discharges. Instead, the care provided at the intervening facility is care that is really an inherent part of the single episode of care at the LTCH and should be paid for as such.

We are providing a limited exception to this policy for patients who are discharged from LTCHs, admitted as inpatients to acute care hospitals and readmitted to the same LTCHs within 3 days if the treatment that they receive at the acute care hospital is grouped to a surgical DRG during the 2005 LTCH PPS rate year. This exception is discussed in greater detail in the following response.

In this final rule, therefore, we are finalizing the policy that will disallow additional Medicare payments to an intervening provider for an episode of care that we believe should have been delivered under arrangements in conformity with existing regulations at § 412.509(b)(c).

As more data become available, we may be able to formulate specific hospital policies and rely on additional comprehensive data analysis.

As noted above, in response to the comment that we are pursuing a new regulatory scheme that penalizes LTCHs for appropriately discharging patients to other sites of care, we firmly believe that we are not penalizing LTCHs for appropriate discharges. LTCHs remain free to discharge patients to acute care hospitals, for example, for necessary medical care. Our final policy does not prevent this. Instead, our 3-day or less interrupted stay policy aims to prevent LTCHs from inappropriately discharging patients only to readmit them in a short time in order to circumvent the "under arrangement" policy. As previously indicated, "under arrangements" regulations have existed since the beginning of the Medicare program, and were certainly in effect under the TEFRA payment system for hospitals excluded from the IPPS, and continue to be in effect with the implementation of the LTCH PPS in § 412.509. Thus, providers are expected to be in continual compliance with the requirements specified in § 411.15(m) and under the LTCH PPS, in § 412.509. The finalized 3-day or less interrupted stay policy, at revised § 412.531, as described in the previous response, is definitely not a new "regulatory scheme" as one commenter asserts.

In response to the commenter's other assertion that there are already processes in place for dealing with non-compliance issues on an individual basis, we would agree and note that, prospectively, we also have every intention of working with QIOs, the OIG, and if necessary, pursuing fraud and abuse actions against individual LTCHs, if appropriate. We do not agree that the existence of standards of medical review are employed by QIOs, and the pursuit of legal remedies is an alternative for establishing policies that disallow unnecessary and inappropriate Medicare payments. We also want to note that while we are aware that certain of our QIOs are engaged in designing medical necessity criteria for LTCHs, we do not believe that this impacts on our responsibility to assure that LTCHs comply with existing "under arrangement" policies and to formulate regulations that protect the Medicare program against unnecessary and inappropriate payments. Moreover, we would also emphasize that the "under arrangements" policy deals with appropriate payment for services, not issues of medical judgment. The policy that we are promulgating does not prohibit a physician at a LTCH from ordering tests or procedures for a patient's benefit that cannot be provided on site at the LTCH. The policy only defines how those services will be paid for under Medicare.

Comment: Two commenters asserted that "under arrangements" refers to what services or procedures the LTCH (primary hospital) arranges for and controls and that if a LTCH patient is subsequently admitted to an acute care hospital, the LTCH would have no control over care that the patient may receive. A third commenter joined in the assertion that under the proposed policy, LTCHs could be subject to unlimited, uncontrolled costs during the acute care stay that would discourage readmissions to the LTCH since, under the proposed policy, the LTCH would be required to pay for the costs of services beyond those that relate to the plan of care in place when the patient was discharged from the LTCH.

Response: Our regulations at § 412.509(c) specify that "[t]he long-term care hospital must furnish all necessary covered services to the Medicare beneficiary who is an inpatient of the hospital either directly or under arrangements * * *" When a necessary covered service is unavailable on site at the hospital, in order to comply with the regulations as well as the statute they implement at section 1862(a)(14) of the Act, the hospital must procure the specific services elsewhere. These services would be delivered at another site under orders from the original hospital because they were deemed necessary by physicians at that location, but unavailable at that site of care. Although personnel from the original hospital would not be administering the tests or treatments that were procured "under arrangements," the services would be related directly to the plan of care for

that patient. Notwithstanding a sudden non-surgical medical emergency occurring during the original test or procedure that could require personnel at the secondary site to alter the original plan of care (and which would still be delivered "under arrangements"), we believe that the very principle of "under arrangements" services implies that the services have been "arranged for" precisely because physicians at the primary hospital determined that those services were necessary. We remained thoughtful of this principle when we examined public comments and revisited the "under arrangements" component of the proposed 3-day or less interrupted stay policy for the LTCH PPS. Under our finalized policy, therefore, the readmission to the LTCH within 3-days of a patient's discharge is a continuation of the original episode of care for payment purposes. In order words, "discharges" by an LTCH followed by a "readmission" to the LTCH within 3 days are not viewed as a true "discharge". Furthermore, treatment that the patient receives during that interruption as an inpatient or outpatient at an acute care hospital or an IRF, or any services at a SNF, will be understood as also arising from the hospitalization at the LTCH and deemed to have been delivered "under arrangements" as governed by § 412.509(c). After considering several of the comments we received, however, we are providing for a limited exception to the above policy that addressed a LTCH's responsibility to pay for all covered services delivered during the interruption. Specifically, we are providing that if inpatient care provided at an acute care hospital is grouped to a surgical DRG for the 2005 LTCH PPS rate year, this case will be separately reimbursed by Medicare for the period July 1, 2004 to June 30, 2005. If a patient's treatment at an acute care hospital during a 1, 2, or 3-day interruption is grouped to a surgical DRG under the acute care inpatient prospective payment system, a separate Medicare payment will be made to the acute care hospital. Based on the limited information we have regarding this specific issue, we believe that this temporary and narrow exception to the general policy that we are finalizing in this regulation is appropriate and may be understood in relation to the logic that underlies our 3-day or less interruption of stay policy. The 3-day or less interruption of stay policy described above is based on the presumption that tests and procedures delivered during a 1, 2, or 3-day interruption in a LTCH stay are an outgrowth of the patient's principal and secondary diagnoses at the LTCH, not requiring a discharge from the LTCH to another site of care, but rather delivered by the LTCH either directly or under arrangements, as required by section at section 1862(a)(14) of the Act and implemented by § 411.15(m) and § 412.509. An emergency surgical procedure may not be directly related to the patient's principle or secondary diagnoses at the LTCH, but may arguably signify a distinct episode of care. Therefore, while the two LTCH discharges will be paid as one discharge, under this limited exception, the acute care hospital will receive a separate payment from Medicare for treatment that is grouped into a surgical DRG even during a 3-day or less interruption of stay from a LTCH.

We are particularly concerned about protecting the Medicare Trust Fund against unnecessary and inappropriate patient shifting and additional Medicare payments in situations where a LTCH exists as a hospital within a hospital, under § 412.22(e) in situations where both hospitals are under common ownership. In that situation, even if the LTCH received only one discharge payment under the original interrupted stay policy, the fact that a full DRG would have been paid to the host acute care hospital (which is under common ownership with the LTCH) could have served as an incentive for decisions to be made for financial purposes rather than for clinical considerations. We are also concerned that if a LTCH patient is discharged to an acute care hospital for only 1, 2, or 3 days, followed by a readmission to the LTCH, there may be reason to believe that the treatment delivered, even if it was grouped to a surgical DRG, was not a major procedure because of the relatively short length of stay, and, therefore, should have been provided under arrangements. (Under the revised interrupted stay policy established in the August 30, 2002 final rule (67 FR 56002–56006), which we are now defining as the "greater than 3-day interruption of stay," at § 412.531(a)(2)(i), we have provided for a separate DRG to be paid to the acute care hospital if the treatment in the acute care hospital requires a stay of greater than 3 days, but less than or equal to 9 days, which is what we believe would commonly be the case for a "major" surgical procedure.) In establishing the one-year exception for surgical DRGs, set forth above, we understand that this exception addresses only some of the concerns raised by the commenters and that we are creating a distinction between surgical and non-surgical care. We believe, however, that this temporary "exception," limited to surgical DRGs, is appropriate as LTCHs specialize in the treatment of complex medical cases. While they may not be set up for a complex surgical intervention, they are generally capable of handling an unexpected medical crisis and a "discharge" to another site of care followed by a readmission to the LTCH within 3 days or less should be unnecessary. Furthermore, we will continue to monitor "surgical" hospitalizations occurring during interruptions in a LTCH stays to determine whether the distinction that we have established with this policy actually accomplishes our goals of preventing unnecessary and inappropriate Medicare payments. During the 2005 LTCH PPS rate year, we will analyze records of LTCH patients who fall within this exception, particularly focusing on the surgical DRGs to which their stays are grouped.

Comment: Several commenters assert that CMS is violating budget neutrality by broadening the scope of financial responsibility beyond what was provided "under arrangements" for base year rates fiscal years 1998 and 1999 and that this would distort and reduce Medicare payments to LTCHs. Two commenters were concerned that if the proposed policy was finalized, there would be a significant financial impact on the LTCH and also noted that there was not regulatory impact in the proposed rule.

Response: We want to note that under the TEFRA payment system, if a LTCH patient required tests and procedures that were unavailable at a LTCH, under section 1862(a)(14) of the Act, implemented in regulations at § 411.15(m), the statute requires that they be provided under arrangements. Thus, if a LTCH patient required tests and procedures that were unavailable at the LTCH, we assume that the LTCH had provided those services "under arrangement" (and did not discharge the patient to another site of care and directly admit the patient following the off-site treatment) because it is required by the statute and regulations. Consequently, we can only assume that hospitals would have included the costs of medical services procured elsewhere "under arrangements" in a patient's Medicare claim since under the TEFRA system, these additional costs would then have been included in the hospital target amount and would be paid for by Medicare. We disagree that our policy violates budget neutrality because LTCHs should have included these

services in their claims data which we used from 1998 and 1999 to set the base rates for the LTCH PPS. We expect that as responsible corporate entities, LTCHs take necessary steps to comply with Medicare regulations which they are required to follow through their provider agreements under 42 CFR Part 489. We presume that LTCHs, to the extent that they were following our regulations, would have included the costs of services furnished under arrangement in their cost reports and, if they failed to do so, those costs may not be reflected in the base rates.

Data from analyses of FY 2000 and CY 2002 MedPAR files were analyzed in order to track patient movement related to discharges from a LTCH and admissions to other inpatient sites, which were followed by readmission to the LTCH. If tests and procedures were being provided and paid for "under arrangements," in compliance with our regulations, significant patient movement would have been uncommon. Our data indicated that in FY 2000, only 1.1 percent of all Medicare patients were readmitted to a LTCH within 3 days of a discharge (912/80,893 patients) of which less than 700 were treated in acute care hospitals during the 3-day period. Our CY 2002 data revealed that 1.0 percent of Medicare patients followed the above sequence (1,077/107,643 patients), of which 850 were treated in an acute care hospital during the 3-day interruption. We believe that this data indicates that prior to the implementation of the LTCH PPS, the vast majority of LTCHs complied with the "under arrangements" regulations. Therefore, since the patient was not discharged in order to procure the service, but rather remained a LTCH patient, even though the LTCH moved the patient to another site for needed tests or care, those tests or care were provided under arrangements. Accordingly, the costs of these services should have been included in the patient's Medicare claim during those years and, thus, should have been factored in when we were calculating our base rates for the LTCH PPS.

The policy that we are finalizing, as described above, therefore, requires a LTCH to cover off-site tests or medical treatment, either inpatient or outpatient, delivered at an acute care hospital or an IRF, or care at a SNF, "under arrangements" if the patient is readmitted to the LTCH within 3 days. We are establishing an exception if the treatment is grouped to a surgical DRG under the IPPS at an acute care hospital during the 2005 LTCH PPS rate year, under the 3-days or less interruption of stay policy. In other words, if the intervening stay is "sandwiched" between two LTCH stays, one LTC–DRG payment will be made by Medicare representing payment in full, as described in § 412.521(b) for the entire episode of care including costs for care delivered "under arrangements". We reiterate that Medicare will make a separate payment to an acute hospital for care that is grouped to a surgical DRG during a 3-day or less interruption during the 2005 LTCH PPS rate year. The policy that we are finalizing adds no greater financial responsibility for LTCHs than existed prior to the implementation of the LTCH PPS. Therefore, we do not agree that this policy will reduce payments to LTCHs in any significant way. We do not believe that the policy will have a measurable impact on payments to LTCHs and therefore we did not produce an impact analysis for this policy.

Comment: Two commenters expressed concern that the proposed policy penalizes appropriate discharges disregarding the clinical needs of patients and that patients' safety could be jeopardized. They assert that the proposed rule contains financial disincentives for a LTCH to discharge a patient to an acute care hospital, even if appropriate, and also discourages readmission of a patient discharged from an acute care hospital.

Response: We disagree with the commenters concerns that the proposed policy could have a negative impact on patient care in that a LTCH would have a significant financial disincentive to seek the most appropriate care for a patient who has developed an unrelated problem that the LTCH could not treat on premises—such as the hypothetical cardiac stent mentioned above—if the LTCH would have to pay for all necessary care at the acute care hospital "under arrangements." The event that would trigger the LTCH's under arrangements financial liability would be a readmission to the LTCH within a 3-day period. Since the length of stay of the patient at the non-LTCH setting is unknown, we do not believe that the LTCH will refrain from discharging the patient for appropriate care. Although we believe that readmission for necessary care to the LTCH should be controlled by the clinical needs of the beneficiary, we understand, however, that the proposed policy could serve to discourage the LTCH from readmitting the patient that had a stay of up to 3 days at a non-LTCH site.

In response to these concerns, we have revised our 3-day interrupted stay policy. Under the revised policy, as noted above, the LTCH will be responsible for medical services obtained "under arrangements" during the 3-day-or-less absence from the LTCH for services provided to the patient during the interruption under the following circumstances: (1) If the treatment is an outpatient service delivered by an acute care hospital or IRF within 3 days; (2) if the patient is admitted to an acute care hospital and is grouped to a medical (but not a surgical) DRG and is readmitted within 3 days; (3) If the patient was admitted to a IRF or a SNF and then readmitted to the LTCH within 3 days. Should the patient's stay be grouped to a medical DRG at the acute care hospital, no Medicare payment would be made to the acute care hospital under the IPPS and the LTCH would report any diagnoses or procedure codes provided at the acute hospital on the patients LTCH record (which could affect the LTC–DRG to which the case is assigned for payment purposes or LTCH outlier payments). Medicare will pay the LTCH based on all of the diagnoses and procedure codes listed, including those resulting from the "under arrangements" care and the LTCH would pay the acute care hospital for the patient's care. If the patient's treatment at the acute care hospital is grouped into a surgical DRG during the LTCH PPS rate year, however, Medicare will generate a separate payment to the acute care hospital. (The patient's readmission to the LTCH in this circumstance may also result in the acute care hospital being paid under the post-acute transfer policy at § 412.4(c).) The patient's readmission to the LTCH, however, would still be considered as a continuation of the original stay for payment purposes, and the LTCH would not receive a second LTC–DRG payment.

We also want to emphasize that any inpatient or outpatient medical treatment at an acute care hospital or IRF or care at a SNF that otherwise should have been provided by the LTCH "under arrangements" that occurs during a 1, 2, or 3-day interruption, is the responsibility of the LTCH. Therefore, if the same day that a patient is discharged from the LTCH, the patient obtains an outpatient test from an acute care hospital and as a result of that test, the patient is admitted to an acute care hospital for one day and is readmitted to the LTCH on the third day, the LTCH is responsible for paying for services delivered at both sites of care.

Comment: One commenter claims that this proposed policy is both arbitrary and capricious and is based on financial

concerns rather than on clinical rationale and medical necessary.

Response: We disagree with the commenter that this policy is arbitrary and capricious and based on financial concerns rather than on clinical rationale or medical necessity. We have provided throughout this final rule, as we did in the proposed rule, our rationale for this policy in conformance with the applicable Administrative Procedures Act. We have conducted thorough examinations of the issues, and our proposed and final policies were formulated on the bases of these detailed analyses. Nothing in the 3-day interrupted stay policy prevents physicians from making appropriate medical decisions for the benefit of patients. The 3-day interrupted stay policy merely addresses how Medicare will pay for the necessary services resulting from those decisions. Thus, we believe physicians make treatment decisions on the basis of clinical judgment and medical necessity and do not let Medicare payment policy dictate the course of action that they believe to be in the best interests of their patients. The requirement for hospitals to provide all inpatient services either directly or "under arrangements" is not new policy. We believe that the revision of the proposed 3-day interrupted stay policy in this final rule addresses the legitimate concerns of our commenters by excepting acute surgical inpatient episodes, during the 2005 LTCH PPS rate year, from the LTCH's responsibility to pay for all medical care delivered to a LTCH patient between a discharge and a subsequent readmission to the LTCH. Although protection of the Medicare Trust Fund from inappropriate and unnecessary overpayments is important, ensuring the delivery of high quality medical care to beneficiaries, which was the rationale behind the Congress' creation of the Medicare program over three decades ago, continues to be our overriding goal. We do not believe that the interrupted stay policy that we are finalizing in this rule should have any negative affect on a LTCH's responsibility or capacity to deliver high quality medical care nor do we believe that we have established a system of financial disincentives that will lead to the compromising of beneficiary care. LTCHs have been working under the principles of "under arrangements" since they were established as a provider category over three decades ago. We also want to note that prospective payment systems are dynamic entities. The Congress conferred broad authority on the Secretary in section 307(b)(1) of Public Law 106–554 to design a PPS for LTCHs and permitted the Secretary to "provide for appropriate adjustments to the long-term hospital payment system * * *" This authority did not end with the implementation of the system on October 1, 2002 and the Secretary is exercising his discretionary authority as conferred by the statute to make these adjustments. As with PPSs, we will continue to monitor the impacts of our policies to determine whether proposed changes in the payment policy are warranted or appropriate.

Comment: One commenter claims that no other provider type is subject to a more stringent "bundling" rule or "under arrangement" rule.

Response: In response to the commenter's assertion that "no other provider is subject to a "more stringent" "bundling rule" or "under arrangements" rule, we would emphasize that all providers, not just LTCHs, are required to provide all inpatient services directly or under arrangements (section 1862(a)(14) of the Act), implemented by § 411.15. This final rule is doing nothing more than forcing those providers that aren't complying with the longstanding "under arrangements" policy to comply with this requirement. Those providers already complying with our "under arrangement" regulations should feel unaffected by our 3-day or less interruption of stay policy because this policy ensures that they follow the "under arrangement" regulations that they are already following.

Typically, LTCHs are certified as inpatient acute care hospitals, but are excluded from the IPPS and paid under a different PPS only if they demonstrate that the patients that they treat require lengthy hospital-level care for on the average, greater than 25 days. Payments under the LTCH PPS are grouped into the same DRGs as are acute care patients under the IPPS, but are weighted to reflect the high degree of resources required to treat these severely sick patients. Therefore, notwithstanding that all providers are required to provide all inpatient services "either directly or under arrangements" under Medicare, we would assert that in general, LTCHs are in a position to offer "directly" a more comprehensive range of medical services than are other excluded hospitals. We would also remind the commenter that the responsibility for the LTCH to pay for any medical care delivered during the up to 3-day interruption is only effectuated by a readmission to the LTCH for additional treatment. This readmission, which triggers the 3-day interrupted stay policy that we are finalizing, serves to link both halves of the hospitalization (that is, the stay at the LTCH before and after the discharge to the intervening provider(s)) as one episode of hospital-level care. Since a LTCH is certified as an acute care hospital, it is reasonable that if the patient needed any additional care otherwise related to the LTCH stay that was unavailable at the LTCH, the care should have been delivered "under arrangements," with no need for a patient discharge. (An exception to this policy would be if a patient received care at an acute care hospital that was grouped to a surgical DRG during the 3-days or less interruption, in which event, Medicare will make a separate payment to the acute care hospital.) Furthermore, should the patient be out of the LTCH and in an intervening acute care hospital, IRF, or SNF before being readmitted to the LTCH, beyond 3-days, but before the applicable fixed periods set forth in the greater than 3-day interruption of stay policy at § 412.531(a)(2) (that is, between 4 and 9 days at an acute care hospital, between 4 and 27 days at an IRF, or between 4 and 45 days at a SNF), we believe the discharge to the facility is bona fide. It is reasonable that a LTCH patient could require a major surgical intervention at an acute care hospital, could appear to be able to benefit from more rigorous rehabilitation at an IRF, or appear to improve to the extent that hospital-level care was no longer necessary. It is also reasonable that after a period of time, which we are establishing as greater than 3 days, after the post-operative period at the acute care hospital, the patient may require further treatment at the LTCH based on the original diagnoses, or the patient at the IRF or SNF could experience a setback and require a readmission to the LTCH. Thus, we are basing this policy on the belief that the intervening provider offered a full course of treatment or care to the patient and should receive a separate Medicare payment.

Comment: One commenter expresses concern that the proposed policy would require negotiations with acute care hospitals for payment of the "under arrangements" services. The commenter notes that since it is customary for a LTCH to refer patients to acute care hospitals for a variety of services, many of which are very costly and involve new pharmaceutical or technological intervention, these costs would not have been included in rate-setting for the LTCH PPS. Two commenters included a list of conditions that a LTCH might not be able to treat and that, in the best interests of the patient, might require

admission to an acute care hospital. Another commenter believes that LTCHs are designed to provide a "higher level of post acute care, not a high level of acute care."

Response: With regard to the commenter's concern that our policy would require negotiations between LTCHs and acute care hospitals that could theoretically put the LTCH at a disadvantage, we would reiterate that even under the TEFRA payment system, LTCHs were required to provide, and actually did provide, necessary patient care either directly or "under arrangements." Moreover, our other PPSs require that necessary care be provided either directly or "under arrangements". Thus, negotiations among hospitals for the payment of medical care or services provided by one facility to the patient of another facility has been and continues to be a common occurrence. Compliance with this requirement presumes a relationship and, therefore, a payment arrangement with an acute care hospital usually existed even prior to the August 30, 2002 publication of the final rule (67 FR 55954) establishing the LTCH PPS and its specific "under arrangements" regulation at § 412.509. With regards to the commenter's concern about the responsibility for LTCHs to cover costs for "very costly" new pharmaceutical or technological services procured "under arrangements" from an acute care hospital for an LTCH patient, we would reiterate that under the TEFRA payment system, LTCHs were required to provide services "under arrangements." To the extent that new pharmaceutical or technological services were provided to LTCH patients "under arrangements" by an acute care hospital, the LTCH was responsible for those costs and should have included them in its Medicare claim for that patient. Generally, these costs would have been included in the base rate when we developed the LTCH PPS. We do not believe that in the past this imposed a significant financial burden on LTCHs, but based on the commenter's concerns, we will monitor the effects of this policy on services involving new technologies and if necessary, will consider addressing this issue in the future. Regarding the two commenters who included a list of conditions that, in their judgment, could result in a discharge from a LTCH and an admission to an acute care hospital, some surgical diagnoses were present, in the list forwarded by the commenters. In addition, there were a number of medical diagnoses included in the commenter's list. As noted earlier, we have modified the proposed policy in this final regulation, so that where the acute stay is grouped to a surgical DRG during the 2005 LTCH PPS rate year in a 3-day or less interrupted stay, the discharge to the intervening provider would not be care provided "under arrangements" and the intervening acute care hospital would receive a separate Medicare payment for the care associated with the surgical DRG. In response to the medical diagnoses included by the commenters, our physicians have reviewed the list and believe that in most cases, it would be within the ability of a LTCH to treat those patients, since LTCHs are certified as acute care hospitals. In response to the LTCHs which see themselves as "providing a higher level of post acute care, not a high level of acute care", as noted by one of the commenters, we believe that this is an issue that we and MedPAC will continue to evaluate, to determine whether higher LTCH PPS payments are appropriate for these facilities. (We anticipate that MedPAC's June 2004 Report to the Congress, will explore this issue, among others, dealing with LTCHs.)

Comment: One of the commenters stated that the proposed expansion of the interrupted stay rule could lead to more "gaming" of system by large LTCH chain facilities which could likely have patients readmitted to a sister LTCH facility in order to avoid this rule.

Response: We are aware of the potential for inappropriate arrangements between closely-located LTCHs owned by the same corporation that would side-step the application of the 3-day interrupted stay policy. At the outset of the LTCH PPS, we noted that as part of our monitoring efforts for the original interrupted stay policy, we would examine patient movement among providers during an episode of care and that our data analyses could, therefore, reveal discharges and readmissions between LTCHs. As data become available, we will certainly continue to monitor the activity and we will pursue appropriate remedies if we detect this behavior.

d. *Onsite discharges and readmittances.* Under § 412.532, generally, if more than 5 percent of all Medicare discharges during a cost reporting period are patients who are discharged to an onsite SNF, IRF, or psychiatric facility, or to an onsite acute care hospital and who are then directly readmitted to the LTCH, only one LTC–DRG payment will be made to the LTCH for these type of discharges and readmittances during the LTCH's cost reporting period. Therefore, payment for the entire stay will be paid either as one full LTC–DRG payment or a short-stay outlier, depending on the duration of the entire LTCH stay.

In applying the 5-percent threshold, we apply one threshold for discharges and readmittances with a co-located acute care hospital. There is also a separate 5-percent threshold for all discharges and readmittances with co-located SNFs, IRFs, and psychiatric facilities. In the case of a LTCH that is co-located with an acute care hospital, an IRF, or a SNF, the interrupted stay policy at § 412.531 applies until the 5-percent threshold is reached. However, once the applicable threshold is reached, all those discharges and readmittances to the applicable site(s) for that cost reporting period are paid as one discharge pursuant to § 412.532. This means that even if a discharged LTCH Medicare patient was readmitted to the LTCH following a stay in an acute care hospital of greater than 9 days, if the facilities share a common location and the 5-percent threshold were exceeded, the subsequent discharge from the LTCH will not represent a separate hospitalization for payment purposes. Only one LTC–DRG payment will be made for all those discharges during a cost reporting period to the acute care hospital, regardless of the length of stay at the acute care hospital, that are followed by readmittances to the onsite LTCH.

Similarly, if the LTCH has exceeded its 5-percent threshold for all discharges to an onsite IRF, SNF, or psychiatric hospital or unit, with readmittances to the LTCH, the subsequent LTCH discharge for patients from any of those sites for the entire cost reporting period will not be treated as a separate discharge for Medicare payment purposes. (As under the interrupted stay policy, payment to an acute care hospital under the IPPS, to an IRF under the IRF PPS, and to a SNF under the SNF PPS, will not be affected. Payments to the psychiatric facility also will not be affected.)

5. Other Payment Adjustments

As indicated earlier, we have broad authority under section 123 of Public Law 106–113, including whether (and how) to provide for adjustments to reflect variations in the necessary costs of treatment among LTCHs. Thus, in the August 30, 2002 final rule (67 FR 56014–56027), we discussed our extensive data analysis and rationale for not implementing an adjustment for geographic reclassification, rural location, treating a disproportionate share of low-income patients (DSH), or indirect medical education (IME) costs. In that same final rule, we stated that we would collect data and reevaluate the

appropriateness of these adjustments in the future once more LTCH data become available after the LTCH PPS is implemented. Because the LTCH PPS has been implemented for less than 2 years and there is a lag-time in data availability, sufficient new data have still not yet been generated that would enable us to conduct a comprehensive reevaluation of these payment adjustments. Nonetheless, in the January 30, 2004 proposed rule (69 FR 4764), we explained that we reviewed the limited data that are available and found no evidence to support additional policy changes. Therefore, we did not propose to make any adjustments for geographic reclassification, rural location, DSH, or IME. We received no comments, and therefore, in this final rule, we are not making an adjustment for geographic reclassification, rural location, DSH, or IME at this time. However, we will continue to collect and interpret new data as they become available in the future to determine if these data support proposing any additional payment adjustments.

6. Budget Neutrality Offset to Account for the Transition Methodology

Under § 412.533, we implemented a 5-year transition period from reasonable cost-based payment to prospective payment, during which a LTCH is paid an increasing percentage of the LTCH PPS rate and a decreasing percentage of its payments under the reasonable cost-based payment methodology for each discharge. Furthermore, we allow a LTCH to elect to be paid based on 100 percent of the standard Federal rate in lieu of the blended methodology.

The standard Federal rate was determined as if all LTCHs will be paid based on 100 percent of the standard Federal rate. As stated earlier, we provide for a 5-year transition period that allows LTCHs to receive payments based partially on the reasonable cost-based methodology. In order to maintain budget neutrality as required by section 123(a)(1) of the Public Law 106–113 and § 412.523(d)(2) during the 5-year transition period, we reduce all LTCH Medicare payments (whether a LTCH elects payment based on 100 percent of the Federal rate or whether a LTCH is being paid under the transition blend methodology).

Specifically, we reduce all LTCH Medicare payments during the 5-year transition by a factor that is equal to 1 minus the ratio of the estimated TEFRA reasonable cost-based payments that would have been made if the LTCH PPS had not been implemented, to the projected total Medicare program PPS payments (that is, payments made under the transition methodology and the option to elect payment based on 100 percent of the Federal rate).

In the June 6, 2003 final rule (68 FR 34512), based on the best available data, we projected that a certain percentage of LTCHs would elect to be paid based on 100 percent of the standard Federal rate rather than receive payment based on the transition blend methodology. As discussed in that same final rule, using the same methodology established in the August 30, 2002 final rule (67 FR 56034), this projection was based on our estimate that either: (1) A LTCH has already elected payment based on 100 percent of the Federal rate prior to the beginning of the 2004 LTCH PPS rate year (July 1, 2003); or (2) a LTCH will receive higher payments based on 100 percent of the standard Federal rate compared to the payments they would receive under the transition blend methodology. Similarly, we projected that the remaining LTCHs would choose to be paid based on the transition blend methodology at § 412.533 because those payments would be higher than if they were paid based on 100 percent of the standard Federal rate.

In the June 6, 2003 final rule (68 FR 34513), we projected that the full effect of the remaining 4 years of the transition period, including the election option, will result in a cost to the Medicare program of $310 million. Specifically, for the 2005 LTCH PPS rate year, we estimated that the cost of the transition would be $100 million. This cost would have necessitated an estimated budget neutrality offset of 4.6 percent (0.954) for payments to LTCHs in the 2005 rate year. Furthermore, in order to maintain budget neutrality, we indicated that, in the future, we would propose a budget neutrality offset for each of the remaining years of the transition period to account for the estimated payments for the respective fiscal year.

In the January 30, 2004 proposed rule (69 FR 4773), based on the best available data at that time, we projected that approximately 69 percent of LTCHs would be paid based on 100 percent of the standard Federal rate rather than receive payment under the transition blend methodology for the 2005 LTCH PPS rate year. Using the same methodology described in the August 30, 2002 final rule (67 FR 56034), this projection, which used updated data and inflation factors, was based on our estimate that either—(1) A LTCH has already elected payment based on 100 percent of the Federal rate prior to the start of the 2005 LTCH PPS rate year (July 1, 2004); or (2) a LTCH would receive higher payments based on 100 percent of the 2005 LTCH PPS rate year standard Federal rate compared to the payments it would receive under the transition blend methodology. Similarly, we projected that the remaining 31 percent of LTCHs would choose to be paid based on the applicable transition blend methodology (as set forth under § 412.533(a)) because they would receive higher payments than if they were paid based on 100 percent of the proposed 2005 LTCH PPS rate year standard Federal rate.

In that same proposed rule, based on the best available data at that time and proposed policy revisions described in that same rule, we projected that the full effect of the remaining 4 years of the transition period (including the election option) would result in a cost to the Medicare program of $170 million as follows: $80 million in the 2005 LTCH PPS rate year; $50 million in the 2006 LTCH PPS rate year; $30 million in the 2007 LTCH PPS rate year; and $10 million in the 2008 LTCH PPS rate year.

Accordingly, using the methodology established in the August 30, 2002 final rule (67 FR 56034) based on updated data and the policies and rates discussed in the January 30, 2004 proposed rule (69 FR 4774), we proposed a 3.0 percent reduction (0.970) to all LTCHs' payments for discharges occurring on or after July 1, 2004, and through June 30, 2005, to account for the estimated cost of the transition period methodology (including the option to elect payment based on 100 percent of the Federal rate) of the $80 million for the 2005 LTCH PPS rate year.

In that same proposed rule, we explained that the proposed offset of 3.0 percent had decreased relative to the prior estimate of 4.6 percent for several reasons. Specifically, we used data from more recent cost reports and were able to obtain data from more LTCHs (211 LTCHs as compared to 194 LTCHs in the June 6, 2003 final rule). In addition, in projecting the percentage of hospitals that would elect to be paid based on 100 percent of the 2005 LTCH PPS rate year standard Federal rate, we used data from the Provider Specific File (PSF), which indicates whether a LTCH opted to be paid based on 100 percent of the standard Federal rate or the transition blend methodology for the FY 2003 LTCH PPS payment year. However, based on information obtained from the PSF, we learned that, for those LTCHs that we projected would choose payment for FY 2003 based on 100 percent of the standard Federal rate (where payment based on the full Federal rate would be expected to be higher for those LTCHs than payment under the transition blend

methodology), a significant number of those LTCHs chose to be paid under the transition blend methodology that is projected to result in payment lower than that using 100 percent of the standard Federal rate.

Similarly, a significant number of those LTCHs that we expected would choose payment under the transition blend methodology (where payment under the transition blend for those LTCHs would be expected to be higher than payment based on 100 percent of the standard Federal rate) chose to be paid using 100 percent of the standard Federal rate, which is projected to result in payment lower than that under the transition blend methodology. Since a number of LTCHs opted to be paid based on a methodology in which they would receive lower payments, we assume that the overall cost of $100 million to the Medicare program of the transition period will be less than what was projected in the June 6, 2003 final rule for the 2005 LTCH PPS rate year. Thus, in the June 6, 2003 final rule, in estimating the $100 million cost to the transition, which would have necessitated a 4.6 percent reduction to all LTCHs' payments for the 2005 LTCH PPS rate year, we overstated our assumptions of the cost of the transition period.

Accordingly, to account for the projected lower cost of the transition period due to those LTCHs that chose to be paid based on a methodology in which they would receive lower payments in FY 2003, in the January 30, 2004 proposed rule (69 FR 4773), we proposed a 3.0 percent (0.970) reduction to all LTCHs' payments during the 2005 LTCH PPS rate year. We also noted that the proposed 0.970 transition period budget neutrality factor for the 2005 LTCH PPS rate year was 3 percentage points lower than the transition period budget neutrality factor for the 2004 LTCH PPS rate year (0.940). We explained that this smaller budget neutrality offset would contribute to greater LTCH payment increases between the 2004 and 2005 LTCH PPS rate years compared to the increases seen between FY 2003 and the 2004 LTCH PPS rate year. We do not expect to see these large payments per discharge increases in future years as the majority of LTCHs will have transitioned fully to the LTCH PPS and, therefore, the transition period budget neutrality factor should remain more stable.

In this final rule, based on the updated data, using the same methodology established in the August 30, 2002 final rule (67 FR 56034), we are projecting that approximately 93 percent of LTCHs will be paid based on 100 percent of the standard Federal rate rather than receive payment under the transition blend methodology during the 2005 LTCH PPS rate year. This projection, which used updated data (including data from the PSF) is based on our estimate that either: (1) A LTCH has already elected payment based on 100 percent of the Federal rate prior to the beginning of the 2005 LTCH PPS rate year (July 1, 2004); or (2) a LTCH will receive higher payments based on 100 percent of the standard Federal rate compared to the payments they would receive under the transition blend methodology. Similarly, we project that the remaining 7 percent of LTCHs will choose to be paid based on the transition blend methodology at § 412.533 because those payments are estimated to be higher than if they were paid based on 100 percent of the standard Federal rate. The applicable transition blend percentage is applicable for a LTCH's entire cost reporting period beginning on or after October 1 (unless the LTCH elects payment based on 100 percent of the Federal rate).

We note that this projection of the percentage of LTCHs that will be paid based on 100 percent of the Federal rate rather than receive payments under the transition blend methodology during the 2005 LTCH PPS rate year is higher than our estimate of 69 percent presented in the January 30, 2004 proposed rule. For this final rule, we are using the most recent available data (claims data from the FY 2003 MedPAR files, cost report data from FYs 1999–2001, and data from the December 2003 update of the PSF) and we have obtained data for more LTCHs (239 LTCHs compared to 211 in the proposed rule.) Specifically, we used data from the PSF as of December 31, 2003, which indicates whether an LTCH has notified its fiscal intermediary that it has elected to receive LTCH PPS payments based on 100 percent of the Federal rate. Based on the information obtained from the PSF, we learned that, of the 65 out of 211 LTCHs (65/211= 31 percent) that we projected in the proposed rule would choose payment under the transition blend methodology for the 2005 LTCH PPS rate year (where payment under the transition blend for those LTCHs was expected to be higher than payment based on 100 percent of the Federal rate), 61 of those 65 LTCHs have in fact already made the election to receive payment based on 100 percent of the Federal rate, even though we had projected that this election would result in a lower payment than payment under the transition blend methodology.

Furthermore, we believe that more LTCHs have elected to receive payments based on 100 percent of the Federal rate due to an increase in estimated fully Federal LTCH PPS payments relative to decreasing reasonable cost-based payments.

Specifically, as we discussed above in section V.C.3. of this preamble, based on an analysis of LTCH claims data in the latest available MedPAR files (December 2003 update of the FY 2003 MedPAR data), we have found that the average LTC–DRG relative weight assigned to each case has increased due to a comparatively larger number of cases being assigned to LTC–DRGs with higher relative weights. This increase may be attributable to a number of factors, including improvements in coding practices, which are typically found when moving from a cost-based reimbursement system to a PPS. Increase in case-mix was also observed after the IPPS was implemented in FY 1984 for acute care hospitals. Additionally, as discussed in the article "Long-Term Care Hospitals Under Medicare: Facility-Level Characteristics" by Liu and Associates published in the Winter 2001 Health Care Financing Review (Volume 23, Number 2), when LTCHs received cost-based reimbursement under the TEFRA system, the cap on LTCHs' target amounts created inequities between older (existing before 1983) and newer (opening after 1983) LTCHs. Specifically, older LTCHs had relatively low target amounts compared to the newer LTCHs, and, therefore, treated relatively less complicated patients in order to keep their costs below their target amount. One of the goals in implementing the PPS for LTCHs was to provide older LTCHs an incentive to treat more complex LTCH patients. The fact that older LTCHs are no longer limited by their relative lower target amounts and are now able to treat more complex patients may be another factor which has contributed to the increase in case-mix. This increase in case-mix has resulted in an increase in projected LTCH PPS payments based on 100 percent of the Federal rate for the 2005 LTCH PPS rate year. In contrast, based on the most recent cost report data (FY 2001), the average cost per discharge appears to be decreasing for many LTCHs. Decreasing costs are also to be expected when converting from a retrospective cost-based reimbursement system to a prospective DRG-based payment system. Accordingly, our projection of the reasonable cost-based portion of the transition blend payment is based on these lower costs. The cost

per discharge could be decreasing due to better operating efficiency of the hospital, which is one of the incentives of a PPS. Thus, our projection of increasing LTCH PPS payments based on 100 percent of the Federal rate and our projection of decreasing payments based on reasonable costs may explain why a much larger number of LTCHs have in fact elected to receive payments based on 100 percent of the Federal rate despite our previous projections to the contrary. Thus, we believe that, in the 2005 LTCH PPS rate year, a larger percentage of LTCHs (larger than we estimated in the January 30, 2004 proposed rule) will elect payment based on 100 percent of the Federal rate rather than the transition blend methodology.

Based on the best available data and the final policies described in this final rule, we are projecting that in the absence of a transition period budget neutrality offset, the full effect of the remaining 4 years of the transition period (including the election option) as compared to payments as if all LTCHs wouldbe paid based on 100 percent of the Federal rate would result in a cost to the Medicare program of $29 million as follows:

LTCH PPS rate year	Estimated cost (in millions)
2005	$15
2006	10
2007	4
2008	0

We are no longer projecting a small cost for the 2008 LTCH PPS rate year (July 1, 2007 through June 30, 2008) even though some LTCH's will have a cost reporting period for the 5th year of the transition period which will be concluding in the first 3 months of the 2008 LTCH PPS rate year because as we discussed above, based on the most recent available data, we are projecting that the vast majority of LTCHs will have made the election to be paid based on 100 percent of the Federal rate rather than the transition blend.

Accordingly, using the methodology established in the August 30, 2002 final rule (67 FR 56034) based on updated data and the policies and rates discussed in this final rule, we are implementing a 0.5 percent reduction (0.995) to all LTCHs' payments for discharges occurring on or after July 1, 2004, and through June 30, 2005, to account for the estimated cost of the transition period methodology (including the option to elect payment based on 100 percent of the Federal rate) of the $15 million for the 2005 LTCH PPS rate year.

We note that the 0.5 percent transition period budget neutrality offset for the 2005 LTCH PPS rate year is lower than the proposed transition period budget neutrality offset for the 2005 LTCH PPS rate year (3.0 percent). As discussed above, we are projecting that the vast majority of LTCHs (93 percent) will be paid based on 100 percent of the Federal rate during the 2005 LTCH PPS rate year. Accordingly, as discussed above, we are projecting a much lower cost ($15 million compared to $80 million in the proposed rule) of the full effect of the transition period methodology (including the election option) for the 2005 LTCH PPS rate year.

As noted above, in order to maintain budget neutrality, we indicated that we would propose a budget neutrality offset for each of the remaining years of the transition period to account for the estimated costs for the respective LTCH PPS rate years. In this final rule, based on the best available data, we estimate the following budget neutrality offsets to LTCH PPS payments during the remaining years of the transition period: 0.4 percent (0.996) for the 2006 LTCH PPS rate year, 0.1 percent (0.999) for the 2007 LTCH PPS rate year, and 0 percent (no adjustment) for the 2008 LTCH PPS rate year. As noted above, we believe there is no longer a need for a small offset in the 2008 LTCH PPS rate year because we project that the vast majority of those LTCHs whose 5th year of the transition period will be concluding in the first 3 months of the 2008 LTCH PPS rate year will be paid based on 100 percent of the Federal rate rather than the transition blend.

As we discussed in the August 30, 2002 final rule (67 FR 56036), consistent with the statutory requirement for budget neutrality in section 123(a)(1) of Public Law 106–113, we intended that estimated aggregate payments under the LTCH PPS equal the estimated aggregate payments that would be made if the LTCH PPS were not implemented. Our methodology for estimating payments for purposes of the budget neutrality calculations uses the best available data at the time and necessarily reflect assumptions. As the LTCH PPS progresses, we are monitoring payment data and will evaluate the ultimate accuracy of the assumptions used in the budget neutrality calculations (for example, inflation factors, intensity of services provided, or behavioral response to the implementation of the LTCH PPS) described in the August 30, 2002 final rule (67 FR 56027–56037). To the extent these assumptions significantly differ from actual experience, the aggregate amount of actual payments may turn out to be significantly higher or lower than the estimates on which the budget neutrality calculations were based.

Section 123 of Public Law 106–113 and section 307 of Public Law 106–554 provide broad authority to the Secretary in developing the LTCH PPS, including the authority for appropriate adjustments. Under this broad authority, as implemented in the regulations at § 412.523(d)(3), we have provided for the possibility of making a one-time prospective adjustment to the LTCH PPS rates by October 1, 2006, so that the effect of any significant difference between actual payments and estimated payments for the first year of the LTCH PPS would not be perpetuated in the LTCH PPS rates for future years.

In the June 6, 2003 final rule (67 FR 34153), we estimated that total Medicare program payments for LTCH services over the next 5 LTCH PPS rate years would be $2.17 billion for the 2004 LTCH PPS rate year; $2.29 billion for the 2005 LTCH PPS rate year; $2.42 billion for the 2006 LTCH PPS rate year; $2.56 billion for the 2007 LTCH PPS rate year; and $2.71 billion for the 2008 LTCH PPS rate year.

In the January 30, 2004 proposed rule (69 FR 4774), based on the best available data at that time, we estimated that total Medicare program payments for LTCH services over the next 5 LTCH PPS rate years would be $2.33 billion for the 2005 LTCH PPS rate year; $2.48 billion for the 2006 LTCH PPS rate year; $2.64 billion for the 2007 LTCH PPS rate year; $2.79 billion for the 2008 LTCH PPS rate year; and $2.96 billion for the 2009 LTCH PPS rate year.

In this final rule, consistent with the methodology established in the August 30, 2002 final rule (67 FR 56036), based on the most recent available data, we estimate that total Medicare program payments for LTCH services for the next 5 LTCH PPS rate years will be as follows:

LTCH PPS rate year	Estimated payments ($ in billions)
2005	2.96
2006	2.98
2007	2.95
2008	3.01
2009	3.12

In accordance with the methodology established in the August 30, 2002 final rule (67 FR 56037), these estimates are based on the projection that 93 percent of LTCHs will elect to be paid based on 100 percent of the 2005 LTCH PPS rate year standard Federal rate rather than the applicable transition blend, and our

estimate of 2005 LTCH PPS rate year payments to LTCHs using our Office of the Actuary's most recent estimate of the excluded hospital with capital market basket of 3.1 percent for the 2005 LTCH PPS rate year, 3.2 percent for the 2006 and 2007 LTCH PPS rate year, 2.8 percent for the 2008 LTCH PPS rate year, and 3.1 percent for the 2009 LTCH PPS rate year. We also took into account our Office of the Actuary's projection that there will be a change in Medicare beneficiary enrollment of 1.0 percent in the 2005 LTCH PPS rate year, −4.8 percent in the 2006 LTCH PPS rate year, −6.4 percent in the 2007 LTCH PPS rate year, −1.2 percent in the 2008 LTCH PPS rate year, and 0.2 percent in the 2009 LTCH PPS rate year. (We note that our Office of the Actuary is projecting a decrease in Medicare Part A enrollment, in part, because they are projecting an increase in Medicare managed care enrollment as a result of the implementation of several provisions of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003.)

Comment: Two commenters endorsed the proposed 3.0 percent transition period budget neutrality adjustment for the 2005 LTCH PPS rate year, but expressed concern that the new data sources for determining the budget neutrality offset (that is, use of cost report data from 211 LTCHs, and the PSF) suggest an error in previous budget neutrality adjustments (for FY 2003 and the 2004 LTCH PPS rate year). The commenters asked if and how CMS plans to account for errors in past estimates, and specifically asked whether CMS would use the one-time prospective adjustment to the LTCH PPS rates (effective October 1, 2006) to account for errors in previous transition period budget neutrality adjustments.

Response: The commenters are referring to the one-time prospective adjustment at 42 CFR § 412.523(d)(3), which states that the Secretary may make a one-time prospective adjustment to the LTCH PPS rates by October 1, 2006, so that the effect of any significant difference between actual payments and estimated payments for the first year of the LTCH PPS would not be perpetuated in the LTCH PPS rates for future years. The purpose of this one-time adjustment is to ensure that ultimately, total payments under the LTCH PPS are budget neutral to what total payments would have been if the LTCH PPS were not implemented in FY 2003, by correcting for possible significant errors in CMS' calculation of the LTCH PPS standard Federal rate. However, the transition period budget neutrality offset is a separate budget neutrality adjustment. The purpose of the latter adjustment is to maintain budget neutrality during the 5-year transition period, since the standard Federal rate was determined based on the assumption that all LTCHs would be paid under 100 percent of the standard Federal rate, while some LTCHs have, in fact, elected to be paid on the transition blend methodology. The budget neutrality adjustment is intended to account for those LTCHs that elected the blend methodology and, therefore, receive higher payments under the blend methodology relative to 100 percent of the standard Federal rate.

Because the transition period budget neutrality offsets are made to all LTCHs' payments under the LTCH PPS during each year of the 5-year transition period and are not a reduction to the LTCH standard Federal rate during the 5-year transition period, any errors in past estimates would not be perpetuated in the LTCH PPS rates for future years. In fact, by the end of the 5-year transition, there will be no budget neutrality offset since all LTCHs will then be paid based on 100 percent of the standard Federal rate. Thus, the one-time prospective adjustment was not intended to address possible errors in the transition period budget neutrality offsets used during the 5-year transition period. Furthermore, while we are aware that there are some limitations in the data, as with other Medicare prospective payment systems, the data that we use to determine the rates, adjustments and other factors under the LTCH PPS, including the transition period budget neutrality offsets, are always based on the best data that we have available at the time. We would expect that the projections of the budget neutrality offsets might fluctuate somewhat from rate year to rate year as more data upon which we base our projections become available, particularly, information on whether a LTCH has actually elected payment based on 100 percent of the standard Federal rate. Accordingly, we are not planning to make an adjustment by 2006 for errors in the estimates of the transition period budget neutrality offsets used in FY 2003 or in the LTCH PPS 2004 rate year.

As we discussed in the January 30, 2004 proposed rule (69 FR 4774), because the LTCH PPS has only been implemented for less than 2 years, sufficient new data have not been generated that would enable us to conduct a comprehensive reevaluation of our budget neutrality calculations. Accordingly, we did not propose to make a one-time adjustment under § 412.523(d)(3). At this time, we still do not have sufficient new data to enable us to conduct a comprehensive reevaluation of our budget neutrality calculations. Therefore, in this final rule, we are not making a one-time adjustment under § 412.523(d)(3) so that the effect of any significant difference between actual payments and estimated payments for the first year of the LTCH PPS is not perpetuated in the PPS rates for future years. However, we will continue to collect and interpret new data as the data become available in the future to determine if such an adjustment should be proposed.

7. Changes in the Procedure for Counting Days in the Average Length of Stay Calculation

Before the implementation of the PPS for LTCHs, Medicare paid LTCHs under the reasonable cost methodology subject to limitations on payments. Both the BBRA and BIPA required the development and implementation of a per discharge PPS for LTCHs based on DRGs for cost reporting periods beginning on or after October 1, 2002 (67 FR 55954, August 30, 2002).

Under the reasonable cost-based reimbursement system, the number of patient days that occurred during a cost reporting period and the costs associated with those days were reported on the hospital's cost report (Hospital and Hospital Health Care Complex Cost Report, CMS Form 2552–96), as were the number of patient discharges that occurred during that same period. This method of reporting and reimbursement did not require that all of the days of care to a patient be counted as occurring in the cost reporting period during which the patient was discharged. Under this method of reporting and reimbursement, the days of care to a patient are counted in the cost reporting period in which they occurred.

With the FY 2003 implementation of the LTCH PPS, as in other discharge-based PPS', such as those for acute care hospitals and for IRFs, all days of the patient's stay, even those occurring prior to the cost reporting period in which the discharge occurs are counted for payment purposes as occurring in the cost reporting period of the patient's discharge. An example of this distinction is as follows: A LTCH has a January 1 through December 31 cost reporting period; a Medicare patient is admitted on December 15 and discharged on February 5, 2004. Prior to the LTCH PPS, under the reasonable cost-based reimbursement system, costs and patient days occurring in December 2003 would be included in the January 1 through December 31, 2003 cost reporting period, even though the

patient was not discharged until February of the next cost reporting period that began January 1, 2004. Those patient days occurring in January and February would be counted in the next cost reporting period (2004) in which the discharge occurred. Since the implementation of the LTCH PPS, for payment purposes, all patient days for this stay would be reported in the cost reporting period in which the discharge occurred. In the above example, therefore, all of the patient stay would be counted in the next cost reporting period, which is the 2004 cost reporting period. Even if a LTCH is transitioning into fully Federal payments and a percentage of its payments is based upon what would have been paid under the former reasonable cost-based reimbursement system, under §§ 412.500 and 412.533, payment policy is governed by the LTCH PPS. At cost report settlement, payment is discharge-based. Therefore, once a LTCH is subject to the LTCH PPS, that is, for its first cost reporting period starting on or after October 1, 2002, the "days follow the discharge," which means that both days and costs are linked to the patient's discharge, even when the days occurred in a previous cost reporting period.

In the August 30, 2002 final rule (67 FR 55972), which established the policies of the LTCH PPS, we stated that "[t]he procedure by which a LTCH will be evaluated by its fiscal intermediary to determine whether it will qualify as a LTCH... is the same procedure currently employed under the TEFRA system." Currently, for determining whether a hospital meets the greater than 25 day average Medicare inpatient length of stay criterion, in the case of a Medicare patient who was admitted during one cost reporting period, but was discharged in a following cost reporting period, both covered and uncovered days are counted in the cost reporting period in which they occurred and not linked to the cost reporting period in which the patient is discharged.

Therefore, presently, for a LTCH with a January 1 through December 31 cost reporting period, if a patient was admitted on December 1, 2002 and discharged on January 15, 2003, patient days would be counted one way for payment purposes and another way for purposes of counting the average length of stay. For payment purposes, all 46 days of the stay and the costs associated with them would be reported during the cost reporting period that the discharge occurred, that is, January 1, 2003 through December 31, 2003. For purposes of determining whether a hospital meets the greater than 25 day length of stay criterion, under § 412.23(e)(2)(i), however, for the same patient, the 31 days in December would be counted as occurring during the January 1, 2002 to December 31, 2002 cost reporting period and the 15 days in January 2003 would be counted, along with the discharge, during the January 1, 2003 through December 31, 2003 cost reporting period.

As we stated in the January 30, 2004 proposed rule, we had received numerous inquiries from providers and fiscal intermediaries indicating that our two different ways of counting days under the LTCH PPS for payment and for average length of stay calculations have created considerable confusion. Therefore, in response to those inquiries and consistent with the payment system already in place for LTCHs as discussed above, we proposed to revise § 412.23(e)(3)(i) of the regulations to specify that if a patient's stay includes days of care furnished during two or more separate consecutive cost reporting periods, the total days of a patient's stay would be reported in the cost reporting period during which the patient is discharged in calculating the average length of stay for hospitals that qualify as LTCHs under both § 412.23(e)(2)(i) and (e)(2)(ii). We did not propose any changes to the formula of dividing the number of total days for Medicare patients by discharges for LTCHs in order to determine whether a hospital qualifies as a LTCH under § 412.23(e)(2)(i) or in the formula of dividing total days for all patients by discharges for LTCHs to qualify under § 412.23(e)(2)(ii).

In the August 1, 2003 final rule for the IPPS (68 FR 45464), we discussed the inability of the present cost report (Hospital and Hospital Health Care Complex Cost Report, CMS Form 2552–96) to capture total days for Medicare patients as required under §§ 412.23(e)(2) and (e)(3) for hospitals qualifying under § 412.23(e)(2)(i) and our present use of census data gathered from the Medicare provider analysis and review (MedPAR) files for this purpose. Prior to the October 1, 2002 implementation of the LTCH PPS, we relied on data from the most recently submitted hospital cost report in order to determine whether or not a hospital qualified as a LTCH. We will continue to utilize patient days and discharge data from MedPAR files for the qualification calculation under the revised § 412.23(e)(3)(i) until the cost reporting form is revised to capture total days for Medicare inpatients. As discussed earlier, for a hospital to qualify as a LTCH under § 412.23(e)(2)(i), it must demonstrate that the Medicare inpatients require care for an average Medicare inpatient length of stay of greater than 25 days for the hospital's most recent cost reporting period. Alternatively, for cost reporting periods beginning on or after August 5, 1997, a hospital that was first excluded from the PPS in 1986, and can demonstrate that at least 80 percent of its annual Medicare inpatient discharges in the 12-month cost reporting period ending in FY 1997 have a principal diagnosis that reflects a finding of neoplastic disease must have an average inpatient length of stay for all patients, including both Medicare and non-Medicare inpatients, of greater than 20 days (§ 412.23(e)(2)(ii)). Under the previous reasonable cost-based reimbursement system to determine whether or not a hospital met this requirement, total days for all patients were divided by the total number of discharges that occurred during a cost reporting period. When we implemented the LTCH PPS on October 1, 2002, we limited this calculation to only Medicare patients for hospitals to qualify under § 412.23(e)(2)(i), but did not change the calculation for hospitals to qualify under § 412.23(e)(2)(ii). As we noted in the August 30, 2002 final rule, "[w]e believe that excluding non-Medicare patients in determining the average inpatient length of stay for purposes of subclause (I) would be more appropriate in identifying the hospitals that warrant exclusion under the general definition of LTCH in subclause (I). However, in enacting subclause (II), the Congress provided an exception to the general definition of LTCH under subclause (I), and we have no reason to believe that the change in methodology for determining the average inpatient length of stay would better identify the hospitals that the Congress intended to exclude under subclause (II) (67 FR 55974). These hospitals will continue to have their greater than 20 days average length of stay calculated based on all days for all patients, whether Medicare or non-Medicare patients." As with a subclause (I) LTCH, payments for a subclause (II) LTCH have been discharge-based since the implementation of the LTCH PPS and, therefore, for consistency, days for all patients will be counted for ALOS purposes, during the cost reporting period when those patients are discharged.

Comment: We received three comments on our proposal to change the procedure for counting days in the ALOS calculation. The commenters generally supported the proposed change provided that CMS establish exceptions for LTCHs that previously

qualified under the existing criteria, but would lose LTCH status under the new procedure. Both commenters suggested that we should allow the LTCHs to present additional data to their fiscal intermediaries indicating that the LTCHs were treating Medicare LTCH patients who had not been discharged in time to comply with the ALOS requirements computed under the new procedure before losing LTCH designation. One of these commenters suggested that only after two years of failing to meet the "days follow the discharge" ALOS requirement, if a LTCH lose its designation. The same commenter asked us to clarify the impact of the proposed "days follow the discharge" policy on our existing policy which allows a LTCH that submits 5 months of data, under § 412.23(e)(3)(ii), to retain its LTCH status.

Response: We thank the commenters for their general endorsement of the proposed policy, and we understand their concern about LTCHs that are providing long-term hospital-level care for Medicare patients losing their designation under the new procedure. We want to reassure the commenters that under § 412.22(d), even if a fiscal intermediary determined that a LTCH was not meeting the ALOS under the new procedure, hospital status changes only at the start of a cost reporting period. Accordingly, even if a determination is made that the LTCH no longer meets the greater than 25 day length of stay criteria, it may be possible for the LTCH to show that for 5 of the 6 months immediately preceding the start of the next cost reporting period it meets the length of stay criteria and, therefore, not have a break in its payment status as a LTCH.

In response to one commenter's concerns, however, we are also providing a one-year grandfathering of LTCH status for all existing LTCHs that will give each hospital an additional cost reporting period to adjust to the new methodology. Therefore, for cost reporting periods beginning on or after July 1, 2004, but before July 1, 2005, no LTCH would lose its designation if it was unable to demonstrate its compliance with the ALOS requirement (§ 412.23(e)(3)(ii)) during its first cost reporting period under the new procedure. An example of our grandfathering provision is as follows: A LTCH's cost reporting period begins on October 1, 2004 and it is informed shortly thereafter by its fiscal intermediary, that it had not met the length of stay requirement under the new computational procedure based on data from its most recent cost reporting period, and the LTCH's data from April 1, 2005 through August 30, 2005 (at least 5 of the immediately preceding 6-month period before the start of its next cost reporting period) also did not show compliance. The LTCH would not lose its designation on October 1, 2005, but would have until the end of this cost reporting period (October 1, 2005 through September 30, 2006) to comply.

In response to the commenter who questioned the impact of the "days follow the discharge" policy on the provider's option to submit additional data demonstrating compliance with the ALOS requirement, we believe that § 412.23(e)(3)(i) is clear. The calculation resulting in the 5 months of data that the LTCH will have to present in order to indicate compliance will be made by the same method as proposed under § 412.23(e)(3)(i) for calculating the initial data reviewed by the fiscal intermediary. This means that the LTCH would not lose its status if its submitted data indicated that by dividing the patient days that represented patients who had been discharged during those 5 months by those discharges and omitting days for patients who had not yet been discharged, the LTCH served patients with a ALOS of greater than 25 days. Therefore, we do not believe that there is any incompatibility between the requirements of § 412.23(e)(3)(i) which establishes the new procedure linking days to discharges for the ALOS calculation and the presentation of 5 months of data by the LTCH by the same method under § 412.23(e)(3)(ii). In addition, while the commenter suggests that we consider an alternate method for meeting the 25 day length of stay criteria, we believe it would be inappropriate to allow a LTCH to present alternative data for indicating its inpatient census to its fiscal intermediary in situations where the LTCH fails to comply with the discharge-based day count, if it also failed to meet the revised computational procedure. We have always been aware of concerns regarding fluctuations in discharges and patient census at LTCHs that could jeopardize LTCH status and that is why, prior to the LTCH PPS, under the TEFRA system, we delay the effect of any determination to the beginning of the hospitals' next cost reporting period and we allowed a LTCH an opportunity to present its most recent data (§ 412.23(e)(3)(ii)) to maintain LTCH status, a policy that continues under the LTCH PPS. We do not believe that in establishing the discharge-based computation, it is appropriate to allow all LTCHs time to make changes, if necessary, to assure compliance with the revised criteria. Therefore, we are also finalizing the 1-year grandfathering provision described above, which gives LTCHs additional time to adjust to the new procedure without jeopardizing LTCH status. We believe that this provision addresses the concerns of the commenter who suggested that we allow non-compliance for 2 years prior to revoking LTCH status.

Finally, we want to clarify that LTCHs that qualify as LTCHs under § 412.23(e)(2)(ii) would also be subject to this requirement. We are issuing this clarification because we discovered that although we expressly provided in our January 30, 2004 proposed rule (69 FR 4775) that the total days of a patient's stay would be reported in the cost reporting periods during which the patient is discharged in calculating the ALOS for hospitals that qualify under both § 412.23(e)(2)(i) and (ii) (and our proposed regulation text is consistent with this language), we inadvertently included preamble language that may have caused confusion about this proposed policy. We also want to clarify that in the proposed regulation text at proposed § 412.23(e)(3)(i) that our "days follow the discharge policy" was applicable to days involving "* * * an admission during one cost reporting period and a discharge in a second consecutive cost reporting period * * *" This regulation text was not as refined as the articulation of the policy in the preamble where it was stated that the policy was applicable "if a patient's stay includes days of care furnished during two or more separate consecutive cost reporting periods." In other words, the days follows discharge policy is not limited to stays that occur in just 2 consecutive cost reporting periods, rather, it applies to stays that span 2 or more consecutive cost reporting periods. Thus, we are making a conforming change to the regulations text to clarify this policy. We apologize for any ambiguity in the proposed rule on this subject.

8. Clarification of the Requirements for a Satellite Facility or a Remote Location To Qualify as a LTCH and Changes to the Requirements for Certain Satellite Facilities and Remote Locations

a. *Policy Change.* 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 IPPS excluded hospital is either a freestanding hospital or a hospital-within-a-hospital under § 412.22(e) that

establishes an additional location by sharing space 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. A detailed discussion of our policies regarding Medicare payments for satellite facilities of hospitals excluded from the IPPS was set forth in the IPPS final rules published on July 30, 1999 (64 FR 41532–41534) and August 1, 2003 (67 FR 49982).

We established Medicare regulations regarding satellite facilities for several reasons. First, we believe that whenever a facility that is co-located with an acute care hospital is presented as part of another IPPS-excluded hospital, it is necessary to ensure that the facility is, in fact, organized and operated as part of the IPPS-excluded hospital and is not simply a unit of the acute hospital with which it is co-located. Although we recognize that the co-location of Medicare providers, in the form of satellite facilities, hospitals-within-hospitals, and excluded units, may have some legitimate advantages from the standpoint of clinical care as well as medical efficiency, we continue to believe that the physical proximity inherent in such arrangements also has considerable potential for Medicare program payment abuse in that it may facilitate patient shifting for reasons related to payment rather than clinical benefits. In existing regulations at § 412.22(e) for hospitals-within-hospitals (59 FR 45330, September 1, 1994), at § 412.23(h) for hospital satellites (64 FR 41532–41534, July 30, 1999 and 67 FR 49982, August 1, 2002), and § 412.25(e) for satellite facilities, we established "separateness and control" requirements governing the relationships between these facilities and their host hospitals.

Research by The Urban Institute on the universe of LTCHs that was used in developing the LTCH PPS pointed to the considerable growth of new LTCHs (or LTCH beds, as in the case of satellite facilities) that were co-located with other Medicare providers. Our more recent data confirm that this trend has continued. Even though our existing regulations governing hospitals-within-hospitals and satellite facilities established certain functional boundaries between these entities and their hosts, we instituted a policy under the LTCH regulations at § 412.532 to discourage inappropriate patient discharges and readmissions among co-located Medicare providers (67 FR 56007–56010, August 30, 2002). Furthermore, in the June 6, 2003 LTCH PPS final rule (68 FR 34157), we noted that we are monitoring the movement of patients among onsite providers for the purpose of determining whether we should consider proposing further changes to LTCH coverage and payment policy.

LTCH hospitals-within-hospitals and LTCH satellite facilities are similar in that both are located on the same campus or in the same building as another hospital, and many of the same separateness and control regulations exist for both types of facilities. However, there is an important distinction between them. A LTCH that is co-located with another Medicare hospital (generally an acute care hospital) is itself a distinct hospital (§ 412.22(e)). Section 412.23(e)(1) requires a LTCH to have a provider agreement as described under 42 CFR Part 489 to participate as a hospital. A satellite facility of a LTCH, like all satellite facilities of hospitals excluded from the IPPS (§ 412.22(h)), is not itself a separate hospital, but a "part of a hospital that provides inpatient services in a building also used by another hospital * * *" Consistent with its status as another hospital, a hospital-within-a-hospital has its own Medicare provider number. A satellite facility shares the provider number of the parent hospital.

Because a satellite facility is not considered a separate hospital under Medicare, if a LTCH with a satellite facility is interested in "spinning off" the satellite facility and establishing the previous satellite facility as an independent LTCH, the satellite must first be separately licensed by the State. The facility must further demonstrate compliance with the Medicare conditions of participation (COPs) under part 482 and other requirements for establishing a provider agreement under parts 482 and 489 to participate under Medicare as a hospital (§ 412.23(e)(1)). (Compliance with the COPs may be either demonstrated by a State agency survey or based on accreditation as a hospital by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO or the American Osteopathic Association (AOA) (section 1865 of the Act).) Second, if the newly established hospital meets the provider agreement requirements under 42 CFR part 489, it must demonstrate that it has an average Medicare inpatient length of stay of greater than 25 days (§ 412.23(e)(2)(i)) by providing data of a period of at least 5 months of the preceding 6-month period (§ 412.22(e)(3)(ii) and (iii)). The data used by the fiscal intermediary to calculate the average length of stay would be from discharges from the newly established hospital and not from discharges attributable to stays at the previous satellite facility for the period prior to its participation as a separate hospital.

Although we believe that these requirements, under existing § 412.23(e)(1) and (e)(2), are clear and unambiguous, we have been informed that due to misinterpretation, in some circumstances, application of this policy has been inconsistent. Therefore, some facilities operating as LTCH satellite facilities have been inappropriately granted autonomous status that has resulted in the assignment of their own Medicare provider numbers as LTCHs without first obtaining provider agreements to participate in Medicare as hospitals, under § 412.23(e)(1). Apparently, in these cases, the satellite facilities were able to demonstrate that as satellite facilities of LTCHs, Medicare patients at their location had an average length of stay of greater than 25 days, in compliance with § 412.22(h)(2)(ii) which required satellite facilities of hospitals excluded from the IPPS to comply with specific requirements for their provider category. In other situations, we understand that fiscal intermediaries correctly refused to accept data from LTCH satellite facilities for purposes of qualification as an autonomous LTCH and instead required the satellites to satisfy criteria for designation as a hospital, under § 412.23 (e)(1). In these cases, the fiscal intermediary evaluated average length of stay data dating from that hospital designation forward, as required by § 412.23(e)(2).

We believe consistency in the application of this policy is needed, in compliance with existing regulations at § 412.23(e)(1) and (e)(2). We are emphasizing that a LTCH satellite facility that is "a part of a hospital that provides inpatient services in a building also used by another hospital * * *" that is seeking to become an independent LTCH, must comply with the requirements set forth in the definition of a new LTCH in existing § 412.23(e)(4). Therefore, in the January 30, 2004 proposed rule (69 FR 4775–4777), we proposed to revise § 412.23(e)(4) to include a new paragraph (e)(4)(ii) that specifies that only data reflecting the average length of stay for Medicare patients in the newly established hospital will be utilized in the qualifying calculation at § 412.23(e)(2). Thus, we proposed to clarify language that emphasized that if a satellite facility is reorganized as a separately participating hospital under Medicare with or without a concurrent change of ownership, the new hospital cannot be paid under Medicare as a

LTCH until it demonstrates that it has an average Medicare inpatient length of stay in excess of 25 days based on discharges occurring on or after its effective date of participation as a hospital and not based on discharges at the satellite facility site when it was part of another hospital (§ 412.23(e)(4)(ii)).

We proposed that this policy clarification would also be applicable to remote locations of LTCHs that are being voluntarily separated from the parent LTCHs or sold and are seeking status as independent LTCHs. A remote location of a hospital (as defined at § 413.65(a)(2)) is similar to a satellite facility because it does not participate in Medicare as a separate hospital, but only as an integral and subordinate part of another hospital. However, unlike a satellite facility, a remote location is not one that is in the same building or on the same campus as another hospital. (Because a remote location has no "host" hospital, it is not required to meet the separateness criteria as hospitals-within-hospitals in § 412.22(e) that would arise for satellite facilities that become independent LTCHs, as discussed above.) Since the hospital would not be a LTCH until the fiscal intermediary reviews its documentation and determines that it qualifies, during those initial months, the hospital would be paid under the IPPS.

We emphasized that notwithstanding the fact that satellite facilities of LTCHs are required to independently meet the average Medicare inpatient length of stay requirement of greater than 25 days under § 412.22(h)(2)(ii)(D), we proposed to evaluate length of stay data only from discharges occurring after the facility has become a hospital. This is the case as the prerequisite to designation as a LTCH is a provider agreement under Part 489 of Chapter IV to participate *as a hospital* in the Medicare program (§ 412.23(e)(1)). The requirement that a satellite facility independently meets the length of stay criterion was never intended as an alternative method of qualifying as a separate excluded hospital. Under § 412.23(h)(2)(ii), satellite facilities of psychiatric, rehabilitation, and children's hospitals, as well as LTCHs, are required to meet specific requirements for their provider category because we believed that it was essential to ensure that satellite facilities of excluded hospitals actually delivered the specialized care for which Medicare was paying (§ 412.23(h)(2)(ii)). Furthermore, those regulations were designed to ensure that there is both an appropriate financial and administrative linkage between the satellite facility and the parent hospital, and a clear separation of the satellite facility from the host hospital. These policies are set forth in the July 30, 1999 IPPS final rule (64 FR 41534). In the case of a LTCH, we believe that our existing requirement that a satellite facility independently meet the greater than 25-day average Medicare inpatient length of stay requirement is consistent with the guiding principles of the LTCH PPS. We do not believe patients who do not require long-term hospital-level care should be admitted to either a LTCH or its satellite facility. In addition, we were concerned that, without requiring separate compliance, shorter lengths of stay at either the LTCH or its satellite facility could be balanced by longer stays at the other. By establishing these distinct standards for satellite facilities of excluded hospitals, we also wanted to safeguard against the possibility of these facilities functioning as a part of an acute care hospital. In the case of a LTCH, that result would be inconsistent with section 1886(d)(1)(B) of the Act, which provides for excluded rehabilitation and psychiatric units to be established in acute care hospitals, but not long-term care units.

There is another situation that must be distinguished from the scenario discussed above in which a LTCH is voluntarily separating from or selling its satellite facility or remote location with the intent of the satellite facility or remote location converting into an independent hospital and eventually a LTCH. Our recent provider-based regulations under § 413.65 require a remote location of a hospital that fails to meet certain requirements at § 413.65(e)(3) to seek status as a separate hospital if it is to continue functioning and being paid by Medicare. Satellite facilities of excluded hospitals, such as LTCHs, may also be affected by these new provider-based requirements and, in those cases, the following procedure would also be applicable.

Under the provider-based regulations, which became effective for the main providers as defined in § 413.65(a)(2), for cost reporting periods beginning on or after July 1, 2003, certain facilities that were formerly treated for payment purposes by Medicare as remote locations or satellite facilities of hospitals, are now precluded from continuing in that status because they do not meet the "common service area" location requirement for provider-based facilities under § 413.65(e)(3) (67 FR 50078, August 1, 2002). It has come to our attention that certain satellite facilities and remote locations of LTCHs are being affected by this preclusion. Due to the compulsory nature of this separation requirement, we proposed an exception for these affected satellite facilities and remote locations of LTCHs that would allow them to utilize length of stay data from the 5 months of the previous 6 months prior to when they were compelled to separate from their main provider under § 413.65(e)(3) (§ 412.23(e)(4)(iii)).

We wanted to emphasize that the only distinction between requirements under § 412.23(e)(4)(ii), for satellite facilities and remote locations that voluntarily separate from their parent LTCHs and requirements in § 412.23(e)(4)(iii) that apply to satellite facilities and remote locations compelled by provider-based location requirements at § 413.65(e)(3) to terminate their link to their main providers, is that we proposed to allow the latter group to utilize data gathered prior to establishing themselves as distinct hospitals. Furthermore, this distinction only exists for satellite facilities and remote locations of LTCHs that are affected by (§ 413.65(e)(3)) and which were in existence prior to the effective date of the provider-based location requirements (July 1, 2003). Under the regulations at § 413.65(e)(3), we did not propose to permit these entities to be established more than 35 miles from the main providers after June 30, 2003. We will assign new Medicare provider numbers to former remote locations of LTCH hospitals or satellite facilities that fail the new location requirement in § 413.65(e)(3), but want to become new LTCHs, if the following conditions were satisfied in § 412.23(e)(4)(iii):

- The facility meets all Medicare COPs in part 482 and other participation requirements set forth in 4part 489.
- The facility provides data to its fiscal intermediary indicating that during 5 of the immediate 6 months preceding its separation from the main hospital, it has independently met the greater than 25-day average length of stay requirement for its Medicare patients (§ 412.23(e)(3)).

Comment: Two commenters endorsed our codification of existing policy that requires a satellite to be certified first as an acute care hospital prior to meeting the requirements for designation as a LTCH. The commenters also endorsed the exception that we proposed to allow a satellite or remote location that must involuntarily separate from the main hospital because it failed to meet the "common service area" requirements under provider-based regulations to utilize ALOS data collected prior to its separation.

Response: We thank the commenters for endorsing both the basic policy and the exception. We believe that the policy that we have proposed is well within the authority given to the

Secretary under section 1886(d)(1)(B)(I) of the Act and, therefore, we are finalizing the policy, as well as the exception to the policy.

Comment: Several commenters asserted that since satellite facilities are already required to demonstrate independent compliance with ALOS provisions, CMS has the authority to allow LTCH satellites and remote locations to gain independent status as LTCHs without waiting the required time period. Furthermore, they state that there is no statutory or regulatory authority that mandates a certification waiting period. If CMS is reluctant to immediately certify satellites as LTCHs, however, they suggest it should implement the proposed policy prospectively, beginning on or after July 1, 2004. That is, this policy should not apply to LTCH satellites and remote locations that otherwise meet the requirements and that commenced the process for obtaining independent LTCH certification status prior to the effective date of this final rule. In addition, the commenters are of the opinion that an exception to the new policy should be created allowing LTCH satellite facilities and remote locations to gain immediate independent LTCH certification status if they meet the applicable requirements and have already been a part of a LTCH for at least 3 years.

Response: As we stated earlier, under § 412.22(h)(1)(ii), we have required satellites to independently meet the specific requirements related to their provider type. In establishing these regulations, our intention was to ensure that the satellite facilities of excluded hospitals were actually delivering the specialized care and indeed existed as an extension of the LTCH and not to provide alternative methodologies for qualifying as a particular category of excluded hospital. Since the satellite facilities share the same provider number as the parent hospital and are governed in all ways by that parent, it would be consistent for us to expect that the satellite facility also meets the length of stay requirement. However, as we have stated previously, if a satellite facility wishes to become an independent LTCH, we require that the satellite facility demonstrate that it meets the necessary requirements to be certified as an acute care hospital; once the satellite facility is Medicare certified, then the hospital may consider the classification requirements for becoming a "specialty" hospital. We are requiring satellites to undertake the same procedures that were in effect with the implementation of the IPPS by the Congress in 1983 in order to be designated as LTCHs. As one of the commenters indicated, the Secretary is not required, but nonetheless, has the statutory authority to establish this policy under section 1886(d)(1)(B)(iv)(I) of the Act. Section 1886(d)(1)(B)(iv)(I) of the Act defines a LTCH as "a hospital which has an average inpatient length of stay (as determined by the Secretary) of greater than 25 days." Thus, the statute is clear that the Secretary decides how the ALOS is calculated. By virtue of the broad authority conferred on the Secretary by the statute, we published regulations at § 412.23(e) describing how the ALOS is determined as well as specifying the procedure for designation as a LTCH. Under the regulations, an entity must be certified as an acute care hospital; the hospital would receive payment under the IPPS until such time (5 out of 6 months) that meet the classification requirement as an LTCH.

In enacting these regulations, the Secretary is exercising the discretionary authority given in section 1886(d)(1)(B)(I) of the Act in permitting an exception for those satellite facilities and remote locations that are required by § 413.65(e)(3) to separate from their parent hospitals because they fail to meet certain requirements. This particular group of satellites or remote locations will be permitted to use their length of stay data from 5 months of the previous 6 months prior to when they were compelled to separate from their main provider. This is appropriate because these satellite facilities and remote locations were compelled to "spin off" by our provider-based regulations at § 413.65(e)(3). With respect to satellite facilities and remote locations of LTCHs that voluntarily "spin off", we have not been given any compelling information that would cause us to make a change to the requirements for classifying LTCHS and, thus, under the Secretary's discretionary authority to determine the methodology for calculating the ALOS, we will continue to use discharges occurring on or after the effective date of participation as a hospital for purposes of qualifying as LTCHs.

While there may have been misunderstandings in the past regarding this policy, we believe we have clarified this long-standing policy in this final rule by unambiguously stating that a satellite facility or remote location must first be considered a hospital before being classified as a LTCH. In other words, a new hospital cannot be paid as a LTCH until it demonstrates that it has an average Medicare inpatient length of stay in excess of 25 days based on discharges occurring on or after the effective date of participation as a hospital. Therefore, we do not think that it is appropriate to apply what, in fact, is existing CMS policy only "prospectively," as suggested by one of the commenters, or to establish a grandfathering provision for LTCH satellites that have existed for at least 3 years.

Comment: One commenter requested that we clarify whether the proposed change to § 412.23(e)(4)(ii) applies to only "voluntary" separation.

Response: Section 412.23(e)(4)(ii) states that a satellite facility that voluntarily separates from its parent LTCH in order to become an independent LTCH must comply with all requirements of § 412.23(e) which includes the 6 month waiting period. However, for a satellite facility or remote location that is being forced to separate from the main hospital "involuntarily" due to not meeting specific provider-based requirements, there would be an exception to this policy (§ 412.23(e)(1)(iii)). Thus, to become an independent LTCH, the remote location or satellite facility would be permitted to utilize data gathered from 5 of the preceding 6 months prior to the involuntary separation. We are finalizing our clarification of this policy as well as the exception to the policy for those providers that are involuntarily separated from the main facility.

Comment: One commenter expressed concern about our proposed policy, but the concern was based on the commenter's confusion over satellites and hospitals-within-hospitals. The commenter also requested a waiver of the provider-based location requirement for a particular facility.

Response: Under § 412.22(h), a satellite facility is defined 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." Where a satellite shares a provider number with its parent hospital and is not in itself a hospital under § 412.22(e), we define a hospital-within-a-hospital as "* * * a hospital that occupies space in a building also used by another hospital or in one or more buildings located on the same campus as buildings used by another hospital * * *" Regarding the commenter's request for a waiver of the provider-based location, this request is beyond the scope of this rule and, therefore, we have no comments to make. However, we would suggest that the commenter contact appropriate CMS staff to discuss the issue.

b. *Technical correction.* In the August 30, 2002 LTCH PPS final rule (67 FR 56053), we issued regulations at § 412.532(i) that require a LTCH or a satellite of a LTCH that occupies space in a building used by another hospital, or in one or more entire buildings located on the same campus as buildings used by another hospital and that meets the criteria of paragraphs (h)(1) through (h)(4) of § 412.532, to notify its fiscal intermediary and us, in writing, of its co-location and any changes in co-location status. In § 412.532(i), we include a cross-reference to the Medicare regulations that contain the requirements for a satellite facility to be paid under Medicare. In the January 30, 2004 proposed rule (69 FR 4777–4778), we stated that we made an unintentional error in specifying this cross-reference as paragraphs (h)(1) through (h)(4) of § 412.532. The correct cross-reference to the requirements for satellite facilities is § 412.22(h)(1) through (h)(4).

In this final rule, we are revising § 412.532(i) to include the correct cross-reference to § 412.22(h)(1) through (h)(4).

We also received several comments that discussed issues outside the scope of the LTCH PPS. Under the circumstances, we will not be responding to these comments since they are not related to the subject of this rule.

VI. Computing the Adjusted Federal Prospective Payments for the 2005 LTCH PPS Rate Year

In accordance with § 412.525 and as discussed in section V.C. of this final rule, the standard Federal rate is adjusted to account for differences in area wages by multiplying the labor-related share of the standard Federal rate by the appropriate LTCH PPS wage index (as shown in Tables 1 and 2 of the Addendum to this final rule). The standard Federal rate is also adjusted to account for the higher costs of hospitals in Alaska and Hawaii by multiplying the nonlabor-related share of the standard Federal rate by the appropriate cost-of-living factor (shown in Table I in section V.C.2. of this preamble). In the January 30, 2004 proposed rule (69 FR 4754), we proposed a standard Federal rate of $36,762.24 for the 2005 LTCH PPS rate year. In this final rule, based on the best available data and the finalized policies described in this final rule, we are establishing a standard Federal rate of $36,833.69 for the 2005 LTCH PPS rate year as discussed in section V.B. of this preamble. We illustrate the methodology used to adjust the Federal prospective payments for the 2005 LTCH PPS rate year in the following example:

During the 2005 LTCH PPS rate year, a Medicare patient is in a LTCH located in Chicago, Illinois (MSA 1600) with a two-fifths wage index value of 1.0357 (*see* table 1 in the Addendum to this final rule). The Medicare patient is classified into LTC–DRG 9 (Spinal Disorders and Injuries), which has a relative weight of 1.5025 (*see* table 3 of the Addendum to this final rule). To calculate the LTCH's total adjusted Federal prospective payment for this Medicare patient, we compute the wage-adjusted Federal prospective payment amount by multiplying the unadjusted standard Federal rate ($36,833.69) by the labor-related share (72.885 percent) and the wage index value (1.0357). (We note that the LTCH in this example is in the second year of the wage index phase-in, thus, the two-fifths wage index value is applicable.) This wage-adjusted amount is then added to the nonlabor-related portion of the unadjusted standard Federal rate (27.115 percent; adjusted for cost of living, if applicable) to determine the adjusted Federal rate, which is then multiplied by the LTC–DRG relative weight (1.5025) to calculate the total adjusted Federal prospective payment for the 2005 LTCH PPS rate year ($56,498.72). In addition, as discussed in section V.C.6. of this preamble, for the 2005 LTCH PPS rate year, we are reducing the LTCH PPS payment by 0.5 percent for the budget neutrality offset to account for the costs of the transition methodology. The following illustrates the components of the calculations in this example:

Unadjusted Standard Federal Prospective Payment Rate	$36,833.69
Labor-Related Share	0.72885
Labor-Related Portion of the Federal Rate	= $26,846.23
2/5th Wage Index (MSA 1600)	1.0357
Wage-Adjusted Labor Share of Federal Rate	= $27,804.64
Nonlabor-Related Portion of the Federal Rate ($36,833.69 × 0.27115)	+ $9,987.46
Adjusted Federal Rate Amount	= $37,792.10
LTC–DRG 4 Relative Weight	× 1.5025
Total Adjusted Federal Prospective Payment (Before the Budget Neutrality Offset)	= $56,782.63
Budget Neutrality Offset	x 0.995
Total Federal Prospective Payment (Including the Budget Neutrality Offset)	= $56,498.72

VII. Transition Period

To provide a stable fiscal base for LTCHs, under § 412.533, we implemented a 5-year transition period from reasonable cost-based reimbursement under the TEFRA system to a prospective payment based on industry-wide average operating and capital-related costs. Under the average pricing system, payment is not based on the experience of an individual hospital. As discussed in the August 30, 2002 final rule (67 FR 56038), we believe that a 5-year phase-in provides LTCHs time to adjust their operations and capital financing to the LTCH PPS, which is based on prospectively determined Federal payment rates. Furthermore, we believe that the 5-year phase-in of the LTCH PPS also allows LTCH personnel to develop proficiency with the LTC–DRG coding system, which will result in improvement in the quality of the data used for generating our annual determination of relative weights and payment rates.

In accordance with § 412.533, the transition period for all hospitals subject to the LTCH PPS begins with the hospital's first cost reporting period beginning on or after October 1, 2002, and extends through the hospital's last cost reporting period beginning before October 1, 2006. During the 5-year transition period, a LTCH's total payment under the LTCH PPS is based on two payment percentages—one based on reasonable cost-based (TEFRA) payments and the other based on the standard Federal prospective payment rate. The percentage of payment based on the LTCH PPS Federal rate increases by 20 percentage points each year, while the reasonable cost-based payment rate percentage decreases by 20 percentage points each year, for the next 3 fiscal years. For cost reporting periods beginning on or after October 1, 2006, Medicare payment to LTCHs will be determined entirely under the Federal PPS methodology. The blend

percentages as set forth in § 412.533(a) are as follows:

Cost reporting periods beginning on or after	Federal rate percentage	Reasonable cost principles rate percentage
October 1, 2002	20	80
October 1, 2003	40	60
October 1, 2004	60	40
October 1, 2005	80	20
October 1, 2006	100	0

For cost reporting periods that begin on or after October 1, 2003, and before October 1, 2004 (FY 2004), the total payment for a LTCH is 60 percent of the amount calculated under reasonable cost principles for that specific LTCH and 40 percent of the Federal prospective payment amount. For cost reporting periods that begin on or after October 1, 2004, and before October 1, 2005 (FY 2005), the total payment for a LTCH will be 40 percent of the amount calculated under reasonable cost principles for that specific LTCH and 60 percent of the Federal prospective payment amount. As we noted in the January 30, 2004 proposed rule (69 FR 4754), the change in the effective date of the annual LTCH PPS rate update from October 1 to July 1 has no effect on the LTCH PPS transition period as set forth in § 412.533(a). That is, LTCHs paid under the transition blend under § 412.533(a) will receive those blend percentages for the entire 5-year transition period (unless they elect payments based on 100 percent of the Federal rate). Furthermore, LTCHs paid under the transition blend will receive the appropriate blend percentages of the Federal and reasonable cost-based rate for their entire cost reporting period as prescribed in § 412.533(a)(1) through (a)(5).

The reasonable cost-based rate percentage is a LTCH specific amount that is based on the amount that the LTCH would have been paid (under TEFRA) if the PPS were not implemented. Medicare fiscal intermediaries will continue to compute the LTCH reasonable cost-based payment amount according to § 412.22(b) of the regulations and sections 1886(d) and (g) of the Act.

In implementing the PPS for LTCHs, one of our goals is to transition hospitals to full prospective payments as soon as appropriate. Therefore, under § 412.533(c), we allow a LTCH, which is subject to a blended rate, to elect payment based on 100 percent of the Federal rate at the start of any of its cost reporting periods during the 5-year transition period rather than incrementally shifting from reasonable cost-based payments to prospective payments. Once a LTCH elects to be paid based on 100 percent of the Federal rate, it will not be able to revert to the transition blend. For cost reporting periods that began on or after December 1, 2002, and for the remainder of the 5-year transition period, a LTCH must notify its fiscal intermediary in writing of its election on or before the 30th day prior to the start of the LTCH's next cost reporting period. For example, a LTCH with a cost reporting period that begins on May 1, 2004, must notify its fiscal intermediary in writing of an election before April 1, 2004.

Under § 412.533(c)(2)(i), the notification by the LTCH to make the election must be made in writing to the Medicare fiscal intermediary. Under §§ 412.533(c)(2)(ii) and (c)(2)(iii), the intermediary must receive the request on or before the specified date (that is, on or before the 30th day before the applicable cost reporting period begins for cost reporting periods beginning on or after December 1, 2002 through September 30, 2006), regardless of any postmarks or anticipated delivery dates.

Notifications received, postmarked, or delivered by other means after the specified date will not be accepted. If the specified date falls on a day that the postal service or other delivery sources are not open for business, the LTCH will be responsible for allowing sufficient time for the delivery of the request before the deadline. If a LTCH's notification is not received timely, payment will be based on the transition period blend percentages.

VIII. Payments to New LTCHs

Under § 412.23(e)(4), for purposes of Medicare payment under the LTCH PPS, we define a new LTCH as a provider of inpatient hospital services that otherwise meets the qualifying criteria for LTCHs, set forth in § 412.23(e)(1) and (e)(2), under present or previous ownership (or both), and its first cost reporting period as a LTCH begins on or after October 1, 2002. We also specify in § 412.500 that the LTCH PPS is applicable to hospitals with a cost reporting period that began on or after October 1, 2002. (In section V.C.8. of this final rule, we clarify existing policy for the time frame for calculating the average length of stay of a new LTCH as it relates to a satellite facility or remote location of a LTCH that voluntarily seeks to become a separate LTCH. We are also implementing a policy for the time frame for calculating the average length of stay as it relates to a remote location of a hospital that fails to meet certain requirements at § 413.65 and is required to seek status as a separate LTCH.)

As we discussed in the August 30, 2002 final rule (67 FR 56040), this definition of new LTCHs should not be confused with those LTCHs first paid under the TEFRA payment system for discharges occurring on or after October 1, 1997, described in section 1886(b)(7)(A) of the Act, as added by section 4416 of Public Law 105–33. As stated in § 413.40(f)(2)(ii), for cost reporting periods beginning on or after October 1, 1997, the payment amount for a "new" (post-FY 1998) LTCH is the lower of the hospital's net inpatient operating cost per case or 110 percent of the national median target amount payment limit for hospitals in the same class for cost reporting periods ending during FY 1996, updated to the applicable cost reporting period (*see* 62 FR 46019, August 29, 1997). Under the LTCH PPS, those "new" LTCHs that meet the definition of "new" under § 413.40(f)(2)(ii) and that have their first cost reporting period as a LTCH beginning prior to October 1, 2002, will be paid under the transition methodology described in § 412.533.

As noted above and in accordance with § 412.533(d), new LTCHs will not participate in the 5-year transition from reasonable cost-based reimbursement to prospective payment. As we discussed in the August 30, 2002 final rule (67 FR 56040), the transition period is intended to provide existing LTCHs time to adjust to payment under the new system. Since these new LTCHs with cost reporting periods beginning on or after October 1, 2002, would not have received payment under reasonable cost-based reimbursement for the delivery of LTCH services prior to the effective date of the LTCH PPS, we do not believe that those new LTCHs require a transition period in order to make adjustments to their operations and capital financing, as will LTCHs that have been paid under the reasonable cost-based methodology.

IX. Method of Payment

Under § 412.513, a Medicare LTCH patient is classified into a LTC–DRG based on the principal diagnosis, up to eight additional (secondary) diagnoses, and up to six procedures performed during the stay, as well as age, sex, and discharge status of the patient. The LTC–DRG is used to determine the Federal prospective payment that the LTCH will receive for the Medicare-covered Part A services the LTCH furnished during the Medicare patient's stay. Under § 412.541(a), the payment is based on the submission of the

discharge bill. The discharge bill also provides data to allow for reclassifying the stay from payment at the full LTC–DRG rate to payment for a case as a short-stay outlier (under § 412.529) or as an interrupted stay (under § 412.531), or to determine if the case will qualify for a high-cost outlier payment (under § 412.525(a)).

Accordingly, the ICD–9–CM codes and other information used to determine if an adjustment to the full LTC–DRG payment is necessary (for example, length of stay or interrupted stay status) are recorded by the LTCH on the Medicare patient's discharge bill and submitted to the Medicare fiscal intermediary for processing. The payment represents payment in full, under § 412.521(b), for inpatient operating and capital-related costs, but not for the costs of an approved medical education program, bad debts, blood clotting factors, anesthesia services by hospital-employed nonphysician anesthetists or obtained under arrangement, or the costs of photocopying and mailing medical records requested by a QIO, which are costs paid outside the LTCH PPS.

As under the previous reasonable cost-based payment system, under § 412.541(b), a LTCH may elect to be paid using the periodic interim payment (PIP) method described in § 413.64(h) and may be eligible to receive accelerated payments as described in § 413.64(g).

For those LTCHs that are paid during the 5-year transition based on the blended transition methodology in § 412.533(a) for cost reporting periods that began on or after October 1, 2002, and before October 1, 2006, the PIP amount is based on the transition blend. For those LTCHs that are paid based on 100 percent of the standard Federal rate, the PIP amount is based on the estimated prospective payment for the year rather than on the estimated reasonable cost-based reimbursement. We exclude high-cost outlier payments that are paid upon submission of a discharge bill from the PIP amounts. In addition, Part A costs that are not paid for under the LTCH PPS, including Medicare costs of an approved medical education program, bad debts, blood clotting factors, anesthesia services by hospital-employed nonphysician anesthetists or obtained under arrangement, and the costs of photocopying and mailing medical records requested by a QIO, are subject to the interim payment provisions (§ 412.541(c)).

Under § 412.541(d), LTCHs with unusually long lengths of stay that are not receiving payment under the PIP method may bill on an interim basis (60 days after an admission and at intervals of at least 60 days after the date of the first interim bill).

X. Monitoring

In the August 30, 2002 final rule (67 FR 56014), we discussed our intent to develop a monitoring system that will assist us in evaluating the LTCH PPS. Specifically, we discussed the monitoring of the various policies that we believe would provide equitable payment for stays that reflect less than the full course of treatment and reduce the incentives for inappropriate admissions, transfers, or premature discharges of patients that are present in a discharge-based prospective payment system. We also stated our intent to collect and interpret data on changes in average lengths of stay under the LTCH PPS for specific LTC–DRGs and the impact of these changes on the Medicare program. We stated that if our data indicate that changes might be warranted, we may revisit these issues and consider proposing revisions to these policies in the future. To this end, we have designed system features utilizing MedPAR data that will enable CMS and the fiscal intermediary to track beneficiary movement to and from a LTCH and to and from another Medicare provider. As we discussed in the June 6, 2003 final rule (68 FR 34157), the MedPAC has endorsed this monitoring activity and is pursuing an independent research initiative that will evaluate all aspects of LTCHs, including the accuracy of data reporting, provision of equivalent services by other providers, growth in the number of LTCHs, and clinical outcomes. We are particularly concerned with the recent significant growth in the number of LTCHs. Since the implementation of the LTCH PPS, we have observed a growth of nearly 50 percent in the number of LTCHs, and that growth is almost exclusively in the number of LTCH that are hospitals within hospitals. We intend to focus our monitoring on this growth and the potential for gaming the IPPS by the co-located acute care hospital; and gaming the LTCH PPS by the LTC hospital-within-a-hospital. Based on the outcome of that monitoring activity we may need to address either the criteria for qualifying for LTCH PPS payments for hospital within hospitals, the payment rates for patients that are discharged from acute care hospitals and admitted to a co-located LTCH, or other policy issues that may arise as a result of our monitoring activity.

Also, in the June 6, 2003 final rule (68 FR 34157), we explained that, given that the only unique requirement that distinguishes a LTCH from other acute care hospitals is an average inpatient length of stay of greater than 25 days, we continue to be concerned about the extent to which LTCH services and patients differ from those services and patients treated in other Medicare covered settings (for example, SNFs and IRFs) and how the LTCH PPS will affect the access, quality, and costs across the health care continuum. Thus, we will monitor trends in the supply and utilization of LTCHs and Medicare's costs in LTCHs relative to other Medicare providers. For example, we may conduct medical record reviews of Medicare patients to monitor changes in service use (for example, ventilator use) over a LTCH episode of care and to assess patterns in the average length of stay at the facility level.

We also are collecting data on patients staying for periods of 6 months or longer in LTCHs and may involve QIOs in evaluating whether or not such extensive stays may be indicative of LTCH patients who could be more appropriately served at a SNF.

Existing policy at § 412.509(c) provides that the LTCH must "furnish all necessary covered services to the Medicare beneficiary who is an inpatient of the hospital either directly or under arrangements." In the January 30, 2004 proposed rule (69 FR 4780–4781), we discussed our proposed extension of the interrupted stay policy, at § 412.531, to include LTCH discharges and readmissions within a period of 3 days.

We believe that such behavior by certain LTCHs may constitute gaming of the Medicare system, circumventing existing Medicare policy, and generating unnecessary Medicare payments.

Therefore, in this final rule, we are extending our interrupted stay policy at § 412.531 to address this situation. (*See* section V.C.4.c. of this final rule for additional information regarding the extension of the interrupted stay policy.)

We did not propose any policies regarding monitoring, but we received three comments expressing support for our plans to monitor LTCHs.

Comment: Two of the commenters were concerned about some of the conclusions that emerged from the recent research initiative by MedPAC. These conclusions concerned the rapid growth in the number of LTCHs as well as whether the appropriate patients are being treated in these facilities. The independent analysis conducted by these commenters indicated different conclusions than those of MedPAC. However, while the commenters support our efforts to collect data

regarding the type of patient that stays in a LTCH for an extended period of time, they recommend that we standardize medical necessity evaluation criteria for QIOs.

Response: We appreciate the commenters support of our monitoring activities. We have been informed of proposals circulating in the LTCH community about QIO admission standards, and we are also aware of discussions regarding the MedPAC research. We continue to be very interested in QIOs reviewing the records of extremely long stays (over 6 months) at LTCHs for purposes of medical necessity. As the new LTCH PPS generates data, we will continue to evaluate patient treatment patterns; beneficiary movement between providers; growth in the number of free-standing LTCHs, HwHs, and satellite facilities; cost/benefit analyses of alternative treatment settings for LTCH patients; and other relevant topics. We will also be reviewing data with regards to the finalized 3-day interrupted stay policy (section V.C.4.c.) to determine compliance and also to evaluate whether there is an increase in the number of patients being discharged and readmitted to the LTCH within 4-days. While we continue to believe in the importance of anecdotal information that we receive from providers, consultants, trade groups, regional offices, and fiscal intermediaries, we intend to monitor these issues and obtain as much data as we can to either confirm or refute the anecdotal information. If our evaluations and investigations reveal the need for policy revisions, we will propose those revisions in a future proposed rule.

XI. Collection of Information Requirements

Under the Paperwork Reduction Act (PRA) of 1995, we are required to provide 30-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the PRA of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

In the January 30, 2004 proposed rule, we solicited public comments on each of these issues for the information collection requirements discussed below.

The following information collection requirements and associated burdens are subject to the PRA:

Section 412.23 Excluded Hospitals: Classifications

In summary, this section requires a satellite facility or a remote location of a hospital that voluntarily reorganizes as a separate Medicare participating hospital that seeks to qualify as a new long-term care hospital for Medicare payment purposes, to demonstrate through documentation that it meets the average length of stay requirement.

The burden associated with this requirement is the time required to maintain documentation to demonstrate that a satellite facility or a remote location of a hospital has an average length of stay as specified by this section. Since this requirement is a voluntary decision that is made by each facility, we do not know the number of facilities and remote locations that will seek to become new LTCHs. However, the information to be documented is currently being collected and maintained on each facility's cost report; therefore, this information collection requirement is currently approved under OMB control number 0938–0050.

This section also requires satellite facilities and remote locations of hospitals that became subject to the provider-based status rules, that become separately participating hospitals, and that seek to qualify as long-term care hospitals for Medicare payment purposes, to submit discharge data for calculation of the greater than 25-day average Medicare inpatient length of stay requirement in § 412.23(e)(2).

The burden associated with this requirement is the time required of the satellite facilities and remote locations of hospitals that became subject to the provider-based status rules (§ 413.65) to submit discharge data to the fiscal intermediary. We estimate that it will take approximately 5 minutes for each of the 300 facilities to submit the required information for a total one-time burden of 25 hours.

We have submitted a copy of this final rule to OMB for its review of the information collection requirements described above. These requirements are not effective until they have been approved by OMB.

If you comment on any of these information collection and recordkeeping requirements, please mail copies directly to the following: Centers for Medicare & Medicaid Services, Office of Strategic Operations and Regulatory Affairs, Regulations Development and Issuances Group, Attn: Dawn Willinghan, CMS–1263–F, Room C5–09–26, 7500 Security Boulevard, Baltimore, MD 21244–1850; 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.

XII. Regulatory Impact Analysis

A. Introduction

We have examined the impact of this final 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.

1. Executive Order 12866

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 one year). In this final rule, we are using the most recent estimate of the LTCH PPS market basket, updated claims data, and updated wage index values to estimate payments for the 2005 LTCH PPS rate year. Based on the best available data for 239 LTCHs, we estimate that the 3.1 percent increase in the standard Federal rate for the 2005 LTCH PPS rate year, in conjunction with the observed increase in case-mix (discussed in section V.C.4. of this preamble) and decrease in the budget neutrality offset to account for the transition methodology (discussed in section V.C.6. of this preamble), will result in an increase in payments from the 2004 LTCH PPS rate year of $235

million for the 239 LTCHs. (Section V.C.6. of this preamble includes an estimate of Medicare program payments for LTCH services.) Because the combined distributional effects and costs to the Medicare program are greater than $100 million, this final rule is considered a major economic rule, as defined above.

2. Regulatory Flexibility Act (RFA)

The RFA requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and government agencies. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $26 million or less in any 1 year. For purposes of the RFA, all hospitals are considered small entities according to the Small Business Administration's latest size standards with total revenues of $26 million or less in any 1 year (for further information, see the Small Business Administration's regulation at 65 FR 69432, November 17, 2000). Because we lack data on individual hospital receipts, we cannot determine the number of small proprietary LTCHs. Therefore, we assume that all LTCHs are considered small entities for the purpose of the analysis that follows. Medicare fiscal intermediaries are not considered to be small entities. Individuals and States are not included in the definition of a small entity.

The provisions of this final rule represent a 13.8 percent increase in estimated payments in the 2005 LTCH PPS rate year (as shown in Table II below). We do not expect an incremental increase of 9.0 percent to the Medicare payment rates to have a significant adverse effect on the overall revenues of most LTCHs. In addition, LTCHs also provide services to (and generate revenue from) patients other than Medicare beneficiaries. Accordingly, we certify that this final rule will not have a significant impact on a substantial number of small entities, in accordance with RFA.

3. Impact on Rural Hospitals

Section 1102(b) of the Social Security Act requires us to prepare a regulatory impact analysis if a proposed or final rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 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. As discussed in detail below, the rates and policies set forth in this final rule will not have an adverse impact on rural hospitals based on the data of the 16 rural hospitals in our database of 239 LTCHs for which data were available.

4. Unfunded Mandates

Section 202 of the UMRA requires that agencies assess anticipated costs and benefits before issuing any rule that may result in expenditure in any one year by State, local, or tribal governments, in the aggregate, or by the private sector, of $110 million or more. This final rule will not mandate any requirements for State, local, or tribal governments, nor would it result in expenditures by the private sector of $110 million or more in any one year.

5. Federalism

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.

We have examined this final rule under the criteria set forth in Executive Order 13132 and have determined that this final rule will not have any significant impact on the rights, roles, and responsibilities of State, local, or tribal governments or preempt State law, based on the 15 State and local LTCHs in our database of 239 LTCHs for which data were available.

B. Anticipated Effects of Payment Rate Changes

We discuss the impact of the payment rate changes in this final rule below in terms of their fiscal impact on the Medicare budget and on LTCHs.

1. Budgetary Impact

Section 123(a)(1) of Medicare, Medicaid and State Child Health Insurance Program (SCHIP) Balanced Budget Refinement Act of 1999 (BBRA) (Pub. L. 106–113) requires us to set the payment rates contained in this final rule such that total payments under the LTCH PPS are projected to equal the amount that would have been paid if this PPS had not been implemented. However, as discussed in greater detail in the August 30, 2002 final rule (67 FR 56033–56036), the FY 2003 standard Federal rate ($34,956.15) was calculated as though all LTCHs will be paid based on 100 percent of the standard Federal rate in FY 2003. As discussed in section V.C.6 of this final rule, we would apply a budget neutrality offset to payments to account for the monetary effect of the 5-year transition period and the policy to permit LTCHs to elect to be paid based on 100 percent of the standard Federal rate rather than a blend of Federal prospective payments and reasonable cost-based payments during the transition. The amount of the offset is equal to 1 minus the ratio of the estimated payments based on 100 percent of the LTCH PPS Federal rate to the projected total Medicare program payments that would be made under the transition methodology and the option to elect payment based on 100 percent of the Federal prospective payment rate.

2. Impact on Providers

The basic methodology for determining a LTCH PPS payment is set forth in the regulations at § 412.515 through § 412.525. In addition to the basic LTC–DRG payment (standard Federal rate × LTC–DRG relative weight), we make adjustments for differences in area wage levels, cost-of-living adjustment for Alaska and Hawaii, and short-stay outliers. In addition, LTCHs may also receive high-cost outlier payments for those cases that qualify under the threshold established each rate year. Section 412.533 provides for a 5-year transition to fully prospective payments from payment based on reasonable cost-based methodology. During the 5-year transition period, payments to LTCHs are based on an increasing percentage of the LTCH PPS Federal rate and a decreasing percentage of payment based on reasonable cost-based methodology. Section 412.533(c) provides for a one-time opportunity for LTCHs to elect payments based on 100 percent of the LTCH PPS Federal rate.

In order to understand the impact of the changes to the LTCH PPS discussed in this final rule on different categories of LTCHs for the 2005 LTCH PPS rate year, it is necessary to estimate payments per discharge under the LTCH PPS rates and factors for the 2004 LTCH PPS rate year (*see* the June 6, 2003 final rule; 68 FR 34122–34190) and payments per discharge that will be made under the LTCH PPS rates and factors for the 2005 LTCH PPS rate year as discussed in the preamble of this final rule. We also evaluated the percent change in payments per discharge of estimated 2004 LTCH PPS rate year payments to estimated 2005 LTCH PPS rate year payments for each category of LTCHs.

Hospital groups were based on characteristics provided in the Online Survey Certification and Reporting (System) (OSCAR) data, FYs 1999 through 2001 cost report data, and Provider Specific File data. Hospitals with incomplete characteristics were

grouped into the "unknown" category. Hospital groups include:

—Location: Large Urban/Other Urban/Rural
—Participation Date
—Ownership Control
—Census Region
—Bed Size

To estimate the impacts among the various categories of providers during the transition period, it is imperative that reasonable cost-based methodology payments and prospective payments contain similar inputs. More specifically, in the impact analysis showing the impact reflecting the applicable transition blend percentages of prospective payments and reasonable cost-based methodology payments and the option to elect payment based on 100 percent of the Federal rate (Table III below), we estimated payments only for those providers for whom we are able to calculate payments based on reasonable cost-based methodology. For example, if we did not have at least 2 years of historical cost data for a LTCH, we were unable to determine an update to the LTCH's target amount to estimate payment under reasonable cost-based methodology.

Using LTCH cases from the FY 2003 MedPAR file and cost data from FYs 1996 through 2001 to estimate payments under the current reasonable cost-based principles, we have both case-mix and cost data for 239 LTCHs. Thus, for the impact analyses reflecting the applicable transition blend percentages of prospective payments and reasonable cost-based methodology payments and the option to elect payment based on 100 percent of the Federal rate (see Table II below), we used data from 239 LTCHs. While currently there are more than 300 LTCHs, the most recent growth is predominantly in for-profit LTCHs that provide respiratory and ventilator-dependent patient care. We believe that the discharges from the MedPAR data for the 239 LTCHs in our database provide sufficient representation in the LTC–DRGs containing discharges for patients who received respiratory and ventilator-dependent care. However, using cases from the FY 2003 MedPAR file, we had case-mix data for 298 LTCHs. Cost data to determine current payments under reasonable cost-based methodology payments are not needed to simulate payments based on 100 percent of the Federal rate. Therefore, for the impact analyses reflecting fully phased-in prospective payments (see Table III below), we used data from 298 LTCHs.

These impacts reflect the estimated "losses" or "gains" among the various classifications of providers for the 2004 LTCH PPS rate year (July 1, 2003 through June 30, 2004) compared to the 2005 LTCH PPS rate year (July 1, 2004 through June 30, 2005). Prospective payments for the 2004 LTCH rate year were based on the standard Federal rate of $35,726.18 and the hospital's estimated case-mix based on FY 2003 claims data. Prospective payments for the 2005 LTCH PPS rate year were based on the standard Federal rate of $36,833.69 and the same FY 2003 claims data.

3. Calculation of Prospective Payments

To estimate payments under the LTCH PPS, we simulated payments on a case-by-case basis by applying the existing payment policy for short-stay outliers (as described in section V.C.4.b. of this final rule) and the existing adjustments for area wage differences (as described in section V.C.1. of this final rule) and for the cost-of-living for Alaska and Hawaii (as described in section V.C.2. of this final rule). Additional payments will also be made for high-cost outlier cases (as described in section V.C.3. of this final rule). As noted in section V.C.5. of this final rule, we are not making adjustments for rural location, geographic reclassification, indirect medical education costs, or a disproportionate share of low-income patients because sufficient new data have not been generated that would enable us to conduct a comprehensive reevaluation of these payment adjustments.

We adjusted for area wage differences for estimated 2004 LTCH PPS rate year payments by computing a weighted average of a LTCH's applicable wage index during the period from July 1, 2003, through June 30, 2004, because some providers may experience a change in the wage index phase-in percentage during that period. For cost reporting periods beginning on or after October 1, 2002 and before September 30, 2003, the labor portion of the Federal rate is adjusted by one-fifth of the applicable "LTCH PPS wage index" (that is, the FY 2004 IPPS wage index data without geographic reclassification, under sections 1886(d)(8) and (d)(10)) of the Act. For cost reporting periods beginning on or after October 1, 2003 and before September 30, 2004, the labor portion of the Federal rate is adjusted by two-fifths of the applicable LTCH PPS wage index. Therefore, a provider with a cost reporting period that began October 1, 2003, will have 3 months of payments under the one-fifth wage index value and 9 months of payment under the two-fifths wage index value. For this provider, we computed a blended wage index of 25 percent (3 months/12 months) of the one-fifth wage index value and 75 percent (9 months/12 months) of the two-fifths wage index value. Similarly, we adjusted for area wage differences for estimated 2005 LTCH PPS rate year payments by computing a weighted average of a LTCH's applicable wage index during the period from July 1, 2004, through June 30, 2005, because some providers may experience a change in the wage index phase-in percentage during that period. For cost reporting periods beginning on or after October 1, 2003 and before September 30, 2004, the labor portion of the Federal rate is adjusted by two-fifths of the applicable LTCH PPS wage index. For cost reporting periods beginning on or after October 1, 2004 and before September 30, 2005, the labor portion of the Federal rate is adjusted by three-fifths of the applicable LTCH PPS wage index. The applicable LTCH PPS wage index values for the 2005 LTCH PPS rate year are shown in Tables 1 and 2 of the Addendum to this final rule.

For those providers projected to receive payment under the transition blend methodology, we also calculated payments using the applicable transition blend percentages. During the 2004 LTCH PPS rate year, based on the transition blend percentages set forth in § 412.533(a), some providers may experience a change in the transition blend percentage during the period from July 1, 2003 through June 30, 2004. That is, during the period from July 1, 2003 through June 30, 2004, a provider with a cost reporting period beginning on October 1, 2002 (which is paid under the 80/20 transition blend (80 percent of payments based on reasonable cost-based methodology and 20 percent of payments under the LTCH PPS) beginning October 1, 2002) had 3 months (July 1, 2003 through September 30, 2003) under the 80/20 blend and 9 months (October 1, 2003 through June 30, 2004) of payment under the 60/40-transition blend (60 percent of payments based on reasonable cost-based methodology and 40 percent of payments under the LTCH PPS). (The 60 percent/40 percent blend will continue until the provider's cost reporting period beginning on October 1, 2004.)

Similarly, during the 2005 LTCH PPS rate year, based on the transition blend percentages set forth in § 412.533(a), some of the providers paid under the transition blend methodology may experience a change in the transition blend percentage during the period from July 1, 2004 through June 30, 2005. That is, during the period from July 1, 2004 through June 30, 2005, a provider with

a cost reporting period beginning on October 1, 2003 (which is paid under the 60/40 transition blend had 3 months (July 1, 2004 through September 30, 2004) under the 60/40 blend and 9 months (October 1, 2004 through June 30, 2005) of payment under the 40/60-transition blend (40 percent of payments based on reasonable cost-based methodology and 60 percent of payments under the LTCH PPS). (The 40 percent/60 percent blend will continue until the provider's cost reporting period beginning on October 1, 2005.)

In estimating blended transition payments, we estimated payments based on reasonable cost-based methodology in accordance with the methodology in section 1886(b) of the Act. For those providers who have not already made the election to be paid based on 100 percent of the Federal rate, we compared the estimated blended transition payment to the LTCH's estimated payment if it would elect payment based on 100 percent of the Federal rate. If we estimated that the LTCH would be paid more based on 100 percent of the Federal rate, we assumed that it would elect to bypass the transition methodology and to receive immediate prospective payments.

Then we applied the 6.0 percent budget neutrality reduction to payments to account for the effect of the 5-year transition methodology and election of payment based on 100 percent of the Federal rate on Medicare program payments established in the June 6, 2003 final rule (68 FR 34153) to each LTCH's estimated payments under the LTCH PPS for the 2004 LTCH PPS rate year. Similarly, we applied the 0.5 percent budget neutrality reduction to payment to account for the effect of the 5-year transition methodology and election of payment based on 100 percent of the Federal rate on Medicare program payments (*see* section V.C.6. of this final rule) to each LTCH's estimated payments under the LTCH PPS for the 2005 LTCH PPS rate year. The impact based on our projection of whether a LTCH will be paid based on the transition blend methodology or will elect payment based on 100 percent of the Federal rate is shown below in Table II.

In Table III below, we also show the impact if the LTCH PPS were fully implemented; that is, as if there were an immediate transition to fully Federal prospective payments under the LTCH PPS for the 2004 LTCH PPS rate year and the 2005 LTCH PPS rate year. Accordingly, the 6.0 percent budget neutrality reduction to account for the 5-year transition methodology on LTCHs' Medicare program payments for the 2004 LTCH PPS rate year and the 0.5 percent budget neutrality reduction to account for the 5-year transition methodology on LTCHs' Medicare program payments established for the 2005 LTCH PPS rate year were not applied to LTCHs' estimated payments under the LTCH PPS.

Tables II and III below illustrate the aggregate impact of the payment system among various classifications of LTCHs.

- The first column, LTCH Classification, identifies the type of LTCH.
- The second column lists the number of LTCHs of each classification type.
- The third column identifies the number of long-term care cases.
- The fourth column shows the estimated payment per discharge for the 2004 LTCH PPS rate year.
- The fifth column shows the estimated payment per discharge for the 2005 LTCH PPS rate year.
- The sixth column shows the percent change of 2004 LTCH PPS rate year compared to the 2005 LTCH PPS rate year.

TABLE II.—PROJECTED IMPACT REFLECTING APPLICABLE TRANSITION BLEND PERCENTAGES OF PROSPECTIVE PAYMENTS AND REASONABLE COST-BASED (TEFRA) PAYMENTS AND OPTION TO ELECT PAYMENT BASED ON 100 PERCENT OF THE FEDERAL RATE [1]

[2004 LTCH PPS Rate Year Payments Compared to 2005 LTCH Prospective Payment System Rate Year]

LTCH classification	Number of LTCHs	Number of LTCH cases	Average 2004 LTCH PPS rate year payment per case [2]	Average 2005 LTCH prospective payment system rate year payment per case [3]	Percent change
All Providers	239	94,169	$27,181	$29,629	9.0
By Location:					
Rural	16	7,782	$24,309	$26,303	8.2
Urban	223	86,387	27,439	29,928	9.1
Large	107	37,759	26,212	28,360	8.2
Other	116	48,628	28,392	31,146	9.7
By Participation Date:					
Before October 1983	15	7,527	$22,088	$24,166	9.4
October 1983–September 1993	44	22,119	28,994	31,6649.	D2
October 1993–September 2002	180	64,523	27,155	29,568	8.9
By Ownership Control:					
Voluntary	58	22,630	25,656	27,887	8.7
Proprietary	166	64,680	27,882	30,444	9.2
Government	15	6,859	25,597	27,691	8.2
By Census Region:					
New England	13	9,377	22,146	24,442	10.4
Middle Atlantic	15	5,290	26,344	28,421	7.9
South Atlantic	22	7,859	32,432	35,264	8.7
East North Central	45	12,914	29,681	32,417	9.2
East South Central	14	4,281	26,934	29,224	8.5
West North Central	17	4,761	29,285	31,988	9.2
West South Central	83	39,528	25,228	27,310	8.3
Mountain	18	4,513	29,961	33,104	10.5
Pacific	12	5,646	33,159	36,930	11.4

TABLE II.—PROJECTED IMPACT REFLECTING APPLICABLE TRANSITION BLEND PERCENTAGES OF PROSPECTIVE PAYMENTS AND REASONABLE COST-BASED (TEFRA) PAYMENTS AND OPTION TO ELECT PAYMENT BASED ON 100 PERCENT OF THE FEDERAL RATE [1]—Continued

[2004 LTCH PPS Rate Year Payments Compared to 2005 LTCH Prospective Payment System Rate Year]

LTCH classification	Number of LTCHs	Number of LTCH cases	Average 2004 LTCH PPS rate year payment per case [2]	Average 2005 LTCH prospective payment system rate year payment per case [3]	Percent change
BY BED SIZE:					
Beds: 0–24	17	2,627	30,162	32,717	8.5
Beds: 25–49	117	30,558	26,480	28,712	8.4
Beds: 50–74	33	11,632	28,911	31,476	8.9
Beds: 75–124	36	16,321	28,092	30,655	9.1
Beds: 125–199	24	19,899	26,501	28,953	9.3
Beds: 200+	12	13,132	26,579	29,258	10.1

[1] These calculations take into account that some providers may experience a change in the blend percentage changes during the 2004 and 2005 LTCH PPS rate years. For example, during the period of July 1, 2003 through June 30, 2004, a provider with a cost reporting period beginning October 1 would have 3 months (July 1, 2003 through September 30, 2003) of payments under the 80/20 blend and 9 months (October 1, 2003 through June 30, 2004) of payment under the 60/40 blend.

[2] Average payment per case for the 12-month period of July 1, 2003 through June 30, 2004.

[3] Average payment per case for the 12-month period of July 1, 2004 through June 30, 2005.

TABLE III.—PROJECTED IMPACT REFLECTING THE FULLY PHASED-IN PROSPECTIVE PAYMENTS

[2004 LTCH PPS Rate Year Payments Compared to 2005 LTCH Prospective Payment System Rate Year Payments]

LTCH classification	Number of LTCHs	Number of LTCH cases	Average 2004 LTCH PPS rate year payment per case [1]	Average 2005 LTCH prospective payment system rate year payment per case [2]	Percent change
All Providers	298	105,732	$28,537	$29,457	3.2
By Location:					
Rural	20	8,455	25,723	26,267	2.1
Urban	278	97,277	28,782	29,734	3.3
Large	151	45,567	27,603	28,318	2.6
Other	127	51,710	29,820	30,981	3.9
By Participation Date:					
Before October 1983	17	7,545	23,119	24,022	3.9
October 1983–September 1993	205	71,916	30,325	29,427	3.7
October 1993–September 2002	45	22,159	28,560	31,453	3.0
After October 2002	21	2,670	26,876	27,523	2.4
Unknown	10	1,442	31,342	32,268	3.0
By Ownership Control:					
Voluntary	62	23,243	26,870	27,730	3.2
Proprietary	182	69,801	29,404	30,375	3.3
Government	18	8,008	26,618	27,439	3.1
Unknown	36	4,680	27,165	27,787	2.3
By Census Region:					
New England	15	9,395	23,458	24,493	4.4
Middle Atlantic	21	6,762	27,528	28,137	2.2
South Atlantic	30	9,250	33,279	34,424	3.4
East North Central	56	14,904	31,282	32,325	3.3
East South Central	17	4,540	28,600	29,312	2.5
West North Central	17	4,761	30,882	31,937	3.4
West South Central	108	44,492	26,517	27,197	2.6
Mountain	21	5,321	31,011	32,416	4.5
Pacific	13	6,307	34,093	35,878	05.2
BY BED SIZE:					
Beds: 0–24	21	3,185	31,087	31,805	2.3
Beds: 25–49	127	33,296	28,105	28,835	2.6
Beds: 50–74	37	13,401	29,767	30,813	3.5
Beds: 75–124	37	16,982	29,353	30,426	3.7
Beds: 125–199	24	19,899	27,950	28,915	3.5
Beds: 200+	13	13,140	28,208	29,359	4.1
Unknown	39	5,829	27,155	27,322	2.6

[1] Average payment per case for the 12-month period of July 1, 2003 through June 30, 2004.

[2] Average payment per case for the 12-month period of July 1, 2004 through June 30, 2005.

4. Results

Based on the most recent available data (as described above for 230 LTCHs), we have prepared the following summary of the impact (as shown in Table II) of the LTCH PPS set forth in this final rule.

a. *Location.* Based on the most recent available data, the majority of LTCHs are in urban areas. Approximately 7 percent of the LTCHs are identified as being located in a rural area, and approximately 8 percent of all LTCH cases are treated in these rural hospitals. Impact analysis in Table II shows that the percent change in estimated payments per discharge for the 2004 LTCH PPS rate year compared to the 2005 LTCH PPS rate year for rural LTCHs will be 8.2 percent, and will be 9.1 percent for urban LTCHs. Large urban LTCHs are projected to experience a 8.2 percent increase in payments per discharge from the 2004 LTCH PPS rate year compared to the 2005 LTCH PPS rate year, while other urban LTCHs projected to experience a 9.7 percent increase in payments per discharge from the 2004 LTCH PPS rate year compared to the 2005 LTCH PPS rate year. (See Table II.)

As noted above, in addition to the update in the standard Federal rate, the estimated percent increase in payments per discharge from the 2004 LTCH PPS rate year to the 2005 LTCH PPS rate year is largely attributable to the decrease in the budget neutrality offset to account for the transition methodology (discussed in section V.C.6. of this preamble). Specifically, we are applying a 0.5 percent budget neutrality reduction (0.995) to payments in the 2005 LTCH PPS rate year to account for the effect of the 5-year transition methodology. The 0.995 transition period budget neutrality factor for the 2005 LTCH PPS rate year is lower than the transition period budget neutrality factor for the 2004 LTCH PPS rate year (0.940). This smaller budget neutrality offset contributes to greater LTCH payment increases between the 2004 and 2005 LTCH PPS rate years compared to the increases seen between FY 2003 and the 2004 LTCH PPS rate year. Furthermore, many LTCHs are experiencing increases in payments because of an increasing wage index adjustment, which is two-fifths of the applicable LTCH PPS wage index for cost reporting periods beginning on or after October 1, 2003, and three-fifths of the applicable wage index for cost reporting periods beginning on or after October 1, 2004. Additionally, many LTCHs are expected to receive an increase in high-cost outlier payments as a result of the decrease in the fixed-loss amount from the 2004 LTCH PPS rate year ($19,590) to the 2005 LTCH PPS rate year ($17,864) as discussed in section V.C.4. of this preamble. We do not expect to see these large payment per discharge increases in future years as the majority of LTCHs have transitioned fully to the LTCH PPS and, therefore, the transition period budget neutrality factor should remain more stable.

b. *Participation Date.* LTCHs are grouped by participation date into three categories: (1) Before October 1983; (2) between October 1983 and September 1993; and (3) between October 1993 and September 2002. At this time, we do not have sufficient cost report data for any of the LTCHs that began participating in the Medicare program after October 2002 (the implementation of the LTCH PPS), and therefore, they are not included in the impact analysis shown below in Table II.

Based on the most recent available data, the majority, approximately 75 percent, of the LTCH cases are in hospitals that began participating between October 1993 and September 2002, and are projected to experience a 8.9 percent increase in payments per discharge from the 2004 LTCH PPS rate year compared to the 2005 LTCH PPS rate year. Approximately 23 percent of the cases are in LTCHs that began participating in Medicare between October 1983 and September 1993, and are projected to experience a 9.2 percent increase in payments per discharge from the 2004 LTCH PPS rate year compared to the 2005 LTCH PPS rate year. LTCHs that began participating before October 1983 are projected to experience a 9.4 percent increase in payments per discharge from the 2004 LTCH PPS rate year compared to the 2005 LTCH PPS rate year. (See Table II.)

As discussed above, these relatively large increases in payments for the 2005 LTCH PPS rate year are mostly due to the decrease in the budget neutrality offset to account for the transition methodology (discussed in section V.C.6. of this preamble). Furthermore, in addition to the update in the standard Federal rate, many of these LTCHs will experience an increase in payments because of an increasing wage index adjustment, which is two-fifths of the applicable LTCH PPS wage index for cost reporting periods beginning on or after October 1, 2003, and three-fifths of the applicable wage index for cost reporting periods beginning on or after October 1, 2004. As noted above, LTCHs may also experience an increase in high-cost outlier payments as a result of the decrease in the fixed-loss amount from the 2004 LTCH PPS rate year ($19,590) to the 2005 LTCH PPS rate year ($17,864). As we also explain above, we do not expect to see these large payment increases in future years as the majority of LTCHs have transitioned fully to the LTCH PPS and, therefore, the transition period budget neutrality factor should remain more stable.

c. *Ownership Control.* LTCHs are grouped into three categories based on ownership control type—(1) voluntary; (2) proprietary; and (3) government.

Based on the most recent available data, approximately 6 percent of LTCHs are government run and we expect that they will experience a 8.2 percent increase in payments per discharge from the 2004 LTCH PPS rate year compared to the 2005 LTCH PPS rate year. Voluntary and proprietary LTCHs are projected to experience a 8.7 percent and 9.2 percent increase in payments per discharge from the 2004 LTCH PPS rate year compared to the 2005 LTCH PPS rate year, respectively. (See Table II.)

d. *Census Region.* LTCHs located in all regions are expected to experience an increase in payments per discharge from the 2004 LTCH PPS rate year compared to the 2005 LTCH PPS rate year. Specifically, of the nine census regions, we expect that LTCHs in the Pacific, Mountain, and New England regions will experience the largest percent increase in payments per discharge from the 2004 LTCH PPS rate year compared to the 2005 LTCH PPS rate year (11.4 percent, 10.5 percent, and 10.4 percent, respectively). LTCHs located in the East North Central and West North Central regions are also projected to experience a 9.2 percent increase in payments per discharge from the 2004 LTCH PPS rate year compared to the 2005 LTCH PPS rate year. (See Table II.)

As explained above, these relatively large increases in payments for the 2005 LTCH PPS rate year are mostly attributable to the decrease in the budget neutrality offset to account for the transition methodology (discussed in section V.C.6. of this preamble). Furthermore, in addition to the update in the standard Federal rate, many LTCHs will experience an increase in payments because of an increasing wage index adjustment, which is two-fifths of the applicable LTCH PPS wage index for cost reporting periods beginning on or after October 1, 2003, and three-fifths of the applicable wage index for cost reporting periods beginning on or after October 1, 2004. As noted above, LTCHs may also experience an increase in high-cost outlier payments as a result of the decrease in the fixed-loss amount from the 2004 LTCH PPS rate year ($19,590)

to the 2005 LTCH PPS rate year ($17,864). As we also explained above, we do not expect to see these large payment increases in future years as the majority of LTCHs have transitioned fully to the LTCH PPS and, therefore, the transition period budget neutrality factor should remain more stable.

We expect LTCHs in the MidAtlantic region to experience the smallest percent increase in payments per discharge from the 2004 LTCH PPS rate year compared to the 2005 LTCH PPS rate year (7.9 percent). We are projecting a slightly lower percent increase in payments per discharge for LTCHs located in this region because of the increasing wage index adjustment. Specifically, many LTCHs located in these areas have a wage index value of less than 1.0. (See Table II.)

e. *Bed Size.* LTCHs were grouped into six categories based on bed size—0–24 beds, 25–49 beds, 50–74 beds, 75–124 beds, 125–199 beds, and 200+ beds.

The percent increase in payments per discharge from the 2004 LTCH PPS rate year compared to the 2005 LTCH PPS rate year are projected to increase for all bed size categories. Most LTCHs were in bed size categories where the percent increase in payments per discharge from the 2004 LTCH PPS rate year compared to the 2005 LTCH PPS rate year is estimated to be approximately 9 percent. LTCHs with greater than 200 beds have the largest estimated percent change in payments per discharge from the 2004 LTCH PPS rate year compared to the 2005 LTCH PPS rate year (10.1 percent), while LTCHs with 25–49 beds have the lowest projected increase in the percent change in payments per discharge from the 2004 LTCH PPS rate year compared to the 2005 LTCH PPS rate year (8.4 percent). (See Table II.)

5. Effect on the Medicare Program

Based on actuarial projections, we estimate that Medicare spending (total Medicare program payments) for LTCH services over the next 5 years will be as follows:

LTCH PPS rate year	Estimated payments ($ in billions)
2005	2.96
2006	2.98
2007	2.95
2008	3.01
2009	3.12

These estimates are based on the current estimate of increase in the excluded hospital with capital market basket of 3.1 percent for the 2005 LTCH PPS rate year, 3.2 percent for the 2006 and 2007 LTCH PPS rate years, 2.8 percent for the 2008 LTCH PPS rate year, and 3.1 percent for the 2009 LTCH PPS rate year. We estimate that there will be a change in Medicare beneficiary enrollment of 1.0 percent in the 2005 LTCH PPS rate year, −4.8 percent in the 2006 LTCH PPS rate year, −6.4 percent in 2007 LTCH PPS rate year, −1.2 percent in the 2008 LTCH PPS rate year, 0.2 percent in the 2009 LTCH PPS rate year, and an estimated increase in the total number of LTCHs. (We note that our Office of the Actuary is projecting a decrease in Medicare fee-for-service Part A enrollment, in part, because they are projecting an increase in Medicare managed care enrollment as a result of the implementation of several provisions of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003.)

Consistent with the statutory requirement for budget neutrality, we intend for estimated aggregate payments under the LTCH PPS in FY 2003 to equal the estimated aggregate payments that would have been made if the LTCH PPS were not implemented. Our methodology for estimating payments for purposes of the budget neutrality calculations uses the best available data and necessarily reflects assumptions. As we collect data from LTCHs, we will monitor payments and evaluate the ultimate accuracy of the assumptions used to calculate the budget neutrality calculations (that is, inflation factors, intensity of services provided, or behavioral response to the implementation of the LTCH PPS).

Section 123 of BBRA and section 307 of BIPA provide the Secretary with extremely broad authority in developing the LTCH PPS, including the authority for appropriate adjustments. In accordance with this broad authority, we may discuss in a future proposed rule a possible one-time prospective adjustment to the LTCH PPS rates to maintain budget neutrality so that the effect of the difference between actual payments and estimated payments for the first year of LTCH PPS is not perpetuated in the PPS rates for future years. Because the LTCH PPS was only recently implemented, we do not yet have sufficient complete data to determine whether such an adjustment is warranted.

6. Effect on Medicare Beneficiaries

Under the LTCH PPS, hospitals receive payment based on the average resources consumed by patients for each diagnosis. We do not expect any changes in the quality of care or access to services for Medicare beneficiaries under the LTCH PPS, but we expect that paying prospectively for LTCH services will enhance the efficiency of the Medicare program.

C. Impact of Policy Changes

1. Requirements for Satellite Facilities and Remote Locations of Hospitals To Qualify as Long-Term Care Hospitals

Under section V.C.8. of the preamble of this final rule, we discuss our clarification of the procedures under which a satellite facility or a remote location of a hospital must meet the statutory and regulatory requirements to qualify as a distinct LTCH. In particular, we are specifying the procedure for determining the period from which the fiscal intermediaries will use discharge data in calculating the average Medicare inpatient length of stay requirement for a new, separately participating hospital that seeks classification as a LTCH.

In this final rule, we are restating in regulations our existing policy that a satellite facility or remote location of a hospital (except for those that are subject to the location requirement under the provider-based rules at § 413.65) that voluntarily reorganizes itself as a separate hospital and meets the provider agreement requirements of 42 CFR part 489 and the Medicare conditions of participation under 42 CFR part 482 will have its average Medicare inpatient length of stay calculated based on discharges that occur after the satellite facility or remote location is established as a separate participating hospital.

The policy that we are incorporating in the regulations is already in existence. Therefore, complying with the regulation amendments will pose no additional burden on LTCHs.

We are further incorporating in regulations that govern requirements for LTCHs an exception to the above policy for satellite facilities and remote locations of hospitals that became subject to the revised location-based provider-based requirements on July 1, 2003, that reorganize as separate participating hospitals, and that seek classification as LTCHs. Under this provision, calculation of the average Medicare inpatient length of stay for purposes of qualifying as a LTCH are based on discharge data during the 5 months of the immediate 6 months preceding the facility's separation from the main hospital. This specific regulation applies only to those facilities or locations that became subject to the revised provider-based location rules on July 1, 2003, and that seek classification as LTCHs for Medicare payment purposes. Therefore, we are unable to quantify how many or

when a facility or location would seek LTCH classification.

These amendments to the regulations will not impose any additional requirements on providers. The data used in the calculation of the average length of stay are already being collected. The existing procedure for application of the discharge data in calculating the average length of stay in both circumstances is consistent with existing statutory and regulatory requirements.

2. Change in Policy on Interruption of a Stay in a LTCH

Under section V.C.4.c. of the preamble of this final rule, we are expanding the definition of an interruption of a stay to include an interruption in which the patient is discharged from the LTCH, and returns to the LTCH within 3 days of the original discharge. We have found, through monitoring activities and other sources, that certain LTCHs appear to be discharging patients during the course of their treatment for the sole purpose of the patient receiving specific tests or procedures and then readmitting the patient following the administration of the test or procedure. We believe these situations are resulting in improper increases in Medicare costs through separate billings for services that are already included in the LTC–DRG payment made to the LTCH. The regulation change will prevent these inappropriate Medicare payments. However, we do not have sufficient data at this time to quantify either the number of providers that would be affected by the change nor the savings to the Medicare program.

3. Change in Procedure for Counting Covered and Noncovered Days in a Stay That Crosses Two Consecutive Cost Reporting Periods

Under section V.C.7. of the preamble to this final rule, we are specifying the procedure for calculating a hospital's inpatient average length of stay for purposes of classification as a LTCH when covered and noncovered days of the stay involve admission in one cost reporting period and discharge in another cost reporting period. We are finalizing the policy of counting the total number of days of the stay in the cost reporting period during which the inpatient was discharged. This policy revises the existing procedure to make it consistent with reporting and payment procedures already in place for discharge-based payment systems that link patient days to discharges. Effective for the 2005 LTCH PPS rate year (July 1, 2004 through June 30, 2005, we have provided for an exception in the event some providers fail to meet the 25-day ALOS criteria due to this change in policy. The fiscal intermediaries will then do an additional calculation to determine if these providers meet the old 25-day criteria. We do not envision many instances where this will be necessary and believe that it will only have minimal impact, if any.

The regulation imposes no additional requirements on providers. The discharge data are already being collected and the revision would merely change the procedure for reporting it.

D. Executive Order 12866

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

List of Subjects in 42 CFR Part 412

Administrative practice and procedure, Health facilities, Medicare, Puerto Rico, Reporting and recordkeeping requirements.

■ In accordance with the discussion in this preamble, the Centers for Medicare & Medicaid Services amends 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).

■ 2. Section 412.23 is amended by—
■ A. Revising paragraph (e)(3).
■ B. Revising paragraph (e)(4).

The revisions and additions read as follows:

§ 412.23 Excluded hospitals: classifications.

* * * * *

(e) *Long-term care hospitals.* * * *

(3) *Calculation of average length of stay.* (i) Subject to the provisions of paragraphs (e)(3)(ii) through (e)(3)(iv) of this section, the average Medicare inpatient length of stay specified under paragraph (e)(2)(i) of this section is calculated by dividing the total number of covered and noncovered days of stay of Medicare inpatients (less leave or pass days) by the number of total Medicare discharges for the hospital's most recent complete cost reporting period. Subject to the provisions of paragraphs (e)(3)(ii) through (e)(3)(iv) of this section, the average inpatient length of stay specified under paragraph (e)(2)(ii) of this section is calculated by dividing the total number of days for all patients, including both Medicare and non-Medicare inpatients (less leave or pass days) by the number of total discharges for the hospital's most recent complete cost reporting period.

(ii) Effective for cost reporting periods beginning on or after July 1, 2004, in calculating the hospital's average length of stay, if the days of a stay of an inpatient involves days of care furnished during two or more separate consecutive cost reporting periods, that is, an admission during one cost reporting period and a discharge during a future consecutive cost reporting period, the total number of days of the stay are considered to have occurred in the cost reporting period during which the inpatient was discharged. However, if after application of this provision, a hospital fails to meet the average length of stay specified under paragraphs (e)(2)(i) and (ii) of this section, Medicare will determine the hospital's average inpatient length of stay for cost reporting periods beginning on or after July 1, 2004, but before July 1, 2005, by dividing the applicable total days for Medicare inpatients under paragraph (e)(2)(i) of this section or the total days for all inpatients under paragraph (e)(2)(ii) of this section, during the cost reporting period when they occur, by the number of discharges occurring during the same cost reporting period.

(iii) If a change in a hospital's average length of stay specified under paragraph (e)(2)(i) or paragraph (e)(2)(ii) of this section is indicated, the calculation is made by the same method for the period of at least 5 months of the immediately preceding 6-month period.

(iv) If a hospital has undergone a change of ownership (as described in § 489.18 of this chapter) at the start of a cost reporting period or at any time within the period of at least 5 months of the preceding 6-month period, the hospital may be excluded from the prospective payment system as a long-term care hospital for a cost reporting period if, for the period of at least 5 months of the 6 months immediately preceding the start of the period (including time before the change of ownership), the hospital has the required average length of stay, continuously operated as a hospital, and continuously participated as a hospital in Medicare.

(4) *Rules applicable to new long-term care hospitals*—(i) *Definition.* For purposes of payment under the long-term care hospital prospective payment system under subpart O of this part, a new long-term care hospital is a provider of inpatient hospital services that meets the qualifying criteria in paragraphs (e)(1) and (e)(2) of this

section and, under present or previous ownership (or both), its first cost reporting period as a LTCH begins on or after October 1, 2002.

(ii) *Satellite facilities and remote locations of hospitals seeking to become new long-term care hospitals.* Except as specified in paragraph (e)(4)(iii) of this section, a satellite facility (as defined in § 412.22(h)) or a remote location of a hospital (as defined in § 413.65(a)(2) of this chapter) that voluntarily reorganizes as a separate Medicare participating hospital, with or without a concurrent change in ownership, and that seeks to qualify as a new long-term care hospital for Medicare payment purposes must demonstrate through documentation that it meets the average length of stay requirement as specified under paragraphs (e)(2)(i) or (e)(2)(ii) of this section based on discharges that occur on or after the effective date of its participation under Medicare as a separate hospital.

(iii) *Provider-based facility or organization identified as a satellite facility and remote location of a hospital prior to July 1, 2003.* Satellite facilities and remote locations of hospitals that became subject to the provider-based status rules under § 413.65 as of July 1, 2003, that become separately participating hospitals, and that seek to qualify as long-term care hospitals for Medicare payment purposes may submit to the fiscal intermediary discharge data gathered during 5 months of the immediate 6 months preceding the facility's separation from the main hospital for calculation of the average length of stay specified under paragraph (e)(2)(i) or paragraph (e)(2)(ii) of this section.

* * * * *

■ 3. Section 412.525 is amended by revising paragraph (d)(2) to read as follows:

§ 412.525 Adjustments to the Federal prospective payment.

* * * * *

(d) *Special payment provisions.* * * *

(2) A 3-day or less interruption of a stay and a greater than 3-day interruption of a stay, as provided for in § 412.531.

■ 4. Section 412.531 is amended by—

■ A. Revising paragraph (a).

■ B. Revising paragraph (b)(1), (b)(2) and (b)(3).

The revisions read as follows:

§ 412.531 Special payment provisions when interruptions of a stay occurs in a long-term care hospital.

(a) *Definitions*—(1) *A 3-day or less interruption of stay defined.* "A 3-day or less interruption of stay" means a stay at a long-term care hospital during which a Medicare inpatient is discharged from the long-term care hospital to an acute care hospital, IRF, SNF, or the patient's home and readmitted to the same long-term care hospital within 3 days of the discharge from the long-term care hospital. The 3-day or less period begins with the date of discharge from the long-term care hospital and ends not later than midnight of the third day.

(2) *A greater than 3-day interruption of stay defined.* "A greater than 3-day or less interruption of stay" means A stay in a long-term care hospital during which a Medicare inpatient is discharged from the long-term care hospital to an acute care hospital, an IRF, or a SNF for a period of greater than 3 days but within the applicable fixed-day period specified in paragraphs (a)(2)(i) through (a)(2)(iii) of this section before being readmitted to the same long-term care hospital.

(i) For a discharge to an acute care hospital, the applicable fixed day period is between 4 and 9 consecutive days. The counting of the days begins on the date of discharge from the long-term care hospital and ends on the 9th date after the discharge.

(ii) For a discharge to an IRF, the applicable fixed day period is between 4 and 27 consecutive days. The counting of the days begins on the day of discharge from the long-term care hospital and ends on the 27th day after discharge.

(iii) For a discharge to a SNF, the applicable fixed day period is between 4 and 45 consecutive days. The counting of the days begins on the day of discharge from the long-term care hospital and ends on the 45th day after the discharge.

(b) *Methods of determining payments.* (1) For purposes of determining a Federal prospective payment—

(i) *Determining the length of stay.* In determining the length of stay of a patient at a long-term care hospital for payment purposes under this paragraph (b)—

(A) Except as specified in paragraphs (b)(1)(i)(B) and (b)(1)(i)(C) of this section, the number of days that a beneficiary spends away from the long-term care hospital during a 3-day or less interruption of stay under paragraph (a)(1) of this section is not included in determining the length of stay of the patient at the long-term care hospital when there is no outpatient or inpatient medical treatment or care provided at an acute care hospital or an IRF, or SNF services during the interruption that is considered a covered service delivered to the beneficiary.

(B) The number of days that a beneficiary spends away from a long-term care hospital during a 3-day or less interruption of stay under paragraph (a)(1) of this section are counted in determining the length of stay of the patient at the long-term care hospital if the beneficiary receives inpatient or outpatient medical care or treatment provided by an acute care hospital or IRF, or SNF services during the interruption. In the case where these services are provided during some, but not all days of a 3-day or less interruption, Medicare will include all days of the interruption in the long-term care hospitals day-count.

(C) The number of days that a beneficiary spends away from a long-term care hospital during a 3-day or less interruption of stay under paragraph (a)(1) of this section during which the beneficiary receives a procedure grouped to a surgical DRG under the inpatient prospective payment system in an acute care hospital during the 2005 LTCH PPS rate year is not included in determining the length of stay of the patient at the long-term care hospital.

(D) The number of days that a beneficiary spends away from a LTCH during a greater than 3-day interruption of stay, as defined in paragraph (a)(2) of this section, is not included in determining the length of stay at the LTCH.

(ii) *Determining how payment is made.* (A) Subject to the provisions of paragraphs (b)(1)(ii)(A)(*1*) and (b)(1)(ii)(A)(*2*) of this section, for a 3-day or less interruption of stay under paragraph (a)(1) of this section, the entire stay is paid as a single discharge from the long-term care hospital. CMS makes only one LTC–DRG payment for all portions of a long-term care stay.

(*1*) For a 3-day or less interruption of stay under paragraph (a)(1) of this section in which a long-term care hospital discharges a patient to an acute care hospital and the patient's treatment during the interruption is grouped into a surgical DRG under the acute care inpatient hospital prospective payment system, for the LTCH 2005 rate year, CMS also makes a separate payment to the acute care hospital for the surgical DRG discharge in accordance with paragraph (b)(1)(i)(C) of this section.

(*2*) For a 3-day or less interruption of stay under paragraph (a)(1) of this section during which the patient receives inpatient or outpatient treatment or services at an acute care hospital or IRF, or SNF services, that are not otherwise excluded under § 412.509(a), the services must be provided under arrangements in

accordance with § 412.509(c). CMS does not make a separate payment to the acute care hospital, IRF, or SNF for these services. The LTC–DRG payment made to the long-term care hospital is considered payment in full as specified in § 412.521(b).

(B) For a greater than 3-day interruption of stay under paragraph (a)(2) of this section, CMS will make only one LTC–DRG payment for all portions of a long-term care stay. CMS also separately pays the acute care hospital, the IRF, or the SNF in accordance with their respective payment systems, as specified in paragraph (c) of this section.

(iii) *Basis for the prospective payment.* Payment to the long-term care hospital is based on the patient's LTC–DRG that is determined in accordance with § 412.513(b).

(2) If the total number of days of a patient's length of stay in a long-term care hospital prior to and following a 3-day or less interruption of stay under paragraphs (b)(1)(i)(A), (B), or (C) of this section or a greater than 3-day interruption of stay under paragraph (b)(1)(i)(D) of this section is up to and including five-sixths of the geometric average length of stay of the LTC–DRG, CMS will make a Federal prospective payment for a short-stay outlier in accordance with § 412.529(c).

(3) If the total number of days of a patient's length of stay in a long-term care hospital prior to and following a 3-day or less interruption of stay under paragraphs (b)(1)(i)(A), (B), or (C) of this section or a greater than 3-day interruption of stay under paragraph (b)(1)(i)(D) of this section exceeds five-sixths of the geometric average length of stay for the LTC–DRG, CMS will make one full Federal LTC–DRG prospective payment for the case. An additional payment will be made if the patient's stay qualifies as a high-cost outlier, as set forth in § 412.525(a).

* * * * *

§ 412.532 [Amended]

■ 5. In § 412.532—

■ A. In paragraph (f), the phrase "under the policies on interruption of a stay as specified in § 412.531." is revised to read "under the policies on a 3-day or less interruption of a stay and a greater than 3-day interruption of a stay as specified in § 412.531."

■ B. In paragraph (i), the reference "paragraphs (h)(1) through (h)(4) of this section" is revised to read "§ 412.22(h)(1) through (h)(4)".

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance)

Dated: April 26, 2004.

Mark McClellan,

Administrator, Centers for Medicare & Medicaid Services.

Dated: April 27, 2004.

Tommy G. Thompson,

Secretary.

Note: The following addendum will not appear in the Code of Federal Regulations.

Addendum

This addendum contains the tables referred to throughout the preamble to this final rule. The tables presented below are as follows:

Table 1.—Long-Term Care Hospital Wage Index for Urban Areas for Discharges Occurring from July 1, 2004 through June 30, 2005

Table 2.—Long-Term Care Hospital Wage Index for Rural Areas for Discharges Occurring from July 1, 2004 through June 30, 2005

Table 3." FY 2004 LTC–DRG Relative Weights, Geometric Mean Length of Stay, and Short-Stay Five-Sixths Average Length of Stay for Discharges Occurring from July 1, 2004 through September 30, 2004.

Note: This is the same information provided in Table 11 of the August 1, 2003 IPPS final rule (68 FR 45650–45658), which has been reprinted here for convenience.)

TABLE 1.—LONG-TERM CARE HOSPITAL WAGE INDEX FOR URBAN AREAS FOR DISCHARGES OCCURRING FROM JULY 1, 2004 THROUGH JUNE 30, 2005

MSA	Urban area (constituent counties)	Full wage index [1]	1/5th wage index [2]	2/5ths wage index [3]	3/5ths wage index [4]
0040	Abilene, TX	0.7627	0.9525	0.9051	0.8576
	Taylor, TX				
0060	Aguadilla, PR	0.4306	0.8861	0.7722	0.6584
	Aguada, PR				
	Aguadilla, PR				
	Moca, PR				
0080	Akron, OH	0.9246	0.9849	0.9698	0.9548
	Portage, OH				
	Summit, OH				
0120	Albany, GA	1.0863	1.0173	1.0345	1.0518
	Dougherty, GA				
	Lee, GA				
0160	Albany-Schenectady-Troy, NY	0.8489	0.9698	0.9396	0.9093
	Albany, NY				
	Montgomery, NY				
	Rensselaer, NY				
	Saratoga, NY				
	Schenectady, NY				
	Schoharie, NY				
0200	Albuquerque, NM	0.9300	0.9860	0.9720	0.9580
	Bernalillo, NM				
	Sandoval, NM				
	Valencia, NM				
0220	Alexandria, LA	0.8019	0.9604	0.9208	0.8811
	Rapides, LA				
0240	Allentown-Bethlehem-Easton, PA	0.9721	0.9944	0.9888	0.9833
	Carbon, PA				
	Lehigh, PA				
	Northampton, PA				
0280	Altoona, PA	0.8806	0.9761	0.9522	0.9284

TABLE 1.—LONG-TERM CARE HOSPITAL WAGE INDEX FOR URBAN AREAS FOR DISCHARGES OCCURRING FROM JULY 1, 2004 THROUGH JUNE 30, 2005—Continued

MSA	Urban area (constituent counties)	Full wage index [1]	1/5th wage index [2]	2/5ths wage index [3]	3/5ths wage index [4]
	Blair, PA				
0320	Amarillo, TX Potter, TX	0.8986	0.9797	0.9594	0.9392
	Randall, TX				
0380	Anchorage, AK	1.2216	1.0443	1.0886	1.1330
	Anchorage, AK				
0440	Ann Arbor, MI	1.1074	1.0215	1.0430	1.0644
	Lenawee, MI				
	Livingston, MI				
	Washtenaw, MI				
0450	Anniston, AL	0.8090	0.9618	0.9236	0.8854
	Calhoun, AL				
0460	Appleton-Oshkosh-Neenah, WI	0.9035	0.9807	0.9614	0.9421
	Calumet, WI				
	Outagamie, WI				
	Winnebago, WI				
0470	Arecibo, PR	0.4155	0.8831	0.7662	0.6493
	Arecibo, PR				
	Camuy, PR				
	Hatillo, PR				
0480	Asheville, NC	0.9720	0.9944	0.9888	0.9832
	Buncombe, NC				
	Madison, NC				
0500	Athens, GA	0.9818	0.9964	0.9927	0.9891
	Clarke, GA				
	Madison, GA				
	Oconee, GA				
0520	Atlanta, GA	1.0130	1.0026	1.0052	1.0078
	Barrow, GA				
	Bartow, GA				
	Carroll, GA				
	Cherokee, GA				
	Clayton, GA				
	Cobb, GA				
	Coweta, GA				
	DeKalb, 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-Cape May, NJ	1.0795	1.0159	1.0318	1.0477
	Atlantic, NJ				
	Cape May, NJ				
0580	Auburn-Opelika, AL	0.8494	0.9699	0.9398	0.9096
	Lee, AL				
0600	Augusta-Aiken, GA-SC	0.9625	0.9925	0.9850	0.9775
	Columbia, GA				
	McDuffie, GA				
	Richmond, GA				
	Aiken, SC				
	Edgefield, SC				
0640	Austin-San Marcos, TX	0.9609	0.9922	0.9844	0.9765
	Bastrop, TX				
	Caldwell, TX				
	Hays, TX				
	Travis, TX				
	Williamson, TX				
0680	Bakersfield, CA	0.9810	0.9962	0.9924	0.9886
	Kern, CA				
0720	Baltimore, MD	0.9919	0.9984	0.9968	0.9951
	Anne Arundel, MD				
	Baltimore, MD				

TABLE 1.—LONG-TERM CARE HOSPITAL WAGE INDEX FOR URBAN AREAS FOR DISCHARGES OCCURRING FROM JULY 1, 2004 THROUGH JUNE 30, 2005—Continued

MSA	Urban area (constituent counties)	Full wage index [1]	1/5th wage index [2]	2/5ths wage index [3]	3/5ths wage index [4]
	Baltimore City, MD				
	Carroll, MD				
	Harford, MD				
	Howard, MD				
	Queen Anne's, MD				
0733	Bangor, ME	0.9904	0.9981	0.9962	0.9942
	Penobscot, ME				
0743	Barnstable-Yarmouth, MA	1.2956	1.0591	1.1182	1.1774
	Barnstable, MA				
0760	Baton Rouge, LA	0.8406	0.9681	0.9362	0.9044
	Ascension, LA				
	East Baton Rouge, LA				
	Livingston, LA				
	West Baton Rouge, LA				
0840	Beaumont-Port Arthur, TX	0.8424	0.9685	0.9370	0.9054
	Hardin, TX				
	Jefferson, TX				
	Orange, TX				
0860	Bellingham, WA	1.1757	1.0351	1.0703	1.1054
	Whatcom, WA				
0870	Benton Harbor, MI	0.8871	0.9774	0.9548	0.9323
	Berrien, MI				
0875	Bergen-Passaic, NJ	1.1692	1.0338	1.0677	1.1015
	Bergen, NJ				
	Passaic, NJ				
0880	Billings, MT	0.8961	0.9792	0.9584	0.9377
	Yellowstone, MT				
0920	Biloxi-Gulfport-Pascagoula, MS	0.9029	0.9806	0.9612	0.9417
	Hancock, MS				
	Harrison, MS				
	Jackson, MS				
0960	Binghamton, NY	0.8428	0.9686	0.9371	0.9057
	Broome, NY				
	Tioga, NY				
1000	Birmingham, AL	0.9212	0.9842	0.9685	0.9527
	Blount, AL				
	Jefferson, AL				
	St. Clair, AL				
	Shelby, AL				
1010	Bismarck, ND	0.7965	0.9593	0.9186	0.8779
	Burleigh, ND				
	Morton, ND				
1020	Bloomington, IN	0.8662	0.9732	0.9465	0.9197
	Monroe, IN				
1040	Bloomington-Normal, IL	0.8832	0.9766	0.9533	0.9299
	McLean, IL				
1080	Boise City, ID	0.9209	0.9842	0.9684	0.9525
	Ada, ID				
	Canyon, ID				
1123	Boston-Worcester-Lawrence-Lowell-Brockton, MA-NH (NH Hospitals)	1.1233	1.0247	1.0493	1.0740
	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	1.0049	1.0010	1.0020	1.0029
	Boulder, CO				
1145	Brazoria, TX	0.8137	0.9627	0.9255	0.8882
	Brazoria, TX				
1150	Bremerton, WA	1.0580	1.0116	1.0232	1.0348
	Kitsap, WA				
1240	Brownsville-Harlingen-San Benito, TX	1.0303	1.0061	1.0121	1.0182
	Cameron, TX				

TABLE 1.—LONG-TERM CARE HOSPITAL WAGE INDEX FOR URBAN AREAS FOR DISCHARGES OCCURRING FROM JULY 1, 2004 THROUGH JUNE 30, 2005—Continued

MSA	Urban area (constituent counties)	Full wage index [1]	1/5th wage index [2]	2/5ths wage index [3]	3/5ths wage index [4]
1260	Bryan-College Station, TX	0.9019	0.9804	0.9608	0.9411
	Brazos, TX				
1280	Buffalo-Niagara Falls, NY	0.9604	0.9921	0.9842	0.9762
	Erie, NY				
	Niagara, NY				
1303	Burlington, VT	0.9704	0.9941	0.9882	0.9822
	Chittenden, VT				
	Franklin, VT				
	Grand Isle, VT				
1310	Caguas, PR	0.4158	0.8832	0.7663	0.6495
	Caguas, PR				
	Cayey, PR				
	Cidra, PR				
	Gurabo, PR				
	San Lorenzo, PR				
1320	Canton-Massillon, OH	0.9071	0.9814	0.9628	0.9443
	Carroll, OH				
	Stark, OH				
1350	Casper, WY	0.9095	0.9819	0.9638	0.9457
	Natrona, WY				
1360	Cedar Rapids, IA	0.8874	0.9775	0.9550	0.9324
	Linn, IA				
1400	Champaign-Urbana, IL	0.9907	0.9981	0.9963	0.9944
	Champaign, IL				
1440	Charleston-North Charleston, SC	0.9332	0.9866	0.9733	0.9599
	Berkeley, SC				
	Charleston, SC				
	Dorchester, SC				
1480	Charleston, WV	0.8880	0.9776	0.9552	0.9328
	Kanawha, WV				
	Putnam, WV				
1520	Charlotte-Gastonia-Rock Hill, NC–SC	0.9760	0.9952	0.9904	0.9856
	Cabarrus, NC				
	Gaston, NC				
	Lincoln, NC				
	Mecklenburg, NC				
	Rowan, NC				
	Stanly, NC				
	Union, NC				
	York, SC				
1540	Charlottesville, VA	1.0025	1.0005	1.0010	1.0015
	Albemarle, VA				
	Charlottesville City, VA				
	Fluvanna, VA				
	Greene, VA				
1560	Chattanooga, TN–GA	0.9086	0.9817	0.9634	0.9452
	Catoosa, GA				
	Dade, GA				
	Walker, GA				
	Hamilton, TN				
	Marion, TN				
1580	Cheyenne, WY	0.8796	0.9759	0.9518	0.9278
	Laramie, WY				
1600	Chicago, IL	1.0892	1.0178	1.0357	1.0535
	Cook, IL				
	DeKalb, IL				
	DuPage, IL				
	Grundy, IL				
	Kane, IL				
	Kendall, IL				
	Lake, IL				
	McHenry, IL				
	Will, IL				
1620	Chico-Paradise, CA	1.0193	1.0039	1.0077	1.0116
	Butte, CA				
1640	Cincinnati, OH-KY-IN	0.9413	0.9883	0.9765	0.9648
	Dearborn, IN				
	Ohio, IN				
	Boone, KY				

TABLE 1.—LONG-TERM CARE HOSPITAL WAGE INDEX FOR URBAN AREAS FOR DISCHARGES OCCURRING FROM JULY 1, 2004 THROUGH JUNE 30, 2005—Continued

MSA	Urban area (constituent counties)	Full wage index [1]	1/5th wage index [2]	2/5ths wage index [3]	3/5ths wage index [4]
	Campbell, KY				
	Gallatin, KY				
	Grant, KY				
	Kenton, KY				
	Pendleton, KY				
	Brown, OH				
	Clermont, OH				
	Hamilton, OH				
	Warren, OH				
1660	Clarksville-Hopkinsville, TN-KY	0.8244	0.9649	0.9298	0.8946
	Christian, KY				
	Montgomery, TN				
1680	Cleveland-Lorain-Elyria, OH	0.9671	0.9934	0.9868	0.9803
	Ashtabula, OH				
	Cuyahoga, OH				
	Geauga, OH				
	Lake, OH				
	Lorain, OH				
	Medina, OH				
1720	Colorado Springs, CO	0.9833	0.9967	0.9933	0.9900
	El Paso, CO				
1740	Columbia, MO	0.8695	0.9739	0.9478	0.9217
	Boone, MO				
1760	Columbia, SC	0.8902	0.9780	0.9561	0.9341
	Lexington, SC				
	Richland, SC				
1800	Columbus, GA-AL Russell, AL	0.8694	0.9739	0.9478	0.9216
	Chattahoochee, GA				
	Harris, GA				
	Muscogee, GA				
1840	Columbus, OH	0.9648	0.9930	0.9859	0.9789
	Delaware, OH				
	Fairfield, OH				
	Franklin, OH				
	Licking, OH				
	Madison, OH				
	Pickaway, OH				
1880	Corpus Christi, TX	0.8521	0.9704	0.9408	0.9113
	Nueces, TX				
	San Patricio, TX				
1890	Corvallis, OR	1.1516	1.0303	1.0606	1.0910
	Benton, OR				
1900	Cumberland, MD–WV (WV Hospital)	0.8200	0.9640	0.9280	0.8920
	Allegany, MD				
	Mineral, WV				
1920	Dallas, TX	0.9974	0.9995	0.9990	0.9984
	Collin, TX				
	Dallas, TX				
	Denton, TX				
	Ellis, TX				
	Henderson, TX				
	Hunt, TX				
	Kaufman, TX				
	Rockwall, TX				
1950	Danville, VA	0.9035	0.9807	0.9614	0.9421
	Danville City, VA				
	Pittsylvania, VA				
1960	Davenport-Moline-Rock Island, IA-IL	0.8985	0.9797	0.9594	0.9391
	Scott, IA				
	Henry, IL				
	Rock Island, IL				
2000	Dayton-Springfield, OH	0.9518	0.9904	0.9807	0.9711
	Clark, OH				
	Greene, OH				
	Miami, OH				
	Montgomery, OH				
2020	Daytona Beach, FL	0.9078	0.9816	0.9631	0.9447
	Flagler, FL				
	Volusia, FL				

TABLE 1.—LONG-TERM CARE HOSPITAL WAGE INDEX FOR URBAN AREAS FOR DISCHARGES OCCURRING FROM JULY 1, 2004 THROUGH JUNE 30, 2005—Continued

MSA	Urban area (constituent counties)	Full wage index [1]	1/5th wage index [2]	2/5ths wage index [3]	3/5ths wage index [4]
2030	Decatur, AL	0.8828	0.9766	0.9531	0.9297
	Lawrence, AL				
	Morgan, AL				
2040	Decatur, IL	0.8161	0.9632	0.9264	0.8897
	Macon, IL				
2080	Denver, CO	1.0837	1.0167	1.0335	1.0502
	Adams, CO				
	Arapahoe, CO				
	Denver, CO				
	Douglas, CO				
	Jefferson, CO				
2120	Des Moines, IA	0.9106	0.9821	0.9642	0.9464
	Dallas, IA				
	Polk, IA				
	Warren, IA				
2160	Detroit, MI	1.0101	1.0020	1.0040	1.0061
	Lapeer, MI				
	Macomb, MI				
	Monroe, MI				
	Oakland, MI				
	St. Clair, MI				
	Wayne, MI				
2180	Dothan, AL	0.7741	0.9548	0.9096	0.8645
	Dale, AL				
	Houston, AL				
2190	Dover, DE	0.9805	0.9961	0.9922	0.9883
	Kent, DE				
2200	Dubuque, IA	0.8886	0.9777	0.9554	0.9332
	Dubuque, IA				
2240	Duluth-Superior, MN-WI	1.0171	1.0034	1.0068	1.0103
	St. Louis, MN				
	Douglas, WI				
2281	Dutchess County, NY	1.0934	1.0187	1.0374	1.0560
	Dutchess, NY				
2290	Eau Claire, WI	0.9064	0.9813	0.9626	0.9438
	Chippewa, WI				
	Eau Claire, WI				
2320	El Paso, TX	0.9196	0.9839	0.9678	0.9518
	El Paso, TX				
2330	Elkhart-Goshen, IN	0.9783	0.9957	0.9913	0.9870
	Elkhart, IN				
2335	Elmira, NY	0.8377	0.9675	0.9351	0.9026
	Chemung, NY				
2340	Enid, OK	0.8559	0.9712	0.9424	0.9135
	Garfield, OK				
2360	Erie, PA	0.8601	0.9720	0.9440	0.9161
	Erie, PA				
2400	Eugene-Springfield, OR	1.1456	1.0291	1.0582	1.0874
	Lane, OR				
2440	Evansville-Henderson, IN-KY (IN Hospitals)	0.8429	0.9686	0.9372	0.9057
	Posey, IN				
	Vanderburgh, IN				
	Warrick, IN				
	Henderson, KY				
2520	Fargo-Moorhead, ND-MN	0.9797	0.9959	0.9919	0.9878
	Clay, MN				
	Cass, ND				
2560	Fayetteville, NC	0.8986	0.9797	0.9594	0.9392
	Cumberland, NC				
2580	Fayetteville-Springdale-Rogers, AR	0.8396	0.9679	0.9358	0.9038
	Benton, AR				
	Washington, AR				
2620	Flagstaff, AZ-UT	1.1333	1.0267	1.0533	1.0800
	Coconino, AZ				
	Kane, UT				
2640	Flint, MI	1.0858	1.0172	1.0343	1.0515
	Genesee, MI				
2650	Florence, AL	0.7747	0.9549	0.9099	0.8648
	Colbert, AL				

TABLE 1.—LONG-TERM CARE HOSPITAL WAGE INDEX FOR URBAN AREAS FOR DISCHARGES OCCURRING FROM JULY 1, 2004 THROUGH JUNE 30, 2005—Continued

MSA	Urban area (constituent counties)	Full wage index [1]	1/5th wage index [2]	2/5ths wage index [3]	3/5ths wage index [4]
	Lauderdale, AL				
2655	Florence, SC	0.8709	0.9742	0.9484	0.9225
	Florence, SC				
2670	Fort Collins-Loveland, CO	1.0108	1.0022	1.0043	1.0065
	Larimer, CO				
2680	Ft. Lauderdale, FL	1.0163	1.0033	1.0065	1.0098
	Broward, FL				
2700	Fort Myers-Cape Coral, FL	0.9816	0.9963	0.9926	0.9890
	Lee, FL				
2710	Fort Pierce-Port St. Lucie, FL	1.0008	1.0002	1.0003	1.0005
	Martin, FL				
	St. Lucie, FL				
2720	Fort Smith, AR-OK	0.8424	0.9685	0.9370	0.9054
	Crawford, AR				
	Sebastian, AR				
	Sequoyah, OK				
2750	Fort Walton Beach, FL	0.8966	0.9793	0.9586	0.9380
	Okaloosa, FL				
2760	Fort Wayne, IN	0.9585	0.9917	0.9834	0.9751
	Adams, IN				
	Allen, IN				
	De Kalb, IN				
	Huntington, IN				
	Wells, IN				
	Whitley, IN				
2800	Fort Worth-Arlington, TX	0.9359	0.9872	0.9744	0.9615
	Hood, TX				
	Johnson, TX				
	Parker, TX				
	Tarrant, TX				
2840	Fresno, CA	1.0094	1.0019	1.0038	1.0056
	Fresno, CA				
	Madera, CA				
2880	Gadsden, AL	0.8206	0.9641	0.9282	0.8924
	Etowah, AL				
2900	Gainesville, FL	0.9693	0.9939	0.9877	0.9816
	Alachua, FL				
2920	Galveston-Texas City, TX	0.9279	0.9856	0.9712	0.9567
	Galveston, TX				
2960	Gary, IN	0.9410	0.9882	0.9764	0.9646
	Lake, IN				
	Porter, IN				
2975	Glens Falls, NY	0.8475	0.9695	0.9390	0.9085
	Warren, NY				
	Washington, NY				
2980	Goldsboro, NC	0.8622	0.9724	0.9449	0.9173
	Wayne, NC				
2985	Grand Forks, ND-MN	0.8636	0.9727	0.9454	0.9182
	Polk, MN				
	Grand Forks, ND				
2995	Grand Junction, CO	0.9633	0.9927	0.9853	0.9780
	Mesa, CO				
3000	Grand Rapids-Muskegon-Holland, MI	0.9469	0.9894	0.9788	0.9681
	Allegan, MI				
	Kent, MI				
	Muskegon, MI				
	Ottawa, MI				
3040	Great Falls, MT	0.8809	0.9762	0.9524	0.9285
	Cascade, MT				
3060	Greeley, CO	0.9372	0.9874	0.9749	0.9623
	Weld, CO				
3080	Green Bay, WI	0.9461	0.9892	0.9784	0.9677
	Brown, WI				
3120	Greensboro-Winston-Salem-High Point, NC	0.9166	0.9833	0.9666	0.9500
	Alamance, NC				
	Davidson, NC				
	Davie, NC				
	Forsyth, NC				
	Guilford, NC				

TABLE 1.—LONG-TERM CARE HOSPITAL WAGE INDEX FOR URBAN AREAS FOR DISCHARGES OCCURRING FROM JULY 1, 2004 THROUGH JUNE 30, 2005—Continued

MSA	Urban area (constituent counties)	Full wage index [1]	1/5th wage index [2]	2/5ths wage index [3]	3/5ths wage index [4]
	Randolph, NC				
	Stokes, NC				
	Yadkin, NC				
3150	Greenville, NC	0.9098	0.9820	0.9639	0.9459
	Pitt, NC				
3160	Greenville-Spartanburg-Anderson, SC	0.9335	0.9867	0.9734	0.9601
	Anderson, SC				
	Cherokee, SC				
	Greenville, SC				
	Pickens, SC				
	Spartanburg, SC				
3180	Hagerstown, MD	0.9172	0.9834	0.9669	0.9503
	Washington, MD				
3200	Hamilton-Middletown, OH	0.9214	0.9843	0.9686	0.9528
	Butler, OH				
3240	Harrisburg-Lebanon-Carlisle, PA	0.9164	0.9833	0.9666	0.9498
	Cumberland, PA				
	Dauphin, PA				
	Lebanon, PA				
	Perry, PA				
3283	Hartford, CT	1.1555	1.0311	1.0622	1.0933
	Hartford, CT				
	Litchfield, CT				
	Middlesex, CT				
	Tolland, CT				
3285	Hattiesburg, MS [2]	0.7307	0.9461	0.8923	0.8384
	Forrest, MS				
	Lamar, MS				
3290	Hickory-Morganton-Lenoir, NC	0.9242	0.9848	0.9697	0.9545
	Alexander, NC				
	Burke, NC				
	Caldwell, NC				
	Catawba, NC				
3320	Honolulu, HI	1.1098	1.0220	1.0439	1.0659
	Honolulu, HI				
3350	Houma, LA	0.7748	0.9550	0.9099	0.8649
	Lafourche, LA				
	Terrebonne, LA				
3360	Houston, TX	0.9834	0.9967	0.9934	0.9900
	Chambers, TX				
	Fort Bend, TX				
	Harris, TX				
	Liberty, TX				
	Montgomery, TX				
	Waller, TX				
3400	Huntington-Ashland, WV-KY-OH	0.9595	0.9919	0.9838	0.9757
	Boyd, KY				
	Carter, KY				
	Greenup, KY				
	Lawrence, OH				
	Cabell, WV				
	Wayne, WV				
3440	Huntsville, AL	0.9245	0.9849	0.9698	0.9547
	Limestone, AL				
	Madison, AL				
3480	Indianapolis, IN	0.9916	0.9983	0.9966	0.9950
	Boone, IN				
	Hamilton, IN				
	Hancock, IN				
	Hendricks, IN				
	Johnson, IN				
	Madison, IN				
	Marion, IN				
	Morgan, IN				
	Shelby, IN				
3500	Iowa City, IA	0.9548	0.9910	0.9819	0.9729
	Johnson, IA				
3520	Jackson, MI	0.8986	0.9797	0.9594	0.9392
	Jackson, MI				

TABLE 1.—LONG-TERM CARE HOSPITAL WAGE INDEX FOR URBAN AREAS FOR DISCHARGES OCCURRING FROM JULY 1, 2004 THROUGH JUNE 30, 2005—Continued

MSA	Urban area (constituent counties)	Full wage index [1]	1/5th wage index [2]	2/5ths wage index [3]	3/5ths wage index [4]
3560	Jackson, MS	0.8357	0.9671	0.9343	0.9014
	Hinds, MS				
	Madison, MS				
	Rankin, MS				
3580	Jackson, TN	0.8984	0.9797	0.9594	0.9390
	Madison, TN				
	Chester, TN				
3600	Jacksonville, FL	0.9529	0.9906	0.9812	0.9717
	Clay, FL				
	Duval, FL				
	Nassau, FL				
	St. Johns, FL				
3605	Jacksonville, NC	0.8544	0.9709	0.9418	0.9126
	Onslow, NC				
3610	Jamestown, NY	0.7762	0.9552	0.9105	0.8657
	Chautauqua, NY				
3620	Janesville-Beloit, WI	0.9282	0.9856	0.9713	0.9569
	Rock, WI				
3640	Jersey City, NJ	1.1115	1.0223	1.0446	1.0669
	Hudson, NJ				
3660	Johnson City-Kingsport-Bristol, TN-VA	0.8253	0.9651	0.9301	0.8952
	Carter, TN				
	Hawkins, TN				
	Sullivan, TN				
	Unicoi, TN				
	Washington, TN				
	Bristol City, VA				
	Scott, VA				
	Washington, VA				
3680	Johnstown, PA	0.8158	0.9632	0.9263	0.8895
	Cambria, PA				
	Somerset, PA				
3700	Jonesboro, AR	0.7794	0.9559	0.9118	0.8676
	Craighead, AR				
3710	Joplin, MO	0.8681	0.9736	0.9472	0.9209
	Jasper, MO				
	Newton, MO				
3720	Kalamazoo-Battlecreek, MI	1.0500	1.0100	1.0200	1.0300
	Calhoun, MI				
	Kalamazoo, MI				
	Van Buren, MI				
3740	Kankakee, IL	1.0419	1.0084	1.0168	1.0251
	Kankakee, IL				
3760	Kansas City, KS-MO	0.9715	0.9943	0.9886	0.9829
	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	0.9761	0.9952	0.9904	0.9857
	Kenosha, WI				
3810	Killeen-Temple, TX	0.9159	0.9832	0.9664	0.9495
	Bell, TX				
	Coryell, TX				
3840	Knoxville, TN	0.8820	0.9764	0.9528	0.9292
	Anderson, TN				
	Blount, TN				
	Knox, TN				
	Loudon, TN				
	Sevier, TN				
	Union, TN				
3850	Kokomo, IN	0.9045	0.9809	0.9618	0.9427
	Howard, IN				

TABLE 1.—LONG-TERM CARE HOSPITAL WAGE INDEX FOR URBAN AREAS FOR DISCHARGES OCCURRING FROM JULY 1, 2004 THROUGH JUNE 30, 2005—Continued

MSA	Urban area (constituent counties)	Full wage index [1]	1/5th wage index [2]	2/5ths wage index [3]	3/5ths wage index [4]
	Tipton, IN				
3870	La Crosse, WI-MN	0.9247	0.9849	0.9699	0.9548
	Houston, MN				
	La Crosse, WI				
3880	Lafayette, LA	0.8189	0.9638	0.9276	0.8913
	Acadia, LA				
	Lafayette, LA				
	St. Landry, LA				
	St. Martin, LA				
3920	Lafayette, IN	0.8584	0.9717	0.9434	0.9150
	Clinton, IN				
	Tippecanoe, IN				
3960	Lake Charles, LA	0.7841	0.9568	0.9136	0.8705
	Calcasieu, LA				
3980	Lakeland-Winter Haven, FL	0.8811	0.9762	0.9524	0.9287
	Polk, FL				
4000	Lancaster, PA	0.9282	0.9856	0.9713	0.9569
	Lancaster, PA				
4040	Lansing-East Lansing, MI	0.9714	0.9943	0.9886	0.9828
	Clinton, MI				
	Eaton, MI				
	Ingham, MI				
4080	Laredo, TX	0.8091	0.9618	0.9236	0.8855
	Webb, TX				
4100	Las Cruces, NM	0.8688	0.9738	0.9475	0.9213
	Dona Ana, NM				
4120	Las Vegas, NV-AZ	1.1528	1.0306	1.0611	1.0917
	Mohave, AZ				
	Clark, NV				
	Nye, NV				
4150	Lawrence, KS	0.8677	0.9735	0.9471	0.9206
	Douglas, KS				
4200	Lawton, OK	0.8267	0.9653	0.9307	0.8960
	Comanche, OK				
4243	Lewiston-Auburn, ME	0.9383	0.9877	0.9753	0.9630
	Androscoggin, ME				
4280	Lexington, KY	0.8685	0.9737	0.9474	0.9211
	Bourbon, KY				
	Clark, KY				
	Fayette, KY				
	Jessamine, KY				
	Madison, KY				
	Scott, KY				
	Woodford, KY				
4320	Lima, OH	0.9522	0.9904	0.9809	0.9713
	Allen, OH				
	Auglaize, OH				
4360	Lincoln, NE	1.0033	1.0007	1.0013	1.0020
	Lancaster, NE				
4400	Little Rock-North Little Rock, AR	0.8923	0.9785	0.9569	0.9354
	Faulkner, AR				
	Lonoke, AR				
	Pulaski, AR				
	Saline, AR				
4420	Longview-Marshall, TX	0.9113	0.9823	0.9645	0.9468
	Gregg, TX				
	Harrison, TX				
	Upshur, TX				
4480	Los Angeles-Long Beach, CA	1.1795	1.0359	1.0718	1.1077
	Los Angeles, CA				
4520	Louisville, KY-IN [1]	0.9242	0.9848	0.9697	0.9545
	Clark, IN				
	Floyd, IN				
	Harrison, IN				
	Scott, IN				
	Bullitt, KY				
	Jefferson, KY				
	Oldham, KY				
4600	Lubbock, TX	0.8272	0.9654	0.9309	0.8963

TABLE 1.—LONG-TERM CARE HOSPITAL WAGE INDEX FOR URBAN AREAS FOR DISCHARGES OCCURRING FROM JULY 1, 2004 THROUGH JUNE 30, 2005—Continued

MSA	Urban area (constituent counties)	Full wage index [1]	1/5th wage index [2]	2/5ths wage index [3]	3/5ths wage index [4]
	Lubbock, TX				
4640	Lynchburg, VA	0.9134	0.9827	0.9654	0.9480
	Amherst, VA				
	Bedford, VA				
	Bedford City, VA				
	Campbell, VA				
	Lynchburg City, VA				
4680	Macon, GA	0.8953	0.9791	0.9581	0.9372
	Bibb, GA				
	Houston, GA				
	Jones, GA				
	Peach, GA				
	Twiggs, GA				
4720	Madison, WI	1.0264	1.0053	1.0106	1.0158
	Dane, WI				
4800	Mansfield, OH	0.9180	0.9836	0.9672	0.9508
	Crawford, OH				
	Richland, OH				
4840	Mayaguez, PR	0.4795	0.8959	0.7918	0.6877
	Anasco, PR				
	Cabo Rojo, PR				
	Hormigueros, PR				
	Mayaguez, PR				
	Sabana Grande, PR				
	San German, PR				
4880	McAllen-Edinburg-Mission, TX	0.8381	0.9676	0.9352	0.9029
	Hidalgc, TX				
4890	Medford-Ashland, OR	1.0772	1.0154	1.0309	1.0463
	Jackson, OR				
4900	Melbourne-Titusville-Palm Bay, FL	0.9776	0.9955	0.9910	0.9866
	Brevard, Fl				
4920	Memphis, TN-AR-MS	0.9009	0.9802	0.9604	0.9405
	Crittenden, AR				
	DeSoto, MS				
	Fayette, TN				
	Shelby, TN				
	Tipton, TN				
4940	Merced, CA	0.9690	0.9938	0.9876	0.9814
	Merced, CA				
5000	Miami, FL	0.9894	0.9979	0.9958	0.9936
	Dade, FL				
5015	Middlesex-Somerset-Hunterdon, NJ	1.1366	1.0273	1.0546	1.0820
	Hunterdon, NJ				
	Middlesex, NJ				
	Somerset, NJ				
5080	Milwaukee-Waukesha, WI	0.9988	0.9998	0.9995	0.9993
	Milwaukee, WI				
	Ozaukee, WI				
	Washington, WI				
	Waukesha, WI				
5120	Minneapolis-St. Paul, MN-WI	1.1001	1.0200	1.0400	1.0601
	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	0.8718	0.9744	0.9487	0.9231
	Missoula, MT				
5160	Mobile, AL	0.7994	0.9599	0.9198	0.8796
	Baldwin, AL				
	Mobile, AL				

TABLE 1.—LONG-TERM CARE HOSPITAL WAGE INDEX FOR URBAN AREAS FOR DISCHARGES OCCURRING FROM JULY 1, 2004 THROUGH JUNE 30, 2005—Continued

MSA	Urban area (constituent counties)	Full wage index [1]	1/5th wage index [2]	2/5ths wage index [3]	3/5ths wage index [4]
5170	Modesto, CA	1.1275	1.0255	1.0510	1.0765
	Stanislaus, CA				
5190	Monmouth-Ocean, NJ	1.0956	1.0191	1.0382	1.0574
	Monmouth, NJ				
	Ocean, NJ				
5200	Monroe, LA	0.7922	0.9584	0.9169	0.8753
	Ouachita, LA				
5240	Montgomery, AL	0.7907	0.9581	0.9163	0.8744
	Autauga, AL				
	Elmore, AL				
	Montgomery, AL				
5280	Muncie, IN	0.8775	0.9755	0.9510	0.9265
	Delaware, IN				
5330	Myrtle Beach, SC	0.9112	0.9822	0.9645	0.9467
	Horry, SC				
5345	Naples, FL	0.9790	0.9958	0.9916	0.9874
	Collier, FL				
5360	Nashville, TN	0.9855	0.9971	0.9942	0.9913
	Cheatham, TN				
	Davidson, TN				
	Dickson, TN				
	Robertson, TN				
	Rutherford TN				
	Sumner, TN				
	Williamson, TN				
	Wilson, TN				
5380	Nassau-Suffolk, NY	1.3140	1.0628	1.1256	1.1884
	Nassau, NY				
	Suffolk, NY				
5483	New Haven-Bridgeport-Stamford-Waterbury-Danbury, CT	1.2385	1.0477	1.0954	1.1431
	Fairfield, CT				
	New Haven, CT				
5523	New London-Norwich, CT	1.1631	1.0326	1.0652	1.0979
	New London, CT				
5560	New Orleans, LA	0.9174	0.9835	0.9670	0.9504
	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	1.4018	1.0804	1.1607	1.2411
	Bronx, NY				
	Kings, NY				
	New York, NY				
	Putnam, NY				
	Queens, NY				
	Richmond, NY				
	Rockland, NY				
	Westchester, NY				
5640	Newark, NJ	1.1518	1.0304	1.0607	1.0911
	Essex, NJ				
	Morris, NJ				
	Sussex, NJ				
	Union, NJ				
	Warren, NJ				
5660	Newburgh, NY-PA	1.1509	1.0302	1.0604	1.0905
	Orange, NY				
	Pike, PA				
5720	Norfolk-Virginia Beach-Newport News, VA-NC	0.8619	0.9724	0.9448	0.9171
	Currituck, NC				
	Chesapeake City, VA				
	Gloucester, VA				
	Hampton City, VA				
	Isle of Wight, VA				
	James City, VA				
	Mathews, VA				

TABLE 1.—LONG-TERM CARE HOSPITAL WAGE INDEX FOR URBAN AREAS FOR DISCHARGES OCCURRING FROM JULY 1, 2004 THROUGH JUNE 30, 2005—Continued

MSA	Urban area (constituent counties)	Full wage index [1]	1/5th wage index [2]	2/5ths wage index [3]	3/5ths wage index [4]
	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				
5775	Oakland, CA	1.4921	1.0984	1.1968	1.2953
	Alameda, CA				
	Contra Costa, CA				
5790	Ocala, FL	0.9728	0.9946	0.9891	0.9837
	Marion, FL				
5800	Odessa-Midland, TX	0.9327	0.9865	0.9731	0.9596
	Ector, TX				
	Midland, TX				
5880	Oklahoma City, OK	0.8984	0.9797	0.9594	0.9390
	Canadian, OK				
	Cleveland, OK				
	Logan, OK				
	McClain, OK				
	Oklahoma, OK				
	Pottawatomie, OK				
5910	Olympia, WA	1.0963	1.0193	1.0385	1.0578
	Thurston, WA				
5920	Omaha, NE-IA	0.9745	0.9949	0.9898	0.9847
	Pottawattamie, IA				
	Cass, NE				
	Douglas, NE				
	Sarpy, NE				
	Washington, NE				
5945	Orange County, CA	1.1372	1.0274	1.0549	1.0823
	Orange, CA				
5960	Orlando, FL	0.9654	0.9931	0.9862	0.9792
	Lake, FL				
	Orange, FL				
	Osceola, FL				
	Seminole, FL				
5990	Owensboro, KY	0.8374	0.9675	0.9350	0.9024
	Daviess, KY				
6015	Panama City, FL	0.8202	0.9640	0.9281	0.8921
	Bay, FL				
6020	Parkersburg-Marietta, WV-OH	0.8039	0.9608	0.9216	0.8823
	Washington, OH				
	Wood, WV				
6080	Pensacola, FL	0.8707	0.9741	0.9483	0.9224
	Escambia, FL				
	Santa Rosa, FL				
6120	Peoria-Pekin, IL	0.8734	0.9747	0.9494	0.9240
	Peoria, IL				
	Tazewell, IL				
	Woodford, IL				
6160	Philadelphia, PA-NJ	1.0883	1.0177	1.0353	1.0530
	Burlington, NJ				
	Camden, NJ				
	Gloucester, NJ				
	Salem, NJ				
	Bucks, PA				
	Chester, PA				
	Delaware, PA				
	Montgomery, PA				
	Philadelphia, PA				
6200	Phoenix-Mesa, AZ	1.0129	1.0026	1.0052	1.0077
	Maricopa, AZ				
	Pinal, AZ				
6240	Pine Bluff, AR	0.7865	0.9573	0.9146	0.8719
	Jefferson, AR				
6280	Pittsburgh, PA	0.8901	0.9780	0.9560	0.9341
	Allegheny, PA				

TABLE 1.—LONG-TERM CARE HOSPITAL WAGE INDEX FOR URBAN AREAS FOR DISCHARGES OCCURRING FROM JULY 1, 2004 THROUGH JUNE 30, 2005—Continued

MSA	Urban area (constituent counties)	Full wage index [1]	1/5th wage index [2]	2/5ths wage index [3]	3/5ths wage index [4]
	Beaver, PA				
	Butler, PA				
	Fayette, PA				
	Washington, PA				
	Westmoreland, PA				
6323	Pittsfield, MA	1.0276	1.0055	1.0110	1.0166
	Berkshire, MA				
6340	Pocatello, ID	0.9042	0.9808	0.9617	0.9425
	Bannock, ID				
6360	Ponce, PR	0.4708	0.8942	0.7883	0.6825
	Guayanilla, PR				
	Juana Diaz, PR				
	Penuelas, PR				
	Ponce, PR				
	Villalba, PR				
	Yauco, PR				
6403	Portland, ME	0.9949	0.9990	0.9980	0.9969
	Cumberland, ME				
	Sagadahoc, ME				
	York, ME				
6440	Portland-Vancouver, OR-WA	1.1213	1.0243	1.0485	1.0728
	Clackamas, OR				
	Columbia, OR				
	Multnomah, OR				
	Washington, OR				
	Yamhill, OR				
	Clark, WA				
6483	Providence-Warwick-Pawtucket, RI	1.0977	1.0195	1.0391	1.0586
	Bristol, RI				
	Kent, RI				
	Newport, RI				
	Providence, RI				
	Washington, RI				
6520	Provo-Orem, UT	0.9976	0.9995	0.9990	0.9986
	Utah, UT				
6560	Pueblo, CO	0.8778	0.9756	0.9511	0.9267
	Pueblo, CO				
6580	Punta Gorda, FL	0.9510	0.9902	0.9804	0.9706
	Charlotte, FL				
6600	Racine, WI	0.8814	0.9763	0.9526	0.9288
	Racine, WI				
6640	Raleigh-Durham-Chapel Hill, NC	0.9959	0.9992	0.9984	0.9975
	Chatham, NC				
	Durham, NC				
	Franklin, NC				
	Johnston, NC				
	Orange, NC				
	Wake, NC				
6660	Rapid City, SD	0.8806	0.9761	0.9522	0.9284
	Pennington, SD				
6680	Reading, PA	0.9133	0.9827	0.9653	0.9480
	Berks, PA				
6690	Redding, CA	1.1352	1.0270	1.0541	1.0811
	Shasta, CA				
6720	Reno, NV	1.0682	1.0136	1.0273	1.0409
	Washoe, NV				
6740	Richland-Kennewick-Pasco, WA	1.0609	1.0122	1.0244	1.0365
	Benton, WA				
	Franklin, WA				
6760	Richmond-Petersburg, VA	0.9349	0.9870	0.9740	0.9609
	Charles City County, VA				
	Chesterfield, VA				
	Colonial Heights City, VA				
	Dinwiddie, VA				
	Goochland, VA				
	Hanover, VA				
	Henrico, VA				
	Hopewell City, VA				
	New Kent, VA				

TABLE 1.—LONG-TERM CARE HOSPITAL WAGE INDEX FOR URBAN AREAS FOR DISCHARGES OCCURRING FROM JULY 1, 2004 THROUGH JUNE 30, 2005—Continued

MSA	Urban area (constituent counties)	Full wage index [1]	1/5th wage index [2]	2/5ths wage index [3]	3/5ths wage index [4]
	Petersburg City, VA				
	Powhatan, VA				
	Prince George, VA				
	Richmond City, VA				
6780	Riverside-San Bernardino, CA	1.1341	1.0268	1.0536	1.0805
	Riverside, CA				
	San Bernardino, CA				
6800	Roanoke, VA	0.8700	0.9740	0.9480	0.9220
	Botetourt, VA				
	Roanoke, VA				
	Roanoke City, VA				
	Salem City, VA				
6820	Rochester, MN	1.1739	1.0348	1.0696	1.1043
	Olmsted, MN				
6840	Rochester, NY	0.9430	0.9886	0.9772	0.9658
	Genesee, NY				
	Livingston, NY				
	Monroe, NY				
	Ontario, NY				
	Orleans, NY				
	Wayne, NY				
6880	Rockford, IL	0.9666	0.9933	0.9866	0.9800
	Boone, IL				
	Ogle, IL				
	Winnebago, IL				
6895	Rocky Mount, NC	0.9076	0.9815	0.9630	0.9446
	Edgecombe, NC				
	Nash, NC				
6920	Sacramento, CA	1.1845	1.0369	1.0738	1.1107
	El Dorado, CA				
	Placer, CA				
	Sacramento, CA				
6960	Saginaw-Bay City-Midland, MI	1.0032	1.0006	1.0013	1.0019
	Bay, MI				
	Midland, MI				
	Saginaw, MI				
6980	St. Cloud, MN	0.9506	0.9901	0.9802	0.9704
	Benton, MN				
	Stearns, MN				
7000	St. Joseph, MO	0.9757	0.9951	0.9903	0.9854
	Andrew, MO				
	Buchanan, MO				
7040	St. Louis, MO-IL	0.9033	0.9807	0.9613	0.9420
	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				
7080	Salem, OR	1.0482	1.0096	1.0193	1.0289
	Marion, OR				
	Polk, OR				
7120	Salinas, CA	1.4339	1.0868	1.1736	1.2603
	Monterey, CA				
7160	Salt Lake City-Ogden, UT	0.9913	0.9983	0.9965	0.9948
	Davis, UT				
	Salt Lake, UT				
	Weber, UT				
7200	San Angelo, TX	0.8535	0.9707	0.9414	0.9121
	Tom Green, TX				
7240	San Antonio, TX	0.8870	0.9774	0.9548	0.9322
	Bexar, TX				
	Comal, TX				

TABLE 1.—LONG-TERM CARE HOSPITAL WAGE INDEX FOR URBAN AREAS FOR DISCHARGES OCCURRING FROM JULY 1, 2004 THROUGH JUNE 30, 2005—Continued

MSA	Urban area (constituent counties)	Full wage index [1]	1/5th wage index [2]	2/5ths wage index [3]	3/5ths wage index [4]
	Guadalupe, TX				
	Wilson, TX				
7320	San Diego, CA	1.1147	1.0229	1.0459	1.0688
	San Diego, CA				
7360	San Francisco, CA	1.4514	1.0903	1.1806	1.2708
	Marin, CA				
	San Francisco, CA				
	San Mateo, CA				
7400	San Jose, CA	1.4626	1.0925	1.1850	1.2776
	Santa Clara, CA				
7440	San Juan-Bayamon, PR	0.4909	0.8982	0.7964	0.6945
	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	1.1429	1.0286	1.0572	1.0857
	San Luis Obispo, CA				
7480	Santa Barbara-Santa Maria-Lompoc, CA	1.0441	1.0088	1.0176	1.0265
	Santa Barbara, CA				
7485	Santa Cruz-Watsonville, CA	1.2942	1.0588	1.1177	1.1765
	Santa Cruz, CA				
7490	Santa Fe, NM	1.0653	1.0131	1.0261	1.0392
	Los Alamos, NM				
	Santa Fe, NM				
7500	Santa Rosa, CA	1.2877	1.0575	1.1151	1.1726
	Sonoma, CA				
7510	Sarasota-Bradenton, FL	0.9964	0.9993	0.9986	0.9978
	Manatee, FL				
	Sarasota, FL				
7520	Savannah, GA	0.9472	0.9894	0.9789	0.9683
	Bryan, GA				
	Chatham, GA				
	Effingham, GA				
7560	Scranton-Wilkes-Barre-Hazleton, PA	0.8412	0.9682	0.9365	0.9047
	Columbia, PA				
	Lackawanna, PA				
	Luzerne, PA				
	Wyoming, PA				
7600	Seattle-Bellevue-Everett, WA	1.1562	1.0312	1.0625	1.0937
	Island, WA				
	King, WA				
	Snohomish, WA				

TABLE 1.—LONG-TERM CARE HOSPITAL WAGE INDEX FOR URBAN AREAS FOR DISCHARGES OCCURRING FROM JULY 1, 2004 THROUGH JUNE 30, 2005—Continued

MSA	Urban area (constituent counties)	Full wage index [1]	1/5th wage index [2]	2/5ths wage index [3]	3/5ths wage index [4]
7610	Sharon, PA Mercer, PA	0.7751	0.9550	0.9100	0.8651
7620	Sheboygan, WI Sheboygan, WI	0.8624	0.9725	0.9450	0.9174
7640	Sherman-Denison, TX Grayson, TX	0.9700	0.9940	0.9880	0.9820
7680	Shreveport-Bossier City, LA Bossier, LA Caddo, LA Webster, LA	0.9083	0.9817	0.9633	0.9450
7720	Sioux City, IA-NE Woodbury, IA Dakota, NE	0.8993	0.9799	0.9597	0.9396
7760	Sioux Falls, SD Lincoln, SD Minnehaha, SD	0.9309	0.9862	0.9724	0.9585
7800	South Bend, IN St. Joseph, IN	0.9821	0.9964	0.9928	0.9893
7840	Spokane, WA Spokane, WA	1.0901	1.0180	1.0360	1.0541
7880	Springfield, IL Menard, IL Sangamon, IL	0.8944	0.9789	0.9578	0.9366
7920	Springfield, MO Christian, MO Greene, MO Webster, MO	0.8457	0.9691	0.9383	0.9074
8003	Springfield, MA Hampden, MA Hampshire, MA	1.0543	1.0109	1.0217	1.0326
8050	State College, PA Centre, PA	0.8740	0.9748	0.9496	0.9244
8080	Steubenville-Weirton, OH–WV (WV Hospitals) Jefferson, OH Brooke, WV Hancock, WV	0.8398	0.9680	0.9359	0.9039
8120	Stockton-Lodi, CA San Joaquin, CA	1.0404	1.0081	1.0162	1.0242
8140	Sumter, SC Sumter, SC	0.8243	0.9649	0.9297	0.8946
8160	Syracuse, NY Cayuga, NY Madison, NY Onondaga, NY Oswego, NY	0.9412	0.9882	0.9765	0.9647
8200	Tacoma, WA Pierce, WA	1.1116	1.0223	1.0446	1.0670
8240	Tallahassee, FL Gadsden, FL Leon, FL	0.8520	0.9704	0.9408	0.9112
8280	Tampa-St. Petersburg-Clearwater, FL Hernando, FL Hillsborough, FL Pasco, FL Pinellas, FL	0.9103	0.9821	0.9641	0.9462
8320	Terre Haute, IN Clay, IN Vermillion, IN Vigo, IN	0.8325	0.9665	0.9330	0.8995
8360	Texarkana, AR-Texarkana, TX Miller, AR Bowie, TX	0.8150	0.9630	0.9260	0.8890
8400	Toledo, OH Fulton, OH Lucas, OH Wood, OH	0.9381	0.9876	0.9752	0.9629
8440	Topeka, KS Shawnee, KS	0.9108	0.9822	0.9643	0.9465
8480	Trenton, NJ Mercer, NJ	1.0517	1.0103	1.0207	1.0310
8520	Tucson, AZ	0.8981	0.9796	0.9592	0.9389

TABLE 1.—LONG-TERM CARE HOSPITAL WAGE INDEX FOR URBAN AREAS FOR DISCHARGES OCCURRING FROM JULY 1, 2004 THROUGH JUNE 30, 2005—Continued

MSA	Urban area (constituent counties)	Full wage index [1]	1/5th wage index [2]	2/5ths wage index [3]	3/5ths wage index [4]
	Pima, AZ				
8560	Tulsa, OK	0.9185	0.9837	0.9674	0.9511
	Creek, OK				
	Osage, OK				
	Rogers, OK				
	Tulsa, OK				
	Wagoner, OK				
8600	Tuscaloosa, AL	0.8212	0.9642	0.9285	0.8927
	Tuscaloosa, AL				
8640	Tyler, TX	0.9404	0.9881	0.9762	0.9642
	Smith, TX				
8680	Utica-Rome, NY	0.8403	0.9681	0.9361	0.9042
	Herkimer, NY				
	Oneida, NY				
8720	Vallejo-Fairfield-Napa, CA	1.3377	1.0675	1.1351	1.2026
	Napa, CA				
	Solano, CA				
8735	Ventura, CA	1.1064	1.0213	1.0426	1.0638
	Ventura, CA				
8750	Victoria, TX	0.8184	0.9637	0.9274	0.8910
	Victoria, TX				
8760	Vineland-Millville-Bridgeton, NJ	1.0405	1.0081	1.0162	1.0243
	Cumberland, NJ				
8780	Visalia-Tulare-Porterville, CA	0.9794	0.9959	0.9918	0.9876
	Tulare, CA				
8800	Waco, TX	0.8394	0.9679	0.9358	0.9036
	McLennan, TX				
8840	Washington, DC-MD-VA-WV	1.0904	1.0181	1.0362	1.0542
	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	0.8366	0.9673	0.9346	0.9020
	Black Hawk, IA				
8940	Wausau, WI	0.9692	0.9938	0.9877	0.9815
	Marathon, WI				
8960	West Palm Beach-Boca Raton, FL	0.9798	0.9960	0.9919	0.9879
	Palm Beach, FL				
9000	Wheeling, WV-OH	0.7494	0.9499	0.8998	0.8496
	Belmont, OH				
	Marshall, WV				
	Ohio, WV				
9040	Wichita, KS	0.9238	0.9848	0.9695	0.9543
	Butler, KS				
	Harvey, KS				
	Sedgwick, KS				
9080	Wichita Falls, TX	0.8341	0.9668	0.9336	0.9005
	Archer, TX				

TABLE 1.—LONG-TERM CARE HOSPITAL WAGE INDEX FOR URBAN AREAS FOR DISCHARGES OCCURRING FROM JULY 1, 2004 THROUGH JUNE 30, 2005—Continued

MSA	Urban area (constituent counties)	Full wage index [1]	1/5th wage index [2]	2/5ths wage index [3]	3/5ths wage index [4]
	Wichita, TX				
9140	Williamsport, PA	0.8158	0.9632	0.9263	0.8895
	Lycoming, PA				
9160	Wilmington-Newark, DE-MD	1.0882	1.0176	1.0353	1.0529
	New Castle, DE				
	Cecil, MD				
9200	Wilmington, NC	0.9563	0.9913	0.9825	0.9738
	New Hanover, NC				
	Brunswick, NC				
9260	Yakima, WA	1.0372	1.0074	1.0149	1.0223
	Yakima, WA				
9270	Yolo, CA	0.9204	0.9841	0.9682	0.9522
	Yolo, CA				
9280	York, PA	0.9119	0.9824	0.9648	0.9471
	York, PA				
9320	Youngstown-Warren, OH	0.9214	0.9843	0.9686	0.9528
	Columbiana, OH				
	Mahoning, OH				
	Trumbull, OH				
9340	Yuba City, CA	1.0196	1.0039	1.0078	1.0118
	Sutter, CA				
	Yuba, CA				
9360	Yuma, AZ	0.8895	0.9779	0.9558	0.9337
	Yuma, AZ				

[1] Wage index calculated using the same wage data used to compute the wage index used by acute care hospitals under the IPPS for Federal FY 2004 (that is, fiscal year 2000 audited acute care hospital inpatient wage data) without regard to reclassification under section 1886(d)(8) or section 1886(d)(10) of the Act.

[2] One-fifth of the full wage index value, applicable for a LTCH's cost reporting period beginning on or after October 1, 2002 through September 30, 2003 (Federal FY 2003). That is, for a LTCH's cost reporting period that began during Federal FY 2003 and located in Chicago, Illinois (MSA 1600), the 1/5th wage index value is computed as (1.0892 + 4)/5 = 1.0178. For further details on the 5-year phase-in of the wage index, see section V.C.1. of this final rule.

[3] Two-fifths of the full wage index value, applicable for a LTCH's cost reporting period beginning on or after October 1, 2003 through September 30, 2004 (Federal FY 2004). That is, for a LTCH's cost reporting period that begins during Federal FY 2004 and located in Chicago, Illinois (MSA 1600), the 2/5ths wage index value is computed as ((2*1.0892) + 3)/5 = 1.0357. For further details on the 5-year phase-in of the wage index, see section V.C.1. of this final rule.

[4] Three-fifths of the full wage index value, applicable for a LTCH's cost reporting period beginning on or after October 1, 2004 through September 30, 2005 (Federal FY 2005). That is, for a LTCH's cost reporting period that begins during Federal FY 2004 and located in Chicago, Illinois (MSA 1600), the 3/5ths wage index value is computed as ((3*1.0892) + 2)/5 = 1.0535. For further details on the 5-year phase-in of the wage index, see section V.C.1. of this final rule.

TABLE 2.—LONG-TERM CARE HOSPITAL WAGE INDEX FOR RURAL AREAS FOR DISCHARGES OCCURRING FROM JULY 1, 2004 THROUGH JUNE 30, 2005

Nonurban area	Full wage index [1]	1/5th wage index [2]	2/5ths wage index [3]	3/5ths wage index [4]
Alabama	0.7492	0.9498	0.8997	0.8495
Alaska	1.1886	1.0377	1.0754	1.1132
Arizona	0.9270	0.9854	0.9708	0.9562
Arkansas	0.7734	0.9547	0.9094	0.8640
California	1.0027	1.0005	1.0011	1.0016
Colorado	0.9328	0.9866	0.9731	0.9597
Connecticut	1.2183	1.0437	1.0873	1.1310
Delaware	0.9557	0.9911	0.9823	0.9734
Florida	0.8870	0.9774	0.9548	0.9322
Georgia	0.8595	0.9719	0.9438	0.9157
Hawaii	0.9958	0.9992	0.9983	0.9975
Idaho	0.8974	0.9795	0.9590	0.9384
Illinois	0.8254	0.9651	0.9302	0.8952
Indiana	0.8824	0.9765	0.9530	0.9294
Iowa	0.8416	0.9683	0.9366	0.9050
Kansas	0.8034	0.9607	0.9214	0.8820
Kentucky	0.7973	0.9595	0.9189	0.8784
Louisiana	0.7458	0.9492	0.8983	0.8475
Maine	0.8812	0.9762	0.9525	0.9287
Maryland	0.9125	0.9825	0.9650	0.9475
Massachusetts	1.0432	1.0086	1.0173	1.0259
Michigan	0.8884	0.9777	0.9554	0.9330
Minnesota	0.9330	0.9866	0.9732	0.9598

TABLE 2.—LONG-TERM CARE HOSPITAL WAGE INDEX FOR RURAL AREAS FOR DISCHARGES OCCURRING FROM JULY 1, 2004 THROUGH JUNE 30, 2005—Continued

Nonurban area	Full wage index [1]	1/5th wage index [2]	2/5ths wage index [3]	3/5ths wage index [4]
Mississippi	0.7778	0.9556	0.9111	0.8667
Missouri	0.7892	0.9578	0.9157	0.8735
Montana	0.8800	0.9760	0.9520	0.9280
Nebraska	0.8822	0.9764	0.9529	0.9293
Nevada	0.9806	0.9961	0.9922	0.9884
New Hampshire	1.0030	1.0006	1.0012	1.0018
New Jersey [5]				
New Mexico	0.8270	0.9654	0.9308	0.8962
New York	0.8526	0.9705	0.9410	0.9116
North Carolina	0.8458	0.9692	0.9383	0.9075
North Dakota	0.7778	0.9556	0.9111	0.8667
Ohio	0.8820	0.9764	0.9528	0.9292
Oklahoma	0.7537	0.9507	0.9015	0.8522
Oregon	0.9994	0.9999	0.9998	0.9996
Pennsylvania	0.8378	0.9676	0.9351	0.9027
Puerto Rico	0.4018	0.8804	0.7607	0.6411
Rhode Island [5]				
South Carolina	0.8498	0.9700	0.9399	0.9099
South Dakota	0.8195	0.9639	0.9278	0.8917
Tennessee	0.7886	0.9577	0.9154	0.8732
Texas	0.7780	0.9556	0.9112	0.8668
Utah	0.8974	0.9795	0.9590	0.9384
Vermont	0.9307	0.9861	0.9723	0.9584
Virginia	0.8498	0.9700	0.9399	0.9099
Washington	1.0388	1.0078	1.0155	1.0233
West Virginia	0.8018	0.9604	0.9207	0.8811
Wisconsin	0.9304	0.9861	0.9722	0.9582
Wyoming	0.9110	0.9822	0.9644	0.9466

[1] Wage index calculated using the same wage data used to compute the wage index used by acute care hospitals under the IPPS for Federal FY 2004 (that is, fiscal year 2000 audited acute care hospital inpatient wage data) without regard to reclassification under section 1886(d)(8) or section 1886(d)(10) of the Act.

[2] One-fifth of the full wage index value, applicable for a LTCH's cost reporting period beginning on or after October 1, 2002 through September 30, 2003 (Federal FY 2003). That is, for a LTCH's cost reporting period that began during Federal FY 2003 and located in rural Illinois, the 1/5th wage index value is computed as (0.8254 + 4)/5 = 0.9651. For further details on the 5-year phase-in of the wage index, see section V.C.1. of this final rule.

[3] Two-fifths of the full wage index value, applicable for a LTCH's cost reporting period beginning on or after October 1, 2003 through September 30, 2004 (Federal FY 2004). That is, for a LTCH's cost reporting period that begins during Federal FY 2004 and located in rural Illinois, the 2/5th wage index value is computed as ((2*0.8254) + 3))/5 = 0.9302. For further details on the 5-year phase-in of the wage index, see section V.C.1. of this final rule.

[4] Three-fifths of the full wage index value, applicable for a LTCH's cost reporting period beginning on or after October 1, 2004 through September 30, 2005 (Federal FY 2005). That is, for a LTCH's cost reporting period that begins during Federal FY 2004 and located in rural Illinois, the 3/5ths wage index value is computed as ((3*0.8254) + 2))/5 = 0.8952. For further details on the 5-year phase-in of the wage index, see section V.C.1. of this final rule.

[5] All counties within the State are classified as urban.

TABLE 3.—FEDERAL FY 2004 LTC–DRG RELATIVE WEIGHTS, GEOMETRIC MEAN LENGTH OF STAY, AND SHORT-STAYS OF FIVE-SIXTHS AVERAGE LENGTH OF STAY FOR DISCHARGES OCCURRING FROM OCTOBER 1, 2004 THROUGH SEPTEMBER 30, 2004

LTC–DRG	Description	Relative weight	Geometric average length of stay	5/6th of the average length of stay
1	CRANIOTOMY AGE >17 W CC [5]	2.0841	40.0	33.3
2	CRANIOTOMY AGE >17 W/O CC [8]	2.0841	40.0	33.3
3	CRANIOTOMY AGE 0–17 [8]	2.0841	40.0	33.3
6	CARPAL TUNNEL RELEASE [8]	0.4964	18.5	15.4
7	PERIPH & CRANIAL NERVE & OTHER NERV SYST PROC W CC [7]	1.5754	41.0	34.1
8	PERIPH & CRANIAL NERVE & OTHER NERV SYST PROC W/O CC [7]	1.5754	41.0	34.1
9	SPINAL DISORDERS & INJURIES	1.5025	32.9	27.4
10	NERVOUS SYSTEM NEOPLASMS W CC	0.7549	23.4	19.5
11	NERVOUS SYSTEM NEOPLASMS W/O CC	0.7281	22.0	18.3
12	DEGENERATIVE NERVOUS SYSTEM DISORDERS	0.7485	25.8	21.5
13	MULTIPLE SCLEROSIS & CEREBELLAR ATAXIA	0.7530	25.9	21.5
14	INTERCRANIAL HEMORRHAGE & STROKE W INFARCT	0.9196	27.4	22.8
15	NONSPECIFIC CVA & PRECEREBRAL OCCULUSION W/O INFARCT	0.8714	28.8	24.0
16	NONSPECIFIC CEREBROVASCULAR DISORDERS W CC	0.9125	23.9	19.9
17	NONSPECIFIC CEREBROVASCULAR DISORDERS W/O CC	0.5262	20.4	17.0
18	CRANIAL & PERIPHERAL NERVE DISORDERS W CC	0.8225	23.9	19.9

TABLE 3.—FEDERAL FY 2004 LTC–DRG RELATIVE WEIGHTS, GEOMETRIC MEAN LENGTH OF STAY, AND SHORT-STAYS OF FIVE-SIXTHS AVERAGE LENGTH OF STAY FOR DISCHARGES OCCURRING FROM OCTOBER 1, 2004 THROUGH SEPTEMBER 30, 2004—Continued

LTC–DRG	Description	Relative weight	Geometric average length of stay	5/6th of the average length of stay
19	CRANIAL & PERIPHERAL NERVE DISORDERS W/O CC	0.6236	22.7	18.9
20	NERVOUS SYSTEM INFECTION EXCEPT VIRAL MENINGITIS	1.0097	24.8	20.6
21	VIRAL MENINGITIS[2]	0.7372	23.5	19.5
22	HYPERTENSIVE ENCEPHALOPATHY[2]	0.7372	23.5	19.5
23	NONTRAUMATIC STUPOR & COMA	0.9033	28.8	24.0
24	SEIZURE & HEADACHE AGE >17 W CC	0.8527	26.2	21.8
25	SEIZURE & HEADACHE AGE >17 W/O CC	0.7727	24.1	20.0
26	SEIZURE & HEADACHE AGE 0–17[8]	0.7372	23.5	19.5
27	TRAUMATIC STUPOR & COMA, COMA >1 HR	1.1929	30.4	25.3
28	TRAUMATIC STUPOR & COMA, COMA <1 HR AGE >17 W CC[8]	1.0211	29.0	24.1
29	TRAUMATIC STUPOR & COMA, COMA <1 HR AGE >17 W/O CC	0.9056	26.6	22.1
30	TRAUMATIC STUPOR & COMA, COMA <1 HR AGE 0–17[8]	0.9562	26.1	21.7
31	CONCUSSION AGE >17 W CC[7]	0.9562	26.1	21.7
32	CONCUSSION AGE >17 W/O CC[7]	0.9562	26.1	21.7
33	CONCUSSION AGE 0–17[8]	0.7372	23.5	19.5
34	OTHER DISORDERS OF NERVOUS SYSTEM W CC	0.9140	27.8	23.1
35	OTHER DISORDERS OF NERVOUS SYSTEM W/O CC	0.6651	24.5	20.4
36	RETINAL PROCEDURES[8]	0.4964	18.5	15.4
37	ORBITAL PROCEDURES[8]	0.4964	18.5	15.4
38	PRIMARY IRIS PROCEDURES[8]	0.4964	18.5	15.4
39	LENS PROCEDURES WITH OR WITHOUT VITRECTOMY[8]	0.4964	18.5	15.4
40	EXTRAOCULAR PROCEDURES EXCEPT ORBIT AGE >17[5]	2.0841	40.0	33.3
41	EXTRAOCULAR PROCEDURES EXCEPT ORBIT AGE 0–17[8]	0.4964	18.5	15.4
42	INTRAOCULAR PROCEDURES EXCEPT RETINA, IRIS & LENS[8]	0.4964	18.5	15.4
43	HYPHEMA[8]	0.4964	18.5	15.4
44	ACUTE MAJOR EYE INFECTIONS[1]	0.4964	18.5	15.4
45	NEUROLOGICAL EYE DISORDERS[8]	0.4964	18.5	15.4
46	OTHER DISORDERS OF THE EYE AGE >17 W CC[1]	0.4964	18.5	15.4
47	OTHER DISORDERS OF THE EYE AGE >17 W/O CC[1]	0.4964	18.5	15.4
48	OTHER DISORDERS OF THE EYE AGE 0–17[8]	0.4964	18.5	15.4
49	MAJOR HEAD & NECK PROCEDURES[8]	1.3569	32.5	27.0
50	SIALOADENECTOMY[8]	0.9562	26.1	21.7
51	SALIVARY GLAND PROCEDURES EXCEPT SIALOADENECTOMY[8]	0.9562	26.1	21.7
52	CLEFT LIP & PALATE REPAIR[8]	0.9562	26.1	21.7
53	SINUS & MASTOID PROCEDURES AGE >17[2]	0.7372	23.5	19.5
54	SINUS & MASTOID PROCEDURES AGE 0–17[8]	0.9562	26.1	21.7
55	MISCELLANEOUS EAR, NOSE, MOUTH & THROAT PROCEDURES[8]	0.9562	26.1	21.7
56	RHINOPLASTY[8]	0.7372	23.5	19.5
57	T&A PROC, EXCEPT TONSILLECTOMY &/OR ADENOIDECTOMY ONLY, AGE >17[8]	0.9562	26.1	21.7
58	T&A PROC, EXCEPT TONSILLECTOMY &/OR ADENOIDECTOMY ONLY, AGE 0–17[8]	0.9562	26.1	21.7
59	TONSILLECTOMY &/OR ADENOIDECTOMY ONLY, AGE >17[8]	0.9562	26.1	21.7
60	TONSILLECTOMY &/OR ADENOIDECTOMY ONLY, AGE 0–17[8]	0.9562	26.1	21.7
61	MYRINGOTOMY W TUBE INSERTION AGE >17[2]	0.7372	23.5	19.5
62	MYRINGOTOMY W TUBE INSERTION AGE 0–17[8]	0.9562	26.1	21.7
63	OTHER EAR, NOSE, MOUTH & THROAT O.R. PROCEDURES[3]	0.9562	26.1	21.7
64	EAR, NOSE, MOUTH & THROAT MALIGNANCY	1.2540	27.5	22.9
65	DYSEQUILIBRIUM[1]	0.4964	18.5	15.4
66	EPISTAXIS[1]	0.4964	18.5	15.4
67	EPIGLOTTITIS[8]	0.9562	26.1	21.7
68	OTITIS MEDIA & URI AGE >17 W CC	0.8243	21.9	18.2
69	OTITIS MEDIA & URI AGE >17 W/O CC[1]	0.4964	18.5	15.4
70	OTITIS MEDIA & URI AGE 0–17[8]	0.4964	18.5	15.4
71	LARYNGOTRACHEITIS[8]	0.4964	18.5	15.4
72	NASAL TRAUMA & DEFORMITY[2]	0.7372	23.5	19.5
73	OTHER EAR, NOSE, MOUTH & THROAT DIAGNOSES AGE >17	0.7215	20.3	16.9
74	OTHER EAR, NOSE, MOUTH & THROAT DIAGNOSES AGE 0–17[8]	0.4964	18.5	15.4
75	MAJOR CHEST PROCEDURES[5]	2.0841	40.0	33.3
76	OTHER RESP SYSTEM O.R. PROCEDURES W CC	2.4382	43.9	36.5
77	OTHER RESP SYSTEM O.R. PROCEDURES W/O CC[5]	2.0841	40.0	33.3
78	PULMONARY EMBOLISM	0.8896	24.2	20.1
79	RESPIRATORY INFECTIONS & INFLAMMATIONS AGE >17 W CC	0.8985	22.6	18.8
80	RESPIRATORY INFECTIONS & INFLAMMATIONS AGE >17 W/O CC	0.7645	22.3	18.5
81	RESPIRATORY INFECTIONS & INFLAMMATIONS AGE 0–17[8]	0.4964	18.5	15.4
82	RESPIRATORY NEOPLASMS	0.7480	20.3	16.9
83	MAJOR CHEST TRAUMA W CC[3]	0.9562	26.1	21.7
84	MAJOR CHEST TRAUMA W/O CC[2]	0.7372	23.5	19.5
85	PLEURAL EFFUSION W CC	0.8514	23.5	19.5

TABLE 3.—FEDERAL FY 2004 LTC–DRG RELATIVE WEIGHTS, GEOMETRIC MEAN LENGTH OF STAY, AND SHORT-STAYS OF FIVE-SIXTHS AVERAGE LENGTH OF STAY FOR DISCHARGES OCCURRING FROM OCTOBER 1, 2004 THROUGH SEPTEMBER 30, 2004—Continued

LTC–DRG	Description	Relative weight	Geometric average length of stay	5/6th of the average length of stay
86	PLEURAL EFFUSION W/O CC	0.6540	22.4	18.6
87	PULMONARY EDEMA & RESPIRATORY FAILURE	1.6513	31.9	26.5
88	CHRONIC OBSTRUCTIVE PULMONARY DISEASE	0.7653	20.7	17.2
89	SIMPLE PNEUMONIA & PLEURISY AGE >17 W CC	0.8428	23.1	19.2
90	SIMPLE PNEUMONIA & PLEURISY AGE >17 W/O CC	0.7318	21.7	18.0
91	SIMPLE PNEUMONIA & PLEURISY AGE 0–17[8]	0.7372	23.5	19.5
92	INTERSTITIAL LUNG DISEASE W CC	0.7702	20.4	17.0
93	INTERSTITIAL LUNG DISEASE W/O CC[1]	0.4964	18.5	15.4
94	PNEUMOTHORAX W CC	0.6571	18.9	15.7
95	PNEUMOTHORAX W/O CC[1]	0.4964	18.5	15.4
96	BRONCHITIS & ASTHMA >17 W CC AGE	0.7381	20.5	17.0
97	BRONCHITIS & ASTHMA AGE >17 W/O CC	0.5296	18.7	15.5
98	BRONCHITIS & ASTHMA AGE 0–17[8]	0.4964	18.5	15.4
99	RESPIRATORY SIGNS & SYMPTOMS W CC	1.0622	26.6	22.1
100	RESPIRATORY SIGNS & SYMPTOMS W/O CC	1.0579	26.1	21.7
101	OTHER RESPIRATORY SYSTEM DIAGNOSES W CC	0.9009	22.6	18.8
102	OTHER RESPIRATORY SYSTEM DIAGNOSES W/O CC	0.7011	21.0	17.5
103	HEART TRANSPLANT[6]	0.0000	0.0	0.0
104	CARDIAC VALVE & OTHER MAJOR CARDIOTHORACIC PROC W CARDIAC CATH[8]	2.0841	40.0	33.3
105	CARDIAC VALVE & OTHER MAJOR CARDIOTHORACIC PROC W/O CARDIAC CATH[8]	2.0841	40.0	33.3
106	CORONARY BYPASS W PTCA[8]	2.0841	40.0	33.3
107	CORONARY BYPASS W CARDIAC CATH[8]	2.0841	40.0	33.3
108	OTHER CARDIOTHORACIC PROCEDURES[5]	2.0841	40.0	33.3
109	CORONARY BYPASS W/O PTCA OR CARDIAC CATH[8]	2.0841	40.0	33.3
110	MAJOR CARDIOVASCULAR PROCEDURES W CC[5]	2.0841	40.0	33.3
111	MAJOR CARDIOVASCULAR PROCEDURES W/O CC[8]	2.0841	40.0	33.3
113	AMPUTATION FOR CIRC SYSTEM DISORDERS EXCEPT UPPER LIMB & TOE	1.5629	38.7	32.2
114	UPPER LIMB & TOE AMPUTATION FOR CIRC SYSTEM DISORDERS	1.3604	38.3	31.9
115	PRM CARD PACEM IMPL W AMI, HRT FAIL OR SHK, OR AICD LEAD OR GNRTR P[5]	2.0841	40.0	33.3
116	OTH PERM CARD PACEMAK IMPL OR PTCA W CORONARY ARTERY STENT IMPLNT[5]	2.0841	40.0	33.3
117	CARDIAC PACEMAKER REVISION EXCEPT DEVICE REPLACEMENT[3]	0.9562	26.1	21.7
118	CARDIAC PACEMAKER DEVICE REPLACEMENT[5]	2.0841	40.0	33.3
119	VEIN LIGATION & STRIPPING[4]	1.3569	32.5	27.0
120	OTHER CIRCULATORY SYSTEM O.R. PROCEDURES	1.2435	34.4	28.6
121	CIRCULATORY DISORDERS W AMI & MAJOR COMP, DISCHARGED ALIVE	0.7467	22.1	18.4
122	CIRCULATORY DISORDERS W AMI W/O MAJOR COMP, DISCHARGED ALIVE	0.6440	18.8	15.6
123	CIRCULATORY DISORDERS W AMI, EXPIRED	0.8527	18.8	15.6
124	CIRCULATORY DISORDERS EXCEPT AMI, W CARD CATH & COMPLEX DIAG[4]	1.3569	32.5	27.0
125	CIRCULATORY DISORDERS EXCEPT AMI, W CARD CATH W/O COMPLEX DIAG[4]	1.3569	32.5	27.0
126	ACUTE & SUBACUTE ENDOCARDITIS	0.8706	25.6	21.3
127	HEART FAILURE & SHOCK	0.7719	22.1	18.4
128	DEEP VEIN THROMBOPHLEBITIS[2]	0.7372	23.5	19.5
129	CARDIAC ARREST, UNEXPLAINED[3]	0.9562	26.1	21.7
130	PERIPHERAL VASCULAR DISORDERS W CC	0.7712	24.4	20.3
131	DISORDERS W/O CC PERIPHERAL VASCULAR	0.6398	23.1	19.2
132	ATHEROSCLEROSIS W CC	0.8092	22.4	18.6
133	ATHEROSCLEROSIS W/O CC	0.7044	21.9	18.2
134	HYPERTENSION	0.9154	27.9	23.2
135	CARDIAC CONGENITAL & VALVULAR DISORDERS AGE >17 W CC	0.9039	23.1	19.2
136	CARDIAC CONGENITAL & VALVULAR DISORDERS AGE >17 W/O CC	0.7186	22.4	18.6
137	CARDIAC CONGENITAL & VALVULAR DISORDERS AGE 0-17[8]	0.7372	23.5	19.5
138	CARDIAC ARRHYTHMIA & CONDUCTION DISORDERS W CC	0.7430	22.7	18.9
139	CARDIAC ARRHYTHMIA & CONDUCTION DISORDERS W/O CC	0.6032	20.3	16.9
140	ANGINA PECTORIS	0.6094	19.3	16.0
141	SYNCOPE & COLLAPSE W CC	0.6453	22.9	19.0
142	SYNCOPE & COLLAPSE W/O CC	0.5041	20.3	16.9
143	CHEST PAIN	0.7314	21.8	18.1
144	OTHER CIRCULATORY SYSTEM DIAGNOSES W CC	0.7921	22.2	18.5
145	OTHER CIRCULATORY SYSTEM DIAGNOSES W/O CC	0.6983	20.7	17.2
146	RECTAL RESECTION W CC[8]	2.0841	40.0	33.3
147	RECTAL RESECTION W/O CC[8]	2.0841	40.0	33.3
148	MAJOR SMALL & LARGE BOWEL PROCEDURES W CC[5]	2.0841	40.0	33.3
149	MAJOR SMALL & LARGE BOWEL PROCEDURES W/O CC[1]	0.4964	18.5	15.4
150	PERITONEAL ADHESIOLYSIS W CC[4]	1.3569	32.5	27.0
151	PERITONEAL ADHESIOLYSIS W/O CC[8]	1.3569	32.5	27.0
152	MINOR SMALL & LARGE BOWEL PROCEDURES W CC[4]	1.3569	32.5	27.0

TABLE 3.—FEDERAL FY 2004 LTC–DRG RELATIVE WEIGHTS, GEOMETRIC MEAN LENGTH OF STAY, AND SHORT-STAYS OF FIVE-SIXTHS AVERAGE LENGTH OF STAY FOR DISCHARGES OCCURRING FROM OCTOBER 1, 2004 THROUGH SEPTEMBER 30, 2004—Continued

LTC–DRG	Description	Relative weight	Geometric average length of stay	5/6th of the average length of stay
153	MINOR SMALL & LARGE BOWEL PROCEDURES W/O CC[8]	1.3569	32.5	27.0
154	STOMACH, ESOPHAGEAL & DUODENAL PROCEDURES AGE >17 W CC[5]	2.0841	40.0	33.3
155	STOMACH, ESOPHAGEAL & DUODENAL PROCEDURES AGE >17 W/O CC[8]	1.3569	32.5	27.0
156	STOMACH, ESOPHAGEAL & DUODENAL PROCEDURES AGE 0-17[8]	1.3569	32.5	27.0
157	ANAL & STOMAL PROCEDURES W CC[4]	1.3569	32.5	27.0
158	ANAL & STOMAL PROCEDURES W/O CC[3]	0.9562	26.1	21.7
159	HERNIA PROCEDURES EXCEPT INGUINAL & FEMORAL AGE >17 W CC[8]	1.3569	32.5	27.0
160	HERNIA PROCEDURES EXCEPT INGUINAL & FEMORAL AGE >17 W/O CC[8]	1.3569	32.5	27.0
161	INGUINAL & FEMORAL HERNIA PROCEDURES AGE >17 W CC[4]	1.3569	32.5	27.0
162	INGUINAL & FEMORAL HERNIA PROCEDURES AGE >17 W/O CC[8]	0.4964	18.5	15.4
163	HERNIA PROCEDURES AGE 0–17[8]	0.4964	18.5	15.4
164	APPENDECTOMY W COMPLICATED PRINCIPAL DIAG W CC[8]	2.0841	40.0	33.3
165	APPENDECTOMY W COMPLICATED PRINCIPAL DIAG W/O CC[8]	0.4964	18.5	15.4
166	APPENDECTOMY W/O COMPLICATED PRINCIPAL DIAG W CC[8]	2.0841	40.0	33.3
167	APPENDECTOMY W/O COMPLICATED PRINCIPAL DIAG W/O CC[8]	0.4964	18.5	15.4
168	MOUTH PROCEDURES W CC[5]	2.0841	40.0	33.3
169	MOUTH PROCEDURES W/O CC[8]	0.7372	23.5	19.5
170	OTHER DIGESTIVE SYSTEM O.R. PROCEDURES W CC	1.7006	40.3	33.5
171	OTHER DIGESTIVE SYSTEM O.R. PROCEDURES W/O CC[4]	1.3569	32.5	27.0
172	DIGESTIVE MALIGNANCY W CC	0.8702	22.5	18.7
173	DIGESTIVE MALIGNANCY W/O CC	0.7092	20.2	16.8
174	G.I. HEMORRHAGE W CC	0.7874	23.7	19.7
175	G.I. HEMORRHAGE W/O CC	0.6345	21.1	17.5
176	COMPLICATED PEPTIC ULCER	0.7728	21.2	17.6
177	UNCOMPLICATED PEPTIC ULCER W CC[2]	0.7372	23.5	19.5
178	UNCOMPLICATED PEPTIC ULCER W/O CC[1]	0.4964	18.5	15.4
179	INFLAMMATORY BOWEL DISEASE	1.0023	25.2	21.0
180	G.I. OBSTRUCTION W CC[7]	0.8222	22.9	19.0
181	G.I. OBSTRUCTION W/O CC[7]	0.8222	22.9	19.0
182	ESOPHAGITIS, GASTROENT & MISC DIGEST DISORDERS AGE >17 W CC	0.8449	23.5	19.5
183	ESOPHAGITIS, GASTROENT & MISC DIGEST DISORDERS AGE >17 W/O CC	0.6362	20.3	16.9
184	ESOPHAGITIS, GASTROENT & MISC DIGEST DISORDERS AGE 0–17[8]	0.7372	23.5	19.5
185	DENTAL & ORAL DIS EXCEPT EXTRACTIONS & RESTORATIONS, AGE >17[2]	0.7372	23.5	19.5
186	DENTAL & ORAL DIS EXCEPT EXTRACTIONS & RESTORATIONS, AGE 0–17[8]	0.7372	23.5	19.5
187	DENTAL EXTRACTIONS & RESTORATIONS[8]	0.7372	23.5	19.5
188	OTHER DIGESTIVE SYSTEM DIAGNOSES AGE >17 W CC	1.0308	25.3	21.0
189	OTHER DIGESTIVE SYSTEM DIAGNOSES AGE >17 W/O CC	0.7826	21.8	18.1
190	OTHER DIGESTIVE SYSTEM DIAGNOSES AGE 0–17[8]	0.7372	23.5	19.5
191	PANCREAS, LIVER & SHUNT PROCEDURES W CC[4]	1.3569	32.5	27.0
192	PANCREAS, LIVER & SHUNT PROCEDURES W/O CC[1]	0.4964	18.5	15.4
193	BILIARY TRACT PROC EXCEPT ONLY CHOLECYST W OR W/O C.D.E. W CC[2]	0.7372	23.5	19.5
194	BILIARY TRACT PROC EXCEPT ONLY CHOLECYST W OR W/O C.D.E. W/O CC[3]	0.7372	23.5	19.5
195	CHOLECYSTECTOMY W C.D.E. W CC[4]	1.3569	32.5	27.0
196	CHOLECYSTECTOMY W C.D.E. W/O CC[8]	0.9562	26.1	21.7
197	CHOLECYSTECTOMY EXCEPT BY LAPAROSCOPE W/O C.D.E. W CC[3]	0.9562	26.1	21.7
198	CHOLECYSTECTOMY EXCEPT BY LAPAROSCOPE W/O C.D.E. W/O CC[8]	0.9562	26.1	21.7
199	HEPATOBILIARY DIAGNOSTIC PROCEDURE FOR MALIGNANCY[8]	0.7372	23.5	19.5
200	HEPATOBILIARY DIAGNOSTIC PROCEDURE FOR NON-MALIGNANCY[2]	0.7372	23.5	19.5
201	OTHER HEPATOBILIARY OR PANCREAS O.R. PROCEDURES[5]	2.0841	40.0	33.3
202	CIRRHOSIS & ALCOHOLIC HEPATITIS	0.7254	22.3	18.5
203	MALIGNANCY OF HEPATOBILIARY SYSTEM OR PANCREAS	0.6758	18.9	15.7
204	DISORDERS OF PANCREAS EXCEPT MALIGNANCY	0.9986	23.4	19.5
205	DISORDERS OF LIVER EXCEPT MALIG, CIRR, ALC HEPA W CC[7]	0.7029	22.1	18.4
206	DISORDERS OF LIVER EXCEPT MALIG, CIRR, ALC HEPA W/O CC[7]	0.7029	22.1	18.4
207	DISORDERS OF THE BILIARY TRACT W CC[7]	0.6671	20.5	17.0
208	DISORDERS OF THE BILIARY TRACT W/O CC[7]	0.6671	20.5	17.0
209	MAJOR JOINT & LIMB REATTACHMENT PROCEDURES OF LOWER EXTREMITY[4]	1.3569	32.5	27.0
210	HIP & FEMUR PROCEDURES EXCEPT MAJOR JOINT AGE >17 W CC[4]	1.3569	32.5	27.0
211	HIP & FEMUR PROCEDURES EXCEPT MAJOR JOINT AGE >17 W/O CC[2]	0.7372	23.5	19.5
212	HIP & FEMUR PROCEDURES EXCEPT MAJOR JOINT AGE 0–117[8]	0.7372	23.5	19.5
213	AMPUTATION FOR MUSCULOSKELETAL SYSTEM & CONN TISSUE DISORDERS	1.3851	33.8	28.1
216	BIOPSIES OF MUSCULOSKELETAL SYSTEM & CONNECTIVE TISSUE[4]	1.3569	32.5	27.0
217	WND DEBRID & SKN GRFT EXCEPT HAND, FOR MUSCSKELET & CONN TISS DIS	1.4038	39.3	32.7
218	LOWER EXTREM & HUMER PROC EXCEPT HIP, FOOT, FEMUR AGE >17 W CC[3]	0.9562	26.1	21.7
219	LOWER EXTREM & HUMER PROC EXCEPT HIP, FOOT, FEMUR AGE >17 W/O CC[8]	0.9562	26.1	21.7
220	LOWER EXTREM & HUMER PROC EXCEPT HIP, FOOT, FEMUR AGE 0–17[8]	0.9562	26.1	21.7
223	MAJOR SHOULDER/ELBOW PROC, OR OTHER UPPER EXTREMITY PROC W CC[3]	0.9562	26.1	21.7

TABLE 3.—FEDERAL FY 2004 LTC–DRG RELATIVE WEIGHTS, GEOMETRIC MEAN LENGTH OF STAY, AND SHORT-STAYS OF FIVE-SIXTHS AVERAGE LENGTH OF STAY FOR DISCHARGES OCCURRING FROM OCTOBER 1, 2004 THROUGH SEPTEMBER 30, 2004—Continued

LTC–DRG	Description	Relative weight	Geometric average length of stay	5/6th of the average length of stay
224	SHOULDER, ELBOW OR FOREARM PROC, EXC MAJOR JOINT PROC, W/O CC[8]	0.9562	26.1	21.7
225	FOOT PROCEDURES[3]	0.9562	26.1	21.7
226	SOFT TISSUE PROCEDURES W CC[7]	1.3569	32.5	27.0
227	SOFT TISSUE PROCEDURES W/O CC[7]	1.3569	32.5	27.0
228	MAJOR THUMB OR JOINT PROC, OR OTH HAND OR WRIST PROC W CC[4]	1.3569	32.5	27.0
229	HAND OR WRIST PROC, EXCEPT MAJOR JOINT PROC, W/O CC[8]	0.9562	26.1	21.7
230	LOCAL EXCISION & REMOVAL OF INT FIX DEVICES OF HIP & FEMUR[4]	1.3569	32.5	27.0
232	ARTHROSCOPY[2]	0.7372	23.5	19.5
233	OTHER MUSCULOSKELET SYS & CONN TISS O.R. PROC W CC[3]	0.9562	26.1	21.7
234	OTHER MUSCULOSKELET SYS & CONN TISS O.R. PROC W/O CC[3]	0.9562	26.1	21.7
235	FRACTURES OF FEMUR	0.8396	29.6	24.6
236	FRACTURES OF HIP & PELVIS	0.7368	27.1	22.5
237	SPRAINS, STRAINS, & ISLOCATIONS OF HIP, PELVIS & THIGH[2]	0.7372	23.5	19.5
238	OSTEOMYELITIS	0.8432	27.9	23.2
239	PATHOLOGICAL FRACTURES & MUSCULOSKELETAL & CONN TISS MALIGNANCY	0.6610	22.0	18.3
240	CONNECTIVE TISSUE DISORDERS W CC	0.6685	21.2	17.6
241	CONNECTIVE TISSUE DISORDERS W/O CC	0.4538	18.7	15.5
242	SEPTIC ARTHRITIS	0.7721	26.4	22.0
243	MEDICAL BACK PROBLEMS	0.6616	23.2	19.3
244	BONE DISEASES & SPECIFIC ARTHROPATHIES W CC	0.5563	20.0	16.6
245	BONE DISEASES & SPECIFIC ARTHROPATHIES W/O CC	0.4721	18.5	15.4
246	NON-SPECIFIC ARTHROPATHIES	0.5128	22.2	18.5
247	SIGNS & SYMPTOMS OF MUSCULOSKELETAL SYSTEM & CONN TISSUE	0.5536	20.2	16.8
248	TENDONITIS, MYOSITIS & BURSITIS	0.7274	24.5	20.4
249	AFTERCARE, MUSCULOSKELETAL SYSTEM & CONNECTIVE TISSUE	0.7829	27.0	22.5
250	FX, SPRN, STRN & DISL OF FOREARM, HAND, FOOT AGE >17 W CC	0.8206	29.9	24.9
251	FX, SPRN, STRN & DISL OF FOREARM, HAND, FOOT AGE >17 W/O CC	0.6009	27.3	22.7
252	FX, SPRN, STRN & DISL OF FOREARM, HAND, FOOT AGE 0–17[8]	0.9562	26.1	21.7
253	FX, SPRN, STRN & DISL OF UPARM, LOWLEG EX FOOT AGE >17 W CC	0.8176	27.6	23.0
254	FX, SPRN, STRN & DISL OF UPARM, LOWLEG EX FOOT AGE >17 W/O CC	0.6691	25.1	20.9
255	FX, SPRN, STRN & DISL OF UPARM, LOWLEG EX FOOT AGE 0–17[8]	0.9562	26.1	21.7
256	OTHER MUSCULOSKELETAL SYSTEM & CONNECTIVE TISSUE DIAGNOSES	0.8294	25.9	21.5
257	TOTAL MASTECTOMY FOR MALIGNANCY W CC[3]	0.9562	26.1	21.7
258	TOTAL MASTECTOMY FOR MALIGNANCY W/O CC[8]	0.9562	26.1	21.7
259	SUBTOTAL MASTECTOMY FOR MALIGNANCY W CC[8]	0.9562	26.1	21.7
260	SUBTOTAL MASTECTOMY FOR MALIGNANCY W/O CC[8]	0.9562	26.1	21.7
261	BREAST PROC FOR NON-MALIGNANCY EXCEPT BIOPSY & LOCAL EXCISION[5]	2.0841	40.0	33.3
262	BREAST BIOPSY & LOCAL EXCISION FOR NON-MALIGNANCY[3]	0.9562	26.1	21.7
263	SKIN GRAFT &/OR DEBRID FOR SKN ULCER OR CELLULITIS W CC	1.4522	42.4	35.3
264	SKIN GRAFT &/OR DEBRID FOR SKN ULCER OR CELLULITIS W/O CC	1.2892	44.1	36.7
265	SKIN GRAFT &/OR DEBRID EXCEPT FOR SKIN ULCER OR CELLULITIS W CC[7]	1.2215	34.8	29.0
266	SKIN GRAFT &/OR DEBRID EXCEPT FOR SKIN ULCER OR CELLULITIS W/O CC[7]	1.2215	34.8	29.0
267	PERIANAL & PILONIDAL PROCEDURES[8]	0.9562	26.1	21.7
268	SKIN, SUBCUTANEOUS TISSUE & BREAST PLASTIC PROCEDURES[5]	2.0841	40.0	33.3
269	OTHER SKIN, SUBCUT TISS & BREAST PROC W CC	1.4466	43.0	35.8
270	OTHER SKIN, SUBCUT TISS & BREAST PROC W/O CC	0.9916	33.9	28.2
271	SKIN ULCERS	0.9620	30.4	25.3
272	MAJOR SKIN DISORDERS W CC	0.7121	22.8	19.0
273	MAJOR SKIN DISORDERS W/O CC[1]	0.4964	18.5	15.4
274	MALIGNANT BREAST DISORDERS W CC	0.9072	24.9	20.7
275	MALIGNANT BREAST DISORDERS W/O CC[2]	0.7372	23.5	19.5
276	NON-MALIGANT BREAST DISORDERS[1]	0.4964	18.5	15.4
277	CELLULITIS AGE >17 W CC	0.7409	23.6	19.6
278	CELLULITIS AGE >17 W/O CC	0.5982	20.7	17.2
279	CELLULITIS AGE 0–17[8]	0.9562	26.1	21.7
280	TRAUMA TO THE SKIN, SUBCUT TISS & BREAST AGE >17 W CC	0.9724	29.5	24.5
281	TRAUMA TO THE SKIN, SUBCUT TISS & BREAST AGE >17 W/O CC	0.7386	26.4	22.0
282	TRAUMA TO THE SKIN, SUBCUT TISS & BREAST AGE 0–17[8]	0.7372	23.5	19.5
283	MINOR SKIN DISORDERS W CC	0.6508	19.3	16.0
284	MINOR SKIN DISORDERS W/O CC[1]	0.4964	18.5	15.4
285	AMPUTAT OF LOWER LIMB FOR ENDOCRINE, NUTRIT, & METABOL DISORDERS	1.5176	37.4	31.1
286	ADRENAL & PITUITARY PROCEDURES[8]	0.7372	23.5	19.5
287	SKIN GRAFTS & WOUND DEBRID FOR ENDOC, NUTRIT & METAB DISORDERS	1.3982	39.7	33.0
288	O.R. PROCEDURES FOR OBESITY[5]	2.0841	40.0	33.3
289	PARATHYROID PROCEDURES[8]	0.7372	23.5	19.5
290	THYROID PROCEDURES[8]	0.7372	23.5	19.5
291	THYROGLOSSAL PROCEDURES[8]	0.7372	23.5	19.5

TABLE 3.—FEDERAL FY 2004 LTC–DRG RELATIVE WEIGHTS, GEOMETRIC MEAN LENGTH OF STAY, AND SHORT-STAYS OF FIVE-SIXTHS AVERAGE LENGTH OF STAY FOR DISCHARGES OCCURRING FROM OCTOBER 1, 2004 THROUGH SEPTEMBER 30, 2004—Continued

LTC–DRG	Description	Relative weight	Geometric average length of stay	5/6th of the average length of stay
292	OTHER ENDOCRINE, NUTRIT & METAB O.R. PROC W CC[4]	1.3569	32.5	27.0
293	OTHER ENDOCRINE, NUTRIT & METAB O.R. PROC W/O CC[8]	0.9562	26.1	21.7
294	DIABETES AGE >35	0.8061	25.9	21.5
295	DIABETES AGE 0–35[3]	0.9562	26.1	21.7
296	NUTRITIONAL & MISC METABOLIC DISORDERS AGE >17 W CC	0.8207	24.1	20.0
297	NUTRITIONAL & MISC METABOLIC DISORDERS AGE >17 W/O CC	0.6524	24.5	20.4
298	NUTRITIONAL & MISC METABOLIC DISORDERS AGE 0–17[8]	0.7372	23.5	19.5
299	INBORN ERRORS OF METABOLISM[3]	0.9562	26.1	21.7
300	ENDOCRINE DISORDERS W CC	0.7704	22.3	18.5
301	ENDOCRINE DISORDERS W/O CC[2]	0.7372	23.5	19.5
302	KIDNEY TRANSPLANT[6]	0.0000	0.0	0.0
303	KIDNEY, URETER & MAJOR BLADDER PROCEDURES FOR NEOPLASM[8]	2.0841	40.0	33.3
304	KIDNEY, URETER & MAJOR BLADDER PROC FOR NON-NEOPL W CC[5]	2.0841	40.0	33.3
305	KIDNEY, URETER & MAJOR BLADDER PROC FOR NON-NEOPL W/O CC[1]	0.4964	18.5	15.4
306	PROSTATECTOMY W CC[8]	1.3569	32.5	27.0
307	PROSTATECTOMY W/O CC[8]	1.3569	32.5	27.0
308	MINOR BLADDER PROCEDURES W CC[4]	1.3569	32.5	27.0
309	MINOR BLADDER PROCEDURES W/O CC[2]	0.7372	23.5	19.5
310	TRANSURETHRAL PROCEDURES W CC[4]	1.3569	32.5	27.0
311	TRANSURETHRAL PROCEDURES W/O CC[1]	0.4964	18.5	15.4
312	URETHRAL PROCEDURES, AGE >17 W CC[4]	1.3569	32.5	27.0
313	URETHRAL PROCEDURES, AGE >17 W/O CC[8]	0.4964	18.5	15.4
314	URETHRAL PROCEDURES, AGE 0–17[8]	0.4964	18.5	15.4
315	OTHER KIDNEY & URINARY TRACT O.R. PROCEDURES	1.5070	36.8	30.6
316	RENAL FAILURE	0.9214	23.8	19.8
317	ADMIT FOR RENAL DIALYSIS[3]	0.9562	26.1	21.7
318	KIDNEY & URINARY TRACT NEOPLASMS W CC	0.7048	21.1	17.5
319	KIDNEY & URINARY TRACT NEOPLASMS W/O CC[1]	0.4964	18.5	15.4
320	KIDNEY & URINARY TRACT INFECTIONS AGE >17 W CC	0.7223	23.0	19.1
321	KIDNEY & URINARY TRACT INFECTIONS AGE >17 W/O CC	0.6260	23.2	19.3
322	KIDNEY & URINARY TRACT INFECTIONS AGE 0–17[8]	0.4964	18.5	15.4
323	URINARY STONES W CC, &/OR ESW LITHOTRIPSY[2]	0.7372	23.5	19.5
324	URINARY STONES W/O CC[2]	0.7372	23.5	19.5
325	KIDNEY & URINARY TRACT SIGNS & SYMPTOMS AGE >17 W CC[3]	0.9562	26.1	21.7
326	KIDNEY & URINARY TRACT SIGNS & SYMPTOMS AGE >17 W/O CC[1]	0.4964	18.5	15.4
327	KIDNEY & URINARY TRACT SIGNS & SYMPTOMS AGE 0–17[8]	0.4964	18.5	15.4
328	URETHRAL STRICTURE AGE >17 W CC[8]	0.4964	18.5	15.4
329	URETHRAL STRICTURE AGE >17 W/O CC[8]	0.4964	18.5	15.4
330	URETHRAL STRICTURE AGE 0–17[8]	0.4964	18.5	15.4
331	OTHER KIDNEY & URINARY TRACT DIAGNOSES AGE >17 W CC	0.8473	23.2	19.3
332	OTHER KIDNEY & URINARY TRACT DIAGNOSES AGE >17 W/O CC	0.5722	21.1	17.5
333	OTHER KIDNEY & URINARY TRACT DIAGNOSES AGE 0–17[8]	0.4964	18.5	15.4
334	MAJOR MALE PELVIC PROCEDURES W CC[8]	2.0841	40.0	33.3
335	MAJOR MALE PELVIC PROCEDURES W/O CC[8]	2.0841	40.0	33.3
336	TRANSURETHRAL PROSTATECTOMY W CC[8]	0.7372	23.5	19.5
337	TRANSURETHRAL PROSTATECTOMY W/O CC[8]	0.7372	23.5	19.5
338	TESTES PROCEDURES, FOR MALIGNANCY[8]	0.7372	23.5	19.5
339	TESTES PROCEDURES, NON-MALIGNANCY AGE >17[2]	0.7372	23.5	19.5
340	TESTES PROCEDURES, NON-MALIGNANCY AGE 0–17[8]	0.7372	23.5	19.5
341	PENIS PROCEDURES[2]	0.7372	23.5	19.5
342	CIRCUMCISION AGE >17[1]	0.4964	18.5	15.4
343	CIRCUMCISION AGE 0–17[8]	0.7372	23.5	19.5
344	OTHER MALE REPRODUCTIVE SYSTEM O.R. PROCEDURES FOR MALIGNANCY[1]	0.4964	18.5	15.4
345	OTHER MALE REPRODUCTIVE SYSTEM O.R. PROC EXCEPT FOR MALIGNANCY[5]	2.0841	40.0	33.3
346	MALIGNANCY, MALE REPRODUCTIVE SYSTEM, W CC[7]	0.7150	22.3	18.5
347	MALIGNANCY, MALE REPRODUCTIVE SYSTEM, W/O CC[7]	0.7150	22.3	18.5
348	BENIGN PROSTATIC HYPERTROPHY W CC[1]	0.4964	18.5	15.4
349	BENIGN PROSTATIC HYPERTROPHY W/O CC[1]	0.4964	18.5	15.4
350	INFLAMMATION OF THE MALE REPRODUCTIVE SYSTEM[1]	1.1820	26.6	22.1
351	STERILIZATION, MALE[8]	0.7372	23.5	19.5
352	OTHER MALE REPRODUCTIVE SYSTEM DIAGNOSES[3]	0.9562	26.1	21.7
353	PELVIC EVISCERATION, RADICAL HYSTERECTOMY & RADICAL VULVECTOMY[8]	2.0841	40.0	33.3
354	UTERINE, ADNEXA PROC FOR NON-OVARIAN/ADNEXAL MALIG W CC[8]	2.0841	40.0	33.3
355	UTERINE, ADNEXA PROC FOR NON-OVARIAN/ADNEXAL MALIG W/O CC[8]	2.0841	40.0	33.3
356	FEMALE REPRODUCTIVE SYSTEM RECONSTRUCTIVE PROCEDURES[8]	1.3569	32.5	27.0
357	UTERINE & ADNEXA PROC FOR OVARIAN OR ADNEXAL MALIGNANCY[8]	1.3569	32.5	27.0
358	UTERINE & ADNEXA PROC FOR NON-MALIGNANCY W CC[8]	1.3569	32.5	27.0

TABLE 3.—FEDERAL FY 2004 LTC–DRG RELATIVE WEIGHTS, GEOMETRIC MEAN LENGTH OF STAY, AND SHORT-STAYS OF FIVE-SIXTHS AVERAGE LENGTH OF STAY FOR DISCHARGES OCCURRING FROM OCTOBER 1, 2004 THROUGH SEPTEMBER 30, 2004—Continued

LTC–DRG	Description	Relative weight	Geometric average length of stay	5/6th of the average length of stay
359	UTERINE & ADNEXA PROC FOR NON-MALIGNANCY W/O CC[8]	1.3569	32.5	27.0
360	VAGINA, CERVIX & VULVA PROCEDURES[4]	1.3569	32.5	27.0
361	LAPAROSCOPY & INCISIONAL TUBAL INTERRUPTION[8]	0.4964	18.5	15.4
362	ENDOSCOPIC TUBAL INTERRUPTION[8]	0.4964	18.5	15.4
363	D&C, CONIZATION & RADIO-IMPLANT, FOR MALIGNANCY[8]	0.4964	18.5	15.4
364	D&C, CONIZATION EXCEPT FOR MALIGNANCY[8]	0.4964	18.5	15.4
365	OTHER FEMALE REPRODUCTIVE SYSTEM O.R. PROCEDURES[5]	2.0841	40.0	33.3
366	MALIGNANCY, FEMALE REPRODUCTIVE SYSTEM W CC	0.8139	23.1	19.2
367	MALIGNANCY, FEMALE REPRODUCTIVE SYSTEM W/O CC[1]	0.4964	18.5	15.4
368	INFECTIONS, FEMALE REPRODUCTIVE SYSTEM	0.6963	19.3	16.0
369	MENSTRUAL & OTHER FEMALE REPRODUCTIVE SYSTEM DISORDERS[3]	0.9562	26.1	21.7
370	CESAREAN SECTION W CC[8]	0.9562	26.1	21.7
371	CESAREAN SECTION W/O CC[8]	0.4964	18.5	15.4
372	VAGINAL DELIVERY W COMPLICATING DIAGNOSES[8]	0.4964	18.5	15.4
373	VAGINAL DELIVERY W/O COMPLICATING DIAGNOSES[8]	0.4964	18.5	15.4
374	VAGINAL DELIVERY W STERILIZATION &/OR D&C[8]	0.4964	18.5	15.4
375	VAGINAL DELIVERY W O.R. PROC EXCEPT STERIL &/OR D&C[8]	0.4964	18.5	15.4
376	POSTPARTUM & POST ABORTION DIAGNOSES W/O O.R. PROCEDURE[1]	0.4964	18.5	15.4
377	POSTPARTUM & POST ABORTION DIAGNOSES W O.R. PROCEDURE[8]	0.4964	18.5	15.4
378	ECTOPIC PREGNANCY[8]	0.9562	26.1	21.7
379	THREATENED ABORTION[8]	0.4964	18.5	15.4
380	ABORTION W/O D&C[8]	0.4964	18.5	15.4
381	ABORTION W D&C, ASPIRATION CURETTAGE OR HYSTEROTOMY[8]	0.4964	18.5	15.4
382	FALSE LABOR[8]	0.4964	18.5	15.4
383	OTHER ANTEPARTUM DIAGNOSES W MEDICAL COMPLICATIONS[8]	0.4964	18.5	15.4
384	OTHER ANTEPARTUM DIAGNOSES W/O MEDICAL COMPLICATIONS[8]	0.4964	18.5	15.4
385	NEONATES, DIED OR TRANSFERRED TO ANOTHER ACUTE CARE FACILITY[8]	0.4964	18.5	15.4
386	EXTREME IMMATURITY[8]	0.4964	18.5	15.4
387	PREMATURITY W MAJOR PROBLEMS[8]	0.4964	18.5	15.4
388	PREMATURITY W/O MAJOR PROBLEMS[8]	0.4964	18.5	15.4
389	FULL TERM NEONATE W MAJOR PROBLEMS[8]	0.4964	18.5	15.4
390	NEONATE W OTHER SIGNIFICANT PROBLEMS[8]	0.4964	18.5	15.4
391	NORMAL NEWBORN[8]	0.4964	18.5	15.4
392	SPLENECTOMY AGE >17[8]	0.7372	23.5	19.5
393	SPLENECTOMY AGE 0–17[8]	0.7372	23.5	19.5
394	OTHER O.R. PROCEDURES OF THE BLOOD AND BLOOD FORMING ORGANS[3]	0.9562	26.1	21.7
395	RED BLOOD CELL DISORDERS AGE >17	0.7782	24.0	20.0
396	RED BLOOD CELL DISORDERS AGE 0–17[8]	0.4964	18.5	15.4
397	COAGULATION DISORDERS	0.9454	23.5	19.5
398	RETICULOENDOTHELIAL & IMMUNITY DISORDERS W CC	0.8372	22.0	18.3
399	RETICULOENDOTHELIAL & IMMUNITY DISORDERS W/O CC[1]	0.4964	18.5	15.4
401	LYMPHOMA & NON-ACUTE LEUKEMIA W OTHER O.R. PROC W CC[5]	2.0841	40.0	33.3
402	LYMPHOMA & NON-ACUTE LEUKEMIA W OTHER O.R. PROC W/O CC[3]	0.9562	26.1	21.7
403	LYMPHOMA & NON-ACUTE LEUKEMIA W CC	0.8941	22.4	18.6
404	LYMPHOMA & NON-ACUTE LEUKEMIA W/O CC	0.7394	18.0	15.0
405	ACUTE LEUKEMIA W/O MAJOR O.R. PROCEDURE AGE 0–17[8]	0.7372	23.5	19.5
406	MYELOPROLIF DISORD OR POORLY DIFF NEOPL W MAJ O.R. PROC W CC[5]	2.0841	40.0	33.3
407	MYELOPROLIF DISORD OR POORLY DIFF NEOPL W OTHER O.R. PROC[8]	0.9562	26.1	21.7
408	MYELOPROLIF DISORD OR POORLY DIFF NEOPL W OTHER O.R. PROC[3]	0.9562	26.1	21.7
409	RADIOTHERAPY	0.8871	25.1	20.9
410	CHEMOTHERAPY W/O ACUTE LEUKEMIA AS SECONDARY DIAGNOSIS[3]	0.9562	26.1	21.7
411	HISTORY OF MALIGNANCY W/O ENDOSCOPY[8]	0.4964	18.5	15.4
412	HISTORY OF MALIGNANCY W ENDOSCOPY[8]	0.4964	18.5	15.4
413	OTHER MYELOPROLIF DIS OR POORLY DIFF NEOPL DIAG W CC	0.9541	25.5	21.2
414	OTHER MYELOPROLIF DIS OR POORLY DIFF NEOPL DIAG W/O CC[1]	0.4964	18.5	15.4
415	O.R. PROCEDURE FOR INFECTIOUS & PARASITIC DISEASES	1.6849	40.1	33.4
416	SEPTICEMIA AGE >17	0.9191	24.9	20.7
417	SEPTICEMIA AGE 0–17[8]	0.9562	26.1	21.7
418	POSTOPERATIVE & POST-TRAUMATIC INFECTIONS	0.8304	25.2	21.0
419	FEVER OF UNKNOWN ORIGIN AGE >17 W CC[3]	0.9562	26.1	21.7
420	FEVER OF UNKNOWN ORIGIN AGE >17 W/O CC[2]	0.7372	23.5	19.5
421	VIRAL ILLNESS AGE >17[2]	0.7372	23.5	19.5
422	VIRAL ILLNESS & FEVER OF UNKNOWN ORIGIN AGE 0–17[8]	0.7372	23.5	19.5
423	OTHER INFECTIOUS & PARASITIC DISEASES DIAGNOSES	0.9024	23.1	19.2
424	O.R. PROCEDURE W PRINCIPAL DIAGNOSES OF MENTAL ILLNESS[4]	1.3569	32.5	27.0
425	ACUTE ADJUSTMENT REACTION & PSYCHOLOGICAL DYSFUNCTION	0.5981	27.5	22.9
426	DEPRESSIVE NEUROSES	0.4660	22.3	18.5

TABLE 3.—FEDERAL FY 2004 LTC–DRG RELATIVE WEIGHTS, GEOMETRIC MEAN LENGTH OF STAY, AND SHORT-STAYS OF FIVE-SIXTHS AVERAGE LENGTH OF STAY FOR DISCHARGES OCCURRING FROM OCTOBER 1, 2004 THROUGH SEPTEMBER 30, 2004—Continued

LTC–DRG	Description	Relative weight	Geometric average length of stay	5/6th of the average length of stay
427	NEUROSES EXCEPT DEPRESSIVE [4]	1.3569	32.5	27.0
428	DISORDERS OF PERSONALITY & IMPULSE CONTROL [1]	0.4964	18.5	15.4
429	ORGANIC DISTURBANCES & MENTAL RETARDATION	0.6438	27.4	22.8
430	PSYCHOSES	0.4689	22.7	18.9
431	CHILDHOOD MENTAL DISORDERS [1]	0.4964	18.5	15.4
432	OTHER MENTAL DISORDER DIAGNOSES [1]	0.4964	18.5	15.4
433	ALCOHOL/DRUG ABUSE OR DEPENDENCE, LEFT AMA [1]	0.4964	18.5	15.4
439	SKIN GRAFTS FOR INJURIES	1.3663	40.5	33.7
440	WOUND DEBRIDEMENTS FOR INJURIES	1.5854	40.0	33.3
441	HAND PROCEDURES FOR INJURIES [5]	2.0841	40.0	33.3
442	OTHER O.R. PROCEDURES FOR INJURIES W CC	1.4971	44.6	37.1
443	OTHER O.R. PROCEDURES FOR INJURIES W/O CC [4]	1.3569	32.5	27.0
444	TRAUMATIC INJURY AGE >17 W CC	0.9609	30.6	25.5
445	TRAUMATIC INJURY AGE >17 W/O CC	0.7552	26.6	22.1
446	TRAUMATIC INJURY AGE 0–17 [8]	0.7372	23.5	19.5
447	ALLERGIC REACTIONS AGE >17 [3]	0.9562	26.1	21.7
448	ALLERGIC REACTIONS AGE 0–17 [8]	0.7372	23.5	19.5
449	POISONING & TOXIC EFFECTS OF DRUGS AGE >17 W CC [7]	0.9562	26.1	21.7
450	POISONING & TOXIC EFFECTS OF DRUGS AGE >17 W/O CC [7]	0.9562	26.1	21.7
451	POISONING & TOXIC EFFECTS OF DRUGS AGE 0–17 [8]	0.7372	23.5	19.5
452	COMPLICATIONS OF TREATMENT W CC	0.9692	24.9	20.7
453	COMPLICATIONS OF TREATMENT W/O CC	0.8633	24.2	20.1
454	OTHER INJURY, POISONING & TOXIC EFFECT DIAG W CC [2]	0.7372	23.5	19.5
455	OTHER INJURY, POISONING & TOXIC EFFECT DIAG W/O CC [2]	0.7372	23.5	19.5
461	O.R. PROC W DIAGNOSES OF OTHER CONTACT W HEALTH SERVICES	1.3216	36.5	30.4
462	REHABILITATION	0.6471	23.2	19.3
463	SIGNS & SYMPTOMS W CC	0.7541	26.8	22.3
464	SIGNS & SYMPTOMS W/O CC	0.6170	25.5	21.2
465	AFTERCARE W HISTORY OF MALIGNANCY AS SECONDARY DIAGNOSIS [2]	0.7372	23.5	19.5
466	AFTERCARE W/O HISTORY OF MALIGNANCY AS SECONDARY DIAGNOSIS	0.7365	22.0	18.3
467	OTHER FACTORS INFLUENCING HEALTH STATUS [1]	0.4964	18.5	15.4
468	EXTENSIVE O.R. PROCEDURE UNRELATED TO PRINCIPAL DIAGNOSIS	2.0686	42.5	35.4
469	PRINCIPAL DIAGNOSIS INVALID AS DISCHARGE DIAGNOSIS [6]	0.0000	0.0	0.0
470	UNGROUPABLE [6]	0.0000	0.0	0.0
471	BILATERAL OR MULTIPLE MAJOR JOINT PROCS OF LOWER EXTREMITY [5]	2.0841	40.0	33.3
473	ACUTE LEUKEMIA W/O MAJOR O.R. PROCEDURE AGE >17 [3]	0.9562	26.1	21.7
475	RESPIRATORY SYSTEM DIAGNOSIS WITH VENTILATOR SUPPORT	2.1358	35.2	29.3
476	PROSTATIC O.R. PROCEDURE UNRELATED TO PRINCIPAL DIAGNOSIS	1.0032	31.9	26.5
477	NON-EXTENSIVE O.R. PROCEDURE UNRELATED TO PRINCIPAL DIAGNOSIS	1.8998	40.0	33.3
478	OTHER VASCULAR PROCEDURES W CC [7]	1.2567	34.2	28.5
479	OTHER VASCULAR PROCEDURES W/O CC [7]	1.2567	34.2	28.5
480	LIVER TRANSPLANT [6]	0.0000	0.0	0.0
481	BONE MARROW TRANSPLANT [8]	0.9562	26.1	21.7
482	TRACHEOSTOMY FOR FACE, MOUTH & NECK DIAGNOSES [5]	2.0841	40.0	33.3
483	TRACH W MECH VENT 96+ HRS OR PDX EXCEPT FACE, MOUTH & NECK DIAG	3.2131	55.7	46.4
484	CRANIOTOMY FOR MULTIPLE SIGNIFICANT TRAUMA [8]	2.0841	40.0	33.3
485	LIMB REATTACHMENT, HIP AND FEMUR PROC FOR MULTIPLE SIGNIFICANT TR [8]	1.3569	32.5	27.0
486	OTHER O.R. PROCEDURES FOR MULTIPLE SIGNIFICANT TRAUMA [4]	1.3569	32.5	27.0
487	OTHER MULTIPLE SIGNIFICANT TRAUMA	1.2484	32.7	27.2
488	HIV W EXTENSIVE O.R. PROCEDURE [5]	2.0841	40.0	33.3
489	HIV W MAJOR RELATED CONDITION	0.9254	21.3	17.7
490	HIV W OR W/O OTHER RELATED CONDITION	0.7361	19.6	16.3
491	MAJOR JOINT & LIMB REATTACHMENT PROCEDURES OF UPPER EXTREMITY [8]	1.3569	32.5	27.0
492	CHEMOTHERAPY W ACUTE LEUKEMIA AS SECONDARY DIAGNOSIS OR W USE HIGH DOSE CHEMOTHERAPY AGENT [8].	0.9562	26.1	21.7
493	LAPAROSCOPIC CHOLECYSTECTOMY W/O C.D.E. W CC [7]	1.3569	32.5	27.0
494	LAPAROSCOPIC CHOLECYSTECTOMY W/O C.D.E. W/O CC [7]	2.0841	40.0	33.3
495	LUNG TRANSPLANT [6]	0.0000	0.0	0.0
496	COMBINED ANTERIOR/POSTERIOR SPINAL FUSION [8]	1.3569	32.5	27.0
497	SPINAL FUSION W CC [7]	0.9562	26.1	21.7
498	SPINAL FUSION W/O CC [47]	0.9562	26.1	21.7
499	BACK & NECK PROCEDURES EXCEPT SPINAL FUSION W CC [5]	2.0841	40.0	33.3
500	BACK & NECK PROCEDURES EXCEPT SPINAL FUSION W/O CC [4]	1.3569	32.5	27.0
501	KNEE PROCEDURES W PDX OF INFECTION W CC [5]	2.0841	40.0	33.3
502	KNEE PROCEDURES W PDX OF INFECTION W/O CC [2]	0.7372	23.5	19.5
503	KNEE PROCEDURES W/O PDX OF INFECTION [3]	0.9562	26.1	21.7
504	EXTENSIVE 3RD DEGREE BURNS W SKIN GRAFT [8]	2.0841	40.0	33.3

TABLE 3.—FEDERAL FY 2004 LTC–DRG RELATIVE WEIGHTS, GEOMETRIC MEAN LENGTH OF STAY, AND SHORT-STAYS OF FIVE-SIXTHS AVERAGE LENGTH OF STAY FOR DISCHARGES OCCURRING FROM OCTOBER 1, 2004 THROUGH SEPTEMBER 30, 2004—Continued

LTC–DRG	Description	Relative weight	Geometric average length of stay	5/6th of the average length of stay
505	EXTENSIVE 3RD DEGREE BURNS W/O SKIN GRAFT[4]	1.3569	32.5	27.0
506	FULL THICKNESS BURN W SKIN GRAFT OR INHAL INJ W CC OR SIG TRAUMA[7]	0.7372	23.5	19.5
507	FULL THICKNESS BURN W SKIN GRFT OR INHAL INJ W/O CC OR SIG TRAUMA[7]	0.7372	23.5	19.5
508	FULL THICKNESS BURN W/O SKIN GRFT OR INHAL INJ W CC OR SIG TRAUMA[2]	0.7372	23.5	19.5
509	FULL THICKNESS BURN W/O SKIN GRFT OR INH INJ W/O CC OR SIG TRAUMA[2]	0.7372	23.5	19.5
510	NON-EXTENSIVE BURNS W CC OR SIGNIFICANT TRAUMA[2]	0.7372	23.5	19.5
511	NON-EXTENSIVE BURNS W/O CC OR SIGNIFICANT TRAUMA[1]	0.4964	18.5	15.4
512	SIMULTANEOUS PANCREAS/KIDNEY TRANSPLANT[6]	0.0000	0.0	0.0
513	PANCREAS TRANSPLANT[6]	0.0000	0.0	0.0
515	CARDIAC DEFIBRILATOR IMPLANT W/O CARDIAC CATH[5]	2.0841	40.0	33.3
516	PERCUTANEOUS CARDIVASCULAR PROCEDURE W AMI[8]	0.9562	26.1	21.7
517	PERCUTANEOUS CARDIVASCULAR PROC W NON-DRUG ELUTING STENT W/O AMI[4].	1.3569	32.5	27.0
518	PERCUTANEOUS CARDIVASCULAR PROC W/O CORONARY ARTERY STENT OR AMI[3].	0.9562	26.1	21.7
519	CERVICAL SPINAL FUSION W CC[4]	1.3569	32.5	27.0
520	CERVICAL SPINAL FUSION W/O CC[8]	0.9562	26.1	21.7
521	ALCOHOL/DRUG ABUSE OR DEPENDENCE W CC	0.4753	20.5	17.0
522	ALCOHOL/DRUG ABUSE OR DEPENDENCE W REHABILITATION THERAPY W/O CC	0.4061	20.4	17.0
523	ALCOHOL/DRUG ABUSE OR DEPENDENCE W/O REHABILITATION THERAPY W/O CC.	0.4214	19.8	16.5
524	TRANSIENT ISCHEMIA	0.5885	22.9	19.0
525	HEART ASSIST SYSTEM, OTHER THAN IMPLANT[8]	2.0841	40.0	33.3
526	PERCUTANEOUS CARVIOVASCULAR PROC W DRUG-ELUTING STENT W AMI[8]	1.3569	32.5	27.0
527	PERCUTANEOUS CARVIOVASCULAR PROC W DRUG-ELUTING STENT W/O AMI[8]	1.3569	32.5	27.0
528	INTRACRANIAL VASCLUAR PROCEDURES WITH PDX HEMORRHAGE[8]	2.0841	40.0	33.3
529	VENTRICULAR SHUNT PROCEDURES WITH CC[2]	0.7372	23.5	19.5
530	VENTRICULAR SHUNT PROCEDURES WITHOUT CC[8]	0.7372	23.5	19.5
531	SPINAL PROCEDURES WITH CC[4]	1.3569	32.5	27.0
532	SPINAL PROCEDURES WITHOUT CC[3]	0.9562	26.1	21.7
533	EXTRACRANIAL VASCULAR PROCEDURES WITH CC[5]	2.0841	40.0	33.3
534	EXTRACRANIAL VASCULAR PROCEDURES WITHOUT CC[8]	1.3569	32.5	27.0
535	CARDIAC DEFIB IMPLANT WITH CARDIAC CATH WITH AMI/HF/SHOCK[8]	2.0841	40.0	33.3
536	CARDIAC DEFIB IMPLANT WITH CARDIAC CATH WITHOUT AMI/HF/SHOCK[5]	2.0841	40.0	33.3
537	LOCAL EXCISION AND REMOVAL OF INTERNAL FIXATION DEVICES EXCEPT HIP AND FEMUR WITH CC[4].	1.3569	32.5	27.0
538	LOCAL EXCISION AND REMOVAL OF INTERNAL FIXATION DEVICES EXCEPT HIP AND FEMUR WITHOUT CC[1].	0.4964	18.5	15.4
539	LYMPHOMA AND LEUKEMIA WITH MAJOR O.R. PROCEDURE WITH CC[8]	2.0841	40.0	33.3
540	LYMPHOMA AND LEUKEMIA WITH MAJOR O.R. PROCEDURE WITHOUT CC[1]	0.4964	18.5	15.4
541	IMPLANT, PULSATILE HEART ASSIST SYSTEM[6]	0.0000	0.0	0.0

[1] Relative weights for these LTC–DRGs were determined by assigning these cases to low volume quintile 1.
[2] Relative weights for these LTC–DRGs were determined by assigning these cases to low volume quintile 2.
[3] Relative weights for these LTC–DRGs were determined by assigning these cases to low volume quintile 3.
[4] Relative weights for these LTC–DRGs were determined by assigning these cases to low volume quintile 4.
[5] Relative weights for these LTC–DRGs were determined by assigning these cases to low volume quintile 5.
[6] Relative weights for these LTC–DRGs were assigned a value of 0.000.
[7] Relative weights for these LTC–DRGs were determined after adjusting to account for nonmonotonicity.
[8] Relative weights for these LTC–DRGs were determined by assigning these cases to the appropriate low volume quintile because they had no LTCH cases in the FY 2002 MedPAR.

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Part III

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Part 412

Medicare Program; Changes to the Criteria for Being Classified as an Inpatient Rehabilitation Facility; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 412

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Medicare Program; Changes to the Criteria for Being Classified as an Inpatient Rehabilitation Facility

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

ACTION: Final rule.

SUMMARY: This final rule responds to public comments on the September 9, 2003 proposed rule, and revises the classification criterion, commonly known as the "75 percent rule," used to classify a hospital as an inpatient rehabilitation facility (IRF). This final rule also modifies and expands the medical conditions listed in the regulatory requirements as well as temporarily lowers the percentage of patients required to fall within one of the specified list of medical conditions.

DATES: *Effective Date:* These regulations are effective for cost reporting periods beginning on or after July 1, 2004.

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I. Conditions for Classification as an IRF—Background

A. Overview of the Inpatient Rehabilitation Facility Prospective Payment System

Section 1886(j) of the Social Security Act (the Act) provides for the implementation of a prospective payment system (PPS) under Medicare for inpatient hospital services furnished by a rehabilitation hospital or a rehabilitation unit of a hospital (referred to as an inpatient rehabilitation facility (IRF)). Sections 1886(d)(1)(B) and 1886(d)(1)(B)(ii) of the Act give the Secretary the discretion to define a rehabilitation hospital and unit. The regulations at 42 CFR 412.23(b), 412.25, and 412.29, specify the criteria for a provider to be classified as a rehabilitation hospital or rehabilitation unit. Hospitals and units meeting those criteria are eligible to be paid on a prospective payment basis as an IRF under the IRF PPS.

Payments made under the IRF PPS cover inpatient operating and capital costs of furnishing covered intensive rehabilitation services (that is, routine, ancillary, and capital costs), but do not cover costs of approved educational activities, bad debts, and other services or items outside the scope of the IRF PPS. Covered intensive rehabilitation services include services for which benefits are provided under Medicare Part A (Hospital Insurance).

Payments under the IRF PPS are made on a per discharge basis. A patient classification system is used to assign patients in IRFs into case-mix groups (CMGs). The IRF PPS uses Federal prospective payment rates across distinct CMGs. We construct a majority of the CMGs using rehabilitation impairment categories (RICs), functional status (both motor and cognitive), and age (though some CMGs do not use cognitive status or age in their definition). We construct special CMGs to account for very short stays and for patients who expire during the IRF stay.

For each CMG, we develop relative weighting factors to account for a patient's clinical characteristics and expected resource consumption. Thus, the weighting factors account for the relative difference in resource use across all CMGs. Within each CMG, the weighting factors are "tiered" based on the estimated effect that the comorbidities from Appendix C of the August 7, 2001 final rule (66 FR 41414) have on resource use.

The Federal prospective payment rates are established using a standard payment amount (also referred to as the budget neutral conversion factor). For each of the tiers within a CMG, we apply the relative weighting factors to the standardized payment conversion factor to compute the unadjusted Federal prospective payment rates.

Adjustments that account for geographic variations in wages (wage index), for the percentage of low-income patients, and for facilities located in a rural area are applied to the unadjusted Federal prospective payment rates. In addition, adjustments are made for early transfers of patients to other facilities, interrupted stays, and high-cost outliers (cases with extraordinarily high costs).

The regulations implementing the IRF PPS provisions are presently in 42 CFR part 412, subpart P. Regulations governing the requirements for exclusion from the inpatient prospective payment system (IPPS) and the classification of hospitals as IRFs are

located in 42 CFR part 412, subpart B. Specifically, § 412.23(b)(2) specifies one of the criteria Medicare uses for classifying a hospital or unit of a hospital as an IRF, commonly known as the "75 percent rule." This regulation provides that during its most recent 12-month cost reporting period, 75 percent of an IRF's total inpatient population required intensive rehabilitation services for treatment of one or more of the medical conditions specified in § 412.23(b)(2).

For a more complete discussion of the development of the IRF PPS, see our August 7, 2001 final rule (66 FR 41316). We also have established a CMS Web site that contains useful information regarding the IRF PPS. The Web site URL is *http://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.

B. Recent Developments on the 75 Percent Rule

1. May 2003 Proposed Rule

On May 16, 2003, we published a proposed rule titled "Medicare Program; Changes to the Inpatient Rehabilitation Facility Prospective Payment System and Fiscal Year 2004 Rates" in the **Federal Register** (68 FR 26786) to propose updates to the IRF Federal prospective payment rates for FY 2004, to be effective for discharges occurring on or after October 1, 2003 and before October 1, 2004. We published the final rule on August 1, 2003 (68 FR 45674). This final rule responded solely to the comments we received in response to our proposed policies, and promulgated the final regulations regarding the proposed update to the IRF PPS for FY 2004.

In the May 16, 2003 proposed rule, we had also solicited public comments on the regulatory requirements in § 412.23(b)(2). As stated previously and discussed more fully in section I.B.2 of this preamble, § 412.23(b)(2) provides that the requirements of the 75 percent rule be met for a provider to be classified as an IRF. On May 19, 2003, we held a Town Hall meeting at our headquarters in Baltimore, MD, in which views regarding all aspects of the IRF PPS could be expressed. Hundreds of people participated in the Town Hall meeting, either by attending at our headquarters or by a conference call. Most of the participants, however, limited their testimony to the 75 percent rule.

In response to the May 16, 2003 proposed rule, we received over 6,000 timely public comments regarding the regulatory requirements in § 412.23(b)(2). The primary issues discussed during the Town Hall meeting and in the public comments are summarized as follows:

- The regulatory requirement specifying the 10 medical conditions contained in § 412.23(b)(2) should be repealed or amended.
- The 10 medical conditions specified in § 412.23(b)(2) do not adequately reflect current care in IRFs.
- The medical conditions specified in § 412.23(b)(2) have not been updated in 20 years and should be revised or rewritten to include other diagnoses.
- Some of the medical conditions specified in § 412.23(b)(2) are vague; they have little clinical relevance; and are inconsistently interpreted by our fiscal intermediaries (FIs), who are charged with enforcing the 75 percent rule.
- Our administrative data indicate most IRFs are not in compliance with § 412.23(b)(2).
- Classification as an IRF should be based on 20 of the 21 RICs.
- Enforcement of the rule could force many IRFs to close.
- Enforcement of the rule limits access to care.
- Treatment in other rehabilitation treatment settings is inferior to treatment furnished in an IRF.

In the May 16, 2003 proposed rule, we did not propose amending the regulatory requirements in § 412.23(b)(2). However, in the September 9, 2003 proposed rule, we proposed to amend the requirements in § 412.23(b)(2), as discussed in section II of that proposed rule (68 FR 53269).

2. Classification as an IRF Under the 75 Percent Rule

As stated in the August 7, 2001 final rule that implemented the IRF PPS, we did not change the survey and certification procedures for classification as an IRF. Under the current regulations, a hospital or unit of a hospital, must first be deemed excluded from the diagnosis-related group (DRG)-based inpatient prospective payment system (IPPS) to be paid under the IRF PPS, and also must meet the general requirements in subpart B of part 412. Secondly, the excluded hospital or unit of the hospital must meet the conditions for payment under the IRF PPS at § 412.604. As specified at § 412.604(b), a provider, among other requirements, must be in compliance with all of the criteria specified in § 412.23(b) in order to be classified as an IRF.

Under § 412.23(b)(2) of the existing 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:

- Stroke.
- Spinal cord injury.
- Congenital deformity.
- Amputation.
- Major multiple trauma.
- Fracture of femur (hip fracture).
- Brain injury.
- Polyarthritis, including rheumatoid arthritis.
- Neurological disorders, including multiple sclerosis, motor neuron diseases, polyneuropathy, muscular dystrophy, and Parkinson's disease.
- Burns.

C. Statutory and Regulatory Background on 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 interim final 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 inpatient 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 would be excluded from the IPPS. We noted that sections 1886(d)(1)(B) and 1886(d)(1)(B)(ii) of the Act also gave the Secretary broad discretion to define a "rehabilitation unit" and a "rehabilitation hospital."

We consulted with the Joint Commission on Accreditation of Hospitals (JCAH), which subsequently became the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), and other accrediting organizations to define a rehabilitation hospital. 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). 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). Similarly, the 75 percent rule was established as a criterion for identifying 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 eight 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 the Professional Standards Review Organization of the American Academy of Physical Medicine and Rehabilitation and the American Congress of Rehabilitation Medicine. In addition, we received input from the National Association of Rehabilitation Facilities and the American Hospital Association. The requirement that 75 percent of an IRF's patient population must have one or more of the medical conditions listed in the regulation reflected that the listed medical conditions accounted for approximately 75 percent of the admissions to IRFs at the time.

On January 3, 1984, we published a final rule entitled "Medicare Program; Prospective Payment for Medicare Inpatient Hospital Services" (49 FR 234). In section II.A.2 of that final rule (49 FR 240), we summarized comments that requested inclusion of neurological disorders, burns, chronic pain, pulmonary disorders, and cardiac disorders in the list of medical conditions under the 75 percent rule. 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 original list of eight medical conditions under the 75 percent rule (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 an IRF (49 FR 239 through 240). We also rejected suggestions that when an IRF could not meet the 75 percent rule, the facility should 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 to an increase in beds of an existing rehabilitation unit.

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 former § 405.471 that addressed the 75 percent rule as provisions under a new § 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 a new rehabilitation unit (or an existing excluded rehabilitation unit that was to be expanded by the addition of new beds) to be excluded from the IPPS if, in addition to meeting other requirements, it submitted a written certification that it would be in compliance with the 75 percent rule during its first cost reporting period. The August 30, 1991 rule specified that, if these facilities were later found to have not complied with the 75 percent rule, we 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 IPPS, 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 unit might need to begin operations at some time other than at the start of its regular cost reporting period. Therefore, we specified that 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 and 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 final rule, we stated that we had received miscellaneous comments requesting that oncology cases, pulmonary disorders, cardiac disorders, and chronic pain be added to the list of medical conditions under the 75 percent rule (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 receiving comments requesting that we either update the list of medical conditions specified in § 412.23(b)(2) or eliminate the regulation (66 FR 41321). We responded that in the November 3, 2000 IRF PPS proposed rule, we had not proposed amending the requirements in § 412.23(b)(2); further, since we believed the existing regulation was appropriate, we would not be revising the requirements in § 412.23(b)(2). However, we also stated that data obtained after we implemented the IRF PPS could lead us to reconsider amending the requirements in § 412.23(b)(2).

D. CMS Evaluation of Compliance With the 75 Percent Rule Regulatory Requirements in § 412.23(b)(2)

In the spring of 2002, we surveyed the Medicare fiscal intermediaries (FIs) in order to ascertain what methods were being used to verify whether IRFs were complying with the requirements in § 412.23(b)(2). Analysis of the survey data made us aware that inconsistent methods were being used to determine whether an IRF was in compliance with the regulation, and that some IRFs were not being reviewed at all for compliance. These survey results led us to become concerned that some IRFs may be out of compliance with the

regulation and inappropriately classified as an IRF. In addition, we were concerned that some FIs might be using different methods to verify compliance with the requirements in § 412.23(b)(2). This practice may have resulted in an IRF being incorrectly considered out of compliance with the regulation. Thus, this practice had the potential to cause an IRF to lose its classification as an IRF inappropriately. Therefore, on June 7, 2002, we suspended enforcement of the regulatory requirements at § 412.23(b)(2) until we conducted a careful examination of this area and determined whether the regulation, or the operating procedures used to verify compliance with it, should be changed.

In addition to our review of the administrative procedures used by our FIs, we conducted an analysis of CMS administrative data to attempt to estimate overall compliance with the regulation. As stated in the May 16, 2003 proposed rule (68 FR 26791), we examined both the inpatient rehabilitation facility-patient assessment instrument (IRF–PAI) data and claims from the years 1998, 1999, and 2002. The patient assessment data used were from the time period of January to August of 2002. We estimated that the percent of facilities with at least 75 percent of cases falling into the 10 conditions was 13.35 percent. We note that the analysis has a number of limitations. For example, it is not possible to discern from the diagnosis data on the IRF–PAI or the claim whether the patient had a medical need for "intensive rehabilitation." The diagnosis describes only some aspects of a patient's clinical status, but the diagnosis alone does not determine the medical necessity of treating a patient in an IRF as opposed to another type of treatment setting. In addition, all of the information necessary to classify a case under one of the 10 conditions may not be present on the claim (for example, polyarthritis).

In the May 16, 2003 proposed rule, we indicated that we would be instructing FIs to re-institute appropriate enforcement action if they were to determine that an IRF has not complied with the requirements in § 412.23(b)(2). We realize that an IRF may need time to come into compliance with the regulation. An IRF's cost reporting period is the time period used to ascertain compliance with the requirements in § 412.23(b)(2). Therefore, we indicated that we were instructing the FIs that they 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 requirements in § 412.23(b)(2). While we did not propose changes to § 412.23(b)(2) in the May 16, 2003 proposed rule, we did express an expectation that improved enforcement and compliance with the existing rule will have varying impacts on providers and beneficiaries.

In the May 16, 2003 proposed rule, we indicated that while it is difficult to predict the aggregate impact of improved compliance on provider payments, we expect that IRFs or their parent hospitals, or both (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 10 conditions. This practice 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. On the other hand, enforcement of the 75 percent rule may cause some IRFs to reduce the number of beds or reduce the number of admissions that may result in a reduction of the facility's revenues or both.

The existing regulation reflects that up to 25 percent of medically necessary admissions may fall outside of the 10 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 his or her condition to prepare the patient to participate in rehabilitation. Alternative settings for rehabilitative care could include the acute care hospital, skilled nursing facilities (SNF), long-term care hospitals, outpatient rehabilitation facilities, and home health care. For this reason, we did not expect to see reduced access to care for Medicare beneficiaries as a result of improved compliance. In addition, because many hospitals that have 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.

As noted above, on June 7, 2002, we suspended enforcement of § 412.23(b)(2), the regulation that set forth the 75 percent rule. We accomplished the suspension of enforcement by the issuance of instructions to the FIs and, therefore, it was a method that was administrative and operational. The suspension of enforcement was communicated to the IRFs by our Regional Offices, the FIs, and other means, such as regular telephone conferences between CMS and providers. Although the May 16, 2003 proposed rule stated that we would be re-instituting enforcement of § 412.23(b)(2) effective with cost reporting periods that start on or after October 1, 2003, we decided to revisit this issue due to the extensive public comments received. Further, as stated in the September 9, 2003 proposed rule, we have now proposed to amend the contents of § 412.23(b)(2) itself. Therefore, we have decided not to use cost reporting periods beginning on or after October 1, 2003 as the timeframe for renewed enforcement, as we had planned in the May 16, 2003 proposed rule. Instead, enforcement of the criteria contained in § 412.23(b)(2) (as revised in accordance with the September 9, 2003 proposed rule and this final rule) will commence with cost reporting periods that start on or after the effective date specified in this final rule. Thus, the provisions in this final rule are effective for cost reporting periods beginning on or after July 1, 2004.

The intent of the policy specified at § 412.23(b)(2), and of other policy criteria for IRFs, is to ensure that these facilities are unique compared to other hospitals in that they provide "intensive" rehabilitative services in an inpatient setting. The uniqueness of these facilities is the justification for paying them under a separate payment system rather than under the IPPS. We believed it was crucial that Medicare maintain criteria to ensure that only facilities providing intensive rehabilitation are identified as IRFs, so that services are paid appropriately under the IRF PPS. In addition, we believed it was imperative to identify conditions that would "typically require intensive inpatient rehabilitation" in IRFs, because rehabilitation in general can be delivered in a variety of settings, such as acute care hospitals, SNFs, and outpatient settings.

E. Summary of the September 9, 2003 Proposed Rule

In the September 9, 2003 proposed rule (68 FR 53270), we proposed a new § 412.23(b)(2)(i) that proposed a temporary revision to the compliance threshold commonly known as the "75 percent rule." As discussed in that proposed rule, we proposed that, for cost reporting periods beginning on or after January 1, 2004 and before January 1, 2007, the hospital must serve an inpatient population of whom at least 65 percent required intensive

rehabilitative services for treatment of one or more of the conditions specified at § 412.23(b)(2)(iii). Further, we proposed (68 FR 53272) that a patient with a comorbidity, as defined at § 412.602, may be included in the inpatient population that counts towards the required 65 percent if—

- The patient is admitted for inpatient rehabilitation for a condition that is not one of the conditions specified at § 412.23(b)(2)(iii) of the September 9, 2003 proposed rule;
- The patient has a comorbidity that falls in one of the conditions specified at paragraph (b)(2)(iii) of the September 9, 2003 proposed rule; and
- The comorbidity has caused significant functional ability decline in the individual such that, even in the absence of the admitting condition, the individual would require the intensive rehabilitation treatment that is unique to inpatient rehabilitation facilities paid under subpart P of this part, and which cannot be appropriately performed in another care setting covered under this title.

In addition, we proposed a new § 412.23(b)(2)(ii). As discussed in the September 9, 2003 proposed rule (68 FR 53273), this proposed provision would specify, for cost reporting periods beginning on or after January 1, 2007, that to be classified as an IRF, the facility must serve an inpatient population of whom at least 75 percent required intensive rehabilitative services for treatment of one or more of the conditions specified at paragraph (b)(2)(iii).

We also proposed a new § 412.23(b)(2)(iii), which included the list of medical conditions to be used in connection with the preceding criteria. As discussed in the September 9, 2003 proposed rule (68 FR 53271), this list would retain the existing conditions except for polyarthritis, which we proposed to replace with the following three new conditions:

- Active, polyarticular rheumatoid arthritis, psoriatic arthritis, and seronegative arthropathies resulting in significant functional impairment of ambulation and other activities of daily living, which has not improved after an appropriate, aggressive, and sustained course of outpatient therapy services or services in other less intensive rehabilitation settings immediately preceding the inpatient rehabilitation admission or which results from a systemic disease activation immediately before admission, but has the potential to improve with more intensive rehabilitation.
- Systemic vasculidities with joint inflammation, resulting in significant functional impairment of ambulation and other activities of daily living, which has not improved after an appropriate, aggressive, and sustained course of outpatient therapy services or services in other less intensive rehabilitation settings immediately preceding the inpatient rehabilitation admission or which results from a systemic disease activation immediately before admission, but has the potential to improve with more intensive rehabilitation.
- Severe or advanced osteoarthritis (osteoarthrosis or degenerative joint disease) involving three or more major joints (elbow, shoulders, hips, or knees) with joint deformity and substantial loss of range of motion, atrophy, significant functional impairment of ambulation and other activities of daily living, which has not improved after an appropriate, aggressive, and sustained course of outpatient therapy services or services in other less intensive rehabilitation settings immediately preceding the inpatient rehabilitation admission but has the potential to improve with more intensive rehabilitation. (A joint replaced by a prosthesis is no longer considered to have osteoarthritis, or other arthritis, even though this condition was the reason for the joint replacement.)

Finally, we proposed to amend § 412.23(b)(2), § 412.30(c), and § 412.30(d)(2)(ii) (68 FR 53274), to revise the time period used to determine compliance with the 65 percent rule set forth in proposed § 412.23(b)(2)(i).

F. Summary of Public Comments Received on the September 9, 2003 Proposed Rule

The September 9, 2003 proposed rule provided for a 60-day comment period ending November 3, 2003. We received approximately 9,800 timely items of correspondence containing multiple comments on the September 9, 2003 proposed rule. Major issues addressed by commenters included:

- Reducing the percentage requirement from 75 to 65.
- Deleting the term "polyarthritis" from the list of 10 qualifying conditions and replacing it with three groups of conditions that will more precisely identify the types of arthritis-related ailments appropriate for care in a rehabilitation facility.
- Continuing to use the IRF's total patient population to determine compliance with the proposed 65 percent rule, but establishing an administrative presumption that if the facility's Medicare population is representative of the total patient population, and that we would presume that the 65 percent rule was met if an IRF's Medicare patient population met the 65 percent compliance threshold.
- Counting toward the proposed 65 percent, not only those patients whose principal diagnosis falls into the 12 conditions, but also those who have a secondary medical condition or comorbidity that meets one of the 12 conditions. The secondary condition would have to complicate the rehabilitation process substantially and also require inpatient rehabilitative care.
- Changing the period of time to review patient data to determine compliance with the proposed 65 percent rule from the most recent 12-month cost reporting period to the most recent, appropriate 12-month time period.
- Using certain assumptions to estimate the impact of the September 2003 proposed rule on IRFs and the Medicare program.

Summaries of the public comments received and our responses to those comments are set forth below under the appropriate subject heading. More detailed background information for each issue can be found in the September 2003 proposed rule.

II. Lowering the Compliance Threshold

In the September 9, 2003 proposed rule (65 FR 53270), we proposed to change the percentage of the total IRF patient population used as a criterion to distinguish an IRF from an acute care hospital from 75 percent to 65 percent in 2004 (proposed § 412.23(b)(2)(i)). Therefore, we also proposed to allow the percentage of cases that met the proposed medical conditions to be lowered to 65 percent, which we believe identify patients who typically can benefit from the type of intensive inpatient rehabilitation services provided by IRFs. In addition, our proposal would allow IRFs to care for some atypical patients who require intensive inpatient rehabilitation and still maintain their status as an IRF. We further indicated that lowering the percentage of cases to 65 percent would be a preventive measure to mitigate any unintended effects on access to care. As part of our ongoing analysis (68 FR 53273), we stated that we would both periodically monitor the literature and analyze the data obtained from assessments of beneficiaries to determine whether it would be appropriate to modify any of the conditions listed in proposed § 412.23(b)(2)(iii). We welcomed the development and presentation of objective evidence that shows the type of patients most appropriately treated in

the IRF setting compared to other settings.

Comment: Commenters stated that the Medicare Payment Advisory Commission (MedPAC) recommended that we lower the compliance threshold to 50 percent for at least 1 year. According to the commenters, MedPAC recommended that during the period of this lower compliance threshold, we obtain the recommendations of an expert panel of clinicians regarding which medical conditions should be specified for this purpose in the regulation. The commenters also stated MedPAC's intention that we count, as meeting the 50 percent threshold, those diagnoses that the industry has historically interpreted as meeting the medical condition "polyarthritis".

Response: The commenters are referring to MedPAC's recommendations that were made in response to our May 16, 2003 proposed rule, rather than our September 9, 2003 proposed rule. In MedPAC's comments to our September 9, 2003 proposed rule, MedPAC characterized our proposal to lower the compliance threshold to 65 percent as "a positive step," and did not recommend setting the compliance threshold lower than 65 percent. MedPAC recognized that, as discussed more fully elsewhere in this preamble, we examined information gathered from experts in the rehabilitation field regarding the medical conditions specified in § 412.23(b)(2)(iii). MedPAC recommended that we continue this information gathering, including convening an expert panel of clinicians, and report to the public the suggestions of these rehabilitation clinicians. We will evaluate the feasibility of convening the panel of clinicians.

Comment: Some commenters stated that Medicare will not pay for the services an IRF furnishes to any patient who does not have a medical condition specified in § 412.23(b)(2)(iii).

Response: Medicare will pay for the services an IRF furnishes to patients who have a medical need for intensive inpatient rehabilitation services, but do not have one of the medical conditions specified in § 412.23(b)(2)(iii). Each patient is evaluated individually for coverage, whether they have a condition specified in § 412.23(b)(2)(iii) or not. However, a facility is recognized as an IRF and is paid under the IRF PPS (rather than under the payment system that applies to acute care hospitals), if the facility's admissions (from any payer source, not just Medicare patients) meets the compliance threshold of revised § 412.23(b)(2)(i) and (b)(2)(ii) and conditions listed in revised § 412.23(b)(2)(iii), and if the IRF also meets the other applicable classification criteria.

Comment: Some commenters stated that enforcement of § 412.23(b)(2) would result in IRFs closing.

Response: We do not believe that an IRF's compliance with revised § 412.23(b)(2) would necessarily result in it closing. We believe that there are a variety of techniques an IRF can use to mitigate any potential or possible adverse effects it may experience due to our enforcement of § 412.23(b)(2). For example, we believe an IRF can alter its admission procedures, and that would result in the IRF managing its case-mix so that its patient population during its most recent, consecutive, and appropriate 12-month time period (as defined by us or the FI) is in compliance with revised § 412.23(b)(2). In addition, an IRF may chose to comply with the amended regulation by reducing its available patient capacity. Reduction of available patient capacity would have the effect of altering the percentage of the Medicare and total patient population that would have to meet the amended regulation. We believe that decreasing the percentage of the IRF's total patient population that must comply with the medical conditions specified in revised § 412.23(b)(2)(iii), gives the IRF sufficient flexibility to achieve compliance with the regulation.

In addition, it is worth noting that the failure of an IRF to comply with revised § 412.23(b)(2) does not preclude it from participating in the Medicare program altogether. A facility that fails to comply with the revised regulation could still participate in the Medicare program as an acute care hospital or unit and be paid under the IPPS.

Comment: Facilities have stated that IPPS payment for the services they furnish would not be sufficient to meet their revenue needs due to the higher operating expenses of being an IRF.

Response: If the IRF has not met the compliance threshold criterion and, thus, did not qualify to be classified as an IRF, then it has not treated a sufficient percentage of patients with the types of medical conditions we believe require the intense inpatient rehabilitation services that are suitable for payment under the IRF PPS. Not being classified as an IRF means that the facility is an acute care free standing hospital or unit, if it meets the criteria for being classified as an acute care facility, and has the operating expenses of an acute care free standing hospital or unit. The services that are being furnished by these facilities are acute care services. The only appropriate payment for acute care services is payment under the IPPS. In addition, if the facility is no longer classified as an IRF, the facility is no longer constrained to provide all patients with the range and intensity of services required of IRFs. Therefore, facilities that were formerly IRFs may be able to reduce their operating expenses by furnishing only an acute care hospital or unit level of services.

Comment: Commenters believe that other medical conditions, not specified in revised § 412.23(b)(2)(iii), that qualify for rehabilitation treatment, including the replacement of a single joint, debility, pulmonary conditions necessitating rehabilitation, cardiac conditions requiring rehabilitation, other circulatory disorders that impair mobility, multi-organ failure (shock/sepsis) that impairs mobility, cancer that requires a patient to receive rehabilitation, and pain, should be counted as part of the percentage of the patient population used to classify a facility as an IRF. Commenters believe that the IRF treatment furnished to patients with these medical conditions leads to faster improvement and fewer medical complications. This results in less cost to Medicare in comparison to these patients receiving rehabilitation services in a different inpatient setting or mode of rehabilitation. Many commenters believe non-IRF rehabilitation programs are not as appropriate for treating the rehabilitation needs of a patient with one or more of these other medical conditions, because in other rehabilitation programs the patient receives less therapy and nursing care. Also, when furnishing outpatient rehabilitation services, it is not possible to furnish intravenous medications concurrently as in an IRF.

Response: As stated more fully in the September 9, 2003 proposed rule (68 FR 53268) and in the September 1, 1983 interim final rule (48 FR 39752), eight of the medical conditions originally specified in § 412.23(b)(2) are based on a document that was the result of a project regarding admission criteria for IRFs, as well as input from the National Association of Rehabilitation Facilities and the American Hospital Association. In addition, Agency physicians, who were knowledgeable about rehabilitation treatment, contributed to the effort to determine what medical conditions should originally be listed in existing § 412.23(b)(2). As a result of comments received in response to the September 1, 1983 interim final rule, the final rule that we published on January 3, 1984 (49 FR 234) modified the original list of medical conditions, by adopting commenters'

recommendations to add two other medical conditions to the list.

Although we have searched the medical literature and received information from experts in private insurance, academic physicians, and others knowledgeable in the field of rehabilitation, we have not seen any studies indicating that medical conditions not now listed in existing § 412.23(b)(2) require the type of intensive rehabilitation treatment that IRFs can uniquely deliver. Although the conditions listed by commenters have been treated in IRFs, we do not believe that they are the type of conditions that typically require intensive rehabilitation. Therefore, we believe it would be inappropriate to use these cases as the basis for the classification criteria used to identify IRFs. None of the literature cited in the comments or the additional literature we have reviewed to date have provided evidence that the list of conditions should be expanded. As described in the September 9, 2003 proposed rule, we proposed to clarify the condition formerly described as "polyarthritis." The proposed clarification of polyarthritis was favorably received by academic reviewers, though many commenters who preferred to interpret the prior term very broadly commented negatively on the clarification.

On pages 53270–53271 of the September 9, 2003 proposed rule, we encouraged providers and any other interested parties to develop and present objective data or evidence from well-designed research studies that would support a change in the policies stipulated in the proposed rule. We still welcome such data or evidence. In addition, we will continue to monitor the literature for studies that support setting a compliance threshold standard less than compliance threshold standards as specified in revised § 412.23(b)(2)(i) and (b)(2)(ii). While our administrative data show that IRFs are treating many patients with medical conditions that do not match the existing list of medical conditions specified in revised § 412.23(b)(2)(iii), an IRF is not necessarily the most appropriate treatment modality for patients with those medical conditions to receive rehabilitation services. Although we believe that 75 percent is still an appropriate threshold to use as the classification criterion, we are lowering the threshold for a period of 3 years to give IRFs additional flexibility to more easily adjust their case-mix so that they can comply with the amended regulation.

We have not encountered data indicating that patients who require some form of rehabilitation for a non-listed medical condition improve faster or have fewer medical complications when treated in an IRF, as opposed to some other treatment setting or program. Thus, we regard comments that state such a perspective as anecdotal in nature. Also, we have not seen objective and comprehensive data to support the commenters' assertions that patients who enter a non-IRF rehabilitation program for medical conditions other than those specified in revised § 412.23(b)(2)(iii) do not receive an amount of therapy, nursing care, or intravenous medications commensurate with their rehabilitation or recuperative needs, as determined by the staff of that treatment setting or program.

While it is true that the state of rehabilitation has changed over the past 20 years since the original medical conditions listed at existing § 412.23(b)(2) were determined, a modification in rehabilitation practices is not, in itself, a determinant that the IRF setting is the most appropriate setting for treating a specific medical condition. Historically, the last 20 years have seen changes in other types of treatment techniques, leading to treatment being shifted from the inpatient setting to other treatment settings. For example, surgical procedures that were formerly performed in the inpatient setting are now performed safely, efficiently, and effectively in another treatment setting.

Comment: Many commenters recommended that we establish a panel of experts to advise CMS on issues relating to the "75 percent" rule.

Response: Although we did not establish a panel of experts, we received written or transcribed oral opinions from a range of experts. We received information from two industry representatives, one chief executive from a distinguished rehabilitation hospital and another executive responsible for a chain of rehabilitation hospitals; four academic physicians with expert knowledge of the field of rehabilitation, including a physician responsible for reviewing and funding rehabilitation research and another who is a leader in academic research in rehabilitation; two physicians from private insurance knowledgeable about rehabilitation; and three physicians knowledgeable about rehabilitation who review Medicare claims. These experts commented on the policies in the proposed rule and the broader issues.

Most of the individuals did not believe that lowering the compliance percentage from 75 percent to 65 percent (as proposed) would change the nature of IRF's focus on delivering intensive rehabilitations services nor diminish the distinction between IRFs and acute care hospitals. However, some individuals were concerned that lowering the percentage may diminish the distinction between IRFs and other types of facilities especially skilled nursing facilities.

Three of the four academic physicians, both of the physicians from private insurance, and two of the physicians reviewing Medicare claims concurred with the proposed definitions to replace polyarthritis. One of the Medicare physicians believed that the definition of osteoarthritis was too broad thus, allowing more patients than appropriate to be counted.

One academic physician did not agree with the proposed osteoarthritis definition because "it offers no relief to the field from the impact of not allowing coverage [sic] for joint replacement patients". The two rehabilitation hospital executives also did not agree with the definition, one, because the proposed definition excludes joint replacement patients, and the other, because the proposed definition represents only 2 percent of all IRF admissions. One of the rehabilitation hospital executives maintained that "a course of outpatient therapy will not increase functioning of patients with osteoarthritis. Joints with no cartilage have bone on bone, which is causing pain that brings the patient in for surgery. No amount of therapy will improve this."

Although we obtained input from various sources regarding which medical conditions should be included in revised § 412.23(b)(2)(iii), we continue to welcome additional input (clinical or otherwise) that would help us determine the best method to use to classify a facility as an IRF.

Comment: Several commenters believe that the methodology used to determine the RICs was more rigorous than the methodology used to determine the medical conditions listed in revised § 412.23(b)(2)(iii). Numerous commenters believe the medical conditions associated with either all of the RICs or 20 of the RICs should be the medical conditions listed in revised § 412.23(b)(2)(iii), or should be used in lieu of these medical conditions as criteria to classify a facility as an IRF. The commenters believe that the medical conditions listed in revised § 412.23(b)(2)(iii) are inconsistent with the IRF PPS, because these are not the same medical conditions that are associated with the rehabilitation services paid for under the IRF PPS.

Response: As stated elsewhere in this preamble, the original medical

conditions listed in § 412.23(b)(2) were the result of a project regarding IRF admission criteria, input from two health associations, as well as input from our staff physicians who are knowledgeable about medical conditions requiring rehabilitation. In addition, input from commenters was used to expand the original list.

The process used to develop the list of medical conditions in § 412.23(b)(2)(iii) was different from the process used to develop the RICs. The process used to develop the RICs depended upon just describing every patient being treated in an IRF, without examining if it was appropriate for the patient to be treated in that setting. We have no data to support the belief that the process used to develop the RICs resulted in the RICs being superior to the medical conditions in revised § 412.23(b)(2)(iii) as criteria to classify a facility as an IRF. Rather, we believe the process used to develop the list of medical conditions specified in revised § 412.23(b)(2)(iii) was valid and resulted in the correct list of medical conditions. The process we relied on to develop and revise the conditions listed in revised § 412.23(b)(2)(iii), as well as the other proposed policies in the proposed rule, included soliciting the views of various individuals knowledgeable in inpatient rehabilitation. However, we still encourage additional expert input (for example, clinical research studies) to help determine what cases are appropriate to the IRF setting for classification purposes.

In a basic way, the processes used to develop the RICs and the medical conditions used to classify a facility as an IRF have some similarities, because both processes analyzed the admission data regarding the types of medical conditions that were being treated in IRFs. We used a data file consisting of information on all patients treated in an IRF in order to develop the RICs. However, when the RICs were being developed, the methodology used was designed solely to develop payment rates. If the RICs had also been developed as a means to classify a facility as an IRF, then we would have attempted to modify the process significantly to allow the payment categories to accomplish that additional task. Thus, we disagree that the RICs should form the basis of the classification criteria.

Medical reviews of admissions to IRFs showed that Medicare often made payments to IRFs for non-intensive rehabilitation cases that exceeded the percentage allowed in the existing regulation. Consequently, Medicare payment for a patient's treatment in an IRF did not necessarily mean that the patient actually required intensive inpatient rehabilitation. The inevitable effect of this occurrence is that despite the fact that we used the best available data to develop the RICs, the RICs may capture patient cases that require less than intensive inpatient rehabilitation services.

In general, under the IRF PPS, the RIC serves to identify the medical condition that caused the patient to be admitted to an IRF. If the case had been reviewed against the coverage criteria, an individual patient may have required intensive rehabilitation treatment, but not all patients with that condition would require intensive inpatient rehabilitation services. The RICs alone may not identify the most appropriate setting for furnishing those rehabilitation services. Thus, the RICs simply group those cases that were being treated in IRFs before the implementation of the IRF PPS, using labels to identify these medical conditions and associated payment rates with these labels. However, the RICs do not serve to identify medical conditions that are likely to be most appropriately treated in an IRF, or that require intensive inpatient rehabilitation services, because their primary function is to determine payment rates. Since the goal of the methodology used to develop the RICs was to include medical conditions both listed and not listed in revised § 412.23(b)(2)(iii), the RICs are not appropriate for use as an IRF classification criterion. In addition, because they serve solely a payment function, the RICs are no more than a formalized system to group and label medical conditions in order to facilitate appropriate payment for the services furnished to treat these medical conditions. Development of a formalized grouping and labeling methodology that associates medical conditions with a payment rate is not the same as using a payment system to identify the IRF as the most appropriate setting or rehabilitation program to treat these medical conditions. As we refine the payment system, we expect the definitions of the RICs and CMGs to change based upon updated claims and cost information, but the changes in the conditions that we may propose in the future to define an IRF under revised § 412.23(b)(2)(iii) will be based upon research.

The RIC medical conditions that are not included in revised § 412.23(b)(2)(iii) are the same medical conditions that were not included in the classification criteria before the creation of the IRF PPS. Because we continue to pay IRFs for treatment of some patients with these RICs does not mean that some of these patients could not be treated in other patient care settings.

We believe it is not necessary for an IRF to treat only those medical conditions listed in revised § 412.23(b)(2)(iii) for the IRF to be distinguished as an inpatient hospital setting that is primarily engaged in furnishing intensive inpatient rehabilitation services. Patients have a variety of medical conditions that require rehabilitation treatment, and that rehabilitation treatment may be furnished by a variety of rehabilitation programs. However, merely because an IRF is one of the settings that is available to furnish rehabilitation does not mean it is the most appropriate setting to treat a medical condition not listed in revised § 412.23(b)(2)(iii). As a prudent purchaser of health care services, we must try to ensure that the rehabilitation setting or program closely matches the level of rehabilitation services furnished by a particular provider. Requiring an IRF to treat a patient population that has a high concentration of the conditions listed in revised § 412.23(b)(2)(iii) is one of the means we have chosen to ensure that the treatment setting is appropriately classified to justify our payment of the level of services furnished.

Comment: Many commenters stated that not including in revised § 412.23(b)(2)(iii) cardiac, pulmonary, cancer, debility, single joint replacement, and other medical conditions that they believe should be treated in an IRF will result in a longer acute care hospital length-of-stay (LOS) for a patient with one or more of these medical conditions, thereby increasing Medicare's costs.

Response: Our data demonstrate that most of the patients with the medical conditions identified by the commenters are not predominantly treated in IRFs. In addition, patients with the conditions listed above have always had, and will continue to have, a range of rehabilitation programs available to them that can furnish treatment commensurate to these patients' need for rehabilitation. The argument that sending patients to IRFs is appropriate because it shortens patients' acute hospital LOS is not a compelling one. Patients should be admitted to IRFs because that site of care is uniquely equipped to meet patients' needs.

Comment: Commenters believed if an IRF's Medicare population met the compliance threshold, we should use the result to administratively presume that the facility's total patient population met the compliance threshold. However, if an IRF's

Medicare population did not meet the compliance threshold, they wanted us to specifically use the IRF's total patient population to calculate if the compliance threshold had been met.

Response: In general, we agree with the commenters because our analysis indicates that an IRF's Medicare patient population is highly predictive of whether an IRF's total patient population meets the compliance threshold. In addition, our analysis, as stated on page XIV of the Rand report entitled "Case Mix Certification Rule for Inpatient Rehabilitation Facilities," indicates that, on average, 70 percent of all cases treated in IRFs are Medicare beneficiaries. Based upon both of these findings, we will issue instructions to the FIs regarding the application of the administrative presumption test to determine if the compliance threshold was met. Specifically, we will instruct the FIs that if, in most cases, an IRF's Medicare population met the compliance threshold, the FI should administratively presume that the facility's total patient population met the compliance threshold. If an IRF's Medicare population did not meet the compliance threshold, we will instruct the FI to specifically calculate if the IRF's total patient population met the compliance threshold.

As stated in the September 9, 2003 proposed rule (68 FR 53271), "we expect individual IRFs to notify their FI if the IRF believes that its Medicare population is not wholly representative of the total facility patient population." There may be situations when an IRF's Medicare population is only a small portion of the IRF's total patient population. Thus, if an IRF's Medicare population does not represent at least a majority of the IRF's total population, we believe that it is not appropriate for the FI to use the administrative presumption discussed above to verify if the compliance threshold was met. Accordingly, we will instruct the FIs that if an IRF's Medicare population does not represent at least a majority of the facility's total patient population, the FI is to verify if the compliance threshold was met using only the facility's total patient population. In addition, the FIs will always have the discretion to analyze a facility's total patient population even if its Medicare patient population met the compliance threshold.

III. Using a Comorbidity To Verify Compliance

In the September 9, 2003 proposed rule, we proposed to consider using comorbidities to verify compliance (proposed § 412.23(b)(2)(i)). In § 412.602, we defined a comorbidity as a specific patient condition that is secondary to the patient's principal diagnosis that is the primary reason for the inpatient rehabilitation stay.

A. Proposed Methodology

In the proposed rule, we proposed that a hospital could be considered to be providing intensive rehabilitation services even if it did not admit the patient for a condition that is specified in revised § 412.23(b)(2)(iii) as long as specific conditions were met. We proposed that such a hospital could still satisfy the 65 percentage as long as all of the following criteria were met:

- The patient is admitted for rehabilitation for a condition that is not one of the conditions listed in proposed § 412.23(b)(2)(iii).
- The patient also has a comorbidity that falls in one of the conditions listed in proposed § 412.23(b)(2)(iii).
- The comorbidity has caused significant functional ability decline in the individual such that, even in the absence of the admitting condition, the individual would require intensive rehabilitation treatment that is unique to inpatient rehabilitation facilities and which cannot be appropriately performed in another setting, such as the inpatient hospital, SNF, home health, or outpatient setting (68 FR 53272).

B. Proposed Alternative Methodology

We also proposed an alternative, in which a case that has a comorbidity that matches one of the conditions in proposed § 412.23(b)(2)(iii) could be included in the proposed percentage only if the patient is admitted to an IRF for postoperative care immediately following a hip or knee replacement (68 FR 53273).

Under this alterative method, we would count a case as included in the proposed percentage that matched all of the following criteria:

- Was postoperative following one or more hip or knee joint replacements that immediately preceded the transfer to an IRF.
- Had a condition at time of admission to an IRF that was complicated by an active comorbidity specified in proposed § 412.23(b)(2)(iii).
- Had an active comorbidity that resulted in a decline in the patient's function beyond the decline generally observed in other patients in that impairment category.
- Had an active comorbidity that substantially complicated the patient's rehabilitation to the point that it would improve only with the intensive, multidisciplinary rehabilitation treatment that is unique to inpatient rehabilitation facilities and that could not be performed in another setting (for example, SNF, inpatient hospital, home health, or outpatient).

Many commenters addressed the two alternative methods pertaining to the use of specific comorbidities that could result in a patient being counted as a case satisfying one of the conditions in § 412.23(b)(2).

Comment: One commenter stated that the two proposed alternative methodologies fail to increase the number of cases falling within the compliance threshold. The commenter objected that the comorbidity itself would require intensive rehabilitation. They claimed that CMS failed to grasp that the initial condition and the co-condition interrelate to reduce function. They believe that CMS' policy should be to count the condition if a comorbidity condition adversely affects the patient's overall function such that the patient requires intensive rehabilitation services.

Response: Not all reductions in a patient's function are appropriate for treatment with intensive rehabilitation. In addition, not all patients and conditions that require rehabilitation treatment require the type of intensive inpatient rehabilitation treatment provided in an IRF. Many conditions affect a patient's overall function but are not appropriately treated in a rehabilitation hospital. For example, iron deficiency anemia is appropriately treated with medications such as iron or erythropoietin or a packed red blood cell transfusion rather than rehabilitation. Almost all diseases affect patients' function, but intensive inpatient rehabilitation is only appropriate for certain conditions. We believe that the conditions identified in revised § 412.23(b)(2)(iii) are typically, though not always, appropriately treated with intensive inpatient rehabilitation. Moreover, there are atypical individual patient cases that fall outside of revised § 412.23(b)(2)(iii) but may nonetheless receive intensive rehabilitation therapy services.

Comment: One commenter points out an inconsistency in the definition of osteoarthritis as an admitting condition (65 FR 53270) and osteoarthritis as a comorbidity (68 FR 53272). It was pointed out that we specified three circumstances when osteoarthritis was defined as a medical condition under revised § 412.23(b)(2)(iii), but we only specified two circumstances when osteoarthritis was a comorbid condition that may be counted as complying with revised § 412.23(b)(2)(i).

Response: This inconsistency was not intentional. The criteria for both should be the same, as follows: The patient has— (1) severe or advanced osteoarthritis in at least three, but now, based on a response to another comment, two major joints, including elbows, shoulders, hips, or knees (but not including any replaced joints); (2) by joint deformity, substantial loss of range of motion, atrophy of surrounding muscles, and significant function impairment of ambulation and other activities of daily living, which has not improved after an appropriate, aggressive, and sustained course of outpatient therapy or in a therapy program in another less intensive rehabilitation setting immediately preceding the inpatient rehabilitation admission; and (3) the potential to improve with more intensive rehabilitation.

Comment: Some commenters requested that we provide a list of specific ICD–9–CM codes that qualify as comorbidities and ensure the definitions of the admitting conditions conform with the definitions of the comorbidities.

Response: We will be providing guidance to our FIs on how to identify patients who fall into the conditions specified in the revised § 412.23(b)(2)(iii). Diagnosis will only be one aspect of the FI's determination, so we believe it is not appropriate, at this time, to supply a list of ICD–9-CM codes. The FI may also review information to assess (1) the medical necessity of rehabilitation in an inpatient setting: (2) the severity of the specific condition(s); (3) the patient's function; and (4) the capacity of the patient to participate in intensive rehabilitation and benefit from it.

Comment: Commenters disagreed with our assertion that adding cardiac, cancer, pulmonary, and pain as conditions would result in virtually all Medicare patients qualifying for inpatient rehabilitation. They argued that these cases currently comprise almost 10 percent of cases treated in rehabilitation hospitals. They also claim that InterQual, a private entity that develops utilization management clinical guidelines, has screening criteria that would identify these patients as requiring intensive rehabilitation.

Response: Almost all patients admitted to acute inpatient hospitals have one of these four conditions. The comments assert that only 10 percent fall into this category now, but almost 11 percent of cases admitted to IRF or acute care in 2002 fall into cardiac, pulmonary and pain impairment categories, with additional cases in the miscellaneous impairment category, which amounts to over 12 percent in total. We believe that the 75 percent rule has constrained the admission of these patients. If they were added to the list of patients in revised § 412.23(b)(2)(iii), the numbers would increase considerably. We have seen no literature indicating that these patients typically require the intensive inpatient rehabilitation appropriately provided in an IRF. We attempted to review the InterQual criteria, but they are proprietary and not available for our review. We are aware of other similar proprietary utilization management clinical guidelines as well, but such proprietary information has not been submitted for consideration and is not available for review by CMS. If we were to modify our policy based on these proprietary clinical guidelines, we believe that we should review guidelines from various sources, not just the one cited by the commenter. If there is, in fact, a small subset of high-risk cardiac patients who require intensive inpatient rehabilitation services, then these patients could be included as part of the cases that do not need to be in the list of conditions specified in revised § 412.23(b)(2)(iii), because this section only applies to a portion of the hospital's admissions.

Comment: One commenter urged us not to consider comorbidities in determining whether a patient could be counted as meeting one of the conditions in revised § 412.23(b)(2)(iii).

Response: Although the commenter seemed to believe that recognition of comorbidities was undesirable many other commenters did not agree. The commenter did not provide a clear explanation of why the comorbidities should not be considered. We were concerned that this commenter thought that the patient would be grouped into the impairment group of the comorbidity instead of being grouped into the impairment group that was the reason for admission. We still believe it is the medical condition that required the patient to be admitted to an IRF, that is, the principal diagnosis, that must be used to group the patient into a CMG. For example, if a patient is admitted for rehabilitation after pneumonia complicated by an ill-fitting below-knee prosthesis and a knee contracture the admission is grouped into the RIC specified by the pneumonia rather than the amputation RIC.

Comment: We proposed two methods for how we would calculate the compliance threshold with the use of certain comorbid conditions. Many commenters preferred the first proposed alternative in which a case with a principal diagnosis that did not match one of the proposed 12 conditions would be considered as meeting § 412.23(b)(2)(i) if all of the following criteria were met: (1) The patient is admitted for rehabilitation for a condition that is not one of the conditions listed in proposed § 412.23(b)(2)(iii); (2) The patient also has a comorbidity that falls in one of the conditions listed in proposed § 412.23(b)(2)(iii); and (3) The comorbidity has caused significant functional ability decline in the individual such that, even in the absence of the admitting condition, the individual would require intensive rehabilitation treatment that is unique to inpatient rehabilitation facilities and which cannot be appropriately performed in another setting, such as inpatient hospital, skilled nursing facility, home health, or outpatient setting.

Response: We will adopt the alternative that is specified above, instead of the alternative that limits counting the comorbidities for only joint replacement cases, except that now there are 13 medical conditions used to count as comorbidities as meeting the compliance threshold specified in revised § 412.23(b)(2)(i). As discussed in section IV of this final rule, this provision to count comorbidities as meeting the compliance threshold expires for cost reporting periods beginning on or after July 1, 2007. As mentioned previously, the vast majority of commenters preferred this method. We believe that this method of counting comorbidities is more comprehensive in recognizing the types of conditions requiring intensive inpatient rehabilitation.

IV. Ongoing Assessment of Implementing the Proposed Policies and Potential Scheduled Sunset Provision to 75 Percent

As stated previously, we originally wanted to publish this final rule so that it would be effective on January 1, 2004. Thus, in the September 9, 2003 proposed rule, we proposed that for cost reporting periods that start on or after January 1, 2004, and before January 1, 2007, the compliance threshold be lowered from 75 percent to 65 percent, but only for a 3-year period. If, during that time period, data from well-designed studies (or other compelling clinical evidence) indicate that the compliance threshold should remain at 65 percent, we would issue a proposed rule and final rule in sufficient time to maintain the compliance threshold below 75 percent.

Comment: Commenters requested that we set a permanent rather than temporary compliance threshold. In addition, commenters stated that the other provisions we proposed greatly reduced any benefit to providers or patients from the temporary lowering of the compliance threshold. Commenters requested that we permanently or temporarily lower the compliance threshold below 65 percent of the IRF's total patient population.

Response: We are concerned that permanently lowering the compliance threshold could have unforeseen and unintended consequences. Those consequences could include a substantial and unwarranted expansion of utilization, resulting in inappropriate additional Medicare expenditures. For example, we are concerned that permanently lowering the compliance threshold might cause beneficiaries who could have been treated appropriately in a less intensive setting to be treated instead in an IRF.

However, we recognize that IRFs may need some additional time to adjust to the amended regulations. In order to provide IRFs with additional time and flexibility to adjust their case-mix, and to take into consideration that this final rule is being published after January 1, 2004, we are modifying the proposed compliance threshold percentage and the "sunset" policy in the proposed rule that lowered the compliance threshold from 75 percent to 65 percent only during the time period from January 1, 2004, to December 31, 2006. Instead, for cost reporting periods beginning on or after July 1, 2004, the compliance threshold will be as follows:

- For cost reporting periods beginning on or after July 1, 2004, and before July 1, 2005, the compliance threshold will be 50 percent of the IRF's total patient population.
- For cost reporting periods beginning on or after July 1, 2005, and before July 1, 2006, the compliance threshold will be 60 percent of the IRF's total patient population.
- For cost reporting periods beginning on or after July 1, 2006 and before July 1, 2007, the compliance threshold will be 65 percent of the IRF's total patient population.
- For cost reporting periods beginning on or after July 1, 2007, the compliance threshold will be 75 percent of the IRF's total patient population. In addition, the provision to use a patient with a comorbidity as counting towards the referenced compliance threshold will expire for the cost reporting periods beginning on or after July 1, 2007.

Thus, we are implementing a 3-year period, as proposed in the proposed rule, to analyze claims and patient assessment data to evaluate if and how the lowering of the compliance threshold, as well as the other policies stipulated in this final rule, affected admission trends and overall IRF utilization. We will use that analysis to determine if we should continue to use a compliance threshold that is lower than 75 percent, as well as continue to use the comorbidity methodology specified elsewhere in this preamble, as criteria to classify a facility as an IRF. If our analysis indicates that the compliance threshold should be set lower than 75 percent, we would publish a proposed rule to lower the compliance threshold based on our analysis.

In addition, we may analyze other potential policy alternatives during this 3-year review period. For example, we received comments suggesting a new policy whereby an IRF may use its idle bed capacity to provide care to patients requiring lower levels of intensive rehabilitative services. To explore this, we would analyze the feasibility of developing a distinct payment rate commensurate with these services. As discussed previously, we also received comments suggesting that CMS incorporate additional conditions under this regulation (for example, cardiac rehabilitation and cancer). We expect to continue to evaluate the available research and medical literature to determine the appropriateness of adding new conditions. Finally, we may explore additional or alternative methods to classify a hospital as an IRF. For example, consistent with several comments that we received, we may evaluate the use of existing or revised criteria that the Commission on Accreditation of Rehabilitation Facilities, and/or the Joint Commission on Accreditation of Healthcare Organizations uses to accredit a hospital as a specialty rehabilitation hospital or unit.

We realize that, for various reasons such as diagnosis coding, there are limitations to the policy conclusions that can be drawn from claim and patient assessment data analysis. Therefore, we will also consider using the results of well-designed analytical studies specific to rehabilitative care to help guide our policy decisions. We believe that this approach benefits the rehabilitation industry, because it affords the industry the opportunity to provide us with compelling clinical evidence to maintain the policies in this final rule, or that supports changes that the industry may want us to consider proposing to these policies. Thus, we are encouraging interested parties to conduct scientifically sound research demonstrating that additional diagnoses are most appropriately treated in the IRF setting. This research should show which patients experienced better medical/health outcomes by receiving rehabilitation services in IRFs, as opposed to other settings (for example, SNFs, the outpatient setting, or home health.) We also encourage research supporting the continued use of comorbidities in determining compliance with the IRF threshold.

In accordance with the above comment and response, we are adopting the policy that for cost reporting periods that begin on or after July 1, 2004, the compliance threshold will be: (a) 50 percent of the IRF's total patient population for cost reporting periods that begin on or after July 1, 2004, and before July 1, 2005; (b) 60 percent of the IRF's total patient population for cost reporting periods that begin on or after July 1, 2005, and before July 1, 2006; (c) 65 percent of the IRF's total patient population for cost reporting periods that begin on or after July 1, 2006, and before July 1, 2007; and (d) 75 percent of the IRF's total patient population for cost reporting periods that begin on or after July 1, 2007.

V. New Medical Conditions

In the September 9, 2003 proposed rule, we proposed to remove the term "polyarthritis" from the list of 10 conditions and substitute instead 3 more clearly defined arthritis-related conditions (as described in section I.E. of this preamble). We also proposed to adopt in proposed § 412.23(b)(2)(iii) the other conditions currently listed in § 412.23(b)(2) because we believed that these other conditions are the most appropriate conditions for treatment in an IRF.

Comment: Several commenters recommended that CMS convene an "expert panel" under the auspices of the Institute of Medicine (or other body) or support research to evaluate the appropriateness of adding other conditions under this policy.

Response: We considered these recommendations very carefully with a view towards establishing a process to ensure that our policy remains consistent with current trends in medical practice.

We have searched the medical literature and received information from experts in private insurance, academic physicians, and others knowledgeable in the field of rehabilitation to support development of the September 9, 2003 proposed rule. However, studies supporting the inclusion of additional medical conditions have not been

found. Although the conditions listed by commenters (for example, joint replacements, cardiac and pulmonary rehab, pain) have been treated in IRFs, the available medical/scientific evidence does not support that they are conditions that typically require intensive inpatient rehabilitation or cannot be treated just as effectively in alternative care settings (such as skilled nursing facilities, home health, or outpatient rehabilitation). As a result, CMS has not used these conditions as a basis for the criteria used to identify IRFs in this final rule.

There are only a few studies that evaluate the effectiveness of inpatient treatment in a rehabilitation hospital (or units—both referred to as IRFs) compared to other settings. A few studies have shown that patients with hip fractures actually do no better in IRFs than in skilled nursing facilities (SNFs). On the other hand, one study showed stroke patients did better in IRFs than in SNFs.

We believe a focused research program offers the best approach to generate the data needed for continued assessment of the efficacy of rehabilitation services in various settings. In particular, the two questions most in need of objective, outcomes-oriented answers with respect to IRFs are: (1) How better to identify those patients who are most appropriate for intensive medical rehabilitation resources provided in the IRF setting as opposed to alternative care settings (such as acute hospital, skilled nursing facilities, home health rehabilitation, or outpatient rehabilitation)? and (2) what conditions, in addition to those in § 412.23(b), are frequently cited as typically requiring the intensive rehabilitation treatment available in IRFs but not in alternative care settings? Because of the relative absence of appropriate evidence-based outcomes-oriented clinical research studies in the peer-reviewed medical literature, CMS maintains an interest in encouraging this type of research and understanding the optimal approaches to answering the questions articulated above. We are concerned that simply convening a group of medical rehabilitation experts in the form of a consensus panel would only reflect "expert opinions" of the individuals involved without the benefit of advancing the more rigorous scientific studies needed in this area.

To assist in facilitating better understanding in this area, we expect to convene a research panel early in the transition period to review the current medical literature and identify optimal approaches to conducting studies in this area. This panel would have two primary purposes. First, based on the evidence currently available, it will consider which are the most appropriate clinical conditions for care in IRFs. Second, it will formulate a research agenda to assist in developing scientific studies to examine this question. We believe this approach will enhance the understanding of care in this important setting and provide the potential to inform future policy changes under Medicare. This panel will provide an opportunity for public input.

We anticipate that the panel will discuss available (or soon to be available) evidence to support some of the conditions identified by commenters to the September 9, 2003 proposed rule, the availability of data sources to support research, and the appropriate research design for studies in this area. This group would also explore available options to direct clinical research studies and identify the most optimal approach to establishing a research program that would provide meaningful and useful answers to the questions posed above. This group could also draw on the knowledge and experience of the clinical researchers with demonstrated expertise in the field of rehabilitation with published findings in the peer-reviewed medical literature. While CMS may not directly sponsor research or clinical trials in this area, we believe this type of discussion will help focus the medical research community on this important public policy area and aid us in our continued review of medical trends in rehabilitation.

We will also determine the feasibility of periodically holding these types of meetings to identify the latest research findings in this area and potential for future studies to inform this policy area. This will assist CMS in its ongoing monitoring of the policy, and the need for future changes in policy to conform to appropriate trends in medical practice. CMS will also periodically solicit comments from the public for data and studies through its annual rulemaking process associated with the IRF PPS, and discuss the need for changes with experts in commercial insurance, the health care industry, and academic researchers.

Comment: Many commenters asserted that the proposed changes to "polyarthritis" will limit the patients counted as meeting revised § 412.23(b)(2)(iii). Some commenters stated that for years, FIs have made the determination that an IRF admission following a lower joint replacement due to arthritis is counted as meeting the term polyarthritis in current § 412.23(b)(2).

Response: We do not agree with the assertions that we have changed the circumstances under which these cases can be considered as cases that meet the medical condition polyarthritis. We believe the confusion regarding the circumstances in which such cases can be counted as a case that meets current § 412.23(b)(2) can be attributed to a variety of causes, such as inadequate communication, misinterpretation by providers of current criteria, and insufficient monitoring. In addition, confusion regarding polyarthritis, which is acknowledged by many clinicians not to represent any clearly defined clinical condition because it can be defined differently by clinicians, has been compounded by insufficient and inconsistent procedures being used to verify compliance with current § 412.23(b)(2). For example, some FIs were using statistical sampling methods to obtain pertinent patient record data, and then analyzing that data in order to determine which cases met the provisions of current § 412.23(b)(2). However, many other FIs were simply allowing the IRF to self-attest that it was in compliance with the provisions of current § 412.23(b)(2), and not independently verifying that the IRF was actually complying with these requirements.

In order to clarify the meanings of the medical conditions specified in current § 412.23(b)(2), as discussed more fully in the preamble, we are amending § 412.23(b)(2) by removing the medical condition "Polyarthritis, including rheumatoid arthritis" and now substituting four groups of arthritis conditions.

Comment: We received many comments related to the medical management and monitoring of patients undergoing rehabilitation. Commenters believe that patients with medical conditions not specified in proposed § 412.23(b)(2)(iii) who do not receive rehabilitation services in an IRF would be denied the level of medical management and monitoring that they need. For example, commenters believe patients who receive rehabilitation for single joint replacement in an IRF also have other serious medical conditions that are best medically managed in an IRF. Commenters believe that for patients undergoing rehabilitation, the medical management received in an IRF results in faster and enhanced improvement by the patient. They also believe that patients denied the option of being treated in an IRF will be discharged home, where they will not be adequately cared for or medically monitored, leading to these patients being more frequently re-hospitalized in

acute care hospitals. In addition, commenters believe that compared to other rehabilitation programs, IRFs provide the best education to patients in adapting to lifestyle changes caused by impairment and/or the use of adaptive devices.

Response: An IRF is an inpatient hospital setting designed to provide the specialized, intensive, interdisciplinary level of care that certain types of patients need. For example, a stroke patient is much more likely to require physical and occupational therapy and speech and language pathology services that are well coordinated for their medical problems, but not all stroke patients require this level of care. Conversely, there may be a patient, for example, with a cardiac problem who also might require the specialized and intensive multidisciplinary rehabilitation services an IRF furnishes, and this patient could also be admitted to an IRF. However, patients who require medical management but not intensive, interdisciplinary rehabilitation can be cared for in another setting. The fact that care in an IRF may be convenient for other patients who require more intensive medical management does not make it the most appropriate clinical treatment setting nor the most optimal use of intensive rehabilitation resources uniquely provided by IRFs. For example, a post cardiac transplant patient may need to be seen daily by cardiologists and surgeons for medical management, but the deconditioning and possible steroid myopathy do not generally require intensive multidisciplinary inpatient rehabilitation. Without supporting data or studies, we do not believe conditions such as transplants or other complex medical conditions should be added to the list of conditions that can be used to define an IRF. However, cases with such conditions may be considered part of the percentage of cases with conditions not included in revised § 412.23(b)(2)(iii).

Commenters provided no documentation or reference to the medical literature to support their assertion that patients denied the option of being treated in an IRF will be discharged home with worse outcomes. These patients have the option of obtaining rehabilitation services in a SNF setting where their physicians can provide close medical oversight and guidance.

Comment: One commenter stated that the polyarthritis definition has been commonly understood to include joint replacements, and that our proposed revisions represent a departure from this common understanding.

Response: We know of no CMS policy that states that joint replacements were ever recognized as polyarthritis. In addition, for at least the past 5 years, we have met often with industry representatives and have consistently expressed our position that joint replacements did not meet the polyarthritis condition used to classify IRFs. Although industry representatives have repeatedly urged us to change our interpretation, we believe the agency's guidance has been consistent and based on the best data available to us.

Comment: Some commenters oppose the requirement of prior therapy for osteoarthritis patients because it poses a burden on beneficiaries and would be difficult for providers to verify.

Response: Osteoarthritis is a chronic disease that develops over years, unlike rheumatoid arthritis, systemic lupus erythematosus, and related diseases that can exacerbate more rapidly. The rehabilitation prescriptions typically involve outpatient therapy several times a week for 4 weeks or more. (Recent reviews of this literature which support this include Hurley, M.V., Muscle Dysfunction and Effective Rehabilitation of Knee Osteoarthritis: What We Know and What We Need to Find Out, Arthritis and Rheumatism [Arthritis Care and Research], 49, 444–52, 2003 and Bischoff, H.A. and Roos, E.M., Effectiveness and safety of strengthening, aerobic, and coordination exercises for patients with osteoarthritis, Current Opinion in Rheumatology, 15: 141–144, 2003.)

Although we recognize that some very unusual cases may require the intensive, multidisciplinary services available at an IRF without prior outpatient treatment, we believe that patients should have participated in a course of appropriate, sustained, and aggressive outpatient treatment before the more intensive treatment in an inpatient setting is determined to be medically reasonable and necessary because of the chronic nature of osteoarthritis. We want to be able to count patients who are appropriate for an intensive, interdisciplinary rehabilitation inpatient treatment as cases that count towards one of the conditions in the revised § 412.23(b)(2)(iii). Thus, we believe the requirement for prior therapy is appropriate. The reduced percentage standard allows IRFs to have the option to treat more exceptional patients who do not meet this criterion of prior therapy; nevertheless, we believe that the requirement is consistent with the pathophysiology of osteoarthritis and with the literature on its appropriate treatment.

Comment: Some commenters indicated that a joint replaced by a prosthesis still has arthritis and should be counted as having osteoarthritis, citing a definition of arthritis: "the pathology of osteoarthritis involves the whole joint including focal and progressive hyaline articular cartilage loss with concomitant changes in the bone underneath the cartilage, including development of marginal outgrowth, osteophytes, and increased thickness of the bony envelope (bony sclerosis). Soft tissue structures in and around the joint are also affected, including synovium, which may show modest inflammatory infiltrates, ligaments, which are also often lax; and bridging muscle, which becomes weak." (Felson, DT, Lawrence, RC, Dieppe, PA *et al,* Osteoarthritis: New Insights. Annals of Internal Medicine 133: 635–646, 2000.

Response: Surgery to implant a total joint replacement removes the hyaline cartilage, underlying bone, and joint synovium. "Total hip arthroplasty is an operative procedure in which the diseased hip joint is resected and replaced with a synthetic acetabulum, femur, and polyethelene liner fixed to bone by cement or bone ingrowth." (Brandler, VA and Mullarkey, CF, Rehabilitation After Total Hip Replacement for Osteoarthritis., Physical Medicine and Rehabilitation: State of the Art Reviews, 16: 415–430, 2002) "In total knee arthroplasty, both the femoral and tibia sides of the joint are replaced using either a long or short stem, most commonly fixated with cement." (Mullarkey, CF, and Brandler, VA, Rehabilitation After Total Knee Replacement for Osteoarthritis., Physical Medicine and Rehabilitation: State of the Art Reviews, 16: 431–443, 2002) Some of the ligaments may also be removed, but others may be retained. Osteoarthritis is "degeneration of articular cartilage and reactive changes in surrounding bone and periarticular tissue." (Wise, C. Osteoarthritis, Scientific American Medicine, 2001 from WebMD 2003) However, the residual, secondary effects of osteoarthritis, for example, the effects on ligaments and muscles surrounding the joint, do not continue to define arthritis in the patient. This description of osteoarthritis is consistent with ICD–9–CM diagnosis coding. Furthermore, a patient's care differs considerably once a prosthetic has been placed as compared to care prior to the joint replacement, indicating the distinction between the two conditions.

For this reason, only joints without joint replacement will be counted as joints with arthritis.

Comment: Commenters recommended that we use two joints rather than three joints to determine if a case complies with the arthritis-related conditions.

Response: After considering the comments, we are aware of the ambiguity in the number of major joints needed to describe the extent of osteoarthritis that would typically require intensive rehabilitation treatment in an IRF. Although some of the experts agreed with the three-joint standard, conflicting opinions would suggest that this issue may need additional study. Until we have more information or clinical outcomes studies that provide data to address this issue, we will revise the standard for osteoarthritis and consider a patient who has two major, weight bearing joints (that is, shoulders, elbows, hips, and knees, but not including joints with a prosthesis) with severe osteoarthritis manifested by joint deformity, substantial loss of range of motion, atrophy of surrounding muscles, significant functional impairment of ambulation and other activities of daily living, as described in the proposed regulations, to count as one of the now 13 conditions that could be counted in revised § 412.23(b)(2)(iii). We believe using the two joint standard provides greater flexibility for the IRF to select patients who require intensive interdisciplinary inpatient rehabilitation. As we develop additional information to determine whether osteoarthritis of two or three joints better defines the type of osteoarthritis typically requiring intensive inpatient rehabilitation, we will, at this time, give IRFs the flexibility of using the lower standard of two joints. The regulatory language will be modified accordingly.

Comment: Commenters stated that we offer no explanation or reasoning for choosing DRGs 484, 485, and 486 to define "major multiple trauma." Instead, commenters propose the use of the Injury Severity Score (ISS) with a score of 16 or higher.

Response: We chose these DRGs to define major multiple trauma because they are consistent with the use of the term in IPPS, and because we believe the acute care classification scheme is used by coders generally and is well understood. Thus, we do not believe this definition narrows the current concept. We are concerned that some fractures of multiple bones, especially tibia and fibula, radius and ulna, or multiple bones of ankle or wrist do not represent major trauma and do not require intensive inpatient rehabilitation and should not be counted towards the condition of major multiple trauma. We would be open to exploring the possibility of modifying the standard, but at present, we are concerned that the ISS may not be used nationwide in all acute care hospitals or be as available to many IRF staff as the DRG classification of the acute hospital admission.

Comment: One commenter believes that we lack concern for patient safety. They cite the CMS Nursing Home Compare data that only 30 percent of short stay SNF residents walk as well or better after discharge.

Response: The CMS Nursing Home Compare website presents quality measure data for SNFs showing the percentage of short stay, independent residents (residents who are expected to stay for a short period of time) who walked better on day 14 than on day 5 of their stay or who walked independently on day 5 and maintained that level on day 14. The measure is based on Minimum Data Set (MDS) assessments. The national average on this quality measure is 30 percent, as the commenter noted. It is important to the interpretation of these data to point out that the measure includes all residents admitted to the SNF under Medicare SNF PPS payment (except coma patients, ventilator-dependent patients, paraplegic or quadriplegic patients, and patients receiving hospice care). This includes a wide range of patients who are being admitted to the SNF for a wide variety of reasons, even including residents who may have been in nursing homes before a qualifying hospital stay and who are now being admitted to the SNF-under Medicare SNF PPS after the acute hospital admission. A further qualifier is that the patient must have had an MDS assessment at both day 5 and day 14 of the stay to be represented in this measure. If a patient improved so much that he or she was discharged before day 14, then that patient would not be included in the data.

For the reasons discussed, we believe that the CMS Nursing Home Compare data do not reflect the efficacy of rehabilitative care in a SNF and are inappropriate to be compared with outcome data from IRFs. Thus, we do not believe that providing certain patients rehabilitation services in a SNF impairs the patient's safety.

Comment: Some comments suggested that some knee or hip joint replacement patients should be counted towards the conditions satisfying a revised § 412.23(b)(2)(iii) where the treatment is complicated because of certain special circumstances, such as patients with bilateral replacements, obese patients, and very elderly patients.

Response: Although we are still hampered by the lack of data on the relative efficacy of rehabilitation in different settings, we will recognize certain categories of hip and joint replacement patients as countable under revised § 412.23(b)(2)(iii). Although we still believe that additional studies are needed, we will add a condition to account for these special circumstances. The 13th condition will include patients who undergo knee and/or hip joint replacement during an acute hospitalization immediately preceding the IRF stay and also meet at least one of the following specific criteria:

- Underwent bilateral knee or hip joint replacement surgery during the acute hospitalization immediately preceding the IRF admission.
- Are extremely obese patients as measured by the patient's Body Mass Index (BMI) of at least 50, at the time of admission to the IRF.
- Are patients considered to be "frail elderly," as determined by a patient's age of 85 or older, at the time of admission to the IRF.

Although the industry suggests a variety of patients to be added, these three groups of patients were mentioned most consistently. The patients with bilateral hip and/or knee joint replacements typically are more challenging to treat in a rehabilitation setting. These patients are likely to have weight bearing restrictions on both of their lower limbs, which explains why they are likely to require more intensive, specialized inpatient rehabilitation treatment.

We believe that the BMI, ratio of a patient's weight (in kilograms) to the height (in meters squared), is the standard that is widely recognized within the medical community as a measure of obesity. We will use the BMI to determine if the patient is extremely obese and, when receiving rehabilitation after a joint replacement, is much more likely to require more skilled therapy personnel and specialized equipment. Patients would be considered extremely obese if their BMI was at least 50 at the time of admission to the IRF.

The industry representatives also cited that some very elderly patients may require intensive inpatient multidisciplinary rehabilitative care. These patients are often characterized as the "frail elderly." Again, although we anticipate better data in the future regarding the appropriateness of setting for inpatient rehabilitation for the frail elderly, at the present, we will allow very elderly patients, following replacement of a hip or knee (likely to

result from osteoarthritis) who require multidisciplinary rehabilitative care to be counted under revised § 412.23(b)(2)(iii). Patients would be considered frail, elderly, if at the time of admission to the IRF, the patient is age 85 or older.

We have revised our regulations at revised § 412.23(b)(2)(iii) to reflect this change in policy. All admitted patients must still meet coverage requirements for IRF care and be able to actively participate in 3 hours of multidisciplinary rehabilitation and have the physical and cognitive capacity to benefit from the rehabilitation treatment.

As noted in a previous comment, we have also decided to amend the proposed definition for osteoarthritis and consider a patient who has two major, weight-bearing joints (that is, shoulders, elbows, hips, and knees, but not counting any joint with a prosthesis) with severe osteoarthritis manifested by joint deformity, substantial loss of range of motion, atrophy of surrounding muscles, and significant function impairment of ambulation and other activities of daily living, as described in the proposed regulation, to now count as one of the 13 conditions that could be counted in the revised § 412.23(b)(2)(iii). The regulatory language will be modified accordingly.

VI. Time Period To Determine Compliance

Under our current regulations at § 412.23(b)(2), § 412.30(c), and § 412.30(d)(2)(ii), we require that data from "the most recent 12-month cost reporting period" be used to determine compliance with the existing 75 percent rule (68 FR 53274). In the September 9, 2003 proposed rule, we proposed to amend the above sections to specify that data from the most recent, consecutive, and appropriate 12-month period of time be used to determine compliance with the proposed 65 percent rule.

As stated in the proposed rule, the intent of the proposed provision was to ensure that a full 12-month period of time is used to determine compliance with the proposed compliance threshold. However, in the proposed rule we recognized that using 12 months of patient data for the initial cost reporting periods affected by these proposed changes would mean that some data would be from a period that is before the effective date of the final rule. Therefore, we stated that it would be necessary to institute a transition period for those cost reporting periods where the most recent 12-month period of time includes admissions that occur before the effective date of the final rule. Accordingly, to ensure that admissions occurring before the effective date of the final rule are not counted in an IRF's compliance percentage, the FIs and the affected IRFs will be given the specific procedures regarding what time period the FIs will use to verify compliance during the transition from the 75 percent rule to the compliance threshold as specified in revised § 412.23(b)(2)(i) and (b)(2)(ii).

Comment: Some commenters recommended that we continue to use data from an IRF's most recent 12-month cost reporting period to determine compliance with the proposed compliance threshold. Other commenters recommended that, due to seasonal variations of patients treated, we should use a full year of data, or use the most recent entire 12-month cost reporting period beginning after the effective date of the final rule. Some commenters were also concerned that patient data may overlap when making a determination over 2 consecutive 12-month periods.

Response: We believe that the use of a cost reporting period, usually of 12 months' duration, does not provide the FI sufficient time to collect 12 months of patient data, make a compliance determination, and administer the process necessary to possibly change an IRF's classification before the start of the subsequent cost reporting period if the requirements were not met. As stated in the proposed rule, the intent of the proposed provision is to ensure that a full 12-month period of time is used to determine compliance with the classification criteria. We recognize that the Regional Office (RO) and FI need 4 months to complete their compliance reviews. (The RO and FI need 4 months to complete the review because the FI must determine, before the start of an IRF's next cost reporting period, whether the IRF meets the threshold criteria and the FI must communicate the results of its compliance review to the RO. If the IRF failed to meet the compliance threshold, the RO would need sufficient time to notify the facility that it will no longer be classified as an IRF beginning with the start of its next cost reporting period.) We note that the 4-month period that the RO and FI need to perform their tasks presents a unique problem for any IRF that has a cost reporting period beginning on or after July 1, 2004 and before November 1, 2004 (that is, 4 months following the effective date of this final rule). This is because the FI cannot collect 12 months of the most recent, consecutive, and appropriate data from a period falling completely after, as opposed to before, the effective date of this final rule and have the 4 months lead time necessary to make the compliance determination. To illustrate, to determine whether a hospital with a cost reporting period beginning on July 1, 2004 should continue to be an excluded rehabilitation hospital for the cost reporting period beginning on July 1, 2005, the FI would have to start its compliance review at the end of February 2005. This means that the most recent, consecutive, and appropriate data from a period after, as opposed to before, the effective date of the final rule is July 1, 2004 through February 28, 2005. If the FI were forced to use 12 months of data from a period before March 1, 2005, the FI would be using 8 months of patient case data following the effective date of the final rule (July 1, 2004 to February 28, 2005) and 4 months of patient case data occurring before the effective date of this final rule (from June 2004 back to March 2004). We believe it is important to use patient case data from a period after the effective date of the final rule because we believe it is appropriate to apply our rules prospectively and not judge IRF behavior before July 1, 2004 by rules that were not effective until July 1, 2004. Therefore, because we do not want to use data before the effective date of the final rule, we have adopted a transition policy that accounts for the fact that FIs need 4 months to complete their compliance review. Also, IRFs should be judged by patient case data from a period after the effective date of the final rule to determine compliance with the classification criteria. (**Note:** It is only those IRFs that have a cost reporting period beginning on July 1, 2004 and before November 1, 2004 that will be judged on less than 12 months of data. As explained above, this occurrence is inevitable in this first year of implementation.)

In addition, we note that for FIs to base their compliance review on the most recent, consecutive, and appropriate data from a period falling after the effective date of this final rule, FIs will examine patient case data from all IRFs that occurs on or after July 1, 2004. Thus, the later an IRF's cost reporting period begins in 2004, the more patient case data an FI will have available to it to make the compliance determination. We have included a chart in this section of the preamble entitled "Establishing The 12-Month Review Period" that shows the initial compliance review time period for IRFs whose cost reporting periods begin during the first 12 months after the effective date of this final rule.

We will provide the FIs and affected IRFs with the following general

procedures regarding the establishment of the review period used to verify compliance with the applicable percentage:

- A determination of non-compliance with the compliance threshold will affect the IRF's classification for its cost reporting period that begins after the 12-month review period. Similar to the current procedures for converted beds, if an IRF loses its classification and wishes to reapply to obtain classification as an IRF in a subsequent cost reporting period, the IRF is responsible for contacting its FI and CMS Regional Office prior to the beginning of that affected cost reporting period. The FI and RO would tell the IRF what the most recent, consecutive, and appropriate 12-month period would be used as the review time period.
- Patient data from any period before the effective date of this final rule will not be included in the 12-month review period.
- The standard period of time FIs and ROs may take to make and administer a determination of compliance with revised § 412.23(b)(2)(i) and (b)(2)(ii) is 4 months. If for any reason the FI requires additional time to make a determination, the FI must consult with the IRF prior to changing the period subject to review and before using patient data that may overlap patient data from the previous 12-month review period. However, we expect that these exceptions will be relatively infrequent. Our instructions will provide guidance to the FI and CMS Regional Offices to establish and maintain a consistent 12-month review period from year to year for each IRF.

Given the general procedures described above, we have illustrated, in Chart 1 below, the establishment of review periods over the first 13 months of cost reporting periods affected by this final rule.

CHART 1.—ESTABLISHING THE 12-MONTH REVIEW PERIOD

For cost reporting periods beginning on:	Review period: (addmissions during)	Number of months in review period	Compliance determination applies to cost reporting period beginning on:
07/01/2004	07/01/2004–02/28/2005	8	07/01/2005
08/01/2004	07/01/2004–03/31/2005	9	08/01/2005
09/01/2004	07/01/2004–04/30/2005	10	09/01/2005
10/01/2004	07/01/2004–05/31/2005	11	10/01/2005
11/01/2004	07/01/2004–06/30/2005	12	11/01/2005
12/01/2004	08/01/2004–07/31/2005	12	12/01/2005
01/01/2005	09/01/2004–08/31/2005	12	01/01/2006
02/01/2005	10/01/2004–09/30/2005	12	02/01/2006
03/01/2005	11/01/2004–10/31/2005	12	03/01/2006
04/01/2005	12/01/2004–11/30/2005	12	04/01/2006
05/01/2005	01/01/2005–12/31/2005	12	05/01/2006
06/01/2005	02/01/2005–01/31/2006	12	06/01/2006
07/01/2005	03/01/2005–02/28/2006	12	07/01/2006

Using Chart 1, the transition period, where less than a 12-month period of time would be necessary, is for cost reporting periods beginning on or after July 1, 2004 and before November 1, 2004. For cost reporting periods beginning on November 1, 2004 and beyond, the most recent, consecutive, and appropriate 12-month period of time would be used, giving the FIs and CMS Regional Offices a 4-month time period to make and administer a compliance determination. We believe that the provision as proposed and described above achieves our basic intent of establishing a full 12-month review period that is equitable to the IRFs by accounting for any variations (including seasonal variations) in patients treated and to the authorities responsible for administering the compliance determinations. Therefore, we are not adopting the recommendations and are instead adopting the provisions as described earlier.

VII. Other Issues

A. General FI Operational Instructions

In the September 2003 proposed rule, we explained that we will take the necessary action to ensure that the proposed compliance policies are consistently enforced on IRFs across all FIs. We will issue instructions to the FIs and provide guidance to the clinical/medical FI personnel responsible for performing the compliance reviews to ensure that they use a method that consistently counts only cases with a diagnosis that both serves as the basis for the intensive rehabilitation services that the IRF would furnish, and meets one of the medical conditions specified in revised § 412.23(b)(2)(iii). In addition, we plan to instruct the FIs in the use of a presumptive eligibility test for verifying compliance with revised § 412.23(b)(2)(i) that includes only Medicare cases determined to be "reasonable and necessary."

B. Administrative Procedure Act

Comment: We received a number of comments asserting that some of the revisions we proposed (or the manner in which we proposed them) failed to comply with the requirements of the Administrative Procedure Act (APA). For example, commenters noted that we proposed to introduce certain qualifying criteria that would have to be met in order to include joint replacement cases with an underlying diagnosis of osteoarthritis under our proposed osteoarthritis definition. The commenters noted that such cases are currently included under the existing "polyarthritis" definition without having to meet the new qualifying criteria, and characterized our proposal as an abrupt change from longstanding practice for which we failed to provide an adequate explanation, and which, therefore, would not withstand scrutiny under the APA. Some of the commenters suggested that under our proposed criteria, facilities might turn away Medicare and non-Medicare patients with non-listed conditions in order to avoid jeopardizing their IRF status. These commenters argued that we failed to consider the impact this practice would have on the patients,

thus rendering our proposals arbitrary and capricious. They also argued that this practice would result in an irrational manner of allocating care that would not withstand scrutiny under the APA. Commenters also asserted that the proposed implementation date of January 1, 2004, which would occur 58 days after the close of the public comment period on the proposed rule, would leave insufficient time in developing a final rule to give adequate consideration to the comments that we received.

Response: Regarding the policy on including joint replacements under the proposed osteoarthritis definition, we note that in section II.B of the proposed rule, we specifically acknowledged "* * * that the industry has interpreted polyarthritis to include hip and knee joint replacement cases * * *" (68 FR 53271). We went on to observe, however, that merely because some joint replacement cases are currently being treated in IRFs does not, in itself, establish this setting as being the most appropriate one for these cases. Rather, we expressed our belief that the current use of this particular setting for those cases may well be driven by other, non-medical factors, such as the presence of strong reimbursement incentives to send patients to IRFs, which have influenced the choice of setting for patients' care. Accordingly, we proposed the additional criteria in connection with a new osteoarthritis definition in order to ensure that the cases identified by this new definition are, in fact, the ones that are clinically appropriate for treatment in this particular setting. It was precisely because the proposed osteoarthritis definition represented a change from current policy that we included it in the proposed rule, in order to provide the opportunity for public comment on it. In this context, we also specifically invited the submission of any "* * * data or studies that might provide evidence about whether certain patients had better outcomes as a result of care in IRFs" (68 FR 53272). Regarding the comments on the potential impact that our proposed changes might have on access to care, we most certainly crafted our proposed policies to ensure that patients needing intensive rehabilitation services continue to receive such care. We note that the proposed rule set forth our plans to conduct a detailed 3-year analysis of "* * * both claims and patient assessment data to examine trends in admissions and overall utilization in IRFs" (68 FR 53273). Further, we proposed to lower the threshold percentage of cases that serve to identify an institution as an IRF from 75 percent to 65 percent during this 3-year period, specifically in order to mitigate any unintended effects on access to care while we perform this analysis (68 FR 53270).

Finally, regarding the concerns expressed about our ability to adequately consider and respond to public comments due to the timeframe between the close of the comment period and the proposed implementation of a final rule, we assure the public that we have given meaningful consideration to the public comments timely received. We fully consider all public comments timely received on proposed rules, regardless of the timeframe between the close of a comment period and the publication and implementation of a final rule. (In addition, we note that publication of this final rule is more than 100 days after the close of the public comment period and implementation is more than 180 days after the close of the comment period.) We believe that IRFs will have sufficient time, after publication of this final rule, to begin to make any necessary adjustments to their patient populations in order to meet the compliance threshold for being classified as an IRF.

C. Assumptions Used for Impact Analysis Section

For the impact analysis in the September 9, 2003 proposed rule (68 FR 53276), it was necessary to make certain assumptions about the effects of amending § 412.23(b)(2). The diagnoses listed in Appendix A in the "Case Mix Certification Rule for Inpatient Rehabilitation Facilities" report, published in May 2003, developed by Rand, identified cases that would meet the current 75 percent rule. The report showed that a large number of cases with possible arthritis-related joint replacements did not meet the current 75 percent rule. We stated in the September 9, 2003 proposed rule that it is difficult to determine the exact number of joint replacement cases that would meet the proposed criteria without extensive medical record data. Therefore, to estimate the impacts on the various classifications of IRFs shown in Chart 2, we chose the assumption that an additional 35 percent (we considered the range of 20 percent to 60 percent in the proposed rule, 35 percent is approximately in the middle of that range) of the joint replacement cases would meet the proposed clinical criteria as set forth in the proposed rule.

Comment: Some commenters disagreed with our assumption that an additional 35 percent of the joint replacement cases would meet the clinical criteria set forth in the proposed rule. Another commenter believed that the percent would probably be higher than 35 percent. Other commenters thought that 35 percent was probably too high because the criteria were rather restrictive, in their opinion. Several commenters stated that our assumption of an additional 35 percent was reasonable based on their professional experience.

Response: After considering all comments and adopting the clinical criteria as stated in section V, we believe that between 40 percent and 70 percent of joint replacement patients will count toward meeting the compliance threshold as specified in § 412.23(b)(2)(i) and (b)(2)(ii). We believe these changes, such as the clarifications to arthritis medical condition, will increase the number of joint replacement patients counting in the new 50 percent requirement more than what we assumed in the proposed rule. These final criteria are less restrictive than those in the proposal when we assumed a range of 20 percent to 60 percent. Therefore, we believe that the 40 to 70 percent range is reasonable and will be used in the impact analysis of the final rule in section XII.

Comment: Commenters disagreed with our suggestion that reimbursement incentives or incorrect FI interpretations, rather than medical advances, have led to changing IRF populations.

Response: It is well recognized that reimbursement incentives influence providers' practices. For example, Leighton Chan et al showed that Medicare's payment system for rehabilitation hospitals under the Tax Equity and Fiscal Responsibility Act (TEFRA) appears to have increased the length of stay and costs of care in rehabilitation hospitals (Chan, L. Koepsell, TD. *et al.*, The Effect of Medicare's Payment System for Rehabilitation Hospitals on Length of Stay, Charges, and Total Payments, New England Journal of Medicine 337:978–985, 1997.) Although there are no studies that directly assess the effect of reimbursement incentives, a recent study which examines post-operative rehabilitation practices in the U.S. compared to in England and in Australia suggests that reimbursement practices in the various countries affect the site of service for certain types of patients. (Lingard, EA. Berven, S. Katz, JN. and Kinemax Outcome Group, Management and Care of Patients Undergoing Total Knee Arthroplasty: Variation Across Different Health Care

Settings, Arthritis Care and Research, 13:129–136, 2000) These authors found that "in the combined U.S. cohort, type of health insurance significantly influenced whether or not a patient went to an extended care facility (a rehabilitation hospital or a SNF) with Medicare 55 percent and 33 percent non-Medicare" and that "use of inpatient rehabilitation following discharge from the acute hospital is extremely rare in the UK." Rehabilitation use in Australia also varied with payment mechanism, suggesting that the influence of payment on medical practices is not limited to the U.S.

We would again welcome any additional studies on this issue, and we encourage researchers to engage in appropriate studies to provide additional knowledge on this issue.

Comment: Some commenters suggested that the standard to determine compliance be changed from using "admissions" to using "patient days."

Response: Using days of care is a lower standard than admissions and considerably loosens the existing standard. Analysis of historical data shows that 50 percent of admissions was the same as 63 percent of patient days. Furthermore, this percentage is easily modified either by shortening lengths of stays of patients who will not count towards the standard or lengthening a patient stay that counts towards the standard. If we want to assure that a hospital has the capacity to serve patients with certain types of conditions, then we should count admissions rather than patient days. As was stated in our earlier response to comments, we continue to believe that a hospital should be categorized by the types of patients admitted, not by their lengths of stay.

We addressed a similar comment described in the January 3, 1984 final rule (49 FR 240) whereby the commenter asked to specify whether the 75 percent rule is applied to discharges or patient days. In our response to that comment, we stated that, "The 75 percent rule applies to the inpatient population. The population could be measured by either the number of admissions or discharges from a hospital or a unit * * * but not by its number of patient-days. This approach is consistent with the study used to develop the sample screening criteria, which showed that 75 percent of the admissions included in the study data were for certain medical conditions". We continue to believe that admissions or discharges are the most appropriate measure for determining compliance with the compliance threshold. Therefore, we are not adopting the commenter's suggestion.

VIII. Provisions of the Final Regulations

This final rule adopts the provisions of the September 9, 2003 proposed rule except as we have specified in the preamble. We have made the following changes from the proposed rule:

- We are modifying the "sunset" policy specified in the September 2003 proposed rule that lowered the threshold from 75 percent to 65 percent during the time period from January 1, 2004, to December 31, 2006, the compliance. For cost reporting periods beginning on or after July 1, 2004, the compliance threshold will be as follows:

—For cost reporting periods beginning on or after July 1, 2004, and before July 1, 2005, the compliance threshold will be 50 percent of the IRF's total patient population.

—For cost reporting periods beginning on or after July 1, 2005, and before July 1, 2006, the compliance threshold will be 60 percent of the IRF's total patient population.

—For cost reporting periods beginning on or after July 1, 2006 and before July 1, 2007, the compliance threshold will be 65 percent of the IRF's total patient population.

—For cost reporting periods beginning on or after July 1, 2007, the compliance threshold will be 75 percent of the IRF's total patient population. Also a patient's comorbidity is not included in the inpatient population that counts towards the required 75 percent.

- We are amending § 412.23(b)(2) by removing the medical condition "Polyarthritis, including rheumatoid arthritis" and substituting four groups of medical conditions. This provision will amend the standard for osteoarthritis. We will now consider a patient as meeting the compliance threshold if the patient has two major, weight-bearing joints (that is, shoulders, elbows, hips, and knees) with severe osteoarthritis manifested by the following:

+ Joint deformity.
+ Substantial loss of range of motion.
+ Atrophy of surrounding muscles.
+ Significant functional impairment of ambulation and other activities of daily living, as described in the proposed rule.

In addition, we are adding a new condition for a total of 13 conditions. The new condition applies to a patient that has a knee or hip joint replacement, or both, during an acute hospitalization immediately preceding the inpatient rehabilitation stay and the patient also meets one or more of the specific criteria in § 412.23(b)(2)(iii)(M).

We will count the above as meeting the compliance threshold in the revised § 412.23(b)(2)(iii).

CMS will issue instructions to the fiscal intermediaries regarding how these policies are to be implemented and enforced as discussed in section VII.A.

IX. Collection of Information Requirements

Under the Paperwork Reduction Act (PRA) of 1995, we are required to provide 30-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the PRA of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

Therefore, we are soliciting public comments on each of these issues for the information collection requirements discussed below.

The following information collection requirements and associated burdens are subject to the PRA.

Section 412.23 Excluded Hospitals: Classifications

Under paragraph (b)(2) of this section, a hospital must show that during its most recent, consecutive, and appropriate 12-month time period (as defined by CMS or the fiscal intermediary), it served an inpatient population that meets the criteria under paragraph (b)(2)(i) or (b)(2)(ii) of this section.

We believe that the current 1210 IRF hospitals will be affected by this requirement. The burden of this section is the time it takes to document that it served an inpatient population meeting the appropriate criteria and provide the documentation to CMS upon request. An IRF hospital will be required to maintain documentation associated with meeting the requirements of this section. The time it will take to furnish the documentation to CMS will vary

depending on the size of the sample that the fiscal intermediary requests.

However, the burden associated with these requirements is currently approved under OMB number 0938–0358, "Psychiatric Unit Criteria Work Sheet, Rehabilitation Hospital Criteria Work Sheet, Rehabilitation Unit Criteria Work Sheet", with a current expiration date of March 31, 2007. Upon the publication of this regulation, CMS will amend this collection to properly reflect the revised regulatory requirements associated with this collection.

We have submitted a copy of this final rule to OMB for its review of the information collection requirements described above. These requirements are not effective until they have been approved by OMB.

If you comment on any of these information collection and record keeping requirements, please mail copies directly to the following:

Centers for Medicare & Medicaid Services, Office of Strategic Operations and Regulatory Affairs, Regulations Development and Issuances Group, Attn: Dawn Willinghan, CMS–1262–F, Room C5–16–03, 7500 Security Boulevard, Baltimore, MD 21244–1850; 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;* fax to OMB: (202) 395–6974.

X. Regulatory Impact

A. Introduction

This final rule revises the classification criterion, currently known as the "75 percent rule," used to classify a hospital as an inpatient rehabilitation facility (IRF). Among other changes, this final rule modifies and expands the medical conditions listed in the current 75 percent rule regulatory requirements as well as lowers the percentage of patients required to fall within one of the specified list of medical criteria from 75 percent to 50 percent. In addition, this final rule responds to public comments on the September 9, 2003 proposed rule (68 FR 53266).

We have examined the impacts of this final 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.

B. Executive Order 12866

Executive Order 12866 (as amended by Executive Order 13258, which merely reassigns 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).

We estimate the savings to the Medicare program, and the annual effects to the overall economy, will be more than $100 million. Therefore, similar to our determination in the RIA of the proposed rule, this final rule is considered a major rule.

C. 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 November 17, 2000 regulation, at 65 FR 69432, that sets forth size standards for health care industries.) 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 FIs and carriers are not considered to be small entities. Individuals and States are not included in the definition of a small entity. Accordingly, we have determined that this rule will have a significant impact on a substantial number of small entities.

Section 1102(b) of the Act requires us to prepare a regulatory impact analysis for any 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 final rule will have a significant impact on the operations of small rural hospitals.

D. 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 final rule will not have a substantial effect on the governments mentioned, or on private sector costs.

E. Executive Order 13132

We examined this final 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.

F. Overall Impact

For the reasons stated above, we have prepared an analysis under the RFA and section 1102(b) of the Act because the policies set forth in this final rule will have a significant impact on all IRFs (small entities and small rural hospitals).

G. Anticipated Effects of the Final Rule

One of the primary purposes of the regulatory impact analysis is to understand the effects policies would have on facilities. As we analyze the impacts of our policies, we assess the extent to which these policies may unduly harm facilities. If there is evidence that we are unduly harming facilities, we make attempts to mitigate these effects, while ensuring that the policies are fair and achieve the intended policy objectives. The policy objective of the current and new § 412.23(b)(2) and of other policy criteria for IRFs is to ensure the distinctiveness of facilities providing intensive rehabilitative services in an inpatient setting. The distinctiveness of these facilities is what justifies paying them under a separate payment system as opposed to under another payment system, such as the acute care IPPS, which may not adequately compensate these facilities for the intensive rehabilitative services they are to provide. We believe it is crucial to ensure that IRFs are indeed providing intensive rehabilitation so that we pay for these services appropriately under the IRF PPS. In addition, we believe it is imperative to identify conditions that will "typically require intensive inpatient rehabilitation" in IRFs because rehabilitation in general can be

delivered in a variety of settings, such as acute care hospitals, SNFs, outpatient or home health.

This policy objective is not new. However, the manner in which the existing regulations have been implemented and enforced may not have achieved these objectives to the extent we had intended. The policies set forth in this final rule are intended to accomplish these same policy objectives, clarify interpretational issues that have led to inconsistent implementation, and improve the extent to which IRFs can admit those patients who will need and benefit from intensive inpatient rehabilitative services. Therefore, although the impacts of the final policy changes shown below illustrate that IRFs may experience somewhat reduced Medicare payments from these final policies, we believe the impacts will show an even greater reduction in Medicare payments to IRFs if the existing policies were more effectively enforced.

We discuss below the Medicare impact of this final rule on IRFs. We used the following data and assumptions to estimate the impacts of the final policies set forth in this preamble.

- As stated in section I.D. of this final rule, we used patient assessment data from January to August 2002 to estimate compliance with the 75 percent rule as published in the May 16, 2003 proposed rule. We are using the same patient assessment data to construct the impact analysis set forth in this final rule.
- We used data described in the report titled "Case Mix Certification Rule for Inpatient Rehabilitation Facilities", published in May 2003, developed by the Rand Corporation. This report states, on page XIV, that 70 percent of all cases treated in IRFs are those of Medicare beneficiaries.
- In addition to Medicare patients, this final rule may have an effect on the 30 percent, or approximately 200,000, of the cases in IRFs that are non-Medicare. While there are numerous approaches a facility might take, and it is impossible to predict either the specific course of treatment or the financial impact, the facility could change both its Medicare and non-Medicare case mix in order to remain an IRF.
- We used regression results from page 25 of the Rand report to estimate that the percentage of total cases that meet the specified conditions for each IRF will be approximately 5 percent more than the percentage of Medicare cases that meet the specified conditions. However, other than an estimate of the size of the non-Medicare population that this final rule may affect, CMS does not have enough information to quantitatively estimate the impact to non-Medicare IRF cases.
- 10 percent of the cases that did not meet the criteria will meet the criteria due to more accurate coding and removing the moratorium of the classification rule.
- 10 percent of the cases that did not meet the criteria with the limited Medicare administrative data used in our analysis will meet the criteria using more extensive medical record data.
- The diagnoses listed in Appendix A in the "Case Mix Certification Rule for Inpatient Rehabilitation Facilities" report, developed by Rand, identified cases that would meet the current 75 percent rule. The report showed that a large number of cases with possible arthritis-related joint replacements did not meet the current 75 percent rule. We believe that the clarifications to arthritis medical conditions in this final rule may increase the number of these cases that will count towards meeting the new 50 percent rule, as described in Section V of this final rule. However, it is difficult to determine the exact number of joint replacement cases that will meet the criteria without extensive medical record data. Therefore, to estimate the impacts on the various classifications of IRFs shown in Chart 3, we chose the assumption that 50 percent of the joint replacement cases will meet the clinical criteria as set forth in this final rule.
- We assume that a percentage of Medicare cases being admitted under the current practices will not be admitted to an IRF under the revised criteria. We believe that these cases will be admitted or treated in extended hospital inpatient stays, outpatient departments, or other post acute care settings. We estimated that it will be equally possible that the cases not admitted to IRFs may be treated in inpatient hospitals, outpatient departments, or home health care settings. We found that approximately 80 percent of IRFs are units within a hospital complex and that approximately 60 percent of these hospital complexes include a SNF. Accordingly, we estimated that SNFs will have a higher probability than other settings of absorbing the cases not admitted to IRFs. Since long term care hospitals need to meet the average 25-day LOS requirement and the average IRF LOS is 14 days, we estimated that long term care hospitals will absorb a smaller portion of the cases not admitted to IRFs.

Because the provisions in this final rule are effective for cost reporting periods beginning on or after July 1, 2004, we've assumed a blended payment amount accounting for 3 months at the FY 2004 payment rate and 9 months at an estimated FY 2005 payment rate.

Based on the above assumptions and the average payments for their respective settings, we have estimated the average FY 2004 payment for these hospital inpatient, outpatient, and other post acute care settings to be approximately $7,000 per case. Thus, for Medicare patients, the difference between the FY 2004 IRF standardized payment per case ($12,525) and the estimated average per case amount for hospital inpatient, outpatient, and other post acute care settings ($7,000) results in a net savings to the Medicare program of approximately $5,525 per case in FY 2004. For fiscal year 2005, we estimated the IRF standardized payment to be $12,926 after rounding and the average for other settings to be $7,216 after rounding for a difference of $5,709 per case after rounding.

Note that this result also assumes that all IRFs will continue to want to be classified as an IRF and admit those patients that will allow them to meet the revised criteria set forth in this final rule.

1. Impact Summary

Dependent on the range of assumptions related to joint replacement cases described above, we project a net savings to the Medicare program between $1 million and $4 million for the first full year after implementation. Specifically, the estimated net savings will be $4 million if we assume that an additional 40 percent of joint replacement cases meet the criteria, $1 million if 70 percent of additional joint replacement cases meet the criteria, and $2 million if 50 percent of additional joint replacement cases meet the criteria. This net savings to Medicare will be a net "loss" of Medicare payments to IRFs or facilities that contain both an IRF and an alternative treatment facility. Some alternative treatment facilities, however, will experience an increase in Medicare payments if they experience a net increase in Medicare cases.

2. Medicare Savings During Transition

Chart 2 below shows the Medicare savings for each federal budget fiscal year during the transition period. Because the provisions in this final rule are effective for cost reporting periods beginning on our after July 1, 2004, the compliance threshold will change during the fiscal year. These savings include a projected increase in the market basket and changes in the number of beneficiaries. The net

Medicare savings for each year is rounded to the nearest 10 million dollars.

CHART 2.—MEDICARE SAVINGS THROUGH THE TRANSITION PERIOD BY FISCAL YEAR

Fiscal year	Compliance threshold	Medicare savings
2004	3 months at 50%	[1] 0
2005	9 months at 50%, 3 months at 60%.	10
2006	9 months at 60%, 3 months at 65%.	30
2007	9 months at 65%, 3 months at 75%.	90
2008	12 months at 75%	190

[1] The impact for 2004 is $0.4 million before rounding.

3. Calculation of Impacts

To determine the estimated effects of implementing the policies in this final rule, we have developed Chart 3 to show the estimated impact on the Medicare program among various classifications of IRFs. Chart 3 assumes a middle estimate of 50 percent of joint replacement cases meeting the new criteria. The columns in Chart 3—Projected Impact of the Changes to the 75 percent Rule on the Medicare Program are defined as follows:

- The first column, Facility Classification, identifies the type of facility. Where data were not available to classify an IRF into a category, the IRF was identified as "missing" in the first column.
- The second column identifies the number of facilities for each classification type.
- The third column lists the estimated number of Medicare cases admitted to IRFs under the existing policies. We estimated the number of Medicare cases from 8 months' worth of post-IRF PPS data (the available data at the time the analysis was done) to represent an annual number of Medicare cases.
- The fourth column, Ratio of Medicare Cases Not Admitted, represents an estimate of the percentage of Medicare cases that will no longer be treated in an IRF due to the final policies set forth in this final rule.
- The fifth column represents the estimated Ratio of All Setting Cost/Savings to IRF Medicare Payments. To estimate this amount we divide the All Setting Cost/Saving in Millions in column six by the Current IRF Medicare Payments in Millions in column nine.
- The sixth column, All Setting Cost/Saving in Millions, indicates the estimated savings impact to the Medicare program. To estimate the savings, we consider that some Medicare cases would possibly be treated in other settings and those settings will be paid accordingly. The following steps illustrate how we estimate this amount.

—Step 1—First, we estimate the number of Medicare cases that may not be admitted to IRFs, by multiplying the percentage in column four, Ratio of Medicare Cases Not Admitted, by the Total Medicare Cases reflected in column three.

—Step 2—We then take the number of cases calculated in Step 1 and multiply these cases by 0.25 (to represent 3 months of payments) times $12,525 (07/01/2004–09/30/2004, the standardized FY 2004 payment amount) and add it to the number of cases calculated in Step 1 multiplied by 0.75 (to represent 9 months of payments) times $12,926 (10/01/2004–6/30/2005, an estimated standardized payment amount for FY 2005) to determine the estimated Medicare payment impact to IRFs.

—Step 3—We then estimate the amount of Medicare payments that these cases may generate in other settings. Specifically, we multiply $7,000 by 0.25 times the number of Medicare cases estimated from Step 1 (the number of Medicare cases that may not be admitted to IRFs) to represent the number of cases at FY 2004 rates and add it to $7,216 multiplied by 0.75 times the number of Medicare cases estimated from Step 1 to represent the number of cases at FY 2005 rates.

—Step 4—Then we subtract the total amount calculated in Step 3 by the total amount calculated in Step 2, in order to estimate the total savings to the Medicare program.

- The seventh column, IRF Medicare Payment Impact in Millions, shows the estimated Medicare impact specific to IRFs. We calculate this estimate by multiplying the percentage of Medicare cases that will not be admitted (shown in column four) by the Total Medicare Cases (shown in Column three) and determine the number of estimated Medicare cases that will not be admitted to IRFs. We then take the total number of projected Medicare cases that will not be admitted to IRFs and multiply these cases by 0.25 times $12,525 and add it to the number of cases multiplied by 0.75 times $12,926, to estimate column seven, IRF Medicare Payment Impact in Millions.
- The eighth column, IRF Medicare Payment Impact Percentage, represents the estimated percentage impact on Medicare payments specific to IRFs.
- The ninth column, Current IRF Medicare Payments in Millions, is the number of Medicare cases reflected in column three multiplied by 0.25 times $12,525 and added to the number of cases in column three multiplied by 0.75 times $12,926.
- The tenth column, Projected IRF Medicare Payments in Millions, reflects the estimate of the total Medicare payments IRFs may receive as a result of the policies set forth in this final rule. This amount is calculated by subtracting the estimate of the IRF Medicare Payment Impact in Millions (column seven) from the estimate of the Current IRF Medicare Payments in Millions (column nine).

CHART 3.—PROJECTED IMPACT OF THE CHANGES TO THE 75 PERCENT RULE ON THE MEDICARE PROGRAM FOR THE FIRST FULL YEAR AFTER IMPLEMENTATION

Facility classification	Total Number of IRF	Total Medicare cases	Ratio of Medicare cases not admitted	Ratio of all setting cost/saving to IRF Medicare payments	All setting cost/saving in millions	IRF medicare payment impact in millions	IRF payment impact percentage	Current IRF Medicare payments in millions	Projected IRF Medicare payments in millions
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10
Total	1,170	459,682	0.1%	0.0%	−2.4	−5.4	−0.1	5,895.8	5,890.4
Census:									
1: New England	38	20,133	0.1%	−0.1%	−0.2	−0.3	−0.1	258.2	257.9
2: Middle Atlantic	170	87,639	0.4%	−0.2%	−1.8	−4.1	−0.4	1,124.0	1,119.9

CHART 3.—PROJECTED IMPACT OF THE CHANGES TO THE 75 PERCENT RULE ON THE MEDICARE PROGRAM FOR THE FIRST FULL YEAR AFTER IMPLEMENTATION—Continued

Facility classification	Total Number of IRF	Total Medicare cases	Ratio of Medicare cases not admitted	Ratio of all setting cost/saving to IRF Medicare payments	All setting cost/saving in millions	IRF medicare payment impact in millions	IRF payment impact percentage	Current IRF Medicare payments in millions	Projected IRF Medicare payments in millions
Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	Column 10
3: South Atlantic	143	75,808	0.0%	0.0%	0.0	0.0	0.0	972.3	972.3
4: East North Central	220	74,361	0.0%	0.0%	−0.1	−0.3	0.0	953.7	953.4
5: East South Central	66	35,764	0.0%	0.0%	0.0	0.0	0.0	458.7	458.7
6: West North Central	99	26,672	0.0%	0.0%	−0.1	−0.1	0.0	342.1	342.0
7: West South Central	235	87,206	0.0%	0.0%	−0.2	−0.3	0.0	1,118.5	1,118.1
8: Mountain	78	24,522	0.0%	0.0%	0.0	−0.1	0.0	314.5	314.4
9: Pacific	121	27,577	0.0%	0.0%	0.0	0.0	0.0	353.7	353.7
Free Standing/Unit Facility:									
Free	214	165,593	0.0%	0.0%	−0.3	−0.7	0.0	2,123.9	2,123.2
Unit	956	294,089	0.1	−0.1%	−2.1	−4.7	−0.1	3,771.9	3,767.2
Teaching Status:									
Missing	180	37,039	0.1%	0.0%	−0.2	−0.4	−0.1	475.1	474.7
Non-teaching	845	344,216	0.0%	0.0%	−0.9	−2.0	0.0	4,414.8	4,412.8
Teaching	145	78,427	0.3%	−0.1%	−1.3	−3.0	−0.3	1,005.9	1,002.9
DSH:									
<0.05	226	80,921	0.1%	−0.1%	−0.6	−1.4	−0.1	1,037.9	1,036.4
≧0.2	145	45,549	0.0%	0.0%	0.0	−0.1	0.0	584.2	584.1
0.05–01	339	161,550	0.1%	0.0%	−1.0	−2.2	−0.1	2,072.0	2,069.8
0.1–0.2	313	143,173	0.1%	0.0%	−0.6	−1.4	−0.1	1,836.3	1,834.9
Missing	147	28,489	0.1%	0.0%	−0.1	−0.3	−0.1	365.4	365.1
Facility Control:									
Government	135	38,942	0.0%	0.0%	−0.1	−0.2	0.0	499.5	499.3
Missing	76	10,264	0.2%	−0.1%	−0.1	−0.3	−0.2	131.6	131.4
Proprietary	259	140,311	0.0%	0.0%	−0.2	−0.6	0.0	1,799.6	1,799.0
Voluntary	700	270,165	0.1%	−0.1%	−1.9	−4.4	−0.1	3,465.1	3,460.7
Urban/Rural:									
Large Urban	493	209,489	0.1%	0.0%	−0.8	−1.9	−0.1	2,686.9	2,684.9
Missing	103	18,881	0.1%	−0.1%	−0.1	−0.3	−0.1	242.2	241.8
Other Urban	404	188,494	0.1%	−0.1%	−1.3	−3.0	−0.1	2,417.6	1,414.6
Rural	170	42,818	0.0%	0.0%	−0.1	−0.2	0.0	549.2	549.0
Size:									
Large	201	172,951	0.1%	0.0%	−0.5	−1.2	−0.1	2,218.2	2,217.0
Medium	502	198,451	0.1%	−0.1%	−1.6	−3.6	−0.1	2,545.3	2,541.7
Missing	158	31,400	0.1%	0.0%	−0.1	−0.3	−0.1	402.7	402.4
Small	309	56,880	0.0%	0.0%	−0.1	−0.3	0.0	729.5	729.3
Size by free Standing/Unit Facility:									
Free:									
Large	74	91,409	0.0%	0.0%	0.0	0.0	0.0	1,172.4	1,172.4
Medium	71	53,640	0.1%	0.0%	−0.2	−0.6	−0.1	688.0	687.4
Missing	38	10,817	0.1%	0.0%	−0.1	−0.1	−0.1	138.7	138.6
Small	31	9,727	0.0%	0.0%	0.0	0.0	0.0	124.8	124.8
Unit:									
Large	127	81,542	0.1%	−0.1%	−0.5	−1.2	−0.1	1,045.8	1,044.6
Medium	431	144,811	0.2%	−0.1%	−1.3	−3.0	−0.2	1,857.3	1,854.3
Missing	120	20,583	0.1%	0.0%	−0.1	−0.2	−0.1	264.0	263.8
Small	278	47,153	0.0%	0.0%	−0.1	−0.3	0.0	604.8	604.5

Due to rounding, there may be slight differences in the numbers presented versus the numbers used for calculation purposes.

Chart 3 breaks down the projected Medicare impacts into many categories that should serve to inform the public and interested parties of the different types of impacts of the changes in this final rule. As can be seen from Chart 3, the impacts vary by specific types of providers and by location. For example, the Middle Atlantic experiences slightly larger payment decreases than all other regions.

Column seven in Chart 3 shows that IRFs are expected to experience a reduction in Medicare payments from the final rule of approximately $5 million, less than a one percent reduction as seen in column 8. This is a net savings to Medicare of approximately $2 million for all Medicare providers. Applying the different assumptions regarding qualifying joint replacement cases yields a Medicare savings range of $1 million (70 percent qualifying) to $4 million (40 percent qualifying).

For the purposes of the RFA analysis, below we discuss IRF impacts in more detail as well as the regulatory alternatives considered by CMS to explore the impact of different options on IRFs. There are distributional impacts among various IRFs due to existing levels of compliance. The expected Medicare savings is due to the percentage of patients admitted to IRFs

that fall outside the identified conditions in relation to what IRFs would be paid for the next year for all Medicare discharges assuming the status quo (varying levels of compliance to the existing 75 percent rule). As we previously stated in this final rule, although the impacts of the policy changes illustrate IRFs may experience some reduction in payments, we believe the impacts will show a greater reduction in payments to IRFs if the existing policies were more effectively enforced. Further, we believe this reduction in Medicare payments appropriately reflects the existing policy objectives described above.

Because we have determined that this final rule will have a significant economic impact on IRFs, we will discuss the alternative changes to the 75 percent rule that we considered. We reviewed the options considered in the proposed rule, took into consideration comments received during the public comment period, and amended § 412.23(b)(2) as discussed in the preamble.

One option (Option A) would have been to consider all cases in rehabilitation impairment categories (RICs) 1–19 and 21 as cases that could be counted towards the 75 percent rule. This would leave only miscellaneous cases (RIC 20) as cases that would not be considered to satisfy the requirements in § 412.23(b)(2). The result would have been that all existing IRFs would not only meet the standard, but that they would have almost no restrictions on the type of cases that they would admit. The intent of the policy specified in amended § 412.23(b)(2) is to ensure that IRFs are unique compared to other hospitals in that they provide intensive rehabilitative services in an inpatient setting. The uniqueness of these facilities justifies paying them under a separate payment system rather than paying them with the same payment system for acute care inpatient PPS. Thus, we believe it is crucial to Medicare to maintain criteria ensuring that only facilities providing intensive rehabilitation are identified as IRFs. In addition, we believe that it is imperative to identify conditions that would typically require intensive inpatient rehabilitation in IRFs because rehabilitation, in general, can be delivered in a variety of settings, such as acute care hospitals, SNFs, and outpatient settings.

We have estimated that the average occupancy rate of all IRFs is approximately 70 percent. If we were to implement option A, we believe that IRFs with available capacity would increase their occupancy rate because, as stated above, IRFs would have almost no restrictions on the type of cases that they would admit. The following estimated effects of implementing option A on the Medicare program assumes that IRFs would increase their Medicare cases using the present ratio of 70 percent Medicare beneficiaries to total patients. Thus, we estimated, as calculated in the proposed rule, that in the first year of implementing option A it would cause an increase in IRF Medicare payments, and would cost the Medicare program, an additional $2.7 billion dollars if occupancy increased to 100 percent, $1.9 billion if occupancy increased to 90 percent, and $1.2 billion if occupancy increased to 80 percent. This range of additional costs to the Medicare program represents up to 50 percent more than the current total IRF Medicare expenditures.

A variant of option A is option B that would add joint replacements, cardiac, pulmonary, pain, and cancer patients to the list of conditions, as discussed in the preamble of the proposed rule in section II.A., which would also result in a significant impact on Medicare expenditures and IRF Medicare payments. If we were to implement option B, using the same assumptions described in option A, we estimate, as calculated in the proposed rule, it would have cost the Medicare program approximately $940 million dollars in the first year.

Another option, option C, would be to retain the compliance percentage requirement at 75 percent, rather than lowering it to 50 percent, but recognize the clinical criteria adopted in this final rule. This option is similar to enforcement of the current policy and, thus, would further reduce Medicare payments to all IRFs over the policies in this rule. Specifically, total estimated payments to all IRFs would be decreased by $459 million (under a 75 percent compliance threshold, assuming a middle estimate of 50 percent of joint replacement cases meeting the criteria) instead of a decrease of only $5 million (under the policies in this final rule, assuming a middle estimate of 50 percent of joint replacement cases meeting the criteria). However, this option would provide a net savings to the Medicare program of $203 million instead of only $2 million in the first full year after implementation.

Option D would be to implement the proposed rule. Lowering the compliance percentage from 75 percent to 65 percent in the proposed rule helped mitigate the impact on IRFs. However, after reviewing comments to the proposed rule we recognize that IRFs may need some additional time to adjust to the amended regulations. The reduction in payments to IRFs for the proposed rule was $223 million (as calculated in the proposed rule, assuming a middle estimate of 35 percent of joint replacement cases meeting the criteria) providing savings of $98 million to the Medicare program.

Additional options not specifically listed here were considered. Among them were the other options mentioned in the proposed rule, varying sunset provisions, and incremental additions of the clinical criteria adopted in amended § 412.23(b)(2).

We believe that the clinical criteria for this final rule reduce the impacts to IRFs considerably from those in the proposed rule, while still ensuring our intent that IRFs are unique compared to other hospitals in that they provide intensive rehabilitation services in an inpatient setting.

We believe that the changes to the clinical criteria in new § 412.23(b)(2) are adequate to distinguish the intensive inpatient rehabilitation provided in IRFs from rehabilitation services provided in other settings. In addition, while the changes to the clinical criteria and the reduction in the compliance percentage to 50 percent do reduce Medicare payments to IRFs ($3 to $9 million), the impact is less than the impact from other alternatives and less than the option considered in the proposed rule ($93 to $371 million). (See Chart 4—Comparison of IRF Medicare Payment Impacts). It is also important to note, as previously mentioned in section V.G., that approximately 80 percent of IRFs are units within a hospital complex and that approximately 60 percent of these hospital complexes include a SNF. We anticipate that in the future, some of the patients currently treated in the IRF will be treated in the SNF unit in these hospital complexes.

CHART 4.—COMPARISON OF IRF MEDICARE PAYMENT IMPACTS

	Compliance percentage	Range of additional joint replacements qualifying [1]	Range of IRF Medicare payment impact in millions
Proposed Rule	65	20%–60%	$93–$371
Final Rule	50	40%–70%	$3–$9

[1] The range of additional joint replacement cases qualifying increased from the proposal to the final due to the changes to the clinical criteria, particularly § 412.23(b)(2)(iii)(M).

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

List of Subjects in 42 CFR Part 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 amends 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 § 412.23, paragraph (b)(2) is revised to read as follows:

§ 412.23 Excluded hospitals: Classifications.

* * * * *

(b) * * *

(2) Except in the case of a newly participating hospital seeking classification under this paragraph as a rehabilitation hospital for its first 12-month cost reporting period, as described in paragraph (b)(8) of this section, a hospital must show that during its most recent, consecutive, and appropriate 12-month time period (as defined by CMS or the fiscal intermediary), it served an inpatient population that meets the criteria under paragraph (b)(2)(i) or (b)(2)(ii) of this section.

(i) For cost reporting periods beginning on or after July 1, 2004 and before July 1, 2005, the hospital has served an inpatient population of whom at least 50 percent, and for cost reporting periods beginning on or after July 1, 2005 and before July 1, 2006, the hospital has served an inpatient population of whom at least 60 percent, and for cost reporting periods beginning on or after July 1, 2006 and before July 1, 2007, the hospital has served an inpatient population of whom at least 65 percent, required intensive rehabilitative services for treatment of one or more of the conditions specified at paragraph (b)(2)(iii) of this section. A patient with a comorbidity, as defined at § 412.602, may be included in the inpatient population that counts towards the required applicable percentage if—

(A) The patient is admitted for inpatient rehabilitation for a condition that is not one of the conditions specified in paragraph (b)(2)(iii) of this section;

(B) The patient has a comorbidity that falls in one of the conditions specified in paragraph (b)(2)(iii) of this section; and

(C) The comorbidity has caused significant decline in functional ability in the individual such that, even in the absence of the admitting condition, the individual would require the intensive rehabilitation treatment that is unique to inpatient rehabilitation facilities paid under subpart P of this part and that cannot be appropriately performed in another care setting covered under this title.

(ii) For cost reporting periods beginning on or after July 1, 2007, the hospital has served an inpatient population of whom at least 75 percent required intensive rehabilitative services for treatment of one or more of the conditions specified in paragraph (b)(2)(iii) of this section. A patient with comorbidity as described in paragraph (b)(2)(i) is not included in the inpatient population that counts towards the required 75 percent.

(iii) *List of conditions.*

(A) Stroke.

(B) Spinal cord injury.

(C) Congenital deformity.

(D) Amputation.

(E) Major multiple trauma.

(F) Fracture of femur (hip fracture).

(G) Brain injury.

(H) Neurological disorders, including multiple sclerosis, motor neuron diseases, polyneuropathy, muscular dystrophy, and Parkinson's disease.

(I) Burns.

(J) Active, polyarticular rheumatoid arthritis, psoriatic arthritis, and seronegative arthropathies resulting in significant functional impairment of ambulation and other activities of daily living that have not improved after an appropriate, aggressive, and sustained course of outpatient therapy services or services in other less intensive rehabilitation settings immediately preceding the inpatient rehabilitation admission or that result from a systemic disease activation immediately before admission, but have the potential to improve with more intensive rehabilitation.

(K) Systemic vasculidities with joint inflammation, resulting in significant functional impairment of ambulation and other activities of daily living that have not improved after an appropriate, aggressive, and sustained course of outpatient therapy services or services in other less intensive rehabilitation settings immediately preceding the inpatient rehabilitation admission or that result from a systemic disease activation immediately before admission, but have the potential to improve with more intensive rehabilitation.

(L) Severe or advanced osteoarthritis (osteoarthrosis or degenerative joint disease) involving two or more major weight bearing joints (elbow, shoulders, hips, or knees, but not counting a joint with a prosthesis) with joint deformity and substantial loss of range of motion, atrophy of muscles surrounding the joint, significant functional impairment of ambulation and other activities of daily living that have not improved after the patient has participated in an appropriate, aggressive, and sustained course of outpatient therapy services or services in other less intensive rehabilitation settings immediately preceding the inpatient rehabilitation admission but have the potential to improve with more intensive rehabilitation. (A joint replaced by a prosthesis no longer is considered to

have osteoarthritis, or other arthritis, even though this condition was the reason for the joint replacement.)

(M) Knee or hip joint replacement, or both, during an acute hospitalization immediately preceding the inpatient rehabilitation stay and also meet one or more of the following specific criteria:

(*1*) The patient underwent bilateral knee or bilateral hip joint replacement surgery during the acute hospital admission immediately preceding the IRF admission.

(*2*) The patient is extremely obese with a Body Mass Index of at least 50 at the time of admission to the IRF.

(*3*) The patient is age 85 or older at the time of admission to the IRF.

* * * * *

■ 3. Section 412.30 is amended by—

■ A. Revising paragraph (c).

■ B. Revising paragraph (d)(2)(ii).

The revisions read as follows:

§ 412.30 Exclusion of new rehabilitation units and expansion of units already excluded.

* * * * *

(c) *Converted units.* A hospital unit is considered a converted unit if it does not qualify as a new unit under paragraph (a) of this section. A converted unit must have treated, for the hospital's most recent, consecutive, and appropriate 12-month time period (as defined by CMS or the fiscal intermediary), an inpatient population meeting the requirements of § 412.23(b)(2).

* * * * *

(d) * * *

(2) * * *

(ii) A hospital may increase the size of its excluded rehabilitation unit through the conversion of existing bed capacity only if it shows that, for the hospital's most recent, consecutive, and appropriate 12-month time period (as defined by CMS or the fiscal intermediary), the beds have been used to treat an inpatient population meeting the requirements of § 412.23(b)(2).

* * * * * *

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance)

Dated: March 12, 2004.

Thomas A. Scully,

Administrator, Centers for Medicare & Medicaid Services.

Approved: March 30, 2004.

Tommy G. Thompson,

Secretary.

[FR Doc. 04–10153 Filed 4–30–04; 9:03 am]

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Federal Register

Friday,
May 7, 2004

Part IV

Securities and Exchange Commission

17 CFR Parts 240, 275 and 279
Certain Thrift Institutions Deemed Not To Be Investment Advisers; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240, 275 and 279

[Release Nos. 34–49639, IA–2232; File No. S7–20–04]

RIN 3235–AI16

Certain Thrift Institutions Deemed Not To Be Investment Advisers

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is publishing for comment a new rule under the Investment Advisers Act of 1940 that would address the application of the Act to certain thrift institutions, and a new rule under the Securities Exchange Act of 1934 addressing thrift institutions' collective trust funds.

DATES: Comments should be received on or before July 9, 2004.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number S7–20–04 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. All submissions should refer to File Number S7–20–04. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Robert Tuleya, Attorney-Adviser, Jamey Basham, Branch Chief, or Jennifer Sawin, Assistant Director, at (202) 942–0719 or *IArules@sec.gov*, Office of Investment Adviser Regulation, Division of Investment Management, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0506.

SUPPLEMENTARY INFORMATION: The Commission is requesting public comment on proposed rule 202(a)(11)–2 under the Investment Advisers Act of 1940 (15 U.S.C. 80b), and on proposed rule 12g–6 under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

Table of Contents

Executive Summary

The Commission is proposing a new rule under the Investment Advisers Act of 1940 ("Advisers Act" or "Act") that would except thrifts from the Act when they provide investment advice as part of certain trust department fiduciary services. Under the rule, a thrift institution would be deemed not to be an investment adviser if its investment advisory services are provided solely in its capacity as trustee, executor, administrator, or guardian for customer accounts created and maintained for a fiduciary purpose, or to its collective trust funds excepted from the Investment Company Act of 1940 ("Investment Company Act"). The Commission is also proposing to exempt thrift institutions' collective trust funds from the registration and reporting requirements of the Securities Exchange Act of 1934 ("Exchange Act").

I. Discussion

The Advisers Act regulates the activities of certain "investment advisers," defined generally by section 202(a)(11) of the Act as persons whose regular business involves providing others with advice about securities for compensation.[1] Under the Act, investment advisers are fiduciaries who must fully disclose any material conflict that they have with their clients.[2] Advisers must register with the Commission,[3] provide their clients with an informational brochure,[4] maintain records related to their advisory activities,[5] and submit to periodic examination by our staff.[6]

Banks (and bank holding companies) are excepted from the definition of investment adviser by section 202(a)(11)(A) of the Act.[7] The Act, however, contains no exception for thrift institutions,[8] which are not "banks" as defined by the Act.[9] As a

[1] 15 U.S.C. 80b–2(a)(11). *See* Applicability of the Investment Advisers Act to Financial Planners, Pension Consultants, and Other Persons Who Provide Investment Advisory Services as a Component of Other Financial Services, Investment Advisers Act Release No. 1092 (Oct. 8, 1987) (52 FR 38400 (Oct. 16, 1987)) ("Release IA–1092").

[2] *See SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963) (an investment adviser is a fiduciary who owes his clients "an affirmative duty of 'utmost good faith, and full and fair' disclosure of all material facts") (*"Capital Gains"*).

[3] 15 U.S.C. 80b–3. Generally, following the enactment of the National Securities Markets Improvement Act of 1996 ("NSMIA") (Pub. L. No. 104–290, 110 Stat. 3428) (1996), only larger advisers that have $25 million or more of assets under management, or that advise investment companies, register with the Commission. Smaller advisers register with state securities authorities under state law. *See* section 203A of the Advisers Act (15 U.S.C. 80b–3a); Rules Implementing Amendments to the Investment Advisers Act of 1940, Investment Advisers Act Release No. 1633 (May 15, 1997) (62 FR 28112 (May 22, 1997)).

[4] 17 CFR 275.204–3.

[5] 15 U.S.C. 80b–4 and 17 CFR 275.204–2.

[6] 15 U.S.C. 80b–4.

[7] 15 U.S.C. 80b–2(a)(11)(A). Provisions of the Gramm-Leach-Bliley Act narrowed this bank exception, so that a bank is an "investment adviser" under the Advisers Act to the extent that it advises registered investment companies. Either the bank itself or a separately identifiable department or division of the bank must register as an investment adviser. The registered adviser is subject to all requirements of the Advisers Act. Pub. L. No. 106–102, 113 Stat. 1338, § 217 (1999) (codified in relevant part at 15 U.S.C. 80b–2(a)).

[8] In this release, the term "thrift institution" or "thrift" includes federal savings associations, federal savings banks, and state savings associations. *See infra* note 40.

[9] A "bank" under section 202(a)(2) of the Advisers Act (15 U.S.C. 80b–202(a)(2)) includes national banks, members of the Federal Reserve System, and other banks and trust companies having similar authority to national banks and supervised by state or federal banking agencies. We have consistently interpreted "bank" as not including savings associations, *see* Status of Savings and Loan Associations Under the Federal Securities Laws, Investment Company Act Release No. 13666 (Dec. 12, 1983) (48 FR 56061 (Dec. 19, 1983)) ("Release IC–13666"), and federal thrift regulators have acknowledged this interpretation. Fiduciary Powers of Federal Savings Associations; Community Reinvestment Act, Office of Thrift Supervision Release No. 97–68 (July 14, 1997) (62 FR 39477 (July 23, 1997)) ("Although banks are exempt from the Investment Advisers Act, Federal savings associations are not.") ("OTS Fiduciary Powers Proposing Release").

result, a thrift that manages securities portfolios or provides other types of investment advisory services for its customers in connection with its trust operations is generally subject to the Act.

The absence of a thrift exception in the Advisers Act can, we believe, be explained by historical context. When Congress enacted the Advisers Act in 1940, federal savings associations, for example, were not authorized to provide the types of services that would subject them to the Act.[10] It was not until 1980 that Congress gave federal savings associations the authority to provide trust services, including the authority to act as an investment adviser.[11] Today, thrifts may be granted trust powers similar to those of national banks.[12] Such thrift trust activities also are subject to similar regulation and supervision by the Office of Thrift Supervision ("OTS").[13] When they serve as trustees, thrifts and banks are both also subject to state trust laws.[14]

Recently, both Congress and the Commission have recognized that thrift trust powers and activities have converged with those of banks. In 1999, in the Gramm-Leach-Bliley Act, Congress amended the definition of "bank" in the Investment Company Act to include thrifts.[15] As a result, common and collective trust funds sponsored by thrifts are now excepted from the definition of "investment company" under the Investment Company Act, subject to the same limitations and conditions as bank common and collective trust funds.[16] In May of 2001, we adopted a new rule exempting thrifts from the definitions of "broker" and "dealer" under the Exchange Act, under the same terms and conditions that apply to banks.[17]

Thrift industry participants,[18] a member of Congress,[19] and the OTS[20]

[10] We use the term "federal savings association" to mean any federal savings association or federal savings bank chartered under section 5 of the Home Owners' Loan Act (12 U.S.C. 1464). *See* 12 U.S.C. 1813(b)(2). *See also* 12 U.S.C. 1462(5).

[11] The Depository Institutions Deregulation and Monetary Control Act of 1980 ("Monetary Control Act") first authorized a grant of trust powers to federal savings associations. Pub. L. No. 96–221, 94 Stat. 132 (1980) (codified in relevant part at 12 U.S.C. 1464(n)). Specifically, the Monetary Control Act authorized the Federal Home Loan Bank Board ("FHLBB"), the predecessor to the Office of Thrift Supervision ("OTS"), to grant federal savings association charters that included fiduciary powers. Pursuant to this authority, the FHLBB issued regulations in December 1980 governing federal savings associations' fiduciary activities. *Trust Powers*, Federal Home Loan Bank Board Resolution No. 80–738 (Nov. 26, 1980) (45 FR 82162 (Dec. 15, 1980)). These rules, which currently appear in Title 12, part 550 of the Code of Federal Regulations ("Part 550"), have been interpreted to apply to federal savings associations' investment advisory services. OTS Fiduciary Powers Proposing Release, *supra* note 9.

[12] *Compare* 12 U.S.C. 92a(a) (authorizing the Office of the Comptroller of the Currency ("OCC") to grant trust powers to national banks) *with* 12 U.S.C. 1464(n) (authorizing the OTS to grant trust powers to federal savings associations). *See also* S. Rep. No. 96–368, 96th Cong., 2d Sess. 13 (1979), *reprinted* in 1980 U.S.C.C.A.N. 236, 248 (stating that the Monetary Control Act permits (the OTS) the authority to grant federal savings associations the ability to offer trust services on the same basis as national banks).

Several states also have granted trust powers to state-chartered savings associations. *See* 205 Ill. Comp. Stat. Ann. 105/1–6 (permitting savings and loan associations to exercise all powers necessary to qualify as a trustee or custodian); Mich. Comp. Laws 491.506 (empowering savings associations to exercise trust powers upon application to and approval by the supervisor); N.J. Stat. Ann. 17:12B–48 (granting associations the power to apply to the commissioner for permission to act as trustee, executor, administrator, guardian); N.Y. Banking Law 380–H (McKinney) (authorizing banking board to allow savings and loan associations to have fiduciary capacity); Okla. Stat. tit. 18, § 381.54 (permitting savings and loan associations to have and exercise all such powers as conferred on federal savings associations).

[13] Federal savings associations providing trust services are subject to OTS regulations that require the proper exercise of savings association trust powers. *See generally* 12 CFR 550. In 1997, the OTS updated its fiduciary powers rules to conform them more closely to the rules issued by the Office of the Comptroller of the Currency at 12 CFR part 9. Fiduciary Powers; Community Reinvestment Act, Office of Thrift Supervision Release No. 97–129 (Dec. 19, 1997) (62 FR 67696 (Dec. 30, 1997)) ("OTS Fiduciary Powers Final Rule"). *See also* OTS Fiduciary Powers Proposing Release, *supra* note 9. The OCC itself comprehensively revised its rules governing the fiduciary powers of national banks in 1996. OTS Fiduciary Powers Proposing Release, *supra* note 9, citing 61 FR 68543 (Dec. 30, 1996). The OTS rules adopted in 1997 draw "extensively on the OCC's final rule and the comments the OCC received on its proposed rule." OTS Fiduciary Powers Proposing Release, *supra* note 9. Additional amendments made to the OTS' fiduciary powers rules in 2002 are also consistent with similar amendments adopted by the OCC. Recordkeeping and Confirmation Requirements for Securities Transactions; Fiduciary Powers of Savings Associations, Office of Thrift Supervision Release No. 2002–57 (Dec. 2, 2002) (67 FR 76293 (Dec. 12, 2002)) ("OTS Recordkeeping Rules Release").

OTS regulations provide that state-chartered savings associations should follow the standards for exercise of trust powers contained in Part 550. 12 CFR 550.10(b)(1). These regulations also state that OTS examinations staff will monitor the fiduciary activities of state-chartered savings associations and may restrict or prohibit activities that threaten the safety and soundness of a state-chartered savings association. 12 CFR 550.10(b)(2).

[14] As trustees, thrifts and banks are subject to state trust law that governs their conduct and activities. *See* George Gleason Bogert & George Taylor Bogert, The Law of Trusts and Trustees § 541, at 159 (1993). Some states have codified trust law. *E.g.*, Cal. Probate Code 16000–16082 (addressing duties of trustees); Ohio Rev. Code Ann. 2109.01–2109.68 (governing fiduciaries); 20 Pa. Cons. Stat. Ann. 7131–7136 (powers, duties and liabilities of trustees). *See also* Uniform Trust Code, Article 8 (2000) (amended 2002) (duties and powers of trustees). Federal laws and regulations governing bank and thrift trust powers refer expressly to state trust law. *See* 12 U.S.C. 92a(a) (authorizing the OCC to grant trust powers consistent with state trust laws); 12 U.S.C. 1464(n) (authorizing Director of the OTS to grant federal savings associations trust powers permitted under state law); 12 CFR 550.136 (clarifying the applicability of state law to federal savings associations); 12 CFR 550.10(b) ("state chartered savings association must conduct its fiduciary operations in accordance with applicable State law"). *See also supra* note 13.

[15] Pub. L. No. 106–102, 113 Stat. 1338, section 223 (1999) (codified in relevant part at 15 U.S.C. 80a–2(a)(5)). As amended by the Gramm-Leach-Bliley Act, section 2(a)(5) of the Investment Company Act defines a "bank" for purposes of the Investment Company Act to include any "depository institution" as that term is defined in the Federal Deposit Insurance Act. 15 U.S.C. 80a–2(a)(5). Savings associations are types of "depository institution" under the Federal Deposit Insurance Act, and are therefore "banks" for purposes of the Investment Company Act. 12 U.S.C. 1813(c).

[16] The Gramm-Leach-Bliley Act also clarified that the scope of the Investment Company Act's bank common trust fund exception is limited to common trust funds operated solely as an aid to a bank's administration of trust or other accounts maintained for a "bona fide" fiduciary purpose. *See* Pub. L. 106–102, 113 Stat. 1338, section 221 (1999) (codified in relevant part at 15 U.S.C. 80a–3(c)(3)). Previously, our staff interpreted the scope of the common trust fund exception in the same manner. *See infra* notes 46 and 53–56 (discussing the long-standing staff interpretation of the bank common trust fund exception).

[17] Definition of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks Under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934, Securities Exchange Act Release No. 44291 (May 11, 2001) (66 FR 27760 (May 18, 2001)) ("Exchange Act Release No. 44291"). Rule 15a–9 gave thrifts the same exemptions as banks from the "broker" and "dealer" definitions. 17 CFR 240.15a–9. Rule 15a–7 under the Exchange Act gave banks a temporary exemption from complying with changes made by the Gramm-Leach-Bliley Act to the Exchange Act's definitions of "broker" and "dealer." 17 CFR 240.15a–7. We have adopted final rules defining "dealer," Definition of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934, Exchange Act Release No. 47364 (Feb. 13, 2003), and have extended the temporary exemption from the definition of "broker" until November 11, 2004. Order Extending Temporary Exemption of Banks, Savings Associations, and Savings Banks from the Definition of "Broker" Under Section 3(a)(4) of the Securities Exchange Act of 1934; Notice of Intent to Amend Rules, Securities Exchange Act Release No. 47649 (April 8, 2003).

[18] Letter from Patricia R. Hatler, Senior Vice President and General Counsel, Office of General Counsel, Nationwide Insurance-Nationwide Financial, to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission (July 12, 2001); Letter from Diane M. Casey, President and Chief Executive Officer, America's Community Bankers, to Paul F. Roye, Director, Division of Investment Management, U.S. Securities and Exchange Commission (July 31, 2001). These letters are available for inspection and copying in the Commission's Public Reference Room, 450 5th Street, NW., Washington, DC (File No. S7–20–04).

[19] Letter from The Honorable Evan Bayh, United States Senator (Indiana), to Arthur Levitt, Chairman, U.S. Securities and Exchange Commission (Aug. 18, 2000). This letter is available in File No. S7–20–04.

[20] Letter from Scott L. Albinson, Managing Director, Office of Supervision, Office of Thrift Supervision, to Annette L. Nazareth, Director, Division of Market Regulation and Paul F. Roye,

Continued

P='25780'≤have called upon us to re-examine the status of thrifts under the Advisers Act. Some of these commenters have argued that, because thrift institutions have fiduciary powers similar to those of national banks and are similarly regulated, thrifts should be treated similarly to banks under the Advisers Act. These commenters have also argued that our new rule under the Exchange Act results in thrifts receiving different treatment under the Exchange Act than under the Advisers Act. Another commentator has suggested that it is inconsistent for a thrift to be subject to the Advisers Act when advising its common or collective trust funds that are excepted from the definition of "investment company" under the Investment Company Act.[21]

On the other hand, two groups of advisers have written us opposing expansion of the Advisers Act bank exception to include thrifts.[22] These groups assert that expanded relief would diminish investor protection by eliminating important safeguards that the Advisers Act provides to advisory clients, would be inconsistent with principles of functional regulation, and would create an unfair competitive advantage for thrifts that provide the same investment advisory services as other money managers and financial planners.[23]

In light of the convergence of bank and thrift trust powers and regulation, we are proposing a new rule that would provide a limited exception from the Advisers Act for thrifts. As described in more detail below, proposed new rule 202(a)(11)–2 would except thrift institutions from the Advisers Act to the extent they provide investment advice in their capacity as trustee, executor, administrator, or guardian. Under the proposed rule, the Act would continue to apply to a thrift institution to the extent the thrift provides other investment advisory services, including advising mutual funds, offering managed agency accounts,[24] or providing "retail" financial planning services. Thus, thrifts that offer advice only in the context of other fiduciary trust services would be excepted from the Advisers Act as are banks, while retail advisory services would continue to be subject to the federal securities laws much as retail brokerage services are.[25]

We are proposing this exception because we believe that the Advisers Act was not intended or designed to regulate certain advisory services provided only as part of these banking (and now thrift) trust services.[26] With respect to certain thrift trust relationships, the Advisers Act cannot be meaningfully applied because it does not work well *in those situations*.[27] The Advisers Act permits advisory clients to protect themselves when their interests conflict with those of their investment adviser. The Advisers Act does this by requiring the adviser to obtain the client's consent after giving the client full and fair disclosure of the conflict.[28] The Act implicitly presumes that the adviser has an identifiable client with identifiable interests, and that this client is competent to grant or withhold consent to conflicts that arise in the course of an advisory relationship. Thrift trust relationships, however, often involve settlors who have died, or beneficiaries who are minors or incompetents. Trust instruments may impose fiduciary obligations upon the thrift as trustee with respect to a number of beneficiaries who could be considered clients under the Advisers Act, some of whom may have competing interests, or even be unborn.[29] Trust law, and OTS regulations governing a savings association's administration of fiduciary accounts over which the savings association exercises investment discretion, address these situations in which informed consent alone may not be effective to protect the interests of trust grantors and beneficiaries. These laws and regulations typically either require transactions presenting potential conflicts to be authorized by the trust instrument or impose procedural safeguards designed to prevent the conflicts from harming the trust.[30]

Director, Division of Investment Management, U.S. Securities and Exchange Commission (Mar. 30, 2001); Letter from Ellen Seidman, Director, Office of Thrift Supervision, to Harvey L. Pitt, Chairman, U.S. Securities and Exchange Commission (Dec. 3, 2001). These letters are available in File No. S7–20–04.

[21] *See* Barry P. Barbash, "The Gramm-Leach-Bliley Act of 1999 and the Investment Management Industry: A Brave New World of Regulation," Materials for 2000 Mutual Funds and Investment Conference (Mar. 26–30, 2000), at XIII–9.

[22] Letter from David G. Tittsworth, Executive Director, Investment Counsel Association of America, to Harvey L. Pitt, Chairman, U.S. Securities and Exchange Commission (Dec. 27, 2001); Letter from Duane R. Thompson, Director of Government Relations, The Financial Planning Association, to Laura S. Unger, Acting Chairman, U.S. Securities and Exchange Commission (June 8, 2001). These letters are available in File No. S7–20–04.

[23] Letter from Duane R. Thompson, Director of Government Relations, The Financial Planning Association, to The Honorable Michael G. Oxley, Chairman, Committee on Financial Services, United States House of Representatives, The Honorable John J. LaFalce, Ranking Member, Committee on Financial Services, United States House of Representatives, The Honorable Spencer Bachus, Chairman, Subcommittee on Financial Institutions and Consumer Credit, United States House of Representatives, and The Honorable Maxine Waters, Ranking Member, Subcommittee on Financial Institutions and Consumer Credit, United States House of Representatives (Mar. 28, 2002). This letter is available in File No. S7–20–04.

[24] In a managed agency account, or investment management agency account, the thrift does not take legal title to the managed assets, as it would if it served as trustee. Instead, the thrift institution, like most investment advisers, gives investment advice to the owner of the assets, or manages those assets under power of attorney granted by the owner. An advisory account may be a managed agency account even though the managed assets are held in a trust; the trustee hires the investment adviser as agent, and is able to receive disclosure and provide client consent when needed.

[25] *See infra* note 31.

[26] We propose to adopt the rule pursuant to section 202(a)(11)(F) of the Act (15 U.S.C. 80b–2(a)(11)(F)), which gives us authority to except from the definition of "investment adviser" (and therefore from all the provisions of the Act) "such * * * persons not within the intent of this paragraph, as the Commission may designate by rules and regulations or order."

[27] We are proposing to except thrifts from the Advisers Act in circumstances where we believe Congress did not intend the Advisers Act to apply and the Act cannot meaningfully be applied. We note that these activities are subject to an alternative system of regulation under thrift regulation and trust law and subject to fiduciary duties imposed by those regulations and laws. *See generally* 12 CFR 550.10–550.620 (outlining standards applicable to the fiduciary activities of savings associations); supra notes 13 and 14. *See also OTS Trust and Asset Management Handbook*, at 110.1 (2001) (discussing responsibilities and duties owed by a fiduciary/trustee) ("OTS Trust Handbook"). We are not, however, suggesting that banking or thrift regulation generally provide protections equivalent to those afforded by the federal securities laws in other circumstances. The protections provided by the securities laws remain essential to adequately guard the interests of the investing public. *See, e.g., Concerning Financial Modernization Legislation: Hearings Before the Senate Comm. on Banking, Hous., and Urban Affairs*, 106th Cong., 1st Sess. (Feb. 24, 1999) (testimony of Arthur Levitt, Chairman, U.S. Securities and Exchange Commission). For example, the bank trust and fiduciary activities exception to the definition of "broker" in section 3(a)(4)(B)(II) of the Exchange Act makes clear that banks acting as brokers with respect to trust and fiduciary accounts by, among other things, being paid as brokers, must shift those accounts to a registered broker-dealer.

[28] Release IA–1092, *supra* note 1.

[29] For example, a life beneficiary's consent to a trustee's investment decision does not relieve the trustee of liability to the remainder beneficiaries for any defect in the decision. *See, e.g.*, Austin Scott & William Fratcher, The Law of Trusts § 216.2 (1987).

[30] As discussed earlier, under the Advisers Act an adviser must disclose to clients all material facts regarding a potential conflict of interest "so that the client can make an informed decision as to whether to enter into or continue an advisory relationship with the adviser or whether to take some action to protect himself against the specific conflict of interest involved." Release IA–1092, *supra* note 1. In comparison, the OTS has recognized that "[o]btaining the consent of all the [trust's] beneficiaries may be difficult if more than one class of remaindermen exist or if the beneficiaries are minors, unborn, or otherwise unable to give informed consent. Under applicable state law, the savings association may need to have a guardian ad litem appointed for minors, the unborn, or the incompetent and obtain an order from the appropriate court approving the transaction." OTS Thrift Bulletin 76–2 (May 15, 2001). Moreover, the OTS has stated, "[i]f a savings association pursues

We are not, however, proposing to give thrifts an unlimited exception from the Advisers Act. We adopted a broad exemption for thrifts under the Exchange Act in light of amendments to that Act that require most brokerage activities of banks to be provided through a registered broker-dealer.[31] The Advisers Act contains no similar or comparable "push out" provision. As a result, a general exception from the Advisers Act would except not only thrifts' trust department services to fiduciary purpose accounts and collective trust accounts, but would also except thrifts' regular (or "retail") advisory activities, which the Advisers Act and its rules are clearly designed to regulate.[32] Such an exception would be inconsistent with functional regulation principles.[33] A general exception would also treat thrifts that provide retail advisory services differently from other registered advisers providing the same services, thus creating regulatory disparity for the firms and for their clients. Further, a general exception could result in many integrated financial services firms moving regular advisory activities to their captive thrifts in order to escape regulation under the Act.[34]

Most significantly, a general exception would eliminate important investor protections afforded to advisory clients under the Advisers Act. For example, investment advisers must provide clients and prospective clients with an informational brochure addressing certain conflict-of-interest issues and explaining the adviser's business practices, fees, investment policies and risks, brokerage practices (such as soft dollar usage), and industry affiliations, and must disclose their policies on voting proxies.[35] Investment advisers are also restricted with respect to the content of their advertisements and the types of advisory fees they charge.[36] A broad exception would eliminate these and other measures under the Advisers Act that currently protect thrifts' retail advisory clients.[37]

We discuss the proposed rule and each of its provisions below.

A. Thrift Institutions Deemed Not To Be Investment Advisers

Proposed rule 202(a)(11)–2(a)(1) would except thrift institutions from the Advisers Act to the extent their investment advice is provided in their capacity as trustee, executor, administrator, or guardian for trusts, estates, guardianships and other accounts created and maintained for a fiduciary purpose, and they do not, except in connection with the ordinary advertising of their services as trustee, executor, administrator, or guardian for these fiduciary purpose accounts, hold themselves out generally to the public as providing investment advisory services.[38] Proposed rule 202(a)(11)–2(a)(2) would except a thrift institution from the Advisers Act to the extent its investment advice is provided to a collective trust fund maintained by the thrift institution and excepted from the definition of the term "investment company" under section 3(c)(11) of the Investment Company Act.[39] Thrifts that meet these conditions would be deemed not to be investment advisers, and thus not subject to any provisions of the Act.

1. Eligible Thrift Institutions

Proposed rule 202(a)(11)–2 would be available to savings associations that have deposits insured by the FDIC.[40] These institutions include federal savings associations, federal savings banks, and state-chartered savings associations. Federal savings associations and federal savings banks are chartered and regulated by the OTS, which also oversees and monitors FDIC-insured state-chartered savings associations.[41] The requirement that the

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an investment for a trust account for which it has [investment] discretion that presents a conflict of interest, but which applicable law authorizes, the trustee has not necessarily complied with the duty of prudence with respect to that investment." *Id.* OTS trust activities regulations generally prohibit a savings association exercising investment discretion over a fiduciary account from lending, selling or otherwise transferring fiduciary account assets if the savings association has an interest in the transaction. (12 CFR 550.350). Similarly, OTS regulations prohibit a savings association from investing funds of a discretionary fiduciary account in stock or obligations acquired from the savings association or its affiliates. (12 CFR 550.330). These regulations contain exceptions for transactions authorized by applicable law. However, applicable trust law generally contains very few exceptions permitting these types of conflict-of-interest transactions. *See, e.g.*, Bogert, *supra* note 14, at § 543; Scott, *supra* note 14, at §§ 170–170.24, 170.25.

[31] Exchange Act Release No. 44291, *supra* note 17, at 27788 ("Now that the general exception for banks has been replaced * * * it seems reasonable to afford savings associations and savings banks the same type of exemptions."). Under this new exemption, thrifts' retail brokerage activities will be subject to the same limitations as banks'.

[32] OTS regulations include these retail activities within the OTS definition of "fiduciary capacities." 12 CFR 550.30. The OTS' definition establishes the scope of Part 550, which contains the OTS' rules governing a thrift's use of powers that the OTS has specially authorized the thrift to exercise under section 5(n) of the Home Owners' Loan Act (12 U.S.C. 1464(n)) and similar powers afforded the thrift under other applicable laws. *See* 12 CFR 550.20, 12 CFR 550.130, and 12 CFR 550.580. It is necessary, however, to look beyond these designations for purposes of our analysis of federal securities law and any exemption for thrifts under the Advisers Act.

[33] In this Release, we use "functional regulation" to mean "regulation of the same functions, or activities, by the same expert regulator, regardless of the nature of the entity engaging in those activities." H.R. Rep. No. 106–74, part 3, at 106th Cong., 1st Sess. at 113–14 (1999). The Commission has consistently and strongly supported functional regulation of all participants in the securities markets so that the same rules apply to the same activities. *See Concerning Financiol Modernizotion ond H.R. 10, The Financfal Services Competition Act of 1997: Heorings Before the Subcommittee on Financial ond Hozordous Materiols, of the House of Representatives Committee on Commerce,* 105th Cong., 1st Sess. (July 17, 1997) (testimony of Arthur Levitt, Chairman, U.S. Securities and Exchange Commission). *See olso Concerning Finonciol Services Modernizotion ond H.R. 192: Heorings Before the Subcommittee on Financiol Institutions Supervision, Regulotion ond Insurance, of the House of Representotives Committee on Bonking, Finonce ond Urban Affoirs,* 102nd Cong., 1st Sess. (Feb. 28, 1991) (testimony of Richard C. Breeden, Chairman, U.S. Securities and Exchange Commission); *Concerning H.R. 1505, H.R. 6, ond H.R. 15: Hearings Before the Subcommittee on Financiol Institutions Supervision, Regulation and Insuronce, of the House of Representotives Committee on Banking, Finance and Uiban Affairs,* 102nd Cong., 1st Sess. (Apr. 30, 1991) (testimony of Richard C. Breeden, Chairman, U.S. Securities and Exchange Commission).

[34] As we discuss in section I.E. of this Release below, a number of financial services firms already operate subsidiaries with thrift charters.

[35] Rule 204–3 (15 CFR 275.204–3); Electronic Filing by Investment Advisers; Proposed Amendments to Form ADV, Investment Advisers Act Release No. 1862 (Apr. 5, 2000) (65 FR 20524 (Apr. 17, 2000)). Investment advisers must also disclose any disciplinary history to clients and prospective clients. Rule 206(4)–4 (15 CFR 275.206(4)–4). Any potential investor with questions about the disciplinary history or business of a registered investment advisor may access, free of charge, a Web-based database containing such information at *http://www.odviserinfo.sec.gov.*

[36] We have adopted a rule prohibiting a number of advertising practices. For example, an investment adviser's advertisement may not contain past specific investment recommendations unless the adviser lists all recommendations made during the previous year. Rule 206(4)–1(a)(2) (15 CFR 275.206(4)–1(a)(2)). With respect to advisory fees, Congress, out of a concern that performance-based fees would encourage undue speculation with client funds, enacted section 205 of the Advisers Act (15 U.S.C. 80b–5). Section 205 generally prohibits advisers from charging fees based on a share of the capital gains or capital appreciation of clients' funds.

[37] Advisory firm employees may also be subject to certain state testing and licensing requirements. An OTS regulation, however, asserts that state law regarding registration and licensing, apparently including investment adviser licensing requirements, is preempted with respect to thrifts' fiduciary activities. 12 CFR 550.136. *See* OTS Recordkeeping Rules Release, *supra* note 13.

[38] Proposed 202(a)(11)–2(a)(1).

[39] Proposed 202(a)(11)–2(a)(2). The rule would also cover the thrift to the extent it advises accounts whose assets are invested solely in the thrift's collective trust funds.

[40] Proposed rule 202(a)(11)–2(c). In the proposed rule, the term "thrift" covers "savings associations" as they are defined in section 3(b)(1) of the Federal Deposit Insurance Act (15 U.S.C. 1813(b)(1). Thus, "thrift" includes any federal savings association or federal savings bank chartered under 12 U.S.C. 1464, and any state savings association.

[41] The Director of the OTS is charged with examination, safe and sound operation, and regulation of "savings associations." 12 U.S.C.

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thrift be FDIC-insured is designed so that the thrifts relying on the rule will be overseen at the federal level.[42]

We request comment on the coverage of the proposed rule.

- Are any institutions excluded that should be included? Would it be useful to include state savings banks?
- Have we included any institutions that should be excluded?

2. Scope of the Rule

a. Fiduciary Purpose Accounts

Proposed rule 202(a)(11)–2(a)(1) would except a thrift institution from the Advisers Act to the extent it performs advisory services solely in its capacity as trustee, executor, administrator, or guardian for trusts, estates, guardianships and other accounts created and established for a fiduciary purpose (rather than primarily for money management), provided the thrift does not hold itself out as providing investment advisory services.[43]

We have drafted these conditions so that only thrift advisory activities that are part of certain fiduciary activities, that have been provided by banks and are now also offered by thrifts, are excepted from the Advisers Act.[44] We have drawn the conditions from the Gramm-Leach-Bliley Act's amendments to the Investment Company Act that permit thrifts to operate common trust funds excepted from the definition of "investment company" under the Investment Company Act on the same basis as banks.[45] The Gramm-Leach-Bliley amendments also clarified that the scope of this "bank common trust fund exception" is limited to common trust funds that are operated solely as an aid to a bank's administration of trusts or other accounts maintained for a "bona fide" fiduciary purpose.[46]

Proposed rule 202(a)(11)–2(a)(1) would permit a thrift institution to provide advisory services *in its capacity as trustee, executor, administrator,*[47] *or guardian for the customer account receiving the advice, without being subject to the Act.*[48] These are the same capacities in which a thrift must hold assets to place them in a common trust fund that is excepted from the definition of "investment company" under the Investment Company Act. In each case, the account advised by the thrift must be established and maintained *for a fiduciary purpose.*[49] This is the same requirement that a thrift must meet for each customer account included in a common trust fund excepted from the Investment Company Act.[50]

To meet the "fiduciary purpose" requirement, the customer account must be established and maintained for an underlying fiduciary reason. A customer account established primarily for money management reasons lacks an underlying fiduciary purpose and cannot meet this requirement.[51] Thus, "fiduciary purpose accounts" would include those established in connection with estate planning, conservatorships and guardianships,[52] and those established for minors under the Uniform Gifts to Minors Act ("UGMA").[53] Accounts established primarily for money management, custodial or administrative purposes, *e.g.*, managed agency accounts,[54] individual retirement account (IRA) trusts,[55] indenture trusts, college

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1463(a). For those purposes, "savings association" means a savings association, as defined in section 3 of the Federal Deposit Insurance Act, whose deposits are insured by the FDIC. 12 U.S.C. 1462(4). As OTS-chartered savings associations, all federal savings associations and federal savings banks must be FDIC-insured. *See* 12 CFR 543.2(g)(2)(i) and 12 CFR 552.2–1(b)(3)(i).

[42] We expect that nearly all state savings associations would meet this condition of the proposed rule.

Proposed rule 202(a)(11)–2 would not be available to thrifts operated for the purpose of evading the provisions of the Advisers Act. Proposed rule 202(a)(11)–2(c). This limitation is similar to section 208(d) of the Act, which makes it unlawful to do indirectly what one may not do directly. 15 U.S.C. 80b–8(d).

[43] Proposed rule 202(a)(11)–2(a)(1).

[44] The line we would draw in the proposed rule is similar to that suggested in an article by a former senior official at the OCC. Our proposed rule would except thrift trust department activities that the article describes as having "no real counterpart" in the securities business, while activities that are (or are very similar to activities that are) also performed by securities firms would remain subject to the Advisers Act. Dean Miller, *The Supervision of Bank Asset Management Activities*, Trusts & Estates, Mar. 1, 2000.

[45] *See supra* notes—and accompanying text.

[46] As amended by the Gramm-Leach-Bliley Act, section 3(c)(3) excepts from the definition of "investment company" any common trust fund maintained by a bank exclusively for the collective investment of commingled trust assets held by the bank in its capacity as trustee, executor, administrator, or guardian "if—

(A) such fund is employed by the bank solely as an aid to the administration of trusts, estates, or other accounts created and maintained for a fiduciary purpose;

(B) except in connection with the ordinary advertising of the bank's fiduciary services, interests in such fund are not—

(i) advertised; or

(ii) offered for sale to the general public; and

(C) fees and expenses charged by such fund are not in contravention of fiduciary principles established under applicable Federal or State law." 15 U.S.C. 80a–3(c)(3).

Before it was amended by the Gramm-Leach-Bliley Act, section 3(c)(3) of the Investment Company Act excepted from the definition of "investment company" any common trust fund maintained by a bank exclusively for the collective investment of commingled trust assets held by the bank in its capacity as trustee, executor, administrator, or guardian. The staff of the Commission has long interpreted the scope of this exception to be limited to common trust funds that are operated solely as an aid to a bank's administration of trusts or other accounts maintained for a "bona fide" fiduciary purpose, and the staff has issued a number of interpretive letters explaining the types of accounts that have, or lack, a fiduciary purpose. *See infra* notes 53–56. Congress amended section 3(c)(3) in the Gramm-Leach-Bliley Act to codify this long-standing position. H.R. Rep. 106–74 (Pt. 3), 106th Cong., 1st Sess. 182 (1999).

[47] The OTS Trust Handbook explains that "(t)he person or entity named to settle an estate by the decedent's will is commonly referred to as the 'executor' of the decedent's estate. The person or entity named to settle an estate where no will exists is commonly referred to as the 'administrator' of the decedent's estate. Financial institutions are often appointed in these capacities." OTS Trust Handbook, *supra* note , at 100.2.

[48] Thrifts that serve trust accounts solely in other capacities would not qualify for the exception. For example, a thrift that is not the trustee for a trust, but is engaged by the trustee as custodian for the trust, could not also provide investment advice to that trust and still rely on the rule.

[49] A note to the proposed rule clarifies that the "fiduciary purpose" requirement applies to each account to which the thrift provides investment advisory services, whether that account takes the form of a trust, an estate, a guardianship or another type of account.

[50] Not all trust department accounts, or even all trusts, necessarily have a fiduciary purpose. Whether a customer establishes a trust, or other account, for a fiduciary purpose depends not only on the terms of the trust instrument (or other documents setting up the account), but also on other facts and circumstances concerning the creation and use of the account. *Cf. United Missouri Bank of Kansas City, N.A.*, SEC Staff No-Action Letter (Dec. 31, 1981) (citing 26 Fed. Reserve Bull. 394 (1940), in which the Federal Reserve Board expressed views that formed the original basis for the Investment Company Act common trust fund exception).

[51] Whether the customer account has a fiduciary *purpose* is distinct from whether the thrift acts in a fiduciary *capacity* with respect to the account. All investment advisers act in a fiduciary capacity for their clients and therefore owe fiduciary duties to their clients, *see Capital Gains, supra* note 2, but the fiduciary obligations of the adviser do not mean that the client's portfolio was established for a fiduciary purpose.

[52] Section 3(c)(3) of the Investment Company Act refers to "trusts, estates, or other accounts created and maintained for a fiduciary purpose" but does not expressly mention guardianships. 15 U.S.C. 80a–3(c)(3). To provide further clarification to thrifts, proposed rule 202(a)(11)–2(a)(1) specifically refers to guardianships.

[53] The Commission's staff has provided clarification, through no-action letters, as to the fiduciary purposes that qualify an account to be pooled under the common trust fund exception in section 3(c)(3) of the Investment Company Act. *See e.g., Commercial Bank*, SEC Staff No-Action Letter (Feb. 24, 1988) (traditional estate planning); *Texas Commerce Bank Nat'l Association*, SEC Staff No-Action Letter (Jan. 26, 1978) (UGMA).

[54] A managed agency account would not be included under the proposed exception even if the underlying assets are held in a trust established for a fiduciary purpose. The thrift, like most other investment advisers that manage trusts' assets, would be acting as agent rather than as trustee, executor, administrator or guardian.

[55] The common trust fund exception in section 3(c)(3) of the Investment Company Act is unavailable to common trust funds holding IRA assets because such assets are not held "for a fiduciary purpose." Exchange Act Release No.

savings trusts, ERISA trusts, "rabbi" trusts, and most revocable inter-vivos trusts, would not be included under rule 202(a)(11)–2(a)(1).[56]

A thrift institution relying on proposed rule 202(a)(11)–2(a)(1) could not hold itself out generally to the public as providing investment advisory services. Advertising or otherwise holding itself out as providing investment advice, portfolio management services, or financial planning would not be consistent with the proposed rule's requirement that the thrift's advisory services be solely in its capacity as trustee, executor, administrator, or guardian. Under the proposed rule, however, a thrift institution could publicize its investment advisory services in connection with the ordinary advertising of its services as trustee, executor, administrator, or guardian to fiduciary purpose accounts.[57]

We request comment on the scope of this proposed exception.

- With respect to trust accounts, should we be guided by revised section 3(c)(3) of the Investment Company Act? We request that commenters disagreeing with our approach provide alternatives.
- Are the rule's limitations clear? If not, we urge commenters to suggest additional guidance that we could provide to clarify the "fiduciary purpose" requirement. We specifically request comments on whether there are fiduciary roles that thrifts typically play, other than acting as trustee, executor, administrator, or guardian, that have no real counterpart in regular investment advisory firms, but that would require the thrift to provide investment advisory services.
- Should the rule permit thrifts to advise managed agency accounts that have a fiduciary purpose without being subject to the Act? Trustees of fiduciary purpose accounts often hire a thrift or other registered investment adviser, as an agent, to manage the trust's assets, and the adviser treats the trustee as its client for purposes of disclosure and consent. Should thrifts be exempt with respect to fiduciary purpose accounts for which they act as agent, but not as trustee, executor, administrator or guardian?
- We also ask that commenters who oppose the exception or who believe it to be too broad suggest appropriate means for thrifts to comply with the Advisers Act when acting as both adviser and trustee for the types of fiduciary accounts that would meet the requirements of the proposed rule. For example, to whom should the thrift send its informational brochure or other disclosure when it acts as guardian for an incompetent, or as trustee under a testamentary trust that benefits minor children?

b. Collective Trust Fund Accounts

Proposed rule 202(a)(11)–2(a)(2) would except a thrift institution from the Advisers Act to the extent it provides investment advisory services to its collective trust funds that are excepted from the definition of "investment company" under the Investment Company Act. Collective trust funds allow a bank or thrift to manage the assets of tax-qualified pension and profit sharing plans on a pooled basis without creating an "investment company."[58] The Investment Company Act has excepted banks' collective trust funds from the definition of "investment company" since 1970,[59] and in the Gramm-Leach-Bliley Act Congress extended this exception to collective trust funds maintained by thrifts.

Consistent with Congress' extension of the Investment Company Act collective trust fund exception, we are proposing to except thrifts from the Advisers Act to the extent they provide investment advice to their collective trust funds excepted from the definition of "investment company."[60] In addition, our proposed rule would except a thrift from the Advisers Act with respect to accounts invested solely in one or more of the thrift's sponsored collective trust funds.

- Should we be guided by Congress' decision to exempt thrift-sponsored collective trust funds from the Investment Company Act?
- Should thrifts also be excepted from the Advisers Act with respect to the separate accounts of employee benefit plans whose assets are pooled in the collective trust account?

B. Thrift Institutions Registered Under the Act

Many thrifts may be required to maintain their existing registrations as investment advisers under the Act, even if we adopt the rule that we are today proposing, because of the scope of their advisory business or marketing activities. For these registered thrifts, our proposed rule includes a paragraph clarifying that we would not necessarily apply the Act to all of the thrift's customer relationships. Under the rule, so long as the thrift makes the undertaking described below, the Advisers Act would apply to the thrift institution only with respect to those customer accounts for which the thrift provides advisory services that subject it to the Act.[61] For example, the Advisers Act would apply to the thrift institution when it advises managed agency accounts or IRA trusts, but may not apply to the same thrift when it serves as trustee to a testamentary trust.

To qualify for this provision of proposed rule 202(a)(11)–2, a thrift

44291, *supra* note 17, at note 85. Some banks have suggested to our Division of Investment Management that, based on a letter from that Division, their common trust funds should be permitted to hold IRA assets and qualify for the exception. *See Continental Bank*, SEC Staff No-Action Letter (Sep. 2, 1982). The amendments to section 3(c)(3) effected by the Gramm-Leach-Bliley Act, however, codify our longstanding interpretation that a bank common trust fund cannot qualify for the exception if it holds assets of accounts that lack fiduciary purpose, including IRAs. *See Concerning H.R. 1505, H.R. 6, and H.R. 15: Hearings Before the Subcommittee on Financial Institutions Supervision, Regulation and Insurance, of the House of Representatives Committee on Banking, Finance and Urban Affairs*, 102nd Cong., 1st Sess. (Apr. 30, 1991) (testimony of Richard C. Breeden, Chairman, U.S. Securities and Exchange Commission). *Cf. Santo Barbaro Bank & Trust, supra* note 46 (stating that the Commission and its staff have determined that the exception is not available for common trust funds holding assets of IRAs).

[56] The staff has issued letters explaining that "rabbi" trusts are not created for a fiduciary purpose, since they are a means for an employer to provide deferred compensation to top executives. *See e.g., Boatmen's Bancshares, Inc.*, SEC Staff No-Action Letter (Aug. 17, 1994). The staff has also issued guidance that revocable inter vivos trusts generally do not have a fiduciary purpose because grantors of these trusts usually retain so much control over the trust that it appears to be merely a vehicle for money management. However, a trust that can show that it has a true fiduciary purpose can rebut this presumption. *See, e.g., First Jersey National Bank*, SEC Staff No-Action Letter (Nov. 13, 1987); *Provident National Bank Middle Market Trust Program*, SEC Staff No-Action Letter (Feb. 17, 1982); *Genesee Merchants Bank and Trust*, SEC Staff No-Action Letter (Jan. 8, 1979).

[57] Therefore, except to the extent that a federal thrift relying on the proposed rule is advertising the services it provides to such fiduciary purpose accounts, it may not publicly represent itself as an investment adviser or as providing investment advisory services. The proposed limitation on advertising again parallels Congress' revisions, in the Gramm-Leach-Bliley Act, to section 3(c)(3) of the Investment Company Act. *See supra* note 46.

[58] Thrift-sponsored collective trust funds are excepted from the definition of the term "investment company" under section 3(c)(11) of the Investment Company Act. 15 U.S.C. 80a–3(c)(11).

[59] Investment Company Amendments Act of 1970, Pub. L. No. 91–547, section 3(b)(5), 84 Stat. 1415.

[60] We are also proposing a conforming rule under the Exchange Act, to exempt thrift-sponsored collective trust funds from the requirements of section 12 of that Act. *See* Section I.D. of this Release, *infra*.

[61] Proposed rule 202(a)(11)–2(b). This is the same approach we have taken in applying the Act to firms registered under both the Exchange Act (as a broker) and the Advisers Act (as an adviser), and that we have proposed to codify in a rule. Certain Broker-Dealers Deemed Not To Be Investment Advisers, Advisers Act Release No. 1845 (Nov. 4, 1999) [64 FR 61226 (Nov 10, 1999)] ("Advisers Act Broker-Dealer Proposal").

institution registered with us as an adviser would be required to confirm that it will provide us with access to all of its trust department records.[62] Under section 204 of the Advisers Act, all records of any investment adviser, including a thrift institution that provides advisory services, are already subject to examination by Commission representatives.[63] Continued access to these records will permit us to determine whether the thrift institution has defrauded advisory clients, for example, by failing to disclose misallocations of initial public offerings or other trades in favor of other trust department clients.[64] These records are considered examination records, and thus receive the confidentiality available under section 210(b) of the Advisers Act.[65]

C. Amendment To Form ADV

We are proposing minor amendments to Form ADV and its instructions to identify those registered investment advisers that are thrift institutions.[66] Form ADV, the investment adviser registration form, currently asks whether the adviser is actively engaged in business as a bank.[67] We propose to amend the Form also to ask whether the adviser is actively engaged in business as a thrift institution. We believe this information would be necessary to allow us to enforce the conditions of proposed rule 202(a)(11)–2(b), if adopted.

D. Exemption Under Securities Exchange Act

We are proposing new rule 12g–6 under the Exchange Act, to exempt thrift-sponsored collective trust funds from the registration and reporting requirements of the Exchange Act. As discussed above, the Gramm-Leach-Bliley Act amended the Investment Company Act to exempt thrift-sponsored common trust funds and thrift-sponsored collective trust funds from the definition of "investment company." Like bank common trust funds, thrift-sponsored common trust funds are exempt from the Exchange Act.[68] However, the provision exempting bank collective trust funds from the Exchange Act does not extend to thrifts.[69] We believe that exempting thrifts' collective trust funds from the Exchange Act is consistent with Congress' determination in the Gramm-Leach-Bliley Act to exempt those collective trust funds from the Investment Company Act. We request comment on the scope of this proposed exemption.

E. Effects on Competition

Based on our general understanding of the types of clients served by the trust departments of thrift institutions, we believe the proposed rule would have the effect of eliminating certain regulatory disparities between banks and thrifts that carry on a fiduciary trust business, without creating new regulatory disparities between thrifts and regular investment advisory firms. We are requesting comment on our understanding of the thrift industry in this regard.

There are approximately 932 insured savings associations in operation. Of these, only 117 savings associations were authorized to establish trust departments, and even fewer—98—filed regulatory reports indicating that they administer any assets pursuant to their trust powers.[70] We estimate that approximately 34 savings associations are registered with us as investment advisers.[71]

Nineteen of the savings associations registered with us as investment advisers are part of national or regional securities or insurance firm complexes in which a number of different types of regulated firms carry out various roles in order to provide a broad selection of financial services and products. With limited exception, the savings associations in these large firms do not appear to engage in any appreciable lending or deposit-taking.[72] Eight of these large firms appear to use their savings associations predominantly to provide services to clients seeking agency accounts or employee benefit trust accounts such as IRAs or ERISA plan accounts, which, under the proposed rule, would not have a fiduciary purpose.[73] Eleven of these large firms may be using, to varying extents, their savings associations to provide fiduciary services to clients in connection with trusts, estates, guardianships and other accounts created and maintained for a fiduciary purpose.[74] However, total trust assets reported by the former group far exceeds that of the latter.[75]

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[62] The thrift would effect this through an undertaking in its Form ADV (Schedule D, Miscellaneous Section). The undertaking need not be complex; it could state simply that the thrift undertakes to provide the Commission with access to all trust department records.

[63] Section 204 of the Advisers Act (15 U.S.C. 80b–4) applies to all investment advisers using interstate commerce in connection with their business, other than advisers specifically exempted from registration pursuant to section 203(b) (15 U.S.C. 80b–3(b).

[64] See *In the Matter of F.W. Thompson*, Investment Advisers Act Release No. 1895, 73 S.E.C. Docket 486 (Sept. 7, 2000) (adviser failed to disclose inequitable method of allocating IPO shares, which disproportionately favored certain clients to the detriment of others); *In the Matter of McKenzie Walker Investment Management, Inc. and Richard C. McKenzie, Jr.*, Investment Advisers Act Release No. 1571, 62 S.E.C. Docket 1010 (July 16, 1996) (adviser unlawfully failed to disclose its practice of favorably allocating IPO and other equity trades to performance-fee paying clients over its other clients).

[65] 15 U.S.C. 80b–10(b).

[66] 17 CFR 279.1.

[67] Item 6.A(6) of Part 1A of Form ADV.

[68] Section 3(a)(12)(A)(iii) of the Exchange Act [15 U.S.C. 78c(a)(12)(A)(iii)].

[69] Section 3(a)(12)(A)(iv) of the Exchange Act [15 U.S.C. 78c(a)(12)(A)(iv)].

[70] These estimates are as of September 30, 2003. We base them on our staff's review of data on all U.S. insured depository institutions, maintained by the Federal Deposit Insurance Corporation (FDIC) and made available at *http://www2.fdic.gov/idasp/main* (visited Jan. 23, 2004) and *http://www2.fdic.gov/sdirpt_Financial.asp* (visited Jan. 26, 2004).

[71] We base this estimate on our staff's review of our adviser registration records to find any of the names of the 117 savings associations identified by FDIC data as having trust powers (at *http://www2.fdic.gov/idasp/main* (visited Jan. 23, 2004)). We cannot precisely determine the number of thrifts registered with us because we do not currently require registered investment advisers to indicate on Form ADV whether they possess a thrift charter. We infer that the remaining 64 savings associations are not registered with us because they are ineligible to do so, as provided by section 203A(a) of the Advisers Act (15 U.S.C. 80b–3A(a)). Section 203A(a) generally prohibits an investment adviser from registering with the Commission unless the adviser is providing continuous and regular supervisory or management services for at least $25 million of client assets or advises a registered investment company.

[72] Our staff reviewed asset and liability data for all 34 savings associations. The data were reported by these savings associations in their September 30, 2003 Thrift Financial Reports (TFRs), and summarized at *http://www2.fdic.gov/idasp/rpt_financial.asp* (visited Jan. 27, 2004). Of the 19 savings associations that are part of large firms, 15 reported only nominal lending or deposit-taking activity. Three others reported lending activity, but only two reported loan assets that exceeded trust assets, whereas loan assets for the other one were small in relation to its trust assets. The one remaining savings association in the group reported no lending activity and deposits equaling approximately 11% of trust assets, comprised mainly of uninsured jumbo deposits.

[73] Our staff reviewed trust department data for all 34 savings associations. The data were reported by these savings associations in their September 30, 2003 TFRs (available at *http://www2.fdic.gov/call_tfr_rpts/?catNumber=74* (visited Jan. 27, 2004)).

[74] The TFR contains a separate category for personal trust accounts, but it does not require the institution to report fiduciary-purpose trust accounts separately from other personal trust accounts. For purposes of this analysis, our staff treated all managed personal trust accounts as fiduciary accounts, although this approach likely overestimates the number of fiduciary accounts. For five of these eleven savings associations, the total reported assets for managed personal trust accounts was approximately 25% to 45% of the total trust assets reported by the savings association, and was approximately 50% or more for the other six savings associations in this group of eleven. In comparison, the same figures for the group of eight large firms that focus primarily on non-fiduciary accounts ranged from less than 1% to 16%.

[75] The eight large firms that focus primarily on non-fiduciary accounts reported trust assets totaling approximately $97.4 billion, whereas the eleven

The other 15 savings associations registered with us appear to function as depository institutions, focused primarily on lending and deposit-taking, and are not business units of national or regional securities or insurance firms.[76] Four of these depository-institution savings associations appear to use their trust departments predominantly to provide services to clients seeking agency accounts and employee benefit trust accounts such as IRAs or ERISA plan accounts, which, under the proposed rule, would not have a fiduciary purpose.[77] The remaining 11 of these depository-institution savings associations may be using, to varying extents, their trust departments to provide fiduciary services to clients in connection with trusts, estates, guardianships and other accounts created and maintained for a fiduciary purpose.[78] Total trust assets reported by the 11 depository institution savings associations providing a greater proportion of fiduciary account services far exceed the total trust assets reported by the four focusing on non-fiduciary accounts.[79]

The above data lead us to infer that, for the savings associations registered with us that use a lending and deposit-taking business model in competition with banks, the savings associations with the majority of the trust business may be holding significant proportions of their total trust assets in fiduciary purpose accounts. By excepting thrift institutions from the Advisers Act to the extent they provide investment advice in their capacity as trustee, executor, administrator, or guardian for accounts with an underlying fiduciary purpose, proposed rule 202(a)(11)–2 will eliminate an existing regulatory disparity between banks and these savings associations. In addition, it is our understanding that the category of thrift customer relationships that the proposed rule would affect—that is, fiduciary purpose trust customers—is not commonly served by regular investment advisory firms. Thus, the proposed rule will not create regulatory disparities between thrifts and regular investment advisory firms.

On the other hand, the above data also lead us to infer that the vast majority of trust business conducted by all the savings associations registered with us is carried on by savings associations that are part of securities and insurance firms, that do not use a lending and deposit-taking business model in competition with banks, and that do not hold significant proportions of their trust assets in fiduciary purpose accounts. Thus, a blanket exception for thrifts from the Advisers Act would be likely to create a new regulatory disparity between the majority of savings associations engaged in significant levels of advisory activity and the regular investment advisory firms with which they currently compete. Regular investment advisory firms would continue to be subject to the investor protection requirements under the Advisers Act, whereas savings associations that are part of large firms holding the dominant share of trust department assets (as discussed above) would be exempted from the same investor protection requirements, notwithstanding that they all appear to service the same types of clients.[80]

The proposed rule would not alter whatever competitive effects are caused by the existing regulatory disparity between savings associations that are part of large firms and banks. However, the existence and extent of any competitive effects is dependent upon other factors as well. For example, there may be few or no competitive effects if banks are not presently seeking to provide the same types of retail investment advisory services as are being provided by these savings associations. Even if banks are providing the same types of retail investment advisory services, there may be no competitive effects if banks seek to provide these services primarily to their depository institution customer base as an accommodation.[81] This issue also raises a question as to whether the existing regulatory disparities are truly between banks and thrifts, or can more accurately be described as being between banks and the financial services complexes of which the thrifts are part.

We request comment on the following questions:

- Is our understanding of the nature and scope of investment advisory services provided by various types of thrifts correct?
- How many of these thrifts compete with banks for the same type of client?
- Do regular investment advisory firms compete, to any appreciable degree, with thrifts for fiduciary-purpose trust clients?

II. General Request for Comment

Any interested persons wishing to submit written comments on the proposed rules that are the subject of this release, or to suggest additional changes or submit comments on other matters that might have an effect on the proposal described above, are requested to do so. Commenters suggesting alternative approaches are encouraged to submit proposed rule text.

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, the Commission also is requesting information regarding the potential impact of the proposed rule on the economy on an annual basis. Commenters should provide empirical data to support their views.

III. Cost-Benefit Analysis

A. Background

Under proposed rule 202(a)(11)–2, certain thrifts would be deemed not to be "investment advisers" as defined in the Advisers Act when they render investment advice solely in their capacity as trustee, executor,

firms that provide services to a greater proportion of fiduciary accounts reported trust assets totaling only $8.5 billion.

[76] One of these depository-institution savings associations reports loan assets in excess of $15 billion on its September 30, 2003 TFR and is part of a world-wide financial holding company. Seven others appear to be regional institutions, reporting loan assets in the range of approximately $1.4 billion to $10.8 billion on their September 30, 2003 TFR. Two others, reporting loan assets of approximately $380 million and $140 million respectively, are affiliated with regional financial holding companies. The remaining five depository-institution savings associations are smaller, reporting approximately $78 million to $650 million in loan assets.

[77] Each of these four savings associations reported that less than 15% of its total trust assets were held in managed personal trust accounts.

[78] Five of these eleven savings associations each reported that approximately 20% to 25% of its total trust assets were held in managed personal trust accounts. The remaining six savings associations each reported that approximately 35% to 85% of its total trust assets were held in managed personal trust accounts.

[79] The 11 depository-institution savings associations that provide fiduciary accounts reported trust assets totaling approximately $13.1 billion, whereas the four depository-institution savings associations that focus primarily on non-fiduciary accounts reported trust assets totaling approximately $940 million.

[80] It appears unlikely that our proposed exemption for thrifts that hold trust assets in collective trust funds will create any competitive disparity for regular investment advisory firms. Our staff's review of TFR data shows that, at most, one or two of the 34 savings associations registered with us may presently be using collective trust funds. In addition, few of these thrifts managed employee benefit plan assets eligible for inclusion in a collective trust fund. Such assets reported by all 34 savings associations totaled approximately one percent of the aggregate trust assets administered by these savings associations. Only three, smaller savings associations out of the 34 registrants reported sizeable proportional holdings of these trust assets, in the range of 55%–65%. Four other savings associations out of the 34 registrants reported proportional holdings of these assets in the range of 10% to 12%, whereas the remaining 27 reported nothing more than nominal holdings.

[81] In addition, any particular bank that also provides investment advice to a registered investment company—such as the bank's proprietary mutual funds—is now required to register under the Advisers Act on account of that activity. *See supra* note 7.

administrator, or guardian to customer accounts created and maintained for a fiduciary purpose, or when they advise collective trust funds they maintain under an exemption from the Investment Company Act.

The Commission is sensitive to the costs and benefits of its rules. We estimate that the proposed amendments may result in benefits to certain thrifts in the form of reduced regulatory compliance costs. As we discussed above, we estimate that approximately 34 thrifts are currently registered with us as investment advisers and incurring compliance costs that would be partially reduced by the proposed rule.[82] The extent of these cost reductions would depend on whether these thrifts continue using their trust departments primarily to provide retail investment advisory services.[83] Other thrifts that wish to begin operating trust departments under a business model that focuses exclusively on activities that would be covered by the proposed rule would obtain the benefit of complete avoidance of these compliance costs. We believe all these benefits can be obtained without imposing any significant costs on thrifts or investors.

B. Benefits

1. Complete Avoidance of Registration and Compliance Costs

To the extent their trust department activities fit within the activities identified in the proposed rule, thrifts will benefit in the form of saved costs they would otherwise expend in connection with Advisers Act compliance. Based on our staff's review of regulatory reports filed by SEC-registered thrifts describing their trust department activities, it appears that few, if any, currently engage exclusively in the type of fiduciary-purpose activities that would be exempted by proposed rule 202(a)(11)–(2)(a)(1). All but one or two of the 34 savings associations currently registered with us as investment advisers report to the OTS that some or all of their trust assets are held in connection with non-fiduciary agency accounts or non-fiduciary employee benefit trust accounts such as IRAs or participant-directed 401(k) plans.[84] Thrift institutions operating under proposed rule 202(a)(11)–2(a)(2) could also save compliance costs associated with trust assets they manage for certain employee benefit plans through collective trust funds. They could also save the costs of registration and reporting required under the Exchange Act for those collective trust funds, under our proposed rule 12g–6 under the Exchange Act. However, it appears that few, if any, of the 34 currently-registered thrifts use collective trust funds. Moreover, few of them manage more than a nominal amount of employee benefit plan assets that would be eligible for inclusion in a collective trust fund.[85]

Benefits under proposed rule 202(a)(11)–2(a)(1) and (2) would be greater for thrifts that choose to operate their trust departments under a business model that focused exclusively on the types of accounts excepted under the proposed rule. Based on our staff's discussions with thrift industry representatives, we believe certain thrifts wish to establish or expand trust department operations using this business model, but we do not have sufficient information to estimate the number or size of such thrifts. These thrifts would be excepted from the requirement to file their registration statement on Form ADV and to pay filing fees to the operator of the IARD system that range from $800 to $1,100 initially and $400 to $550 annually.[86] For Paperwork Reduction Act ("PRA") purposes, the Commission further estimates that the burden of completing and filing Form ADV for a new registrant is approximately 22 hours, and approximately 1.13 additional hours each year for annual amendments.[87] These thrifts would also save the cost of staff time expended in responding to questions and supplying records requested by our examiners during periodic exams.

Additionally, thrifts that operated under a business model that focuses exclusively on accounts exempted under the proposed rule would save costs associated with establishing and maintaining internal procedures and systems for complying with the Advisers Act and the rules under the Advisers Act. In connection with adopting our recent rules concerning investment adviser compliance programs, we estimated for Paperwork Reduction Act purposes that the average annual burden of these compliance programs is 80 hours.[88] However, given the systems and records these thrifts would still be required to maintain to comply with OTS requirements governing trust department activities, it is difficult to estimate whether these thrifts would obtain any marginal cost or burden decrease.

2. Partial Avoidance of Costs

For most of the 34 thrifts currently registered with us, the proposed rule offers benefits in the form of saved compliance costs for that portion of their operations that manages trust assets held in fiduciary-purpose trust accounts. The proposed rule would include a paragraph clarifying that a thrift's obligations under the Advisers Act extend only to those customer accounts for which the thrift provides advisory services that subject it to the Act.[89]

Our staff has reviewed the trust department activities of the thrifts currently registered with us as investment advisers to identify the proportion of assets and accounts that may have lower compliance costs because they qualify for the proposed exception. The proportion of potentially-exempt assets in each thrift appears to vary across a range, from approximately 0.5 to 15 percent for 12

[82] We estimate that approximately 34 savings associations have registered with us as investment advisers, based on our staff's review of SEC-registered investment advisers whose names identify them as savings associations. *See supra* note 71.

[83] Our staff reviewed data from savings associations that are registered with us as investment advisers that they reported in their September 30, 2003 Thrift Financial Reports (TFRs). A few of the 34 savings associations held all or nearly all their trust assets in personal trust accounts, but most of the 34 savings associations held most of their trust assets, or significant portions of them, in other types of accounts that would not meet the requirements of the proposed rule. More than half of the 34 savings associations were part of national or regional securities or insurance complexes. *See supra* notes 73, 74, 77, and 78.

[84] *See supra* notes 73, 74, 77, and 78.

[85] Based on our staff's review of September 30, 2003 TFR data, employee benefit plan assets that may be eligible for inclusion in a collective trust fund totaled less than one percent of the aggregate trust assets administered by the 34 savings associations currently registered with us. Only three smaller savings associations out of the 34 registrants reported sizeable proportional holdings of these trust assets, in the range of 55%–65%. Four other savings associations out of the 34 registrants reported proportional holdings of these assets in the range of 10% to 12%, whereas the remaining 27 reported nothing more than nominal holdings. *See supra* note 80.

[86] Registered advisers with assets under management of more than $100 million must pay an initial set-up fee of $1,100 and an annual updating fee of $550. Advisers with assets under management of $25 million to $100 million must pay an initial set-up fee of $800 and an annual updating fee of $400. Other advisers, with assets under management of less than $25 million, must pay an initial set-up fee of $150 and an annual updating fee of $100. *See* Investment Advisers Act Release No. 1888 (July 28, 2000) (65 FR 47807 (Aug. 3, 2000)) ("Advisers Act Release No. 1888").

[87] The Commission has previously estimated a burden of approximately 0.75 hours per adviser per amendment filed on IARD. Currently registered advisers are estimated to amend their Form ADV, on average, 1.5 times per year. *See* Advisers Act Release No. 1888.

[88] Compliance Programs of Investment Companies and Investment Advisers, Investment Advisers Act Release No. 2204 (Dec. 17, 2003) [68 FR 74714 (Dec. 24, 2003)].

[89] Proposed rule 202(a)(11)–2(b). *See supra* Section I.B. of this Release.

of the thrifts at the low end, up to 50 to 100 percent for nine thrifts at the high end.[90] For the group, we estimate trust assets that may qualify for the fiduciary-purpose exception total approximately $17.5 billion, or approximately 15% of the $119 billion in total trust assets reported by the group.[91] For the exempt accounts containing these assets, these thrifts would save the cost of making client disclosures required under the Advisers Act.[92] These thrifts would also save the costs associated with other requirements under the Act and its rules relating to matters such as recordkeeping, custody, proxy voting on behalf of customers, and the like. While we use the percentage of a thrift trust department's assets held in potentially fiduciary-purpose accounts to describe, in relative terms, the proportion of these thrifts' exempt activities, their relative cost savings would not necessarily vary by the same proportions. For a given amount of trust assets, a savings association's compliance costs may vary depending on the number of clients, their investment objectives, the type and turnover rate of the assets, the savings association's other securities activities, or even the personal activities of its trust department employees.

3. Competitive Effect Costs

The proposed rule would also benefit some of the 34 thrifts registered with us by eliminating certain regulatory disparities between banks and thrifts that carry on a fiduciary-purpose trust business covered by the proposed rule. This benefit is difficult to quantify. Other parties interested in this issue have suggested these regulatory disparities can be eliminated only by giving thrifts a blanket exemption from the Advisers Act.[93] However, our review of registered thrifts shows this is unnecessary and would primarily create new regulatory disparities benefiting thrifts competing with other securities firms for retail advisory business.

As discussed above, our staff has reviewed the trust department activities of the thrifts currently registered with us as investment advisers. Based on this review, we infer that the vast majority of the trust activities conducted by thrifts, overall, are conducted by thrifts that are part of securities and insurance firms, that do not use a lending and deposit-taking business model in competition with banks, and that do not hold significant proportions of their trust assets in fiduciary purpose accounts. The following table summarizes these firms by business model:[94]

Category of thrift institution	Aggregate trust assets held by thrifts in the category (in billions)	Number of thrift institutions in category
Thrift Arms of Securities or Insurance Firms Using Retail Advisory Model	$97.4	8
Thrift Arms of Securities or Insurance Firms with Significant Fiduciary-Purpose Accounts	8.5	11
Deposit-and-Lending Thrifts Using Retail Advisory Model	0.9	4
Deposit-and-Lending Thrifts with Significant Fiduciary-Purpose Accounts	13.1	11

This table shows that 15 of the 34 SEC-registered thrifts engage in a deposit-taking and lending business model in competition with banks. Eleven of these thrifts that compete with banks may be holding significant portions of their trust assets in fiduciary-purpose accounts, and the proposed rule would eliminate an existing regulatory disparity between these thrifts and banks. However, most of the trust business carried on by the 34 SEC-registered thrifts is being conducted by 8 thrifts using the retail advisory model that are part of a securities or insurance complex. Creating a blanket exception would create a new regulatory disparity between these thrifts and the regular investment advisory firms with which they currently compete.

C. Costs

We expect that a thrift relying on the proposed amendments would incur only minimal incremental costs. Thrifts that would be required to maintain their Advisers Act registration and that could take advantage of the rule only with respect to certain accounts would be required to confirm, by including an undertaking in their Form ADV (Schedule D), that they will make all trust department records available to Commission examiners upon request. For PRA purposes, the Commission estimates that including this undertaking would impose an annual burden of only five minutes per thrift, or less than 10 hours in the aggregate.[95] Thrifts maintaining their registration under the Advisers Act would also be required to check a box on their Form ADV to indicate that they are actively engaged in business as a thrift institution. For PRA purposes, the Commission estimates that completing this item on Form ADV would impose an annual burden of only two minutes per thrift, or less than four hours in the aggregate.[96]

Costs to customers that receive investment advice from a thrift are also expected to be minimal. Customers whose accounts no longer subject the thrift to the Advisers Act will not receive the benefits and protections of the Act, including the disclosure that the Act requires. As discussed earlier, however, the Advisers Act does not work well when applied to certain thrift trust department relationships, and thus the benefits of the Act in these circumstances may already be minimal. Accordingly, we estimate the cost of removing the Act's benefits and protections with regard to these accounts would also be minimal, although those costs cannot be quantified.[97]

- The Commission requests comments on the costs and benefits identified in this release, as well as any other cost and benefits that may result from the proposal.
- We encourage commenters to identify, discuss, analyze, and supply

[90] This information was obtained from data reported by the 34 savings associations registered with us in their September 30, 2003 TFRs. *See supra* notes 73, 74, 75, and 77–79.

[91] *Id.*

[92] Investment advisers are required to deliver an information brochure to clients and prospective clients under rule 204–3 (17 CFR 275.204–3), and to make detailed disclosures about the disciplinary history of the advisory firm and its supervised persons under rule 206(4)–4 (17 CFR 275.206(4)–4). The Commission has previously estimated that the annual burden of compliance with the brochure delivery requirements of rule 204–3 is approximately 694 hours per adviser, and that the annual burden of compliance with the disclosure requirements of rule 206(4)–4 is 7.5 hours per adviser affected by rule 206(4)–4.

[93] *See supra* note and accompanying text.

[94] This table summarizes information presented in Section I.E. of this Release, *supra*.

[95] *See infra* note 101.

[96] *See infra* note 103.

[97] *See supra* note 27 and accompanying text.

empirical data relating to any costs and benefits they discuss.

- How many thrifts would qualify to use the proposed exceptions from the Advisers Act or from section 12(g) of the Exchange Act, and to what extent?
- Would the incremental costs saved by thrifts that were completely excepted from the Advisers Act be more than the cost savings for thrifts that remained registered? What would cause the difference, and how much would it be?

IV. Paperwork Reduction Act

The proposed form amendment and certain provisions of the proposed rule contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 to 3520), and the Commission has submitted the amendment and proposed rule to the Office of Management and Budget ("OMB") in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The title for the collections of information are "Rule 202(a)(11)–2" and "Form ADV" both under the Advisers Act. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Rule 202(a)(11)–2

Certain thrift institutions relying on the proposed rule would be deemed not to be "investment advisers" as defined in the Advisers Act. These thrifts would not be subject to any provision of the Advisers Act, including the various registration, disclosure and recordkeeping requirements under the Act. These thrifts could continue to render investment advice to customer accounts created and maintained for a fiduciary purpose if the advice is provided solely in the thrift's capacity as trustee, executor, administrator, or guardian for that account. For these thrift institutions, the proposed rule would serve to eliminate altogether the annual reporting and recordkeeping burden under the Advisers Act. As previously discussed, we estimate that approximately 34 advisers currently registered with us appear to be thrift institutions, but most engage in trust activities that would not be covered by the proposed exception.[98] Each thrift institution would need to assess both its current and planned trust department business in order to determine whether it would seek to rely on the proposed rule to be excluded from the Advisers Act and thus from the Act's reporting and recordkeeping requirements. Because the number of thrifts that would qualify for the proposed exception will depend on the future business decisions of individual thrift institutions, it would be speculative to quantify the number of thrifts whose paperwork burden will be entirely eliminated as a result of the proposed rule.[99] Comment is requested on the number of thrift institutions that would qualify to use the proposed exception from the Advisers Act, and on the number of those qualifying thrifts that would elect to use it.

Thrifts that would be required to maintain their registration under the Advisers Act and that elected to rely on the rule with respect to certain customer accounts would be required to confirm, in an undertaking in their Form ADV (Schedule D), that they will make all trust department records available to Commission examiners, upon request. This collection of information is necessary to obtain the benefit of the proposed rule with regard to these certain accounts. The Commission staff will use this collection of information in its examination and oversight program.

The Commission estimates that compliance with the requirement to type in this brief undertaking in Form ADV would impose a total annual burden of 5 minutes for each thrift registered under the Act and relying on the rule to exclude, from the Act, its services to certain customer accounts. In addition, data contained on Thrift Financial Reports submitted by all savings associations indicate that approximately 117 savings associations have been granted trust powers.[100] Based on these data, the Commission estimates that approximately 117 thrift institutions could potentially take advantage of the proposed rule to exclude, from the scope of the Advisers Act, their advisory services to certain customer accounts. Accordingly, the total burden hours imposed by proposed rule 202(a)(11)–2 is estimated to be 9.75 hours annually.[101] The Commission believes this undertaking will not impose a significant additional recordkeeping burden on thrift institutions. The undertaking does not require that new or additional records be kept, only that existing records required under adviser or thrift regulations be made available.[102]

Form ADV

Thrifts that would be required to maintain their registration under the Advisers Act would also be required to check a box on their Form ADV that they are actively engaged in business as a thrift institution. This collection of information is mandatory. The Commission staff will use this collection of information in its examination and oversight program. The Commission estimates that compliance with this requirement to check a box on Form ADV would impose a total annual burden of 2 minutes per thrift responding to the question. As discussed above, the Commission estimates that as many as approximately 117 thrift institutions may be required to register with us and respond to this question. Accordingly, the total annual burden imposed by this collection of information is estimated to be 3.9 hours.[103]

Any information received by the Commission related to the proposed rule and form amendment would not be kept confidential. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments (i) to evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (ii) to evaluate the accuracy of the agency's estimate of the burden of the proposed collections of information; (iii) to enhance the quality, utility, and clarity of the information to be collected; and (iv) to minimize the burden of these collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons desiring to submit comments on these collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, D.C. 20503, and also should send a copy of their comments to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Stop 6–9, Washington, DC 20549 with

[98] *See supra* note 84.

[99] For example, some thrifts may choose to maintain their exempt activities within the thrift itself, but to move their non-exempt advisory business to another affiliate within their financial service firm complex.

[100] *See supra* note 70.

[101] 5 minutes × 117 thrifts = 585 minutes = 9.75 hours. Because the proposed rule may except some thrifts entirely from the definition of "investment adviser" (and thus from the paperwork burden of the Advisers Act), although all approximately 117 thrift institutions that have been granted trust powers could potentially take advantage of the proposed rule, it is possible that fewer than 117 would actually remain subject to the Advisers Act.

[102] The OTS requires that records be maintained for fiduciary accounts. *See* 12 CFR 550.410 (requiring thrifts overseen by the OTS to keep adequate records for all fiduciary accounts).

[103] 2 minutes × 117 thrifts = 234 minutes = 3.9 hours.

reference to File No. S7–20–04. OMB is required to make a decision concerning the collection of information requirements between 30 and 60 days after publication. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

V. Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act,[104] the Commission hereby certifies that proposed rule 202(a)(11)–2, proposed rule 12g–6, and the proposed amendment to Form ADV would not, if adopted, have a significant economic impact on a substantial number of small entities. Proposed rule 202(a)(11)–2 and the proposed amendment would except savings associations from the Advisers Act when they provide investment advice as part of certain trust department fiduciary services and revise the investment adviser registration form so that registrants could identify themselves as savings associations. Based on data reported by all savings associations in their September 30, 2003 Thrift Financial Reports (TFRs), there are no thrifts that meet the definition of a "small business" for purposes of the Advisers Act.[105] Proposed rule 12g–6 would exempt collective trust funds maintained by savings associations from the registration and reporting requirements of the Exchange Act. Based on the same TFR data, there are no thrift-managed collective trust funds that meet the definition of a "small business issuer" for purposes of the Exchange Act.[106] No other entities would incur obligations from or otherwise be directly affected by the proposed rules and amendment. Accordingly, the Commission certifies that proposed rule 202(a)(11)–2, proposed rule 12g–6, and the proposed amendment to Form ADV would not have a significant economic impact on a substantial number of small entities.

The Commission requests written comments regarding this certification. The Commission requests that commenters describe the nature of any impact on small businesses and provide empirical data to support the extent of the impact.

VI. Statutory Authority

We are proposing rule 202(a)(11)–2 pursuant to our authority under sections 202(a)(11)(F) and 211(a) of the Advisers Act.[107] Section 202(a)(11)(F) gives us authority to except, by rule or order, from the statutory definition of "investment adviser" persons not within the intent of that definition. Section 211(a) gives us authority to classify, by rule, persons and matters within our jurisdiction and to prescribe different requirements for different classes of persons, as necessary or appropriate to the exercise of our authority under the Act.

We are proposing amendments to Form ADV under section 19(a) of the Securities Act of 1933,[108] sections 23(a) and 28(e)(2) of the Securities Exchange Act of 1934,[109] section 319(a) of the Trust Indenture Act of 1939,[110] section 38(a) of the Investment Company Act of 1940,[111] and sections 203(c)(1), 204, and 211(a) of the Investment Advisers Act of 1940.[112]

We are proposing rule 12g–6 pursuant to our authority under section 12(h) of the Exchange Act.[113] Section 12(h) gives us authority to, by rules or regulations, exempt any issuer or class of issuers from the provisions of section (g) of the Exchange Act, if we find by reason of the nature and extent of the activities of the issuer that such action is not inconsistent with the public interest or the protection of investors. Section 12(h) also gives us authority to classify issuers and prescribe requirements appropriate for each such class.

Text of Proposed Rules and Form Amendments

List of Subjects

17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

17 CFR Part 275 and 279

Investment advisers, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The general authority citation for Part 240 continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78ll, 78mm, 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

2. Section 240.12g–6 is added to read as follows:

§ 240.12g–6 Exemption from Section 12(g) for collective trust funds.

An issuer that is a collective trust fund excluded from the definition of an investment company under section 3(c)(11) of the Investment Company Act of 1940 shall be exempt from the requirement to register any class of equity securities pursuant to section 12(g)(1) of the Act (15 U.S.C. 78*l*(g)(1)).

PART 275—RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

3. The general authority citation for Part 275 continues to read as follows:

Authority: 15 U.S.C. 80b–2(a)(11)(F), 80b–2(a)(17), 80b–3, 80b–4, 80b–4a, 80b–6(4), 80b–6a, 80b–11, unless otherwise noted.

* * * * *

4. Section 275.202(a)(11)–2 is added to read as follows:

§ 275.202(a)(11)–2 Certain thrift institutions deemed not to be investment advisers.

(a) A thrift institution will be deemed not to be an investment adviser if the thrift institution limits its investment advisory services to the following:

(1) Investment advisory services that the thrift institution performs solely in its capacity as trustee, executor, administrator, or guardian for trusts, estates, guardianships and other accounts created and maintained for a fiduciary purpose, provided that the thrift institution does not, except in connection with the ordinary advertising of its services as trustee, executor, administrator, or guardian for such accounts, hold itself out generally to the public as providing investment advisory services.

(2) Investment advisory services for a collective trust fund maintained by the

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[104] 5 U.S.C. 605(b).

[105] Under Commission rules, for the purposes of the Advisers Act and the Regulatory Flexibility Act, an investment adviser generally is a small entity if it: (i) Has assets under management having a total value of less than $25 million; (ii) did not have total assets of $5 million or more on the last day of its most recent fiscal year; and (iii) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had $5 million or more on the last day of its most recent fiscal year. 17 CFR 275.0–7(a).

[106] Under Commission rules, for the purposes of the Exchange Act and the Regulatory Flexibility Act, an issuer is generally is a small entity if it did not have total assets of $10 million or more on the last day of its most recent fiscal year. 17 CFR 240.0–10(a).

[107] 15 U.S.C. 80b–2(a)(11)(F) and 15 U.S.C. 80b–11(a).

[108] 15 U.S.C. 77s(a).

[109] 15 U.S.C. 78w(a) and 78bb(e)(2).

[110] 15 U.S.C. 77sss(a).

[111] 15 U.S.C. 78a–37(a).

[112] 15 U.S.C. 80b–3(c)(1), 80b–4, and 80b–11(a).

[113] 15 U.S.C. 78*l*(h).

thrift institution and excluded from the definition of the term "investment company" under section 3(c)(11) of the Investment Company Act of 1940, and for accounts the assets of which are invested solely in one or more such collective trust funds.

Note to paragraph (a)(1): Under paragraph (a)(1), each account to which the thrift institution provides investment advisory services must be created and maintained for a fiduciary purpose, whether that account is a trust, an estate, a guardianship or another type of account.

(b) A thrift institution will not be deemed to be an investment adviser with respect to accounts for which it provides investment advisory services that do not subject the thrift institution to the Act, but only if the thrift institution confirms in an undertaking on Schedule D of its Form ADV (17 CFR 279.1) that it will make available to Commission examiners, upon request, all trust department records. Such records shall be considered examination records under section 210(b) of the Act (15 U.S.C. 80b–10(b)).

(c) The term *thrift institution* means a "savings association" as that term is defined in sections 3(b)(1) and of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)) that has deposits insured by the Federal Deposit Insurance Corporation under the Federal Deposit Insurance Act (12 U.S.C. 1811), and that is not operated for the purpose of evading the provisions of the Investment Advisers Act of 1940.

PART 279—FORMS PRESCRIBED UNDER THE INVESTMENT ADVISERS ACT OF 1940

5. The authority citation for Part 279 continues to read as follows:

Authority: The Investment Advisers Act of 1940, 15 U.S.C. 80b–1, *et seq.*

6. Item 6A of Part 1A of Form ADV (§ 279.1) is amended to read as follows:

Form ADV

* * * * *

Part 1A

* * * * *

Item 6 Other Business Activities

* * * * *

A. You are actively engaged in business as a (check all that apply):

☐ (1) Broker-dealer

☐ (2) Registered representative of a broker-dealer

☐ (3) Futures commission merchant, commodity pool operator, or commodity trading advisor

☐ (4) Real estate broker, dealer, or agent

☐ (5) Insurance broker or agent

☐ (6) Bank (including a separately identifiable department or division of a bank) or thrift institution

☐ (7) Other financial product salesperson (specify):

Note: The text of Form ADV does not and the amendment will not appear in the Code of Federal Regulations.

* * * * *

Dated: April 30, 2004.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04–10392 Filed 5–6–04; 8:45 am]

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Federal Register

Friday,
May 7, 2004

Part V

Pension Benefit Guaranty Corporation

Participant Notice Voluntary Correction Program

29 CFR Parts 4011 and 4071

Assessment of and Relief From Penalties—Participant Notices; Notice and Proposed Rule

PENSION BENEFIT GUARANTY CORPORATION

RIN 1212–AB00

Participant Notice Voluntary Correction Program

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Notice.

SUMMARY: The Pension Benefit Guaranty Corporation ("PBGC") is announcing a Participant Notice Voluntary Correction Program ("VCP"). This program, which generally covers Participant Notices for the 2002 or 2003 plan year that were not issued as required, is designed to encourage plan administrators to correct recent compliance failures without penalty and to facilitate plan administrators' future compliance. The PBGC will not pursue any failure to provide a pre-2002 Participant Notice unless there is a 2002 or 2003 Participant Notice failure that is covered by the VCP but that does not meet the requirements for penalty relief under the VCP. Elsewhere in today's **Federal Register**, the PBGC is proposing a new Participant Notice penalty policy.

DATES: To meet the requirements for penalty relief under the Participant Notice Voluntary Correction Program with respect to a Participant Notice failure for the 2002 or 2003 plan year, the plan administrator must: (1) Issue a VCP corrective notice by the 2004 Participant Notice due date (for calendar year plans, generally October 4, 2004, November 15, 2004, or December 15, 2004); and (2) notify the PBGC within 30 days after the 2004 Participant Notice due date.

FOR FURTHER INFORMATION CONTACT: Harold J. Ashner, Assistant General Counsel, or Catherine B. Klion, Attorney, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005–4026; 202–326–4024 (TTY/TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4024.)

SUPPLEMENTARY INFORMATION:

Overview of Participant Notice Requirements

Section 4011 of the Employee Retirement Income Security Act of 1974 ("ERISA") requires certain underfunded plans to issue a notice to participants of the plan's funding status and the limits on the PBGC's guarantee ("Participant Notice"). The Participant Notice helps to ensure that participants better understand the financial status of their plans and the consequences that plan underfunding may have on their promised benefits. The PBGC's implementing regulations are at 29 CFR part 4011.

In general, a plan administrator must issue a Participant Notice for a plan year if a variable rate premium (which is tied to plan underfunding) is payable for that plan year, unless the plan meets the "DRC Exception Test" for that plan year or for the prior plan year. However, the Job Creation and Worker Assistance Act of 2002 (JCWAA) made a temporary change to the premium interest rate that did not apply for purposes of determining whether a Participant Notice was required. Therefore, a plan administrator may be required to provide a Participant Notice for the 2002 or 2003 plan year even if a variable rate premium is not payable for that plan year.

The Pension Funding Equity Act of 2004 (PFEA), which was signed into law by the President on April 10, 2004, changes the rules for determining the required interest rate for premium payment years beginning in 2004 or 2005. Under PFEA, plan administrators may use the premium interest rate for purposes of determining whether a Participant Notice is required. Thus, a plan administrator may be required to issue a Participant Notice for the 2004 or 2005 plan year only if a variable rate premium is payable for that plan year.

A Participant Notice for a plan year is due in that plan year—"two months after the due date (with extensions) for the plan's Form 5500 for the prior plan year. (The due date for a plan's Participant Notice for a plan year is keyed to the due date for the plan's Summary Annual Report for the prior plan year so that the two documents may be issued together.) For calendar year plans, common due dates for the 2004 Participant Notice are therefore October 4, 2004, November 15, 2004, and December 15, 2004. There are a variety of rules governing who is entitled to receive the Participant Notice and the form, content, and manner of issuance of the Participant Notice.

Plan administrators are required to certify on the annual PBGC premium filing (Form 1 or Form 1–EZ) that, for the prior plan year: (1) A Participant Notice was not required to be issued; (2) a Participant Notice was issued as required; or (3) an explanation is attached (*e.g.*, because a required Participant Notice was issued late).

See appendix A for a detailed explanation of the requirements governing Participant Notices.

Compliance and Enforcement Background

The Participant Notice requirement went into effect in the 1995 plan year for large plans (generally plans with more than 100 participants) and in the 1996 plan year for small plans (generally plans with 100 or fewer participants). In the first few years after the requirement went into effect, plan administrators of only a relatively small number of defined benefit plans had to provide a Participant Notice, reflecting the fact that plans were better funded at that time. The PBGC conducted compliance surveys and found that both large plan and small plan compliance was high for those plan years. In the last several years, however, because of low interest rates and poor investment returns, more plans have become underfunded and, therefore, many plan administrators have been required to issue a Participant Notice for the first time.

Recent PBGC audits have found higher rates of noncompliance with the Participant Notice requirement than in prior years. Much of the noncompliance appears to have resulted from a lack of awareness or understanding of the applicable requirements rather than from an attempt to avoid disclosure. Nonetheless, plan participants deserve to know if their plans are underfunded. As a result, the PBGC is expanding its Participant Notice enforcement program with a view toward more actively auditing compliance and assessing penalties for noncompliance.

Overview of Voluntary Correction Program

As a transition to this expanded enforcement program, the PBGC is launching a Participant Notice Voluntary Correction Program ("VCP") designed to encourage plan administrators to correct past compliance failures and to facilitate their future compliance with Participant Notice requirements. The VCP generally covers Participant Notice failures for the 2002 and 2003 plan years. Under this program, the PBGC will not assess penalties for failure to provide a 2002 or 2003 Participant Notice as required if the failure is corrected in accordance with the guidelines in this notice. (The VCP focuses on the 2002 and 2003 plan years in part because the PBGC is concerned that some plan administrators may have misunderstood the effect of JCWAA on their Participant Notice obligations for those plan years.)

The PBGC will not pursue failures to provide a pre-2002 Participant Notice unless there is a 2002 or 2003

Participant Notice failure that is covered by the VCP but that does not meet the requirements for penalty relief under the VCP. Focusing the PBGC's enforcement resources primarily on 2002 and later Participant Notice failures will concentrate those resources effectively and limit disclosures to plan years that are most relevant to participants.

The PBGC anticipates that many plan administrators will want to participate in the VCP as a precaution, even in the absence of a known Participant Notice failure. Participation in the VCP will not affect the likelihood that a plan will be selected for audit of compliance with the requirement to issue a post-VCP Participant Notice (see "Participant Notices Covered by VCP"), with the PBGC premium requirement, or with any other PBGC requirement.

Participant Notices Covered by VCP

The VCP covers any Participant Notice for a plan's 2002 or 2003 plan year: (1) That is due before May 7, 2004; and (2) that is not, as of May 7, 2004, the subject of a PBGC audit proceeding.

For purposes of determining whether the VCP covers a plan's Participant Notice, the date the Participant Notice is due is determined without regard to any deadline extension resulting from a disaster relief notice. For example, if a calendar year plan's 2003 Participant Notice was originally due on December 15, 2003, but as a result of a disaster relief notice the due date was extended to May 14, 2004, the VCP would cover the plan's 2003 Participant Notice because the extension to May 14, 2004, would be disregarded.

Requirements for VCP Penalty Relief

For any Participant Notice that is covered by the VCP, the PBGC will not assess a penalty if the plan administrator, in accordance with the guidelines in this notice: (1) Issues a VCP corrective notice; and (2) notifies the PBGC that it is participating in the VCP. (If the only failure was a late issuance corrected before May 7, 2004, *see* "Special rule for late 2002/2003 notices already corrected.")

VCP Corrective Notice

The PBGC believes that many of the plans that will participate in the VCP to correct a Participant Notice failure for 2002 or 2003 will also be required to issue a Participant Notice for 2004. Accordingly, the PBGC has structured the VCP corrective notice requirements to enable such plans to issue a single notice that meets the requirements for a VCP corrective notice *and* for the 2004 Participant Notice. This approach will minimize the confusion for participants that could result from the issuance of multiple notices at or about the same time.

The VCP corrective notice must meet all of the requirements that apply to the 2004 Participant Notice (or, if the plan is not required to issue a 2004 Participant Notice, all of the requirements that would apply if it were required), except as otherwise provided in the guidelines in this notice.

Normally the 2004 Participant Notice would have to include the "funded current liability percentage" for the 2003 plan year or for the 2004 plan year. Under the VCP, whether the plan administrator is correcting only a 2002 failure, only a 2003 failure, or both a 2002 and a 2003 failure, the VCP corrective notice: (1) Must include the funded current liability percentage for the 2002 plan year and for the 2003 plan year, and (2) may include as well the funded current liability percentage for the 2004 plan year. In all other respects, the VCP corrective notice must contain the information required in a 2004 Participant Notice (*e.g.*, current information on funding waivers, missed contributions, and limitations on the PBGC's guarantee).

Although the plan administrator is not required to inform participants that it had a Participant Notice failure for the 2002 or 2003 plan year (or for both), or that it is participating in a "voluntary correction program," a plan administrator may choose to include that information in the VCP corrective notice.

Appendix B contains a model VCP corrective notice that plan administrators may use to meet VCP requirements. The PBGC will treat a VCP corrective notice that is issued in accordance with the guidelines in this notice as meeting the requirements for the 2004 Participant Notice.

Plan administrators should take special note that because the VCP corrective notice is tied to the requirements for the 2004 Participant Notice rather than to the requirements for the 2002 or 2003 Participant Notice that was not issued as required, the VCP corrective notice is required to be issued only to those persons entitled to receive the plan's 2004 Participant Notice (or that would be entitled to receive the plan's 2004 Participant Notice if it were required). Thus, there is no need to issue the VCP corrective notice to those persons who were entitled to receive the 2002 or 2003 Participant Notice that was not issued as required but who are not entitled to receive the 2004 Participant Notice (*e.g.*, a participant whose entire benefit has been annuitized or paid out in a lump sum).

Notice to PBGC

The plan administrator must notify the PBGC that it is participating in the VCP no later than the 30th day after the due date for issuing the VCP corrective notice. The notification must include a copy of the VCP corrective notice and the name and telephone number of a person for the PBGC to contact with any questions. Plan administrators may notify the PBGC electronically through the PBGC's Web site at *http://www.pbgc.gov/participantnotice*, by fax at 202–336–4197, or by mail, commercial delivery service, or hand at Contracts and Control Review Department, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Suite 580, Washington, DC 20005–4026. The PBGC will promptly issue a written acknowledgment of the notification. Plan administrators should keep the acknowledgment as proof of meeting the VCP requirement of notifying the PBGC.

Special Rule for Late 2002/2003 Notices Already Corrected

If a plan administrator's only failure with respect to a 2002 or 2003 Participant Notice was late issuance and the failure has been corrected before May 7, 2004, the PBGC will treat the plan administrator as having participated in the VCP and will assess no penalty for that 2002 or 2003 failure (and will not pursue any pre-2002 Participant Notice failure) without requiring that the plan administrator issue a VCP corrective notice or notify the PBGC of the plan's participation in the VCP.

Effect of VCP on Certification Requirements

Ordinarily, a plan administrator that filed an erroneous certification on the annual PBGC premium filing as to whether a Participant Notice was required for the prior plan year and, if so, whether it was issued as required would have to file an amended certification. However, if the plan administrator notifies the PBGC of the plan's participation in the VCP, the PBGC will treat the notification as effectively amending any erroneous certification filed on or before May 7, 2004, with respect to a 2002 or 2003 Participant Notice. The PBGC will take no enforcement action based on the erroneous prior certification if the plan administrator of a plan that meets the requirements for penalty relief under the VCP amends (or effectively amends) the erroneous prior certification.

Plan administrators of all plans that meet the requirements for VCP penalty relief will be required to check a box on the 2005 PBGC premium filing notifying the PBGC of the plan's participation in the VCP. This requirement is in addition to the Notice to PBGC requirement described above that must be met to qualify for VCP penalty relief, except under "Special rule for late 2002/2003 notices already corrected."

Compliance Assistance

The PBGC has developed written guidance on the requirements of the VCP, including a Fact Sheet and Frequently Asked Questions. All information related to the VCP and to Participant Notice requirements generally is available on the PBGC's Web site at *http://www.pbgc.gov/participantnotice*. In addition, plan administrators seeking guidance on Participant Notice compliance questions, including questions about the VCP, may submit questions electronically through that Web site or call the toll-free telephone number at the PBGC's Practitioner Customer Service Center (1–800–736–2444).

Plan administrators may also contact the PBGC to request appropriate modifications to the VCP requirements on a case-by-case basis. For example, in the case of a 2002 or 2003 "partial" failure such as a failure to provide the notice to some of the participants or a failure to include in the notice some required information, the PBGC will work with the plan administrator to determine what type of correction, if any, would be needed to address the partial failure in order to qualify for penalty relief under the VCP.

Future Participant Notice Penalties

Elsewhere in today's **Federal Register**, the PBGC is proposing a new Participant Notice penalty policy. The PBGC intends to publish its final Participant Notice penalty policy as soon as practicable after considering public comments.

Compliance With Rulemaking Guidelines

The PBGC has determined, in consultation with the Office of Management and Budget, that this Notice is a "significant regulatory action" under Executive Order. The Office of Management and Budget has therefore reviewed this notice under Executive Order 12866.

The collection of information requirements under the VCP have been approved by the Office of Management and Budget under control numbers 1212–0009 (expires December 31, 2006) and 1212–0050 (expires November 30, 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 currently valid OMB control number.

Because this action deals only with a general statement of PBGC enforcement policy, it is not subject to the notice and comment rulemaking requirements or delayed effective date requirements under section 553 of the Administrative Procedure Act. Because no general notice of proposed rulemaking is required, the Regulatory Flexibility Act does not apply. *See* 5 U.S.C. 601(2), 603, 604.

Issued in Washington, DC, this 3rd day of May, 2004.

Bradley D. Belt,

Executive Director, Pension Benefit Guaranty Corporation.

Appendix A

Summary of Participant Notice Requirements

Statutory and Regulatory Framework

Section 4011 of ERISA and 29 CFR part 4011 require certain underfunded plans to issue an annual notice to participants (a "Participant Notice") that discloses the plan's funding status and the limits of the PBGC's guarantee.

When Requirement Applies

In general, a plan administrator is required to provide a Participant Notice for a plan year if a variable rate premium (which is tied to plan underfunding) is payable for that plan year, unless the plan meets a funding-related test tied to the "deficit reduction contribution" rules—the "Deficit Reduction Contribution ("DRC") Exception Test"—for that plan year or for the prior plan year. *See* § 4011.3. However, as discussed below under Effect of JCWAA on Requirements, a plan administrator may be required to provide a Participant Notice for the 2002 or 2003 plan year even if a variable rate premium is not payable for that plan year.

In general, the DRC Exception Test requires a plan to be at least 90 percent funded, although a plan that is at least 80 percent funded meets the test if it was at least 90 percent funded for two consecutive plan years out of the last three. There are special rules under the DRC Exception Test that allow small plans to avoid doing additional calculations by using numbers they already reported on the Schedule B to their Form 5500. *See* § 4011.4. Most new and newly-covered plans are exempt from the Participant Notice requirement. *See* § 4011.5.

Due Dates

A participant notice for a plan year is due in that plan year. The due date for issuing a Participant Notice for a plan year is two months after the plan's due date, with extensions, if any, for filing the Form 5500 for the prior plan year. (The due date for a plan's Participant Notice for a plan year is keyed to the due date for the plan's Summary Annual Report for the prior plan year so that the two documents may be issued together.) The plan administrator may change the date of issuance from one plan year to the next, provided that the effect of any change is not to avoid disclosing a minimum funding waiver or a missed contribution. *See* § 4011.8. The following table shows the common due dates for calendar year plans for the 2004 Participant Notice:

2003 Form 5500 due date	2004 Participant notice due date
Monday, August 2, 2004.	Monday, October 4, 2004.
Wednesday, September 15, 2004.	Monday, November 15, 2004.
Friday, October 15, 2004.	Wednesday, December 15, 2004.

Persons Entitled To Receive Notice

A plan administrator must provide a Participant Notice to participants, beneficiaries of deceased participants, alternate payees, and unions. To determine who is a person entitled to receive a Participant Notice, the plan administrator may select any date during the period beginning with the last day of the prior plan year and ending with the date on which the Participant Notice is due, provided that a change in the date from one plan year to another does not exclude a substantial number of participants and beneficiaries. *See* § 4011.7.

Manner of Issuance

The plan administrator must issue a Participant Notice using measures reasonably calculated to ensure actual receipt by the persons entitled to receive it. A Participant Notice may be issued together with another document, such as the Summary Annual Report (which is due at the same time as the Participant Notice), as long as it is in a separate document. *See* § 4011.9, as amended by the PBGC's final rule published October 28, 2003 (68 FR 61344, 61353).

Form of Notice

A Participant Notice must contain the plan's "Notice Funding Percentage"—the plan's "funded current liability percentage" as defined in section 302(d)(9)(C) of ERISA—for the current plan year or the prior plan year, along with the date as of which that percentage is determined. The Participant Notice also must contain information on minimum funding waivers and missed contributions, a summary of plan benefits guaranteed by the PBGC with an explanation of the limitations on the guarantee, and other information specified in the regulation. *See* § 4011.10(b) and (c). Additional information must be in a separate document. *See* § 4011.10(d).

A Participant Notice must be readable and written in a manner calculated to be understood by the average plan participant and not to mislead recipients. *See* § 4011.10(a). Plan administrators of plans with specified numbers or percentages of participants literate only in the same non-English language must provide either an English-language Participant Notice with a

prominent legend in the common non-English language offering assistance in that language or a Participant Notice in the common non-English language. *See* § 4011.10(e).

The Participant Notice regulation contains a Model Participant Notice as an example of a Participant Notice that meets the requirements of § 4011.10. Each year the PBGC issues a Technical Update that provides specific information relating to that year's Participant Notice and updates the Model Notice.

Effect of JCWAA on Requirements

Section 405 of the Job Creation and Worker Assistance Act of 2002 ("JCWAA") increased the required interest rate for calculating vested benefits for the PBGC variable rate premium under section 4006(a)(3)(E)(iii) of ERISA from 85 percent to 100 percent of the yield on 30-year Treasury securities. The statutory change applies only to plan years beginning in 2002 or 2003. However, JCWAA does *not* allow use of 100 percent of the Treasury yield to determine whether a PBGC variable rate premium is payable for purposes of determining whether a Participant Notice is required. Thus, plan administrators must continue to use 85 percent of the Treasury yield for this purpose.

Section 405 of JCWAA also increased, for plan years beginning in 2002 or 2003, the maximum interest rate (from 105 percent to 120 percent of the four-year weighted average of the yield on 30-year Treasury securities) that may be used to calculate current liability for purposes of the DRC funding requirement. The change in the maximum interest rate used to calculate current liability for DRC funding purposes can affect, for the 2002, 2003, and certain future plan years: (1) Whether a plan administrator is required to issue a Participant Notice; and (2) the plan funding information required to be disclosed in a Participant Notice.

The effect of JWCAA on Participant Notice requirements is fully discussed in PBGC Technical Updates 02–2 and 03–17, both available on the PBGC's Web site, *http://www.pbgc.gov/participantnotice*.

Certification

The plan administrator is required to certify on the annual PBGC premium filing (Form 1 or Form 1–EZ) that, for the prior plan year: (1) A Participant Notice was not required to be issued; (2) a Participant Notice was issued as required; or (3) an explanation is attached (*e.g.*, because a required Participant Notice was issued late).

Penalties

If a Participant Notice is not issued as required, the PBGC may assess penalties under section 4071 of ERISA and 29 CFR part 4071. For more information on Participant Notice penalties, *see* the PBGC's proposal on such penalties published elsewhere in today's **Federal Register**.

Appendix B

Model VCP Corrective Notice

The following is an example of a corrective notice that satisfies the requirements of the Participant Notice Voluntary Correction Program when the required information is filled in (subject to § 4011.10(d)–(e), as applicable). It also satisfies the requirements of § 4011.10 for the 2004 Participant Notice.

Notice to Participants of [Plan Name]

The law requires that you receive information on the funding level of your defined benefit pension plan and the benefits guaranteed by the Pension Benefit Guaranty Corporation (PBGC), a federal insurance agency. [YOU MAY INCLUDE A STATEMENT TO THE EFFECT THAT THE PLAN HAD A PARTICIPANT NOTICE FAILURE FOR THE 2002 PLAN YEAR OR FOR THE 2003 PLAN YEAR (OR FOR BOTH). YOU MAY ALSO INCLUDE A STATEMENT TO THE EFFECT THAT THE PLAN IS PARTICIPATING THE PBGC'S PARTICIPANT NOTICE VOLUNTARY CORRECTION PROGRAM.]

Your Plan's Funding

As of [APPLICABLE DATE], your plan had [INSERT PLAN'S FUNDED CURRENT LIABILITY PERCENTAGE (AS DEFINED IN SECTION 302(d)(9)(C) of ERISA) FOR THE 2002 PLAN YEAR] percent of the money needed to pay benefits promised to employees and retirees.

As of [APPLICABLE DATE], your plan had [INSERT PLAN'S FUNDED CURRENT LIABILITY PERCENTAGE (AS DEFINED IN SECTION 302(d)(9)(C) of ERISA) FOR THE 2003 PLAN YEAR] percent of the money needed to pay benefits promised to employees and retirees.

[YOU MAY ALSO INCLUDE THE FOLLOWING STATEMENT:

As of [APPLICABLE DATE], your plan had [INSERT PLAN'S FUNDED CURRENT LIABILITY PERCENTAGE (AS DEFINED IN SECTION 302(d)(9)(C) of ERISA) FOR THE 2004 PLAN YEAR] percent of the money needed to pay benefits promised to employees and retirees.]

[SEE § 4011.10(c)(2) FOR SPECIAL RULES SMALL PLANS MAY USE TO DETERMINE THE PLAN'S FUNDED CURRENT LIABILITY PERCENTAGE.]

To pay pension benefits, your employer is required to contribute money to the pension plan over a period of years. A plan's funding percentage does not take into consideration the financial strength of the employer. Your employer, by law, must pay for all pension benefits, but your benefits may be at risk if your employer faces a severe financial crisis or is in bankruptcy.

[INCLUDE THE FOLLOWING PARAGRAPH ONLY IF, FOR ANY OF THE PREVIOUS FIVE PLAN YEARS, THE PLAN HAS BEEN GRANTED AND HAS NOT FULLY REPAID A FUNDING WAIVER.]

Your plan received a funding waiver for [LIST ANY OF THE FIVE PREVIOUS PLAN YEARS FOR WHICH A FUNDING WAIVER WAS GRANTED AND HAS NOT BEEN FULLY REPAID]. If a company is experiencing temporary financial hardship, the Internal Revenue Service may grant a funding waiver that permits the company to delay contributions that fund the pension plan.

[INCLUDE THE FOLLOWING WITH RESPECT TO ANY UNPAID OR LATE PAYMENT THAT MUST BE DISCLOSED UNDER SECTION 4011.10(b)(6):]

Your plan was required to receive a payment from the employer on [LIST APPLICABLE DUE DATE(S)]. That payment [has not been made] [was made on [LIST APPLICABLE PAYMENT DATE(S)]].

PBGC Guarantees

When a pension plan terminates without enough money to pay all benefits, the PBGC steps in to pay pension benefits. The PBGC pays most people all pension benefits, but some people may lose certain benefits that are not guaranteed.

The PBGC pays pension benefits up to certain maximum limits.

- The maximum guaranteed benefit is $3,698.86 per month or $44,386.32 per year for a 65-year-old person in a plan that terminates in 2004. [IF YOU ISSUE THIS NOTICE AFTER THE MAXIMUM GUARANTEED BENEFIT INFORMATION FOR PLANS THAT TERMINATE IN 2005 IS ANNOUNCED, YOU MAY ADD OR SUBSTITUTE THAT INFORMATION IN ORDER TO PROVIDE PARTICIPANTS WITH MORE CURRENT INFORMATION. THE PBGC EXPECTS TO MAKE THAT INFORMATION AVAILABLE ON ITS WEB SITE AT *WWW.PBGC.GOV* IN EARLY NOVEMBER 2004.]
- The maximum benefit may be reduced for an individual who is younger than age 65. For example, it is $1,664.49 per month or $19,973.88 per year for an individual who starts receiving benefits at age 55. [IN LIEU OF AGE 55, YOU MAY ADD OR SUBSTITUTE ANY AGE(S) RELEVANT UNDER THE PLAN. FOR EXAMPLE, YOU MAY ADD OR SUBSTITUTE THE MAXIMUM BENEFIT FOR AGES 62 OR 60. THE MAXIMUM BENEFIT IS $2,922.10 PER MONTH OR $35,065.20 PER YEAR AT AGE 62; IT IS $2,404.26 PER MONTH OR $28,851.12 PER YEAR AT AGE 60. IF THE PLAN PROVIDES FOR NORMAL RETIREMENT BEFORE AGE 65, YOU MUST INCLUDE THE NORMAL RETIREMENT AGE.] [IF YOU ISSUE THIS NOTICE AFTER THE MAXIMUM GUARANTEED BENEFIT INFORMATION FOR PLANS THAT TERMINATE IN 2005 IS ANNOUNCED, YOU MAY ADD OR SUBSTITUTE THAT INFORMATION IN ORDER TO PROVIDE PARTICIPANTS WITH MORE CURRENT INFORMATION. THE PBGC EXPECTS TO MAKE THAT INFORMATION AVAILABLE ON ITS WEB SITE AT *WWW.PBGC.GOV* IN EARLY NOVEMBER 2004.] [IF THE PLAN DOES NOT PROVIDE FOR COMMENCEMENT OF BENEFITS BEFORE AGE 65, YOU MAY OMIT THIS PARAGRAPH.]
- The maximum benefit will also be reduced when a benefit is provided for a survivor.

The PBGC does not guarantee certain types of benefits. [INCLUDE THE FOLLOWING GUARANTEE LIMITS THAT APPLY TO THE BENEFITS AVAILABLE UNDER YOUR PLAN.]

- The PBGC does not guarantee benefits for which you do not have a vested right when a plan terminates, usually because you have not worked enough years for the company.

• The PBGC does not guarantee benefits for which you have not met all age, service, or other requirements at the time the plan terminates.

• Benefit increases and new benefits that have been in place for less than a year are not guaranteed. Those that have been in place for less than 5 years are only partly guaranteed.

• Early retirement payments that are greater than payments at normal retirement age may not be guaranteed. For example, a supplemental benefit that stops when you become eligible for Social Security may not be guaranteed.

• Benefits other than pension benefits, such as health insurance, life insurance, death benefits, vacation pay, or severance pay, are not guaranteed.

• The PBGC generally does not pay lump sums exceeding $5,000.

Where To Get More Information

Your plan, [EIN-PN], is sponsored by [CONTRIBUTING SPONSOR(S)]. If you would like more information about the funding of your plan, contact [INSERT NAME, TITLE, BUSINESS ADDRESS AND PHONE NUMBER OF INDIVIDUAL OR ENTITY].

For more information about the PBGC and the benefits it guarantees, you may request a free copy of Your Guaranteed Pension by writing to Consumer Information Center, Dept. YGP, Pueblo, Colorado 81009. [THE FOLLOWING SENTENCE MAY BE INCLUDED:] "Your Guaranteed Pension" is also available on the PBGC's Web site at *www.pbgc.gov*.

Issued: [INSERT AT LEAST MONTH AND YEAR]

[FR Doc. 04–10406 Filed 5–6–04; 8:45 am]

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PENSION BENEFIT GUARANTY CORPORATION

29 CFR Parts 4011 and 4071

RIN 1212–AA95

Assessment of and Relief From Penalties—Participant Notices

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Proposed statement of policy.

SUMMARY: The PBGC is proposing a new penalty policy for failures to issue Participant Notices as required under section 4011 of the Employee Retirement Security Act of 1974 and 29 CFR part 4011. The new policy would tie the guideline penalty amounts primarily to the number of plan participants. Subject to a one-year transition period, the new policy would apply to: (1) 2004 and later Participant Notices, (2) 2002 and 2003 Participant Notices that do not meet the requirements for penalty relief under the Participant Notice Voluntary Correction Program ("VCP") announced elsewhere in today's **Federal Register**, and (3) pre-2002 Participant Notices, where there is a 2002 or 2003 Participant Notice failure that is covered by the VCP but that does not meet the requirements for penalty relief under the VCP.

DATES: Comments must be received on or before July 6, 2004.

ADDRESSES: Comments may be mailed to the Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005–4026, or delivered to Suite 340 at the above address. Comments also may be submitted electronically through the PBGC's Web site at *http://www.pbgc.gov/regs*, or by fax to 202–326–4112. The PBGC will make all comments available on its Web site, *http://www.pbgc.gov*. Copies of the comments may also be obtained by writing to the PBGC's Communications and Public Affairs Department at Suite 240 at the above address or by visiting that office or calling 202–326–4040 during normal business hours. (TTY and TDD users may call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4040.)

FOR FURTHER INFORMATION CONTACT: Harold J. Ashner, Assistant General Counsel, or Catherine B. Klion, Attorney, Pension Benefit Guaranty Corporation, Office of the General Counsel, Suite 340, 1200 K Street, NW., Washington, DC 20005–4026, 202–326–4024. (For TTY/TDD users, call the Federal relay service toll-free at 1–800–877–8339 and ask to be connected to 202–326–4024.)

SUPPLEMENTARY INFORMATION: Section 4011 of the Employee Retirement Income Security Act of 1974 ("ERISA") requires certain underfunded plans to issue a notice to participants of the plan's funding status and the limits on the PBGC's guarantee ("Participant Notice"). The Participant Notice helps to ensure that participants better understand the financial status of their plans and the consequences that plan underfunding may have on their promised benefits. The PBGC's implementing regulations are at 29 CFR part 4011.

Elsewhere in today's **Federal Register**, the PBGC is announcing a Participant Notice Voluntary Correction Program ("VCP"). This program, which generally covers Participant Notices for the 2002 or 2003 plan year that were not issued as required, is designed to encourage plan administrators to correct recent compliance failures without penalty and to facilitate plan administrators' future compliance. The VCP and the requirements generally governing Participant Notices, including the effect of the Pension Funding Equity Act of 2004, which was signed into law by the President on April 10, 2004, are more fully described in that announcement.

Under section 4071 of ERISA and 29 CFR part 4071, the PBGC may assess a penalty of up to $1,100 a day for certain failures to provide notices or other material information in a timely manner, including a failure to provide a Participant Notice as required. The Department of Labor has advised the PBGC that a penalty assessed against a plan administrator under section 4071 of ERISA for failure to issue a Participant Notice as required is a liability of the plan administrator, not a liability of the plan, and may not be paid out of plan assets.

On July 18, 1995 (60 FR 36837), the PBGC published its current penalty policy, which applies to Participant Notices along with other types of information. The current policy provides:

General guideline penalty amounts: The penalty accrues at the rate of $25 per day for the first 90 days of delinquency and $50 per day thereafter. The penalty is reduced proportionately for plans with fewer than 100 participants, subject to a floor of $5 per day. There is a cap on the total penalty for any violation of $100 times the number of plan participants.

Facts-and-circumstances adjustments: The PBGC may adjust the penalty rate up or down based on the facts and circumstances surrounding the violation. The policy identifies certain specific circumstances in which the PBGC may or will assess larger penalties.

Penalty waivers for reasonable cause: The PBGC evaluates each request for a waiver based on "reasonable cause" to determine whether the responsible person exercised ordinary business care and prudence and delay resulted from circumstances beyond that person's control.

On January 12, 2001 (66 FR 2856), the PBGC published a proposed rule that would, among other things, codify in its regulations an expanded version of its 1995 penalty policy. The proposed policy leaves the guideline amounts for assessing penalties basically unchanged and provides guidance on determining whether there is "reasonable cause" that would justify a waiver of penalties. The PBGC did not receive any comments on this proposal.

Based on its experience in enforcing Participant Notice requirements, the PBGC has reconsidered its 2001 proposal as applied to Participant Notices. The PBGC believes that its guideline penalties for Participant Notice failures should be tied primarily to the number of plan participants rather than, as is the case under the existing policy and the 2001 proposal, the number of days of delinquency. This approach recognizes that the significance of a failure to provide a Participant Notice varies with the number of participants who were entitled to, but did not, receive the Participant Notice. Accordingly, the PBGC is issuing a supplemental proposal relating to its penalty policy for Participant Notice failures. Under the proposed new penalty structure, as under the existing penalty policy and the 2001 penalty policy proposal, the PBGC would continue to consider the facts and circumstances of each case to ensure that the penalty fits the violation. The PBGC intends to publish its final Participant Notice penalty policy as soon as practicable after considering public comments.

Proposed Participant Notice Penalty Policy

The guideline penalty amount for a failure to issue a Participant Notice as required would equal the number of participants in the plan multiplied by the applicable per-participant information penalty rate. That rate would depend on whether the failure is a repeat violation and on the timing of its correction in relation to a PBGC audit:

Pre-audit corrections: If the plan administrator corrects the failure on or before the date the PBGC issues a written notice to the plan that it is or may be auditing compliance with Participant Notice requirements, the per-participant information penalty rate would be $5, unless the violation is a repeat violation, in which case the per-participant information penalty rate would be $20.

Post-audit corrections: If the plan administrator corrects the failure after the date the PBGC issues a written notice to the plan that it is or may be auditing compliance with Participant Notice requirements, the per-participant information penalty rate would be $40, unless the violation is a repeat violation, in which case the per-participant information penalty rate would be $100.

However, if the plan administrator corrects the failure within one year after the Participant Notice was originally due (regardless of whether the correction was pre-audit or post-audit), the PBGC would prorate the penalty based on the number of days before correction. For example, if the plan administrator corrects the failure 90 days after the Participant Notice deadline, the PBGC would reduce the penalty by multiplying it by 90/365. The PBGC would not increase the penalty for failures corrected after a year.

Determination of Participant Count

In applying the new penalty structure, the PBGC generally would use the number of plan participants as determined for premium purposes for the plan for which the Participant Notice is required. Thus, the participant count would ordinarily be determined as of the last day of the prior plan year, which usually serves as the "snapshot" date used to count participants for premium purposes. However, where this participant count is significantly higher or lower than the number of persons entitled to receive the Participant Notice, the PBGC may make an appropriate adjustment to the participant count.

Determination of Repeat Violation Status

The PBGC would treat a failure to issue a Participant Notice as required for a plan year as a repeat violation if it occurred after the date the plan administrator knew, or should have known, that there was a non-*de minimis* Participant Notice failure for a previous plan year. For this purpose, the PBGC would disregard any Participant Notice failure for: (1) Any plan year more than six years before the plan year in question, (2) any 2002 or 2003 plan year, provided the 2002 or 2003 Participant Notice failure meets the requirements for penalty relief under the VCP announced elsewhere in today's **Federal Register**, and (3) any pre-2002 plan year, except where there is a 2002 or 2003 Participant Notice failure that is covered by the VCP but that does not meet the requirements for penalty relief under the VCP.

Determination That Valid Corrective Notice Has Been Issued

The PBGC would determine whether a corrective notice issued by a plan administrator is valid for purposes of this penalty policy under the following guidelines:

Pre-audit corrections: If the plan administrator corrects a Participant Notice failure on or before the date the PBGC issues a written notice to the plan that it is or may be auditing compliance with Participant Notice requirements, the correction would be valid for purposes of this penalty policy if the PBGC determines, based on the facts and circumstances, that the corrective notice serves the statutory purposes of the Participant Notice requirement. There would be a "safe harbor" under which the PBGC would treat the corrective notice as valid if the corrective notice:

(1) Included, in addition to the information originally required in the delinquent Participant Notice, all information that was required in all later Participant Notices that were due on or before the date the corrective notice is issued; and

(2) Was issued to the persons who were entitled to receive the most recent Participant Notice that was due on or before the date the corrective notice was issued.

(If the plan was not required to issue a Participant Notice for a particular plan year, the safe-harbor requirements would apply as if the plan had been required to issue a Participant Notice for that plan year.) The PBGC encourages plan administrators to correct Participant Notice failures as soon as possible, both to ensure that participants receive more timely information and to minimize penalty exposure. However, depending on the timing, a plan administrator might choose to combine into a single document a "safe-harbor" corrective notice and a required Participant Notice for a later plan year. If so, the PBGC would not treat the required Participant Notice as violating the requirement in § 4011.10(d) that additional information may be included only if it is in a separate document.

Example: Assume that a Plan Administrator fails to issue a required Participant Notice for the 2004 plan year, is not required to issue a Participant Notice for the 2005 plan year, and is required to issue a Participant Notice for the 2006 plan year. Assume further that the Plan Administrator issues the 2006 Participant Notice to the persons entitled to receive it and includes as part of the 2006 Participant Notice all information originally required in the 2004 Participant Notice and all information that would have been required in the 2005 Participant Notice if it had been required to be issued. The PBGC would treat the plan administrator as having issued a valid corrective notice, and the 2006 Participant Notice would not violate the requirement in § 4011.10(d) that additional information may be included only if it is in a separate document.

Plan administrators are encouraged to contact the PBGC for guidance on pre-audit corrections of Participant Notice failures by submitting questions electronically through the PBGC's Web site at *http://www.pbgc.gov/participantnotice* or by calling the toll-free telephone number at the PBGC's Practitioner Customer Service Center (1–800–736–2444). *Post-audit corrections:* If the plan administrator corrects a Participant Notice failure after the date the PBGC issues a written notice to the plan that it is or may be auditing compliance with Participant Notice requirements, the PBGC would treat the correction as valid only if the corrective notice is approved by the PBGC.

Downward Adjustment to Guideline Penalty Amount for Partial Failure

The PBGC would make an appropriate downward adjustment to the penalty amount where there was a partial failure to comply with the Participant Notice requirements other than a late issuance of an otherwise valid Participant Notice (*e.g.*, a failure to issue the Participant Notice to some of the persons entitled to receive it or a failure to include in the Participant Notice some of the required information).

Upward Adjustment to Guideline Penalty Amount for Failure To Cooperate

The PBGC would make an appropriate upward adjustment to the penalty amount where it determines upon audit that there was a failure to comply with the Participant Notice requirements and the plan administrator does not promptly issue a corrective notice approved by the PBGC. The upward adjustment would generally be to a penalty that is significantly higher.

Applicability

The new Participant Notice penalty policy would apply to: (1) 2004 and later Participant Notices, (2) 2002 and 2003 Participant Notices that do not meet the requirements for penalty relief under the VCP, and (3) pre-2002 Participant Notices, where there is a 2002 or 2003 Participant Notice failure that is covered by the VCP but that does not meet the requirements for penalty relief under the VCP.

The PBGC would generally use the new guideline penalty amounts for its penalty assessments and reviews of penalty assessments on and after the effective date of the new penalty policy, which the PBGC anticipates will be at least 30 days after the date it publishes its final penalty policy. However, the PBGC would apply a transition rule in the case of a Participant Notice failure that starts before the effective date of the new penalty policy and that is corrected no later than one year after the effective date of the new penalty policy (including a delinquency corrected before the new penalty policy becomes effective). For such delinquencies, the guideline penalty amount would be the lesser of the amount calculated under the current penalty policy and the amount calculated under the new penalty policy.

Compliance With Rulemaking Guidelines

The PBGC has determined, in consultation with the Office of Management and Budget, that this proposed Statement of Policy is a "significant regulatory action" under Executive Order 12866. The Office of Management and Budget has therefore reviewed this proposed Statement of Policy under Executive Order 12866.

This action is not subject to notice and comment rulemaking requirements under section 553 of the Administrative Procedure Act because it deals only with a general statement of PBGC policy. However, the PBGC nonetheless is publishing this Statement of Policy in proposed form and invites public comment. Because no general notice of proposed rulemaking is required, the Regulatory Flexibility Act does not apply. *See* 5 U.S.C. 601(2), 603, 604.

Issued in Washington, DC, this 3rd day of May, 2004.

Bradley D. Belt,

Executive Director, Pension Benefit Guaranty Corporation.

[FR Doc. 04–10407 Filed 5–6–04; 8:45 am]

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Federal Register

Friday,
May 7, 2004

Part VI

Department of Health and Human Services

Centers for Disease Control and Prevention

Steps to a Healthier US: A Community-Focused Initiative to Reduce the Burden of Asthma, Diabetes, and Obesity; Notice

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Program Announcement 04234]

Steps to a Healthier US: A Community-Focused Initiative To Reduce the Burden of Asthma, Diabetes, and Obesity

Announcement Type: New.

Funding Opportunity Number: 04234.

Catalog of Federal Domestic Assistance Number: 93.283.

Key Dates:

Letter of Intent Deadline: May 27, 2004.

Application Deadline: June 21, 2004.

I. Funding Opportunity Description

Authority: This program is authorized under section 301(a) and 317(k)(2) of the Public Health Service Act, (42 U.S.C. 241(a) and 247b(k)(2)), as amended.

Purpose: The Department of Health and Human Services (HHS), acting through the Centers for Disease Control and Prevention (CDC), and combining the strengths and resources of all relevant HHS agencies and programs, announces the availability of fiscal year (FY) 2004 funds for a cooperative agreement program to implement the Secretary of HHS initiative for Americans, entitled "Steps to a HealthierUS" (hereafter referred to as STEPS). The relevant HHS agencies and offices include, but are not limited to, the Administration for Children and Families, Administration on Aging, Agency for Healthcare Research and Quality, CDC, Centers for Medicare and Medicaid Services, Food and Drug Administration, Health Resources and Services Administration, Indian Health Service, National Institutes of Health, Office of Disease Prevention and Health Promotion, and the Substance Abuse and Mental Health Services Administration hereafter referred to as "HHS agencies".

The centerpiece of STEPS is a five-year cooperative agreement program to create healthier communities by improving the lives of Americans through innovative and effective community-based health promotion and chronic disease prevention and control programs.

STEPS is based on the President's HealthierUS Initiative, which highlights the influence that healthy lifestyles and behaviors—such as making healthful nutritional choices, being physically active, and avoiding tobacco use and exposure—have in achieving and maintaining good health for persons of all ages. STEPS will work through public-private partnerships at the community level to support community-driven programs that enable persons to adopt healthy lifestyles that contribute directly to the prevention, delay, and/or mitigation of the consequences of diabetes, asthma, and obesity.

The initiative's goals are to:

- Prevent 75,000 to 100,000 Americans from developing diabetes.
- Prevent 100,000 to 150,000 Americans from developing obesity.
- Prevent 50,000 Americans from being hospitalized for asthma.

The purpose of STEPS is to enable communities to reduce the burden of chronic disease, including: Preventing diabetes among populations with pre-diabetes; increasing the likelihood that persons with undiagnosed diabetes are diagnosed; reducing complications of diabetes; preventing overweight and obesity; reducing overweight and obesity; and reducing the complications of asthma. STEPS will achieve these outcomes by improving nutrition; increasing physical activity; preventing tobacco use and exposure, targeting adults who are diabetic or who live with persons with asthma; increasing tobacco cessation, targeting adults who are diabetic or who live with persons with asthma; increasing use of appropriate health care services; improving the quality of care; and increasing effective self-management of chronic diseases and associated risk factors.

The key to the success of STEPS will be community-focused programs that include the full engagement of schools, businesses, faith-communities, health care purchasers, health plans, health care providers, academic institutions, senior centers, and many other community sectors working together to promote health and prevent chronic disease. STEPS programs need to build on, but not duplicate current and prior HHS programs and coordinate fully with existing programs and resources in the community.

Background

In the United States today, seven of ten deaths and the vast majority of serious illness, disability, and health care costs are caused by chronic diseases, such as diabetes, asthma, and obesity. Underlying these serious diseases are several important risk factors that can be modified years before they contribute to illness and death. Three risk factors—poor nutrition, lack of physical activity, and tobacco use and exposure—are major contributors to the nation's leading causes of death and must be addressed as part of this initiative. The first two of these risk factors contribute primarily to obesity and diabetes. Tobacco use contributes primarily to asthma, but it also contributes to the risk of poor circulation and heart disease among those who have diabetes. Research has demonstrated a clear link between exposure to tobacco smoke and exacerbation of asthma, and has provided evidence of a causal link between exposure to tobacco smoke and the development of asthma. Research has also shown that smoking heightens the risk for diabetes-related complications of neuropathy and nephropathy; cigarette use has been shown to be a significant risk factor for death by coronary heart disease in type 2 diabetes. By requiring recipients to address nutrition, physical activity, and tobacco use as core components of their community interventions, STEPS programs will reduce the burden of diabetes, asthma, and obesity.

Efforts to address risk factors and disease management through improved health care access, health care utilization, health care quality, and self-management skills, including adherence to medication and other health regimens, also may be addressed as part of this initiative. While payment for health care services is not an allowable expense under this program announcement, increasing access to and use of diagnostic screening and improved treatment can be accomplished in four primary ways: (1) Identifying existing services and resources in the community and

linking/referring persons to treatment; (2) educating health care providers on current standards of care and methods for implementing those standards; (3) developing consumer awareness and demand for quality health care (*e.g.*, using media to promote increased demand for vaccinations, appropriate screenings, and treatment); (4) helping health care providers implement effective office-based strategies, such as patient reminder systems, that help ensure timely and appropriate care.

Communities funded under this cooperative agreement will join the 23 currently funded communities in establishing community-based, coordinated, comprehensive health promotion, prevention, and control programs of sufficient intensity and durability to create sustainable change and thereby achieve the "Healthy People 2010" objectives shown in Attachment A. All referenced attachments are posted with this announcement on the CDC Web site (*http://www.cdc.gov*). Click on "Funding" then "Grants and Cooperative Agreements".

Resources useful to the preparation of applications and in support of program implementation are available in Attachment B.

Activities: All recipient activities funded under this program announcement need to coordinate with and reinforce, but not duplicate, related, existing Federal, State, and local activities. In conducting activities to achieve the purpose of this program announcement, Large Cities and Urban Community applicants will be responsible for the activities listed under number 1 below, Tribal applicants for the activities listed under number 2 below, State-Coordinated Small City and Rural Community applicants for the activities listed under number 3 below, and HHS Agencies for the activities listed under number 4 below. All recipients must address both community and school-based components. In addition, applications that do not address all of the activities listed in the respective category under which they are applying will be considered non-responsive and will not be entered into the review process. You will be notified that your application did not meet submission requirements. (*See* section III 1., 2., 3. for eligibility criteria and definitions of these applicant categories.)

1. Large City and Urban Community Recipient Activities

(a) Fiduciary Responsibilities

i. Lead Agency. Establish the lead/fiduciary agency to be the local health department, its equivalent, or a *bona fide* agent as designated by the mayor, county executive, or other equivalent governmental official.

ii. Allocate Funds. Allocate and disperse funds to the local education agency or agencies responsible for schools within the intervention area, and additional key partners and collaborators to implement recipient activities. Include adequate funds to participate fully in the substantial data collection and evaluation activities associated with this award.

iii. Contract Services. Contract for services, as needed, to accomplish the objectives of this program announcement.

iv. Link Budget to Performance. Provide integrated progress and financial reports that link the performance and expenditures of the local health department and all key partners.

v. Sustainability. If funded for years three through five, engage in efforts that will sustain successful interventions on a long-term basis.

(b) Community Consortium

Identify key partners and coalitions that focus on the prevention and control of chronic disease and associated risk factors. Build an alliance of partnerships and coalitions committed to participating actively in the planning, implementation, and evaluation of STEPS. Effective partnerships are central to the success and sustainability of STEPS. Key partners should demonstrate a high-level commitment to the initiative by their willingness to invest expertise, leadership, personnel, and other resources in the success of the project.

Partners must include, but are not limited to, the mayor's office (or equivalent); local and State health departments; local and state education agencies; key community, health care, voluntary, and professional organizations; business, community, and faith-based leaders; and at least one lay person representative of the population to be served. Other partners may include, but are not limited to, existing community coalitions (especially those already focusing on chronic diseases), Federally Qualified Health Centers including community health centers, worksite wellness programs, health care purchasers, health plans, unions, health care providers for farm and migrant workers and their families, school-based and school-linked clinics, health care providers for the homeless, primary care associations, social service providers, health maintenance organizations, private providers, hospitals, universities, schools of public health, academic health centers, organizations that serve young children and youth, parks and recreation departments, departments of transportation, public housing authorities, State Medicaid officials, service organizations, food manufacturers and distributors, aging services organizations, senior centers, community action groups, consumer groups, and the media.

(**Note:** Consolidated Health Centers under section 330, of the Public Health Service Act are commonly referred to as community health centers. They include centers that tailor resources for populations such as low-income persons, the uninsured, homeless people, migrant and seasonal farm workers, and public housing residents.)

(c) Leadership, Coordination, and Management

i. Leadership Team. Establish and coordinate a leadership team responsible for overseeing project activities, establishing and maintaining an organizational structure and governance for the community consortium (including decision-making procedures), determining the project budget and subcontracts, and participating in project-related local and national meetings. The leadership team must include, but is not limited to, the local health department, the local education agency or agencies, and other key leaders from the community.

ii. Project Staff. Establish and maintain paid project staff to include a full-time project coordinator with management experience in risk factor interventions and community-based chronic disease prevention and control. Other part-time or full-time staff, contractors, and consultants must be sufficient in number and expertise to ensure project success and have demonstrated skills and experience in coalition and partnership development, community mobilization, health care systems, public health, program evaluation, epidemiology, data management, health promotion, policy and environmental interventions, health care quality improvement, communications, resource development, school health, and the risk factor and disease areas targeted by the program.

iii. Project Management. The project coordinator with the other project staff and leadership team, should:

a. Encourage active participation of consortium members in project activities and decisions, through regular meetings and other proactive methods of communication.

b. Actively oversee all project activities during their planning, development, implementation, and evaluation phases.

c. Track performance in relationship to the achievement of short-term and intermediate outcomes and budgetary expenditures.

d. Seek technical assistance from the State, HHS agencies, other Federal agencies, other recipients, national voluntary organizations, universities, or other sources.

e. Keep the Program Consultant informed and seek Program Consultant input and assistance.

f. Take corrective action promptly when necessary to ensure project success.

g. Participate in STEPS-wide program evaluations.

iv. Coordinate with State Plans and Activities. Ensure that community objectives, activities, and interventions are consistent with and supportive of State plans and activities for the prevention and control of diabetes, asthma, obesity, and associated risk factors. Ensure that community objectives, activities, and interventions do not duplicate existing efforts.

(d) Community Action Plan, Community and School-Based Interventions

Identify and implement high priority, eligible intervention strategies proven to prevent and control diabetes, asthma, and obesity. To establish such priorities, communities must examine their chronic disease burden, at-risk populations, current services and resources, and partnership capabilities to develop a comprehensive community action plan.

All communities must address nutrition, physical activity, and tobacco use and exposure since these areas will positively impact primary and/or secondary prevention in diabetes, asthma, and obesity. Additionally, communities are expected to implement other specific interventions to reduce the burden of the diseases/conditions addressed by STEPS (asthma, diabetes, and obesity). Such interventions might include: (1) Conducting community-wide campaigns to implement a diabetes assessment questionnaire (*e.g.*, American Diabetes Association's "Are You at Risk?"); (2) promoting quality care by providing health care settings with effective systems for handling referrals, follow-ups, and patient reminder systems; and (3) providing training for health care providers on how to establish effective asthma care plans with patients and their families.

i. Community Interventions. Programs are expected to employ multiple, evidence-based public health strategies based on the existing and emerging research base and careful scientific reviews such as the Guide to Community Preventive Services (*http://www.thecommunityguide.org/*), the Guide to Clinical Preventive Services (*http://www.odphp.osophs.dhhs.gov/pubs/guidecps/* and *http://www.ahrq.gov/clinic/prevnew.htm*), and the National Registry for Effective Programs (*http://modelprograms.samhsa.gov/template.cfm?page=nrepbutton*). Effective public health strategies may include changes to the social and physical environments; health promotion, public education, and information; media and other communication strategies; technological advances; economic incentives and disincentives; system improvements; provider education and medical office-based improvement strategies. (*See* Attachment C for additional, example intervention strategies).

While project activities should reach all persons in an identified intervention area, special efforts should be taken to ensure focus on populations with disproportionate burden of chronic diseases/conditions who also tend to experience disparities in access to and use of preventive and health care services. Populations of special focus might include racial and ethnic minorities, low-income persons, the medically underserved, persons with disabilities, and others with special needs. Programs must be culturally competent, and meet the health literacy and linguistic needs of target populations in the intervention area.

Programs should optimize resources by coordinating and partnering with existing programs and resources in the community, surrounding areas, and the State (*e.g.*, State incentive grant programs). Programs should expand the resources available through public-private ventures, foundation grants, public funding, and in-kind contributions in order to achieve and sustain STEPS outcomes.

Collaborative partnerships with, for example, professional organizations; health care providers, employers/purchasers, and plans; faith-based organizations; schools; child care, early childhood programs, and other organizations that serve children and youth; senior centers or service organizations; primary care associations; area health education centers; community health centers; local, regional, and state chapters of national chronic disease organizations (*e.g.*, the American Diabetes Association, the American Heart Association, the American Lung Association, the Asthma and Allergy Foundation of America, the American Cancer Society); and many others will be key to reaching affected populations and delivering and sustaining effective programs. Strong, cooperative linkages between clinical preventive care and community public health should be established and maintained.

With direction and coordination from the leadership team, the community consortium should develop and implement priority community health interventions to prevent and control diabetes, asthma, obesity, and associated risk factors in the identified intervention area. Such interventions may include:

a. Actively engaging members of the intended audience in community assessments, program planning (including establishing program goals and specifying intervention content and design), delivery, evaluation, and program improvement.

b. Supporting community-based initiatives to increase physical activity, improve nutrition, and eliminate tobacco use and exposure.

c. Increasing healthy food choices in restaurants, grocery stores, vending machines, worksites, shopping malls, senior centers, and other community settings. (*http://www.cdc.gov/nccdphp/dnpa/obesity/index.htm*)

d. Increasing access to and use of attractive and safe locations for engaging in physical activity.

e. Increasing access to and use of effective cessation programs for persons who use tobacco, targeting adults who are diabetic or who live with persons with asthma. (*http://www.surgeongeneral.gov/tobacco/default.htm*)

f. Improving strategic communication through the use of media and information technologies to improve public awareness and motivation to establish healthy nutrition, physical activity, and avoidance of tobacco use.

g. Developing supportive environments to complement and sustain individual change efforts.

h. Providing social support, reinforcement, and inducements to make healthy choices.

i. Enlisting the support of organizations and settings (*e.g.*, after school programs, worksites, youth-serving organizations, families, faith-based organizations, senior centers, and

health care partners) to encourage and support healthy behavior.

j. Working with health care providers, health plans, and employer/purchasers to increase the use of evidence-based preventive care practices.

k. Improving access to and utilization of quality health care services for primary and secondary prevention of the STEPS diseases/conditions (asthma, diabetes, and obesity).

l. Increasing self-management skills, including adherence to medication and other health regimens, among persons with established risk factors or chronic disease.

m. Ensuring adequate provider education, including strategies to implement national guidelines on quality care, and improving provider communication and counseling skills.

n. Educating persons with chronic disease on the proper management of their disease and the importance of seeking early, appropriate care to prevent and minimize complications.

o. Raising levels of health literacy to enable persons to make informed health decisions.

ii. School interventions. With guidance from the local education agency or agencies, implement school health interventions to prevent and control diabetes, asthma, and obesity in the same intervention area being served by the community interventions. Such interventions may include:

a. Identifying or establishing a full-time school health program coordinator and School Health Council to direct project activities and assist in their implementation. See the American Cancer Society's Guide on the Role of the School Health Coordinator and Guide to School Health Councils. (*http://www.schoolhealth.info*)

b. Reviewing and strengthening the schools' health-related policies and instructional programs using the CDC's School Health Index (*http://www.cdc.gov/nccdphp/dash/SHI/*), and the National Association of State Boards of Education's *Fit, Healthy and Ready to Learn: A School Health Policy Guide.* (*http://www.nasbe.org/HealthySchools/fithealthy.mgi*)

c. Providing adequate physical education for all students throughout the school year and increasing opportunities for physical activity through recess, intramural activities, and other offerings. (*http://www.cdc.gov/nccdphp/dash/healthtopics/physical_activity/guidelines/index.htm*)

d. Providing professional development for staff to enable them to deliver effective, skills-based health instruction for students. (*http://www.nasn.org/*)

e. Implementing staff wellness programs that include health assessment, health promotion, and health management components.

f. Ensuring that school food service personnel are qualified and trained in the use of United States Department of Agriculture (USDA) guidelines for healthy eating.

g. Wherever food is served in school, make appealing foods available that are low in fat, sodium, and added sugars. Limit the sale and distribution of foods of minimal nutritional value. (*http://www.cdc.gov/nccdphp/dash/healthtopics/nutrition/guidelines/index.htm*)

h. Establishing a tobacco-free school environment that prohibits tobacco use on school property, in school vehicles, at school-sponsored events (on and off school property) for students, staff, and visitors, at all times in order to reduce potential exposure to those with asthma. Offer or refer students and staff to school-or community-based tobacco use cessation programs, targeting those who have diabetes or who live with persons with asthma. (*http://www.cdc.gov/nccdphp/dash/healthtopics/tobacco/guidelines/index.htm*)

i. Alleviating indoor air quality problems caused by allergens and irritants such as smoke, dust, mites, molds, warm-blooded animals, and cockroaches.

j. Establishing management and support systems for students with targeted health problems. Ensure communication and coordination among students, families, relevant school staff, and community health and mental health providers.

k. Coordinating school, family, and community efforts. Assist families to support a healthy lifestyle for their children and families. Link school efforts to community programs and activities.

l. Working with school-based and school-linked clinics, assist students and families in meeting their chronic disease-related health needs.

(e) Updated Community Action Plans

Within the first eight months, finalize a five-year community action plan, based on the guidelines of this announcement, the preliminary plan submitted with this application, input from the application review process, newly available community information, HHS agencies and other sources of technical support, and continuing discussions with the community consortium. Base your revised action plan on a logic model that serves as the foundation for prioritizing, planning, and budgeting interventions, program management, and program sustainability (*See* Attachment B for references regarding logic model development and use). Review and update the community action plan annually to reflect community needs, opportunities, resources, and program evaluation findings. Formulate an activity-based budget for years 2 through 5 of the program that directly corresponds to the logic model, revised community action plan, and completed evaluation plan.

(f) Project Monitoring and Evaluation

i. Risk Factor Surveillance. Work with the state health department and CDC to expand existing surveillance mechanisms to collect representative Behavioral Risk Factor Surveillance System (BRFSS) baseline data for 1,500 to 2,000 adults within the intervention area, and repeat such assessments on an annual basis. (*http://www.cdc.gov/brfss/*)

Work with the state education agency and CDC to collect representative baseline data from the Youth Risk Behavior Surveillance System (YRBSS) (including, at a minimum, information on nutrition, physical activity, asthma, and tobacco) for 1,500 to 2,000 middle and/or high school students within the intervention area, and repeat such assessments on at least a biennial basis. (*http://www.cdc.gov/nccdphp/dash/yrbs/about_yrbss.htm*)

ii. Existing Data Sources. Identify existing data sources that can be used to design and monitor STEPS interventions, including hospital discharge data; medical care practice data; vital statistics data; Women, Infants, and Children (WIC) data; community health centers data; Medicaid and Medicare data; school data such absentee rates, academic, health, and risk information; and other sources of information about individual, group, or community health status, needs, and resources.

iii. Common Performance Measures. STEPS recipients will participate in establishing a common set of core performance measures to track the number and types of persons served by various intervention strategies and the achievement of related short-term, intermediate, and long-term outcomes. Recipients must agree to collect and report on core performance measures using standardized methodology to document how intervention strategies are being implemented and are successfully addressing STEP priorities. Performance goals should show the link between program activities and the

achievement of the initiative's overarching goals. *See* Attachment A for selected "Healthy People 2010" objectives that are anticipated to form part of the core performance measures.

iv. Comprehensive Evaluation Plan. Agree to participate fully in a STEPS-wide independent, external evaluation to examine and document the effectiveness of this cooperative agreement program. An important mechanism for changing behavior and implementing effective practices in a variety of settings is the ability to examine and act on successes, barriers to success, and failures. The recipients are expected to be full partners in the evaluation of this initiative by actively gathering and submitting data on selected outcome and performance measures. Grantees will also participate in other evaluation activities that may include regular debriefings, descriptive case studies, special analyses, and mid-course adjustments.

v. Data-Based Decision Making. Projects are expected to use all the information above, in consultation with their Program Consultant, to design and modify intervention strategies and the community action plan; revise budgets and subcontracts; request technical assistance from HHS agencies and/or contracted experts; recruit new members to the consortium; and/or change the structure of the consortium to improve project participation and outcomes.

(g) Information Sharing

Actively promote the sharing of experiences, strategies, and results with both funded and unfunded cities, communities, and interested partners. Ensure effective, timely communication and exchange of information, experiences, and results through the use of the Internet; management information systems; other electronic approaches and formats; workshops; site visits to and between communities and cities; and other activities.

2. Tribal Recipient Activities

Recipient activities are the same as the activities outlined above under sections 1.(a) through (g) for Large Cities and Urban Communities.

3. State-Coordinated Small City and Rural Community Recipient Activities

(a) State Fiduciary Responsibilities

i. Lead Agency. Establish the lead/fiduciary agency to be the State health department, its equivalent, or a *bona fide* agent as designated by the Governor.

ii. Allocate Funds. Allocate and disperse funds to communities, the State education agency, other key partners to implement recipient activities at the community level. Include adequate funds to participate fully in the substantial data collection and evaluation activities associated with this award.

iii. Contract Services. Contract for services, as needed, to accomplish the objectives of this program announcement.

iv. Link Budget to Performance. Provide integrated progress and financial reports that link the performance and expenditures of the communities and all key partners.

v. Sustainability. If funded for years three through five, engage in efforts that will sustain successful community programs on a long-term basis.

(b) Small City and Rural Community Responsibilities

Each of the two to four identified communities is expected, with State assistance, to assume the responsibilities identified above under Large City and Urban Community Recipient Activities section 1(a) through (g).

(c) Leadership/Coordination/Management

In support of the communities, the State health department should establish and coordinate a State-Community Management Team, including participation from the funded communities, the State health department, education agency, Office of Rural Health, any city or large community that is funded within the State borders under this program announcement, and other key public and private sector partners.

i. Coordinate community objectives with State health plans. Ensure that community, and city objectives, activities, and interventions are consistent with, and supportive of, State plans and activities for the prevention and control of diabetes, asthma, and obesity.

ii. Collaboration. Ensure collaboration between the community and city programs funded under this program announcement and other State and local chronic disease prevention and control programs.

iii. Project Staff. Establish and maintain project staff sufficient to provide oversight and technical assistance to the funded communities.

(d) Technical Assistance

The State health department and State education agency should provide or facilitate the provision of technical assistance, consultation, and support to the funded communities in:

i. Monitoring Disease Burden. Defining and monitoring the burden of chronic diseases and disparities through surveillance, epidemiology, and existing data sources (*e.g.*, vital statistics, hospital discharge data, WIC data, community health centers data, Health Centers Uniform Data System, Medicaid and Medicare data).

ii. Risk Factor Surveillance. Working with participating communities and other interested parties, ensure that surveillance mechanisms are in place to monitor changes in risk factors (*e.g.*, BRFSS & YRBSS).

iii. Program Evaluation. Work with funded communities on on-going evaluation, including assessing the effectiveness of, targeting of, number of persons reached by, and use of intervention strategies; tracking the accomplishment of activities and the achievement of short-term and intermediate outcomes; monitoring changes in health outcomes; tracking performance in relationship to budget execution; and using program evaluation findings to adjust plans and strengthen the program.

iv. Evidence-Based Practices. Accessing and sharing with funded communities current prevention effectiveness, intervention effectiveness, and other research and program evaluation findings. Identifying and sharing promising practices.

v. Community Support. Helping to build community engagement, mobilization, ownership, and organization.

vi. Intervention Selection and Development. Identifying, recommending, and adapting, evidence-based intervention strategies consistent with the needs, cultures, and resources of the communities.

vii. Resource Development. Promoting public and private resource development in support of community-based intervention strategies and long-term sustainability.

(e) Project Monitoring and Evaluation

The State health department should work with each of the selected communities to ensure that surveillance mechanisms collect representative data for program planning and monitoring. Obtain existing and new data sources to better understand the burden and trends of chronic diseases, and associated risk factors, and the effects of the STEPS program.

(f) Information Sharing

The State health department should actively promote the sharing of

experiences, strategies, and results among communities and cities within the State, between States funded under this program announcement, and with other interested communities. Support community efforts by ensuring effective, timely communication and exchange of information, experiences, and results through the use of the internet; management information systems; other electronic approaches and formats; workshops; site visits to and between communities and cities; and other activities.

4. HHS Activities

In a cooperative agreement, HHS staff is substantially involved in the program activities, above and beyond routine grant monitoring. HHS Activities for this program are as follows:

(a) Leadership and Coordination

i. HHS Steps to a HealthierUS Steering Committee. An HHS Steps to a HealthierUS Steering Committee has been established to coordinate and organize the "Steps to a HealthierUS" initiative and is comprised of high-level representatives of relevant HHS agencies and offices. The Committee provides ongoing policy oversight and direction to STEPS and will continue to coordinate technical assistance from each agency in support of the successful achievement of the purposes and performance objectives of this program announcement.

ii. STEPS workgroup. A STEPS workgroup has been established and is coordinated by the HHS Steps to a HealthierUS Steering Committee. The STEPS National Workgroup is comprised of representatives from funded communities, cities, tribes and States, and a wide variety of national partner organizations to:

a. Ensure collaboration between the recipients and their key partners funded under this program announcement and other local and State chronic disease prevention and control programs.

b. Anticipate the priority needs of recipients and prepare to meet these needs on a timely basis so that STEPS is implemented efficiently and successfully.

c. Assist in organizing and facilitating approaches to sharing experiences, lessons learned, results, and resources among recipients and existing community and State local chronic disease programs.

d. Make available the expertise, staff, and evidence-based resources of HHS agencies to assist and enhance the work of funded communities, States, and tribes.

iii. In concert with all of the HHS activities planned in support of STEPS, the Indian Health Service will provide additional coordination and assistance to tribes funded under this announcement.

(b) Technical Assistance

Provide technical assistance, training, and support to funded projects in the areas of surveillance and epidemiology, community assessment and planning, evidence-based interventions, community mobilization and partnership development, monitoring of program performance outcomes, data management, program sustainability, and other areas as needed. Provide on-site assistance, workshops, webforums, training and intervention materials.

(c) Evaluation Oversight and Coordination

HHS will separately fund and direct an independent, external evaluation of STEPS. However, recipients are expected to budget for their full participation in the data collection associated with this external review. Additionally, HHS will coordinate cross-site evaluation activities, including the establishment of core performance measures. HHS will provide, or ensure the provision of, expert resources to assist communities, States and tribes in the design, collection, analysis, and use of comparable evaluation data for evaluating and strengthening their programs.

II. Award Information

Type of Award: Cooperative agreement. HHS involvement in this program is listed in the Activities section above.

Fiscal Year Funds: 2004.

Approximate Total Funding: $10,500,000 total; $5,000,000 for Large City and Urban Community applicants; $1,000,000 for Tribal applicants; $4,500,000 for State-Coordinated Small City and Urban Community applicants. Total funding in each category is subject to change based on the number of applications received and funding amounts requested.

Approximate Number of Awards: 8 to 12 total; up to 5 Large City and Urban Community applicants; up to 2 Tribal applicants; up to 3 State-Coordinated Small City and Urban Community applicants. The total number of awards in each category is subject to change based on the number of applications received and funding amounts requested.

Approximate Average Award: $1,000,000 for Large City and Urban Community applicants; $500,000 for Tribal applicants; $1,500,000 for State-Coordinated Small City and Rural Community applicants. (This amount is for the first 12-month budget period, and includes both direct and indirect costs.)

Floor of Award Range: $750,000 for large city and Urban Community applicants; $300,000 for Tribal applicants; $1,000,000 for State-Coordinated Small City and Rural Community applicants.

Ceiling of Award Range: $1,250,000 for Large City and Urban Community applicants; $600,000 for Tribal applicants; $2,000,000 for State-Coordinated Small City and Rural Applicants.

If you request a funding amount greater than the ceiling of the award range, your application will be considered non-responsive, and will not be entered into the review process. You will be notified that your application did not meet the submission requirements.

Anticipated Award Date: September 22, 2004.

Budget Period Length: 12 months.

Project Period Length: 5 years.

Throughout the project period, CDC's commitment to continuation of awards will be conditioned on the availability of funds, evidence of satisfactory progress by the recipient (as documented in required reports), and the determination that continued funding is in the best interest of the Federal government.

The lead/fiduciary agent for State-Coordinated Small City and Rural Community awardees Health Departments must ensure that 75 percent of the total STEPS award is distributed on an annual basis to the identified communities in the State-coordinated application within four months of the award date. The remaining 25 percent of funds should be used to support the funded communities through technical assistance and other means. The 25 percent of the award described above is subject to a match requirement as described in section III.2. of this announcement.

Awarded communities must show progress toward objectives during the first two years of funding to be eligible for continued funding in years three through five of the program. Continuation awards and level of funding within an approved project period (FY 2005 through FY 2008) will be based on the availability of funds and satisfactory progress in achieving performance measures as evidenced by required progress reports.

Funding for FY 2005 and beyond is expected to range from $1,000,000 to $2,000,000 for each Large City and Urban Community recipient; $300,000 to $1,000,000 for each Tribal recipient; and from $2,000,000 to $2,500,000 for each State-Coordinated Small City and Rural Community recipient.

It is also anticipated that additional FY 2005 resources may enable the Secretary to fund additional prevention initiatives based on this announcement or a separate announcement. Applicants funded for the first time in FY 2005 will be required to submit a revised work plan and budget in order to receive funds at FY 2005 funding levels during their first year of funding.

Pending availability of funds, beginning in FY 2005 and each of the remaining years of this program announcement (September 22, 2005, through September 21, 2009), there may be an open season for new competitive applications. Specific guidance will be provided with exact application due dates and funding levels each year.

III. Eligibility Information

III.1. Eligible Applicants

If your application is incomplete or non-responsive to the requirements listed in this section, it will not be entered into the review process. You will be notified that your application did not meet submission requirements.

Cities and urban communities, and tribes or tribal consortia are eligible to apply directly under this announcement. In addition, States may coordinate the applications of up to four small cities and rural communities that do not meet the eligibility criteria for large cities/urban communities or independent tribal applicants (*see* numbers 1 and 2 below). In determining eligibility, Large City and Urban Community applicants must meet the criteria under number 1 below, Tribal applicants must meet the criteria under number 2 below, and State-Coordinated Small City and Rural Community applicants must meet the criteria under number 3 below.

1. Large City and Urban Community Applicants

The term "large cities and urban communities" is defined as any contiguous geographic area (including counties) with a population exceeding 400,000 persons with substantial expertise and infrastructure for the design, delivery and evaluation of chronic disease prevention and control interventions. The District of Columbia is eligible to apply for funding under this section of the program announcement. Eligible applicants in this category must specify the intervention area that will be the focus of the STEPS program. The intervention area can be smaller than the entire city or community, but must be geographically contiguous and must include a population of at least 150,000 residents but not more than 500,000 residents.

The large city/urban community applicant must select a lead/fiduciary agent designated by the mayor, county executive, or other equivalent governmental official. In many cases, the official local health department or its equivalent will serve as the lead/fiduciary agent. However, the mayor, county executive or other equivalent governmental official may name a different entity as the *bona fide* agent to serve as the lead/fiduciary agency.

A *bona fide* agent is the official fiscal agent the mayor (or other equivalent official) determines will function on behalf of the community for this award. In most instances, the *bona fide* agent is a foundation or non-profit organization that serves as the legal agent for applying for Federal grants for the local health agency. Other entities (such as departments of education, community-based organizations or universities) may be proposed as a *bona fide* agent but the mayor must determine those agents and the agents must have an established capability to serve as fiduciary agents. If you are applying as a *bona fide* agent of a local government, you must provide a letter from the local government as documentation of your status. Place this documentation behind the first page of your application form.

Only one application will be accepted from each eligible large city and urban community.

2. Tribal Applicants

The term "tribal applicants" is defined as federally recognized tribal governments, Regional Area Indian Health Boards, Urban Indian organizations, tribal consortia and inter-tribal Councils which serve 10,000 or more American Indians/Alaskan Natives in their catchment area(s). The tribal applicant must select a lead/fiduciary agent as designated by the Principal tribal elected official or chief executive officer. Only one application will be accepted from each eligible tribal entity.

3. State-Coordinated Small City and Rural Community Applicants

The term "State" includes the 50 states, the Commonwealth of Puerto Rico, the Virgin Islands, the Commonwealth of the Northern Marianna Islands, American Samoa, Guam, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau. To be eligible, States must identify two to four communities of total resident size not to exceed 800,000 persons combined. Each selected community must be geographically contiguous and include a minimum population of 10,000 persons. Neighboring small or rural counties may be grouped together to form a single, contiguous "community." States are strongly encouraged to include diverse communities that vary in size and location. HHS anticipates funding some programs that encompass rural communities as well as small cities.

The State applicant must select a lead/fiduciary agent designated by the Governor. In many cases, the official state health department or its equivalent will serve as the lead/fiduciary agent. However, the Governor may name a different entity as the *bona fide* agent to serve as the lead/fiduciary agency.

A *bona fide* agent is the official fiscal agent the Governor determines will function on behalf of the community for this award. In most instances, the *bona fide* agent is a foundation or non-profit organization that serves as the legal agent for applying for Federal grants for the State health agency. Other entities (such as departments of education, community-based organizations, universities) may be proposed as a *bona fide* agent but the Governor must determine those agents and the agents must have an established capability to serve as fiduciary agents. If you are applying as a *bona fide* agent of a state government, you must provide a letter from the state government as documentation of your status. Place this documentation behind the first page of your application form.

Only one application will be accepted from each State.

III.2. Cost Sharing or Matching

Matching funds are required for this project. Matching funds are required from non-Federal sources in an amount not less than 25 percent of Federal funds awarded to Large City and Urban Community Grantees. State grantees funded under the State-Coordinated Small City and Rural Community Program are required to provide a match not less than 50 percent of the funds retained by the States to support the funded communities through technical assistance and other means. In no case shall the amount to be matched be less than 25 percent of the award to the State.

In an effort to move grantees toward a self-sustaining program, the HHS

Secretary may require an increase in the match requirements in years 2 through 5 of the program. For the purpose of the initial application's 5 year plan and budget, applicants should calculate budgets based on the first year match requirements listed above.

The matching funds may be cash or its equivalent in-kind or donated services, fairly evaluated. The contribution may be made directly or through donations from public or private entities. Matching funds must be consistent with the community action plans that are submitted and approved. The total amount of Federal funds requested (including direct and indirect costs), combined with the amount for matching shall constitute the grantee's proposed costs for the budget period.

Matching funds may not be met through: (1) The payment of treatment services or the donation of treatment, or direct patient education services; (2) services assisted or subsidized by the Federal government; or (3) the indirect or overhead of an organization.

Matching funds are not required of Tribal Applicants. However, Tribal Applicants are encouraged to identify financial and in-kind contributions from their own organization and their partners to support and sustain the activities of this program announcement. Applications from tribal entities that include private partners who contribute in-kind or funding support and incentives to these efforts are strongly encouraged.

III.3. Other Eligibility Requirements

If you request a funding amount greater than the ceiling of the award range, your application will be considered non-responsive, and will not be entered into the review process. You will be notified that your application did not meet the submission requirements.

You must respond to all of the activities stipulated in section I "Activities" to be eligible for this program. Applications that do not address all activities will be considered non-responsive, and will not be entered into the review process.

You must submit a timely Letter of Intent (LOI) to be eligible to apply for this program. *See* sections IV.2, IV.3, and IV.6 of this announcement for more information on LOI submission.

Note: Title 2 of the United States Code section 1611 states that an organization described in section 501(c)(4) of the Internal Revenue Code that engages in lobbying activities is not eligible to receive Federal funds constituting an award, grant, or loan.

Applications that do not meet the matching requirements stipulated in section III.2 above will be considered non-responsive and will not be entered into the review process.

IV. Application and Submission Information

IV.1. How To Obtain Application Forms and Form Instructions

To apply for this funding opportunity use application form CDC 1246. Application forms and instructions are available on the CDC Web site, at the following Internet address: *http://www.cdc.gov/od/pgo/forminfo.htm.*

If you do not have access to the Internet, or if you have difficulty accessing the forms on-line, you may contact the CDC Procurement and Grants Office Technical Information Management Section (PGO-TIM) staff at: 770–488–2700. Application forms can be mailed to you.

IV.2. Content and Form of Submission

Letter of Intent (LOI): A Letter of Intent (LOI) from the Chief Executive Officer (Mayor, county executive, tribal chief, Governor or other equivalent governmental official) is required from all potential applicant communities for the purposes of determining eligibility and planning the competitive review process. As only one application per community will be accepted, LOIs will be used to identify communities that might inadvertently submit more than one application. If multiple LOIs from a single community are received, those organizations will be contacted to facilitate communication among the various parties so that a single application can be developed for that community, and the lead/fiduciary agent identified for the community. Failure to submit a LOI will preclude you from submitting an application. In addition, organizations submitting LOIs from communities that do not meet the eligibility criteria will be contacted.

Format: The LOI should be no more than two pages (8.5 x 11), double-spaced, printed on one side, with one-inch margins, written in English (avoiding jargon), and unreduced 12-point font.

Content: LOIs should include the following information:

(1) The program announcement title and number;

(2) Whether the application will be from a Large City and Urban Community applicant, a Tribal applicant, or a State-Coordinated Small City and Rural Community applicant; and

(3) The name of the lead/fiduciary agency or organization, the official contact person and that person's telephone number, fax number, mailing and e-mail addresses.

If the LOI is being sent from a Large City and Urban Community applicant, also provide the exact boundaries and total population size of the contiguous geographic area with population exceeding 400,000 persons that qualifies the applicant as eligible for this program announcement.

Application: The program announcement title and number must appear in the application. Use the information in the Activities section, Review Criteria section, and this section to develop the application content. Your application will be evaluated on the criteria listed, so it is important to follow this guidance carefully. Content requirements for Large City and Urban Community applicants are listed under number 1 below; for Tribal applicants under number 2 below; and for State-Coordinated Small City and Rural Community applicants under number 3 below. You must submit a project narrative with your application forms. The narrative must be submitted in the following format:

- Maximum number of pages: 50 pages for Large City and Urban Community applicants; 50 pages for Tribal applicants; 100 pages for State-Coordinated Small City and Rural Community Applicants. If your narrative exceeds the page limit, only the first pages which are within the page limit will be reviewed.
- Font size: 12 point unreduced.
- Double-spaced.
- Paper size: 8.5 by 11 inches.
- Page margin size: One inch.
- Printed only on one side of page.
- Held together only by rubber bands or metal clips; not bound in any other way.
- Other format requirements:

1. Large City and Urban Community Applicants

In addition to the application forms, the application must contain the following in this order:

(a) Official Transmittal Letter

Letter of transmittal from the Chief Executive Officer (Mayor, county executive, or other equivalent governmental official) committing local government support, identifying the lead agency (local health department, *bona fide* agent, or equivalent) and citing the amount requested.

(b) Table of Contents

Table of Contents with page numbers for each of the following sections.

(c) Executive Summary

Executive summary briefly describing the overall project, intervention area and population size, partnerships, intervention strategies, and major short-term and intermediate outcomes. The executive summary is limited to 2 pages.

(d) Application Narrative

The narrative (excluding appendices) must be no more than 50 pages, double-spaced, printed on one side, with one-inch margins, and unreduced 12-point font. If your narrative exceeds the page limit, only the first 50 pages will be reviewed. The narrative consists of sections (e)–(m), described as follows:

(e) Lead Agency

Description of the lead agency, including fiduciary and programmatic capabilities, as well as an inventory of current agency activities related to this announcement.

(f) Intervention Area

Description of the intervention area, including its demographic, geographic and political boundaries, target populations to receive special focus under this award, as well as evidence of the burden of disease, disparities in diabetes, asthma, obesity, associated risk factors, and access to and use of proven prevention and control interventions. Description of current activities and projects underway to address chronic diseases in the intervention area. Overview of the assets and deficiencies of the intervention area, including State, local, and private sector efforts, and a description of findings from any community assessments or asset mapping done in the past three years.

(g) Staff

Description of the proposed STEPS staff, including resumes or job descriptions for the full-time project coordinator and other key staff, the qualifications and responsibilities of each staff member and the percent of time each are committing to STEPS.

(h) Community

Description of the community consortium, including a list of key partners, and documentation of their capabilities; their commitment to specific functions, responsibilities, and resources; and evidence of prior successful collaborations. The structure, decision-making processes, and methods for accountability of the members should be described as well as how coordination and linkage with existing programs and interventions with similar focus will be maintained.

(i) Community Action Plan

A preliminary five-year community action plan that includes the community and school interventions to be employed in the intervention area. The community action plan should include time-phased, specific, measurable, and realistic short-term and intermediate outcomes based on the needs of the community and gaps in current prevention and control activities. The community action plan should identify likely approaches, strategies, and interventions to be used over the entire five-year project period to address nutrition, physical activity, and tobacco use and exposure as well as additional interventions to address the targeted STEPS chronic diseases or conditions. The organizations responsible for the interventions should be clearly identified as well as the target populations to be addressed. The community action plan should address first year activities in depth and their relationship to attaining specific short-term and intermediate outcomes. The community action plan should include a plan to ensure long-term sustainability of project efforts and outcomes.

(j) Financial Contributions

Description of financial and in-kind resources, if any, that will be contributed toward activities initiated as part of STEPS.

(k) Evaluation and Monitoring

A plan for data identification, collection, and use for program planning and monitoring. Describe efforts to obtain existing and new data sources to better understand chronic disease burden and trends, related risk factors and the effects of STEPS. Provide specific assurances to track common performance measures and participate fully in an independent, external evaluation of STEPS processes and outcomes. Performance goals should directly link program activities to the achievement of the initiative's overarching goals. Describe how the project is anticipated to improve specific performance measures and outcomes compared to baseline performance.

(l) Communications Plan

A plan to communicate and share information with the members of the consortium, the community, and other key partners. The plan should describe the proposed exchange of information, the means and proposed timing of communication, with an emphasis on communications innovations such as electronic formats, management information systems, webforums, etc.

(m) Letters of Support

The narrative must include a summary of the organizations that have submitted letters of support and Memoranda of Understanding (as appropriate) from the local health agencies, local Education Agency or agencies, Health Center Networks or Primary Care Associations and other key members of the consortium that specify their roles, responsibilities, and resources. Actual letters and memoranda should be placed in an appendix.

(n) Budget and Budget Justification/ Narrative

i. Allocate Budget

Clearly indicate estimated budget amounts to be allocated and dispersed to the local education agency or agencies and other key consortium members. Provide a description of the funding mechanisms and timelines that will be used to disperse these funds.

ii. One-Year and Five-Year Budgets

In support of the five-year community action plan, provide both a detailed budget and budget justification or narrative for the first budget year, and a budget estimate for budget years two through five.

a. Provide a detailed budget for the first budget year in support of each activity that must be completed in the first year of program operations to accomplish the short-term and intermediate outcomes specified in the five-year community action plan. Develop a budget justification and narrative that describes all requested funds by object class category: Personnel, fringe benefits, travel, equipment, supplies, contractual, and other direct costs. As part of the request for travel funds in FY 2004, applicants should budget for a 5-day trip to Atlanta for 5 to 6 key leadership team and project staff for a workshop early in the first budget year, and a 2-to-4-day trip to Washington, DC for 5 to 6 key leadership team and project staff for a conference later in the first budget year. Use Standard Form 424A (Budget Information—Non-Construction Programs).

b. Provide estimated budgets for FY 2005 through FY 2008 that are linked to the accomplishment of intermediate outcomes. For each budget year, include budget estimates for two trips to workshops and/or conferences for key staff members of the lead/ fiduciary organization and its key partners. For

planning purposes, use Atlanta and Washington, DC as the travel destinations. Provide budget estimates for each year for each object class category in section B of a separate Standard Form 424A (Budget Information—Non-Construction Programs).

(o) Appendices

The following additional information may be included in appendices. The appendices will not be counted toward the narrative page limit. Appendices are limited to the following items:

- Curriculum vitae.
- Resumes.
- Organizational charts.
- Letters of support or memoranda of understanding.

Any material submitted in the appendices that is not listed here will not be reviewed. All information included in appendices should be clearly referenced within the 50-page narrative to aid reviewers in connecting information in the appendices to that provided in the narrative.

2. Tribal Applicants

In addition to the application forms, the application must contain the following in this order:

(a) Official Transmittal Letter

Letter of transmittal from the Principal tribal elected official or the chief executive officer of the tribe, inter-tribal council, Urban Indian Organization, or Regional Area Indian Health Board identifying the lead agency and citing the amount requested.

(b) Table of Contents

A table of contents should be provided as described in 1.(b) above for Large Cities and Urban Communities.

(c) Executive Summary

An executive summary should be provided as described in 1.(c) above for Large Cities and Urban Community applications. The executive summary is limited to 2 pages.

(d) Narrative Content

The narrative (excluding appendices) should be no more than 50 pages double-spaced, printed on one side, with one-inch margins, and unreduced 12-point font. If your narrative exceeds the page limit, only the first 50 pages will be reviewed. The narrative should address the content described under 1.(e) through (m) above for Large Cities and Urban Community applications.

(e) Budget and Budget Justification/ Narrative

The budget should be included as described under 1.(n) above for Large Cities and Urban Communities. Travel estimates should be made as for Large Cities and Urban Communities, for 3 to 5 staff.

(f) Appendices

Appendices should be included as described under 1.(o) above for Large Cities and Urban Community applications.

3. State-Coordinated Small City and Rural Community Applicants

In addition to the application forms, the application must contain the following in this order:

(a) Official Transmittal Letter

Letter of transmittal from the Governor committing state support, identifying the lead agency (state health department, *bona fide* agent, or equivalent) and citing the amount requested.

(b) Table of Contents

Table of Contents with page numbers for each of the following sections.

(c) Executive Summary

Executive Summary briefly describing the overall project; intervention area(s) and population sizes; partnerships, intervention strategies, and major short-term and intermediate outcomes. The executive summary is limited to 3 pages.

(d) Application Narrative

The narrative (excluding appendices) must be no more than 100 pages, double-spaced, printed on one side, with one-inch margins, and unreduced 12-point font. If your narrative exceeds the page limit, only the first 100 pages will be reviewed. The narrative consists of sections e–n, described as follows:

(e) State Lead Agency

Description of the lead agency including fiduciary and programmatic capabilities, as well as an inventory of current agency activities related to this announcement. Description of the state health department's ability to provide, and history of providing, expert assistance to local communities in the design and delivery of evidence-based approaches to chronic disease prevention and control.

(f) Community Lead Agencies

Description of the lead agency (local health department or equivalent) for each of two to four separate community intervention areas, including fiduciary and programmatic capabilities, as well as an inventory of current agency activities related to this announcement.

(g) Intervention Areas

Description of each of the community intervention areas, including their demographic, geographic and political boundaries, target populations to receive special focus under this award, as well as evidence of the burden of disease, and disparities in diabetes, asthma, obesity, associated risk factors, and access to and use of proven prevention and control interventions. Description of current State, local, and private-sector activities underway to address chronic diseases in the intervention areas. Overview of the assets and deficiencies of the intervention areas including a description of findings from any community assessments or asset mapping done in the past three years.

(h) Staffing

Description of the proposed STEPS staff including resumes or job descriptions for full-time project coordinators in each community and other key staff at the State and community levels, the qualifications and responsibilities of each staff member and percent of time each is committing to STEPS.

(i) Community Consortia

Description of the community consortia for each community including a list of key partners and documentation of their capabilities; their commitment to specific functions, responsibilities, and resources; and evidence of prior successful collaborations. The structure, decision-making processes, and methods for accountability of the members should be described as well as how coordination and linkage with existing programs and interventions with similar focus will be maintained.

(j) Community Action Plans

A preliminary five-year community action plan for each community that includes the community and school interventions to be employed in the intervention areas. The community action plans should include time-phased, specific, measurable, and realistic short-term and intermediate outcomes that are based on the needs of the communities and gaps in current prevention and control activities. The community action plans should identify likely approaches, strategies, and interventions to be used over the entire five-year project period to address nutrition, physical activity, and tobacco

use and exposure as well as additional interventions to address the STEPS chronic diseases/conditions (asthma, diabetes, and obesity). The organizations responsible for the interventions should be clearly identified as well as the target populations to be addressed. The community action plan should address first year activities in depth and their relationship to attaining specific short-term and intermediate outcomes. The community action plan should include a plan to ensure long-term sustainability of project efforts and outcomes.

(k) Financial Contributions

Description of financial and in-kind resources that will be contributed toward new activities initiated as part of STEPS.

(l) Evaluation and Monitoring

A plan for data identification, collection, and use for program planning and monitoring for each community. Describe efforts to obtain existing and new data sources to better understand the burden and trends of chronic diseases and their risk factors and the effects of the STEPS program. Provide specific assurance from each community, and from the state, to track common performance measures and to participate fully in an independent, external evaluation of STEPS outcomes. Describe for each community how the project is anticipated to improve specific performance measures and outcomes compared to baseline performance.

(m) Communication Plans

A plan for each community to communicate and share information with the members of their consortia, other key partners, and their own communities broadly, as well as with other funded communities and the state. The plans should describe the proposed exchange of information, the proposed means and timing of communication, with an emphasis on communications innovations such as electronic formats, management information systems, webforums, etc.

(n) Letters of Support

The narrative must include a summary of the organizations that have submitted letters of support and Memoranda of Understanding (as appropriate) from the local health agencies, local Education Agency or agencies, Health Center Networks or Primary Care Associations and other key members of the consortium that specify their roles, responsibilities, and resources. Actual letters and memoranda should be placed in an appendix.

(o) Budget and Budget Justification/ Narrative

The budget tables and justification are not included in the 100 page application narrative. The following must be included in the budget:

i. Community Funding. Provide a description of how the state will distribute a minimum of 75 percent of total STEPS funds to the identified communities within four months of the receipt of their award.

ii. Allocate Budget. Clearly indicate estimated budget amounts to be allocated and dispersed to the funded communities, the State Education Agency, and other state partners. Provide a description of the funding mechanisms and timelines that will be used to disperse these funds.

iii. One-Year and Five-Year Budgets. In support of the five-year community action plans, provide a detailed budget and budget justification/narrative for the first budget year and a budget estimate for years two through five.

a. Provide a detailed budget for the first budget year in support of each activity that must be completed in the first year of program operations to accomplish the short-term and intermediate outcomes specified in the five-year community action plans. This detailed budget must include:

- State expenditures. A budget justification and narrative that describes all requested funds for the State Health and Education Agencies, and other key state partners by object class category: personnel, fringe benefits, travel, equipment, supplies, contractual, and other direct costs. State expenditures should clearly reflect activities that support the efforts of the funded communities. As part of the request for travel funds in FY 2004, applicants should budget for a 5-day trip to Atlanta for 7 to 10 key leadership team and project staff for a workshop early in the first budget year, and a 2-to-4-day trip to Washington, DC for 7 to 10 key leadership team and project staff for a conference later in the first budget year.
- Community expenditures. For each community, a budget justification and narrative that describe all requested funds for the local health department, the local education agency or agencies, and other key community partners by object class category in support of first-year activities in the five-year community action plan. As part of the request for travel funds in FY 2004, applicants should budget for two trips to workshops and/or conferences for key community members. For planning purposes, use Atlanta and Washington, DC as the travel destinations. Use Standard Form 424A (Budget Information—Non-Construction Programs).

b. Provide estimated budgets for FY 2004 through FY 2007 that are linked to the accomplishment of intermediate outcomes for each funded community. For each budget year, include budget estimates for two trips to workshops and/or conferences for key staff members of the lead/fiduciary organization and its key partners. For planning purposes, use Atlanta and Washington, DC as the travel destinations. Provide the estimated total budget for each year (*i.e.*, state plus all funded communities) for each object class category in Section B of Standard Form 424A (Budget Information—Non-Construction Programs).

(p) Appendices

The following additional information may be included in appendices. The appendices will not be counted toward the narrative page limit. Appendices are limited to the following items:

- Curriculum vitae.
- Resumes.
- Organizational charts.
- Letters of support or memoranda of understanding.

Any material submitted in the appendices that is not listed here will not be reviewed. All information included in appendices should be clearly referenced within the 50-page narrative to aid reviewers in connecting information in the appendices to that provided in the narrative.

You are required to have a Dun and Bradstreet Data Universal Numbering System (DUNS) number to apply for a grant or cooperative agreement from the Federal government. The DUNS number is a nine-digit identification number, which uniquely identifies business entities. Obtaining a DUNS number is easy and there is no charge. To obtain a DUNS number, access *http://www.dunandbradstreet.com* or call 1–866–705–5711. For more information, *see* the CDC Web site at: *http://www.cdc.gov/od/pgo/funding/pubcomnt.htm*. If your application form does not have a DUNS number field, please write your DUNS number at the top of the first page of your application, and/or include your DUNS number in your application cover letter.

Additional requirements that may require you to submit additional documentation with your application are listed in section "VI.2. Administrative and National Policy Requirements."

IV.3. Submission Dates and Times

LOI Deadline Date: May 27, 2004. CDC requires that you send a LOI if you intend to apply for this program.

Application Deadline Date: June 21, 2004.

Explanation of Deadlines: LOIs and Applications must be received in the CDC Procurement and Grants Office by 4 p.m. eastern time on the deadline date. If you send your LOI or application by the United States Postal Service or commercial delivery service, you must ensure that the carrier will be able to guarantee delivery of the application by the closing date and time. If CDC receives your LOI or application after closing due to: (1) Carrier error, when the carrier accepted the package with a guarantee for delivery by the closing date and time, or (2) significant weather delays or natural disasters, you will be given the opportunity to submit documentation of the carriers guarantee. If the documentation verifies a carrier problem, CDC will consider the LOI or application as having been received by the deadline.

This announcement is the definitive guide on LOI and application submission address and deadline. It supersedes information provided in the application instructions. If your LOI or application does not meet the deadline above, it will not be eligible for review, and will be discarded. You will be notified that your LOI or application did not meet the submission requirements.

CDC will not notify you upon receipt of your LOI or application. If you have a question about the receipt of your LOI or application, first contact your courier. If you still have a question, contact the PGO–TIM staff at: 770–488–2700. Before calling, please wait two to three days after the LOI or application deadline. This will allow time for applications to be processed and logged.

IV.4. Intergovernmental Review of Applications

Executive Order 12372 does not apply to this program.

IV.5. Funding restrictions

Use of Funds

Cooperative agreement funds may be used to expand, enhance, or complement existing activities to accomplish the objectives of this program announcement. Funds may be used to pay for, but are not limited to: Staffing, consultants, contractors, materials, resources, travel, and associated expenses to implement and evaluate intervention activities such as those described under the "Activities" section of this announcement.

Funds received under this announcement may not be used to supplant or replace existing local, State, or Federal funds or activities. Cooperative agreement funds may not be used for direct patient care, diagnostic medical testing, patient rehabilitation, pharmaceutical purchases, facilities construction, lobbying, basic research or controlled trials.

Direct assistance, that is, assistance provided by the Federal government in the form of Federal employee staffing when detailed to the recipient (pay, allowances, and travel), supplies, or equipment in lieu of cooperative agreement/financial assistance funds, is not available as part of FY 2004 STEPS awards. Direct assistance in lieu of cash may be available in subsequent years.

Funded agencies are eligible to receive indirect costs in this program. However the indirect costs allowed in this program are limited to the negotiated indirect cost rate or 5 per cent of the total award amount, whichever is less. If you are requesting indirect costs in your budget, you must include a copy of your current indirect cost rate agreement. If your indirect cost rate is a provisional rate, the agreement should be less than 12 months of age.

Awards will not allow reimbursement of pre-award costs.

Guidance for completing your budget can be found on the CDC Web site, at the following Internet address: *http://www.cdc.gov/od/pgo/funding/budgetguide.htm.*

IV.6. Other Submission Requirements

LOI Submission Address: Submit your LOI by express mail, delivery service, fax, or e-mail to: Technical Information Management—PA#04234, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341.

Application Submission Address: Submit the original and two hard copies of your application by mail or express delivery service to: Technical Information Management—PA#04234, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341.

LOIs and applications may not be submitted electronically at this time.

V. Application Review Information

V.1. Review Criteria

You are required to provide measures of effectiveness that will demonstrate the accomplishment of the various identified objectives of the cooperative agreement. Measures of effectiveness must relate to the performance goals stated in the "Purpose" section of this announcement. Measures must be objective and quantitative, and must measure the intended outcome. These measures of effectiveness must be submitted with the application and will be an element of evaluation.

An Independent Objective Review Group appointed by HHS will evaluate the quality of each application against the following criteria.

Evaluation criteria for Large City and Urban Communities are listed under number 1 below, for Tribes under number 2 below, and for State-Coordinated Small City and Rural Communities under number 3 below.

1. Large City and Urban Community Applicants

(a) Intervention Strategies (40 Points)

i. Community Interventions (30 of 40 Points)

a. Does the five-year community action plan include objectives and activities that are specific, time-phased, measurable, realistic, and related to identified needs and gaps in existing programs, program requirements, and purposes and goals of this cooperative agreement program?

b. Is the community action plan and its evaluation based on sound scientific evidence of community intervention effectiveness?

c. Are the individual intervention strategies and the action plan as a whole likely to be effective? This includes the estimated efficacy of each intervention based on existing science, the likely reach of each intervention (percentage of the community likely to be engaged or impacted by the intervention), the extent to which interventions build on and complement, but do not duplicate, existing programs, and the potential synergy created through multiple interventions.

d. Does the proposed plan include interventions/strategies to address all of the disease, condition and risk factor areas covered by STEPS (nutrition, physical activity, tobacco, asthma, diabetes, and obesity)?

e. How well does the plan reflect and build on a substantiated and comprehensive understanding of the assets, attributes, and deficiencies of the communities including non-STEPS-related activities completed or on-going in these communities?

f. Does the applicant include a plan to sustain the project long term?

ii. School Interventions (10 of 40 Points)

a. Does the applicant describe plans to implement school-based interventions

that promote healthy lifestyles among students and their families, and address the prevention and control of chronic diseases within the same intervention area as the community interventions?

b. Does the applicant provide a feasible plan to establish a full-time school health program coordinator and a school health council that will direct school-based activities and assist in their implementation?

c. Are the school-based interventions and the evaluation of them based on sound scientific evidence of their effectiveness?

d. Are the proposed objectives and activities for school-based interventions specific, time-phased, measurable, realistic, feasible, and related to identified needs and gaps in existing programs, program requirements, and purposes and goals of this cooperative agreement program?

(b) Project Leadership and Management (20 Points)

i. Is the lead/fiduciary agency clearly identified?

ii. Does the lead/fiduciary agency have the capacity to ensure accountability for expenditures in relationship to performance of all key partners?

iii. Does the applicant clearly and fully describe the proposed structure of the project including decision-making processes?

iv. Does the applicant provide letters of support and memoranda of understanding (as appropriate) with partner agencies and organizations?

v. Do letters of support and memoranda of understanding describe specific collaborative actions to be undertaken and the role of the partners?

vi. Do the key partner organizations within the applicant community provide financial or in-kind contributions toward the success of the STEPS initiative?

vii. Does the applicant describe realistic plans to coordinate proposed activities with state- and community-level programs to prevent and control chronic disease?

viii. How well qualified are proposed staff regarding relevant background, expertise, qualifications, and experience to successfully accomplish the goals of the STEPS Program?

ix. Does the proposed staffing plan appear appropriate to the level of work proposed and demonstrate the intent to minimize staff levels in order to maximize funding for interventions?

x. Does the applicant describe clearly defined roles of project staff and an appropriate percent of time each is committing to STEPS?

(c) Plan for Project Monitoring and Evaluation (15 Points)

i. Does the applicant describe plans to collaborate with other STEPS recipients in developing and implementing a set of common performance measures to monitor the success of funded projects?

ii. Are appropriate data sources currently available or will they be made available?

iii. Does the evaluation plan include the use of BRFSS and YRBS?

iv. Are appropriate data sources used to monitor and track changes in community capacity; the extent to which interventions reach populations at high risk; changes in risk factors, chronic disease burden, and disparities; the relationship between interventions and outcomes; and changes in program efficiency?

v. Does the applicant describe plans to collaborate fully in external, independently coordinated evaluation activities to evaluate the overall impact of STEPS?

vi. Does the applicant demonstrate the capability to conduct surveillance and program evaluation, access and analyze official data sources, and use evaluation to strengthen the program?

vii. Does the applicant describe how the project is anticipated to improve specific performance measures and outcomes compared to baseline performance?

(d) Background and Need (10 Points)

i. Is the proposed intervention area clearly and thoroughly described, including the populations to be served?

ii. Are data provided that substantiate the existing burden and/or disparities of chronic diseases and conditions, specifically diabetes, asthma, and obesity in the proposed intervention area and populations to be served?

iii. Are data provided that substantiate existing health risk behaviors and risk factors related to chronic diseases in the proposed intervention area and populations to be served?

iv. Are assets and barriers to successful program implementation identified?

v. How well are existing resources being leveraged and used to complement or contribute to the effort planned in the proposal?

(e) Community Consortium (10 Points)

i. Does the applicant demonstrate the ability to establish a consortium that is inclusive of key partners, and related coalitions?

ii. Are all of the required partner organizations (*see* E.1.b.) included in the community consortium?

iii. Does the applicant describe the capacity of the proposed consortium in terms of leadership, expertise, community representation, collaborative experience/abilities, and agency representation?

iv. Do the key partners demonstrate a high-level commitment to planning, implementing, and evaluating the proposed project, including a commitment of staff and other resources?

v. Have members of the proposed consortia successfully worked together or with others in the past to achieve improved health outcomes?

(f) Communication and Information Sharing (5 Points)

i. Does the applicant describe plans to share experiences, strategies, and results with other interested States, communities, and partners?

ii. Does the applicant describe plans to ensure effective and timely communication and exchange of information, experiences and results through mechanisms such as the internet, management information systems, other electronic formats, workshops, publications, and other innovations?

(g) Budget (Not Scored)

Is the budget reasonable and consistent with the proposed activities and intent of the program?

2. Tribal Applicants

Will be evaluated according to the Large City and Urban Community evaluation criteria listed under "Evaluation Criteria" V.1.a) through g) above.

3. State-Coordinated Small City and Rural Community Applicants

a. Intervention Strategies (40 Points)

The points for this section will be divided equally between the two to four pre-selected communities where project activities and interventions will occur (*i.e.*, 20 points per community if the project proposes to work in two communities, 13 points per community if three communities, 10 points per community if four communities). This section will be evaluated according to the same criteria for Large City and Urban Community proposals under "Evaluation Criteria" V.1.a) (i–ii) above.

b. Project Leadership, Collaboration, and Proposed Structure (15 Points)

i. Is the lead/fiduciary agency clearly identified?

ii. Does the lead/fiduciary agency have the capacity to ensure accountability for expenditures in

relationship to performance of all key partners?

iii. Does the applicant clearly and fully describe the proposed structure of the project including decision-making processes, monitoring, problem solving, and providing support to community-based programs?

iv. Does the applicant provide letters of support and memoranda of understanding (as appropriate) with partner agencies and organizations?

v. Do letters of support and memoranda of understanding describe specific collaborative actions to be undertaken and the role, responsibilities, and commitment of resources of the partners?

vi. Do the key partner organizations within the State and proposed communities provide financial or in-kind contributions toward the success of the STEPS initiative?

vii. Does the applicant describe realistic plans to coordinate proposed activities with State- and community-level programs to prevent and control chronic disease?

viii. Do the proposed staff have the relevant background, qualifications, and experience to successfully accomplish the goals of the STEPS Program?

ix. Does the proposed staffing plan appear appropriate to the level of work proposed and demonstrate the intent to minimize staff levels in order to maximize funding for interventions?

x. Does the applicant describe clearly defined roles of project staff and an appropriate percent time each is committing to STEPS?

xi. Does the proposed local consortia have the capacity for leadership, technical expertise, community representation, collaborative experience/abilities, and agency representation to successfully accomplish the goals of the STEPS Program?

x. Does the applicant describe the past history and evidence of effectiveness of community-State partnerships in relation to health issues and interventions (especially those related to chronic disease prevention and control, and those involving the specific communities selected for this program)?

xi. Does the applicant describe the past history and evidence of effectiveness of community partnerships within the proposed communities in relation to health issues and interventions (especially those involving chronic disease prevention and control)?

c. Plan for Project Monitoring and Evaluation (15 Points)

i. Does the applicant describe plans to collaborate with other STEPS recipients in developing and implementing a set of common performance measures to monitor the success of funded projects?

ii. Are appropriate data sources currently available or will they be made available?

iii. Does the evaluation plan include the use of BRFSS and YRBS?

iv. Are appropriate data sources used to monitor and track changes in community capacity; the extent to which interventions reach populations at high risk; changes in risk factors, chronic disease burden, and disparities; the relationship between interventions and outcomes; and changes in program efficiency?

v. Does the applicant describe plans for the State, proposed communities, and other key partners to collaborate fully in external, independently coordinated evaluation activities to evaluate the overall impact of STEPS?

vi. Does the applicant demonstrate the capability to conduct surveillance and program evaluation, access and analyze official data sources, and use evaluation to strengthen the program?

vii. Does the applicant describe how the project is anticipated to improve specific performance measures and outcomes compared to baseline performance?

d. Capacity To Guide and Support Intervention Communities (15 Points)

i. Does the applicant propose a State-Community Management Team fully capable of guiding and directing the overall project?

ii. Does the state have sufficient experience, expertise, and capacity to assist local communities in the activities of this project?

iii. Does the applicant include evidence of having provided guidance and support to local communities that resulted in successful implementation and outcomes?

iv. Are specific methods to assist local communities in the activities of this project described?

e. Background and Need (10 Points)

i. Is the proposed intervention area clearly and thoroughly described, including the populations to be served?

ii. Are data provided that substantiate the existing burden and/or disparities of chronic diseases and conditions, specifically diabetes, asthma, and obesity in the proposed intervention area and populations to be served?

iii. Are data provided that substantiate existing health risk behaviors and risk factors related to chronic diseases in the proposed intervention area and populations to be served?

iv. Are assets and barriers to successful program implementation identified?

v. How well are existing resources being leveraged and used to complement or contribute to the effort planned in the proposal?

f. Communication and Information Sharing (5 Points)

i. Does the applicant describe plans to share experiences, strategies, and results with other interested states, communities, and partners?

ii. Does the applicant describe plans to ensure effective and timely communication and exchange of information, experiences and results through mechanisms such as the internet, management information systems, other electronic formats, workshops, publications, and other innovations?

g. Budget (Not Scored)

Is the budget reasonable and consistent with the proposed activities and intent of the program?

V.2. Review and Selection Process

Eligibility: LOIs and applications will be reviewed for eligibility. Applications that are non-responsive to the eligibility criteria will not advance through the review process. Applicants will be notified that their application did not meet submission requirements.

Completeness: Applications will be reviewed for timeliness and completeness. Late applications, applications for which an LOI was not submitted, and incomplete applications (*i.e.*, those that do not include all required forms and all elements described in section IV.2 of this program announcement) will not be entered into the review process. Applicants will be notified that their application did not meet submission requirements.

Responsiveness: Applications will be reviewed for responsiveness. Applications that do not address all of the activities described in sections I.1, I.2, or I.3 of this program announcement will be considered non-responsive and will not be entered into the review process. Applicants will be notified that their application did not meet submission requirements.

Review Process: An objective review panel will evaluate complete and responsive applications according to the criteria listed in the "V.1. Review Criteria." The following factors affect the award selection.

1. The scores provided by the objective review. A minimum score of 80 points must be received for further consideration.

2. Geographic distribution across the country, considering the location of existing Steps grantee communities.

3. Standardized scores. Multiple objective review panels will be used to evaluate the volume of applications generated by this announcement. HHS reserves the right to consider the applicant's rank on the objective review panel and/or a calculated standardized score. Standardized scores are used to normalize variations in scoring among the panels identified by the panels' average scores, standard deviations, median scores, minimum scores, maximum scores. Standardized scores take into account the average and standard deviation of the panel scores, thereby setting each panel's average score equal to zero, and allowing direct comparisons across panels.

In addition, the following factors may affect the funding decision. Preference in funding, based on well-documented data, may be given to ensure:

- Inclusion of populations disproportionately affected by chronic disease and associated risk factors.
- Inclusion of geographic areas with high, age-adjusted rates of chronic disease and associated risk factors.
- Geographic distribution of STEPS programs nationwide.
- Inclusion of communities of varying sizes, including rural, suburban, and urban communities.

V.3. Anticipated Announcement and Award Dates

September 22, 2004.

VI. Award Administration Information

VI.1. Award Notices

Successful applicants will receive a Notice of Grant Award (NGA) from the CDC Procurement and Grants Office. The NGA shall be the only binding, authorizing document between the recipient and CDC. The NGA will be signed by an authorized Grants Management Officer, and mailed to the recipient fiscal officer identified in the application.

Unsuccessful applicants will receive notification of the results of the application review by mail.

VI.2. Administrative and National Policy Requirements

45 CFR parts 74 and 92.

For more information on the Code of Federal Regulations, *see* the National Archives and Records Administration at the following Internet address: *http://www.access.gpo.gov/nara/cfr/cfr-table-search.html.*

The following additional requirements apply to this project:

- AR–8 Public Health System Reporting Requirements;
- AR–9 Paperwork Reduction Act Requirements;
- AR–10 Smoke-Free Workplace Requirements;
- AR–11 Healthy People 2010;
- AR–12 Lobbying Restrictions.

Additional information on these requirements can be found on the CDC Web site at the following Internet address: *http://www.cdc.gov/od/pgo/funding/ARs.htm.*

VI.3. Reporting Requirements

You must provide CDC with an original, plus two hard copies of the following reports:

1. Interim progress report will be due May 30, 2005, and subsequent interim progress reports will be due on the 30th of May each year through May 30, 2009. The progress report will serve as the non-competing continuation application for the subsequent year, and must contain the following elements:

(a) A succinct description of the program accomplishments/narrative and progress made in achieving short-term and intermediate outcomes and other performance measures within the planned budget during the first six months of the budget period.

(b) The reason(s) for not achieving established short-term and intermediate outcomes and other performance measures within the planned budget and what will be done to achieve unmet objectives.

(c) Current budget period financial progress.

(d) New budget period proposed program activities and objectives. Detailed changes in the activity-based budget, the line-item budget, existing contracts, summary budget, and budget justification. For newly proposed contracts, provide the name of the contractor(s), method of selection, period of performance, scope of work, and itemized budget and budget justification or narrative.

2. An annual progress report summarizing the budget period (12 month) accomplishments for each budget period objective. The annual progress report will be due on November 20, 2005 and subsequent annual progress reports will be due on the 20th of November each year through November 20, 2009.

3. Financial status report, no more than 90 days after the end of the budget period.

4. Final financial, performance, and evaluation reports, no more than 90 days after the end of the five-year project period.

Send all reports to the Grants Management Specialist identified in the "Agency Contacts" section of this announcement.

VII. Agency Contacts

For general questions about this announcement, contact: Technical Information Management Section, CDC Procurement and Grants Office,2920 Brandywine Road, Atlanta, GA 30341, telephone: 770–488–2700.

For program technical assistance, contact: Dr. Mary Vernon-Smiley, Centers for Disease Control and Prevention, 4770 Buford Highway, NE., Mailstop K–40, Atlanta, GA 30341, telephone: 770–488–6164, e-mail address: *StepsInfo@cdc.gov.*

For financial, grants management, or budget assistance, contact: Sylvia Dawson, Grants Management Specialist, CDC Procurement and Grants Office, 2920 Brandywine Road, Atlanta, GA 30341, telephone: 770–488–2771, e-mail: *snd8@cdc.gov.*

For business management and budget assistance, in the territories contact: Vincent Falzone, Procurement and Grants Office, Centers for Disease Control and Prevention, 2920 Brandywine Rd., Room 3000, Atlanta, GA 30341–4146, telephone: 770–488–2763, e-mail address: *vcf6@cdc.gov.*

VIII. Other Information

A live, interactive webcast about this announcement and the STEPS Program will be held on May 19, 2004, starting at 1 p.m. eastern standard time. Information about the webcast, including directions on how to participate, as well as common questions and answers about this program announcement can be found at *http://www.HealthierUS.gov.*

This and other CDC announcements, the necessary applications, and associated forms can be found on the CDC Web site, Internet address: *http://www.cdc.gov.* Click on "Funding" then "Grants and Cooperative Agreements".

Dated: April 30, 2004.

William P. Nichols,

Acting Director, Procurement and Grants Office, Centers for Disease Control and Prevention.

[FR Doc. 04–10416 Filed 5–4–04; 2:52 pm]

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Friday, May 7, 2004

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Semi-annual agenda; Open for comments until further notice; published 12-22-03 [FR 03-25121]

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LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "PLUS" (Public Laws Update Service) on 202–741–6043. This list is also available online at *http://www.archives.gov/federal_register/public_laws/public_laws.html*.

The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202–512–1808). The text will also be made available on the Internet from GPO Access at *http://www.gpoaccess.gov/plaws/index.html*. Some laws may not yet be available.

H.R. 1274/P.L. 108–221
To direct the Administrator of General Services to convey to Fresno County, California the existing Federal courthouse in that county. (Apr. 30, 2004; 118 Stat. 619)

H.R. 2489/P.L. 108–222
Cowlitz Indian Tribe Distribution of Judgment Funds Act (Apr. 30, 2004; 118 Stat. 621)

H.R. 3118/P.L. 108–223
To designate the Orville Wright Federal Building and the Wilbur Wright Federal Building in Washington, District of Columbia. (Apr. 30, 2004; 118 Stat. 626)

H.R. 4219/P.L. 108–224
Surface Transportation Extension Act of 2004, Part II (Apr. 30, 2004; 118 Stat. 627)

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