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Presidential Documents

Title 3—

The President

Presidential Determination No. 2004–09 of November 21, 2003

Waiving Prohibition on United States Military Assistance to Parties to the Rome Statute Establishing the International Criminal Court

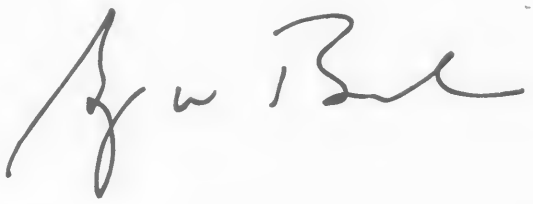
Memorandum for the Secretary of State

Consistent with the authority vested in me by section 2007 of the American Servicemembers' Protection Act of 2002 (the "Act"), title II of Public Law 107–206 (22 U.S.C. 7421 *et seq.*), I hereby:

• Determine that it is important to the national interest of the United States to waive the prohibition of section 2007 (a) with respect to Bulgaria, Estonia, Latvia, Lithuania, Slovakia, and Slovenia, with respect to military assistance for only certain specific projects that I have decided are needed to support the process of integration of these countries into NATO, or to support Operation ENDURING FREEDOM or Operation IRAQI FREEDOM; and

• Waive the prohibition with respect to the projects referred to above for these countries.

You are authorized and directed to report this determination and the accompanying Memorandum of Justification, prepared by my Administration, to the Congress, and to arrange for publication of this determination in the **Federal Register**.



THE WHITE HOUSE,
Washington, November 21, 2003.

[FR Doc. 03–29854
Filed 11–26–03; 8:45 am]
Billing code 4710–10–P

Rules and Regulations

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OFFICE OF SPECIAL COUNSEL

5 CFR Part 1800

Revision of Regulations To Describe Filing Requirements and Options, Including Electronic Filing

AGENCY: U.S. Office of Special Counsel.

ACTION: Final rule.

SUMMARY: The U.S. Office of Special Counsel (OSC) is revising its regulations on filing to state filing requirements and options more clearly and to provide information on where to find instructions for electronic filing with OSC.

DATES: This rule will be effective December 1, 2003.

FOR FURTHER INFORMATION CONTACT: Kathryn Stackhouse, General Law Counsel, in writing at: U.S. Office of Special Counsel, Legal Counsel and Policy Division, 1730 M Street NW., Suite 218, Washington, DC 20036–4505; by telephone at (202) 653–8971; or by facsimile at (202) 653–5151.

SUPPLEMENTARY INFORMATION: The U.S. Office of Special Counsel (OSC) is revising its regulations governing filing of: (1) complaints of prohibited personnel practices or other prohibited activity; (2) disclosures of information; and (3) requests for advisory opinions on the Hatch Act, under 5 CFR 1800.1, 1800.2, and 1800.3. These revisions are intended to more clearly describe the requirements and options for filing complaints, disclosures and requests for advisory opinions, and to direct potential filers to OSC's web site for information and instructions on electronic filing of complaints and disclosures (at *http://www.osc.gov*). The Government Paperwork Elimination Act (GPEA, Pub. L. 105–277) requires Federal agencies to provide individuals or entities that deal with agencies the option to submit information or transact with the agency electronically, and to maintain records electronically, when practicable. OSC has been working to comply with GPEA in stages by first offering complaint and disclosure forms to be printed from OSC's web site; then adding the capability of filling the forms out on-line and submitting them by mail or fax to OSC; and finally by offering electronic filing. These options are described on the OSC Web site at *http://www.osc.gov* (under "Forms"). This revision of OSC regulations on filing complaints and disclosures with OSC is intended to present clear information on all available options for such filings.

Procedural Determinations

Administrative Procedure Act (*APA*) This action is taken under the Special Counsel's authority, at 5 U.S.C. 1212(e), to publish regulations in the Federal Register. Under the Administrative Procedure Act, at 5 U.S.C. 553(b)(3)(B), statutory procedures for agency rulemaking do not apply "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." OSC finds that such notice and public procedure are unnecessary and contrary to the public interest because: (1) these revisions more clearly describe filing options at OSC; and (2) the public benefits from early notice of additional filing options, and further delay is unnecessary and contrary to the public interest.

Congressional Review Act (*CRA*): OSC has determined that these revisions are non-major under the Congressional Review Act, and is submitting a report on this final rule to Congress and the General Accounting Office pursuant to the act. The rule is effective December 1, 2003, as permitted by 5 U.S.C. 808.

Regulatory Flexibility Act (*RFA*): The Regulatory Flexibility Act does not apply, as this rule is not subject to notice and comment procedures under the APA.

Paperwork Reduction Act (*PRA*): OSC has received OMB approval of the Forms OSC–11 and OSC–12, which are referenced in the regulations, for use through August 31, 2006, including use of these forms for electronic filing.

Unfunded Mandates Reform Act (*UMRA*): This proposed revision does not impose any Federal mandates on State, local, or tribal governments, or on the private sector within the meaning of the UMRA.

Executive Order 12866 (*Regulatory Planning and Review*): OSC anticipates that the economic impact of this revision will be insignificant. Thus this proposed revision is not a significant regulatory action under section 3(f) of Executive Order 12866, and does not require an assessment of potential costs and benefits under section 6(a)(3) of the order.

Executive Order 12988 (*Civil Justice Reform*): This proposed rule meets applicable standards of section 3(a) and 3(b)(2) of Executive Order 12988.

Executive Order 13132 (*Federalism*): This proposed revision does not have new federalism implications under Executive Order 13132. The Hatch Act, at title 5 of the U.S. Code, chapter 15, prohibits certain political activities of covered state and local government employees. The OSC has jurisdiction to issue advisory opinions on political activity by those employees, and to bring an enforcement action before the Merit Systems Protection Board for prohibited activity by a covered state or local government employee. However, this proposed revision does not substantively affect the rights of state and local government employees. Rather, these revised regulations simply provide information on options for filing an allegation of a violation of the Hatch Act, or a request for an advisory opinion on the Hatch Act with OSC.

List of Subjects in 5 CFR Part 1800

Administrative practice and procedure, Government employees, Investigations, Law enforcement, Political activities (Government employees), Reporting and recordkeeping requirements, Whistleblowing.

■ For the reasons stated in the preamble, OSC amends 5 CFR part 1800 as follows:

PART 1800–FILING OF COMPLAINTS AND ALLEGATIONS

■ 1. The authority citation for Part 1800 continues to read as follows:

Authority: 5 U.S.C. 1212(e).

■ 2. Section 1800.1 is revised to read as follows:

§ 1800.1 Filing complaints of prohibited personnel practices or other prohibited activities.

(a) *Prohibited personnel practices.* The Office of Special Counsel (OSC) has investigative jurisdiction over the following prohibited personnel practices committed against current or former Federal employees and applicants for Federal employment:

(1) Discrimination, including discrimination based on marital status or political affiliation (*see* §1810.1 of this chapter for information about OSC's deferral policy);

(2) Soliciting or considering improper recommendations or statements about individuals requesting, or under consideration for, personnel actions;

(3) Coercing political activity, or engaging in reprisal for refusal to engage in political activity;

(4) Deceiving or obstructing anyone with respect to competition for employment;

(5) Influencing anyone to withdraw from competition to improve or injure the employment prospects of another;

(6) Granting an unauthorized preference or advantage to improve or injure the employment prospects of another;

(7) Nepotism;

(8) Reprisal for whistleblowing (whistleblowing is generally defined as the disclosure of information about a Federal agency by an employee or applicant who reasonably believes that the information shows a violation of any law, rule, or regulation; gross mismanagement; gross waste of funds; abuse of authority; or a substantial and specific danger to public health or safety);

(9) Reprisal for:

(i) Exercising certain appeal rights;

(ii) Providing testimony or other assistance to persons exercising appeal rights;

(iii) Cooperating with the Special Counsel or an Inspector General; or

(iv) Refusing to obey an order that would require the violation of law;

(10) Discrimination based on personal conduct not adverse to job performance;

(11) Violation of a veterans' preference requirement; and

(12) Taking or failing to take a personnel action in violation of any law, rule, or regulation implementing or directly concerning merit system principles at 5 U.S.C. 2301(b).

(b) *Other prohibited activities.* OSC also has investigative jurisdiction over allegations of the following prohibited activities:

(1) Violation of the Federal Hatch Act at title 5 of the U.S. Code, chapter 73, subchapter III;

(2) Violation of the state and local Hatch Act at title 5 of the U.S. Code, chapter 15;

(3) Arbitrary and capricious withholding of information prohibited under the Freedom of Information Act at 5 U.S.C. 552 (except for certain foreign and counterintelligence information);

(4) Activities prohibited by any civil service law, rule, or regulation, including any activity relating to political intrusion in personnel decisionmaking;

(5) Involvement by any employee in any prohibited discrimination found by any court or appropriate administrative authority to have occurred in the course of any personnel action (unless the Special Counsel determines that the allegation may be resolved more appropriately under an administrative appeals procedure); and

(6) Violation of uniformed services employment and reemployment rights under 38 U.S.C. 4301, *et seq.*

(c) *Procedures for filing complaints alleging prohibited personnel practices or other prohibited activities (other than the Hatch Act).*

(1) Current or former Federal employees, and applicants for Federal employment, may file a complaint with OSC alleging one or more prohibited personnel practices, or other prohibited activities within OSC's investigative jurisdiction. Form OSC–11 ("Complaint of Possible Prohibited Personnel Practice or Other Prohibited Activity") must be used to file all such complaints (except those limited to an allegation or allegations of a Hatch Act violation - *see* paragraph (d) of this section for information on filing Hatch Act complaints).

(2) Part 2 of Form OSC–11 must be completed in connection with allegations of reprisal for whistleblowing, including identification of:

(i) Each disclosure involved;

(ii) The date of each disclosure;

(iii) The person to whom each disclosure was made; and

(iv) The type and date of any personnel action that occurred because of each disclosure.

(3) Except for complaints limited to alleged violation(s) of the Hatch Act, OSC will not process a complaint filed in any format other than a completed Form OSC–11. If a filer does not use Form OSC–11 to submit a complaint, OSC will provide the filer with information about the form. The complaint will be considered to be filed on the date on which OSC receives a completed Form OSC–11.

(4) Form OSC–11 is available:

(i) By writing to OSC, at: Office of Special Counsel, Complaints Examining Unit, 1730 M Street NW., Suite 218, Washington, DC 20036–4505;

(ii) By calling OSC, at: (800) 872–9855 (toll-free), or (202) 653–7188 (in the Washington, DC area); or

(iii) Online, at: *http://www.osc.gov* (to print out and complete on paper, or to complete online).

(5) A complainant can file a completed Form OSC–11 with OSC by any of the following methods:

(i) By mail, to: Office of Special Counsel, Complaints Examining Unit, 1730 M Street NW., Suite 218, Washington, DC 20036–4505;

(ii) By fax, to: (202) 653–5151; or

(iii) Electronically, at: *http://www.osc.gov.*

(d) *Procedures for filing complaints alleging violation of the Hatch Act.*

(1) Complaints alleging a violation of the Hatch Act may be submitted in any written form, but should include:

(i) The complainant's name, mailing address, telephone number, and a time when OSC can contact that person about his or her complaint (unless the matter is submitted anonymously);

(ii) The department or agency, location, and organizational unit complained of; and

(iii) A concise description of the actions complained about, names and positions of employees who took the actions, if known to the complainant, and dates of the actions, preferably in chronological order, together with any documentary evidence that the complainant can provide.

(2) A written Hatch Act complaint can be filed with OSC by any of the methods listed in paragraph (c)(5)(i)-(iii) of this section.

■ 3. Section 1800.2 is revised to read as follows:

§ 1800.2 Filing disclosures of information.

(a) *General.* OSC is authorized by law (at 5 U.S.C. 1213) to provide an independent and secure channel for use by current or former Federal employees and applicants for Federal employment in disclosing information that they reasonably believe shows wrongdoing by a Federal agency. OSC must determine whether there is a substantial likelihood that the information discloses a violation of any law, rule, or regulation; gross mismanagement; gross waste of funds; abuse of authority; or a substantial and specific danger to public health or safety. If it does, the law requires OSC to refer the information to the agency head involved for investigation and a written report on the findings to the Special Counsel. The law

does not authorize OSC to investigate the subject of a disclosure.

(b) *Procedures for filing disclosures.* Current or former Federal employees, and applicants for Federal employment, may file a disclosure of the type of information described in paragraph (a) of this section with OSC. Such disclosures must be filed in writing (including electronically - *see* paragraph (b)(3)(iii) of this section).

(1) Filers are encouraged to use Form OSC–12 ("Disclosure of Information") to file a disclosure of the type of information described in paragraph (a) of this section with OSC. This form provides more information about OSC jurisdiction, and procedures for processing whistleblower disclosures. Form OSC–12 is available:

(i) By writing to OSC, at: Office of Special Counsel, Disclosure Unit, 1730 M Street NW., Suite 218, Washington, DC 20036–4505;

(ii) By calling OSC, at: (800) 572–2249 (toll-free), or (202) 653–9125 (in the Washington, DC area); or

(iii) Online, at: *http://www.osc.gov* (to print out and complete on paper, or to complete online).

(2) Filers may use another written format to submit a disclosure to OSC, but the submission should include:

(i) The name, mailing address, and telephone number(s) of the person(s) making the disclosure(s), and a time when OSC can contact that person about his or her disclosure;

(ii) The department or agency, location and organizational unit complained of; and

(iii) A statement as to whether the filer consents to disclosure of his or her identity by OSC to the agency involved, in connection with any OSC referral to that agency.

(3) A disclosure can be filed in writing with OSC by any of the following methods:

(i) By mail, to: Office of Special Counsel, Disclosure Unit, 1730 M Street NW., Suite 218, Washington, DC 20036–4505;

(ii) By fax, to: (202) 653–5151; or

(iii) Electronically, at: *http://www.osc.gov.*

■ 4. Section 1800.3 is revised to read as follows:

§ 1800.3 Advisory opinions.

The Special Counsel is authorized to issue advisory opinions only about political activity of state or local officers and employees (under title 5 of the United States Code, at chapter 15), and political activity of Federal officers and employees (under title 5 of the United States Code, at chapter 73, subchapter III). A person can seek an advisory opinion from OSC by any of the following methods:

(a) By phone, at: (800) 854–2824 (toll-free), or (202) 653–7143 (in the Washington, DC area);

(b) By mail, to: Office of Special Counsel, Hatch Act Unit, 1730 M Street NW., Suite 218, Washington, DC 20036–4505;

(c) By fax, to: (202) 653–5151; or

(d) By e-mail, to: *hatchact@osc.gov.*

Dated: November 20, 2003

William E. Reukauf,

Acting Special Counsel.

[FR Doc. 03–29518 Filed 11–26–03; 8:45 am]

BILLING CODE 7405–01–S

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1032

[Docket No. DA–01–07; AO–313–A44]

Milk in the Central Marketing Area; Order Amending the Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This document adopts as a final rule, without change, an interim final rule concerning pooling provisions of the Central milk order. More than the required number of producers in the Central marketing area have approved the issuance of the final order amendments.

EFFECTIVE DATE: December 1, 2003.

FOR FURTHER INFORMATION CONTACT: Jack Rower or Carol S. Warlick, Marketing Specialists, USDA/AMS/Dairy Programs, Order Formulation and Enforcement Branch, Stop 0231—Room 2971, 1400 Independence Avenue, SW., Washington, DC 20250–0231, (202) 720–2357, e-mail address: *jack.rower@usda.gov,* or (202) 720–9363, e-mail address: *carol.warlick@usda.gov.*

SUPPLEMENTARY INFORMATION: This document adopts as a final rule, without change, an interim final rule concerning pooling provisions of the Central milk order. Specifically, this final rule continues to amend the *Pool plant* provisions which: Establish lower but year-round supply plant performance standards; do not consider the volume of milk shipments to distributing plants regulated by another Federal milk order as a qualifying shipment on the Central order; exclude from receipts diverted milk made by a pool plant to another pool plant in determining pool plant diversion limits; and establish a "net shipments" provision for milk deliveries to distributing plants. For *Producer milk,* this final rule continues to adopt amendments which: Establish higher year-round diversion limits; base diversion limits for supply plants on deliveries to Central order distributing plants; and eliminate the ability to simultaneously pool the same milk on the Central order and a State-operated milk order that has marketwide pooling.

This administrative rule is governed by the provisions of sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have a retroactive effect. This rule will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with the rule.

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), provides that administrative proceedings must be exhausted before parties may file suit in court. Under Section 608c(15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing with the Department of Agriculture (USDA) a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Department would rule on the petition. The Act provides that the District Court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Department's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Regulatory Flexibility Act and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this rule will not have a significant economic impact on a substantial number of small entities. For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a "small business" if it has an annual gross revenue of less than $750,000, and a dairy products manufacturer is a "small business" if it has fewer than 500 employees.

For the purposes of determining which dairy farms are "small businesses," the $750,000 per year criterion was used to establish a production guideline of 500,000 pounds per month.

Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most "small" dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

Of the 10,108 dairy producers (farmers) whose milk was pooled under the Central order at the time of the hearing (November 2001) 9,695 or 95.9 percent would meet the definition of small businesses. On the processing side, 10 of the 56 milk plants associated with the Central order during November 2001 would qualify as "small businesses," constituting about 18 percent of the total.

Based on these criteria, more than 95 percent of the producers would be considered as small businesses. The adoption of the proposed pooling standards serves to revise the criteria that determine those producers, producer milk, and plants that have a reasonable association with, and are consistently serving the fluid needs of, the Central milk marketing area and are not associated with other marketwide pools concerning the same milk. Criteria for pooling are established on the basis of performance levels that are considered adequate to meet the Class I fluid needs and, by doing so, determine those that are eligible to share in the revenue that arises from the classified pricing of milk. Criteria for pooling are established without regard to the size of any dairy industry organization or entity. The criteria established are applied in an identical fashion to both large and small businesses and do not have any different economic impact on small entities as opposed to large entities. Therefore, the amendments will not have a significant economic impact on a substantial number of small entities.

A review of reporting requirements was completed under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). It was determined that these amendments would have no impact on reporting, recordkeeping, or other compliance requirements because they would remain identical to the current requirements. No new forms are proposed and no additional reporting requirements would be necessary.

This action does not require additional information collection that requires clearance by the Office of Management and Budget beyond currently approved information collection. The primary sources of data used to complete the forms are routinely used in most business transactions. Forms require only a minimal amount of information which can be supplied without data processing equipment or a trained statistical staff. Thus, the information collection and reporting burden is relatively small. Requiring the same reports for all handlers does not significantly disadvantage any handler that is smaller than the industry average.

Prior Documents in This Proceeding:

Notice of Hearing: Issued October 17, 2001; published October 23, 2001 (66 FR 53551).

Tentative Final Decision: Issued November 8, 2002; published November 19, 2002 (67 FR 69910).

Interim Final Rule: Issued February 6, 2003; published February 12, 2003 (68 FR 7070).

Final Decision: Issued August 18, 2003; published August 27, 2003 (68 FR 51640).

Findings and Determinations

The findings and determinations hereinafter set forth supplement those that were made when the Central order was first issued and when it was amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

The following findings are hereby made with respect to the Central order:

(A) *Findings upon the basis of the hearing record.* Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900), a public hearing was held upon certain proposed amendments to the tentative marketing agreement and to the order regulating the handling of milk in the Central marketing area.

Upon the basis of the evidence introduced at such hearing and the record thereof it is found that:

(1) The Central order, as hereby amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The parity prices of milk, as determined pursuant to section 2 of the Act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area, and the minimum prices specified in the order, as hereby amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(3) The Central order, as hereby amended, regulates the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial and commercial activity specified in, a marketing agreement upon which a hearing has been held.

(B) *Additional Findings.* It is necessary in the public interest to make these amendments to the Central order effective December 1, 2003.

The amendments to these orders are known to handlers. The final decision containing the proposed amendments to these orders was issued on August 18, 2003. These proposed amendments are identical to the amendments in the Interim Final Rule published in the **Federal Register** on February 12, 2003 (68 FR 7070), regulating the handling of milk in the Central marketing area.

The changes that result from these amendments will not require extensive preparation or substantial alteration in the method of operation for handlers. In view of the foregoing, it is hereby found and determined that good cause exists for making these order amendments effective December 1, 2003. It would be contrary to the public interest to delay the effective date of these amendments for 30 days after their publication in the **Federal Register**. (Sec. 553(d), Administrative Procedure Act, 5 U.S.C. 551–559.)

(C) *Determinations.* It is hereby determined that:

(1) The refusal or failure of handlers (excluding cooperative associations specified in Sec. 8c(9) of the Act) of more than 50 percent of the milk, which is marketed within the specified marketing area, to sign a proposed marketing agreement, tends to prevent the effectuation of the declared policy of the Act;

(2) The issuance of this order amending the Central order is the only practical means pursuant to the declared policy of the Act of advancing the interests of producers as defined in the order as hereby amended;

(3) The issuance of the order amending the Central order is favored by at least two-thirds of the producers who were engaged in the production of milk for sale in the marketing area.

List of Subjects in 7 CFR Part 1032

Milk marketing orders.

Order Relative to Handling

■ *It is therefore ordered*, that on and after the effective date of this document, the handling of milk in the Central marketing area shall be in conformity to and in compliance with the terms and conditions of the order, as amended, and as hereby further amended, as follows:

PART 1032—MILK IN THE CENTRAL MARKETING AREA

■ The interim final rule amending 7 CFR part 1032 which was published at 68 FR 7070 on February 12, 2003, is adopted as a final rule without change.

Dated: November 19, 2003.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 03–29624 Filed 11–26–03; 8:45 am]

BILLING CODE 3410–02–P

FEDERAL ELECTION COMMISSION

11 CFR Parts 104, 107, 110, 9001, 9003, 9004, 9008, 9031, 9032, 9033, 9034, 9035, 9036, and 9038

[Notice 2003–23]

Public Financing of Presidential Candidates and Nominating Conventions; Announcement of Effective Date and Correction

AGENCY: Federal Election Commission.

ACTION: Final rules; announcement of effective date and correction.

SUMMARY: The Federal Election Commission announces that the final rules governing the public financing of Presidential candidates and nominating conventions that were published in the **Federal Register** on August 8, 2003, 68 FR 47386, are effective as of November 28, 2003. Additionally, the Commission is publishing a correction to the final rules. The correction: Removes the citation "11 CFR 9008.55(d)" from a subject heading; changes two references from "11 CFR 9008.55(e)" to "11 CFR 9008.55(d)"; and corrects an amendatory instruction. The corrections also are effective as of November 28, 2003.

EFFECTIVE DATE: November 28, 2003.

FOR FURTHER INFORMATION CONTACT: Ms. Mai T. Dinh, Acting Assistant General Counsel, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Federal Election Commission published a document in the **Federal Register** of August 8, 2003, at 68 FR 47386, containing revised regulations at 11 CFR 104.5, 107.2, 110.2, 9001.1, 9003.1, 9003.3, 9003.5, 9004.4, 9008.3, 9008.7, 9008.8, 9008.10, 9008.12, 9008.50, 9008.51, 9008.52, 9008.53, 9031.1, 9032.9, 9033.1, 9033.11, 9034.4, 9035.1, 9036.1, 9036.2, and 9038.2, and new regulations at 11 CFR 9004.11, 9008.55, 9034.10, and 9034.11. The Commission is announcing the effective date for these regulations. Section 9009(c) of Title 26, United States Code, require that any rules or regulations prescribed by the Commission to carry out the provisions of the Presidential Election Campaign Fund Act be transmitted to the Speaker of the House of Representatives and the President of the Senate thirty legislative days prior to final promulgation. These rules were transmitted to Congress on July 31, 2003. Thirty legislative days expired in the Senate and the House of Representatives on November 4, 2003.

■ The Commission's document published in the **Federal Register** on August 8, 2003, contained three incorrect references and one incorrect amendatory instruction. First, the document as published included a reference to a provision that was not adopted by the Commission. That provision was originally located in 11 CFR 9008.55(d). Prior to adopting the final rules, the Commission deleted 11 CFR 9008.55(d) and redesignated paragraph (e) of 11 CFR 9008.55 as paragraph (d). While this change was reflected in the regulatory text of 11 CFR 9008.55 and in its Explanation and Justification, the deleted provision was cited as 11 CFR 9008.55(d) in one instance. *See* 69 FR 47403 (third column). Thus, this correction deletes the misleading reference to "11 CFR 9008.55(d)" in the third column on page 47403.

■ Second, the document as published contained two incorrect references to the provision that was proposed to be 11 CFR 9008.55(e) but was redesignated in the final regulations to be 11 CFR 9008.55(d). This change was reflected in the regulatory text of 11 CFR 9008.55, but the Explanation and Justification for 11 CFR 9008.55 cited the redesignated provision as 11 CFR 9008.55(e) in two instances. *See* 69 FR 47404 (second and third columns). Thus, this correction changes the references in the second and third columns on page 47404 from "11 CFR 9008.55(e)" to "11 CFR 9008.55(d)."

■ Third, the document as published contained one incorrect amendatory instruction. Amendatory instruction 29 in the third column on page 47418, incorrectly identified 11 CFR 9031.1 as 11 CFR 9003.1. Thus, this correction changes this reference in amendatory instruction 29 in the third column on page 47418 from "11 CFR 9003.1" to "11 CFR 9031.1."

Announcement of Effective Date

■ New 11 CFR 9004.11, 9008.55, 9034.10, and 9034.11 and amended 11 CFR 104.5, 107.2, 110.2, 9001.1, 9003.1, 9003.3, 9003.5, 9004.4, 9008.3, 9008.7, 9008.8, 9008.10, 9008.12, 9008.50, 9008.51, 9008.52, 9008.53, 9031.1, 9032.9, 9033.1, 9033.11, 9034.4, 9035.1, 9036.1, 9036.2, and 9038.2, as published at 68 FR 47386 (Aug. 8, 2003), and as corrected herein, are effective as of November 28, 2003.

Correction of Publication

■ In rule FR Doc 03–19893, published on August 8, 2003 (68 FR 47386), make the following corrections. On page 47403, in the third column, in the thirty-fourth line from the bottom, remove "11 CFR 9008.55(d)—". On page 47404, in the second column, in the sixth line from the bottom (not including footnote text), replace "11 CFR 9008.55(e)" with "11 CFR 9008.55(d)". On page 47404, in the third column, in the fourth line from the bottom (not including footnote text), replace "11 CFR 9008.55(e)" with "11 CFR 9008.55(d)". On page 47418, in the third column, in the second through fifth lines from the top, correct the amendatory instruction 29 to read as follows:

■ 29. Section 9031.1 is amended by removing the number "116" and adding in its place the number "400" in both instances in which "116" appears.

Dated: November 21, 2003.

Ellen L. Weintraub,

Chair, Federal Election Commission.

[FR Doc. 03–29616 Filed 11–26–03; 8:45 am]

BILLING CODE 6715–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2003–15532; Airspace Docket No. 03–ASO–10]

Establishment of Class D Airspace; Columbus, MS

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes Class D airspace at Columbus, MS. A federal contract tower with a weather reporting

system has been constructed at the Golden Triangle Regional Airport. Therefore, the airport meets criteria for Class D airspace. Class D surface area airspace is required when the control tower is open to contain Standard Instrument Approach Procedures (SIAPs) and other Instrument Flight Rules (IFR) operations at the airport. This action establishes Class D airspace extending upward from the surface to and including 2,800 feet MSL within a 4.1-mile radius of the airport.

EFFECTIVE DATE: 0901 UTC, February 19, 2004.

FOR FURTHER INFORMATION CONTACT: Walter R. Cochran, Manager, Airspace Branch, Air Traffic Division, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–5627.

SUPPLEMENTARY INFORMATION:

History

On July 22, 2003, the FAA proposed to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) by establishing Class D airspace at Columbus, MS, (68 FR 43340). This action provides adequate Class D airspace for IFR operations at Golden Triangle Regional Airport. Designations for Class D are published in FAA Order 7400.9L, dated September 2, 2003, and effective September 16, 2003, which is incorporated by reference in 14 CFR part 71.1. The Class D designations listed in this document will be published subsequently in the Order.

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received.

The Rule

This amendment to part 71 of the Federal Aviation Regulations (14 CFR part 71) establishes Class D airspace at Columbus, MS.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR Part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

■ 1. The authority citation for Part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9L, Airspace Designations and Reporting Points, dated September 2, 2003, and effective September 16, 2003, is amended as follows:

Paragraph 5000 Class D Airspace.

ASO MS D Columbus Golden Triangle, MS [NEW]

Golden Triangle Regional Airport, MS
(Lat. 33°27′01″ N, long. 88°35′29″ W)

That airspace extending upward from the surface to and including 2,800 feet MSL within a 4.1-mile radius of the Golden Triangle Regional Airport. This Class D airspace area is effective during the specific days and times established in advance by a Notice to Airmen. The effective days and times will thereafter be continuously published in the Airport/Facility Directory.

* * * * *

Issued in College Park, Georgia, on October 29, 2003.

Walter R. Cochran,

Acting Manager, Air Traffic Division, Southern Region.

[FR Doc. 03–28536 Filed 11–26–03; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2003–16497; Airspace Docket No. 03–ACE–81]

Modification of Class E Airspace; Milford, IA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; request for comments.

SUMMARY: This action modifies the Class E airspace area at Milford, IA. A review of controlled airspace for Fuller Airport, Milford, IA, indicates it does not comply with the criteria for 700 feet Above Ground Level (AGL) airspace required for diverse departures as specified in FAA Order 7400.2E. The area is enlarged to conform to the criteria in FAA Order 7400.2E.

DATES: This direct final rule is effective on 0901 UTC, February 19, 2004. Comments for inclusion in the Rules Docket must be received on or before December 31, 2003.

ADDRESSES: Send comments on this rule to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590–0001. You must identify the docket number FAA–2003–16497/Airspace Docket No. 03–ACE–81, at the beginning of your comments. You may also submit comments on the Internet at *http://dms.dot.gov*. You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527) is on the plaza level of the Department of Transportation NASSIF Building at the above address.

FOR FURTHER INFORMATION CONTACT: Kathy Randolph, Air Traffic Division, Airspace Branch, ACE–520C, DOT Municipal Headquarters Building, Federal Aviation Administration, 901 Locust, Kansas City, MO 64106; telephone: (816) 329–2525.

SUPPLEMENTARY INFORMATION: This amendment to 14 CFR 71 modifies the Class E airspace area extending upward from 700 feet above the surface of the earth at Milford, IA. An examination of controlled airspace for Fuller Airport reveals it does not meet the criteria for 700 AGL airspace required for diverse departures as specified in FAA Order 7400.2E, Procedures for Handling

Airspace Matters. The criteria in FAA Order 7400.2E for an aircraft to reach 1200 feet AGL is based on a standard climb gradient of 200 feet per mile plus the distance from the Airport Reference Point (ARP) to the end of the outermost runway. Any fractional part of a mile is converted to the next higher tenth of a mile. This amendment brings the legal description of the Milford, IA Class E airspace area into compliance with FAA Order 7400.2E. This area will be depicted on appropriate aeronautical charts. Class E airspace areas extending upward from 700 feet or more above the surface of the earth are published in paragraph 6005 of FAA Order 7400.9L, dated September 2, 2003, and effective September 16, 2003, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

The Direct Final Rule Procedure

The FAA anticipates that this regulation will not result in adverse or negative comment and, therefore, is issuing it as a direct final rule. Previous actions of this nature have not been controversial and have not resulted in adverse comments or objections. Unless a written adverse or negative comment, or a written notice of intent to submit an adverse or negative comment is received within the comment period, the regulation will become effective on the date specified above. After the close of the comment period, the FAA will publish a document in the **Federal Register** indicating that no adverse or negative comments were receiving and confirming the date on which the final rule will become effective. If the FAA does receive, within the comment period, an adverse or negative comment, or written notice of intent to the submit such a comment, a document withdrawing the direct final rule will be published in the **Federal Register**, and a notice of proposed rulemaking may be published with a new comment period.

Comments Invited

Interested parties are invited to participate in this rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developed reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. FAA–2003–16497/Airspace Docket No. 03–ACE–81." The postcard will be date/time stamped and returned to the commenter.

Agency Findings

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 noncontroversial and unlikely to result in adverse or negative comments. For the reasons discussed in the preamble, I certfy that this regulation (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not "significant rule" under Department of Transportation (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.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

■ Accordingly, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9656, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9L, dated September 2, 2003, and effective September 16, 2003, is amended as follows:

* * * * *

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

ACE IA E5 Milford, IA

Milford, Fuller Airport, IA (Lat. 43°19′59″ N., long. 95°09′33″ W.)

That airspace extending upward from 700 feet above the surface within a 6.3-mile radius of Fuller Airport, excluding that airspace within the Spencer, IA Class E airspace area.

* * * * *

Issued in Kansas City, MO, on November 14, 2003.

Paul J. Sheridan,

Acting Manager, Air Traffic Division, Central Region.

[FR Doc. 03–29452 Filed 11–26–03; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2003–16496; Airspace Docket No. 03–ACE–80]

Modification of Class E Airspace; Mapleton, IA

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; request for comments.

SUMMARY: Mapleton Municipal Airport has been renamed James G. Whiting Memorial Field. A review of controlled airspace for Mapleton, IA indicates it does not comply with the criteria for 700 feet Above Ground Level (AGL) airspace required for diverse departures.

This action replaces "Mapleton Municipal Airport" in the legal description of Mapleton, IA Class E airspace area with "James G. Whiting Memorial Field." It also enlarges the area to provide adequate protection for diverse departures and brings the legal description into compliance with FAA Orders.

DATES: This direct final rule is effective on 0901 UTC, February 19, 2004. Comments for inclusion in the Rules Docket must be received on or before December 31, 2003.

ADDRESSES: Send comments on this rule to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590–0001. You must identify the docket number FAA–2003–16496/Airspace Docket No. 03–ACE–80, at the beginning of your comments. You may also submit comments on the

Internet at *http://dms.dot.gov*. You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527) is on the plaza level of the Department of Transportation NASSIF Building at the above address.

FOR FURTHER INFORMATION CONTACT: Kathy Randolph, Air Traffic Division, Airspace Branch, ACE–520C, DOT Regional Headquarters Building, Federal Aviation Administration, 901 Locust, Kansas City, MO 64106; telephone: (816) 329–2525.

SUPPLEMENTARY INFORMATION: This amendment to 14 CFR 71 modifies the Class E airspace area extending upward from 700 feet above the surface at Mapleton, IA. It replaces "Mapleton Municipal Airport," the former name of the airport, with "James G. Whiting Memorial field," the new name of the airport, in the legal description. A review of controlled airspace at Mapleton, IA indicates 700 feet Above Ground Level (AGL) airspace required for diverse departures, as specified in FAA Order 7400.2E, Procedures for Handling Airspace Matters, for James G. Whiting Memorial Field does not comply with the Order. The criteria in FAA Order 7400.2E for an aircraft to reach 1200 feet AGL is based on a standard climb gradient of 200 feet per mile plus the distance from the Airport Reference Point (ARP) to the end of the outermost runway. Any fractional part of a mile is converted to the next higher tenth of a mile. The area is enlarged to conform to the criteria in FAA Order 7400.2E. This action also modifies the northeast extension of the Mapleton, IA Class E airspace area by defining it with the 030° bearing from the Mapleton NDB versus the current 032° bearing. It brings the legal description of this airspace area into compliance with FAA Order 7400.2E. The area will be depicted on appropriate aeronautical charts. Class E airspace areas extending upward from 700 feet or more above the surface of the earth are published in paragraph 6005 of FAA Order 7400.9L, dated September 2, 2003, and effective September 16, 2003, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

The Direct Final Rule Procedure

The FAA anticipates that this regulation will not result in adverse or negative comment and, therefore, is issuing it as a direct final rule. Previous actions of this nature have not been controversial and have not resulted in adverse comments or objections. Unless a written adverse or negative comment, or a written notice of intent to submit an adverse or negative comment is received within the comment period, the regulation will become effective on the date specified above. After the close of the comment period, the FAA will publish a document in the **Federal Register** indicating that no adverse or negative comments were received and confirming the date on which the final rule will become effective. If the FAA does receive, within the comment period, an adverse or negative comment, or written notice of intent to submit such a comment, a document withdrawing the direct final rule will be published in the **Federal Register** and a notice of proposed rulemaking may be published with a new comment period.

Comments Invited

Interested parties are invited to participate in this rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. FAA–2003–16496/Airspace Docket No. 03–ACE–80." The postcard will be date/time stamped and retuned to the commenter.

Agency Findings

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 determine that this final rule does not have federalism implications under Executive Order 13132.

The FAA has determined that this regulation is noncontroversial and unlikely to result in adverse or negative comments. For the reasons discussed in the preamble, I certify that this regulation (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under Department of Transportation (DOT) Regulatory Policies and Procedure (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.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

■ Accordingly, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

■ 1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120, E.O. 10854, 24 FR 9565, 3 CFR , 1959–1963 Comp., p. 389,

§ 71.1 Amended

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9L, dated September 2, 2003, and effective September 16, 2003, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

ACE IA E5 Mapleton, IA

Mapleton, James G. Whiting Memorial Field, IA
(Lat. 42°10′42″ N., long. 95°47′37″ W.).
Maplelon NDB
(Lat. 42°10′50″ N., long. 95°47′41″ W.)

That airspace extending upward from 700 feet above the surface within a 6.3-mile radius of James G. Whiting Memorial Field; and within 3.1 miles each side of the 030° bearing from the Mapleton NDB extending from the 6.3-mile radius to 10 miles northeast of the airport.

* * * * *

Issued in Kansas City, MO, on November 14, 2003.

Paul J. Sheridan,

Acting Manager, Air Traffic Division, Central Region.

[FR Doc. 03–29451 Filed 11–26–03; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

15 CFR Part 270

[Docket No. 030421094–3094–01]

RIN 0693–AB53

Procedures for Implementation of the National Construction Safety Team Act

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Interim final rule; request for comments.

SUMMARY: The Director of the National Institute of Standards and Technology (NIST), Technology Administration, United States Department of Commerce, requests comments on an interim final rule pertaining to the implementation of the National Construction Safety Team Act ("Act"). The interim final rule clarifies NIST's role in recommending improvements to building codes, standards, and practices, and clarifies the relationship between investigations conducted under the Act and criminal investigations of the same building failure. The interim final rule also establishes procedures regarding the establishment and deployment of National Construction Safety Teams ("Teams") and for the conduct of investigations under the Act.

DATES: This interim rule is effective November 28, 2003. Comments must be received no later than December 29, 2003.

ADDRESSES: Comments on the interim final rule regulations must be submitted to: Dr. James E. Hill, Acting Director, Building and Fire Research Laboratory, National Institute of Standards and Technology, Mail Stop 8600, Gaithersburg, MD 20899–8600, telephone number (301) 975–5900.

FOR FURTHER INFORMATION CONTACT: Dr. James E. Hill, Acting Director, Building and Fire Research Laboratory, National Institute of Standards and Technology, Mail Stop 8600, Gaithersburg, MD 20899–8600, telephone number (301) 975–5900.

SUPPLEMENTARY INFORMATION:

Background

The National Construction Safety Team Act, Pub. L. 107–231, was enacted to provide for the establishment of investigative teams ("Teams") to assess building performance and emergency response and evacuation procedures in the wake of any building failure that has resulted in substantial loss of life or that posed significant potential of substantial loss of life. The purpose of investigations by Teams is to improve the safety and structural integrity of buildings in the United States. A Team will (1) establish the likely technical cause or causes of the building failure; (2) evaluate the technical aspects of evacuation and emergency response procedures; (3) recommend, as necessary, specific improvements to building standards, codes, and practices based on the findings made pursuant to (1) and (2); and (4) recommend any research and other appropriate actions needed to improve the structural safety of buildings, and improve evacuation and emergency response procedures, based on the findings of the investigation. Section 2(c)(1) of the Act requires that the Director develop procedures for certain activities to be carried out under the Act as follows: Regarding conflicts of interest related to service on a Team; defining the circumstances under which the Director will establish and deploy a Team; prescribing the appropriate size of Teams; guiding the disclosure of information under section 7 of the Act; guiding the conduct of investigations under the Act; identifying and prescribing appropriate conditions for provision by the Director of additional resources and services Teams may need; to ensure that investigations under the Act do not impede and are coordinated with any search and rescue efforts being undertaken at the site of the building failure; for regular briefings of the public on the status of the investigative proceedings and findings; guiding the Teams in moving and preserving evidence; providing for coordination with Federal, State, and local entities that may sponsor research or investigations of building failures; and regarding other issues.

NIST published an interim final rule with a request for public comments in the **Federal Register** on January 30, 2003 (68 FR 4693), seeking public comment on general provisions regarding implementation of the Act and on provisions establishing procedures for the collection and preservation of evidence obtained and the protection of information created as part of investigations conducted pursuant to the Act, including guiding the disclosure of information under section 7 of the Act (§§ 270.350, 270.351, and 270.352) and guiding the Teams in moving and preserving evidence (§ 270.330). These general provisions and procedures, comprising Subparts A and D of the rule, are necessary to the conduct of the investigation of the World Trade Center disaster, already underway, and became effective immediately upon publication. The comment period closed on March 3, 2003. On May 7, 2003, NIST published a final rule in the **Federal Register** (68 FR 24343), addressing the comments received.

The interim final rule amends section 270.1, Description of rule; purpose, applicability, of the final rule to clarify NIST's role in recommending improvements to building codes, standards, and practices and to clarify the relationship between investigations conducted under the Act and criminal investigations of the same building failure. This interim final rule also amends the definition of Credentials, contained in section 270.2, to clarify that credentials are issued by the Director of NIST and to better define the term. This interim final rule also sets forth procedures regarding conflicts of interest related to service on a Team (section 270.106); defining the circumstances under which the Director will establish and deploy a Team (section 270.102); prescribing the appropriate size of Teams (section 270.104); guiding the conduct of investigations under the Act (section 270.200); identifying and prescribing appropriate conditions for provision by the Director of additional resources and services Teams may need (section 270.204); to ensure that investigations under the Act do not impede and are coordinated with any search and rescue efforts being undertaken at the site of the building failure (section 270.202); for regular briefings of the public on the status of the investigative proceedings and findings (section 270.206); providing for coordination with Federal, State, and local entities that may sponsor research or investigations of building failures (section 270.203); and regarding other issues. This interim final rule also amends section 270.313, Requests for Evidence, to clarify that collections of evidence under that section are investigatory in nature and are not research.

Research for Public Comment: Persons interested in commenting on the interim final rule should submit their comments in writing to the above address. All comments received in response to this notice will become part of the public record and will be available for inspection and copying at the Department of Commerce Central Reference and Records Inspection facility, room 6228, Hoover Building, Washington, DC 20230.

Additional Information

Executive Order 12866

This rule has been determined not to be significant under section 3(f) of Executive Order 12866.

Executive Order 12612

This rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

Administrative Procedure Act

Prior notice and an opportunity for public comment are not required for this rule of agency organization, procedure, or practice. 5 U.S.C. 553(b)(A). However, NIST feels it important to seek public comment on the issues addressed in this rule.

Regulatory Flexibility Act

Because notice and comment are not required under 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are inapplicable. As such, a regulatory flexibility analysis is not required, and none has been prepared.

Paperwork Reduction Act

Notwithstanding any other provision of the law, no person is required to, nor shall any person be subject to penalty for failure to comply with, a collection of information, subject to the requirements of the Paperwork Reduction Act, unless that collection of information displays a currently valid OMB Control Number.

There are no collections of information involved in this rulemaking.

National Environmental Policy Act

This rule will not significantly affect the quality of the human environment. Therefore, an environmental assessment or Environmental Impact Statement is not required to be prepared under the National Environmental Policy Act of 1969.

List of Subjects in 15 CFR Part 270

Administrative practice and procedure; investigations; buildings and facilities; evidence; subpoena.

Dated: November 21, 2003.

Arden L. Bement, Jr.,

Director.

■ For the reasons set forth in the preamble, the National Institute of Standards and Technology amends 15 CFR Part 270 as follows:

PART 270—NATIONAL CONSTRUCTION SAFETY TEAMS

■ 1. The authority citation for Part 270 as follows:

Authority: Pub. L. 107–231, 116 Stat. 1471 (15 U.S.C. 7301 *et seq.*).

■ 2. Section 270.1 is amended by revising paragraph (b) to read as follows:

§ 2701. Description of rule; purpose, applicability.

* * * * *

(b)(1) The purpose of investigations by Teams is to improve the safety and structural integrity of buildings in the United States. The role of NIST in implementing the Act is to understand the factors contributing to the building failure and to develop recommendations for improving national building and fire model codes, standards, and practices. To do this, the Teams produce technical reports containing data, findings, and recommendations for consideration by private sector bodies responsible for the affected national building and fire model code, standard, or practice. While NIST is an active participant in many of these organizations, NIST's recommendations are one of many factors considered by these bodies. NIST is not now and will not become a participant in the processes and adoption of practices, standards, or codes by state or local regulatory authorities.

(2) It is not NIST's role to determine whether a failed building resulted from a criminal act, violated any applicable federal requirements or state or local code or regulatory requirements, or to determine any culpability associated therewith. These are matters for other federal, state, or local authorities, who enforce their regulations.

* * * * *

■ 3. Section 270.2 is amended by revising the definition of *Credentials* to read as follows:

§ 270.2 Definitions used in this part.

* * * * *

Credentials. Credentials issued by the Director, identifying a person as a member of a National Construction Safety Team, including photo identification and other materials, including badges, deemed appropriate by the Director.

* * * * *

■ 4. Add new subparts B and C to read as follows:

Subpart B—Establishment and Deployment of Teams

Subpart C—Investigations

Subpart B—Establishment and Deployment of Teams

§ 270.100 General.

(a) Historically, in the United States building failures from fire, earthquake, hurricanes, tornadoes, and other disasters that have "resulted in substantial loss of life or that posed significant potential for substantial loss of life" have occurred at a frequency of less than once per year. It is expected that this pattern is likely to continue in the future. Acts of terrorism causing a building failure may occur at any time.

(b) For purposes of this part, a building failure may involve one or more of the following: structural system, fire protection (active or passive) system, air-handling system, and building control system. Teams established under the Act and this part will investigate these technical causes of building failures and will also investigate the technical aspects of evacuation and emergency response procedures, including multiple-occupant behavior or evacuation (egress or access) system, emergency response system, and emergency communication system.

(c) For purposes of this part, the number of fatalities considered to be "substantial" will depend on the nature of the event, its impact, its unusual or unforeseen character, historical norms, and other pertinent factors.

§ 270.101 Preliminary reconnaissance.

(a) To the extent the Director deems it appropriate, the Director may conduct a preliminary reconnaissance at the site of a building failure. The Director may establish and deploy a Team to conduct the preliminary reconnaissance, as described in § 270.102 of this subpart, or may have information gathered at the site of a building failure without establishing a Team.

(b) If the Director establishes and deploys a Team to conduct the

preliminary reconnaissance, the Team shall perform all duties pursuant to section 2(b)(2) of the Act, and may perform all activities that Teams are authorized to perform under the Act and these procedures, including gathering and preserving evidence. At the completion of the preliminary reconnaissance, the Team will report its findings to the Director in a timely manner. The Director may either determine that the Team should conduct further investigation, or may direct the Team to prepare its public report immediately.

(c) If the preliminary reconnaissance is conducted without the establishment of a Team, the leader of the initial assessment will report his/her findings to the Director in a timely manner. The Director will decide whether to establish a Team and conduct an investigation using the criteria established in § 270.102 of this subpart.

§ 270.102 Conditions for establishment and deployment of a Team.

(a) The Director may establish a Team for deployment after an event that caused the failure of a building or buildings that resulted in substantial loss of life or posed significant potential for substantial loss of life. The Director will determine the following prior to deploying a Team:

(1) The event was any of the following:

(i) A major failure of one or more buildings or types of buildings due to an extreme natural event (earthquake, hurricane, tornado, flood, *etc.*);

(ii) A fire that resulted in major damage or destruction of the building of origin, and/or that spread beyond the building of origin;

(iii) A major building failure at significantly less than its design basis, during construction, or while in active use; or

(iv) An act of terrorism or other event resulting in a Presidential declaration of disaster and activation of the Federal Response Plan; and

(2) A fact-finding investigation of the building performance and emergency response and evacuation procedures will likely result in significant and new knowledge or building code revision recommendations needed to reduce public risk and economic losses from future building failures.

(b) In making the determinations pursuant to paragraph (a) of this section, the Director will consider the following:

(1) Whether sufficient financial and personnel resources are available to conduct an investigation; and

(2) Whether an investigation of the building failure warrants the advanced capabilities and experiences of a Team; and

(3) If the technical cause of the failure is readily apparent, whether an investigation is likely to result in relevant knowledge other than reaffirmation of the technical cause; and

(4) Whether deployment of a Team will substantially duplicate local or state resources equal in investigatory and analytical capability and quality to a Team; and

(5) Recommendations resulting from a preliminary reconnaissance of the site of the building failure.

(c) To the maximum extent practicable, the Director will establish and deploy a Team within 48 hours after such an event.

§ 270.103 Publication in the Federal Register.

The Director will promptly publish in the **Federal Register** notice of the establishment of each Team.

§ 270.104 Size and composition of a team.

(a) *Size of a Team.* The size of a Team will depend upon the likely scope and complexity of the investigation. A Team may consist of five or less members if the investigation is narrowly focused, or a Team may consist of twenty or more members divided into groups if the breadth of the investigation spans a number of technical issues. In addition, Teams may be supported by others at NIST, in other federal agencies, and in the private sector, who may conduct supporting experiments, analysis, interviews witnesses, and/or examine the response of first responders, occupants, etc.

(b) *Composition of a Team.* (1) A Team will be composed of individuals selected by the Director and led by a Lead Investigator designated by the Director.

(2) The Lead Investigator will be a NIST employee, selected based on his/her technical qualifications, ability to mobilize and lead a multi-disciplinary investigative team, and ability to deal with sensitive issues and the media.

(3) Team members will include at least one employee of NIST and will include experts who are not employees of NIST, who may include private sector experts, university experts, representatives of professional organizations with appropriate expertise, and appropriate Federal, State, or local officials.

(4) Team members who are not Federal employees will be Federal Government contractors.

(5) Teams may include members who are experts in one or more of the following disciplines: civil, mechanical, fire, forensic, safety, architectural, and materials engineering, and specialists in emergency response, human behavior, and evacuation.

(c) *Duration of a Team.* A Team's term will end 3 months after the Team's final public report is published, but the term may be extended or terminated earlier by the Director.

§ 270.105 Duties of a team.

(a) A Team's Lead Investigator will organize, conduct, and control all technical aspects of the investigation, up to and including the completion of the final investigation public report and any subsequent actions that may be required. The Lead Investigator has the responsibility and authority to supervise and coordinate all resources and activities of NIST personnel involved in the investigation. The Lead Investigator may be the Contracting Officer's Technical Representative (COTR) on any contract for service on the Team or in support of the Team; while the COTR remains the technical representative of the Contracting Officer for purposes of contract administration, the Lead Investigator will oversee all NIST personnel acting as COTRs for contracts for service on the Team or in support of the Team. The Lead Investigator's duties will terminate upon termination of the Team. The Lead Investigator will keep the Director and the NCST Advisory Committee informed about the status of investigations.

(b) A Team will:

(1) Establish the likely technical cause or causes of the building failure;

(2) Evaluate the technical aspects of evacuation and emergency response procedures;

(3) Recommend, as necessary, specific improvements to building standards, codes, and practices based on the findings made pursuant to paragraphs (b)(1) and (b)(2) of this section;

(4) Recommend any research and other appropriate actions needed to improve the structural safety of buildings, and improve evacuation and emergency response procedures, based on the findings of the investigation; and

(5) Not later than 90 days after completing an investigation, issue a public report in accordance with § 270.205 of this subpart.

(c) In performing these duties, a Team will:

(1) Not interfere unnecessarily with services provided by the owner or operator of the buildings, building components, materials, artifacts, property, records, or facility;

(2) Preserve evidence related to the building failure consistent with the ongoing needs of the investigation;

(3) Preserve evidence related to a criminal act that may have caused the building failure;

(4) Not impede and coordinate its investigation with any search and rescue efforts being undertaken at the site of the building failure;

(5) Coordinate its investigation with qualified researchers who are conducting engineering or scientific research (including social science) relating to the building failure;

(6) Cooperate with State and local authorities carrying out any activities related to a Team's investigation;

(d) In performing these duties, in a manner consistent with the procedures set forth in this part, a Team may:

(1) Enter property where a building failure being investigated has occurred and take necessary, appropriate, and reasonable action to carry out the duties described in paragraph (b) of this section;

(2) Inspect any record, process, or facility related to the investigation during reasonable hours;

(3) Inspect and test any building components, materials, and artifacts related to the building failure; and

(4) Move records, components, materials, and artifacts related to the building failure.

§ 270.106 Conflicts of interest related to service on a Team.

(a) Team members who are not Federal employees will be Federal Government contractors.

(b) Contracts between NIST and Team members will include appropriate provisions to ensure that potential conflicts of interest that arise prior to award or during the contract are identified and resolved.

Subpart C—Investigations

§ 270.200 Technical conduct of investigation.

(a) *Preliminary reconnaissance.* (1) An initial assessment of the event, including an initial site reconnaissance, if deemed appropriate by the Director, will be conducted. This assessment will be done within a few hours of the event, if possible. The Director may establish and deploy a Team to conduct the preliminary reconnaissance, using the criteria established in § 270.102 of this part, or may have information gathered at the site of a building failure without establishing a Team.

(2) If the Director establishes and deploys a Team to conduct the preliminary reconnaissance, the Team shall perform all duties pursuant to section 2(b)(2) of the Act, and may perform all activities that Teams are authorized to perform under the Act and these procedures, with a focus on gathering and preserving evidence, inspecting the site of the building failure, and interviewing of eyewitnesses, survivors, and first responders. Collections of evidence by a Team established for preliminary reconnaissance are investigatory in nature and will not be considered research for any purpose. At the completion of the preliminary reconnaissance, the Team will report its findings to the Director in a timely manner. The Director may either determine that the Team should conduct further investigation, or may direct the Team to immediately prepare the public report as required by section 8 of the Act.

(3) If the preliminary reconnaissance is conducted without the establishment of a Team, the leader of the initial assessment will report his/her findings to the Director in a timely manner. The Director will decide whether to establish a team and conduct an investigation using the criteria established in § 270.102 of this part.

(b) *Investigation plan.* (1) If the Director establishes a Team without ordering preliminary reconnaissance, establishes a Team after preliminary reconnaissance, or establishes a Team to conduct preliminary reconnaissance and subsequently determines that further investigation is necessary prior to preparing the public report required by section 8 of the Act, the Director, or his/her designee, will formulate a plan that includes:

(i) A brief description of the building failure;

(ii) The criteria upon which the decision to conduct the investigation was based;

(iii) Supporting effort(s) by other organizations either in place or expected in the future;

(iv) Identification of the Lead Investigator and Team members;

(v) The technical investigation plan;

(vi) Site, community, and local, state, and Federal agency liaison status; and

(vii) Estimated duration and cost.

(2) To the extent practicable, the Director will include the most appropriate expertise on each Team from within NIST, other government agencies, and the private sector. The NCST Advisory Committee may be convened as soon as feasible following the launch of an investigation to provide the Director the benefit of its advice on investigation Team activities.

(c) *Investigation.* (1) The duration of an investigation that proceeds beyond preliminary reconnaissance will be as little as a few months to as long as a few years depending on the complexity of the event.

(2) Tasks that may be completed during investigations that proceed beyond preliminary reconnaissance include:

(i) Consult with experts in building design and construction, fire protection engineering, emergency evacuation, and members of other investigation teams involved in the event to identify technical issues and major hypotheses requiring investigation.

(ii) Collect data from the building(s) owner and occupants, local authorities, and contractors and suppliers. Such data will include relevant building and fire protection documents, records, video and photographic data, field data, and data from interviews and other oral and written accounts from building occupants, emergency responders, and other witnesses.

(iii) Collect and analyze physical evidence, including material samples and other forensic evidence, to the extent they are available.

(iv) Determine the conditions in the building(s) prior to the event, which may include the materials of construction and contents; the location, size, and condition of all openings that may have affected egress, entry, and fire conditions (if applicable); the installed security and/or fire protection systems (if applicable); the number of occupants and their approximate locations at the time of the event.

(v) Reconstruct the event within the building(s) using computer models to identify the most probable technical cause (or causes) of the failure and the uncertainty(ies) associated with it (them). Such models may include initial damage, blast effects, pre-existing deficiencies and phenomena such as fire spread, smoke movement, tenability, occupant behavior and response, evacuation issues, cooperation of security and fire protection systems, and building collapse.

(vi) Conduct small and full-scale experiments to provide additional data and verify the computer models being used.

(vii) Examine the impact of alternate building/system/equipment design and use on the survivability of the building and its occupants.

(viii) Analyze emergency evacuation and occupant responses to better understand the actions of the first responders and the impediments to safe egress encountered by the occupants.

(ix) Analyze the relevant building practices to determine the extent to which the circumstances that led to this building failure have regional or national implications.

(x) Identify specific areas in building and fire codes, standards, and building practices that may warrant revisions based on investigation findings.

(xi) Identify research and other appropriate actions required to help prevent future building failures.

(d) If a disaster site contains multiple building failures, the Director will narrow the scope of the investigation plan taking into account available financial and personnel resources, and giving priority to failures offering the most opportunity to advance the safety of building codes. The Director may consider the capabilities of NIST in establishing priorities.

§ 270.201 Priority of investigation.

(a) *General.* Except as provided in this section, a Team investigation will have priority over any other investigation of any other Federal agency.

(b) *Criminal acts.* (1) If the Attorney General, in consultation with the Director, determines, and notifies the Director that circumstances reasonably indicate that the building failure being investigated by a Team may have been caused by a criminal act, the Team will relinquish investigative priority to the appropriate law enforcement agency.

(2) If a criminal investigation of the building failure being investigated by a Team is initiated at the state or local level, the Team will relinquish investigative priority to the appropriate law enforcement agency.

(3) The relinquishment of investigative priority by the Team will not otherwise affect the authority of the Team to continue its investigation under the Act.

(c) *National Transportation Safety Board.* If the National Transportation Safety Board is conducting an investigation related to an investigation of a Team, the National Transportation Safety Board investigation will have priority over the Team investigation. Such priority will not otherwise affect the authority of the Team to continue its investigation under the Act.

(d) Although NIST will share any evidence of criminal activity that it obtains in the course of an investigation under the Act with the appropriate law enforcement agency, NIST will not participate in the investigation of any potential criminal activity.

§ 270.202 Coordination with search and rescue efforts.

NIST will coordinate its investigation with any search and rescue or search and recovery efforts being undertaken at the site of the building failure, including local FEMA offices and local emergency response groups. Upon arrival at a disaster site, the Lead Investigator will identify the lead of the search and rescue operations and will work closely with that person to ensure coordination of efforts.

§ 270.203 Coordination with Federal, State, and local entities.

NIST will enter into Memoranda of Understanding with Federal, State, and local entities, as appropriate, to ensure the coordination of investigations.

§ 270.204 Provision of additional resources and services needed by a team.

The Director will determine the appropriate resources that a Team will require to carry out its investigation and will ensure that those resources are available to the Team.

§ 270.205 Reports.

(a) Not later than 90 days after completing an investigation, a Team shall issue a public report which includes:

(1) An analysis of the likely technical cause or causes of the building failure investigated;

(2) Any technical recommendations for changes to or the establishment of evacuation or emergency response procedures;

(3) Any recommended specific improvements to building standards, codes, and practices; and

(4) Recommendations for research and other appropriate actions needed to help prevent future building failures.

(b) A Team that is directed to prepare its public report immediately after conducting a preliminary reconnaissance will issue a public report not later than 90 days after completion of the preliminary reconnaissance. The public report will be in accordance with paragraph (a) of this section, but will be summary in nature.

(c) A Team that continues to conduct an investigation after conducting a preliminary reconnaissance will issue a public report not later than 90 days after completing the investigation in accordance with paragraph (a) of this section.

§ 270.206 Public briefings and requests for information.

(a) NIST will establish methods to provide updates to the public on its planning and progress of an investigation. Methods may include:

(1) A public Web site;

(2) Mailing lists, to include an emphasis on e-mail;

(3) Semi-annual written progress reports;

(4) Media briefings; and

(5) Public meetings.

(b) Requests for information on the plans and conduct of an investigation should be submitted to the NIST Public and Business Affairs Division.

■ 5. Section 270.313 is amended by adding new paragraph (c) to read as follows:

§ 270.313 Requests for evidence.

* * * * *

(e) Collections of evidence under paragraphs (b), (c), and (d) of this section are investigatory in nature and will not be considered research for any purpose.

■ 6. Section 270.315 is amended by revising paragraph (a) to read as follows:

§ 270.315 Subpoenas.

(a) *General.* Subpoenas requiring the attendance of witnesses or the production of documentary or physical evidence for the purpose of taking depositions or at a hearing may be issued only under the signature of the Director with the concurrence of the General Counsel, but may be served by any person designated by the Counsel for NIST on behalf of the Director.

* * * * *

[FR Doc. 03–29615 Filed 11–26–03; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9090]

RIN 1545–BC31

Limitation on Use of the Nonaccrual-Experience Method of Accounting Under Section 448(d)(5); Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to temporary regulations.

SUMMARY: This document contains corrections to temporary regulations that were published in the **Federal Register** on September 4, 2003 (68 FR 52496) that revises temporary income tax regulations to providing guidance regarding the use of a nonaccrual-experience method of accounting by taxpayers using an accrual method of accounting and performing services.

EFFECTIVE DATE: This correction is effective September 4, 2003.

FOR FURTHER INFORMATION CONTACT: Terrance McWhorter (202) 622–4970 (not a toll free number).

SUPPLEMENTARY INFORMATION:

Background

The temporary regulations that are the subject of these corrections are under section 448 of the Internal Revenue Code.

Need for Correction

As published, this temporary regulation (TD 9090) contain errors that may prove to be misleading and are in need of clarification.

Correction of Publication

Accordingly, the publication of temporary regulations (TD 9090), which were the subject of FR Doc. 03–22458, is corrected as follows:

1. On page 52504, column 1, § 1.448–2T(f)(c) *T3Example 4*, the sixth entry in the table is corrected to read as follows:

Taxable year	Total accounts receivable	Bad debts adjusted for recoveries
* *	* *	*
2002	90,000	16,800
* *	* *	*

2. On page 52504, column 1, § 1.448–2T(f)(c), *Example 4* (ii), third line, the language "Assume that $49,300 of the total $80,000 of" is corrected to read "Assume that $49,300 of the total $90,000 of".

Cynthia E. Grigsby,

Acting Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel, (Procedure and Administration).

[FR Doc. 03–29727 Filed 11–26–03; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

31 CFR Part 103

Notice of Expiration of Conditional Exception to Bank Secrecy Act Regulations Relating to Orders for Transmittals of Funds by Financial Institutions

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

ACTION: Notice of expiration of conditional exception following extension.

SUMMARY: FinCEN is giving notice that on July 1, 2004, a conditional exception to a Bank Secrecy Act (BSA) requirement will permanently expire. Upon expiration of that exception, financial institutions will no longer be able to comply with the terms of that BSA requirement by using coded information or pseudonyms for the name of a customer in a funds transmittal order. This document further explains that FinCEN is revoking prior guidance regarding the meaning of the term "address", eliminating the need to utilize the conditional exception for transmittal orders lacking a transmittor's street address.

DATES: Effective December 2, 2003.

FOR FURTHER INFORMATION CONTACT: Don Carbaugh, Office of Regulatory Programs, FinCEN, (202) 354–6400; and Al Zarate, Office of Chief Counsel, FinCEN, at (703) 905–3590 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

I. Background

In 1998, FinCEN granted a conditional exception (the Customer Information File (CIF) Exception) to the strict operation of 31 CFR 103.33(g) (the Travel Rule). *See* FinCEN Issuance 98–1, 63 FR 3640 (January 26, 1998). The Travel Rule requires a financial institution to include certain information in transmittal orders relating to transmittals of funds of $3,000 or more. The CIF Exception addressed computer programming problems in the banking and securities industries by relaxing the Travel Rule's requirement that a customer's true name and address be included in a funds transmittal order, so long as alternate steps, described in FinCEN Issuance 98–1 and designed to prevent avoidance of the Travel Rule, were satisfied. By its terms, the CIF Exception to the Travel Rule was to expire on May 31, 1999; however, in light of programming burdens associated with year 2000 compliance issues, FinCEN extended the CIF Exception so that it would expire on May 31, 2001. *See* FinCEN Issuance 99–1, 64 FR 41041 (July 29, 1999). On May 30, 2001, after first soliciting input from the law enforcement community for its views on any law enforcement burdens caused by the CIF Exception, FinCEN again extended the CIF Exception so that it would expire on May 31, 2003. *See* FinCEN Issuance 2001–1, 66 FR 32746 (June 18, 2001). On March 7, 2003, FinCEN published a Notice of intent to permit the CIF exception to expire on May 31, 2003. *See* 68 FR 10965 (Notice of Intent). The Notice of Intent solicited comment on a number of issues relating to the operation of the CIF Exception. On May 19, 2003, FinCEN published a notice that again extended the CIF Exception so that it would expire on December 1, 2003. *See* FinCEN Issuance 2003–1, 68 FR 26996. The purpose of this most recent extension was to allow time for FinCEN to conduct a study on the operation of the CIF Exception, and to determine whether to remove, modify, or make permanent the Exception.

II. Terms of CIF Exception

FinCEN promulgated the Travel Rule in 1995. The Travel Rule requires financial institutions to include certain information in transmittal orders relating to transmittals of funds of $3,000 or more, which must "travel" with the order throughout the funds transmittal sequence. Among these requirements is that each transmittor's financial institution and intermediary financial institution include in a transmittal order the transmittor's name and address. *See* 31 CFR 103.33(g)(1)(i)–(ii) and (g)(2)(i)–(ii). Subsequently, financial institutions represented to FinCEN that their ability to comply with the Travel Rule at all depended on their ability to use their automated customer information files, known as CIFs. Although an originating institution always maintains the originating customer's true name and address, the CIFs were sometimes programmed with coded or nominee names and addresses (or post office boxes). The reprogramming tasks involved in changing the CIFs were represented to be a significant barrier to compliance with the Travel Rule. In light of these burdens, and in the interest of obtaining prompt compliance, FinCEN promulgated the conditional exception.

The conditional exception provides that a financial institution may satisfy the requirements of 31 CFR 103.33(g) that a customer's true name and address be included in a transmittal order, only upon satisfaction of the following conditions:

(1) The CIFs are not specifically altered for the particular transmittal of funds in question;

(2) The CIFs are generally programmed and used by the institution for customer communications, not simply for transmittal of funds transactions, and are programmed to generate other than true name and street address information;

(3) The institution itself knows and can associate the CIF information used in the funds transmittal order with the true name and street address of the transmittor of the order;

(4) The transmittal order includes a question mark symbol immediately following any designation of the transmittor other than by a true name on the order;

(5) Any currency transaction report or suspicious activity report by the institution with respect to the funds transmittal contains the true name and

address information for the transmittor and plainly associates the report with the particular funds transmittal in question.

The conditional exception further provides that it has no application to any funds transmittals for whose processing an institution does not automatically rely on preprogrammed and prespecified CIF name and address information. FinCEN's release promulgating the CIF Exception further informed financial institutions that any customer request for a nominee name in a CIF should be carefully evaluated as a potentially suspicious transaction. *See* 63 FR 3642.

III. Results of CIF Exception Study

Since the issuance in May 2003 of the Notice of Intent, FinCEN has studied the use of the CIF Exception by financial institutions, and the implications of continuing the CIF exception for law enforcement investigations. The staff of the Federal Reserve Bank of New York assisted in this process by providing FinCEN with a sample of funds transfer activity using the Fedwire system, which gave FinCEN a one-day snapshot of the frequency and type of use of the CIF Exception. FinCEN also obtained the views of law enforcement officials and financial institutions on this issue. Ultimately, FinCEN formed a Subcommittee of the Bank Secrecy Act Advisory Group (BSAAG)[1] to advise FinCEN on the costs and benefits of maintaining, terminating, or modifying the Exception. The Subcommittee consists of officials representing FinCEN, the U.S. Department of the Treasury, the U.S. Department of Justice, the federal bank and securities regulators, the banking industry, and the securities industry. FinCEN presented the Subcommittee with the results of its factfinding and the Subcommittee also reviewed information provided by the New York Clearing House Association L.L.C.[2]

Based on its factfinding and input from the Subcommittee, FinCEN has made the following determinations. First, there is a powerful law enforcement interest, particularly in light of the tragic events of 9/11, in ensuring that a financial institution can identify funds transfers conducted by a terrorist suspect listed in a subpoena or other authorized search request. The use of coded names and pseudonyms effectively prevents an intermediary or a receiving financial institution from recognizing if it has records related to a government target. Second, to the extent that code names and pseudonyms are used in transmittal orders, such use appears to be limited to select private banking customers for confidentiality purposes. Because the use of coded names and pseudonyms is so infrequent, there is not a substantial cost involved in changing CIFs to reflect true names. Lastly, FinCEN understands that mailing addresses, rather than street addresses, are widely used by financial institutions in their CIFs. The banking industry contends that changing CIFs to reflect street addresses would require banks to examine each address in a CIF, and compare it with other customer information maintained by the bank, to determine whether the CIF address was a mailing address or street address. In addition, a new field would have to be created in the CIF to accommodate street address information, because customers would still want their statements and other information sent to their mailing address. Finally, each program that links the CIF to each of the bank's systems would have to be revised so that the correct address would be used for each application. According to the banking industry, each of these steps would have to be accomplished largely on a manual basis, resulting in significant costs to financial institutions. Law enforcement has acknowledged that the conduct of a reliable search is more dependent upon the use of true names than it is upon the use of street addresses.

Based upon these findings, and after weighing the competing interests involved, FinCEN has determined that revocation of the CIF Exception is appropriate. Regarding true name information, whatever legitimate interest is served by the use of coded names or pseudonyms in shielding the identity of a few select clients is overwhelmingly outweighed by the potential harm resulting from an intermediary or receiving financial institution not being able to determine whether it has records related to a government target. Weighed against the small number of clients for which the CIF Exception is used, the law enforcement interests predominate. FinCEN wishes to clarify that, although the Travel Rule does not permit the use of coded names or pseudonyms, the Rule does allow the use of abbreviated names, names reflecting different accounts of a corporation (*e.g.*, XYZ Payroll Account), as well as trade and assumed names of businesses (D/B/A) or the names of unincorporated divisions or departments of businesses.

FinCEN has reached a different conclusion regarding the requirement to use a transmittor's street address. The term "address," as it is used in 31 U.S.C. 103.33(g), is not defined. FinCEN has previously issued guidance that has been interpreted as not allowing the use of mailing addresses, including post office boxes, in situations in which a street address is known to the transmittor's financial institution.[3] Because the use of the conditional exception for mailing addresses arises from a prior interpretation, rather than the explicit language of section 103.33(g) itself, FinCEN believes this issue is more appropriately addressed through a regulatory interpretation, rather than through a temporary exception.

FinCEN believes that the Travel Rule, like all Bank Secrecy Act rules, should be read with some flexibility so as to avoid the unnecessary burdening of financial institutions. After weighing the competing interests involved in whether to require street address information FinCEN has determined that the Travel Rule should be read to allow the use of mailing addresses. Consequently, for purposes of 31 CFR 103.33(g), the term address means either the transmittor's street address, or the transmittor's address maintained in the financial institution's automated customer information file so long as the institution maintains the transmittor's address on file and such address information is retrievable upon request by law enforcement.[4] Under no

[1] The BSAAG is an advisory group consisting of representatives of government, financial institutions, and other interested persons. The BSAAG meets semiannually for the purpose of informing private sector representatives of the utility of Bank Secrecy Act reports and to advise the Secretary of the Treasury (or his designee) of potential enhancements or modifications to existing Bank Secrecy Act requirements.

[2] *See* Letter from Clearing House to Director James F. Sloan, FinCEN, October 20, 2003. The members of the Clearing House are: Bank of America, National Association; The Bank of New York; Bank One, National Association; Citibank, N.A.; Deutsche Bank Trust Company Americas; Fleet National Bank; HSBC Bank USA; JPMorgan Chase Bank; LaSalle Bank National Association; Wachovia Bank, National Association; and Wells Fargo Bank, National Association. The following members of The Clearing House's affiliate, The Clearing House Interbank Payments Company L.L.C, also support the positions taken in the October 20 letter: American Express Bank, Ltd.; The Bank of Tokyo-Mitsubishi, Ltd., New York Branch; and UBS AG, Stamford Branch. In addition, the American Banker's Association participated in the drafting of the October 20 letter and supports the views expressed in it.

[3] *See Clearing House Letter* (citing FinCEN Advisory Issue 3, Funds Transfers: Questions and Answers, June 1996 (Q&A no. 18).

[4] Consistent with the final rules issued under section 326 of the USA Patriot Act (Pub. L. 107–56), an "address" for purposes of the Travel Rule, for an individual, is a residential or business street address, or an Army Post Office Box or a Fleet Post Office Box, or the residential or business street

Continued

circumstances may a financial institution use its own address or another financial institution's address in place of the customer's address, notwithstanding any prior guidance that appeared to allow the use of a financial institution's address under limited circumstances.[5] To avoid any confusion on the issue of addresses in transmittal orders, FinCEN, by this notice, hereby revokes Q&A no. 18 contained in FinCEN Advisory Issue 3 (June 1996) and Q&A no.16 contained in FinCEN Advisory Issue 7 (January 1997). FinCEN anticipates issuing a new set of frequently asked questions and answers regarding the application of the funds transfer rules very shortly. Nothing in this notice affects the obligation of a financial institution to comply with any other requirement imposed under the Bank Secrecy Act, including a customer identification program requirement imposed under Section 326 of the USA Patriot Act.

Finally, to give financial institutions the opportunity to take those steps necessary to comply fully with the Travel Rule, this Notice extends the conditional exception through July 1, 2004.

IV. FinCEN Issuance

By virtue of the authority contained in 31 CFR 103.55(a) and (b), which has been delegated to the Director of FinCEN, the effective period of the CIF Exception, as such Exception is set forth (as part of FinCEN Issuance 98–1, 63 FR 3640 (January 6, 1998)) under the heading "Grant of Exceptions" (63 FR 3641) is extended so that CIF Exception will expire on July 1, 2004, for transmittals of funds initiated after that date.

address of next of kin or another contact individual for individuals who do not have a residential or business address. For a person other than an individual (such as a corporation, partnership, or trust), "address" is a principal place of business, local office, or other physical location. *See* 68 FR 25090 (May 9, 2003) (Final Rules for Customer Identification Programs) issued jointly with the Board of Governors of the Federal Reserve System, Office of the Comptroller of the Currency, Office of Thrift Supervision, Federal Deposit Insurance Corporation, National Credit Union Administration, Commodity Futures Trading Commission, and Securities and Exchange Commission. Note, however, that while the Section 326 rules apply only to new customers opening accounts on or after October 1, 2003, and exempt wire transfers from the definition of "account" for banks, the Travel Rule applies to all transmittals of funds of $3,000 or more, whether or not the transmittor is a customer for purposes of the Section 326 rules.

[5] *See* FinCEN Advisory Issue 7, Funds "Travel" Regulations: Questions & Answers, January 1997 (Q&A no. 16) (stating that a financial institution must not use its own address "except where it is the actual address of record of the person").

Dated: November 21, 2003.

William F. Baity,

Acting Director, Financial Crimes Enforcement Network.

[FR Doc. 03–29617 Filed 11–26–03; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare and Medicaid Services

42 CFR Parts 403, 489 and 498

[CMS–1909–F]

RIN 0938–AI93

Medicare and Medicaid Programs; Religious Nonmedical Health Care Institutions and Advance Directives

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

ACTION: Final rule.

SUMMARY: This final rule implements requirements under the Balanced Budget Act of 1997, which set forth requirements for the new Religious Nonmedical Health Care Institution program and advance directives. This rule finalizes the Medicare requirements for coverage and payment of services furnished by religious nonmedical health care institutions, the conditions of participation that these institutions must meet before they can participate in Medicare, and the methodology we will use to pay these institutions and monitor expenditures for services they furnish. This rule also finalizes the rules governing States' optional coverage of religious nonmedical health care institution services under the Medicaid program. Additionally, this final rule addresses comments we received on the November 30, 1999, interim final rule and also makes minor changes to clarify our policy. Lastly, this rule incorporates a minor change to the requirements for advance directives.

DATES: *Effective date:* These regulations are effective December 29, 2003.

FOR FURTHER INFORMATION CONTACT:

Jean-Marie Moore, (410) 786–3508 (for general information, Medicare coverage, and payment issues);

Nancy Archer, (410) 786–0596 (for Medicare conditions of participation issues); and Linda Tavener, (410) 786–3838 (for Medicaid issues).

SUPPLEMENTARY INFORMATION:

Copies: This **Federal Register** document is 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.*

I. Background

Section 4454 of the Balanced Budget Act of 1997 (BBA '97), (Pub. L. 105–33, enacted August 5, 1997) provides for removal of all statutory and regulatory references to Christian Science sanatoria, and for coverage and payment of inpatient hospital services and post-hospital extended care services furnished in qualified religious nonmedical health care institutions (RNHCIs) under Medicare and as a State Plan option under Medicaid. (We will refer to these services as "RNHCI services.") The new amendments make it possible for institutions other than Christian Science facilities to qualify as RNHCIs and to participate in Medicare and Medicaid.

On November 30, 1999, we published an interim final rule in the **Federal Register** (67 FR 67028) to implement the BBA '97 amendments that set forth the requirements for coverage and payment for services furnished by RNHCIs, and modified the rules regarding advance directives.

Specifically, the interim final rule presented the methodologies under which we will pay RNHCIs, monitor the Medicare expenditure level for RNHCI secular services for any given federal fiscal year (FFY), and implement a statutory "sunset" of the RNHCI benefit. In addition, the rule set forth the conditions of participation that an RNHCI must fully meet to participate in the Medicare program and revised Medicaid regulations to reflect statutory changes and made necessary nomenclature and conforming changes. Finally, the rule revised the regulations pertaining to advance directives for all providers.

II. Provisions of the Interim Final Rule

Below we provide a brief summary of the provisions we implemented in the November 30, 1999, interim final rule to comply with requirements set forth by section 4454 of BBA '97.

A. RNHCI Medicare Benefits, Conditions of Participation, and Payment

1. Basis and Purpose (§ 403.700)

This subpart implemented sections 1821; 1861(e), (y) and (ss); 1869; and 1878 of the Social Security Act (the Act) regarding Medicare payment for inpatient hospital or post-hospital extended care services furnished to eligible beneficiaries in RNHCIs.

2. Definitions and Terms (§ 403.702)

Under this section, we included definitions for terms or acronyms used in the rule. Those terms that were defined elsewhere within the text of the rule were not included under this section.

3. Conditions for Coverage (§ 403.720)

Under this section, we specified the 10 qualifying provisions as contained in section 1861(ss)(1) of the Act that a Medicare or Medicaid provider must satisfy to meet the definition of an RNHCI. While the requirements contained in sections 1861(ss)(1)(B) (lawful operation), (G) (ownership by or in a provider of medical services), and (H) (utilization review) of the Act were explicitly addressed in the Medicare Conditions of Participation before passage of the BBA '97, it is essential that a facility meet all 10 elements to qualify as an RNHCI for both the Medicare and Medicaid programs.

In addition to meeting the definition of an RNHCI, the facility must also meet conditions of coverage for RNHCI services as established under section 1821 of the Act. Specifically, section 1821(a) of the Act requires that as a condition for Part A Medicare coverage, the beneficiary must have a condition that would qualify under Medicare Part A for inpatient hospital services or extended care services furnished in a hospital or skilled nursing facility that is not an RNHCI. The beneficiary must also have a valid election in effect to receive RNHCI services.

The RNHCI may not accept a patient as a Medicare or Medicaid beneficiary after the sunset provision (§ 403.756) is implemented, unless the patient has an election in effect before January 1 of the year in which the sunset provision is implemented. A claim filed for payment for services furnished to a patient with no valid election in effect before January 1 of the year the sunset provision is implemented would be denied. We explain the circumstances in which the sunset provision would be triggered at § 403.750 of the regulations.

4. Valid Election Requirements (§ 403.724)

Under this section, we implemented section 1821(b) of the Act to address the issues involved in beneficiary election of RNHCI services. We specified the general requirements relating to the election and the election process as well as the written statements that must be included in the election form. In addition, we described the circumstances under which the election would be revoked. Finally, we discussed the limitations that apply to subsequent elections.

5. Conditions of Participation

Under section 1861(ss)(1)(J) of the Act, we may accept an RNHCI as a participating Medicare provider only if, in addition to meeting the specific requirements of that section, it meets other requirements we find necessary in the interest of patient health and safety. With the broad authority the Act gave us to impose these requirements, we set forth those conditions we found to be appropriate and necessary in the religious nonmedical setting that an RNHCI must meet to participate in the Medicare program. We set forth conditions of participation regarding patient rights (§ 403.730); quality assessment and performance improvement (§ 403.732); food services (§ 403.734); discharge planning (§ 403.736); administration (§ 403.738); staffing (§ 403.740); physical environment (§ 403.742); life safety from fire (§ 403.744); and utilization review (UR) (§ 403.746).

Life Safety from Fire. In the interim final rule we required that an RNHCI comply with the 1997 edition of the National Fire Protection Association (NFPA) Life Safety Code that we incorporated by reference. We discuss the update to the Life Safety Code later in this rule.

Utilization Review. This was the only condition of participation specifically required by statute. Section 1861(ss)(1)(H) of the Act requires that an RNHCI have in effect a UR plan that includes the establishment of a UR committee to carry out the functions of the program.

6. Estimate of Expenditures and Adjustments (§ 403.750)

Section 1821(c)(1) of the Act requires us to estimate the level of Medicare expenditures for RNHCI benefits before the beginning of each Federal fiscal year (FFY) and requires us to monitor the expenditure level for RNHCI services provided in each FFY. The estimation of expenditure levels is necessary to determine if adjustments are required to limit payments to RNHCIs in the following FFY. In addition, the estimate is used to determine if the sunset provision is implemented.

As required by section 1861(e) of the Act, we will issue an annual Report to Congress, reviewed by the Office of Management and Budget, as the vehicle for reporting the potential need to make adjustments in payments and proposed mechanisms to be employed in order to stay within the established expenditure "trigger level" which is defined in section 1821(c)(2)(C) of the Act as the "unadjusted trigger level" for an FFY, adjusted using the consumer price index to the last 12 months ending July of the prior FFY, and increased or decreased by the carry forward from the previous FFY. In the interim final rule, we provided descriptions and examples of the trigger level calculation, the carry forward calculation, estimated expenditures, and adjustments in payments to help explain the statutory provision (64 FR 67036).

Section 1821(c)(2)(A) of the Act provides for a proportional reduction in payments for covered RNHCI services when the level of estimated expenditures exceeds the trigger level for any FFY. In addition to a proportional reduction in payments, section 1821(c)(2)(B) of the Act authorizes us to impose other conditions or limitations to keep Medicare expenditure levels below the trigger level. The statute provides us with authority to decide which type of adjustment to apply but is silent about when to apply a proportional adjustment or when to apply alternative adjustments. Therefore, we have extremely broad authority to decide what type of adjustments to impose.

The regulations at § 403.750 implement the statute and provide for imposing either a proportional adjustment to payments or alternative adjustments, depending on the magnitude of the adjustment required to keep the level of estimated expenditures from exceeding the trigger level. To account for any error in the estimation of expenditure levels, the trigger level for the next FFY is adjusted by the "carry forward." If expenditures were to exceed the trigger level, the trigger level for the subsequent year must be decreased, resulting in more drastic payment adjustments in future years. We will do this in an attempt to prevent expenditures from exceeding the trigger level for 3 consecutive years and thus avoid having to implement the sunset provision.

7. Payment Provisions (§ 403.752)

Payment to RNHCIs. Sections 1861(e) and (y)(1) of the Act grant us broad authority to construct a payment methodology for RNHCIs. We specified that we would continue to pay RNHCIs under the same reasonable cost methodology we used for Christian Science sanatoria. We pay RNHCIs the reasonable cost of furnishing covered services to Medicare beneficiaries subject to the rate of increase limits in accordance with the provisions in 42 CFR 413.40, which implement section 101 of the Tax Equity and Fiscal

Responsibility Act of 1982 (TEFRA) (Pub. L. 97–248).

We added that we intended to continue paying all RNHCIs under a reasonable cost, subject to the rate of increase limit methodology, until we identify an appropriate prospective payment methodology to meet the special requirements for this provider group. In the interim final rule, we removed and reserved § 412.90(c) and § 412.98 for the RNHCI prospective payment.

Administrative and Judicial Review. Under section 1821(c)(2)(D) of the Act, there is no administrative or judicial review of our estimates of the level of expenditures for RNHCI services or the application of the adjustment in payments for those services. We incorporated this provision into our regulations.

Beneficiary Liability. Under the new regulations, RNHCIs are subject to Medicare rules for deductibles and coinsurance. Under normal Medicare rules, a provider of services may only bill a beneficiary deductible and coinsurance amounts. However, section 1821(c)(2)(E) of the Act authorizes RNHCIs to bill individuals an amount equal to the reduction in payments applied under sections 1821(c)(2)(A) or (B) of the Act. We implemented this provision specifying that when payments are reduced to prevent estimated expenditures from exceeding the trigger level, the RNHCI may bill the beneficiary the amount of the Medicare reduction attributable to his or her covered services. In addition, we set forth the requirements an RNHCI must follow regarding notifying a beneficiary of any current or proposed Medicare adjustments.

8. Monitoring Expenditure Level (§ 403.754)

Under this section, we implemented section 1821(c)(3)(A) of the Act that requires us to monitor the expenditure level of RNHCIs beginning with FFY 1999 which allows us to calculate the carry forward.

9. Sunset Provision (§ 403.756)

Section 1821(d) of the Act contains the RNHCI sunset provision. This provision, when activated, will prevent beneficiaries from making elections to receive Medicare payment for religious nonmedical health care services after a certain date. The sunset provision will be activated when the level of estimated expenditures exceeds the trigger level for three consecutive FFYs.

In accordance with this statutory provision, we specified in our regulations under this section that beginning FFY 2002, if the level of estimated expenditures for all RNHCIs exceeds the trigger level for 3 consecutive FFYs, we would not accept any Medicare claims for payment for any election executed on or after January 1 of the following calendar year. We also specified in the interim final rule that we would publish a notice in the **Federal Register** at least 60 days before the effective date of the sunset provision to alert the public that no elections will be accepted for services in an RNHCI.

B. Medicaid Provisions (§ 440.170)

Services in RNHCIs are optional Medicaid services that a State may elect to include in its title XIX State plan in accordance with section 1905(a)(27) of the Act. This section permits the inclusion of any other medical care and any other type of remedial care recognized under State law, specified by CMS. Federal financial participation is only available to a State for these services if they are included in the State Plan.

Section 4454(b) of the BBA '97 provides for coverage of a religious nonmedical health care institution as defined in section 1861(ss)(1) of the Act. Specific ownership and affiliation requirements related to RNHCIs are described in section 1861(ss)(4) of the Act. We therefore revised § 440.170(c), "Services in Christian Science sanitoriums," to accommodate the new RNHCI program. Additionally, an RNHCI as defined in section 1861(ss)(1) of the Act furnishes exclusively inpatient services. Consequently, we revised § 440.170(b), "Services of Christian Science nurses," since it dealt with Christian Science and care in the home setting. We revised language at § 440.170(b), to define an RNHCI for Medicaid coverage purposes as one that meets the requirements of section 1861(ss)(1) of the Act, and § 440.170(c), to describe the specific ownership and affiliation requirements applicable to Medicaid RNHCIs. In addition, we specified in the interim final rule that RNHCIs are required to meet the Medicare conditions of participation described in part 403 of this rule in order to be eligible to receive payment under Medicaid, rather than developing separate Medicaid requirements.

C. Part 488 Survey, Certification, and Enforcement Procedures

Section 1861(ss)(2) of the Act provides that we may accept the accreditation of an approved group that RNHCIs meet or exceed some or all of the applicable Medicare requirements. Therefore, in the interim final rule, we amended the regulations at § 488.2 to add section 1861(ss)(2) of the Act as the statutory basis for accreditation of RNHCIs and § 488.6 to add the RNHCIs to the list of providers in this section.

D. Part 489, Subpart I—Advance Directives

Section 4641 of the BBA '97 required that (for all providers entering into a provider agreement with CMS) an individual's advance directive be placed in a "prominent part" of his or her medical record. As this was such a minor change to our requirements at section 489, we requested that this change be appended to the RNHCI regulation, thereby avoiding a separate rulemaking process. Therefore, in the November 30, 1999 final rule, we added "prominent part" to § 489.102(a)(2) to reflect this requirement. That is, providers are required to document an advance directive in a prominent part of the individual's current medical record.

III. Analysis of and Responses to Comments

We received a total of three items of correspondence on the interim final rule with comment published on November 30, 1999. The comment response on the interim final rule was very limited, and there were no similarities in issues raised by the commenters. We received comments from a fire safety association; a pediatric medical association; and a national religious organization that is oriented to healing by prayer. Each commenter approached the final rule in a manner that reflected the views of his or her particular organization. The major issues that commenters raised included the following:

- A prohibition on the admission of children to an RNHCI.
- Incorporation of a specific version of the fire safety code in the rule.
- Modification of the requirements to correspond to the beliefs of a specific religious group.
- Modification of the requirements related to the election process and the related coverage of services.
- Modification of the prohibition on the use of restraints.

We are not making any changes in the regulation as a result of the three comments we received, although we note that one change, regarding the Life Safety Code, was made in a separate rule on January 10, 2003, with an effective date of March 11, 2003 (68 FR 1374). We summarized the issues raised by each commenter and have provided our responses below.

A. Pediatric Medical Association

Sections 403.702, 403.730, and 440.170

Comment: One commenter suggested amending the conditions of participation explicitly to prohibit RNHCIs from providing care to any child, regardless of whether the individual is seeking payment under Medicare or Medicaid for that care. The comment is based on the statutory language that authorizes the Secretary to establish standards to ensure the health and safety of patients choosing to receive care in RNHCIs. The commenter believes that it is impossible to ensure the health and safety of children who are patients in an RNHCI because the patient is isolated from persons competent or willing to assess the need and appropriately secure medical care when the care is necessary to preserve the child's life or health. The commenter added that the Secretary has the authority to prohibit RNHCIs from providing services to children and should do so.

Response: We do not have the authority to exclude any patients, including children, from admission to an RNHCI. Nevertheless, our data indicate that no children have sought RNHCI services as program beneficiaries thus far. The reason for this situation is that, in at least some instances, children must undergo some type of medical examination before they can obtain benefits under Medicare and Medicaid. For example, a child can only receive Medicare benefits if he or she has undergone a medical physical examination and as a result was determined to meet Social Security criteria for disability. Such an examination is inconsistent with opposition to receipt of traditional medical care. For these reasons, we believe few if any children will be admitted to RNHCIs as Medicare or Medicaid beneficiaries. Therefore, we will not revise the conditions of participation as the commenter suggested.

B. Religious Nonmedical Organization

Definitions and Terms—§ 403.702

Comment: The commenter requested that the definition for "religious nonmedical care or religious method of healing" be removed or revised as follows:

> Religious nonmedical care or religious method of healing" means health care furnished in accordance with a religious belief or doctrine with which the acceptance of conventional or unconventional medical care by a beneficiary would be inconsistent.

The commenter argued that our current definition, "health care furnished under established religious tenets that *prohibited* conventional or unconventional medical care for the treatment of a beneficiary, and *the sole reliance on these religious tenets,*" if interpreted literally, could actually prohibit religious nonmedical nursing facilities from qualifying as RNHCIs that the Congress clearly intended to be qualified.

The commenter indicated that their method of healing did not include the use of conventional or unconventional care and that the teachings of this Church did not expressly "prohibit" the choice of medical treatment. The commenter stated that the choice of treatment rested with the individual, but an individual would not be practicing his or her religion while receiving medical care. The commenter further stated that this is why practicing members of the group, relying entirely on spiritual means for healing, required accommodation in order to participate in Medicare. The commenter indicated that many members of their group engaged in a number of practices that involved neither the acceptance of medical treatment nor reliance on religious "tenets" but were undertaken in the interest of practicing good care of their "health." The commenter sought more flexibility for a beneficiary to select some forms of health care that are nonintrusive such as visiting dentists for oral hygiene; visiting an optometrist or wearing eyeglasses; or being fitted for or wearing a mechanical hearing aid.

Additionally, the commenter expressed that the definition of "religious nonmedical care or religious method of healing" was neither required by nor consistent with the Act, and that Constitutional issues have been raised regarding the use of the term "established religious tenets."

Response: Both the statute and the related legislative history demonstrate a clear congressional intent to establish this benefit for those who for religious reasons are conscientiously opposed to acceptance of medical care and to provide parameters for nonexcepted medical treatment. Since both the law and the congressional deliberations are clear on the issue, the rule must follow the statutory intent and provide a framework for all religious groups that may use the benefit. The rule must be applicable to all in the intended benefit group, not to just a sector of the potential beneficiaries. With regard to a beneficiary's choice or need to receive such services as oral hygiene visits, optometry visits or eyeglasses, or testing and fitting for hearing aids, it should be noted that Medicare does not cover these services and that they are the financial responsibility of the individual.

The use of the term "religious tenet" is considered appropriate to cover the basic beliefs of any religious group that is seeking participation in the RNHCI program. While the use of the term is not prescribed by the statute, the development of regulations does provide the opportunity to use other language and the term "religious tenets" is consistent with the Act. Federal courts have repeatedly upheld the constitutionality of these provisions. *See,* for example, *Kong* v. *Min De Parle,* No. C 00–4285 CRB, 2001 WL 1464549 (N.D.Cal. Nov. 13, 2001) (upholding constitutionality of section 4454 of the BBA); *see also Children's Healthcare is a Legal Duty, Inc.* v. *Min De Parle,* 212 F.3d 1084 (8th Cir. 2000), *cert. den.*, 532 U.S. 957, 121 S.Ct. 1483 (2001) (same). We are making no changes to the terms "religious nonmedical care" or "religious method of healing."

Comment: The commenter suggested that we provide a more flexible definition of "religious nonmedical nursing personnel" to provide the RNHCI more latitude in hiring outside their religious denomination, if they so choose. The commenter indicates that constitutional issues may be raised by the requirement that nursing personnel "be grounded in the religious beliefs of the RNHCI." The commenter stated that the Act only requires personnel to be "experienced in caring for the physical needs of these patients."

Additionally the commenter would appreciate it if the regulations could clearly state that nursing personnel who are less experienced, such as trainees, may provide service to patients under the supervision of those who are "formally recognized as competent in the administration of care within their religious nonmedical health care group." The commenter assumed that the regulations did not prohibit RNHCIs from allowing trainees to provide service to patients when supervised by experienced personnel but requested that we provide clarification in the regulation.

Response: Medical model health care settings use registered nurses or licensed practical nurses that have participated in educational programs and following graduation take standardized tests for licensure. The statute requires that for payment purposes a beneficiary would require hospital or skilled nursing facility care in order to qualify for admission to an RNHCI. In turn, by statute the RNHCI may provide only nonmedical nursing

items and services to patients, which is contrary to conventional nursing practice. Currently the only standardization for RNHCI nurse credentials exists for those individuals prepared in religious group nurse training programs and involved in the practice of that religion.

The phrase "grounded in the religious beliefs" of an RNHCI is not intended to mean that religious nonmedical nursing personnel must "accept or practice" a particular religious belief. The phrase "grounded in the religious beliefs" means that nonmedical nursing personnel must be appropriately familiar with the culture and religious beliefs of the RNHCI to care for the physical needs of patients.

For purposes of writing the rule, it was necessary to choose those requirements that would provide a level of standardization for providing nonmedical nursing care to beneficiaries. We are retaining the definition of religious nonmedical nursing personnel as set forth in the interim final rule.

Similar to other provider types, the issue of nurse trainees was not addressed in the rule. The per-diem rate includes payment for RNHCI nurses responsible for the care of beneficiaries, and they may also supervise those aspects of care provided by trainees. While trainees can provide care under the supervision of an RNHCI nurse, any cost or payment attributed to the trainee is not to be considered a component of the Medicare or Medicaid per diem rate.

Comment: The commenter suggested that we expand the term "legal representative" that is included in the definition of "election" to include someone acting under a valid health care durable power of attorney or an equivalent instrument.

Response: The term "legal representative" as used in the definition of "election" is considered appropriate to safeguard the interest of the beneficiary, and we are not making any revisions. The designation of a legal representative is a serious responsibility that should follow accepted legal protocols and therefore does not require further definition in the rule. In this matter, we generally defer to the States in deciding who qualifies as a "legal representative" since State law governs these questions.

Elections and Revocations § 403.724

Comment: The commenter suggested that for practical purposes an election be considered valid without notarization under certain circumstances. The commenter requested a grace period to cover those periods when the business office is not open, such as evenings, nights, weekends, and holidays.

Response: Since we consider obtaining notary authority for individual staff members to be a relatively straightforward process, there can be several notaries in a facility to meet beneficiary needs when the business office is not open. Additionally, the RNHCI can establish relationships with notaries within the community to provide assistance in emergency situations. Therefore, we are retaining the election policy as established in the interim final rule.

Comment: The commenter suggested that care be covered without an election under certain limited circumstances. The commenter requested a grace period of at least 72 hours to provide care for a patient in distress, or to locate a legal representative or have one appointed in the case of admitting an unresponsive or incompetent Medicare beneficiary, before fully executing the election for RNHCI care.

Response: We do not believe we have the authority for the requested grace period. The statute requires a valid election to be in place for RNHCI services to be covered and paid for. Delaying the election process is of concern particularly for an individual in distress and unable to make his or her personal wishes known.

Comment: The commenter recommended that an election be effective retroactively for care provided up to 72 hours before the election is signed. If the patient expires before the execution of a valid election, the commenter requested that Medicare pay for the care provided by the RNHCI to the beneficiary.

Response: We do not believe we have the authority to accommodate the requested pre-election coverage period.

Election Revocation § 403.724(a)(1)(iii)

Comment: The commenter indicated an inconsistency between section 1821(b)(3) of the Act and § 403.724(a)(1)(iii) of the regulation, regarding payment being received versus payment being requested. The commenter believes that the election should be revoked only if Medicare makes payment rather than when Medicare medical care is merely sought.

Response: Section 403.724(a)(1)(iii) of our regulations implements section 1821(b)(3) of the Act, which set forth the information that must be included in the election form. This section specifies that receipt of nonexcepted medical services constitutes a revocation of an election. Seeking Medicare medical care indicates that a beneficiary anticipates that the program will pay for the service under the statute. It is the payment for that Medicare claim that actually triggers the revocation of the RNHCI election and (if applicable) the start of the waiting period that determines when a new RNHCI election may be filed.

Condition of Participation: Patient Rights § 403.730(c)(4)

Comment: The commenter requested that the utilization review committee have the power to authorize the limited use of restraints when the patient poses a danger to self, other patients, or staff. The commenter indicated that since the UR committee could make an initial determination for coverage under Medicare and Medicaid, it could also be capable of determining if and when those rare occasions existed when there would be a need to protect the safety of a patient and the staff. Additionally, the commenter stated that it would be appropriate to place specific requirements on the use of restraints, such as—

- Choosing the least restrictive manner for the least amount of time as possible;
- Placing time limits for using restraints without additional review by the UR committee;
- Not permitting standing orders for the use of restraints;
- Using restraints only when absolutely necessary and other interventions have been ineffective; and
- Requiring RNHCI staff to frequently check on the restrained patient.

Response: Section 1866(ss)(1) of the Act and the related legislative history underscore the centrality of nonmedical interventions to the care provided by RNHCIs. The statute requires active patient choice and limits the benefit to those for whom the "acceptance of medical health services would be inconsistent with their religious beliefs." Under this model, chemical restraints (drugs) would clearly be antithetical, as well against the statute. On the other hand, "assistive devices" (such as crutches, canes, and walkers, *etc.*), used only on a voluntary basis by the patient, would not constitute a "restraint." We currently define "physical restraint" in our hospital condition of participation at § 482.13 as "any manual method or physical or mechanical device, material, or equipment attached or adjacent to the patient's body that he or she cannot easily remove [and] that restricts freedom of movement or normal access to one's body." In thinking about whether a device or practice may be considered a restraint, the RNHCI

should consider how the device or practice affects the patient. For example, if a patient were in a wheelchair with a belt, the belt would not be considered a restraint if the patient can independently unsnap the belt. The key is to assess each patient and each situation to determine how a device or practice will affect the patient. If the belt described above were snapped in the back so that the patient could not reach it to release it, it would be considered a restraint. (*See* previous discussion in the preamble of the interim final at 64 FR 67032.)

Current professional standards of practice and guidelines advocate for minimal use of physical restraints, in limited medical circumstances. The Medicare and Medicaid programs have very strict criteria for the use of physical restraints in other provider types, such as hospitals and nursing homes, that require both medical supervision and intensive "medical * * * examination, diagnosis, prognosis [and] treatment" of the patient in order to assure that the minimum appropriate restraint is used. While it would seem that rare occasions could arise where (physical) restraints could be used to protect the safety of a patient or staff, we believe that this restraint use, without medical review poses too great a hazard. Since the RNHCI statute expressly prohibits these facilities from engaging in "medical * * * examination, diagnosis, prognosis [and] treatment," the use of restraints is not within their purview.

We disagree that the utilization review committees in the RNHCIs could provide an adequate oversight function for the use of physical restraints. While the UR committees are the body responsible for ascertaining the appropriateness of Medicare (or Medicaid) covered services for an individual, they do not have the medical expertise necessary to assure that physical restraints could be provided to Medicare or Medicaid beneficiaries safely.

Condition of Participation: Food Service § 403.734(b)

Comment: The commenter requested that we add the language to our standard regarding requirements for the meal served to the patient in the RNHCI at § 403.734(b). The commenter believes we should add that the RNHCI should be required to ensure that the meals served to beneficiaries meet the recommended daily allowances of the Food and Nutrition Board of the National Research Council, National Academy of Sciences, "except insofar as compliance with such dietary allowances would be contrary to the religious beliefs observed by the institution or its personnel." The commenter considered the recommended dietary allowances of the National Academy of Sciences to be a medical model that involved learning the chemistry of food and determining the patient's body weight and height. As the basis for their objection, the commenter cited section 1861(ss)(3)(B)(i) of the Act, which species that the Secretary shall not subject a religious nonmedical health care institution or its personnel to any medical supervision, regulations, or control, insofar as such supervision, regulation, or control would be contrary to the religious beliefs observed by the institution or those personnel.

Response: Our first priority is to patient health and safety. We appreciate the commenter's suggestion, but we disagree with the suggested provision. We do not believe that this requirement violates section 1861(ss)(3)(B)(i) of the Act because the requirement is designed to meet general physical health needs unrelated to medical treatment for any illness, injury, or condition. Because therapeutic diets or parenteral nutrition are not expected to be ordered for the population of patients in these facilities, we are not suggesting that nurses perform duties outside the scope of their religious beliefs. The requirements in the rule are not medical in nature, but rather guidance for the maintenance of health within the general population.

Condition of Participation: Discharge Planning § 403.736(a)(1)

Comment: One commenter requested that, following the first sentence of the discharge planning evaluation standard at § 403.736(a) that states the RNCHI must assess the need for a discharge plan for patients likely to suffer adverse consequences if there is no plan and for patients upon request or at the request of their legal representative, we add the following language, "provided that this planning process shall not require actions which would be contrary to the religious beliefs observed by the institution or its personnel." The commenter believes that the requirement to initiate discharge planning on admission requires the nurse to make a prognosis. Again, the commenter cited section 1861(ss)(3)(B)(i) of the Act as the basis for the objection.

Response: Again, we appreciate the commenter's suggestion for additional language, but we do not agree that the requirement violates section 1861(ss)(3)(B)(i) of the Act. The requirement for discharge planning is for the safety of the patient and does not mean that a medical prognosis is being made. The requirement is not that a prognosis be made but rather that the discharge process be started early on during a stay, and not only when discharge is imminent. The RNCHI is also responsible for identifying the qualified and experienced person for developing or supervising a discharge plan. If a patient may need additional services after discharge from the RNCHI, a plan must be in place to ensure that those services will be available in the community or another facility.

Condition of Participation: Utilization Review (UR) § 403.746(a)&(b)

Comment: The commenter objected to the requirement of having a UR plan that must contain written procedures for evaluating the duration of care and the need for continuing care of an extended duration. The commenter believes that the requirement leads to speculation about the duration of a patient's illness and requires nurses to make a prognosis, which is contrary to the nursing practice of the religious group. The commenter requested that we revise the standard under § 403.746(a) to include a disclaimer in favor of their beliefs.

Response: We are not suggesting that RNHCI nurses practice outside of their scope of practice or religious beliefs. We are requiring, however, that the RNCHI provide, through procedures written in their UR plan, the patient's initial need and appropriateness of an RNHCI stay and justifications for extending that stay. The UR condition of coverage and condition of participation are statutory, and we do not believe we have authority to alter those conditions.

Comment: The commenter requested that we remove the requirement that the governing body be included on the UR committee. The commenter stated that the governing bodies of most Christian Science facilities are made up of Christian Scientists from the large geographical area served by the facility and are not involved in the daily administration of the facility. Many do not live close enough to the facility to permit review of admissions or decisions on a daily basis. Additionally, they do not possess the skills or experience required to make appropriate UR decisions. The commenter suggested that the UR committee be composed of the administrator, superintendent of nursing, the assistant superintendent of nursing or another Christian Science nurse, and a nonvoting secretary/recorder.

Response: We appreciate the commenter's concerns; however, we do not agree with these suggestions. The purpose of this requirement is to afford

the governing body the opportunity to be involved in the daily operations of the provider. With current technology, including the governing body in the UR committee meetings may be accomplished via many avenues (for example, teleconferencing).

Comment: One commenter stated that the proposed regulations do not specify the frequency of the UR committee meeting. The organization believes that the rules before implementation of the BBA '97, which required a meeting at least every 14 days, were appropriate and should be in the new rule.

Response: We appreciate the commenter's suggestion, but we do not agree. Because there is no medical necessity for RNHCI UR committee meetings within certain time frames, we did not see a necessity to mandate these timeframes. Additionally, not mandating a timeframe for the frequency of UR committee meetings is less burdensome for the provider and can appropriately accommodate patient needs within an individual RNHCI.

C. National Fire Safety Protection Association

Condition of Participation: Life Safety From Fire § 403.744(a)(1)

Comment: The commenter commended us for our recognition of the National Fire Safety Protection Association as state-of-the-art technology in fire and life safety protection and the best method to provide continued health care fire safety to Medicare and Medicaid beneficiaries. The association applauded our reference of the 1997 edition of the Life Safety Code that, they stated, showed our commitment to Public Law 104–113, the "National Technology Transfer and Advancement Act of 1995" (requires Federal government agencies to use private sector, national consensus technology standards in carrying out public policy wherever appropriate).

Response: We appreciate the commenter's support. When we published the November 30, 1999 interim final rule, we required RNHCIs to comply with the 1997 edition of the Life Safe Code, which, at that time, was the latest edition. Since that time, a new regulation was published updating the Life Safety Code for providers, including RNHCIs. Therefore, we are now requiring RNHCIs to comply with the 2000 edition of the Life Safety Code that we incorporated by reference in the final rule published in the **Federal Register** on January 10, 2003 (68 FR 1374). That rule became effective on March 11, 2003.

IV. Provisions of the Final Rule

For the most part, this final rule incorporates the provisions of the November 30, 1999 interim final rule. However, we are making the following minor changes to our regulations:

- We are making editorial changes to § 403.736(a)(3) to clarify our policy regarding the discharge planning evaluation. We are specifying that the discharge planning evaluation must be included in the patient's "care" record rather than the patient's "rights" record and specified that staff are required to discuss the results of the evaluation with the beneficiary.
- We are amending to § 403.738(a) to include that RNHCIs must comply with Federal, State, and local laws pertaining to "privacy of individually identifiable health information (45 CFR part 164)."
- We are amending the introductory text of § 489.102 to add RNHCIs among the list of providers that must maintain written policies and procedures concerning advance directives. In addition, we are adding that these advance directives must be maintained with respect to all adult individuals receiving medical care, "or patient care in the case of a patient in a religious nonmedical health care institution." We intended to make these changes in the interim final rule; however, they were not incorporated due to an error in our amendatory language.
- Section 1861(ss)(i) of the Act specifies the requirements that a Medicare or Medicaid provider must meet to satisfy the definition of a RNHCI. In addition, section 1866 of the Act requires that all providers of services under Medicare enter into a provider agreement with the Secretary and comply with other requirements specified in that section. Currently, all of the 16 not-for-profit Medicare/Medicaid RNHCI providers have provider agreements with CMS. In the November 30, 1999 interim final rule, we intended to revise the regulations to include RNHCIs among the providers required to enter into provider agreements in accordance with the statute. These revisions were inadvertently omitted from the interim final rule. Therefore, in this final rule, we are revising the regulations at part 489 so that RNHCIs are subject to the requirements regarding provider agreements and supplier approval. In addition we are revising regulations at part 498 to ensure the RNHCI access to the appeals process in the case of an adverse determination concerning continued participation in the Medicare program.

Additional Change Affecting the Rule

A final rule published on January 10, 2003 (68 FR 1374) revised § 403.744 that set forth the condition of participation for life safety from fire. That final rule amended the fire safety standards for most health care providers, including RNHCIs. It adopted the 2000 edition of the Life Safety Code and eliminated references in our regulations to all earlier editions. The regulation became effective March 11, 2003. Since the rule published in January updated this provision, we are not republishing or making any additional changes to § 403.744 of the regulations.

V. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995 (PRA), 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 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.

We are soliciting public comment on each of the issues for the provisions summarized below that contain information collection requirements:

Section 403.724 Valid Election Requirements

In summary, § 403.724(a)(1) requires an RNHCI to use a written election statement that includes the requirements set forth in this section.

The burden associated with this requirement is the one-time effort required to agree on the format for the election statement. It was estimated that it would take each RNHCI 2 hours to comply with these requirements. This was completed by the 16 RNHCIs when they started participating in the program. We know of only one provider that is considering applying to participate; thus, there will be a possible total of 2 burden hours. There have been no new applications since the first providers transitioned into the RNHCI

program. The burden associated with signing, filing, and submitting the election statement is described in § 403.724(a)(2), § 403.724(a)(3), and § 403.724(a)(4).

In summary § 403.724(a)(2) and § 403.724(a)(3) require that an election must be signed and dated by the beneficiary or his or her legal representative and have it notarized.

The burden associated with this requirement is the time required for the beneficiary or his or her legal representative to read, sign, and date the election statement and have it notarized. It is estimated that it will take each beneficiary approximately 10 minutes to read, sign, and date the election statement. We anticipate that the RNHCI will have a notary present to witness and notarize the election statement. There are approximately 800 beneficiaries that will be affected by this requirement for a total of 103.3 burden hours during the first year of the final rule.

Section 403.724(a)(4) requires that the RNHCI keep a copy of the election statement on file and submit the original to CMS with any information obtained regarding prior elections or revocations.

The burden associated with this requirement is the time required for an RNHCI to keep a copy of the election statement and submit the original to CMS. It is estimated that it will take 5 minutes to comply with this requirement. During the first year, there will be approximately 800 election statements for a total of 66.6 burden hours.

If not revoked, an election is effective for life and does not need to be completed during future admissions. Section 403.724(b)(1) states that a beneficiary can revoke his or her election statement by the receipt of nonexcepted medical treatment or the beneficiary may voluntarily revoke the election and notify CMS in writing. We anticipate that there would be very few (fewer than 10 beneficiaries) if any instances in which a beneficiary will notify CMS in writing that he or she will revoke his or her election statement. We believe the above requirement is not subject to the PRA in accordance with 5 CFR 1320.3(c)(4) since this requirement does not collect information from 10 or more entities on an annual basis.

While the information collection requirements summarized below are subject to the PRA, we believe the burden associated with these information collection requirements is exempt as defined in 5 CFR 1320.3(b)(2) because the time, effort, and financial resources necessary to comply with these requirements would be incurred by persons in the normal course of their activities.

Section 403.730 Condition of Participation: Patient Rights

Section 403.730(a)(1) states that the RNHCI must inform each patient of his or her rights in advance of furnishing patient care.

Section 403.730(b)(3) states that the RNHCI must formulate advance directives and expect staff who furnish care in the RNHCI to comply with those directives, in accordance with part 489, subpart I of this chapter. For purposes of conforming with the requirement in § 489.102 that there be documentation in the patient's medical records concerning advanced directives, the patient care records of a beneficiary in an RNHCI are equivalent to medical records held by other providers.

Section 403.732 Condition of Participation: Quality Assessment and Evaluation

In summary, § 403.732 states that the RNHCI must develop, implement, and maintain a quality assessment and evaluation program.

Section 403.736 Condition of Participation: Discharge Planning

Section 403.736(a)(1) requires that the discharge planning evaluation must be initiated at admission and must include the following: (1) An assessment of the possibility of a patient needing post-RNHCI services and of the availability of those services; and (2) an assessment of the probability of a patient's capacity for self-care or of the possibility of the patient being cared for in the environment from which he or she entered the RNHCI.

Section 403.736(a)(3) states that the discharge planning evaluation must be included in the patient's care record for use in establishing an appropriate discharge plan. Staff must discuss the results of the discharge planning evaluation with the patient or a legal representative acting on his or her behalf.

Section 403.736(b)(1) states that, if the discharge planning evaluation indicates a need for a discharge plan, qualified and experienced personnel must develop or supervise the development of the plan.

Section 403.736(b)(2) states that, in the absence of a finding by the RNHCI that the beneficiary needs a discharge plan, the beneficiary or his or her legal representative may request a discharge plan. In this case, the RNHCI must develop a discharge plan for the beneficiary.

Section 403.736(b)(3) states that the RNHCI must arrange for the initial implementation of the patient's discharge plan.

Section 403.736(b)(4) states that, if there are factors that may affect continuing care needs or the appropriateness of the discharge plan, the RNHCI must reevaluate the beneficiary's discharge plan.

Section 403.736(b)(5) states that the RNHCI must inform the beneficiary or legal representative about the beneficiary's post-RNHCI care requirements.

Section 403.736(b)(6) states that the discharge plan must inform the beneficiary or his or her legal representative about the freedom to choose among providers of care when a variety of providers is available that are willing to respect the discharge preferences of the beneficiary or legal representative.

Section 403.736(c) states that the RNHCI must transfer or refer patients to appropriate facilities (including medical facilities if the beneficiary so desires) as needed for follow up or ancillary care and notify the patient of his or her right to participate in planning the transfer or referral in accordance with § "403.730(a)(2).

Section 403.736(d) states that the RNHCI must reassess its discharge planning process on an ongoing basis. The reassessment must include a review of discharge plans to ensure that they are responsive to discharge needs.

Section 403.738 Condition of Participation: Administration

In summary, § 403.738(a) states that an RNHCI must have written policies regarding its organization, services, and administration.

Section 403.738(c)(3) states that the RNHCI must furnish written notice, including the identity of each new individual or company, to CMS at the time of a change, if a change occurs in any of the following: Persons with an ownership or control interest, as defined in 42 CFR 420.201 and 455.101; the officers, directors, agents, or managing employees; the religious entity, corporation, association, or other company responsible for the management of the RNHCI; and the RNHCI's administrator or director of nonmedical nursing services.

While this information collection requirement is subject to the PRA, we believe the burden associated with this information collection requirement is exempt as defined in 5 CFR 1320.3(c)(4), since it does not collect information from 10 or more entities on an annual basis.

Section 403.742 Condition of Participation: Physical Environment

Section 403.742(a)(4) requires that a RNHCI have a written disaster plan to address loss of power, water, sewage disposal, and other emergencies.

Section 403.742(b)(3) requires that CMS may permit variances in requirements specified in paragraphs (b)(1)(i) and (b)(1)(ii) of this section relating to rooms on an individual basis when the RNHCI adequately demonstrates in writing that the variances meet the requirements of this section.

While this information collection requirement is subject to the PRA, we believe the burden associated with this ICR is exempt as defined in 5 CFR 1320.3(c)(4), since it does not collect information from 10 or more entities on an annual basis.

Section 403.746 Condition of Participation: Utilization Review

In summary, § 403.746 states that the RNHCI must have in effect a written utilization review plan to assess the necessity of services furnished. The plan must provide that records be maintained of all meetings, decisions, and actions by the utilization review committee. The utilization review plan must contain written procedures for evaluating the following: Admissions, the duration of care, continuing care of an extended duration, and items and services furnished.

The following sections describe the burden associated with the payment provisions. Based on the most recent data available, Medicare expenditures for Christian Science sanatoria were approximately $5 million annually. The trigger level for FFY 1998, the first year of RNHCI implementation, was $20 million. Beginning in FFY 2000, when estimated expenditures for RNHCI services exceed the trigger level for a FFY, CMS must adjust the RNHCI payment rates. Therefore, the burden associated with the following sections is not subject to the PRA at this point in time.

Section 403.752 Payment Provisions

Section 403.752(d)(i) states that the RNHCI must notify the beneficiary in writing at the time of admission of any proposed or current proportional Medicare adjustment. A beneficiary currently receiving care in the RNHCI must be notified in writing 30 days before the Medicare reduction is to take effect. The notification must inform the beneficiary that the RNHCI can bill him or her for the proportional Medicare adjustment.

Section 403.752(d)(ii) states that the RNHCI must, at time of billing, provide the beneficiary with his or her liability for payment, based on a calculation of the Medicare reduction pertaining to the beneficiary's covered services permitted by § 403.750(b).

We believe that this ICR is not subject to the PRA, as implemented by 5 CFR 1320.4(a)(2), since the collection action is conducted during an investigation or audit against specific individuals or entities.

Section 440.170 General Provisions—Medicaid

Section 440.170(b)(9) states that an RNHCI must provide, upon request, information CMS may require to implement section 1821 of the Act, including information relating to quality of care coverage and determinations.

Section 489.102 Requirements for Providers

The ICR in the following section, except for its application to RNHCIs, has been approved under OMB approval number 0938–0610.

In summary, § 489.102(a) requires that hospitals, critical access hospitals, skilled nursing facilities, home health agencies, providers of home health care (and for Medicaid purposes, providers of personal care services), hospices, and religious nonmedical health care institutions document and maintain written policies and procedures concerning advance directives with respect to all adult individuals receiving medical care.

For the current approval, we stated that it will take each facility 3 minutes to document a beneficiary's record whether he or she has implemented an advance directive. We anticipate that it will also take each RNHCI 3 minutes per patient to comply with this requirement, for a total of 104 burden hours on an annual basis. In addition, there will be a one-time burden of 8 hours per RNHCI to maintain written policies and procedures concerning advance directives, for a total of 152 hours.

We will submit a revision to OMB approval number 0938–0610 to reflect the addition of RNHCIs to the paperwork burden.

We have submitted a copy of this rule to OMB for its review of the ICRs. These requirements are not effective until they have been approved by OMB. A notice will be published in the **Federal Register** when approval is obtained.

If you comment on 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–1909–F, Room C5–14–03, 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.

VI. Regulatory Impact Statement

A. Overall Impact

We have examined the impacts of this rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 16, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), and Executive Order 13132.

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).

This rule provides religious nonmedical health care institution (RNHCI) inpatient services to individuals qualifying for Medicare or Medicaid benefits, who because of their religious beliefs do not find it appropriate to use conventional medical care. The rule provides for the physical care of these beneficiaries in RNHCIs but does not provide payment for the religious component of care. Currently, only 16 RNHCI facilities nationally participate in the program, with expenditure levels approximately $5 million annually. This rule does not reach the economic threshold and thus is not considered a major rule.

B. Anticipated Effects

1. Effects on Small Business

The RFA requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and government agencies. Most hospitals and most other providers and suppliers

are small entities, either by nonprofit status or by having revenues of $6 million to $29 million in any 1 year. For purposes of the RFA, all of the 16 not-for-profit Medicare/Medicaid RNHCI providers are considered small businesses according to the Small Business Administration's size standards, with total revenues of $6 million or less in any one year. Individuals and States are not included in the definition of a small entity.

Currently, only one religious group is participating in the RNHCI program and no other groups have applied for participation. The RNHCIs are operated as independent facilities by individual boards composed of members from the religious group. The facilities are not in competition with other medical care providers in any geographical area since they pursue a religious rather than a medical approach to health care. We are not preparing an analysis for the RFA because we have determined that this rule will not have a significant economic impact on a substantial number of small entities.

2. Effects on Other Health Care Providers

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 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. This rule will not have a significant impact on small rural hospitals. The RNHCIs are not in competition with other medical care providers in any geographical area, since they pursue a religious rather than a medical approach to health care. Currently, all of the RNHCIs are located in metropolitan rather than rural areas. We are not preparing an analysis for section 1102(b) of the Act because we have determined that this rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

3. Effects on States, Local or Tribal Governments

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule that may result in expenditure in any one year by State, local, or tribal governments, in the aggregate, or by the private sector, of $110 million. This rule will have no consequential effect on the governments mentioned or on the private sector.

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.

In accordance with the provisions of Executive Order 13132, this regulation will not significantly affect any State or local government. This rule describes only processes that must be undertaken if a State chooses to exercise its option to amend the State plan and include coverage of inpatient RNHCI services.

Those States that have RNHCI facilities and have selected to offer the optional RNHCI service are very limited. Currently, we only have 16 facilities participating in Medicare and one of these is dually eligible to participate in Medicare and Medicaid. The monitoring of the program is conducted by staff in the Boston Regional Office (Region I) and they will be responsible for the survey and certification activity that is usually conducted by a State Agency. Since this regulation does not impose any costs on State or local governments, the requirements of E.O. 13132 are not applicable.

4. Effect on the Medicare and Medicaid Programs

Section 4454 of BBA '97 removed the authorization for payment for services furnished in Christian Science sanatoria from under both Medicare and Medicaid. Section 4454 authorizes payment for inpatient services in an RNHCI for beneficiaries who, for religious reasons, are conscientiously opposed to the acceptance of medical care. Section 4454 of BBA '97 provides for coverage of the nonmedical aspects of inpatient care services in RNHCIs under Medicare and as a State option under Medicaid. In order for a provider to satisfy the definition of a religious nonmedical health care institution, for both Medicare and Medicaid, it must satisfy the 10 qualifying provisions contained in section 1861(ss)(1) of the Act. The RNHCI choosing to participate in Medicare must also be in compliance with both the conditions for coverage and the conditions of participation contained in the regulations. Neither Medicare nor Medicaid will pay for any religious aspects of care provided in these facilities. CMS has used one fiscal intermediary to handle all RNHCIs and the Boston Regional Office to monitor the process, and we plan to continue that arrangement.

Section 4454 of BBA '97 establishes certain controls on the amount of expenditures for RNHCI services in a given FFY. Section 1821(c)(2)(C) of the Act explains the operation of these controls through the use of a trigger level.

The trigger level is used to determine if Medicare payments for the current FFY need to be adjusted. If the estimated level of expenditures for an FFY exceeds the trigger level for that FFY, we are required under statute to make a proportional adjustment to payments or alternative adjustments to prevent expenditures from exceeding the trigger level.

BBA '97 precludes administrative or judicial review of adjustments that we determine are necessary to control expenditures. The trigger level is also used to activate the sunset provision, which prohibits us from accepting any new elections when estimated expenditures exceed the trigger level for 3 consecutive fiscal years. It must be noted that the trigger level has not been even closely approached since the inception of the program.

Currently, there are 16 RNHCIs that are furnishing services and receiving payment under Medicare. One of these facilities is dually eligible to participate in Medicare and Medicaid. There have been no Medicaid expenditure reports submitted by any State for several years.

5. Effects on RNHCIs

The rule enables RNHCI providers and beneficiaries the opportunity to continue to receive funding for inpatient health care service that are in keeping with their religious convictions. Additionally, the rule provides that a beneficiary will always have the option of choosing to seek conventional medical care for covered services.

C. Alternatives Considered

This final rule adheres to the statutory provisions, which in many instances were very prescriptive; however, we used every opportunity possible to consider alternative approaches as discussed below.

Elections

The statute does not prescribe when the election must be made except to specify that it must be made before receiving care. Initially, we considered the possibility of opening the election process to all eligible beneficiaries, who would wish to pursue RNHCI services, to ensure these benefits would be available when they were admitted to an RNHCI. However, some religious groups consider it acceptable to receive some medical care (for example, closed

reduction of fractures) that is considered as nonexcepted care under the RNHCI amendments to the statute and regulations. With the above cited approach to elections, we might be placing some beneficiaries in a position of having an RNHCI election revoked one or more times without ever being admitted to an RNHCI. This would subject a beneficiary to having to wait the prescribed period of time between revocation and when they could again file a viable election. Therefore, we decided it was in the beneficiary's best interest to initiate the election process at the time of admission to an RNHCI.

Payment to Providers

The statute provided flexibility for provider payment and initially we continued the new provider group under the TEFRA payment methodology to ensure a smooth transition. The new RNHCI group was already facing a number of changes when compared with their prior requirements as Christian Science sanatoria. We considered the possibility of moving swiftly to a prospective payment methodology as systems were being developed for skilled nursing facilities, home health agencies and rehabilitation hospitals. While the new methodologies were different from those under the hospital diagnosis related group (DRG), there was still a partial diagnosis based relationship to the payment system. Since the statute prohibits the use of diagnosis or other medical approaches for assessing RNHCI patients, we have decided to wait until we can conduct studies and find a methodology that is fully appropriate for the RNHCI setting.

D. Conclusion

For the above reasons, we are not preparing analyses for either the RFA or section 1102(b) of the Act. We have determined that this rule will not have a significant economic impact on a substantial number of small entities or a significant impact on the operations of a substantial number of small rural hospitals.

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

List of Subjects

42 CFR Part 403

Health insurance, Hospitals, Intergovernmental relations, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 489

Health facilities, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 498

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

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

PART 403—SPECIAL PROGRAMS AND PROJECTS

■ 1. The authority citation for part 403 continues to read as follows:

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

Subpart G—Religious Nonmedical Health Care Institutions—Benefits, Conditions of Participation, and Payment

■ 2. In § 403.736, paragraph (a)(3) is revised to read as follows:

§ 403.736 Condition of participation: Discharge planning.

* * * * *

(a) *Standard: Discharge planning evaluation.* * * *

(3) The discharge planning evaluation must be included in the patient's care record for use in establishing an appropriate discharge plan. Staff must discuss the results of the discharge planning evaluation with the patient or a legal representative acting on his or her behalf.

* * * * *

■ 3. In § 403.738, paragraph (a)(4) is added to read as follows:

§ 403.738 Condition of participation: Administration.

* * * * *

(a) *Standard: Compliance with Federal, State, and local laws.* * * *

(4) Privacy of individually identifiable health information (45 CFR part 164).

* * * * *

PART 489—PROVIDER AGREEMENTS AND SUPPLIER APPROVAL

■ 1. The authority citation for part 489 continues to read as follows:

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

■ 2. In § 489.2, paragraph (b) introductory text is republished and a new paragraph (b)(9) is added to read as follows:

§ 489.2 Scope of part.

* * * * *

(b) The following providers are subject to the provisions of this part:

* * * * *

(9) Religious nonmedical health care institutions (RNHCIs).

* * * * *

■ 3. In § 489.10 paragraphs (a) and (c) are revised to read as follows:

§ 489.10 Basic requirements.

(a) Any of the providers specified in § 489.2 may request participation in Medicare. In order to be accepted, it must meet the conditions of participation or requirements (for SNFs) set forth in this section and elsewhere in this chapter. The RNHCIs must meet the conditions for coverage, conditions for participation and the requirements set forth in this section and elsewhere in this chapter.

* * * * *

(c) In order for a hospital, SNF, HHA, hospice, or RNHCI to be accepted, it must also meet the advance directives requirements specified in subpart I of this part.

* * * * *

■ 4. In § 489.53 paragraph (a) introductry text is republished and paragraph (a)(3) is revised to read as follows:

§ 489.53 Termination by CMS.

(a) *Basis for termination of agreement with any provider.* CMS may terminate the agreement with any provider if CMS finds that any of the following failings is attributable to that provider:

* * * * *

(3) It no longer meets the appropriate conditions of participation or requirements (for SNFs and NFs) set forth elsewhere in this chapter. In the case of an RNHCI no longer meets the conditions for coverage, conditions of participation and requirements set forth elsewhere in this chapter.

* * * * *

■ 5. In § 489.102, paragraph (a) introductory text is revised to read as follows:

§ 489.102 Requirements for providers.

(a) Hospitals, critical access hospitals, skilled nursing facilities, nursing facilities, home health agencies, providers of home health care (and for Medicaid purposes, providers of personal care services), hospices, and religious nonmedical health care institutions must maintain written policies and procedures concerning advance directives with respect to all adult individuals receiving medical care, or patient care in the case of a patient in a religious nonmedical health

care institution, by or through the provider and are required to:

* * * * *

PART 498—APPEALS PROCEDURES FOR DETERMINATIONS THAT AFFECT PARTICIPATION IN THE MEDICARE PROGRAM AND FOR DETERMINATIONS THAT AFFECT THE PARTICIPATION OF ICFs/MR AND CERTAIN NFs IN THE MEDICAID PROGRAM

■ 1. The authority citation for part 498 continues to read as follows:

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

■ 2. In § 498.2 the definition of "provider" is revised to read as follows:

§ 498.2 Definitions.

* * * * *

Provider means a hospital, critical access hospital (CAH), skilled nursing facility (SNF), comprehensive outpatient rehabilitation facility (CORF), home health agency (HHA), hospice, or religious nonmedical health care institution (RNHCI) that has in effect an agreement to participate in Medicare, that has in effect an agreement to participate in Medicaid, or a clinic, rehabilitation agency, or public health agency that has a similar agreement but only to furnish outpatient physical therapy or outpatient speech pathology services, and prospective provider means any of the listed entities that seeks to participate in Medicare as a provider or to have any facility or organization determined to be a department of the provider or provider-based entity under § 413.65 of this chapter.

* * * * *

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; Program No. 93.774, Medicare—Supplementary Medical Insurance Program; and Program No. 93.778, Medical Assistance Program)

Dated: May 19, 2003.

Thomas A. Scully,

Administrator, Centers for Medicare and Medicaid Services.

Dated: August 6, 2003.

Tommy G. Thompson,

Secretary.

[FR Doc. 03–29139 Filed 11–26–03; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 408

RIN 0938–AL49

[CMS–6016–F]

Medicare Program; Reduction in Medicare Part B Premiums as Additional Benefits Under Medicare+Choice Plans

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

ACTION: Final rule.

SUMMARY: This final rule revises the regulations to provide for a Medicare+Choice organization to offer a reduction in the standard Medicare Part B premium as an additional benefit under one or more Medicare+Choice (M+C) plans. The legislation specifies that the reduction to the Medicare Part B premium cannot exceed the standard Medicare Part B premium amount and cannot be applied to surcharges. Surcharges are increased premiums for late enrollment and for reenrollment. The Medicare Part B premium may be collected by a variety of methods: Paid directly to the Centers of Medicare & Medicaid Services by the beneficiary; collected as an adjustment to any Social Security, Railroad Retirement, or Civil Service Retirement benefits; paid by an employer as part of an annuity package; or, paid by the State for individuals enrolled in a qualifying State Medicaid program. This legislation applies to benefits under Medicare M+C plans offered by an M+C organization electing this option, beginning January 1, 2003. This final rule revises the regulations to set out the basic rules under section 606 of the Medicare, Medicaid, and SCHIP Benefits Improvement Protection Act of 2000 (BIPA) for adjustment and payment of the Medicare Part B premium.

EFFECTIVE DATE: The provisions of this final rule are effective December 29, 2003.

FOR FURTHER INFORMATION CONTACT: Michele Sanders, (410) 786–0808.

SUPPLEMENTARY INFORMATION: 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.*

I. Background

Section 606 of the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 (BIPA) amended section 1854 (f)(1) of the Social Security Act (the Act) by allowing Medicare+Choice (M+C) organizations to elect to receive a reduction in its payment under § 422.250(a)(1), 80 percent of which would be applied to reduce (or eliminate) the standard Medicare Part B premium otherwise paid by, or on behalf of, its Medicare enrollees. This was intended to make the M+C plan more attractive to Medicare beneficiaries and increase enrollment in M+C plans.

Beneficiaries must pay a premium in order to receive Supplementary Medical Insurance benefits commonly referred to as Medicare Part B. The Part B premiums are collected monthly, most commonly as deductions from the beneficiary's Social Security or other retirement benefits. They also may be paid by a third party, such as an employer or the State Medicaid program, or are paid directly by the beneficiary.

The provisions of this final rule revising part 408 to reflect the provisions of section 606 of BIPA are described in detail in section II, Provisions of the Final Rule.

II. Provisions of the Final Rule

We are making the following revisions to 42 CFR part 408 to reflect changes in the statute made in section 606 of BIPA:

We are adding a new § 408.21 entitled "Reduction in Medicare Part B Premium as an Additional Benefit Under Medicare+Choice Plans." This new provision includes paragraphs treating, respectively, the basis for a reduction of Medicare Part B premiums, the administrative requirements for a Medicare Part B premium reduction,

beneficiary eligibility, and notification of premium reductions.

In § 408.21(a), we set forth language reflecting the fact that, under section 606 of BIPA, an M+C organization may offer, as an additional benefit under an M+C plan, a reduction in the amount that an enrollee in the M+C plan pays to Medicare for the Medicare Part B premium. For the Medicare Part B premium reduction to occur, the M+C organization must accept a reduction in its monthly capitation payments under § 422.250(a)(1). The Medicare Part B premium paid by a beneficiary enrolled in an M+C plan that offers this additional benefit will be reduced by 80 percent of the amount that the capitation payment to the M+C organization is reduced. The Medicare Part B premium reduction may not exceed the standard Medicare Part B premium amount, and if the beneficiary owes less than this amount, the difference is not paid to the Medicare beneficiary.

In § 408.21(b), we set forth the administrative requirements under section 606 of BIPA for the Medicare Part B premium reductions. These requirements include: (1) The M+C capitation reduction must not result in a Medicare Part B premium reduction greater than the standard premium amount determined for the year under section 1839 of the Act (the reduction to the Medicare Part B premium may be less); (2) the Medicare Part B premium reduction will use only multiples of 10 cents; (3) the Medicare Part B premium reduction will be applied to all beneficiaries who are enrolled in the M+C plan under which the benefit is offered without regard to who actually pays/collects the Medicare Part B premium (Social Security Administration (SSA), Railroad Retirement Board (RRB), Office of Personnel Management (OPM), the beneficiary, the State, or employer); (4) The Medicare Part B premium reduction will never result in a payment to a beneficiary. (If the amount of the reduction is equal to or greater than the amount a beneficiary owes due to hold harmless premiums, the beneficiary will owe $0.)

Section 408.21(c) specifies the eligibility requirements under section 606 of BIPA for the Medicare Part B premium reduction; namely that, in order to be eligible for the reduction, a beneficiary must be enrolled in an M+C plan that offers the reduction to the Medicare Part B premium as an additional benefit.

Section 408.21(d) explains that after the Centers for Medicare & Medicaid Services (CMS) determines the Medicare Part B premium reduction amount for each eligible beneficiary, the SSA, RRB, or OPM, as applicable, will include the adjusted amount of the Medicare Part B premium in benefit check amounts as appropriate and notify the beneficiaries of their new benefit amount. The paragraph also notes that we will notify States, formal groups, and directly billed beneficiaries of each beneficiary's reduced Medicare Part B premium amounts in the regular monthly billing process.

III. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 60-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 3506c(2)(A) of the Paperwork Reduction Act 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.

There are no information collection requirements associated with this final rule. This provision is strictly voluntary and is provided as a benefit option for M+C organizations.

IV. Regulatory Impact

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 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1955 (Pub. L. 104–4), and Executive Order 13132.

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 annually). This is not a major rule. It will have no significant economic impact on either costs or savings and may result in lower premiums for some beneficiaries.

The RFA requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and government agencies. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $6 million to $29 million annually (*see* 65 FR 69432). Individuals and States are not included in the definition of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital located outside of a Metropolitan Statistical Area with fewer than 100 beds.

We are not preparing analyses for either the RFA or section 1102(b) of the Act because we have determined, and we certify, that this rule will have no impact on any small entities or rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits before issuing any rule that may result in an expenditure in any one year by State, local, or tribal governments, in the aggregate, or by the private sector, of $110 million. This final rule will have a positive effect on the annual expenditures of any State, local, or tribal government, or private sector with enrollees covered under a State buy-in agreement or group payer arrangement as set forth in subpart C and E, respectively, of part 407 of this chapter; and, whose enrollees opt to enroll in a Medicare+Choice organization's (M+CO) Plan Benefit Package that offers a reduction to the Medicare Part B premium permitted as an additional benefit, authorized under section 606 of the BIPA and defined under part 422, subpart A of this chapter. Any reduction to the beneficiary's Medicare Part B premium will be applied regardless of the entity that actually pays the Medicare Part B premium on behalf of the beneficiary. The entity that actually pays the

Medicare Part B premium would receive the benefit of this reduction under this rule. If a beneficiary is paying the premium, he or she would pay a lower premium. If another entity pays the premium, they would receive the savings.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a final rule that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This final rule would impose no direct requirement costs on State and local governments, would not preempt State law, or have any Federalism implications. Participation is strictly voluntary.

In accordance with the provisions of Executive Order 12866, this final rule was reviewed by the Office of Management and Budget. This final rule is not a major rule as defined at 5 U.S.C. 804(2).

V. Waiver of Proposed Rulemaking

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** and invite public comment on the proposed rule. The notice of proposed rulemaking includes a reference to the legal authority under which the rule is proposed, and the terms and substances of the proposed rule or a description of the subjects and issues involved. The notice of proposed rulemaking can be waived, however, if an agency finds good cause that notice and comment procedures are impracticable, unnecessary, or contrary to the public interest, and it incorporates a statement of the finding and its reasons in the rule issued.

Publishing a proposed rule is unnecessary in this instance, as this final rule only makes conforming changes to the regulations to implement sections of the BIPA in which the Congress allowed no discretion as to the actions to be taken and the times in which they must be completed. These changes were enacted by the Congress, and would be in effect on the date mandated by the legislation without regard to whether they are reflected in conforming changes to the regulation text, since a statute controls over a regulation. In this final rule we merely have revised the regulation text to reflect these new statutory provisions. The BIPA provisions have been incorporated virtually verbatim, with no interpretation necessary. We do not believe that publishing a notice of proposed rulemaking is necessary, nor would it be practicable given that a number of the provisions have already taken effect consistent with the effective dates established under the BIPA.

List of Subjects in 42 CFR Part 408

Medicare.

■ For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV, part 408 as set forth below:

PART 408—PREMIUMS FOR SUPPLEMENTAL MEDICAL INSURANCE

■ 1. The authority citation for part 408 continues to read as follows:

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

Subpart B—Amount of Monthly Premiums

■ 2. Section 408.21 is added to read as follows:

§ 408.21 Reduction in Medicare Part B premium as an additional benefit under Medicare+Choice plans.

(a) *Basis for reduction in Part B premium.* Beginning January 1, 2003 an M+C organization may elect to receive a reduction in its payments under § 422.250(a)(1) of this chapter if—

(1) 80 percent of the payment reduction is applied to reduce the standard Medicare Part B premiums of its Medicare enrollees.

(2) The Medicare Part B premium is reduced monthly and is offered to all Medicare enrollees in a specific plan benefit package.

(b) *Administrative requirements for the Part B premium reduction.* (1) The Medicare Part B premium reduction cannot be greater than the standard premium amount determined for the year, under section 1839(a)(3) of the Act. However, it may be less.

(2) The Medicare Part B premium reduction must be a multiple of 10 cents.

(3) The Medicare Part B premium reduction is applied regardless of who pays or collects the Part B premium on behalf of the beneficiary.

(4) The Medicare Part B premium can never be less than zero and will never result in a payment to a beneficiary for a specific month.

(c) *Beneficiary eligibility.* In order for a beneficiary to be eligible for the Medicare Part B premium reduction, the beneficiary must be enrolled in an M+C plan that offers the Medicare Part B premium reduction as an additional benefit.

(d) *Notifications.* After determining the Medicare Part B premium reduction amount for each eligible beneficiary, CMS will—

(1) Transmit this information to the Social Security Administration, Railroad Retirement Board, or the Office of Personnel Management, as appropriate, which will adjust the benefit check amounts as appropriate and notify the beneficiaries of their new benefit amount.

(2) Notify states and formal groups and direct billed beneficiaries of their reduced premium amounts in the regular monthly billing process.

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

Dated: May 6, 2003.

Thomas A. Scully,

Administrator, Centers for Medicare & Medicaid Services.

Approved: July 28, 2003.

Tommy G. Thompson,

Secretary.

[FR Doc. 03–28718 Filed 11–26–03; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 4

RIN 1090–AA92

Special Rules Applicable to Surface Coal Mining Hearings and Appeals

AGENCY: Office of the Secretary, Interior.

ACTION: Final rule.

SUMMARY: The Office of Hearings and Appeals is publishing a final rule that revises an existing regulation allocating the burden of proof in a proceeding under the Surface Mining Control and Reclamation Act of 1977.

EFFECTIVE DATE: December 29, 2003.

FOR FURTHER INFORMATION CONTACT: Will A. Irwin, Administrative Judge, Interior Board of Land Appeals, U.S. Department of the Interior, 801 N. Quincy Street, Suite 300, Arlington, Virginia 22203, telephone 703–235–3750. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

On March 20, 2003, the Office of Hearings and Appeals (OHA) published for comment a petition for rulemaking that it had received from the National Mining Association (NMA). 68 FR 13657–13661 (Mar. 20, 2003). On the basis of the decision of the U.S. Supreme Court in *Director, Office of*

Workers' Compensation Programs, Department of Labor v. *Greenwich Collieries*, 512 U.S. 267, 114 S. Ct. 2251 (1994), the petition urged that OHA reallocate the burden of proof in several existing rules that govern hearings under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201–1328 (2000) (the Act or SMCRA).

The Administrative Procedure Act (APA), 5 U.S.C. 554 (2000), applies to cases of adjudication that are required by statute to be determined on the record after an opportunity for an agency hearing. Section 554(c)(2) of the APA requires an agency to give all interested parties an opportunity for a hearing in accordance with sections 556 and 557. Section 556(d) provides that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof."

In *Greenwich Collieries*, the Supreme Court considered whether a rule employed by the Department of Labor in adjudicating claims for benefits under the Black Lung Benefits Act was consistent with section 556(d) of the APA. The Court explained that the effect of the rule was to "shift the burden of persuasion to the party opposing the benefits claim—when the evidence is evenly balanced, the benefits claimant wins," 512 U.S. at 269, 114 S. Ct. at 2253. The Court construed the term "burden of proof" in section 556(d) to mean "burden of persuasion," not merely "burden of production (*i.e.*, the burden of going forward with evidence)," 512 U.S. at 272, 114 S. Ct. at 2255; and it concluded that the Department of Labor rule was inconsistent with section 556(d), pursuant to which "when the evidence is evenly balanced, the benefits claimant must lose." 512 U.S. at 281, 114 S. Ct. at 2259.

The NMA petition argued that, "[i]n those proceedings where SMCRA does not expressly provide a burden of proof distinct from that set forth in the APA, OHA has improperly relieved OSM [the Office of Surface Mining Reclamation and Enforcement] of the burden of persuasion when OSM is the proponent of a rule or order * * *. Since the ultimate burden of persuasion under section [556(d)] of the APA requires the agency as a proponent of a rule or order to prove its case by a preponderance of the evidence * * *, OHA must revise its regulations concerning the burden of proof to require OSM, as the proponent of a rule or order, to prove its case by a preponderance of the evidence." Petition at 11.

The petition addressed existing OHA rules applicable to the burden of proof in five different kinds of proceedings: (1) Proceedings to review notices of violation or cessation orders issued under section 521 of the Act (the applicable existing rule is 43 CFR 4.1171); (2) civil penalty proceedings (§ 4.1155); (3) individual civil penalty proceedings (§ 4.1307); (4) permit suspension or revocation proceedings (§ 4.1194); and (5) proceedings to review permit revisions ordered by OSM (§ 4.1366(b)).

OHA received 19 comments in support of the petition from mining companies, mining trade associations, and law firms; and it received one comment from an agency in a primacy state recommending that the burden of proof remain with the permittee.

As a preliminary matter OHA observes that, although the Supreme Court did not discuss how often "the evidence is evenly balanced," in OHA's experience under SMCRA it is quite rare. *See, e.g., OSM* v. *C-Ann Coal Co.*, 94 IBLA 14, 19 (1986); *Harry Smith Construction Co.* v. *OSM*, 78 IBLA 27, 29, 32 (1983).

In any event, with one exception, OHA does not agree with the premise of the NMA petition, *i.e.*, that SMCRA does not provide for a burden of proof distinct from that set forth in section 556(d) of the APA for the proceedings NMA addresses. Whether or not OSM is "the proponent of a rule or order" within the meaning of section 556(d), it does not bear the burden of persuasion in most of the proceedings discussed in NMA's petition because SMCRA "otherwise provide[s]." Each of the proceedings is analyzed below.

A. Proceedings To Review Notices of Violation or Cessation Orders Issued Under Section 521 of the Act

Section 525(a)(1) of the Act, 30 U.S.C. 1275(a)(1), provides as follows:

> A permittee issued a notice or order by the Secretary pursuant to the provisions of subparagraphs (a)(2) and (3) of section 521 of this title [30 U.S.C. 1271], or pursuant to a Federal program or the Federal lands program, or any person having an interest which is or may be adversely affected by such notice or order or by any modification, vacation, or termination of such notice or order, may apply to the Secretary for review of the notice or order within thirty days of receipt thereof or within thirty days of its modification, vacation, or termination. Upon receipt of such application, the Secretary shall cause such investigation to be made as he deems appropriate. *Such investigation shall provide an opportunity for a public hearing*, at the request of the applicant or the person having an interest which is or may be adversely affected, *to enable the applicant or such person to present information relating to the issuance and continuance of such notice or order or the modification, vacation, or termination thereof.* The filing of an application for review under this subsection shall not operate as a stay of any order or notice.

Section 525(a)(1) (emphasis added). Under section 525(a)(2), "[a]ny such hearing shall be of record and shall be subject to section 554 of title 5 of the United State Code."

The existing regulation, 43 CFR 4.1171, provides that OSM has the "burden of going forward to establish a prima facie case as to the validity" of the notice or order or its modification, vacation or termination; the "ultimate burden of persuasion" rests with the applicant for review. OHA believes the regulation correctly allocates the burdens of proof.

In *Old Ben Coal Corp.* v. *Interior Board of Mine Operations Appeals*, 523 F.2d 25 (7th Cir. 1975), the court construed nearly identical language from the Federal Coal Mine Health and Safety Act of 1969. Section 105(a)(1) of that statute, 30 U.S.C. 815(a)(1) (1976), provided as follows:

> An operator issued an order pursuant to the provisions of section 814 of this title, or any representative of miners in any mine affected by such order or by any modification or termination of such order, may apply to the Secretary for review of the order within thirty days of receipt thereof or within thirty days of its modification or termination. * * * Upon receipt of such application, the Secretary shall cause such investigation to be made as he deems appropriate. *Such investigation shall provide an opportunity for a public hearing*, at the request of the operator or the representative of miners in such mine, *to enable the operator and the representative of miners in such mine to present information relating to the issuance or continuance of such order or the modification or termination thereof or to the time fixed in such notice.* The filing of an application for review under this subsection shall not operate as a stay of any order or notice.

(Emphasis added.) Section 105(a)(2) provided that any such hearing "shall be of record and shall be subject to section 554 of title 5."

The operator in that case argued that a Department of the Interior regulation allocating the burden of proof under section 105(a) to "the applicant, petitioner, or other party initiating the proceedings" violated section 556(d) of the APA because there was no provision in the Coal Mine Health and Safety Act that "require[d] the mine operator to carry the burden of proof in a review of summary agency action." 523 F.2d at 35. In defending the regulation, the Secretary argued that section 105(a) fit within the "[e]xcept as otherwise provided by statute" language in section 556(d) "because it specifically places on the operator who requests a public

hearing the burden "to present information relating to the issuance and continuance of such order [Section 104(a) withdrawal order]." *Id.* at 36 (bracketed text in original). The court agreed:

> We think that an examination of the statutory scheme as a whole, as well as a review of the legislative history of the Act * * *, supports respondents' argument that the Secretary's regulation is consistent with the intent of Congress to place upon the mine operator the primary responsibility for the safety of miners.

Id. The court found "no compelling indications that the Secretary was wrong in interpreting the Act to place the burden of proof on the petitioner." *Id.* On Petition for Rehearing, the court clarified that, "[i]n practice * * *, the burden of proof is split, with the Government bearing the burden of going forward [to establish a prima facie case], and the mine operator bearing the ultimate burden of persuasion." *Id.* at 39, 40.

Since *Old Ben* dealt with the exception language in 5 U.S.C. 556(d), rather than the meaning of the term "burden of proof," it remains good law after the Supreme Court's decision in *Greenwich Collieries*. II Richard J. Pierce, Jr., *Administrative Law Treatise* § 10.7 (4th ed. 2002), at 760–61.

A similar examination of SMCRA's language and legislative history demonstrates that the allocation of the burden of proof in 43 CFR 4.1171 is likewise consistent with the intent of Congress. The purpose of the hearing provided in section 525(a)(1) is not for the Secretary to prove that a violation exists but "to enable *the applicant* * * * to present information relating to the issuance and continuance of [the] notice or order * * *." (emphasis supplied). Thus SMCRA itself places the burden of proof on the applicant. This interpretation is clear from the legislative history:

> In order to assure expeditious review and due process for persons seeking administrative relief of enforcement decisions of Federal inspectors under the provisions of section [521], section [525] establishes clear, definitive administrative review procedures. Those persons having standing to request such administrative review include permittees against whom notices and orders have been issued pursuant to section [521] and persons having an interest which is or may be adversely affected by such notice or order. Any person with standing may request a public hearing which must be of record and subject to the Administrative Procedure Act. *The person seeking review shall have the ultimate burden of proof in proceedings to review notices and orders issued under Section [521].* Pending review the notice or order complained of will remain in effect. * * *

S. Rep. No. 95–128, 95th Cong., 1st Sess., 92–93 (1977).

The legislative history also confirms what is obvious from the language of the two statutes, namely, that SMCRA's enforcement provisions were modeled after those in the Coal Mine Health and Safety Act. *Id.* at 58. Thus, comparable to the regulation at issue in *Old Ben*, 43 CFR 4.1171 properly allocates to OSM the burden of going forward to establish a prima facie case as to the validity of the notice of violation or cessation order (or its modification, vacation, or termination), and to the applicant for review the ultimate burden of persuasion.

B. Civil Penalty Proceedings

Section 518(a) of the Act, 30 U.S.C. 1268(a), provides that a permittee who violates the Act or a permit condition may be assessed a civil penalty. Section 518(b) provides that the penalty may only be assessed after the person charged with a violation has been given the opportunity for a public hearing conducted in accordance with section 554 of the APA. Section 518(c) provides that the person charged may contest the amount of the penalty or the fact of the violation.

Section 518(b) also provides that, when there has been a hearing, "the Secretary shall * * * issue a written decision as to the occurrence of the violation and the amount of the penalty which is warranted" and "shall consolidate such hearings with other proceedings under section 521" when appropriate.

When OHA originally adopted the regulation governing burdens of proof in civil penalty proceedings, 43 CFR 4.1155, it allocated both the burden of going forward to establish a prima facie case and the burden of persuasion to OSM, with respect to both the fact of violation and the amount of the penalty. 43 FR 34376, 34393 (Aug. 3, 1978). The result was that the allocation of the ultimate burden of persuasion as to the fact of a violation was inconsistent with the legislative history of the Act discussed above in connection with section 525. In addition, when there was a consolidated hearing to review a notice or order issued under section 521 and a civil penalty proposed under section 518, there were contradictory provisions allocating the ultimate burden of persuasion as to the fact of a violation: § 4.1171 to the applicant for review and § 4.1155 to OSM. 52 FR 38246–38247 (October 15, 1987).

In 1988, therefore, OHA amended § 4.1155 to provide that "OSM shall have the burden of going forward to establish a prima facie case as to the fact of the violation and the amount of the civil penalty and the ultimate burden of persuasion as to the amount of the civil penalty." A person who petitions for review of a proposed assessment of a civil penalty, however, has "the ultimate burden of persuasion as to the fact of the violation."

Viewing the statutory scheme as a whole, including the interplay among SMCRA sections 518, 521, and 525, and in view of the legislative history and case precedent discussed above, OHA concludes that the burden of proof as to the fact of the violation in civil penalty proceedings fits within the exception language of 5 U.S.C. 556(d) and that 43 CFR 4.1155 is consistent with Congressional intent.

C. Individual Civil Penalty Proceedings

Section 518(f) of the Act, 30 U.S.C. 1268(f), provides that, when a corporate permittee violates a condition of its permit or fails or refuses to comply with any order issued under section 521 of the Act or any order in a final decision by the Secretary (with certain exceptions), any director, officer, or agent of the corporation who willfully and knowingly authorized, ordered, or carried out the corporation's violation or its failure or refusal to comply, "shall be subject to the same civil penalties * * * that may be imposed upon a person" under section 518(a).

43 CFR 4.1307(a) allocates to OSM the burden of going forward with evidence to establish a prima facie case that (1) the corporation violated a permit condition or failed or refused to comply with an order; (2) the individual was a director, officer, or agent of the corporation at the time of the violation; and (3) the individual acted willfully and knowingly. Section 4.1307(b) imposes on the individual the ultimate burden of persuasion as to (1) whether the corporation violated a permit condition or failed or refused to comply with an order and (2) whether he or she was a director or officer at the time of the violation or refusal. Section 4.1307(c) imposes on OSM the ultimate burden of persuasion as to (1) whether the individual was an agent of the corporation and (2) the amount of the individual civil penalty.

Just as the statutory scheme, legislative history, and court precedent discussed above assign the burden of persuasion as to the fact of a violation to a corporate permittee under section 518(a), so they support allocating the burden of proof on that issue to the individual under section 518(f). However, the same conclusion cannot be drawn as to the individual's role in the corporation. Since SMCRA does not

"otherwise provide[]" an allocation of the burden of proof on that issue, OHA agrees with NMA that the burden must be imposed on OSM as the proponent of the order (individual civil penalty) under 5 U.S.C. 556(d). OHA is therefore amending 43 CFR 4.1307 in this final rule to state that OSM has the ultimate burden of persuasion as to whether the individual was a director, officer, or agent of the corporation.

D. Permit Suspension or Revocation Proceedings

Section 521(a)(4) of the Act, 30 U.S.C. 1271(a)(4), provides as follows:

> When, on the basis of a Federal inspection * * *, the Secretary or his authorized representative determines that a pattern of violations of any requirements of this Act or any permit conditions required by this Act exists or has existed, and if the Secretary or his authorized representative also finds that such violations are caused by the unwarranted failure of the permittee to comply with any requirements of this Act or any permit conditions, or that such violations are willfully caused by the permittee, the Secretary or his authorized representative shall forthwith *issue an order to the permittee to show cause as to why the permit should not be suspended or revoked* and shall provide opportunity for a public hearing. If a hearing is requested, the Secretary shall inform all interested parties of the time and place of the hearing. *Upon the permittee's failure to show cause as to why the permit should not be suspended or revoked,* the Secretary or his authorized representative shall forthwith suspend or revoke the permit.

(Emphasis added.) Section 525(d) of the Act, 30 U.S.C. 1275(d), provides that the hearing shall be of record and subject to section 554 of the APA.

OHA's regulations at 43 CFR 4.1194 provide that, in such proceedings, OSM has the burden of going forward to establish a prima facie case for suspension or revocation of the permit, but the ultimate burden of persuasion that the permit should not be suspended or revoked rests with the permittee.

The language of section 521(a)(4) clearly assigns the burden of persuasion in permit suspension or revocation proceedings to the permittee. The legislative history confirms Congress' intent:

> This section [section 525] also provides for the Secretary to hold a public hearing following the issuance of an order to show cause why a permit should not be revoked or suspended pursuant to [section 521]. *At the hearing the permittee shall have the burden of proof to show why his permit should not be suspended or revoked.*

S. Rep. No. 95–128, 95th Cong., 1st Sess., 96 (1977) (emphasis added).

As with the fact-of-the-violation issue in proceedings under sections 525(a)(1), 518(b), and 518(f), therefore, SMCRA provides its own allocation of the burden of proof in permit suspension or revocation proceedings, and the language of 5 U.S.C. 556(d) assigning the burden to the proponent of the order does not apply.

E. Proceedings To Review Permit Revisions Ordered by OSM

Section 511 of the Act, 30 U.S.C. 1261, applies to revision of permits. Section 511(a) provides that, during the term of the permit, a permittee may apply for a revision to a permit. Section 511(c) provides that the regulatory authority must, within time limits prescribed in regulations, review outstanding permits and may require reasonable revision or modification of permit provisions during the term of the permit. The revision or modification is to be "based upon a written finding and subject to notice and hearing requirements established by the State or Federal program." *Id.*

OSM's implementing regulations at 30 CFR 774.10(a) provide that the regulatory authority must review each permit issued under an approved program not later than the middle of each permit term. The regulatory authority "may, by order, require reasonable revision of a permit * * * to ensure compliance with the Act and the regulatory program." § 774.10(b). Any order requiring revision of a permit "shall be based upon written findings and shall be subject to the provisions for administrative and judicial review in [30 CFR] part 775." § 774.10(c). Under § 775.11(c), all hearings "under a Federal program for a State or a Federal lands program * * * on an application for approval of * * * permit revision shall be of record and governed by 5 U.S.C. 554 and 43 CFR part 4."

OHA's regulations at 43 CFR 4.1366(b) provide that, in a proceeding to review a permit revision ordered by OSM, OSM has the burden of going forward to establish a prima facie case that the permit should be revised, and the permittee has the ultimate burden of persuasion. This allocation of the burden of proof was explained in the preamble to the proposed rule:

> A comment suggested due process requires that 43 CFR [4.1365] should provide that the filing of a request for review would stay an OSM order requiring revision of a permit because it is an "ex parte action by OSM"* * *. [B]ecause the purpose of such an order is to ensure compliance with the Act (*see* 30 CFR 774.11(b)), no stay is appropriate, just as it is not under 30 U.S.C. 1275(a)(1) when an application for review is filed for a notice of violation or cessation order (unless temporary relief is granted). *Cf.* 43 CFR 4.1116. *Because of the enforcement nature of such an order, the ultimate burden of persuasion is properly on the permittee in 43 CFR [4.1366(b)]. Cf.* 43 CFR 4.1171(b).

51 FR 35250 (Oct. 2, 1986) (emphasis added).

Under section 510(a) of the Act, 30 U.S.C. 1260(a), "[t]he applicant for a permit, or revision of a permit, shall have the burden of establishing that his application is in compliance with all the requirements of the applicable State or Federal program." If at any point the permitted operation is no longer in compliance with the Act, "the regulatory authority * * * may require reasonable revision or modification of the permit provisions * * *." Section 511(c). It follows that, when challenging OSM's decision to require a permit revision to ensure compliance with the Act, the permit holder properly bears the burden of persuasion.

Construing section 511(c) in light of the statutory scheme as a whole, including sections 510(a), 521(a), and 525(a), and in light of the legislative history and case precedent interpreting those provisions, OHA believes it has correctly allocated the burden of proof in 43 CFR 4.1366(b).

F. Conclusion

For the foregoing reasons, NMA's petition for rulemaking is granted in part with respect to 43 CFR 4.1307 and is otherwise denied.

II. Review Under Procedural Statutes and Executive Orders

A. *Planning and Review (E.O. 12866).* accordance with the criteria in Executive Order 12866, the Department of the Interior finds that this document is not a significant rule. The Office of Management and Budget has not reviewed this rule under Executive Order 12866.

1. This rule will not have an annual economic effect of $100 million or adversely affect an economic sector, productivity, competition, jobs, the environment, public health or safety, or other units of government. A cost-benefit and economic analysis is not required. The amended rule will have virtually no effect on the economy because it will only change the allocation of the burden of proof—from the individual to OSM—on one issue in one kind of proceeding under SMCRA. Moreover, the practical effect of the rule will be limited to the rare situation in which the evidence on that one issue is evenly balanced.

2. This rule will not create inconsistencies with or interfere with other agencies' actions. The rule amends an existing OHA regulation to change

the allocation of the burden of proof in one kind of proceeding under SMCRA.

3. This rule will not alter the budgetary effects of entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. The existing regulation has to do with the burden of proof in one kind of proceeding under SMCRA, not with entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

4. This rule does not raise novel legal or policy issues. Rather, it conforms OHA's regulations to recent court precedent.

B. *Regulatory Flexibility Act.* The Department certifies that this rule will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Changing the allocation of the burden of proof on one issue in individual civil penalty proceedings under SMCRA will have no effect on small entities. A Small Entity Compliance Guide is not required.

C. *Small Business Regulatory Enforcement Fairness Act.* This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act.

1. This rule will not have an annual effect on the economy of $100 million or more. Changing the allocation of the burden of proof in one kind of proceeding under SMCRA will have no effect on the economy.

2. This rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, state, or local government agencies, or geographic regions. Changing the allocation of the burden of proof in one kind of proceeding under SMCRA will not affect costs or prices for citizens, individual industries, or government agencies.

3. This rule will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. Changing the allocation of the burden of proof in one kind of proceeding under SMCRA will have no effects, adverse or beneficial, on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

D. *Unfunded Mandates Reform Act.* In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*), the Department finds as follows:

1. This rule will not have a significant or unique effect on state, local, or tribal governments or the private sector. Changing the allocation of the burden of proof in one kind of proceeding under SMCRA will neither uniquely nor significantly affect these governments. A statement containing the information required by the Unfunded Mandates Reform Act, 2 U.S.C. 1531 *et seq.*, is not required.

2. This rule will not produce an unfunded Federal mandate of $100 million or more on state, local, or tribal governments or the private sector in any year, *i.e.*, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act.

E. *Takings (E.O. 12630).* In accordance with Executive Order 12630, the Department finds that this rule will not have significant takings implications. A takings implication assessment is not required. Imposing on OSM the burden of proof on one issue in one kind of proceeding under the SMCRA will have no effect on property rights.

F. *Federalism (E.O. 13132).* In accordance with Executive Order 13132, the Department finds that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. States with approved regulatory programs may be affected to the extent they make a conforming change to their own rules and consequently bear the burden of proof on the issue of whether someone who receives a proposed individual civil penalty assessment was an officer, director, or agent of the corporation. These effects are so minor that a Federalism Assessment is not required.

G. *Civil Justice Reform (E.O. 12988).* In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. This rule, because it simply changes the allocation of the burden of proof proceedings in one kind of proceeding under SMCRA, will not burden either administrative or judicial tribunals.

H. *Paperwork Reduction Act.* This rule will not require an information collection from 10 or more parties, and a submission under the Paperwork Reduction Act is not required. An OMB form 83–I has not been prepared and has not been approved by the Office of Policy Analysis. This rule will only change the allocation of the burden of proof in one kind of proceeding under SMCRA; it will not require the public to provide information.

I. *National Environmental Policy Act.* The Department has analyzed this rule in accordance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, Council on Environmental Quality (CEQ) regulations, 40 CFR part 1500, and the Department of the Interior Departmental Manual (DM). CEQ regulations, at 40 CFR 1508.4, define a "categorical exclusion" as a category of actions that the Department has determined ordinarily do not individually or cumulatively have a significant effect on the human environment. The regulations further direct each department to adopt NEPA procedures, including categorical exclusions. 40 CFR 1507.3. The Department has determined that this rule is categorically excluded from further environmental analysis under NEPA in accordance with 516 DM 2, Appendix 1, which categorically excludes "[p]olicies, directives, regulations and guidelines of an administrative, financial, legal, technical or procedural nature." In addition, the Department has determined that none of the exceptions to categorical exclusions, listed in 516 DM 2, Appendix 2, applies to this rule. This rule is an administrative and procedural rule, relating to the allocation of the burden of proof in one kind of proceeding under SMCRA. Therefore, neither an environmental assessment nor an environmental impact statement under NEPA is required.

J. *Government-to-Government Relationship with Tribes.* In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), E.O. 13175, and 512 DM 2, the Department has evaluated potential effects of this rule on Federally recognized Indian tribes and has determined that there are no potential effects. This rule will not affect Indian trust resources; it will simply change the allocation of the burden of proof in one kind of proceeding under SMCRA.

K. *Effects on the Nation's Energy Supply.* In accordance with Executive Order 13211, the Department finds that this regulation does not have a significant effect on the nation's energy supply, distribution, or use. Changing the allocation of the burden of proof in one kind of proceeding under SMCRA will not affect energy supply or consumption.

III. Determination To Issue Final Rule

The Department has determined that prior publication of a proposed rule to amend 43 CFR 4.1307 is not required by the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. 553(b), because an opportunity was provided to comment on the change

as proposed in NMA's petition for rulemaking (68 FR 13657).

List of Subjects in 43 CFR Part 4

Administrative practice and procedure; Mines; Public lands; Surface mining.

Dated: November 13, 2003.

P. Lynn Scarlett,

Assistant Secretary—Policy, Management and Budget.

■ For the reasons set forth in the preamble, part 4, subpart L, of title 43 of the Code of Federal Regulations is amended as set forth below:

PART 4—[AMENDED]

Subpart L—Special Rules Applicable to Surface Coal Mining Hearings and Appeals

■ 1. The authority for 43 CFR part 4 subpart L continues to read as follows:

Authority: 30 U.S.C. 1256, 1260, 1261, 1264, 1268, 1271, 1272, 1275, 1293; 5 U.S.C. 301.

■ 2. In § 4.1307, revise paragraphs (b) and (c) to read as follows:

§ 4.1307 Elements; burden of proof.

* * * * *

(b) The individual shall have the ultimate burden of persuasion by a preponderance of the evidence as to the elements set forth in paragraph (a)(1) of this section.

(c) OSM shall have the ultimate burden of persuasion by a preponderance of the evidence as to the elements set forth in paragraphs (a)(2) and (a)(3) of this section and as to the amount of the individual civil penalty.

[FR Doc. 03–29695 Filed 11–26–03; 8:45 am]

BILLING CODE 4310–79–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 15 and 76

[CS Docket No. 97–80; PP Docket No. 00–67; FCC 03–225]

Commercial Availability of Navigation Devices and Compatibility Between Cable Systems and Consumer Electronics Equipment

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document the Commission adopts rules that set technical and other criteria that manufacturers would have to meet in order to label or market unidirectional digital cable televisions and other unidirectional digital cable products as "digital cable ready." The rules also require cable operators to support operation of unidirectional digital cable products on digital cable systems and set limits on the levels of content protection that could be triggered by MVPDs. This action is taken to further the digital television transition and the commercial availability of navigation devices pursuant to section 629 of the Communications Act.

DATES: Effective December 29, 2003, except for §§ 15.123, 76.1905, and 76.1906 which contains information collection requirements that are not effective until approved by the Office of Management and Budget. The FCC will publish a document in the **Federal Register** announcing the effective date for those sections. The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register, as of December 29, 2003, except for the incorporation by reference in § 15.123 which will be approved as of the effective date announced in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Susan Mort, *susan.mort@fcc.gov*, (202) 418–1043. For additional information concerning the information collection(s) contained in this document, contact Leslie Smith, Federal Communications Commission, Room 1–A804, 445 12th Street, SW., Washington, DC 20554, or via the Internet at *Leslie.Smith@fcc.gov.*, or at 202–418–0217.

SUPPLEMENTARY INFORMATION: This is a summary of the Federal Communications Commission's Second Report and Order and Second Further Notice of Proposed Rulemaking, FCC 03–225, adopted on September 10, 2003, and released on October 9, 2003. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street, SW., Washington, DC 20554. The complete text may be purchased from the Commission's copy contractor, Qualex International, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. The full text may also be downloaded at: *www.fcc.gov*. Alternative formats are available to persons with disabilities by contacting Brian Millin at (202) 418–7426 or TTY (202) 418–7365 or at *Brian.Millin@fcc.gov*.

Paperwork Reduction Act

The Second Report and Order portion of this document contains either a new or modified information collection(s). The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collections contained in this Second Report and Order, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. Public and agency comments are due January 27, 2004.

In addition to filing comments with the Secretary, a copy of any PRA comments on the information collections contained herein should be submitted to Leslie Smith, Federal Communications Commission, Room 1–A804, 445 12th Street, SW., Washington, DC 20554, or via the Internet to *Leslie.Smith@fcc.gov*, and to Kim A. Johnson, OMB Desk Officer, Room 10236 NEOB, 725 17th Street, NW., Washington, DC 20503, or via the Internet to *Kim_A._Johnson@omb.eop.gov*.

Summary of the Second Report and Order

1. In the *Second Report and Order* portion of this *Second Report and Order and Second Further Notice of Proposed Rulemaking*, the Commission is adopting final rules that set technical and other criteria that manufacturers would have to meet in order to label or market unidirectional digital cable televisions and other unidirectional digital cable products as "digital cable ready." This regime includes testing and self-certification standards. The final rules also require consumer information disclosures to purchasers of unidirectional digital cable televisions receivers in appropriate post-sale materials that describe the functionality of these devices and the need to obtain a security module from their cable operator. Cable operators with digital systems of 750 MHz or greater activated channel capacity will be required to support operation of unidirectional digital cable products on digital cable systems. Certain other technical support requirements apply to all digital cable systems, regardless of channel capacity, including those systems whole only digital programming comes from HITS. In addition, all cable operators will be required to supply digital subscribers with point-of-deployment modules ("PODs") and high definition set-top boxes that comply with certain technical standards by April 1, 2004 and July 1, 2005 deadlines. Finally, all MVPDs would be prohibited from encoding content to activate selectable output controls on consumer premises equipment, or the down-resolution of unencrypted broadcast television programming. MVPDs would also be limited in the levels of copy protection

that could be applied to various categories of programming.

2. *Paperwork Reduction Act:* This *Second Report and Order* contains either a new or modified information collection(s). The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to comment on the information collection(s) contained in this *Second Report and Order* as required by the Paperwork Reduction Act of 1995, Public Law 104–13. Public and agency comments are due January 27, 2004.

3. *Final Regulatory Flexibility Analysis:* As required by the Regulatory Flexibility Act, the Commission has prepared a Final Regulatory Flexibility Analysis ("FRFA") relating to this *Second Report and Order.* The FRFA is set forth within.

4. *Ordering Clauses: It is ordered* that pursuant to the authority contained in sections 1, 4(i) and (j), 303, 403, 601, 624A and 629 of the Communications Act of 1934, 47 U.S.C 151, 154(i) and (j), 303, 403, 521, 544a and 549, that the Commission's rules *are hereby amended* as set forth herein, and shall become effective December 29, 2003, except that §§ 15.123, 76.1905, and 76.1906 that contain information collection requirements under the PRA is not effective until approved by OMB. The FCC will publish a document in the **Federal Register** announcing the effective date for those sections. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this *Second Report and Order,* including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Final Regulatory Flexibility Analysis

5. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA") an Initial Regulatory Flexibility Analysis ("IRFA") was incorporated in the Further Notice of Proposed Rulemaking ("FNPRM"). The Commission sought written public comment on the proposals in the FNPRM, including comment on the IRFA. Comments were received on the IRFA. This present Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.

6. *Need for, and Objectives of, the Second Report and Order and Second Further Notice of Proposed Rulemaking.* The need for FCC regulation in this area derives from the lack of a so-called cable compatibility "plug and play" standard for a digital cable television receiver and related digital cable television consumer electronics equipment. The absence of such a standard has been identified as a key impediment to the anticipated rate and scope of the transition to digital television ("DTV"). Such a standard would allow consumers to directly attach their DTV receivers to cable systems and receive certain cable television services without the need for an external navigation device. Since more than sixty percent of television households subscribe to cable programming services, the availability of digital cable television receivers and products would encourage more consumers to convert to DTV, thereby furthering the transition. Private industry negotiations between cable operators and consumer electronics manufacturers resulted in a Memorandum of Understanding ("MOU") on a cable compatibility standard for an integrated, unidirectional digital cable television receiver, as well as for other unidirectional digital cable products. The MOU requires the consumer electronics and cable television industries to each commit to certain voluntary acts and sought the creation or revision of certain relevant Commission rules. The objective of the final rules, as set forth in the Second Report and Order portion of the Second Report and Order and Further Notice of Proposed Rulemaking ("Second Report and Order"), is to facilitate the DTV transition.

7. *Summary of Significant Issues Raised by Public Comments in Response to the IRFA.* The Commission received comments from the American Cable Association ("ACA") in response to the IRFA accompanying the FNPRM. In these comments, ACA expresses its support for the Commission's efforts to advance the DTV transition, but asks that the Commission take into account the special circumstances of smaller cable companies in this proceeding. Specifically, ACA asks that the Commission consider: (1) the costs of compliance for smaller cable systems, (2) how plug-and-play requirements might affect smaller cable systems that use Comcast's Headend-in-the-Sky ("HITS") programming, and (3) why some of the plug-and-play requirements are limited to systems having 750 MHz activated channel capacity or higher, while other requirements apply to all digital cable systems. To the extent that the Commission determines that there would be a disparate cost impact upon small cable systems, ACA asks that the Commission consider waivers and an extended phase-in for small system compliance. We have discussed compliance impacts in this FRFA in below.

8. *Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply.* The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules. The RFA generally defines the term "small entity" as encompassing the terms "small business," "small organization," and "small governmental entity." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").

9. *Television Broadcasting.* The Small Business Administration defines a television broadcasting station that has no more than $12 million in annual receipts as a small business. Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound." According to Commission staff review of the BIA Publications, Inc. Master Access Television Analyzer Database as of May 16, 2003, about 814 of the 1,220 commercial television stations in the United States have revenues of $12 million or less. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. There are also 2,127 low power television stations (LPTV). Given the nature of this service, we will presume that all LPTV licensees qualify as small entities under the SBA definition.

10. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also as noted, an additional element of the definition of "small business" is that the entity must be independently owned

and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

11. *Cable and Other Program Distribution.* The SBA has developed a small business size standard for cable and other program distribution services, which includes all such companies generating $12.5 million or less in revenue annually. This category includes, among others, cable operators, direct broadcast satellite ("DBS") services, home satellite dish ("HSD") services, multipoint distribution services ("MDS"), multichannel multipoint distribution service ("MMDS"), Instructional Television Fixed Service ("ITFS"), local multipoint distribution service ("LMDS"), satellite master antenna television ("SMATV") systems, and open video systems ("OVS"). According to the Census Bureau data, there are 1,311 total cable and other pay television service firms that operate throughout the year of which 1,180 have less than $10 million in revenue. We address below each service individually to provide a more precise estimate of small entities.

12. *Cable Operators.* The Commission has developed, with SBA's approval, our own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide. We last estimated that there were 1,439 cable operators that qualified as small cable companies. Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators that may be affected by the decisions and rules proposed in this Second Report and Order.

13. The Communications Act, as amended, also contains a size standard for a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1% of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000." The Commission has determined that there are 68,500,000 subscribers in the United States. Therefore, an operator serving fewer than 685,000 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate. Based on available data, we find that the number of cable operators serving 685,000 subscribers or less totals approximately 1,450. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

14. *Direct Broadcast Satellite ("DBS") Service.* Because DBS provides subscription services, DBS falls within the SBA-recognized definition of cable and other program distribution services. This definition provides that a small entity is one with $12.5 million or less in annual receipts. There are four licensees of DBS services under Part 100 of the Commission's Rules. Three of those licensees are currently operational. Two of the licensees that are operational have annual revenues that may be in excess of the threshold for a small business. The Commission, however, does not collect annual revenue data for DBS and, therefore, is unable to ascertain the number of small DBS licensees that could be impacted by these proposed rules. DBS service requires a great investment of capital for operation, and we acknowledge, despite the absence of specific data on this point, that there are entrants in this field that may not yet have generated $12.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

15. *Home Satellite Dish ("HSD") Service.* Because HSD provides subscription services, HSD falls within the SBA-recognized definition of cable and other program distribution services. This definition provides that a small entity is one with $12.5 million or less in annual receipts. The market for HSD service is difficult to quantify. Indeed, the service itself bears little resemblance to other MVPDs. HSD owners have access to more than 265 channels of programming placed on C-band satellites by programmers for receipt and distribution by MVPDs, of which 115 channels are scrambled and approximately 150 are unscrambled. HSD owners can watch unscrambled channels without paying a subscription fee. To receive scrambled channels, however, an HSD owner must purchase an integrated receiver-decoder from an equipment dealer and pay a subscription fee to an HSD programming package. Thus, HSD users include: (1) viewers who subscribe to a packaged programming service, which affords them access to most of the same programming provided to subscribers of other MVPDs; (2) viewers who receive only non-subscription programming; and (3) viewers who receive satellite programming services illegally without subscribing. Because scrambled packages of programming are most specifically intended for retail consumers, these are the services most relevant to this discussion.

16. *Multipoint Distribution Service ("MDS"), Multichannel Multipoint Distribution Service ("MMDS") Instructional Television Fixed Service ("ITFS") and Local Multipoint Distribution Service ("LMDS").* MMDS systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of the MDS and ITFS. LMDS is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.

17. In connection with the 1996 MDS auction, the Commission defined small businesses as entities that had annual average gross revenues of less than $40 million in the previous three calendar years. This definition of a small entity in the context of MDS auctions has been approved by the SBA. The MDS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas ("BTAs"). Of the 67 auction winners, 61 met the definition of a small business. MDS also includes licensees of stations authorized prior to the auction. As noted, the SBA has developed a definition of small entities for pay television services, which includes all such companies generating $12.5 million or less in annual receipts. This definition includes multipoint distribution services, and thus applies to MDS licensees and wireless cable operators that did not participate in the MDS auction. Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of $12.5 million annually. Therefore, for purposes of the IRFA, we find there are approximately 850 small MDS providers as defined by the SBA and the Commission's auction rules.

18. The SBA definition of small entities for cable and other program distribution services, which includes such companies generating $12.5 million in annual receipts, seems reasonably applicable to ITFS. There are presently 2,032 ITFS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in the definition of a small business. However,

we do not collect annual revenue data for ITFS licensees, and are not able to ascertain how many of the 100 non-educational licensees would be categorized as small under the SBA definition. Thus, we tentatively conclude that at least 1,932 licensees are small businesses.

19. Additionally, the auction of the 1,030 LMDS licenses began on February 18, 1998, and closed on March 25, 1998. The Commission defined "small entity" for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years. An additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding calendar years. These regulations defining "small entity" in the context of LMDS auctions have been approved by the SBA. There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 40 winning bidders. Based on this information, we conclude that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission's auction rules.

20. In sum, there are approximately a total of 2,000 MDS/MMDS/LMDS stations currently licensed. Of the approximate total of 2,000 stations, we estimate that there are 1,595 MDS/MMDS/LMDS providers that are small businesses as deemed by the SBA and the Commission's auction rules.

21. *Satellite Master Antenna Television ("SMATV") Systems.* The SBA definition of small entities for cable and other program distribution services includes SMATV services and, thus, small entities are defined as all such companies generating $12.5 million or less in annual receipts. Industry sources estimate that approximately 5,200 SMATV operators were providing service as of December 1995. Other estimates indicate that SMATV operators serve approximately 1.5 million residential subscribers as of July 2001. The best available estimates indicate that the largest SMATV operators serve between 15,000 and 55,000 subscribers each. Most SMATV operators serve approximately 3,000–4,000 customers. Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten SMATVs, we believe that a substantial number of SMATV operators qualify as small entities

22. *Open Video Systems ("OVS").* Because OVS operators provide subscription services, OVS falls within the SBA-recognized definition of cable and other program distribution services. This definition provides that a small entity is one with $12.5 million or less in annual receipts. The Commission has certified 25 OVS operators with some now providing service. Affiliates of Residential Communications Network, Inc. ("RCN") received approval to operate OVS systems in New York City, Boston, Washington, D.C. and other areas. RCN has sufficient revenues to assure us that they do not qualify as small business entities. Little financial information is available for the other entities authorized to provide OVS that are not yet operational. Given that other entities have been authorized to provide OVS service but have not yet begun to generate revenues, we conclude that at least some of the OVS operators qualify as small entities.

23. *Electronics Equipment Manufacturers.* Rules adopted in this proceeding could apply to manufacturers of DTV receiving equipment and other types of consumer electronics equipment. The SBA has developed definitions of small entity for manufacturers of audio and video equipment as well as radio and television broadcasting and wireless communications equipment. These categories both include all such companies employing 750 or fewer employees. The Commission has not developed a definition of small entities applicable to manufacturers of electronic equipment used by consumers, as compared to industrial use by television licensees and related businesses. Therefore, we will utilize the SBA definitions applicable to manufacturers of audio and visual equipment and radio and television broadcasting and wireless communications equipment, since these are the two closest NAICS Codes applicable to the consumer electronics equipment manufacturing industry. However, these NAICS categories are broad and specific figures are not available as to how many of these establishments manufacture consumer equipment. According to the SBA's regulations, an audio and visual equipment manufacturer must have 750 or fewer employees in order to qualify as a small business concern. Census Bureau data indicates that there are 554 U.S. establishments that manufacture audio and visual equipment, and that 542 of these establishments have fewer than 500 employees and would be classified as small entities. The remaining 12 establishments have 500 or more employees; however, we are unable to determine how many of those have fewer than 750 employees and therefore, also qualify as small entities under the SBA definition. Under the SBA's regulations, a radio and television broadcasting and wireless communications equipment manufacturer must also have 750 or fewer employees in order to qualify as a small business concern. Census Bureau data indicates that there 1,215 U.S. establishments that manufacture radio and television broadcasting and wireless communications equipment, and that 1,150 of these establishments have fewer than 500 employees and would be classified as small entities. The remaining 65 establishments have 500 or more employees; however, we are unable to determine how many of those have fewer than 750 employees and therefore, also qualify as small entities under the SBA definition. We therefore conclude that there are no more than 542 small manufacturers of audio and visual electronics equipment and no more than 1,150 small manufacturers of radio and television broadcasting and wireless communications equipment for consumer/household use.

24. *Computer Manufacturers.* The Commission has not developed a definition of small entities applicable to computer manufacturers. Therefore, we will utilize the SBA definition of electronic computers manufacturing. According to SBA regulations, a computer manufacturer must have 1,000 or fewer employees in order to qualify as a small entity. Census Bureau data indicates that there are 563 firms that manufacture electronic computers and of those, 544 have fewer than 1,000 employees and qualify as small entities. The remaining 19 firms have 1,000 or more employees. We conclude that there are approximately 544 small computer manufacturers.

25. *Description of Projected Reporting, Recordkeeping and other Compliance Requirements.* The final rules set technical and other criteria that manufacturers would have to meet in order to label or market unidirectional digital cable televisions and other unidirectional digital cable products as "digital cable ready." This regime

includes testing and self-certification standards. The final rules also require consumer information disclosures to purchasers of unidirectional digital cable televisions receivers in appropriate post-sale materials that describe the functionality of these devices and the need to obtain a security module from their cable operator. Cable operators with digital systems of 750 MHz or greater activated channel capacity will be required to support operation of unidirectional digital cable products on digital cable systems. Certain other technical support requirements apply to all digital cable systems, regardless of channel capacity, including those systems whose only digital programming comes from HITS. In addition, all cable operators will be required to supply digital subscribers with point-of-deployment modules ("PODs") and high definition set-top boxes that comply with certain technical standards by April 1, 2004 and July 1, 2005 deadlines. Finally, all MVPDs would be prohibited from encoding content to activate selectable output controls on consumer premises equipment, or the down-resolution of unencrypted broadcast television programming. MVPDs would also be limited in the levels of copy protection that could be applied to various categories of programming.

26. *Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered.* The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

27. Because the "digital cable ready" labeling regime does not require manufacturers to affix a label to devices, we do not anticipate that small manufacturers will be significantly affected. Although the consumer information disclosure in post-sale is mandatory, we do not believe that it will adversely affect small manufacturers since they already include owner's manuals and other documentation inside equipment packaging.

28. The record in this proceeding did not provide the Commission with detailed cost information on the digital cable system support requirements. In an effort to take into account the concerns of small cable systems, the Commission has indicated that it will consider waiver requests for these requirements on a case-by-case basis. As to the POD-provisioning mandate, cable operators are already required to provide PODs to subscribers by request. We therefore do not believe that the new provisioning requirements will have a significant impact on small cable systems. Likewise, we anticipate that the upcoming high definition set-top box deadlines will not negatively impact small operators since the 2004 deadline only applies to output upgrades upon subscriber request, and the 2005 deadline will only apply to inventory acquired after that date.

29. Finally, we anticipate that the encoding prohibitions on selectable output controls and the down-resolution of unencrypted broadcast programming will largely impact upon the DBS industry, which is primarily composed of large entities. While the caps on copy protection will affect all MVPDs, we do not believe they will negatively impact small entities.

30. *Federal Rules Which Duplicate, Overlap, or Conflict with the Commission's Proposals.* None.

31. *Report to Congress:* The Commission will send a copy of the Second Report and Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the Second Report and Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Second Report and Order and FRFA (or summaries thereof) will also be published in the **Federal Register**.

List of Subjects

47 CFR Part 15

Cable television, Incorporation by reference, Television.

47 CFR Part 76

Cable television, Incorporation by reference, Recordings, Television.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 15 and 76 as follows:

PART 15—RADIO FREQUENCY DEVICES

■ 1. The authority for part 15 continues to read as follows:

Authority: 47 U.S.C. 154, 302, 303, 304, 307, 336, and 544a.

■ 2. Amend § 15.19 by revising paragraph (d) to read as follows:

§ 15.19 Labelling requirements.

* * * * *

(d) Consumer electronics TV receiving devices, including TV receivers, videocassette recorders, and similar devices, that incorporate features intended to be used with cable television service, but do not fully comply with the technical standards for cable ready equipment set forth in § 15.118, shall not be marketed with terminology that describes the device as "cable ready" or "cable compatible," or that otherwise conveys the impression that the device is fully compatible with cable service. Factual statements about the various features of a device that are intended for use with cable service or the quality of such features are acceptable so long as such statements do not imply that the device is fully compatible with cable service. Statements relating to product features are generally acceptable where they are limited to one or more specific features of a device, rather than the device as a whole. This requirement applies to consumer TV receivers, videocassette recorders and similar devices manufactured or imported for sale in this country on or after October 31, 1994.

■ 3. Add § 15.38 to subpart A to read as follows:

§ 15.38 Incorporation by reference.

(a) The materials listed in this section are incorporated by reference in this part. These incorporations by reference were approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. These materials are incorporated as they exist on the date of the approval, and notice of any change in these materials will be published in the **Federal Register**. The materials are available for purchase at the corresponding addresses as noted, and all are available for inspection at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC, and at the Federal Communications Commission, 445 12th. St., SW., Reference Information Center, Room CY–A257, Washington, DC 20554.

(b) The following materials are available for purchase from at least one of the following addresses: Global

Engineering Documents, 15 Inverness Way East, Englewood, CO 80112 or at *http://global.ihs.com;* or American National Standards Institute, 25 West 43rd Street, 4th Floor, New York, NY 10036 or at *http://webstore.ansi.org/ansidocstore/default.asp;* or Society of Cable Telecommunications Engineers at *http://www.scte.org/standards/index.cfm.*

(1) SCTE 28 2003 (formerly DVS 295): "Host-POD Interface Standard," 2003, IBR approved for § 15.123.

(2) SCTE 41 2003 (formerly DVS 301): "POD Copy Protection System," 2003, IBR approved for § 15.123.

(3) ANSI/SCTE 54 2003 (formerly DVS 241): "Digital Video Service Multiplex and Transport System Standard for Cable Television," 2003, IBR approved for § 15.123.

(4) ANSI/SCTE 65 2002 (formerly DVS 234): "Service Information Delivered Out-of-Band for Digital Cable Television," 2002, IBR approved for § 15.123.

(5) SCTE 40 2003 (formerly DVS 313): "Digital Cable Network Interface Standard," 2003, IBR approved for § 15.123.

(6) ANSI C63.4–1992: "Methods of Measurement of Radio-Noise Emissions from Low-Voltage Electrical and Electronic Equipment in the Range of 9 kHz to 40 GHz," 1992, IBR approved for § 15.31, except for sections 5.7, 9 and 14.

(7) EIA IS–132: "Cable Television Channel Identification Plan," 1994, IBR approved for § 15.118.

(8) EIA–608: "Recommended Practice for Line 21 Data Service," 1994, IBR approved for § 15.120.

(9) EIA–744: "Transport of Content Advisory Information Using Extended Data Service (XDS)," 1997, IBR approved for § 15.120.

(10) EIA–708–B: "Digital Television (DTV) Closed Captioning," 1999, IBR approved for § 15.122.

(11) Third Edition of the International Special Committee on Radio Interference (CISPR), Pub. 22, "Information Technology Equipment—Radio Disturbance Characteristics—Limits and Methods of Measurement," 1997, IBR approved for § 15.109.

(c) The following materials are freely available from at least one of the following addresses: Consumer Electronics Association, 2500 Wilson Blvd., Arlington, VA 22201 or at *http://www.ce.org/publicpolicy*: Uni-Dir-PICS–I01–030903: "Uni-Directional Receiving Device: Conformance Checklist: PICS Proforma," 2003, IBR approved for § 15.123.

■ 4. Add § 15.123 to subpart B to read as follows:

§ 15.123 Labeling of digital cable ready products.

(a) The requirements of this section shall apply to unidirectional digital cable products. Unidirectional digital cable products are one-way devices that accept a Point of Deployment module (POD) and which include, but are not limited to televisions, set-top-boxes and recording devices connected to digital cable systems. Unidirectional digital cable products do not include interactive two-way digital television products.

(b) A unidirectional digital cable product may not be labeled with or marketed using the term "digital cable ready," or other terminology that describes the device as "cable ready" or "cable compatible," or otherwise indicates that the device accepts a POD or conveys the impression that the device is compatible with digital cable service unless it implements at a minimum the following features:

(1) Tunes NTSC analog channels transmitted in-the-clear.

(2) Tunes digital channels that are transmitted in compliance with SCTE 40 2003 (formerly DVS 313): "Digital Cable Network Interface Standard" (incorporated by reference, *see* § 15.38), provided, however, that with respect to Table B.11 of that standard, the phase noise requirement shall be –86 dB/Hz including both in-the-clear channels and channels that are subject to conditional access.

(3) Allows navigation of channels based on channel information (virtual channel map and source names) provided through the cable system in compliance with ANSI/SCTE 65 2002 (formerly DVS 234): "Service Information Delivered Out-of-Band for Digital Cable Television" (incorporated by reference, *see* § 15.38), and/or PSIP-enabled navigation (ANSI/SCTE 54 2003 (formerly DVS 241): "Digital Video Service Multiplex and Transport System Standard for Cable Television" (incorporated by reference, *see* § 15.38)).

(4) Includes the POD-Host Interface specified in SCTE 28 2003 (formerly DVS 295): "Host-POD Interface Standard" (incorporated by reference, *see* § 15.38), and SCTE 41 2003 (formerly DVS 301): "POD Copy Protection System" (incorporated by reference, *see* § 15.38), or implementation of a more advanced POD-Host Interface based on successor standards. Support for Internet protocol flows is not required.

(5) Responds to emergency alerts that are transmitted in compliance with ANSI/SCTE 54 2003 (formerly DVS 241): "Digital Video Service Multiplex and Transport System Standard for Cable Television" (incorporated by reference, *see* § 15.38).

(6) In addition to the requirements of paragraphs (b)(1) through (5) of this section, a unidirectional digital cable television may not be labeled or marketed as digital cable ready or with other terminology as described in paragraph (b) of this section, unless it includes a DTV broadcast tuner as set forth in § 15.117(i) and employs at least one specified interface in accordance with the following schedule:

(i) For 480p grade unidirectional digital cable televisions, either a DVI/HDCP, HDMI/HDCP, or 480p Y,Pb,Pr interface:

(A) Models with screen sizes 36 inches and above: 50% of a manufacturer's or importer's models manufactured or imported after July 1, 2004; 100% of such models manufactured or imported after July 1, 2005.

(B) Models with screen sizes 32 to 35 inches: 50% of a manufacturer's or importer's models manufactured or imported after July 1, 2005; 100% of such models manufactured or imported after July 1, 2006.

(ii) For 720p/1080i grade unidirectional digital cable televisions, either a DVI/HDCP or HDMI/HDCP interface:

(A) Models with screen sizes 36 inches and above: 50% of a manufacturer's or importer's models manufactured or imported after July 1, 2004; 100% of such models manufactured or imported after July 1, 2005.

(B) Models with screen sizes 25 to 35 inches: 50% of a manufacturer's or importer's models manufactured or imported after July 1, 2005; 100% of such models manufactured or imported after July l, 2006.

(C) Models with screen sizes 13 to 24 inches: 100% of a manufacturer's or importer's models manufactured or imported after July 1, 2007.

(c) Before a manufacturer's or importer's first unidirectional digital cable product may be labeled or marketed as digital cable ready or with other terminology as described in paragraph (b) of this section, the manufacturer or importer shall verify the device as follows:

(1) The manufacturer or importer shall have a sample of its first model of a unidirectional digital cable product tested to show compliance with the procedures set forth in Uni–Dir–PICS–I01–030903: "Uni-Directional Receiving Device: Conformance Checklist: PICS Proforma" (incorporated by reference, *see* § 15.38) at a qualified test facility. The manufacturer or importer shall have

any modifications to the product to correct failures of the procedures in Uni–Dir–PICS–I01–030903: "Uni-Directional Receiving Device: Conformance Checklist: PICS Proforma" (incorporated by reference, *see* § 15.38) retested at a qualified test facility.

(2) A qualified test facility is a facility representing cable television system operators serving a majority of the cable television subscribers in the United States or an independent laboratory with personnel knowledgeable with respect to the standards referenced in paragraph (b) of this section concerning the procedures set forth in Uni–Dir–PICS–I01–030903: "Uni-Directional Receiving Device: Conformance Checklist: PICS Proforma" (incorporated by reference, *see* § 15.38).

(3) Subsequent to the testing of its initial unidirectional digital cable product model, a manufacturer or importer is not required to have other models of unidirectional digital cable products tested at a qualified test facility for compliance with the procedures of Uni–Dir–PICS–I01–030903: "Uni-Directional Receiving Device: Conformance Checklist: PICS Proforma" (incorporated by reference, *see* § 15.38). However, the manufacturer or importer shall ensure that all subsequent models of unidirectional digital cable products comply with the procedures in the Uni–Dir–PICS–I01–030903: "Uni-Directional Receiving Device: Conformance Checklist: PICS Proforma" (incorporated by reference, *see* § 15.38) and all other applicable rules and standards. The manufacturer or importer shall maintain records indicating such compliance in accordance with the verification procedure requirements in part 2, subpart J of this chapter. The manufacturer or importer shall further submit documentation verifying compliance with the procedures in the Uni–Dir–PICS–I01–030903: "Uni-Directional Receiving Device: Conformance Checklist: PICS Proforma" (incorporated by reference, *see* § 15.38) to a facility representing cable television system operators serving a majority of the cable television subscribers in the United States.

(d) Manufacturers and importers shall provide in appropriate post-sale material that describes the features and functionality of the product, such as the owner's guide, the following language: "This digital television is capable of receiving analog basic, digital basic and digital premium cable television programming by direct connection to a cable system providing such programming. A security card provided by your cable operator is required to view encrypted digital programming. Certain advanced and interactive digital cable services such as video-on-demand, a cable operator's enhanced program guide and data-enhanced television services may require the use of a set-top box. For more information call your local cable operator."

PART 76—MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

■ 5. The authority citation for part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 317, 325, 338, 339, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 531, 571, 572, and 573.

■ 6. Add § 76.602 to subpart K to read as follows:

§ 76.602 Incorporation by reference.

(a) The materials listed in this section are incorporated by reference in this part. These incorporations by reference were approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. These materials are incorporated as they exist on the date of the approval, and notice of any change in these materials will be published in the **Federal Register**. The materials are available for purchase at the corresponding addresses as noted, and all are available for inspection at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC, and at the Federal Communications Commission, 445 12th. St., SW., Reference Information Center, Room CY–A257, Washington, DC 20554.

(b) The following materials are available for purchase from at least one of the following addresses: Global Engineering Documents, 15 Inverness Way East, Englewood, CO 80112 or at *http://global.ihs.com*; or American National Standards Institute, 25 West 43rd Street, 4th Floor, New York, NY 10036 or at *http://webstore.ansi.org/ansidocstore/default.asp*; or Society of Cable Telecommunications Engineers at *http://www.scte.org/standards/index.cfm*; or Advanced Television Systems Committee, 1750 K Street, NW., Suite 1200, Washington, DC 20006 or at *http://www.atsc.org/standards*.

(1) ANSI/SCTE 26 2001 (formerly DVS 194): "Home Digital Network Interface Specification with Copy Protection," 2001, IBR approved for § 76.640.

(2) SCTE 28 2003 (formerly DVS 295): "Host-POD Interface Standard," 2003, IBR approved for § 76.640.

(3) SCTE 41 2003 (formerly DVS 301): "POD Copy Protection System," 2003, IBR approved for § 76.640.

(4) ANSI/SCTE 54 2003 (formerly DVS 241), "Digital Video Service Multiplex and Transport System Standard for Cable Television," 2003, IBR approved for § 76.640.

(5) ANSI/SCTE 65 2002 (formerly DVS 234), "Service Information Delivered Out-of-Band for Digital Cable Television," 2002, IBR approved for § 76.640.

(6) CEA–931–A, "Remote Control Command Pass-through Standard for Home Networking," 2003, IBR approved for § 76.640.

(7) SCTE 40 2003 (formerly DVS 313), "Digital Cable Network Interface Standard," 2003, IBR approved for § 76.640.

(8) ATSC A/65B: "ATSC Standard: Program and System Information Protocol for Terrestrial Broadcast and Cable (Revision B)," March 18, 2003, IBR approved for § 76.640.

(9) EIA IS–132: "Cable Television Channel Identification Plan," 1994, IBR approved for § 76.605.

■ 7. Add § 76.640 to subpart B to read as follows:

§ 76.640 Support for unidirectional digital cable products on digital cable systems.

(a) The requirements of this section shall apply to digital cable systems. For purposes of this section, digital cable systems shall be defined as a cable system with one or more channels utilizing QAM modulation for transporting programs and services from its headend to receiving devices. Cable systems that only pass through 8 VSB broadcast signals shall not be considered digital cable systems.

(b) No later than July 1, 2004, cable operators shall support unidirectional digital cable products, as defined in § 15.123 of this chapter, through the provisioning of Point of Deployment modules (PODs) and services, as follows:

(1) Digital cable systems with an activated channel capacity of 750 MHz or greater shall comply with the following technical standards and requirements:

(i) SCTE 40 2003 (formerly DVS 313): "Digital Cable Network Interface Standard" (incorporated by reference, *see* § 76.602), provided however that with respect to Table B.11, the Phase Noise requirement shall be −86 dB/Hz, and also provided that the "transit delay for most distant customer" requirement in Table B.3 is not mandatory.

(ii) ANSI/SCTE 65 2002 (formerly DVS 234): "Service Information Delivered Out-of-Band for Digital Cable Television" (incorporated by reference, *see* § 76.602), provided however that the

referenced Source Name Subtable shall be provided for Profiles 1, 2, and 3.

(iii) ANSI/SCTE 54 2003 (formerly DVS 241): "Digital Video Service Multiplex and Transport System Standard for Cable Television" (incorporated by reference, *see* § 76.602).

(iv) For each digital transport stream that includes one or more services carried in-the-clear, such transport stream shall include virtual channel data in-band in the form of ATSC A/65B: "ATSC Standard: Program and System Information Protocol for Terrestrial Broadcast and Cable (Revision B)" (incorporated by reference, *see* § 76.602), when available from the content provider. With respect to in-band transport:

(A) The data shall, at minimum, describe services carried within the transport stream carrying the PSIP data itself;

(B) PSIP data describing a twelve-hour time period shall be carried for each service in the transport stream. This twelve-hour period corresponds to delivery of the following event information tables: EIT–0, –1, –2 and –3;

(C) The format of event information data format shall conform to ATSC A/65B: "ATSC Standard: Program and System Information Protocol for Terrestrial Broadcast and Cable (Revision B)" (incorporated by reference, *see* § 76.602);

(D) Each channel shall be identified by a one- or two-part channel number and a textual channel name; and

(E) The total bandwidth for PSIP data may be limited by the cable system to 80 kbps for a 27 Mbits multiplex and 115 kbps for a 38.8 Mbits multiplex.

(v) When service information tables are transmitted out-of-band for scrambled services:

(A) The data shall, at minimum, describe services carried within the transport stream carrying the PSIP data itself;

(B) A virtual channel table shall be provided via the extended channel interface from the POD module. Tables to be included shall conform to ANSI/SCTE 65 2002 (formerly DVS 234): "Service Information Delivered Out-of-Band for Digital Cable Television" (incorporated by reference, *see* § 76.602).

(C) Event information data when present shall conform to ANSI/SCTE 65 2002 (formerly DVS 234): "Service Information Delivered Out-of-Band for Digital Cable Television" (incorporated by reference, *see* § 76.602) (profiles 4 or higher).

(D) Each channel shall be identified by a one-or two-part channel number and a textual channel name; and

(E) The channel number identified with out-of-band signaling information data should match the channel identified with in-band PSIP data for all unscrambled in-the-clear services.

(2) All digital cable systems shall comply with:

(i) SCTE 28 2003 (formerly DVS 295): "Host-POD Interface Standard" (incorporated by reference, *see* § 76.602).

(ii) SCTE 41 2003 (formerly DVS 301): "POD Copy Protection System" (incorporated by reference, *see* § 76.602).

(3) Cable operators shall ensure, as to all digital cable systems, an adequate supply of PODs that comply with the standards specified in paragraph (b)(2) of this section to ensure convenient access to such PODS by customers. Without limiting the foregoing, cable operators may provide more advanced PODs (i.e., PODs that are based on successor standards to those specified in paragraph (b)(2) of this section) to customers whose unidirectional digital cable products are compatible with the more advanced PODs.

(4) Cable operators shall:

(i) Effective April 1, 2004, upon request of a customer, replace any leased high definition set-top box, which does not include a functional IEEE 1394 interface, with one that includes a functional IEEE 1394 interface or upgrade the customer's set-top box by download or other means to ensure that the IEEE 1394 interface is functional.

(ii) Effective July 1, 2005, include both a DVI or HDMI interface and an IEEE 1394 interface on all high definition set-top boxes acquired by a cable operator for distribution to customers.

(iii) Ensure that these cable operator-provided high definition set-top boxes shall comply with ANSI/SCTE 26 2001 (formerly DVS 194): "Home Digital Network Interface Specification with Copy Protection" (incorporated by reference, *see* § 76.602), with transmission of bit-mapped graphics optional, and shall support the CEA–931–A: "Remote Control Command Pass-through Standard for Home Networking" (incorporated by reference, *see* § 76.602), pass through control commands: tune function, mute function, and restore volume function. In addition these boxes shall support the power control commands (power on, power off, and status inquiry) defined in A/VC Digital Interface Command Set General Specification Version 4.0 (as referenced in ANSI/SCTE 26 2001 (formerly DVS 194): "Home Digital Network Interface Specification with Copy Protection" (incorporated by reference, *see* § 76.602)).

■ 8. Add subpart W to read as follows:

Subpart W—Encoding Rules

Sec.

§ 76.1901 Applicability.

(a) Each multi-channel video programming distributor shall comply with the requirements of this subpart.

(b) This subpart shall not apply to distribution of any content over the Internet, nor to a multichannel video programming distributor's operations via cable modem or DSL.

(c) With respect to cable system operators, this subpart shall apply only to cable services. This subpart shall not apply to cable modem services, whether or not provided by a cable system operator or affiliate.

§ 76.1902 Definitions.

(a) *Commercial advertising messages* shall mean, with respect to any service, program, or schedule or group of programs, commercial advertising messages other than:

(1) Advertising relating to such service itself or the programming contained therein,

(2) Interstitial programming relating to such service itself or the programming contained therein, or

(3) Any advertising which is displayed concurrently with the display of any part of such program(s), including but not limited to "bugs," "frames" and "banners."

(b) *Commercial audiovisual content* shall mean works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied, transmitted by a covered entity and that are:

(1) Not created by the user of a covered product, and

(2) Offered for transmission, either generally or on demand, to subscribers or purchasers or the public at large or otherwise for commercial purposes, not uniquely to an individual or a small, private group.

(c) *Commercially adopted access control method* shall mean any commercially adopted access control method including digitally controlled analog scrambling systems, whether now or hereafter in commercial use.

(d) *Copy never* shall mean, with respect to commercial audiovisual content, the encoding of such content so as to signal that such content may not to be copied by a covered product.

(e) *Copy one generation* shall mean, with respect to commercial audiovisual content, the encoding of such content so as to permit a first generation of copies to be made by a covered product but not copies of such first generation of copies.

(f) *Copy no more* shall mean, with respect to commercial audiovisual content, the encoding of such content so as to reflect that such content is a first generation copy of content encoded as copy one generation and no further copies are permitted.

(g) *Covered product* shall mean a device used by consumers to access commercial audiovisual content offered by a covered entity (excluding delivery via cable modem or the Internet); and any device to which commercial audiovisual content so delivered from such covered product may be passed, directly or indirectly.

(h) *Covered entity* shall mean any entity that is subject to this subpart.

(i) *Defined business model* shall mean video-on-demand, pay-per view, pay television transmission, non-premium subscription television, free conditional access delivery and unencrypted broadcast television.

(j) *Encode* shall mean, in the transmission of commercial audiovisual content, to pass, attach, embed, or otherwise apply to, associate with, or allow to persist in or remain associated with such content, data or information which when read or responded to in a covered device has the effect of preventing, pausing, or limiting copying, or constraining the resolution of a program when output from the covered device.

(k) *Encoding rules* shall mean the requirements or prohibitions describing or limiting encoding of audiovisual content as set forth in this subpart.

(l) *Free conditional access delivery* shall mean a delivery of a service, program, or schedule or group of programs via a commercially-adopted access control method, where viewers are not charged any fee (other than government-mandated fees) for the reception or viewing of the programming contained therein, other than unencrypted broadcast television.

(m) *Non-premium subscription television* shall mean a service, or schedule or group of programs (which may be offered for sale together with other services, or schedule or group of programs), for which subscribers are charged a subscription fee for the reception or viewing of the programming contained therein, other than pay television, subscription-on-demand and unencrypted broadcast television. By way of example, "basic cable service" and "extended basic cable service" (other than unencrypted broadcast television) are "non-premium subscription television."

(n) *Pay-per-view shall* mean a delivery of a single program or a specified group of programs, as to which each such single program is generally uninterrupted by commercial advertising messages and for which recipients are charged a separate fee for each program or specified group of programs. The term pay-per-view shall also include delivery of a single program for which multiple start times are made available at time intervals which are less than the running time of such program as a whole. If a given delivery qualifies both as pay-per-view and a pay television transmission, then, for purposes of this subpart, such delivery shall be deemed pay-per-view rather than a pay television transmission.

(o) *Pay television transmission* shall mean a transmission of a service or schedule of programs, as to which each individual program is generally uninterrupted by commercial advertising messages and for which service or schedule of programs subscribing viewers are charged a periodic subscription fee, such as on a monthly basis, for the reception of such programming delivered by such service whether separately or together with other services or programming, during the specified viewing period covered by such fee. If a given delivery qualifies both as a pay television transmission and pay-per-view, video-on-demand, or subscription-on-demand then, for purposes of this subpart, such delivery shall be deemed pay-per-view, video-on-demand or subscription-on-demand rather than a pay television transmission.

(p) *Program* shall mean any work of commercial audiovisual content.

(q) *Subscription-on-demand* shall mean the delivery of a single program or a specified group of programs for which:

(1) A subscriber is able, at his or her discretion, to select the time for commencement of exhibition thereof,

(2) Where each such single program is generally uninterrupted by commercial advertising messages; and

(3) For which program or specified group of programs subscribing viewers are charged a periodic subscription fee for the reception of programming delivered by such service during the specified viewing period covered by the fee. In the event a given delivery of a program qualifies both as a pay television transmission and subscription-on-demand, then for purposes of this subpart, such delivery shall be deemed subscription-on-demand rather than a pay television transmission.

(r) *Undefined business model* shall mean a business model that does not fall within the definition of a defined business model.

(s) *Unencrypted broadcast television* means any service, program, or schedule or group of programs, that is a further transmission of a broadcast transmission (*i.e.*, an over-the-air transmission for reception by the general public using radio frequencies allocated for that purpose) that substantially simultaneously is made by a terrestrial television broadcast station located within the country or territory in which the entity further transmitting such broadcast transmission also is located, where such broadcast transmission is not subject to a commercially-adopted access control method (*e.g.*, is broadcast in the clear to members of the public receiving such broadcasts), regardless of whether such entity subjects such further transmission to an access control method.

(t) *Video-on-demand* shall mean a delivery of a single program or a specified group of programs for which:

(1) Each such individual program is generally uninterrupted by commercial advertising messages;

(2) Recipients are charged a separate fee for each such single program or specified group of programs; and

(3) A recipient is able, at his or her discretion, to select the time for commencement of exhibition of such individual program or specified group of programs. In the event a delivery qualifies as both video-on-demand and a pay television transmission, then for purposes of this subpart, such delivery shall be deemed video-on-demand.

§ 76.1903 Interfaces.

A covered entity shall not attach or embed data or information with commercial audiovisual content, or otherwise apply to, associate with, or

allow such data to persist in or remain associated with such content, so as to prevent its output through any analog or digital output authorized or permitted under license, law or regulation governing such covered product.

§ 76.1904 Encoding rules for defined business models.

(a) Commercial audiovisual content delivered as unencrypted broadcast television shall not be encoded so as to prevent or limit copying thereof by covered products or, to constrain the resolution of the image when output from a covered product.

(b) Except for a specific determination made by the Commission pursuant to a petition with respect to a defined business model other than unencrypted broadcast television, or an undefined business model subject to the procedures set forth in § 76.1906:

(1) Commercial audiovisual content shall not be encoded so as to prevent or limit copying thereof except as follows:

(i) To prevent or limit copying of video-on-demand or pay-per-view transmissions, subject to the requirements of paragraph (b)(2) of this section; and

(ii) To prevent or limit copying, other than first generation of copies, of pay television transmissions, non-premium subscription television, and free conditional access delivery transmissions; and

(2) With respect to any commercial audiovisual content delivered or transmitted in form of a video-on-demand or pay-per-view transmission, a covered entity shall not encode such content so as to prevent a covered product, without further authorization, from pausing such content up to 90 minutes from initial transmission by the covered entity (*e.g.*, frame-by-frame, minute-by-minute, megabyte by megabyte).

§ 76.1905 Petitions to modify encoding rules for new services within defined business models.

(a) The encoding rules for defined business models in § 76.1904 reflect the conventional methods for packaging programs in the MVPD market as of December 31, 2002, and are presumed to be the appropriate rules for defined business models. A covered entity may petition the Commission for approval to allow within a defined business model, other than unencrypted broadcast television, the encoding of a new service in a manner different from the encoding rules set forth in § 76.1904(b)(1) and (2). No such petition will be approved under the public interest test set forth in paragraph (c)(4) of this section unless the new service differs from existing services provided by any covered entity under the applicable defined business model prior to December 31, 2002.

(b) Petitions. A petition to encode a new service within a defined business model other than as permitted by the encoding rules set forth in § 76.1904(b)(1) and (2) shall describe:

(1) The defined business model, the new service, and the proposed encoding terms, including the use of copy never and copy one generation encoding, and the encoding of content with respect to "pause" set forth in § 76.1904(b)(2).

(2) Whether the claimed benefit to consumers of the new service, including, but not limited to, the availability of content in earlier release windows, more favorable terms, innovation or original programming, outweighs the limitation on the consumers' control over the new service;

(3) The ways in which the new service differs from existing services offered by any covered entity within the applicable defined business model prior to December 31, 2002;

(4) All other pertinent facts and considerations relied on to support a determination that grant of the petition would serve the public interest.

(5) Factual allegations shall be supported by affidavit or declaration of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(c) *Petition process*—(1) *Public notice.* The Commission shall give public notice of any such petition.

(2) *Comments.* Interested persons may submit comments or oppositions to the petition within thirty (30) days after the date of public notice of the filing of such petition. Comments or oppositions shall be served on the petitioner and on all persons listed in petitioner's certificate of service, and shall contain a detailed full statement of any facts or considerations relied on. Factual allegations shall be supported by affidavit or declaration of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(3) *Replies.* The petitioner may file a reply to the comments or oppositions within ten (10) days after their submission, which shall be served on all persons who have filed pleadings and shall also contain a detailed full showing, supported by affidavit or declaration, of any additional facts or considerations relied on. There shall be no further pleadings filed after petitioner's reply, unless authorized by the Commission.

(4) *Commission determination as to encoding rules for a new service within a defined business model.*

(i) Proceedings initiated by petitions pursuant to this section shall be permit-but-disclose proceedings, unless otherwise specified by the Commission. The covered entity shall have the burden of proof to establish that the proposed change in encoding rules for a new service is in the public interest. In making its determination, the Commission shall take into account the following factors:

(A) Whether the benefit to consumers of the new service, including but not limited to earlier release windows, more favorable terms, innovation or original programming, outweighs the limitation on the consumers' control over the new service;

(B) Ways in which the new service differs from existing services offered by any covered entity within the applicable defined business model prior to December 31, 2002; and

(ii) The Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate.

(iii) A petition may, upon request of the petitioner, be dismissed without prejudice as a matter of right prior to the adoption date of any final action taken by the Commission with respect to the petition. A petitioner's request for the return of a petition will be regarded as a request for dismissal.

(d) *Complaint regarding a new service not subject to petition.* In an instance in which an interested party has a substantial basis to believe and does believe in good faith that a new service within a defined business model has been launched without a petition as required by this section, such party may file a complaint pursuant to § 76.7.

§ 76.1906 Encoding rules for undefined business models.

(a) Upon public notice and subject to requirements as set forth herein, a covered entity may launch a program service pursuant to an undefined business model. Subject to Commission review upon complaint, the covered entity may initially encode programs pursuant to such undefined business model without regard to limitations set forth in § 76.1904(b).

(1) *Notice.* Concurrent with the launch of an undefined business model by a covered entity, the covered entity shall issue a press release to the PR Newswire so as to provide public notice of the undefined business model, and the proposed encoding terms. The notice shall provide a concise summary

of the commercial audiovisual content to be provided pursuant to the undefined business model, and of the terms on which such content is to be available to consumers. Immediately upon request from a party entitled to be a complainant, the covered entity shall make available information that indicates the proposed encoding terms, including the use of copy never or copy one generation encoding, and the encoding of content with respect to "pause" as defined in § 76.1904(b)(2).

(2) *Complaint process.* Any interested party ("complainant") may file a complaint with the Commission objecting to application of encoding as set forth in the notice.

(i) *Pre-complaint resolution.* Prior to initiating a complaint with the Commission under this section, the complainant shall notify the covered entity that it may file a complaint under this section. The notice must be sufficiently detailed so that the covered entity can determine the specific nature of the potential complaint. The potential complainant must allow a minimum of thirty (30) days from such notice before filing such complaint with the Commission. During this period the parties shall endeavor in good faith to resolve the issue(s) in dispute. If the parties fail to reach agreement within this 30 day period, complainant may initiate a complaint in accordance with the procedures set forth herein.

(ii) *Complaint.* Within two years of publication of a notice under paragraph (a)(1) of this section, a complainant may file a complaint with the Commission objecting to application of the encoding terms to the service at issue. Such complaint shall state with particularity the basis for objection to the encoding terms.

(A) The complaint shall contain the name and address of the complainant and the name and address of the covered entity.

(B) The complaint shall be accompanied by a certification of service on the named covered entity.

(C) The complaint shall set forth with specificity all information and arguments relied upon. Specific factual allegations shall be supported by a declaration of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(D) The complaint shall set forth attempts made by the complainant to resolve its complaint pursuant to paragraph (a)(2)(i) of this section.

(iii) *Public notice.* The Commission shall give public notice of the filing of the complaint. Once the Commission has issued such public notice, any person otherwise entitled to be a complainant shall instead have the status of a person submitting comments under paragraph (a)(2)(iv) of this section rather than a complainant.

(iv) *Comments and reply.*

(A) Any person may submit comments regarding the complaint within thirty (30) days after the date of public notice by the Commission. Comments shall be served on the complainant and the covered entity and on any persons listed in relevant certificates of service, and shall contain a detailed full statement of any facts or considerations relied on. Specific factual allegations shall be supported by a declaration of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(B) The covered entity may file a response to the complaint and comments within twenty (20) days after the date that comments are due. Such response shall be served on all persons who have filed complaints or comments and shall also contain a detailed full showing, supported by affidavit or declaration, of any additional facts or considerations relied on. Replies shall be due ten (10) days from the date for filing a response.

(v) *Basis for Commission determination as to encoding terms for an undefined business model.* In a permit-but-disclose proceeding, unless otherwise specified by the Commission, to determine whether encoding terms as noticed may be applied to an undefined business model, the covered entity shall have the burden of proof to establish that application of the encoding terms in the undefined business model is in the public interest. In making any such determination, the Commission shall take into account the following factors:

(A) Whether the benefit to consumers of the new service, including but not limited to earlier release windows, more favorable terms, innovation or original programming, outweighs the limitation on the consumers' control over the new service;

(B) Ways in which the new service differs from services offered by any covered entity prior to December 31, 2002;

(vi) *Determination procedures.* The Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate.

(b) *Complaint regarding a service not subject to notice.* In an instance in which an interested party has a substantial basis to believe and believes in good faith that a service pursuant to an undefined business model has been launched without requisite notice, such party may file a complaint pursuant to § 76.7.

§ 76.1907 Temporary bona fide trials.

The obligations and procedures as to encoding rules set forth in §§ 76.1904(b) and (c) and 76.1905(a) and (b) do not apply in the case of a temporary bona fide trial of a service.

§ 76.1908 Certain practices not prohibited.

Nothing in this subpart shall be construed as prohibiting a covered entity from:

(a) Encoding, storing or managing commercial audiovisual content within its distribution system or within a covered product under the control of a covered entity's commercially adopted access control method, provided that the outcome for the consumer from the application of the encoding rules set out in § 76.1904(a) and (b) is unchanged thereby when such commercial audiovisual content is released to consumer control, or

(b) Causing, with respect to a specific covered product, the output of content from such product in a format as necessary to match the display format of another device connected to such product, including but not limited to providing for content conversion between widely-used formats for the transport, processing and display of audiovisual signals or data, such as between analog and digital formats and between PAL and NTSC or RGB and Y,Pb,Pr.

[FR Doc. 03–29520 Filed 11–26–03; 8:45 am]
BILLING CODE 6712–01–P

DEPARTMENT OF DEFENSE

Department of the Army

48 CFR Part 5125

RIN 0702–AA38

Foreign Acquisition

AGENCY: Department of Army, DoD.

ACTION: Interim final rule; request for comments.

SUMMARY: The Department of the Army is amending the Department of the Army Acquisition Regulations (also referred to as the Army Federal Acquisition Regulation Supplement (AFARS)) to increase consistency in Army contracts that may require deployment of contractor personnel. This change is a consolidation and summarization of current information

available in several documents, some of which are currently in draft form, and does not include new Army contracting policy. The purpose of this issuance is to notify interested parties of this change, and to request the public's comments. This change is issued by the Assistant Secretary of the Army (Acquisition, Logistics, and Technology) (ASA(ALT)). This issuance is made concurrent with publication of an interim rule with request for comments to Solicitations Provisions and Contract Clauses, published in this issue of the **Federal Register**.

DATES: *Effective date:* November 28. 2003.

Comment date: Comments must be submitted to the address shown below on or before January 27, 2004.

ADDRESSES: Respondents may e-mail comments to: *s.wisniewski@us.army.mil.* Those who cannot submit comments by e-mail may submit comments to: Procurement Policy and Support Office, Attn: SAAL–PP, Sharon Wisniewski, Presidential Towers, 2511 S. Jeff Davis Highway, Arlington, VA, 22202, facsimile (703) 604–8178. Please cite "AFARS CAF Clause" in the subject line of comments.

FOR FURTHER INFORMATION CONTACT: Sharon Wisniewski, (586) 574–7050 or Linda Fowlkes, (703) 604–7104.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule is added to incorporate information to facilitate deploying contractor personnel to Iraq or other areas of operations. It also seeks to ease the administrative difficulty for each contractor and contracting office researching current guidance on contractors accompanying the force, and to increase consistency among Army contracts. This AFARS change is published to address contractor and Army contracting offices' questions and concerns. This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

The Army does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule applies only to contractors that may require deployment of contractor personnel outside the United States, and because it only consolidates existing and draft logistical guidance. The amount of such additional services is not expected to be significantly large in comparison to the total amount of services procured by Army, and any additional costs would be reimbursable under the resulting contract. Therefore, Army has not performed an initial regulatory flexibility analysis. Army invites comments from small businesses and other interested parties. Army also will consider comments from small entities concerning the affected AFARS subpart in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite "Small Entities CAF comment."

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

D. Determination To Issue a Rule Effective With Publication in the Federal Register

A determination has been made under the authority of the Army Deputy Assistant Secretary of the Army (Policy & Procurement) that urgent and compelling reasons exist to publish this rule prior to affording the public an opportunity to comment. Contracting offices continue to write contracts that require contractor personnel to accompany the military force in Iraq and other places. Contractor representatives and contracting offices have requested inclusion of coverage in the AFARS expeditiously, even if not a complete solution, pending coverage on this topic in higher level regulations. Comments received in response to this notice will be considered.

Emily Clarke,

Director, Procurement Policy and Support.

List of Subjects in 48 CFR Part 5125

Government contracts, Government procurement.

■ For the reasons stated in the preamble, the Department of the Army adds 48 CFR part 5125 to read as follows:

PART 5125—FOREIGN ACQUISITION

Authority: 5 U.S.C 301, 10 U.S.C. 2202, DoD Directive 5000.35, FAR 1.301 and DOD FAR Supplement 201.3.

Subpart 5125.74–9000—Contractors Accompanying the Force—Deployment of Contractor Personnel in Support of Military Operations

Scope of Subpart

(a) *General.* This subpart applies whenever contractors may be required to accompany the force in support of military operations, as defined in Joint Publication 1–02, "DOD Dictionary of Military and Associated Terms."

(b) *Coordination.* There are many operational details that will affect the scope of work in contracts requiring deployment of contractor personnel in support of military operations. The requirements activity, in conjunction with the contracting activity, must coordinate with the appropriate logistics organization to determine what level of support (*e.g.*, billeting, messing, clothing and equipment, access to medical facilities, pre-deployment processing) will be available to contractors.

(i) DFARS 225.802–70 (Contracts for performance outside the United States and Canada) prescribes special procedures applicable to contracts requiring the performance of work in a foreign country by U.S. personnel or a third country contractor, or that will require logistics support for contractor employees, and the contracting activity is not under the command jurisdiction of a unified or specified command for the country involved. This provision generally requires the contracting activity to undertake certain coordination with the cognizant contract administration office for that country.

(ii) In situations where no contract administration office has been designated, the contracting officer shall ensure, prior to contract award, that the responsible combatant command concurs with any contract provision that promises logistical support to U.S. or foreign national contractor personnel. This requirement may be satisfied through a memorandum executed by the requiring activity that documents combatant command approval of any logistical support specified in the main body of the contract or its statement of work.

(c) *Legal status of contractor personnel.* The Status of Forces Agreements applicable to the Area of Operations (AO), as well as the Geneva Conventions and other international laws govern the legal status of contractor personnel. Contractor personnel's legal status will vary depending on the location and circumstances surrounding an incident.

(d) Requirements offices and contracting officers should use the Army Contractors Accompanying the Force Guidebook for more detailed guidance, including sample contract language, and a listing of Army and DoD regulations and other resources. Contracting Officers may tailor this language as appropriate, but using the Guidebook will both answer many

common questions and foster uniform handling of common issues. The Guidebook may be found on the Deputy Assistant Secretary of the Army (Procurement & Production) Web site at *http://dasapp.saalt.army.mil/*.

(e) *Solicitation provision and contract clause.* The clause at § 5152.225–74–9000 shall be inserted in all solicitations and contracts that may require deployment of contractor personnel in support of military operations. It may be tailored to fit the specific circumstances of the procurement.

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BILLING CODE 3710–08–P

DEPARTMENT OF DEFENSE

Department of the Army

48 CFR Part 5152

RIN 0702–AA39

Solicitation Provisions and Contract Clauses

AGENCY: Department of Army, DOD.

ACTION: Interim final rule; Request for comments.

SUMMARY: The Department of the Army is amending its Acquisition Regulations to increase consistency in Army contracts that may require deployment of contractor personnel. This change is a consolidation and summarization of current information available in several documents, some of which are currently in draft form, and does not include new Army contracting policy. The purpose of this issuance is to notify interested parties of this change, and to request the public's comments. This change is issued by the Assistant Secretary of the Army (Acquisition, Logistics, and Technology) (ASA(ALT)). This issuance is made concurrent with publication of an interim rule with request for comments to add rules concerning Foreign Acquisition—Contractors Accompanying the Force, published in this issue of the **Federal Register**.

DATES: *Effective date:* November 28, 2003.

Comment date: Comments must be submitted to the address shown below on or before January 27, 2004.

ADDRESSES: Respondents may e-mail comments to: *s.wisniewski@us.army.mil*. Those who cannot submit comments by e-mail may submit comments to: Procurement Policy and Support Office, Attn: SAAL-PP, Sharon Wisniewski, Presidential Towers, 2511 S. Jeff Davis Highway, Arlington, VA, 22202, facsimile (703) 604–8178. Please cite "AFARS CAF Clause" in the subject line of comments.

FOR FURTHER INFORMATION CONTACT: Sharon Wisniewski, (586) 574–7050 or Linda Fowlkes, (703)604–7104.

SUPPLEMENTARY INFORMATION:

A. Background

This issuance amends 48 CFR part 5152 (also referred to as the Army Federal Acquisition Regulation Supplement (AFARS)) to incorporate information to facilitate deploying contractor personnel to Iraq or other areas of operations. It also seeks to ease the administrative difficulty for each contractor and contracting office researching current guidance on contractors accompanying the force, and to increase consistency among Army contracts. This AFARS change is published to address contractor and Army contracting offices' questions and concerns. This notice was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

The Army does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule applies only to contractors that may require deployment of contractor personnel outside the United States, and because it only consolidates existing and draft logistical guidance. The amount of such additional services is not expected to be significantly large in comparison to the total amount of services procured by Army, and any additional costs would be reimbursable under the resulting contract. Therefore, Army has not performed an initial regulatory flexibility analysis. Army invites comments from small businesses and other interested parties. Army also will consider comments from small entities concerning the affected AFARS subpart in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite "Small Entities CAF comment."

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

D. Determination To Issue a Rule Effective With Publication in the Federal Register

A determination has been made under the authority of the Army Deputy Assistant Secretary of the Army (Policy & Procurement) that urgent and compelling reasons exist to publish this notice prior to affording the public an opportunity to comment. Contracting offices continue to write contracts that require contractor personnel to accompany the military force in Iraq and other places. Contractor representatives and contracting offices have requested inclusion of coverage in the AFARS expeditiously, even if not a complete solution, pending coverage on this topic in higher level regulations. Comments received in response to this notice will be considered.

Emily Clarke,

Director, Procurement Policy and Support.

List of Subjects in 48 CFR Part 5152

Government contracts, Government procurement.

■ For reasons set forth in the preamble, the Department of the Army amends 48 CFR Part 5152 as follows:

PART 5152—SOLICITATIONS PROVISIONS AND CONTRACT CLAUSES

■ 1. The authority citation for 5152.225–74–9000 is added to read as follows:

Authority: 5 U.S.C. 301, 10 U.S.C. 2202, DOD Directive 5000.35, FAR 1.301 and DOD FAR Supplement 201.3.

■ 2. Add 5152.225–74–9000 to read as follows:

5152.225–74–9000 Contractors Accompanying the Force.

As prescribed at subpart 5125.74–9000(e) insert the following clause:

CONTRACTORS ACCOMPANYING THE FORCE (NOV. 2003)

(a) *General.* (1) Performance of this contract may require deployment of Contractor Personnel in support of military operations. The Contractor acknowledges that such operations are inherently dangerous and accepts the risks associated with contract performance in this environment.

(2) For purposes of this clause, the term "Contractor Personnel" refers to the Contractor's officers and employees. Unless otherwise specified (*e.g.*, subparagraph (b) of this clause), this term does not include personnel who permanently reside in the country where contract performance will take place.

(3) The Contractor shall ensure that Contractor Personnel working in an area of operations (AO, as defined in the Joint Publication 1–02, "DOD Dictionary of

Military and Associated Terms") are familiar and comply with applicable: (i) Military Service and Department of Defense regulations, directives, instructions, general orders, policies, and procedures, in particular Army Regulation 715–9 and Field Manual 3–100.21; (ii) U.S., host country, local, and international laws and regulations; and (iii) treaties and international agreements (*e.g.*, Status of Forces Agreements, Host Nation Support Agreements, and Defense Technical Agreements) relating to safety, health, force protection, and operations under this contract.

(4) The Contractor shall ensure that this clause is included in all subcontracts.

(b) *Compliance with Combatant Command Orders.* The Contractor shall ensure that Contractor Personnel, regardless of residency status, working in the AO comply with all orders, directives, and instructions of the combatant command relating to non-interference in military operations, force protection, health, and safety. The Combatant Commander or his subordinate commanders, in conjunction with the Contracting Officer or the Contracting Officer's Representative, may direct the Contractor, at the Contractor's own expense, to replace and, where applicable, repatriate any Contractor personnel who fail to comply with this provision. Such action may be taken at the Government's discretion without prejudice to its rights under any other provision of this contract, including the Termination for Default clause.

(c) *Contractor Personnel Administration.* (1) In order to maintain accountability of all deployed personnel in the AO, the Contractor shall follow instructions issued by the Army Materiel Command's Logistics Support Element (AMC LSE) or other Contracting Officer's designated representative to provide, and keep current, requested data on Contractor Personnel for entry into military personnel database systems.

(2) The Contractor shall coordinate with the AMC LSE or other Contracting Officer's designated representative for logistics support, as follows: (i) Upon initial entry into the AO; (ii) upon initiation of contract performance; (iii) upon relocation of contract operations within the AO; and (iv) upon exiting the AO.

(3) Before deployment, the Contractor shall ensure that:

(i) All Contractor Personnel complete two DD Forms 93, Record of Emergency Data Card. One copy of the completed form shall be returned to the Government official specified by the Contracting Officer's designated representative; the other shall be hand-carried by the individual employee to the AO.

(ii) All required security and background checks are completed.

(iii) All medical screening and requirements are met.

(4) The Contractor shall ensure that Contractor Personnel have completed all pre-deployment requirements specified by the Contracting Officer's designated representative (including processing through the designated Continental United States (CONUS) Replacement Center unless another deployment processing method is specifically authorized), and the Contractor shall notify the Contracting Officer's designated representative that these actions have been accomplished.

(5) The Contractor shall have a plan for timely replacement of employees who are no longer available for deployment for any reason, including mobilization as members of the Reserve, injury, or death.

(d) *Clothing and Equipment Issue.* (1) To help distinguish them from combatants, Contractor Personnel shall not wear military clothing unless specifically authorized by a written Department of Army waiver. Contractor Personnel may wear specific items of clothing and equipment required for safety and security such as ballistic or NBC (Nuclear, Biological, Chemical) protective clothing. The CONUS Replacement Center or the combatant command may provide to the Contractor Personnel military unique Organizational Clothing and Individual Equipment (OCIE) to ensure security and safety.

(2) All issued OCIE shall be considered Government Furnished Property, and will be treated in accordance with Government Furnished Property clauses included elsewhere in this contract.

(e) *Weapons and Training.* (1) Contractor Personnel may not possess privately owned firearms in the AO. The combatant command may issue weapons and ammunition to Contractor Personnel, with the employee's company's consent as well as the individual employees' consent, and may require weapons and other pre-deployment training.

(2) The Contractor shall ensure that Contractor Personnel follow all instructions by the combatant command, as well as applicable Military Service and DoD regulations, regarding possession, use, safety, and accountability of weapons and ammunition.

(3) All issued weapons, ammunition, and accessories (*e.g.*, holsters) shall be considered Government Furnished Property. Upon redeployment or notification by the combatant command, the Contractor shall ensure that all Government issued weapons and unused ammunition are returned to the point of issue using a method that complies with Military Service regulations for issue and turn-in of firearms.

(f) *Vehicle and Equipment Operation.* (1) The Contractor shall ensure that Contractor Personnel possess the required licenses to operate all vehicles or equipment necessary to perform the contract in the AO.

(2) Contractor-owned or leased motor vehicles or equipment shall meet all requirements established by the combatant command and shall be maintained in a safe operating condition.

(g) *Passports, Visas and Customs.* The Contractor is responsible for obtaining all passports, visas, and other documents necessary for Contractor Personnel to enter and exit any AO.

(h) *Purchasing Limited Resources.* When the Combatant Command establishes a Commander-in-Chief Logistics Procurement Support Board (CLPSB), Joint Acquisition Review Board, or similar purchase review committee, the contractor will be required to coordinate local purchases of goods and services designated as limited, in accordance with instructions provided by the Administrative Contracting Officer or the Contracting Officer's designated representative.

(End of Clause)

[FR Doc. 03–29417 Filed 11–26–03; 8:45 am]

BILLING CODE 3710–08–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. NHTSA–2002–12065]

RIN 2127–AI88

Federal Motor Vehicle Safety Standards; Child Restraint Systems

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

ACTION: Delay of expiration date of interim final rule.

SUMMARY: On October 22, 2002, NHTSA published an interim final rule that amended the Federal motor vehicle safety standard on child restraint systems to permit the manufacture and sale of harnesses that attach to school bus seat backs as long as the harnesses are properly labeled. The agency scheduled the interim final rule to terminate on December 1, 2003, while requesting comments on permanently adopting the provisions of the interim final rule. To allow for more time to respond to the comments, this document delays the expiration date of the interim final rule for an additional nine months.

DATES: The expiration of the interim final rule published at 67 FR 64818 (October 22, 2002), as amended by this rule, is delayed until September 1, 2004. The amendment published in this rule is effective November 28, 2003, and expires on September 1, 2004.

Any petitions for reconsideration of this final rule must be received by NHTSA not later than January 12, 2004.

ADDRESSES: Petitions for reconsideration, identified by DOT DMS Docket No. NHTSA–2002–12065, should be submitted to: Administrator, National Highway Traffic Safety Administration, 400 Seventh St., SW., Washington, DC 20590.

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

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

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

SUPPLEMENTARY INFORMATION: Interim Final Rule

On October 22, 2002, NHTSA published an interim final rule to permit, temporarily, the manufacture and sale of harnesses designed to attach to school bus seats. (67 FR 64818; Docket No. NHTSA–2002–12065). The interim rule was adopted to facilitate the transportation of preschool and special needs children for the new school year, and to relieve a restriction imposed by FMVSS No. 213, *Child restraint systems,* on the manufacture and sale of the harnesses.

The interim rule responded to a petition for rulemaking from a harness manufacturer. E-Z-On Products, Inc. ("E-Z-On"), which requested that NHTSA amend a prohibition in S5.3.1 of FMVSS No. 213 against seat-mounted harnesses. The petitioner believed that the harnesses were especially needed to help transport preschool and special needs children in school buses, because the devices could restrain the children and provide upper body support without the use of seat belts.

In the interim rule, NHTSA determined that permitting the manufacture and sale of seat-mounted harnesses for use on school buses would enhance the safe transportation of preschool and special needs children, subject to a precautionary measure to avoid overloading the seat to which the harness is attached in a collision. The interim rule provided that, as of February 1, 2003, seat-mounted harnesses for school buses could be manufactured if they bore a permanent warning label that warned about overloading the seat. The agency decided that the likelihood of seat failure in a collision would be reduced if the entire seat directly rearward of a child restrained in a seat-mounted harness were vacant or occupied only by restrained passengers. NHTSA required the label to be placed on the part of the restraint that attaches the harness to the vehicle seat back, and it must be visible when the harness is installed. The label must bear a pictogram and the following statements: "WARNING! This restraint must only be used on school bus seats. Entire seat directly behind must be unoccupied or have restrained occupants."

The interim rule also added a definition of "harness" [1] to the standard. The definition of a harness is "a combination pelvic and upper torso child restraint system that consists primarily of flexible material, such as straps, webbing or similar material, and that does not include a rigid seating structure for the child."

The interim rule made several other amendments to FMVSS No. 213 relating to this issue. These other amendments specified the means of attachment by which a harness must be capable of meeting the requirements of FMVSS No. 213 and established the dynamic test procedures of the standard for testing seat-mounted harnesses.

NHTSA determined that it was in the public interest to make the changes effective immediately on an interim basis (until December 1, 2003) to enable the restraints to be manufactured and sold for immediate use during the school year. A one-year period was provided to enable us to decide whether to amend the standard permanently.

A large majority of the commenters supported adopting a permanent exclusion for harnesses manufactured and sold for use on school bus seats from the prohibition against such a design. Some commenters raised questions about the warning label text and placement. Comments were also received on the specific test conditions of the standard.

The agency is in the process of determining whether to amend the standard permanently in response to the comments received. We anticipate issuing a response to comments in early 2004. A nine-month extension of the temporary amendments, to September 1, 2004, preserves the status quo until then.

Effective Date of This Document

Because the December 1, 2003 date for the termination of the period during which seat-mounted harnesses can be manufactured is fast approaching, NHTSA finds for good cause that today's action extending the temporary amendments must take effect immediately. Today's final rule makes no substantive change to the standard as amended by the interim rule, but extends the temporary amendments for nine months while the agency complete its response to the comments. If the effective date were not delayed, manufacturers would be required to stop production and sales of harnesses that attach to school bus seat backs prior to the agency's response to comments that requested the interim rule to be made permanent. Also, pupil transportation operators would find it increasingly difficult to purchase seat-mounted harnesses beginning December 1, 2003.

[1] We consider the term "harness" to be interchangeable with the term "vest", which is commonly used to describe seatk-mounted retraints.

Rulemaking Analysis and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

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

B. Regulatory Flexibility Act

NHTSA has considered the impacts of this rulemaking action under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). I certify that the amendment will not have a significant economic impact on a substantial number of small entities. The rule will not impose any new requirements or costs on manufacturers, but instead will extend the period in which manufacturers are permitted to produce seated-mounted harnesses, so long as the harnesses bear a label providing information regarding how the restraint should be used. We anticipate that the seat-mounted harnesses will be sold to school districts and to other pupil transportation providers. NHTSA has learned of the existence of two manufacturers, both of which are small businesses. The agency believes that this rule will not have a significant impact on these businesses since it only preserves the status quo for nine months.

C. Paperwork Reduction Act

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

establish any new information collection requirements.

D. National Environmental Policy Act

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

E. Executive Order 13132 (Federalism)

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

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

F. Executive Order 12778 (Civil Justice Reform)

This rule does not have any retroactive effect. Under 49 U.S.C. 30103, whenever a Federal motor vehicle safety standard is in effect, a state may not adopt or maintain a safety standard applicable to the same aspect of performance which is not identical to the Federal standard, except to the extent that the state requirement imposes a higher level of performance and applies only to vehicles procured for the State's use. 49 U.S.C. 30161 sets forth a procedure for judicial review of final rules establishing, amending or revoking Federal motor vehicle safety standards. That section does not require submission of a petition for reconsideration or other administrative proceedings before parties may file suit in court.

G. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272) directs us to use voluntary consensus standards in regulatory activities unless doing so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies, such as the Society of Automotive Engineers (SAE).

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

H. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires Federal agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million in any one year (adjusted for inflation with base year of 1995).

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

I. Regulation Identifier Number (RIN)

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

List of Subjects in 49 CFR Part 571

Motor vehicle safety, Reporting and recordkeeping requirements, Tires.

PART 571—[AMENDED]

■ In consideration of the foregoing, NHTSA amends 49 CFR part 571 as set forth below.

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

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

§ 571.213 [Amended]

■ 2. In § 571.213, S5.3.1 is revised to read as follows:

§ 571.213 Standard No. 213; Child restraint systems.

* * * * *

S5.3.1 Add-on child restraints shall meet the requirements of either paragraph (a) or (b) of this section, as appropriate.

(a) Except for components designed to attach to a child restraint anchorage system, each add-on child restraint system must not have any means designed for attaching the system to a vehicle seat cushion or vehicle seat back and any component (except belts) that is designed to be inserted between the vehicle seat cushion and vehicle seat back. Harnesses manufactured before February 1, 2003 that are manufactured for use on school bus seats are excluded from S5.3.1(a).

(b) Harnesses manufactured on or after February 1, 2003, but before September 1, 2004, for use on school bus seats must meet S5.3.1(a) of this standard, unless a label that conforms in content to Figure 12 and to the requirements of S5.3.1(b)(1) through S5.3.1(b)(3) of this standard is permanently affixed to the part of the harness that attaches the system to a vehicle seat back.

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

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

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

* * * * *

Issued on: November 21, 2003.

Jeffrey W. Runge,

Administrator.

[FR Doc. 03–29610 Filed 11–24–03; 12:02 pm]

BILLING CODE 4910–59–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 18

RIN 1018–AH92

Marine Mammals; Incidental Take During Specified Activities

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the Fish and Wildlife Service (Service), have developed regulations that would authorize the incidental, unintentional take of small numbers of polar bears and Pacific walrus during year-round oil and gas industry (Industry) exploration, development, and production operations in the Beaufort Sea and adjacent northern coast of Alaska. Industry operations for the covered period are similar to and include all activities covered by the 3-year Beaufort Sea incidental take regulations that were effective from March 30, 2000, through March 31, 2003 (65 FR 16828, March 30, 2000).

We find that the total expected takings of polar bear and Pacific walrus during oil and gas industry exploration, development, and production activities will have a negligible impact on these species and no unmitigable adverse impacts on the availability of these species for subsistence use by Alaska Natives. We base this finding on the results of 9 years of monitoring and evaluating interactions between polar bears, Pacific walrus, and Industry, and also on oil spill trajectory models, polar bear density models, and an independent population distribution model that determine the likelihood of impacts to polar bears should an accidental oil release occur.

DATES: This rule is effective November 28, 2003, and remains effective through March 28, 2005.

ADDRESSES: Comments and materials received in response to this action are available for public inspection during normal working hours of 8 a.m. to 4:30 p.m., Monday through Friday, at the Office of Marine Mammals Management, U.S. Fish and Wildlife Service, 1011 E. Tudor Road, Anchorage, AK 99503.

FOR FURTHER INFORMATION CONTACT: Craig Perham, Office of Marine Mammals Management, U.S. Fish and Wildlife Service, 1011 East Tudor Road, Anchorage, AK 99503; telephone 907–786–3810 or 1–800–362–5148; e-mail: *craig_perham@fws.gov*.

SUPPLEMENTARY INFORMATION:

Background

Section 1371(a)(5)(A) of the Marine Mammal Protection Act (MMPA) (16 U.S.C. 1361–1407) gives the Secretary of the Interior (Secretary) through the Director of the Service the authority to allow the incidental, but not intentional, taking of small numbers of marine mammals, in response to requests by U.S. citizens (you) (as defined in 50 CFR 18.27(c)) engaged in a specified activity (other than commercial fishing) in a specified geographic region. If regulations allowing such incidental taking are issued, we can issue Letters of Authorization (LOA) to conduct activities under the provisions of these regulations when requested by citizens of the United States.

We are authorizing the incidental taking of polar bears and Pacific walrus based on our final finding using the best scientific evidence available that the total of such taking for the regulatory period will have no more than a negligible impact on these species and will not have an unmitigable adverse impact on the availability of these species for taking for subsistence use by Alaska Natives. These regulations set forth: (1) Permissible methods of taking; (2) the means of effecting the least practicable adverse impact on the species and their habitat and on the availability of the species for subsistence uses; and (3) requirements for monitoring and reporting.

The term "take," as defined by the MMPA, means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill, any marine mammal. Harassment as defined by the MMPA, as amended in 1994, "means any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild" (the MMPA calls this Level A harassment), "or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering" (the MMPA calls this Level B harassment). As a result of 1986 amendments to the MMPA, we amended 50 CFR 18.27 (*i.e.*, regulations governing small takes of marine mammals incidental to specified activities) with a final rule published on September 29, 1989 (54 FR 40338). Section 18.27(c) included a revised definition of "negligible impact" and a new definition for "unmitigable adverse impact" as follows. Negligible impact is "an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival." Unmitigable adverse impact means "an impact resulting from the specified activity (1) that is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by (i) causing the marine mammals to abandon or avoid hunting areas, (ii) directly displacing subsistence users, or (iii) placing physical barriers between the marine mammals and the subsistence hunters; and (2) that cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met." Industry conducts activities such as oil and gas exploration, development, and production in marine mammal habitat and, therefore, risks violating the prohibitions on the taking of marine mammals.

Although Industry is under no legal requirement to obtain incidental take authorization, since 1993 Industry has chosen to seek authorization to avoid the uncertainties of taking marine mammals associated with conducting activities in marine mammal habitat.

On November 16, 1993 (58 FR 60402), we issued final regulations to allow the incidental, but not intentional, take of small numbers of polar bears and Pacific walrus when such taking(s) occurred in the course of Industry activities during year-round operations in the area described later in this rule in the section "Description of Geographic Region." The regulations were effective for 18 months. At the same time, the Secretary of the Interior directed us to develop, and then begin implementation of, a polar bear habitat conservation strategy before extending the regulations beyond the initial 18 months for a total 5-year period as allowed by the MMPA. On August 14, 1995, we completed development of and issued our Habitat Conservation Strategy for Polar Bears in Alaska to ensure that the regulations met with the intent of Congress. On August 17, 1995, we issued the final rule and notice of availability of a completed final polar bear habitat conservation strategy (60 FR 42805). We then extended the regulations for an additional 42 months to expire on December 15, 1998.

On August 28, 1997, BP Exploration (Alaska), Inc., submitted a petition for itself and for ARCO Alaska, Inc., Exxon Corporation, and Western Geophysical Company for rulemaking pursuant to section 101(a)(5)(A) of the MMPA, and section 553(e) of the Administrative Procedure Act (APA; 5 U.S.C. 553).

Their request sought regulations to allow the incidental, but not intentional, take of small numbers of polar bears and Pacific walrus when takings occurred during Industry operations in Arctic Alaska. Specifically, they requested an extension of the incidental take regulations that begin at 50 CFR 18.121 for an additional 5-year term from December 16, 1998, through December 15, 2003. The geographic extent of the request was the same as that of previously issued regulations that begin at 50 CFR 18.121 that were in effect through December 15, 1998 (*see* above).

The petition to extend the incidental take regulations included two new oil fields (Northstar and Liberty). Plans to develop each field identified a need for an offshore gravel island and a buried subsea pipeline to transport crude oil to existing onshore infrastructure. The Liberty prospect was subsequently abandoned, while the Northstar prospect moved toward production. At the time, based on the preliminary nature of the information related to subsea pipelines published in a Draft Environmental Impact Statement (DEIS) for the Northstar project, we were unable to make a finding of negligible impact and issue regulations for the full 5-year period as requested by Industry.

On November 17, 1998, we published proposed regulations (63 FR 63812) to allow the incidental, unintentional take of small numbers of polar bears and Pacific walrus in the Beaufort Sea and northern coast of Alaska for a 15-month period. These regulations did not authorize the incidental take of polar bears and Pacific walrus during construction or operation of subsea pipelines in the Beaufort Sea. On January 28, 1999, we issued final regulations effective through January 30, 2000 (64 FR 4328).

The U.S. Army Corps of Engineers (Corps) finalized the Northstar Final Environmental Impact Statement (FEIS) in February 1999. On February 3, 2000, we issued regulations effective through March 31, 2000 (65 FR 5275), in order to finalize the subsequent longer-term regulations without a lapse in coverage. After a thorough analysis of the Northstar FEIS and other data related to oil spills, on March 30, 2000, we issued regulations effective for a 3-year duration, through March 31, 2003 (65 FR 16828). This assessment included a polar bear oil spill risk analysis, a model that simulated oil spills and their subsequent effects on estimated polar bear survival on the basis of distribution in the Beaufort Sea. The likelihood of polar bear mortality caused by oil spills during different seasons (open-water, ice-covered, broken ice) was also analyzed. A 3-year period was selected, rather than a 5-year period, due to the potential development of additional offshore oil and gas production sites, such as the offshore Liberty Development, which would need increased oil spill analysis if development proceeded. The Liberty Development Plan was subsequently withdrawn by the operator to be re-evaluated.

Between January 1994 and March 2003, we issued 223 LOAs for oil and gas related activities. Activities covered by LOAs included: exploratory operations, such as seismic surveys and drilling; development activities, such as construction and remediation; and production activities for operational fields. Between January 1, 1994, and March 31, 2000, 77 percent (n=89) of LOAs issued were for exploratory activities, 10 percent (n=11) were for development, and 13 percent (n=15) were for production activities. Less than a third (32 of 115) of these activities actually sighted polar bears, and approximately two-thirds of sightings (171 of 258) occurred during production activities.

Summary of Current Request

On August 23, 2002, the Alaska Oil and Gas Association (AOGA), on behalf of its members, requested that we promulgate regulations for nonlethal incidental take of small numbers of Pacific walrus and polar bears pursuant to section 101(a)(5) of the MMPA. The request was for a period of 5 years, from March 31, 2003, through March 31, 2008. Members of AOGA include Alyeska Pipeline Service Company; Marathon Oil Company; Anadarko Petroleum Corporation Petro Star, Inc.; BP Exploration (Alaska) Inc.; Phillips Alaska, Inc.; ChevronTexaco Corporation; Shell Western E&P Inc.; Cook Inlet Pipe Line Company; Tesoro Alaska Company; Cook Inlet Region, Inc.; TotalFinaElf E&P USA; EnCana Oil & Gas (USA) Inc.; UNOCAL; Evergreen Resources, Inc.; Williams Alaska Petroleum, Inc.; ExxonMobil Production Company; XTO Energy, Inc.; and Forest Oil Corporation. Along with their request for incidental take authorization, Industry has also developed and implemented polar bear conservation measures. The geographic region defined in Industry's 2002 application is described later in this rule in the section titled "Description of Geographic Region."

On July 25, 2003, we published in the **Federal Register** (68 FR 44020) a proposal to promulgate regulations under section 101(a)(5)(A) of the MMPA that would allow the Industry to take small numbers of polar bears and Pacific walrus incidental to year-round oil and gas industry exploration, development, and production operations in the Beaufort Sea and adjacent northern coast of Alaska.

The comment period on the proposed rule was open from July 25, 2003, through August 25, 2003. To expedite the rulemaking process, a comment period of 30 days was selected because the previous regulations authorizing the incidental, unintentional take of small numbers of polar bears and Pacific walrus during year-round oil and gas industry exploration, development, and production operations in the Beaufort Sea and adjacent northern coast of Alaska had expired on March 31, 2003.

We are issuing new regulations that will remain in effect for 16 months to ensure that we have adequate time to thoroughly assess effects of Industry activities over the longer period (5 years) requested by Industry. We will assess the effects of Industry activities for the requested period (5 years) and expect to publish a longer-term proposed rule during the term described in this final rule.

Description of Regulations

The regulations that we are issuing include: Permissible methods of taking; measures to ensure the least practicable adverse impact on the species and the availability of these species for subsistence uses; and requirements for monitoring and reporting. The geographic coverage and the scope of industrial activities assessed in these regulations are the same as those in the regulations we issued on March 30, 2000. New LOAs will be issued following the effective date of these final regulations.

These regulations do not authorize the actual activities associated with oil and gas exploration, development, and production. Rather, they authorize the incidental, unintentional take of small numbers of polar bears and Pacific walrus associated with those activities. The U.S. Minerals Management Service (MMS), the Corps, and the U.S. Bureau of Land Management are responsible for permitting activities associated with oil and gas activities in Federal waters and on Federal lands. The State of Alaska is responsible for activities on State lands and in State waters.

With final incidental take regulations, persons seeking taking authorization for particular projects will apply for an LOA to cover take associated with exploration, development, and production activities pursuant to the regulations. Each group or individual conducting an oil and gas industry-

related activity within the area covered by these regulations may request an LOA. Each applicant for an LOA must submit a plan to monitor the effects of authorized activities on polar bears and walrus. Each LOA applicant must also include a Plan of Cooperation on the availability of these species for subsistence use by Alaska Native communities that may be affected by Industry operations. The purpose of the Plan is to minimize the impact of oil and gas activity on the availability of the species or the stock to ensure that subsistence needs can be met. The Plan must provide the procedures on how Industry will work with the affected Native communities, including a description of the necessary actions that will be taken to: (1) avoid interference with subsistence hunting of polar bears and Pacific walrus; and (2) ensure continued availability of these species for subsistence use.

We will evaluate each request for an LOA for a specific activity and specific location, and may condition each LOA for that activity and location. For example, an LOA issued in response to a request to conduct activities on barrier islands with known active bear dens, or a history of polar bear denning, may be conditioned to require avoidance of a specific den site by 1 mile, intensified monitoring in a 1-mile buffer around the den, or avoiding the area until a specific date. More information on applying for and receiving an LOA can be found at 50 CFR 18.27(f).

Description of Geographic Region

These regulations would allow Industry to incidentally take small numbers of polar bear and Pacific walrus within the same area, referred to as the Beaufort Sea Region, as covered by our previous regulations. This region is defined by a north-south line at Barrow, Alaska, and includes all Alaska coastal areas, State waters, and Outer Continental Shelf waters east of that line to the Canadian border. The onshore region is the same north-south line at Barrow, 25 miles inland and east to the Canning River. The Arctic National Wildlife Refuge is not included in the area covered by these regulations.

Description of Activities

In accordance with 50 CFR 18.27, Industry submitted a request for the promulgation of incidental take regulations pursuant to section 101(a)(5)(A) of the MMPA. Activities covered in this regulation include Industry exploration, development, and production of oil and gas, as well as environmental monitoring associated with these activities. These regulations do not authorize incidental take for offshore production sites other than the Northstar Production area.

Exploration activities may occur onshore or offshore and include: Geological surveys; geotechnical site investigations; reflective seismic exploration; vibrator seismic data collection; airgun and water gun seismic data collection; explosive seismic data collection; vertical seismic profiles; subsea sediment sampling; construction and use of drilling structures such as caisson-retained islands, ice islands, bottom-founded structures (steel drilling caisson, or SDC), ice pads and ice roads; oil spill prevention, response, and cleanup; and site restoration and remediation.

Exploratory drilling for oil is an aspect of exploration activities. Exploratory drilling and associated support activities and features include: transportation to site; setup of 90–100 person camps and support camps (requiring lights, generators, snow removal, water plants, wastewater plants, dining halls, sleeping quarters, mechanical shops, fuel storage, camp moves, landing strips, aircraft support, health and safety facilities, data recording facility, and communication equipment); building gravel pads; building gravel islands with sandbag and concrete block protection, ice islands, and ice roads; gravel hauling; gravel mine sites; road building; pipelines; electrical lines; water lines; road maintenance; buildings; facilities; operating heavy equipment; digging trenches; burying pipelines and covering pipelines; sea lift; water flood; security operations; dredging; moving floating drill units; helicopter support; and drill ships such as the SDC, CANMAR Explorer III, and the Kulluk.

Development activities associated with oil and gas industry operations include: Road construction; pipeline construction; waterline construction; gravel pad construction; camp construction (personnel, dining, lodging, maintenance shops, water plants, wastewater plants); transportation (automobile, airplane, and helicopter traffic; runway construction; installation of electronic equipment); well drilling; drill rig transport; personnel support; and demobilization, restoration, and remediation.

Production activities include: personnel transportation (automobiles, airplanes, helicopters, boats, rolligons, cat trains, and snowmobiles) and unit operations (building operations, oil production, oil spills, cleanup, restoration, and remediation).

Alaska's North Slope encompasses an area of 88,280 square miles and contains 8 major oil and gas fields in production: Endicott-Duck Island, Prudhoe Bay, Kuparuk River, Point McIntyre, Milne Point, Badami, Northstar, and Colville River. These 8 fields include 21 current satellite oilfields: Sag Delta North, Eider, North Prudhoe Bay, Lisburne, Niakuk, Niakuk-Ivashak, Aurora, Midnight Sun, Borealis, West Beach, Polaris, Orion, Tarn, Tabasco, Palm, West Sak, Meltwater, Cascade, Schrader Bluff, Sag River, and Alpine. Exploration and delineation of known satellite fields identified within existing production fields would also be appropriate for coverage under the provisions of this rule.

During the period covered by the regulations, we anticipate a level of activity per year at existing production facilities similar to that during the timeframe of the previous regulations. In addition, during the period of the rule, we anticipate that the levels of new annual exploration and development activities will be similar to those of the previous 3 years. At this time no additional production sites are planned within the next 16 months, except possibly satellite fields, associated with existing major oil and gas fields and addressed through existing Environmental Assessments or existing Environmental Impact Statements.

Biological Information

Pacific Walrus

The Pacific walrus (*Odobenus rosmarus*) typically inhabits the waters of the Chukchi and Bering seas. Most of the population congregates near the ice edge of the Chukchi Sea pack ice west of Point Barrow during the summer. Walrus migrate north and south following the annual advance and retreat of the pack ice. In the winter, walrus inhabit the pack ice of the Bering Sea, with concentrations occurring in the Gulf of Anadyr, south of St. Lawrence Island, and south of Nunivak Island. The current, conservative minimum population estimate is approximately 200,000 walrus. This estimate is based on surveys conducted in 1990 and is associated with wide confidence intervals. However, no surveys have been conducted since then and the actual size and trend of the population is unknown, although believed to be near the 1990 level. Pacific walrus use five major haulout sites on the west coast of Alaska. There are no known haulout sites from Point Barrow to Demarcation Point on the Beaufort Sea coast.

Walrus occur infrequently in the Beaufort Sea, and although individuals are occasionally seen in the Beaufort Sea, they do not occur in significant numbers to the east of Point Barrow. If walrus are observed, they are most likely to be seen in nearshore and offshore areas during the summer open-water season. They will not be encountered during the ice-covered season.

Walrus sightings in the Beaufort Sea have consisted solely of widely scattered individuals and small groups. For example, while walrus have been encountered and are present in the Beaufort Sea, there were only five sightings of walrus between 146° and 150°W during MMS sponsored aerial surveys conducted from 1979 to 1995.

Pacific walrus mainly feed on bivalve mollusks obtained from bottom sediments along the shallow continental shelf, typically at depths of 80 m (262 ft) or less. Walrus are also known to feed on a variety of benthic invertebrates such as worms, snails, and shrimp and some slow-moving fish; and some animals feed on seals and seabirds. Mating usually occurs between January and March. Implantation of a fertilized egg is delayed until June or July. Gestation lasts 11 months (a total of 15 months after mating) and birth occurs between April and June during the annual northward migration. Calves weigh about 63 kg (139 lb) at birth and are usually weaned by age two. Females give birth to one calf every two or more years. This reproductive rate is much lower than other pinnipeds; however, some walrus may live to age 35–40 and remain reproductively active until late in life.

Polar Bear

Polar bears (*Ursus maritimus*) occur in the circumpolar Arctic and live in close association with polar ice. In Alaska, their distribution extends from south of the Bering Strait to the U.S.-Canada border. Two stocks occur in Alaska: the Chukchi-Bering seas stock, whose minimum size is approximately 2,000; and the Southern Beaufort Sea stock, which was estimated in 2002 to have 2,273 bears.

Females without dependent cubs breed in the spring and enter maternity dens by late November. Females with cubs do not mate. Each pregnant female gives birth to one to three cubs, with two-cub litters being most common. Cubs are usually born in December. Family groups emerge from their dens in late March or early April. Only pregnant females den for an extended period during the winter; however, other polar bears may burrow in depressions to escape harsh winter winds. The reproductive potential (intrinsic rate of increase) of polar bears is low. The average reproductive interval for a polar bear is 3–4 years. The maximum reported age of reproduction in Alaska is 18 years. Based on these data, a female polar bear may produce about 8–10 cubs in her lifetime.

Ringed seals (*Phoca hispida*) are the primary prey species of the polar bear, although polar bears occasionally hunt bearded seals (*Erignathus barbatus*) and walrus calves. Polar bears also scavenge on marine mammal carcasses washed up on shore and have been known to eat anthropogenic nonfood items such as Styrofoam, plastics, car batteries, antifreeze, and lubricating fluids.

Polar bears have no natural predators, and they do not appear to be prone to death by disease or parasites. The most significant source of mortality is humans. Since 1972, with the passage of the MMPA, only Alaska Natives are allowed to hunt polar bears in Alaska. Bears are used by Alaska Natives for subsistence purposes, such as consumption and the manufacture of handicraft and clothing items. The Native harvest occurs without restrictions on sex, age, number, or season, provided that takes are non-wasteful. From 1980 through 2002, the total annual harvest in Alaska averaged 107 bears. The majority of this harvest (69 percent) occurred in the Chukchi and Bering Seas area.

Polar bears in the near-shore Alaskan Beaufort Sea are widely distributed in low numbers, with an average density of about one bear per 30 to 50 square miles. Polar bears congregate on barrier islands in the fall and winter because of available food and favorable environmental conditions. Polar bears will occasionally feed on bowhead whale carcasses on barrier islands. In November 1996, biologists from the U.S. Geological Survey observed 28 polar bears near a bowhead whale carcass on Cross Island, and approximately 11 polar bears within a 2-mile radius of another bowhead whale carcass near the village of Kaktovik on Barter Island. From 2000 to 2003, biologists from the Service conducted systematic coastal aerial surveys for polar bears from Cape Halkett to Barter Island. During these surveys they observed as many as 5 polar bears at Cross Island and 51 polar bears on Barter Island within a 2-mile radius of bowhead whale carcasses. In a survey during October 2002, we observed 109 polar bears on barrier islands and the coastal mainland from Cape Halkett to Barter Island, a distance of approximately 350 kilometers.

Effects of Oil and Gas Industry Activities on Subsistence Uses of Marine Mammals

The subsistence harvest provides Alaska Natives with food, clothing, and materials that are used to produce arts and crafts. Walrus meat is often consumed, and the ivory is used to manufacture traditional arts and crafts. Polar bears are primarily hunted for their fur, which is used to manufacture cold weather gear; however, their meat is also consumed. Although walrus and polar bears are a part of the annual subsistence harvest of most rural communities on the North Slope of Alaska, these species are not as significant a food resource as bowhead whales, seals, caribou, and fish.

Pacific Walrus

The Pacific walrus has cultural and subsistence significance to Alaska Natives. Although it is not considered a primary food source for residents of the North Slope, walrus are still taken by a few Alaskan communities located in the southern Beaufort Sea along the northern coast of Alaska, including Barrow, Nuiqsut, and Kaktovik.

The primary range of Pacific walrus is west and south of the Beaufort Sea. Accordingly, few walrus inhabit, or are harvested in, the Beaufort Sea along the northern coast of Alaska. Therefore, the effect to Pacific walrus of Industry activities described in this rulemaking would most likely be minimal, as they would affect only those individuals inhabiting the Beaufort Sea. Walrus constitute only a small portion of the total marine mammal harvest for the village of Barrow. From 1994 to 2002, 182 walrus were taken by Barrow hunters as reported through the Service Marking, Tagging, and Reporting Program. Reports indicate that only up to 4 of the 182 animals were taken east of Point Barrow, within the geographic area of these incidental take regulations. Furthermore, hunters from Nuiqsut and Kaktovik do not normally hunt walrus east of Point Barrow and have taken only one walrus in that area in the last 13 years.

Polar Bear

Within the area covered by the regulations, polar bears are taken for subsistence use in Barrow, Nuiqsut, and Kaktovik where Alaska Natives utilize parts of the bears to make traditional handicrafts and clothing. Data from our Marine Mammal Management Office indicate that, from July 1, 1993, to June 30, 2002, a total of 194 polar bears was reported harvested by residents of Barrow; 26 by residents of the village of

Nuiqsut; and 26 by residents of the village of Kaktovik. Hunting success varies considerably from year to year because of variable ice and weather conditions.

Native subsistence polar bear hunting could be affected by oil and gas activities in various ways. Hunting areas where polar bears are historically taken may be viewed as tainted if an oil spill were to occur at these sites. Other potential disturbances, such as noise and vehicular traffic, could have limited effects on subsistence activities if these disturbances were to occur near traditional hunting areas and lead to the displacement of polar bears.

Plan of Cooperation

Polar bear and Pacific walrus inhabiting the Beaufort Sea represent a small portion, in terms of the number of animals, of the total subsistence harvest for the villages of Barrow, Nuiqsut, and Kaktovik. Despite this fact, the harvest of these species is important to Alaska Natives. An important aspect of the LOA process, therefore, is that prior to issuance of an LOA, Industry must provide evidence to us that an adequate Plan of Cooperation has been presented to any affected subsistence community, the Eskimo Walrus Commission, the Alaska Nanuuq Commission, and the North Slope Borough. This Plan of Cooperation must provide the procedures on how Industry will work with the affected Native communities and what actions will be taken to avoid interfering with subsistence hunting of polar bear and walrus. For this rule we evaluated the effect of proposed activities on the availability of polar bears and walrus for subsistence use. Although all three communities are located in the geographic area of the rule, the community most likely affected by Industry activities due to its close proximity is Nuiqsut. For this rule we determined that the total taking of polar bears and walrus will not have an unmitigable adverse impact on the availability of these species for subsistence uses during the duration of the regulation. We base this conclusion on: the results of coastal aerial surveys conducted within the area during the past three years; direct observations of polar bears occurring on Cross Island during the village of Nuiqsut's annual fall bowhead whaling efforts; anecdotal reports and recent sighting of polar bears by Nuiqsut residents; and data discussed in the sections of this regulation titlted, "Effects of Oil and Gas Industry Activities on Pacific Walrus and Polar Bears" and "Actual Impacts of Oil and Gas Industry Activities on Pacific Walrus and Polar Bears". Furthermore, we have received no evidence or reports that bears are being deflected (*i.e.*, altering habitat use patterns by avoiding certain areas) or being impacted in other ways by the existing level of oil and gas activity near Nuiqsut to diminish their availability for subsistence use; nor do we expect any change in the impact of future activities.

Effects of Oil and Gas Industry Activities on Pacific Walrus and Polar Bears

Pacific Walrus

Walrus are not present in the region of activity during the ice-covered season and occur only in small numbers in the defined area during the open-water season. From 1994 to 2000, three Pacific walrus were sighted during the open-water season. In June 1996, one walrus was observed from a seismic vessel near Point Barrow. In October 1996, one walrus was sighted approximately 5 miles northwest of Howe Island. In September 1997, one walrus was sighted approximately 20 miles north of Pingok Island.

Certain activities associated with oil and gas exploration and production during the open-water season have the potential to disturb walrus. Activities that may affect walrus include disturbance by: (1) Noise, including stationary and mobile sources, and vessel and aircraft traffic; (2) physical obstructions; and (3) contact with releases of oil or waste products. Despite the potential for disturbance, there is no indication that walrus have been injured during an encounter by industry activities on the North Slope, and there has been no evidence of lethal takes to date.

1. Noise Disturbance

Reactions of marine mammals to noise sources, particularly mobile sources such as marine vessels, vary. Reactions depend on the individuals' prior exposure to the disturbance source and their need or desire to be in the particular habitat or area where they are exposed to the noise and visual presence of the disturbance sources. Walrus are typically more sensitive to disturbance when hauled out on land or ice than when they are in the water. In addition, females and young are generally more sensitive to disturbance than adult males.

Noise generated by Industry activities, whether stationary or mobile, has the potential to disturb small numbers of walrus. The response of walrus to sound sources may be either avoidance or tolerance. In one instance, prior to the initiation of incidental take regulations, walrus that tolerated noises produced by Industry activities were intentionally harassed to protect them from more serious injury. Shell Western E & P Inc. encountered several walrus close to the drillship during offshore drilling operations in the eastern Chukchi Sea in 1989. On more than one occasion, one walrus actually entered the moon pool of the drillship. (A moon pool is the opening to the sea on a drillship for a marine drill apparatus. The drill apparatus protrudes from the ship through the moon pool to the sea floor.) Eventually, the walrus had to be removed from the ship for its own safety.

A. Stationary Sources—It is highly improbable that noise from stationary sources would impact walrus. Currently, Endicott, the saltwater treatment plant, and Northstar, are the only offshore facilities that could produce noise that has the potential to disturb walrus. Walrus are rare in the vicinity of these facilities, although one walrus hauled out on Northstar Island in the fall of 2001.

B. Mobile Sources—Open-water seismic exploration produces underwater sounds, typically with airgun arrays, that may be audible numerous kilometers from the source. Such exploration activities could potentially disturb walrus at varying ranges. In addition, source levels are thought to be high enough to cause hearing damage in pinnipeds close in proximity to the sound. Therefore, it is possible that walrus within the 190 dB re 1 μPa safety radius of seismic activities (Industry standard) could suffer temporary threshold shift; however, the use of acoustic safety radii and monitoring programs are designed to ensure that marine mammals are not exposed to potentially harmful noise levels. Previous open-water seismic exploration has been conducted in nearshore ice-free areas. This is the area where any expected open-water seismic exploration will occur in the duration of this rule. It is highly unlikely that walrus will be present in these areas, and therefore, it is not expected that seismic exploration would disturb walrus.

C. Vessel Traffic—Noise produced by routine vessel traffic could potentially disturb walrus in the Beaufort Sea. However, walrus densities are highest along the edge of the pack ice, and Industry vessel traffic typically avoids these areas. The reaction of walrus to vessel traffic is highly dependent on distance, vessel speed, as well as previous exposure to hunting. Walrus in the water appear to be less readily

disturbed by vessels than walrus hauled out on land or ice. In addition, barges and vessels associated with Industry activities travel in open water and avoid large ice floes or land where walrus are likely to be found. Thus, vessel activities are likely to impact at most a few walrus.

D. Aircraft Traffic—Aircraft overflights may disturb walrus. Reactions to aircraft vary with range, aircraft type, and flight pattern, as well as walrus age, sex, and group size. Adult females, calves, and immature walrus tend to be more sensitive to aircraft disturbance. Most aircraft traffic, however, is in nearshore areas, where there are typically few to no walrus.

2. Physical Obstructions

Based on known walrus distribution and numbers in the Beaufort Sea near Prudhoe Bay, it is unlikely that walrus movements would be displaced by offshore stationary facilities, such as the Northstar or Endicott, or vessel traffic. There was no indication that the walrus that used Northstar Island as a haulout in 2001 was displaced from its movements. Vessel traffic could temporarily interrupt the movement of walrus, or displace some animals when vessels pass through an area. This displacement would probably have minimal or no effect on animals and would last no more than a few hours at most.

3. Contact With Releases of Oil or Waste Products

The potential releases of oil and waste products associated with oil and gas exploration and production during the open-water season and the associated potential to disturb walrus are discussed following the polar bear discussion in this section.

Polar Bear

Oil and gas activities could impact polar bears in various ways during both open-water and ice-covered seasons. These impacts could result from the following: (1) Noise from stationary operations, construction activities, vehicle traffic, vessel traffic, aircraft traffic, and geophysical and geological exploration activities; (2) physical obstruction, such as a causeway or an artificial island; (3) human-animal encounters; and (4) oil spills or contact with hazardous materials or production wastes.

1. Noise Disturbance

Noise produced by Industry activities during the open-water and ice-covered seasons could potentially result in takes of polar bears. During the ice-covered season, denning female bears, as well as mobile, non-denning bears, could be exposed to oil and gas activities and potentially affected in different ways. The best available scientific information indicates that female polar bears entering dens, or females in dens with cubs, are more sensitive than other age and sex groups to noises.

Noise disturbance can originate from either stationary or mobile sources. Stationary sources include: Construction, maintenance, repair, and remediation activities; operations at production facilities; flaring excess gas; and drilling operations from either onshore or offshore facilities. Mobile sources include: Vessel and aircraft traffic; open-water seismic exploration; winter vibroseis programs; geotechnical surveys; ice road construction and associated vehicle traffic; drilling; dredging; and ice-breaking vessels.

A. Stationary Sources—All production facilities on the North Slope in the area to be covered by this rulemaking are currently located within the landfast ice zone. Typically, most polar bears occur in the active ice zone, far offshore, hunting throughout the year; although some bears also spend a limited amount of time on land, coming ashore to feed, den, or move to other areas. At times, usually during the fall season when the ice edge is near shore and then quickly retreats northward, bears may remain along the coast or on barrier islands for several weeks until the ice returns.

During the ice-covered season, noise and vibration from Industry facilities may deter females from denning in the surrounding area, even though polar bears have been known to den in close proximity to industrial activities. In 1991, two maternity dens were located on the south shore of a barrier island within 2.8 km (1.7 mi) of a production facility. Recently, industrial activities were initiated while two polar bears denned close to the activities. During the ice-covered seasons of 2000–2001 and 2001–2002, dens known to be active were located within approximately 0.4 km and 0.8 km (0.25 mi and 0.5 mi) of remediation activities on Flaxman Island without any observed impact to the polar bears.

In contrast, information exists indicating that polar bears within the geographic area of these regulations may have abandoned dens in the past due to exposure to human disturbance. For example, in January 1985, a female polar bear may have abandoned her den due to rollagon traffic, which occurred 250–500 m from the den site. While such events may have occurred, information indicates they have been infrequent and isolated, and will continue to be so in the future.

Noise produced by stationary Industry activities could elicit several different responses in polar bears. The noise may act as a deterrent to bears entering the area, or the noise could potentially attract bears. Attracting bears to these facilities could result in a human-bear encounter, which could result in unintentional harassment, lethal take, or intentional hazing (under separate authorization) of the bear.

B. Mobile Sources—In the southern Beaufort Sea, during the open-water season, polar bears spend the majority of their lives on the pack ice, which limits the chances of impacts on polar bears from Industry activities. Although polar bears have been documented in open water, miles from the ice edge or ice floes, this is a relatively rare occurrence. In the open-water season, Industry activities are generally limited to vessel-based exploration activities, such as ocean-bottom cable (OBC) and shallow hazards surveys. These activities avoid ice floes and the multi-year ice edge.

C. Vessel Traffic—Vessel traffic would most likely result in short-term behavioral disturbance only. During the open-water season, most polar bears remain offshore in the pack ice and are not typically present in the area of vessel traffic. Barges and vessels associated with Industry activities travel in open water and avoid large ice floes.

D. Aircraft Traffic—Routine aircraft traffic should have little to no effect on polar bears. However, extensive or repeated overflights of fixed-wing aircraft or helicopters could disturb polar bears throughout the year. Behavioral reactions of non-denning polar bears should be limited to short-term changes in behavior and would have no long-term impact on individuals and no impacts on the polar bear population. In contrast, denning bears may abandon or depart their dens early in response to noise and vibrations produced by extensive aircraft overflights. Mitigation measures, such as minimum flight elevations over polar bears, or areas of concern, and flight restrictions around known polar bear dens, are routinely implemented to reduce the likelihood that aircraft disturbs bears.

E. Seismic Exploration—Although polar bears are typically associated with the pack ice during summer and fall, open-water seismic exploration activities can encounter polar bears in the central Beaufort Sea in late summer or fall. It is unlikely that seismic exploration activities or other geophysical surveys during the open-

water season would result in more than temporary behavioral disturbance to polar bears. Polar bears normally swim with their heads above the surface, where underwater noises are weak or undetectable.

Noise and vibrations produced by oil and gas exploration and production activities during the ice-covered season could potentially result in impacts on polar bears. During this time of year, denning female bears as well as mobile, non-denning bears could be exposed to and affected differently by potential impacts from oil and gas activities. Disturbances to denning females. either on land or on ice, are of particular concern. As part of the LOA application for seismic surveys during denning season, Industry provides us with the proposed seismic survey routes. To minimize the likelihood of disturbance to denning females, we evaluate these routes along with information about known polar bear dens, historic denning sites, and probable denning habitat.

A standard condition of LOAs requires Industry to maintain a 1-mile buffer between survey activities and known denning sites. In addition, we may require Industry to avoid denning habitat until bears have left their dens. To further reduce the potential for disturbance to denning females, we have conducted research, in cooperation with Industry, to enable us to accurately detect active polar bear dens. We have evaluated the use of remote sensing techniques, such as Forward Looking Infrared (FLIR) imagery and the use of scent-trained dogs to locate dens. Based on these methodologies, the use of FLIR technology coupled with using trained dogs to locate occupied polar bear dens as a verification is a viable technique that could help to minimize impacts from oil and gas industry activities on denning polar bears. These techniques will be included as conditions of LOAs as appropriate. In addition, Industry has sponsored cooperative research evaluating noise and vibration propagation through substrates and the received levels of noise and vibration in polar bear dens. This information will be used to refine site-specific mitigation measures.

2. Physical Obstructions

There is little chance that Industry facilities would act as physical barriers to movements of polar bears. Most facilities are located onshore where polar bears are only occasionally found. The offshore and coastal facilities are most likely to be approached by polar bears. The Endicott Causeway and West Dock facilities have the greatest potential to act as barriers to movements of polar bears because they extend continuously from the coastline to the offshore facility. Yet, because polar bears appear to have little or no fear of man-made structures and can easily climb and cross gravel roads and causeways, bears have frequently been observed crossing existing roads and causeways in the Prudhoe Bay oilfields. Offshore production facilities, such as Northstar, may be approached by polar bears, but due to their layout (*i.e.*, continuous sheet pile walls around the perimeter) the bears may not gain access to the facility itself. This situation may present a small scale, local obstruction to the bears' movement, but also minimizes the likelihood of human-bear encounters.

3. Human-Polar Bear Encounters

Encounters with humans can result in the harassment or (rarely) the death of polar bears. Unlike most mammals, polar bears typically do not fear humans and are extremely curious. Polar bears are most likely to encounter humans during the ice-covered season, when both humans and bears are found on the land-fast ice and adjacent coastline. Polar bears can also come in contact with humans along the coast or on islands, particularly near locations where subsistence whalers haul bowhead whales on shore to butcher them.

Depending upon the circumstances, bears can be either repelled from or attracted to sounds, smells, or sights associated with Industry activities. In the past, such interactions have been addressed through the LOA process which requires the applicant to develop a polar bear interaction plan for each operation. These plans outline the steps the applicant will take, such as garbage disposal procedures, to minimize impacts to polar bears by reducing the attraction of Industry activities to polar bears. Interaction plans also outline the chain of command for responding to a polar bear sighting. In addition to interaction plans, Industry personnel participate in polar bear interaction training while on site. Employee training programs are designed to educate field personnel about the dangers of bear encounters and to implement safety procedures in the event of a bear sighting. The result of these polar bear interaction plans and training allows personnel on site to detect bears and respond appropriately. Most often, this response involves deterring the bear from the site. Personnel are instructed to leave an area where bears are seen. If it is not possible to leave, in most cases bears can be displaced by using pyrotechnics (*e.g.*, cracker shells) or other forms of deterrents (*e.g.*, the vehicle itself, vehicle horn, vehicle siren, vehicle lights, spot lights, etc.). The purpose of these plans and training is to eliminate the potential for lethal takes of bears in defense of human life. No bears have been killed and no Industry personnel have been injured as a result of Industry activities since regulations have been in place. Therefore, we believe, such mitigation measures have minimized polar bear/human interactions and will continue to be requirements of future LOAs as appropriate.

Although very unlikely, it is possible that on-ice vehicle traffic could physically run over an unidentified polar bear den. Known dens around the oilfield are monitored by the Service and Industry. The oil and gas industry communicates with the Service to determine the location of Industry's activities relative to known dens. General LOA provisions require Industry operations to avoid known polar bear dens by 1 mile. There is the possibility that an unknown den may be encountered during Industry activities. If a previously unknown den is identified, communication between Industry and the Service and the implementation of mitigation measures, such as the 1-mile exclusion area around the den, help ensure that disturbance is minimized.

Contact With Oil or Waste Products by Pacific Walrus and Polar Bears

The discharge of oil or waste products into the environment could potentially impact polar bears and walrus depending on the location (*i.e.*, onshore or offshore), size of the spill, environmental conditions, and success of cleanup measures. Spills of crude oil and petroleum products associated with onshore production facilities during ice-covered and open-water seasons are usually minor spills (*i.e.*, 1 to 50 barrels per incident) that are contained and cleaned up immediately. They can occur during normal operations (*e.g.*, transfer of fuel, handling of lubricants and liquid products, and general maintenance of equipment). Fueling crews have personnel that are trained to handle operational spills. If a small offshore spill occurs, spill response vessels are stationed in close proximity and respond immediately. Production related spills, generally larger, could occur at any production facility or pipeline connecting wells to the Trans-Alaska Pipeline System. These large spills have been modeled to examine potential impacts on marine mammals.

1. Physical Effects of Oil on Pacific Walrus and Polar Bear

Walrus could contact oil in water and on potential haulouts (ice or islands), while polar bears could contact spilled oil in the water, on ice, or on land. In 1980, Canadian scientists performed experiments that studied the effects to polar bears of exposure to oil. More information is available regarding the effects of oil on polar bears than walrus.

Effects on experimentally oiled polar bears (where bears were forced to remain in oil for prolonged periods of time) included acute inflammation of the nasal passages, marked epidermal responses, anemia, anorexia, and biochemical changes indicative of stress, renal impairment, and death. In experimental oiling, many effects did not become evident until several weeks after exposure to oil.

A. *External Oiling*— Oiling of the pelt causes significant thermoregulatory problems by reducing the insulation value of the pelt in polar bears. Excessive oiling could cause mortality as well. Polar bears rely on their fur as well as their layer of blubber for thermal insulation. Experiments on live polar bears and pelts showed that the thermal value of the fur decreased significantly after oiling, and oiled bears showed increased metabolic rates and elevated skin temperatures. Irritation or damage to the skin by oil may further contribute to impaired thermoregulation. Furthermore, an oiled bear would ingest oil because it would groom in order to restore the insulation value of the oiled fur. In one field observation, biologists documented a bear in Cape Churchill, Manitoba, with lubricating oil matted into its fur on parts of its head, neck, and shoulders. The bear was re-sighted two months later, at which time he had suffered substantial hair loss in the contaminated areas. Four years later, the bear was recaptured and no skin or hair damage was detectable, which suggests that while oiling can damage the fur and skin, in some instances this damage is only temporary.

Walrus do not rely on fur for thermal insulation, using a layer of blubber for warmth. Hence, they would be less susceptible to similar insulative and pelt impacts of external oiling than bears.

Petroleum hydrocarbons can also be irritating or destructive to eyes and mucous membranes, and repeated exposure could have detrimental consequences to polar bears and walrus. In one experimental study, ringed seals quickly showed signs of eye irritation after being immersed in water covered by crude oil. This progressed to severe inflammation and corneal erosions during the 24-hour experiment. When the animals were returned to uncontaminated water, the eye condition resolved within 3–4 days. This reaction could be expected in other marine mammals, such as polar bears and walrus.

B. *Ingestion and Inhalation of Oil*— Oil ingestion by polar bears through consumption of contaminated prey, and by grooming or nursing, could have pathological effects, depending on the amount of oil ingested and the individual's physiological state. Death could occur if a large amount of oil were ingested or if volatile components of oil were aspirated into the lungs. Indeed, two of three bears died in the Canadian experiment and it was suspected that the ingestion of oil was a contributing factor to the deaths. Experimentally oiled bears ingested much oil through grooming. Much of it was eliminated by vomiting and in the feces, but some was absorbed and later found in body fluids and tissues.

Ingestion of sublethal amounts of oil can have various physiological effects on a polar bear, depending on whether the animal is able to excrete and/or detoxify the hydrocarbons. Petroleum hydrocarbons irritate or destroy epithelial cells lining the stomach and intestine, and thereby affect motility, digestion, and absorption. Polar bears may exhibit these types of symptoms, such as affected motility, digestion, and absorption if they ingest oil.

Polar bears and walrus swimming in, or bears walking adjacent to, an oil spill could inhale petroleum vapors. Vapor inhalation by polar bears and walrus could result in damage to various systems, such as the respiratory and the central nervous systems, depending on the amount of exposure.

C. *Indirect Effects of Oil*—Oil may affect food sources of walrus and polar bears. A local reduction in ringed seal numbers as a result of direct or indirect effects of oil could, therefore, temporarily affect the local distribution of polar bears. A reduction in density of seals as a direct result of mortality from contact with spilled oil could result in polar bears not using a particular area for hunting. Possible impacts from a loss of a food source could reduce recruitment or survival. Also, seals that die as a result of an oil spill could be scavenged by polar bears. This would increase bears' exposure to hydrocarbons and could result in lethal impact or reduced survival to individual bears. Additionally, potentially lethal impacts caused by an oil spill to an area's benthic community could divert walrus from using the area as a food source.

2. Potential Oil Spill and Waste Products Impacts on Pacific Walrus and Polar Bears

A. Pacific Walrus. Onshore oil spills would not impact walrus unless oil moved into the offshore environment. During the open-water season, if a small spill occurs at offshore facilities or by vessel traffic, few walrus would likely encounter the oil. In the event of a larger spill during the open-water season, oil in the water column could drift offshore and possibly encounter a limited number of walrus. During the ice-covered season, spilled oil would be incorporated into the thickening sea ice. During spring melt, the oil would then travel to the surface of the ice, via brine channels, where most could be collected by spill response activities.

Few walrus are found in the Beaufort Sea east of Barrow and low to moderate numbers are found along the pack-ice edge 241 km (150 mi) or more northwest of Prudhoe Bay. Thus, the probability of individual walrus occurring in the vicinity of industry and encountering oil, as a result of an oil spill from Industry activities, is low.

B. *Polar Bear.* Polar bears could encounter oil spills during the open-water and ice-covered seasons in offshore or onshore habitat. Although the majority of the Southern Beaufort Sea polar bear population spends a large amount of its time offshore on the pack ice, individual bears could encounter oil from a spill regardless of ocean conditions.

Small spills (1–50 barrels) of oil or waste products throughout the year by Industry activities could impact small numbers of bears. As stated previously, the effects of fouling fur or ingesting oil or wastes, depending on the amount of oil or wastes involved, could be short term or result in death. In April 1988, a dead polar bear was found on Leavitt Island, approximately 9.3 km (5 nmi) northeast of Oliktok Point. The cause of death was determined to be poisoning by a mixture that included ethylene glycol and Rhodamine B dye; however, the source of the mixture was unknown.

During the ice-covered season, mobile, non-denning bears would have a higher probability of encountering oil or other production wastes than denning females. Current management practices put in place by Industry minimize the potential for such incidents by requiring the proper use, storage, and disposal of hazardous materials. In the event of an oil spill, it is also likely that polar bears would be deliberately hazed to move them away

from the area, further reducing the likelihood of impacting the population.

To date, large oil spills from Industry activities in the Beaufort Sea and coastal regions that have impacted polar bears have not occurred, although the development of offshore production facilities has increased the potential for large offshore oil spills. In a large spill (*e.g.*, 3,600 barrels: the size of a rupture in the Northstar pipeline and a complete drain of the subsea portion of the pipeline), oil would be influenced by seasonal weather and sea conditions. These would include temperature, winds, and, for offshore events, wave action and currents. Weather and sea conditions would also affect the type of equipment needed for spill response and how effective spill cleanup would be. For example, spill response has been unsuccessful in the cleanup of oil in broken ice conditions. These factors, in turn, would dictate how large spills impact polar bear habitat and numbers.

The major concern regarding large oil spills is the impact a spill would have on the survival and recruitment of the Southern Beaufort Sea polar bear population. Currently, this bear population is approximately 2,200 bears. The most recent population growth rate was estimated at 2.4 percent annually based on data from 1982 through 1992, although the population is believed to have slowed its growth or stabilized since 1992. In addition, the maximum sustainable harvest is 80 bears for this population (divided between Canada and Alaska). In Alaska, the annual subsistence harvest has fluctuated around 36 bears. The annual subsistence harvest for the Southern Beaufort Sea population (Alaska and Canada combined) has been approximately 62 bears.

The bear population may be able to sustain the additional mortality caused by a large oil spill of a small number of bears, such as 1–5 individuals; however, the additive effect of numerous bear deaths (*i.e.*, in the range of 20–30) caused by an oil spill or secondary effects of the spill caused through a local reduction in seal productivity or scavenging of oiled seal carcasses coupled with the subsistence harvest and other potential impacts, both natural and human-induced, may reduce population rates of recruitment and survival. The removal rate of bears from the population would then increase higher than what could be sustained by the population, potentially causing a decline in the bear population and affecting bear productivity and subsistence use.

Actual Impacts of Oil and Gas Industry Activities on Pacific Walrus and Polar Bears

Pacific Walrus

The actual impact to Pacific walrus in the central Beaufort Sea from oil and gas activities has been minimal. From 1994 to 2000, only three Pacific walrus were encountered in the Beaufort Sea. All were sighted during open-water seismic programs.

Polar Bear

Actual impacts on polar bears by the oil and gas industry during the past 30 years have been minimal as well. Polar bears have been encountered at or near most coastal and offshore production facilities, or along the roads and causeways that link these facilities to the mainland. During this time, only 2 polar bear deaths related to oil and gas activities have occurred. In winter 1968–1969, an industry employee on the Alaskan North Slope shot and killed a polar bear. In 1990 a female polar bear was killed at a drill site on the west side of Camden Bay. In contrast, 33 polar bears were killed in the Canadian Northwest Territories from1976 to 1986 due to encounters with industry. Since the beginning of the incidental take program, including measures that minimize impacts to the species, no polar bears have been killed due to encounters associated with current Industry activities in the Prudhoe Bay area (Alpine to Badami).

The majority of actual impacts on polar bears have resulted from direct human-bear encounters. Monitoring efforts by Industry required under previous regulations for the incidental take of polar bears and walrus have documented various types of interaction between polar bears and Industry. During a 7-year period (1994–2000), while incidental take regulations were in place, Industry reported 258 polar bear sightings. During this period, polar bears were sighted during 32 of the 115 activities covered by incidental take regulations. Approximately two-thirds of the sightings (171 of 258 sightings) occurred during production activities, which suggests that Industry activities that occur on or near the Beaufort Sea coast have a greater possibility for encountering polar bears than other Industry activities. Sixty-one percent of polar bear sightings (157 of 258 sightings) consisted of observations of polar bears traveling through or resting near the monitored areas without a perceived reaction to human presence, while 101 polar bear sightings involved bear-human interactions.

Twenty-one percent of all bear-human interactions (21 of 101 sightings) involved anthropogenic attractants, such as garbage dumpsters and landfills, where these attractants altered the bear's behavior. Sixty-five percent of polar bear-human interactions (66 of 101 sightings) involved Level B harassment to maintain human and bear safety by preventing bears from approaching facilities and people. We have no indication that these types of encounters that cause this type of minor alteration of the behavior and movement of individual bears have any long-term effects on those bears, related to recruitment or survival. We, therefore, believe that the small number and types of encounters anticipated to occur between polar bears and Industry are unlikely to have any significant effect on the polar bear population.

Risk Assessment Analysis

For Pacific walrus and polar bears, oil spills are of most concern when they occur in the marine environment, where spilled oil can accumulate at the water surface and ice edge, in leads, and similar areas of importance to marine mammals. Thus, offshore production activities, such as Northstar, have the potential to cause negative impacts on marine mammals because as additional offshore oil exploration and production occurs, the potential for large spills increases.

Due to the concern of a potential offshore oil spill, a risk assessment was performed to investigate the probability of mortality in polar bears due to an oil spill and the likelihood of occurrence in various ice conditions. Pacific walrus were not included in the risk assessment due to a lack of data regarding walrus abundance and distribution in the Beaufort Sea and because small numbers are present only seasonally in the Beaufort Sea.

The Northstar production field was used as a basis for the assessment because Northstar is currently the only offshore production field not connected to the mainland and serviced by an island. Northstar transports crude oil from a gravel island in the Beaufort Sea to shore via a 5.96-mile buried subsea pipeline. The pipeline is buried in a trench in the sea floor deep enough to reduce the risk of damage from ice gouging and strudel scour (*i.e.*, erosion to the sea floor caused by large volumes of water siphoning at high velocities through openings in the sea ice resulting in unstable pipeline bedding). Production of Northstar began in 2001, and currently 70,000 barrels of oil pass through the pipeline daily.

The quantitative rationale for a negligible impact assessment was based on a risk assessment that considered oil spill probability estimates for the Northstar production field, an oil spill trajectory model, and a polar bear distribution model. The Northstar FEIS provided estimates of the probability that one or more spills greater than 1,000 barrels of oil (a large volume spill) will occur over the project's life of 15 years. We considered only spill probabilities for the drilling platform and subsea pipeline, as these are the spill locations that would affect polar bears.

Methodology

Initially, Applied Sciences Associates, Inc., was contracted by BP Exploration Alaska Inc. to run the OILMAP oil spill trajectory model. The size of the modeled spills was set at 3,600 barrels, simulating rupture and drainage of the entire subsea pipeline. Each spill was modeled by tracking the location of 100 "spillets," each representing 36 barrels. In the model, spillets were driven by wind, and their movements were stopped by the presence of sea ice. Open water and broken ice scenarios were each modeled with 250 simulations. A solid ice scenario was also modeled, in which oil was trapped beneath the ice and did not spread. In this event, we found it unlikely that polar bears will contact oil, and therefore removed this scenario from further analysis. Each simulation was run to cover a period of 4 days, with no cleanup or containment efforts simulated. At the end of each simulation, the size and location of each spill was represented in a geographic information system, or GIS.

The trajectory model was dependent on numerous assumptions, some of which underestimate, while others overestimate, the potential risk to polar bears. These assumptions relate to, and include: variation in spill probabilities during the year; the length of time that oil was in the environment and was subject to the spill trajectory model; whether or not containment occurred in various runs of the trajectory model; types of efforts and effects of efforts to deter wildlife during spills; contact by bears with a modeled spillet resulting in mortality; and the presence and size of bear groups. We assumed that the annual probability of a spill was equal during any season of the year. Any differences in seasonal spill probabilities would have a corresponding increase or decrease in risk. The model assumed oil would remain in the environment for 4 days; increasing that period of time would increase the risk to polar bears, while decreasing the period would decrease the risk. We assumed that containment of oil in broken-ice conditions would not be effective; however, any successful containment of oil under other water conditions would correspondingly reduce the risk of oiling to wildlife. We assumed that deterrent hazing of wildlife did not take place. If instituted, hazing could reduce the likelihood of polar bears encountering oil. We assumed that polar bear distribution was not affected by sights, smells, or sounds associated with a spill and that polar bears were neither attracted to nor displaced by these factors.

Similarly, the risk assessment model accounted for average movements and likelihood of polar bears being present in any given location based on a history of movements from satellite-collared females. The model did not consider aggregations of polar bears that may be present seasonally in the study area, nor did it consider whether other sex and age classes of polar bears have movements similar to adult females. If aggregations were to occur, then the risk to polar bears could increase. If the distribution of other sex-age classes differs from adult females, then risk may correspondingly increase or decrease for these sex-age classes.

Lastly, we assumed that polar bears located within the distribution grid that intersected with oil spillets modeled in the trajectory model were oiled and that mortality occurred, although this may not occur naturally. In evaluating the impacts of all these assumptions, we determined that the assumptions that overestimate and underestimate mortalities were generally in balance.

Impacts to polar bears from the oil spill trajectory model were derived using telemetry data from the U.S. Geological Survey, Biological Resources Division (USGS). Telemetry data suggest that polar bears are widely distributed in low numbers across the Beaufort Sea with a density of about one bear per 30–50 square miles. Movement and distribution information was derived from radio and satellite relocations of collared adult females. The USGS developed a polar bear distribution model based on an extensive telemetry data set of over 10,000 relocations. Using a technique called "kernel smoothing," they created a grid system centered over Northstar and estimated the number of bears expected to occur within each 0.25-km^2 grid cell. Each of the simulated oil spills was overlaid with the polar bear distribution grid. In the simulation, if a spillet passed through a grid cell, the bears in that cell were considered killed by the spill. In the open water scenario, the estimated number of bears killed ranged from less than 1 to 78 bears, with a median of 8 bears. In the broken ice scenario, results ranged from less than 1 to 108, with a median of 21. These results are based on an "average" distribution of polar bears and do not include potential aggregation of bears, such as on Cross Island in the fall.

The Service then analyzed the spill trajectory and polar bear distribution to estimate the probability of an oil spill during the 16-month regulation period and the likelihood of occurrence of oil spills causing mortality for various numbers of bears. Assuming this probability was uniform throughout the year, the probability during any particular set of ice conditions was proportional to the length of those conditions. The probability of polar bear mortality in the event of an oil spill was calculated from mortality levels in excess of 5, 10, and 20 bears. Likelihood of occurrence is the product of the probabilities of spill and mortality. Hence, the overall likelihood is the sum of likelihoods over all ice conditions.

Results

We calculated that the probability of a spill that will cause mortality of one or more bears is 0.4–1.3 percent. As the threshold number of bears is increased, the likelihood of that event decreases; the likelihood of taking more bears becomes less and less. Thus, the probability of a spill that will cause a mortality of 5 or more bears is 0.3–1.1 percent; for 10 or more bears is 0.3–0.9 percent; and for 20 or more bears is 0.1–0.5 percent. We note that the values of these probabilities differ slightly from those presented in the Proposed Rule. The reason for this difference is that the Proposed Rule relied on calculations for probabilities of an oil spill resulting in polar bear mortality for a three-year period (*i.e.*, the length of time used during the last rulemaking). The corrected values presented in this rule reflect the probabilities over a 16-month period. Although the values differ slightly, the final results of the analysis are similar; there is still a very low probability that there will be an oil spill that will result in bear mortality.

In addition, using exposure variables and production estimates from the Northstar EIS, we estimated that the likelihood of one or more spills greater than 1,000 barrels in size occurring in the marine environment is 1–5 percent during the period covered by the regulations.

Discussion

The greatest source of uncertainty in our calculations was the probability of an oil spill occurring. The oil spill probability estimates for the Northstar Project were calculated using data for sub-sea pipelines outside of Alaska and outside of the Arctic. These spill probability estimates, therefore, do not reflect conditions that are routinely encountered in the Arctic, such as permafrost, ice gouging, and strudel scour. They may include other conditions unlikely to be encountered in the Arctic, such as damage from anchors and trawl nets. Consequently, we have some uncertainty about oil spill probabilities as presented in the Northstar FEIS. However, if the probability of a spill were actually twice the estimated value, the probability of a spill that will cause a mortality of one or more bears is still low (about 6 percent).

In addition to the results from the risk analysis, anecdotal information supported our determination that any take associated with Northstar will have a negligible impact on the Beaufort Sea polar bear population. This information was based on observations of polar bear aggregations on barrier islands and coastal areas in the Beaufort Sea, which may occur for brief periods in the fall, usually 4 to 6 weeks. The presence and duration of these aggregations are influenced by the presence of sea ice near shore and the availability of marine mammal carcasses, notably bowhead whales from subsistence hunts. In order for any take associated with a Northstar oil spill to have more than a negligible impact on polar bears, an oil spill would have to occur, an aggregation of bears would have to be present, and the spill would have to contact the aggregation. We believe the probability of all these events occurring simultaneously is low, but are not quantified.

We concluded that if an offshore oil spill were to occur during the fall or spring broken-ice periods, a significant impact to polar bears could occur. We also recognize that some of the impact may result from latent effects of the spill on bears themselves or locally through secondary impacts to the environment and its value for feeding, such as foraging or scavenging on oiled seal carcasses. In balancing the level of potential impacts with the probability of occurrence, however, we conclude that the probability of a large-volume spill that would cause latent effects that result in significant polar bear takes is low.

Additionally, because of the small volume of oil associated with onshore spills, the rapid response system in place to clean up spills, and the protocol available to deter bears away from the affected area for their safety, we concluded that onshore spills would have little impact on the polar bear population. Therefore, the total expected taking of polar bear caused by Industry discharge of oil or waste products into the environment will have no more than a negligible impact on this species.

In making this finding, we are following Congressional direction in balancing the potential for a significant impact with the likelihood of that event occurring. The specific Congressional direction that justifies balancing probabilities with impacts follows:

If potential effects of a specified activity are conjectural or speculative, a finding of negligible impact may be appropriate. A finding of negligible impact may also be appropriate if the probability of occurrence is low but the potential effects may be significant. In this case, the probability of occurrence of impacts must be balanced with the potential severity of harm to the species or stock when determining negligible impact. In applying this balancing test, the Service will thoroughly evaluate the risks involved and the potential impacts on marine mammal populations. Such determination will be made based on the best available scientific information. 53 FR at 8474; accord, 132 Cong. Rec. S 16305 (Oct. 15, 1986).

Summary of Take Estimate for Pacific Walrus and Polar Bear

Pacific Walrus

Since walrus are typically not found in the region of Industry activity, the probability is small that Industry activities, such as offshore drilling operations, seismic, and coastal activities, will affect walrus. Walrus observed in the region have typically been lone individuals, further reducing the number of potential takes expected. Only 3 walrus were observed by Industry during its activities between 1994 to 2000. In addition, the majority of walrus hunted by Barrow residents were harvested west of Point Barrow, outside of the area covered by incidental take regulations, while Kaktovik harvested only one walrus. Given this information, no more than a small number of walrus are likely to be taken during the length of this rule. Any takes would most likely be nonlethal.

Polar Bear

Industry exploration, development, and production operations could potentially disturb polar bears. These disturbances are expected to be primarily nonlethal, short-term behavioral reactions resulting in displacement with minimal impacts to individuals. Polar bears could be displaced from the immediate area of activity due to noise and vibrations. They could be attracted to sources of noise and vibrations out of curiosity, which could result in human-bear encounters. Denning females with cubs could prematurely abandon their dens due to noise and vibrations produced by certain industrial activities at close distances. Also, noise and vibration from stationary sources could keep females from denning in the vicinity of the source. These disturbances are not expected to affect the rates of recruitment or survival of the Southern Beaufort Sea polar bear population.

Contact with or ingestion of oil could also potentially affect polar bears. Small oil spills are likely to be cleaned up immediately and should have little opportunity to affect polar bears. The probability of a large spill occurring is very small. However, if such a spill were to occur at an offshore oil facility, polar bears could come into contact with oil. The impact of a large spill would depend on the location and size of the spill, environmental factors, and the success of cleanup measures.

The Service estimates that only a small number of polar bear takes will occur during the length of the regulations. These takes are expected to be nonlethal. However, it is possible that a few unintentional lethal takes could occur under low probability circumstances. For example, a scenario of an unintentional lethal take could be a road accident where a vehicle strikes and kills a polar bear.

Based on past LOA monitoring reports, we believe that takes resulting from the interactions between Industry and Pacific walrus and polar bears have had a negligible impact on these species. Additional information, such as recorded subsistence harvest levels and incidental observations of polar bears near shore, suggests that these populations have not been adversely affected. The projected levels of activities during the period covered by the regulations (existing development and production activities, as well as proposed exploratory activities) are similar in scale to previous levels. In addition, current mitigation measures will be kept in place.

Conclusions

Based on the previous discussion, we make the following findings regarding this action.

Impact on Species

The Pacific walrus is only occasionally found during the open-water season in the Beaufort Sea. Industry impacts would be no more than negligible for the walrus population.

The Beaufort Sea polar bear population is widely distributed throughout its range. Polar bears typically occur in low numbers in coastal and nearshore areas where most Industry activities occur. Hence, impacts that might be significant for individuals or small groups of animals are expected to be no more than negligible for the polar bear population as a whole.

We reviewed the effects of the oil and gas industry activities on marine mammals, which included impacts from stationary and mobile sources such as noise, physical obstructions, and oil spills. Based on past LOA monitoring reports, we conclude that any take reasonably likely to or reasonably expected to occur as a result of projected activities will have a negligible impact on polar bear and Pacific walrus populations.

The Northstar development is currently the only offshore facility in production with a subsea pipeline. Concerns about potential oil spills in the marine environment as a result of this development were raised in the Northstar FEIS. We have analyzed the likelihood of an oil spill in the marine environment of the magnitude necessary to kill a significant number of polar bears, and found it to be minimal. Thus, after considering the cumulative effects of existing development and production activities, the likelihood of impacts occurring, and proposed exploratory activities, both onshore and offshore, we find that the total expected takings resulting from oil and gas industry exploration, development, and production activities will have a negligible impact on polar bear and Pacific walrus populations.

Even though the probability of an oil spill that will cause significant impacts to the walrus and polar bear population is extremely low, in the event of a catastrophic spill we will reassess the impacts to polar bear and walrus and reconsider the appropriateness of authorizations for incidental taking through section 101(a)(5)(A) of the MMPA.

Our finding of "negligible impact" applies to oil and gas exploration, development, and production activities. As with our past incidental take regulations for these actions, each LOA will require actions to minimize interference with normal breeding, feeding, and possible migration patterns to ensure that the effects to the species remain negligible. We may add additional measures depending upon site-specific and species-specific concerns. Conditions can include the following: (1) These regulations do not authorize intentional taking of polar bear or Pacific walrus. (2) For the protection of pregnant polar bears during denning activities (den selection, birthing, and maturation of cubs) in known and confirmed denning areas, Industry activities may be restricted in specific locations during specified times of the year. These restrictions will be applied on a case-by-case basis after assessing each LOA request. In potential denning areas, we will advise operators using a den habitat map and, as appropriate, will require pre-activity surveys (*e.g.*, aerial surveys, FLIR surveys, or polar bear scent-trained dogs) to determine the presence or absence of dens; in known denning areas we may require enhanced monitoring during activities. (3) Each activity covered by an LOA requires a site-specific plan of operation and a site-specific polar bear interaction plan. The purpose of the required plans is to ensure that the level of activity and possible takes will be consistent with our finding that the cumulative total of incidental takes will have a negligible impact on polar bear and Pacific walrus, and where relevant, will not have an unmitigable adverse impact on the availability of these species for subsistence uses.

Impact on Subsistence Take

We find, based on the best scientific information available, including the results of monitoring data, that any take reasonably likely to result from the effects of Industry activities during the period of the rule in the Beaufort Sea and adjacent northern coast of Alaska will not have an unmitigable adverse impact on the availability of polar bears and Pacific walrus for taking for subsistence uses.

Polar bears are hunted primarily during the ice-covered season, and the proposed activities are expected to have a negligible effect on the distribution, movement, and numbers of polar bears found during this time period in the regulation area. Walrus are primarily hunted during the open-water season, and the proposed oil and gas activities are also expected to have a negligible effect on the distribution, movement, and numbers of walrus in the region. We reached these conclusions based on data and analyses discussed in the sections of this regulation titled, "Effects of Oil and Gas Industry Activities on Pacific Walrus and Polar Bears" and "Actual Impacts of Oil and Gas Industry Activities on Pacific Walrus and Polar Bears," and also because there is no indication of past adverse effects, and because past Plans of Cooperation appear to have been effective. In addition, regular communication between the Industry and Native communities through Plans of Cooperation will further reduce the likelihood of interference with subsistence harvest. Therefore, we find that the anticipated effects of Industry relevant to subsistence are unlikely to have an adverse effect on subsistence use.

If there is evidence during the period of the rule that oil and gas activities may adversely affect the availability of polar bear or walrus for take for subsistence uses, we will reevaluate our findings regarding permissible limits of take and the measures required to ensure continued subsistence hunting opportunities.

Monitoring and Reporting

We require an approved plan for monitoring and reporting the effects of oil and gas industry exploration, development, and production activities on polar bear and walrus prior to issuance of an LOA. Monitoring plans are required to determine effects of oil and gas activities on polar bear and walrus in the Beaufort Sea and the adjacent northern coast of Alaska. Monitoring plans must identify the methods used to assess changes in the movements, behavior, and habitat use of polar bear and walrus in response to Industry activities. Monitoring activities are summarized and reported in a formal report each year. The applicant must submit a monitoring and reporting plan at least 90 days prior to the initiation of an activity. We base each year's monitoring objective on the previous year's monitoring results. For exploration activities the applicant must submit a final monitoring report to us no later than 90 days after the completion of the activity. Since development and production activities are continuous and long-term, we will issue LOAs, which include conditions for the submittal of monitoring and reporting plans for the life of the activity or until the expiration of the regulations, whichever occurs first. Prior to January 15 of each year, we will require that the operator submit development and production activity monitoring results of the previous year's activity. We require approval of the monitoring results for continued coverage under the LOA.

Discussion of Comments on the Proposed Rule

The proposed rule, which was published in the **Federal Register** (68 FR 44020) on July 25, 2003, included a request for public comments. The closing date for the comment period was August 25, 2003. We received seven comments. Two commenters indicated support for the rule but did not provide specific comments. One commenter provided new comments but also incorporated by reference their comments on the 2000 proposed rule (65 FR 16828). For those past comments, we refer the commenter to our previous responses (65 FR 16828). The following issues were raised by the commenters.

Specific Comments and Responses

Comment: Some commenters stated their opposition to any form of incidental killing of wildlife, indicating their opinion that the incidental take program was developed as a vehicle to grant permission to the oil and gas industry to kill polar bears and walrus.

Response: The authorization of incidental take of marine mammals is provided for under section 101(a)(5)(A) of the MMPA. Take is defined as "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." Intentional take is not authorized by these regulations. Incidental take is authorized only after the Service finds that any expected take will have no more than a negligible impact on the species. During the past nine years of incidental take regulations, there are no known instances where a polar bear or walrus was killed by Industry activities. When polar bears do encounter Industry activities, appropriate measures are taken to safeguard the lives of both humans and bears. Section 101(5)(B) authorizes the Secretary to withdraw or suspend the authorization if these regulations are not complied with, or if the take allowed under the regulations is having or may have a more than negligible impact on the species or stock of concern.

Comment: No number or percentage of a population is included as an upper limit on the number of polar bears or walrus that could be killed over a given period of time while ensuring a sustainable population.

Response: The assessment of effects does not attempt to describe the allowable maximum sustainable incidental take mortality that could occur. We evaluated the potential effect of the predicted take to determine if the impact of this level of take would be negligible. If an unanticipated mortality of polar bears occurs, we will evaluate this level and the effect on polar bear population rates of recruitment and survival and, if warranted, reconsider or revise the negligible effect finding of this rule.

Comment: Polar bears may be more affected by an oil spill than an initial mortality survey may indicate.

Response: We agree that there may be secondary or latent effects on polar bears from an oil spill. These effects are additive to the potential direct effects discussed in the section on oil spills in the proposed rule. The final rule has been revised to reflect our analysis of such latent effects and the finding that the potential secondary or latent effects, along with potential direct effects, will have a negligible impact, considering the likelihood of these effects occurring.

Comment: The proposed rule is inconsistent with the incidental take provisions of the MMPA. (The commenter did not identify specific inconsistencies.)

Response: Incidental take is authorized under section 101(a)(5)(A) of the MMPA. While the MMPA placed a moratorium on the taking of any marine mammal, section 101(a) of the MMPA identifies exceptions to the moratorium. Section 101(a)(5)(A) of the MMPA provides for the incidental but not intentional take of small numbers of marine mammals, provided that the total take will have a negligible impact on the population and will not affect the availability of the species for subsistence users.

Comment: A more comprehensive analysis of incidences of harassment of polar bears is necessary prior to issuing these regulations.

Response: Polar bear/human interaction data (1994—2003) occurring during Industry activities was incorporated into the analysis of this rule. The level and effects of hazing during this period were not significant and resulted in a negligible impact finding. The general objective of hazing polar bears is to encourage the movement of bears transient to coastal habitats back onto the pack-ice environment. The type and degree of hazing depend on specific circumstances, and in many instances only passive forms of hazing are necessary, such as positioning of vehicles or noise to displace bears from areas occupied by people. Cracker shell shotgun fire or deterrent rounds may be used when concerns for human safety are more immediate. We will continue to evaluate the data to determine if trends exist regarding the location and timing of hazing events and, if necessary, we will refine how hazing is conducted in the future. The hazing of polar bears reduces potential impacts to polar bears and thus reduces potential effects of industrial activities and helps to support a negligible impact finding.

In addition, any future improvements to monitoring and reporting requirements may be implemented as conditions to future LOAs as warranted.

Comment: No alternatives were analyzed, such as issuing regulations that cover a narrower geographical scope (*e.g.*, only lands falling within existing leases).

Response: The current geographic scope of the regulations accurately addresses the areas of ongoing or expected Industry activities and provides the framework for our assessment of potential impacts. Narrowing the scope of the regulations or evaluating lesser alternatives of reduced scale or frequency would not allow us to adequately address potential cumulative impacts. The alternatives considered in our environmental assessment were to issue regulations or not to issue regulations covering the full geographic area in which similar and interrelated Industry activities occur.

Comment: The regulations should not include the State or Federal Outer Continental Shelf waters offshore of the Arctic National Wildlife Refuge.

Response: We acknowledge that the State and Federal Outer Continental Shelf waters offshore the Arctic National Wildlife Refuge are important movement, feeding, and denning habitats to polar bears. However, these regulations do not authorize the actual Industry activities in this or other areas. The geographic scope of the regulations was based on that area in which Industry has already been authorized to conduct exploration, development, and production activities; that area in which Industry applied for MMPA coverage; and that area which allows us to accurately assess Industry's effects on polar bears and walrus.

Comment: The Service has conflated the MMPA's requirement that the number of takings be small and that the number of takings has a negligible impact on a species or stock.

Response: We disagree with this comment and believe that our analysis has fully considered the MMPA requirement that the number of takes be small and that takings have a negligible impact on species or stock. Based on the monitoring information we have acquired to date, we conservatively estimate that the average number of polar bears and walrus that may modify their behavior as a result of the oil and gas industry is small. In most cases, takes are a behavioral change that will be temporary, minor behavioral

modifications that we believe will have no effect on rates of recruitment or survival. Other takes will be associated with deterrence or, hazing, events. We believe these events will have no effect on rates or recruitment and survival as well. Lethal takes are extremely rare, but they may also occur (only 2 polar bear deaths have been attributed to oil and gas activities in Alaska during the past 30 years). Although the small potential for a lethal take occurring continues to exist throughout the length of this rule, it is unlikely that a lethal take will have little effect on the rates of recruitment or survival of the population as a whole.

Takes that may have effects on recruitment and survival are associated with oil spills. We calculated that the probability of a spill that will cause mortality of one or more bears is 0.4–1.3 percent. As the threshold number of bears is increased, the likelihood of that event decreases; that is, the likelihood of taking more bears becomes less and less. The probability of a spill that will cause a mortality of 5 or more bears is 0.3–1.1 percent; for 10 or more bears is 0.3–0.9 percent; and for 20 or more bears is 0.1–0.5 percent.

Comment: The Service should establish a mechanism to evaluate and authorize the incidental taking of marine mammals resulting from activities associated with, but occurring outside of, the geographic location of the proposed regulation (*e.g.*, ship traffic that passes through the Bering and Chukchi seas and supplies industry operations in the Beaufort Sea).

Response: This suggestion goes beyond the scope of this rule and beyond the petitioner's request. We considered past oil and gas support activities beyond the geographic area of the rule. The vast majority of the secondary industry support activities occur during the open water season associated with barge re-supply when encounters with polar bears or walrus would be minimal. We determined that the potential effect of these activities was not significant and did not contribute cumulatively to the impacts within the geographic area requested. We concluded that the boundaries that were requested were accurate to monitor effects of the oil and gas activity on polar bears and Pacific walrus occurring within the Beaufort Sea. If concerns for the potential takes associated with Industry support activities beyond the current geographical area of the regulations increase in the future, we may consider this issue elsewhere.

Comment: Prior to finalizing the regulations, the Service should conduct a thorough analysis of possible impacts of oil and gas activities on the availability of polar bears to the village of Nuiqsut.

Response: We have considered this issue and find that the total taking of polar bears will not have an unmitigable adverse impact on the availability of this species to Nuiqsut residents for subsistence uses during the duration of the regulation. We base this conclusion on the results of coastal aerial surveys conducted within the area during the past three years, upon direct observations of polar bears occurring on Cross Island during the village of Nuiqsut's annual fall bowhead whaling efforts, and upon anecdotal reports of Nuiqsut residents. In addition, the Service has not received any evidence or reports that bears are being deflected or being impacted in other ways to diminish their availability for subsistence use by the existing level of oil and gas activity.

Comment: The Service should modify its oil spill risk assessment to properly reflect the assumptions and uncertainties concerning the effects of oil spills on walrus and polar bears.

Response: The oil spill risk assessment represents the best available methodology and is a marked improvement from the previous lack of information on this topic. The Service recognizes the limitations of the oil spill assessment model and the predictive values based on data inputs, assumptions, and model construction. This model is a stochastic model and incorporates levels of variance associated with certain parameters such as environmental conditions and polar bear distribution probabilities. The model presents a range of values representing the number of polar bears that may be oiled resulting from the numerous model run interactions conducted, and an associated frequency of occurrence or likelihood value. We believe that this is the most reliable assessment given the existing information. We are working to improve the model for future use. This will take time, effort, coordination, and funds.

Comment: The Service should initiate a complete analysis of cumulative effects on polar bears and walrus for the future, longer-term regulations.

Response: The Service agrees with this comment. We are currently accumulating information for consideration in a future longer-term rule, such as reviewing elements of existing and future research and monitoring plans that will improve our ability to detect and measure changes in the population.

In this final rule, the cumulative effects of the previous incidental take regulations are considered. Incidental take regulations have been in place in the Arctic oil and gas fields for the past 10 years. Monitoring results indicate that there has been little to no short-term impact on polar bears or Pacific walrus. Additional information, such as subsistence harvest levels and observations of the frequency, timing, and magnitude of polar bear occurrence near shore, provides evidence that these populations have not been adversely affected. For the duration of this rule, we anticipate that the level and effect of oil and gas industry interactions with polar bears and Pacific walrus will be similar to interactions of past years.

Our goal is to continue to collect or improve on the collection of the types of information that have been useful in assessing cumulative effects in the past. We also anticipate that additional analysis and collection of additional data will be necessary to improve upon future longer-range impact assessment.

Comment: In the final regulations, the Service should describe mitigation measures that will be required for industry to minimize impacts to polar bears.

Response: We have revised the regulations to include those mitigation measures that may be required as conditions of LOAs to ensure that the total taking of polar bears and walrus will have a negligible impact on these species and will not have an unmitigable adverse impact on the availability of these species for subsistence uses during the duration of the regulation. Some of the conditions are standard requirements, and others are activity- and site-specific and may vary. The final rule has been expanded and also lists a map that delineates polar bear denning habitat and can include the use of FLIR or polar bear scent-trained dogs to determine the presence or absence of dens as examples of mitigation measures that have been used successfully in the past on a case-by-case basis.

Comment: The Service should develop and implement a monitoring program with sufficient resolution to detect changes in parameters that might be expected to occur.

Response: We find that the independently gathered population data on the Southern Beaufort Sea population demonstrated that development, as guided under the previous regulations, has not affected rates of recruitment and survival of this polar bear population. As scientific methods improve and better information becomes available they will be incorporated into monitoring programs to help to assess potential effects to rates of recruitment and survival and the

population parameters linked to assessing population level impacts from oil and gas development. We also agree that as information and technology improves, the monitoring program will continue to evolve. With this in mind, we convened a small workshop of technical experts during September 3–5, 2003, to consider research, studies, and monitoring that would improve our understanding of the effects of oil and gas activities on polar bears. The product of this effort, considered as a work in progress subject to revision and refinement, will be a proceedings of the workshop that details the various information needs, studies, monitoring, and research. We consider the results of workshop to be the first step in improving our monitoring programs. We also acknowledge that developing a comprehensive research and monitoring program capable of developing information of sufficient resolution to detect changes in population rates of recruitment and survival is a formidable task and a worthy goal.

Effective Date

In accordance with 5 U.S.C. 553(d)(3), we find that we have good cause to make this rule effective immediately upon publication. To protect the affected species and reduce the chances of lethal and nonlethal effects from Industry, we need to implement incidental take and monitoring programs on the North Slope of Alaska coincident with the season of greatest probability for polar bear encounters in the industrial area considered within this rule. The period of greatest probability for polar bear encounters is the fall and early winter period. The mitigation measures required through LOAs have proven to be effective in minimizing effects of oil and gas activities on polar bears and walrus. Furthermore, safety measures included in this process minimize potential lethal encounters between polar bears and personnel at industrial sites. Therefore, it is essential to implement these regulations as soon as possible so that polar bears and walrus may benefit from these protective measures.

Required Determinations

NEPA Considerations

We have prepared an Environmental Assessment (EA) in conjunction with this rulemaking, and have determined that this rulemaking is not a major Federal action significantly affecting the quality of the human environment within the meaning of section 102(2)(C) of the National Environmental Policy Act (NEPA) of 1969. For a copy of the Environmental Assessment, contact the individual identified in the section **FOR FURTHER INFORMATION CONTACT.**

Regulatory Planning and Review

This document has not been reviewed by the Office of Management and Budget (OMB) under Executive Order 12866 (Regulatory Planning and Review). This rule will not have an effect of $100 million or more on the economy; will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients; and does not raise novel legal or policy issues. The rule is not likely to result in an annual effect on the economy of $100 million or more. Expenses will be related to, but not necessarily limited to, the development of applications for LOAs, monitoring, record keeping, and reporting activities conducted during Industry oil and gas operations, development of polar bear interaction plans, and coordination with Alaska Natives to minimize effects of operations on subsistence hunting. Compliance with the rule is not expected to result in additional costs to Industry that it has not already been subjected to for the previous 6 years. Realistically, these costs are minimal in comparison to those related to actual oil and gas exploration, development, and production operations. The actual costs to Industry to develop the petition for promulgation of regulations (originally developed in 2002) and LOA requests probably does not exceed $500,000 per year, short of the "major rule" threshold that would require preparation of a regulatory impact analysis. As is presently the case, profits will accrue to Industry, royalties and taxes will accrue to the Government, and the rule will have little or no impact on decisions by Industry to relinquish tracts and write off bonus payments.

Small Business Regulatory Enforcement Fairness Act

We have determined that this rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. The rule is also not likely to result in a major increase in costs or prices for consumers, individual industries, or government agencies or have significant adverse effects on competition, employment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Regulatory Flexibility Act

We have also determined that this rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Oil companies and their contractors conducting exploration, development, and production activities in Alaska have been identified as the only likely applicants under the regulations. Therefore, a Regulatory Flexibility Analysis is not required. In addition, these potential applicants have not been identified as small businesses, and, therefore, a Small Entity Compliance Guide is not required. The analysis for this rule is available from the person in Alaska identified in the section **FOR FURTHER INFORMATION CONTACT.**

Takings Implications

This rule does not have takings implications under Executive Order 12630 because it authorizes the incidental, but not intentional, take of small numbers of polar bear and walrus by oil and gas industry companies and thereby exempts these companies from civil and criminal liability as long as they operate in compliance with the terms of their LOAs. Therefore, a takings implications assessment is not required.

Federalism Effects

This rule also does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132. In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501, *et seq.*), this rule will not "significantly or uniquely" affect small governments. A Small Government Agency Plan is not required. The Service has determined and certifies pursuant to the Unfunded Mandates Reform Act that this rulemaking will not impose a cost of $100 million or more in any given year on local or State governments or private entities. This rule will not produce a Federal mandate of $100 million or greater in any year, *i.e.*, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act.

Civil Justice Reform

The Departmental Solicitor's Office has determined that these regulations do not unduly burden the judicial system and meet the applicable standards

provided in sections 3(a) and 3(b)(2) of Executive Order 12988.

Paperwork Reduction Act

The information collection requirements included in this rule are already approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The OMB control number assigned to these information collection requirements is 1018–0070, which expires on September 30, 2004. This control number covers the information collection requirements in 50 CFR 18, subpart J, which contains information collection, record keeping, and reporting requirements associated with the development and issuance of specific regulations and LOAs.

Energy Effects

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule provides exceptions from the taking prohibitions of the MMPA for entities engaged in the exploration, development, and production of oil and gas in the Beaufort Sea and adjacent coastal areas of northern Alaska. By providing certainty regarding compliance with the MMPA, this rule will have a positive effect on Industry and its activities. Although the rule requires Industry to take a number of actions, these actions have been undertaken by Industry for many years as part of similar past regulations. Therefore, this rule is not expected to significantly affect energy supplies, distribution, or use and does not constitute a significant energy action. No Statement of Energy Effects is required.

List of Subjects in 50 CFR Part 18

Administrative practice and procedure, Alaska, Imports, Indians, Marine mammals, Oil and gas exploration, Reporting and record keeping requirements, Transportation.

Final Regulation Promulgation

■ For the reasons set forth in the preamble, the Service amends part 18, subchapter B, of chapter 1, title 50, of the Code of Federal Regulations as set forth below.

PART 18—MARINE MAMMALS

■ 1. The authority citation of 50 CFR part 18 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*

■ 2. Amend part 18 by adding a new subpart J to read as follows:

Subpart J—Taking of Marine Mammals Incidental to Oil and Gas Exploration, Development, and Production Activities in the Beaufort Sea and Adjacent Northern Coast of Alaska

Sec.

Subpart J—Taking of Marine Mammals Incidental to Oil and Gas Exploration, Development, and Production Activities in the Beaufort Sea and Adjacent Northern Coast of Alaska

§ 18.121 What specified activities does this subpart cover?

Regulations in this subpart apply to the incidental, but not intentional, take of small numbers of polar bear and Pacific walrus by you (U.S. citizens as defined in § 18.27 (c)) while engaged in oil and gas exploration, development, and production activities in the Beaufort Sea and adjacent northern coast of Alaska.

§ 18.122 In what specified geographic region does this subpart apply?

This subpart applies to the specified geographic region defined by a north-south line at Barrow, Alaska, and includes all Alaska coastal areas, State waters, and Outer Continental Shelf waters east of that line to the Canadian border and an area 25 miles inland from Barrow on the west to the Canning River on the east. The Arctic National Wildlife Refuge is not included in the area covered by this subpart. Figure 1 shows the area where this subpart applies.

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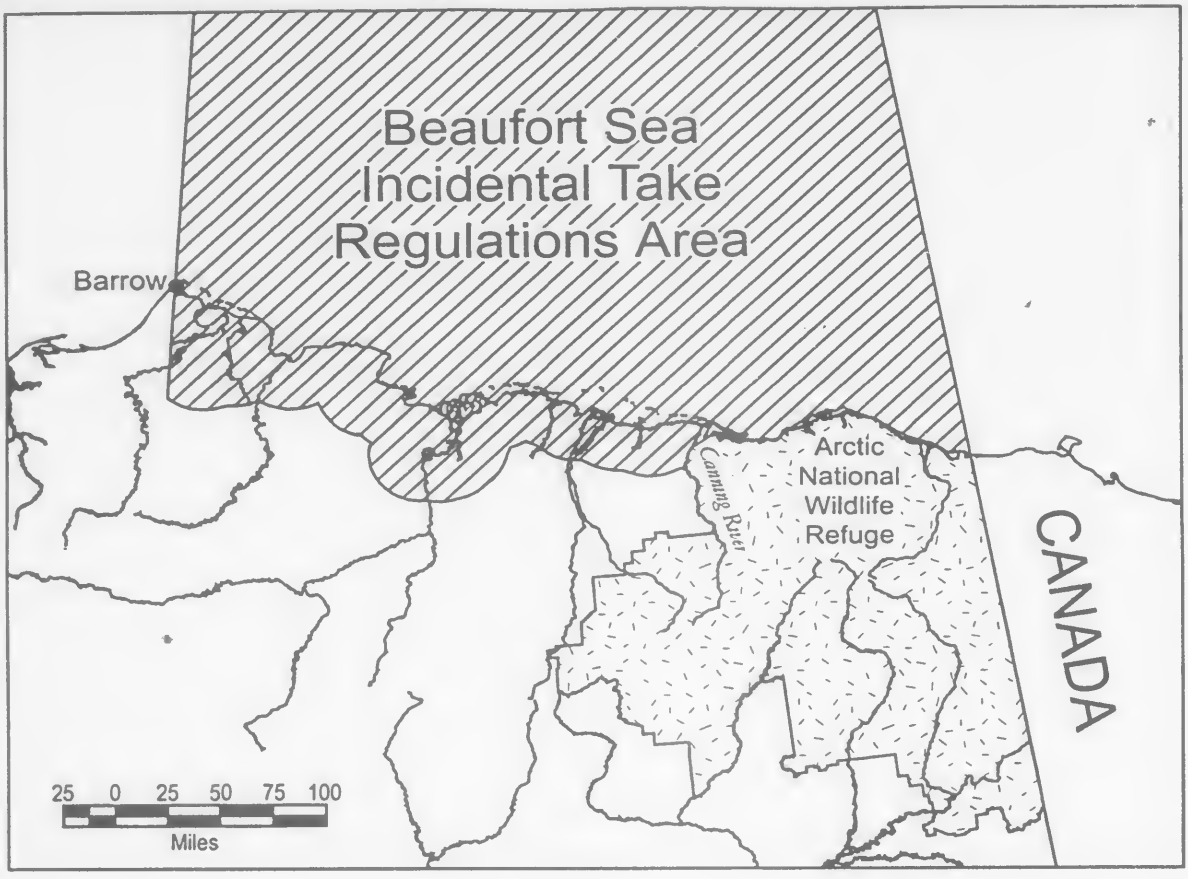

Figure 1. Specific geographic area covered by the Beaufort Sea incidental take regulations.

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§ 18.123 When is this subpart effective?

Regulations in this subpart are effective from November 28, 2003, through March 28, 2005, for year-round oil and gas exploration, development, and production activities.

§ 18.124 How do I obtain a Letter of Authorization?

(a) You must be a U.S. citizen as defined in § 18.27(c) of this part.

(b) If you are conducting an oil and gas exploration, development, or production activity that may cause the taking of polar bear or Pacific walrus in the specified geographic region described in § 18.122 and you want incidental take authorization under this rule, you must apply for a Letter of Authorization for each exploration activity or a Letter of Authorization for activities in each development and production area. You must submit the application for authorization to our Alaska Regional Director (*see* 50 CFR 2.2 for address) at least 90 days prior to the start of the activity.

(c) Your application for a Letter of Authorization must include the following information:

(1) A description of the activity, the dates and duration of the activity, the specific location, and the estimated area affected by that activity.

(2) A site-specific plan to monitor the effects of the activity on the behavior of polar bear and Pacific walrus that may be present during the ongoing activity. Your monitoring program must document the effects on these marine mammals and estimate the actual level and type of take. The monitoring requirements will vary depending on the activity, the location, and the time of year.

(3) A site-specific polar bear awareness and interaction plan.

(4) A Plan of Cooperation to mitigate potential conflicts between the proposed activity and subsistence hunting. This Plan of Cooperation must identify measures to minimize adverse effects on the availability of polar bear and Pacific walrus for subsistence uses if the activity takes place in or near a traditional subsistence hunting area.

§ 18.125 What criteria does the Service use to evaluate Letter of Authorization requests?

(a) We will evaluate each request for a Letter of Authorization based on the specific activity and the specific geographic location. We will determine whether the level of activity identified in the request exceeds that considered by us in making a finding of negligible impact on the species and a finding of no unmitigable adverse impact on the availability of the species for take for subsistence uses. If the level of activity is greater, we will reevaluate our findings to determine if those findings continue to be appropriate based on the greater level of activity that you have requested. Depending on the results of the evaluation, we may grant the authorization as is, add further conditions, or deny the authorization.

(b) In accordance with § 18.27(f)(5) of this part, we will make decisions concerning withdrawals of Letters of Authorization, either on an individual or class basis, only after notice and opportunity for public comment.

(c) The requirement for notice and public comment in paragraph (b) of this section will not apply should we determine that an emergency exists that poses a significant risk to the well-being of the species or stock of polar bear or Pacific walrus.

§ 18.126 What does a Letter of Authorization allow?

(a) Your Letter of Authorization may allow the incidental, but not intentional, take of polar bear and Pacific walrus when you are carrying out one or more of the following activities:

(1) Conducting geological and geophysical surveys and associated activities;

(2) Drilling exploratory wells and associated activities;

(3) Developing oil fields and associated activities;

(4) Drilling production wells and performing production support operations;

(5) Conducting environmental monitoring programs associated with exploration, development, and production activities to determine specific impacts of each activity.

(b) You must use methods and conduct activities identified in your Letter of Authorization in a manner that minimizes to the greatest extent practicable adverse impacts on polar bear and Pacific walrus, their habitat, and on the availability of these marine mammals for subsistence uses.

(c) Each Letter of Authorization will identify conditions or methods that are specific to the activity and location.

§ 18.127 What activities are prohibited?

(a) Intentional take of polar bear or Pacific walrus.

(b) Any take that fails to comply with the terms and conditions of these specific regulations or of your Letter of Authorization.

§ 18.128 What are the mitigation, monitoring and reporting requirements?

(a) We require holders of Letters of Authorization to cooperate with us and other designated Federal, State, and local agencies to monitor the impacts of oil and gas exploration, development, and production activities on polar bear and Pacific walrus.

(b) Holders of Letters of Authorization must designate a qualified individual or individuals to observe, record, and report on the effects of their activities on polar bear and Pacific walrus.

(c) Holders of Letters of Authorization are required to have a polar bear interaction plan on file with the Service, and polar bear awareness training will also be required of certain personnel.

(d) Under a Plan of Cooperation Industry must contact affected subsistence communities to discuss potential conflicts caused by location, timing, and methods of proposed operations. Industry must make reasonable efforts to ensure that activities do not interfere with subsistence hunting and that adverse effects on the availability of polar bear or Pacific walrus are minimized.

(e) We may place an observer on the site of the activity or on board drill ships, drill rigs, aircraft, icebreakers, or other support vessels or vehicles to monitor the impacts of your activity on polar bear and Pacific walrus.

(f) If known occupied dens are located within an operator's area of activity, we will require a 1-mile exclusion buffer around the den to limit disturbance or require that the operator conduct activities after the female bears emerge from their dens. We will review these instances for extenuating circumstances on a case by case basis.

(g) Industry may also be required to use Forward Looking Infrared (FLIR) imagery and/or scent-trained dogs to determine presence or absence of polar bear dens in areas of activity.

(h) A map of potential coastal polar bear denning habitat can be found at: *http://www.absc.usgs.gov/research/sis_summaries/polar_bears_sis/mapping_dens.htm*. This map is available to Industry to ensure that the location of potential polar bear dens is considered when conducting activities in the coastal areas of the Beaufort Sea.

(i) For exploratory activities, holders of a Letter of Authorization must submit a report to our Alaska Regional Director within 90 days after completion of activities. For development and production activities, holders of a Letter of Authorization must submit a report to our Alaska Regional Director by January 15 for the preceding year's activities. Reports must include, at a minimum, the following information:

(1) Dates and times of activity;

(2) Dates and locations of polar bear or Pacific walrus activity as related to the monitoring activity; and

(3) Results of the monitoring activities, including an estimated level of take.

§ 18.129 What are the information collection requirements?

(a) The collection of information contained in this subpart has been approved by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) and assigned clearance number 1018–0070. We need to collect the information in order to assess the proposed activity and estimate the impacts of potential takings by all persons conducting the activity. We will use the information to evaluate the application and determine whether to issue specific Letters of Authorization.

(b) For the duration of this rule, when you conduct operations under this rule, we estimate an 8-hour burden per Letter of Authorization, a 4-hour burden for monitoring, and an 8-hour burden per monitoring report. You must respond to this information collection request to obtain a benefit pursuant to section 101(a)(5) of the Marine Mammal Protection Act (MMPA). You should direct comments regarding the burden estimate or any other aspect of this requirement to the Information Collection Clearance Officer, U.S. Fish and Wildlife Service, Department of the Interior, Mail Stop 222 ARLSQ, 1849 C Street, NW., Washington, DC 20240, and the Office of Management and Budget, Paperwork Reduction Project (1018–0070), Washington, DC 20503.

Dated: November 20, 2003.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 03–29751 Filed 11–26–03; 8:45 am]

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Proposed Rules

Federal Register
Vol. 68, No. 229
Friday, November 28, 2003

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NM–380–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A330–301, –321, –322, –341, and –342 Series Airplanes; and Model A340 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 Airbus Model A330–301, –321, –322, –341, and –342 series airplanes; and certain Model A340 series airplanes. This proposal would require inspecting for and repairing cracks of the wire harness slots in the inner rear spars of the wings between ribs 4 and 5, and cold-expanding crack-free wire harness slots and bolt holes. This action is necessary to prevent cracking of the wire harness slot, which could result in reduced structural integrity of the wing. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by December 29, 2003.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2001–NM–380–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–380–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 2001–NM–380–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–380–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 certain Airbus Model A330–301, –321, –322, –341, and –342 series airplanes; and certain Model A340 series airplanes. The DGAC advises that major wing fatigue tests revealed cracks initiating from the wire harness slot in the inner rear spars of the wings between ribs 4 and 5. The cracking can occur on airplanes that have not been modified to reinforce the wire harness slot and the adjacent holes. The results indicate that the fatigue life for the wire harness slot is less than the design requirement. Cracks in the wire harness slot, if not corrected, could result in reduced structural integrity of the wing.

Explanation of Relevant Service Information

Airbus has issued Service Bulletins A330–57–3055 and A340–57–4062, both Revision 01, dated May 2, 2002. The service bulletins describe procedures for a modification of the inner rear spars of the wings. The modification involves an eddy current surface crack inspection of the wire harness slots in the rear spars of the wings between ribs 4 and 5, a high-frequency eddy current rototest inspection for cracks in the area around the bolt holes that attach the support plates of the electrical connectors, and cold-expansion of the wire harness slots and the bolt holes. The service bulletins recommend contacting Airbus if cracks are found. Accomplishment of the actions specified in the service bulletins is intended to adequately address the identified unsafe condition. The DGAC

classified these service bulletins as mandatory and issued French airworthiness directives 2001–578(B) and 2001–579(B), both dated November 28, 2001, 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 bulletins described previously, except as discussed below.

Difference Between Proposed AD and Service Bulletins

Although the service bulletins specify that operators may contact the manufacturer for disposition of certain repair conditions, this proposal would require operators to repair those conditions per a method approved by either the FAA or the DGAC (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, for this proposed AD, a repair approved by either the FAA or the DGAC would be acceptable for compliance with this proposed AD.

Cost Impact

We estimate that this proposed AD would affect 1 Model A330 series airplane of U.S. registry. Currently, there are no affected Model A330–341 or A340 series airplanes on the U.S. Register. The proposed actions would take about 30 work hours per airplane, at an average labor rate of $65 per work hour. Required parts would cost about $1,075 per airplane. Based on these figures, the cost impact of this proposed action is estimated to be $3,025 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:

Airbus: Docket 2001–NM–380–AD.

Applicability: The airplanes listed in Table 1 of this AD, certificated in any category:

TABLE 1.—APPLICABILITY

Model—	Except those modified by Airbus Modification—	Or Airbus Service Bulletin—
A330–301, –321, –322, –341, and –342 series airplanes ..	43503	A330–57–3055, dated November 28, 2001, or Revision 01, dated May 2, 2002.
A340 series airplanes	43692	A340–57–4062, dated November 28, 2001, or Revision 01, dated May 2, 2002.

Compliance: Required as indicated, unless accomplished previously.

To prevent cracking of the wire harness slot on the inner rear spar of the wing, which could result in reduced structural integrity of the wing, accomplish the following:

Modification

(a) At the time specified in paragraph (a)(1), (a)(2), or (a)(3) of this AD: Modify the inner rear spars of the wings in accordance with the Accomplishment Instructions of Airbus Service Bulletin A330–57–3055 or A340–57–4062, both Revision 01, both dated May 2, 2002, as applicable. The modification involves an eddy current surface crack inspection of the wire harness slots in the rear spars of the wings between ribs 4 and 5, a high-frequency eddy current rototest inspection for cracks in the area around the bolt holes that attach the support plates of the electrical connectors, and cold-expansion of the wire harness slots and the bolt holes.

(1) For Model A330 series airplanes: Inspect before the accumulation of 16,500 total flight cycles or 51,400 total flight hours, whichever occurs first.

(2) For Model A340 series airplanes, pre-Modification 41300: Inspect before the accumulation of 14,500 total flight cycles or 75,400 total flight hours, whichever occurs first.

(3) For Model A340 series airplanes, post-Modification 41300: Inspect before the accumulation of 13,400 total flight cycles or 70,000 total flight hours, whichever occurs first.

(b) A modification done before the effective date of this AD in accordance with Airbus Service Bulletin A330–57–3055 or A340–57–4062, both dated November 28, 2001, is acceptable for compliance with the applicable requirements of this AD.

Repair

(c) If any crack is found during an inspection required by paragraph (a) of this AD: Before further flight, repair in accordance with a method approved by either the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the Direction Générale de l'Aviation Civile (or its delegated agent).

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 1: The subject of this AD is addressed in French airworthiness directives 2001–578(B) and 2001–579(B), both dated November 28, 2001.

Issued in Renton, Washington, on November 21, 2003.

Vi L. Lipski,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 03–29696 Filed 11–26–03; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–14–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 777 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 Boeing Model 777 series airplanes. This proposal would require replacement of the cargo control joysticks with new joysticks that include a moisture seal and ventilated cover. This action is necessary to prevent water from being trapped inside the joystick covers, which could result in uncommanded movements of the power drive unit during ground handling of cargo and consequent possible injury to ground personnel. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by January 12, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2002–NM–14–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–14–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 Airplane Group, 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: Clint Jones, Aerospace Engineer, Cabin Safety and Environmental Systems Branch, ANM–150S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6471; 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–14–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–14–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The FAA has received reports of uncommanded movements of the power drive unit (PDU) after the joystick was returned to neutral position during cargo bay operations on certain Boeing Model 777 series airplanes. Investigation revealed that water trapped inside the joystick cover could lead to circuit board corrosion and leakage currents. This condition, if not corrected, could result in uncommanded movements of the PDU during ground handling of cargo and consequent possible injury to ground personnel.

Explanation of Relevant Service Information

The FAA has reviewed and approved Boeing Service Bulletin 777–25–0191, dated September 13, 2001, which describes procedures for replacement of the cargo control joysticks with new joysticks that include a moisture seal and ventilated cover. 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 require accomplishment of the actions specified in the service bulletin described previously, except as discussed below.

Differences Between Proposed Rule and Service Bulletin

Operators should note that, although the service bulletin recommends accomplishing the replacement at the next normally scheduled maintenance period, the FAA has determined that such an imprecise compliance time would not address the identified unsafe condition in a timely manner. In developing an appropriate compliance time for this proposed AD, the FAA considered not only the manufacturer's recommendation, but the degree of urgency associated with addressing the subject unsafe condition, the average utilization of the affected fleet, and the time necessary to perform the inspection (three hours). In light of all of these factors, the FAA finds an 18-month compliance time for completing the required actions to be warranted, in that it represents an appropriate interval of time allowable for affected airplanes to continue to operate without compromising safety.

Cost Impact

There are approximately 360 airplanes of the affected design in the worldwide fleet. The FAA estimates that 124 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 replacement, and that the average labor rate is $65 per work hour. Required parts would cost approximately $2,200 per airplane. Based on these figures, the cost impact of the proposed AD on U.S. operators is estimated to be $296,980, or $2,395 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. 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 adding the following new airworthiness directive:

Boeing: Docket 2002–NM–14–AD.

Applicability: Model 777 series airplanes, as listed in Boeing Service Bulletin 777–25–0191, dated September 13, 2002, certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent uncommanded movements of the power drive unit during ground handling of cargo and consequent possible injury to ground personnel, accomplish the following:

Replacement

(a) Within 18 months after the effective date of this AD, replace the cargo control joysticks with new joysticks, per the Accomplishment Instructions of Boeing Service Bulletin 777–25–0191, dated September 13, 2002.

Parts Installation

(b) As of the effective date of this AD, no person shall install a cargo control joystick, part number S283W602–1 or S283W602–2, on any airplane.

Alternative Methods of Compliance

(c) 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 November 21, 2003.

Vi L. Lipski,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 03–29697 Filed 11–26–03; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–NM–154–AD]

RIN 2120–AA64

Airworthiness Directives; Bombardier Model DHC–8–102, –103, –106, –201, –202, –301, –311, and –315 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 Bombardier Model DHC–8–102, –103, –106, –201, –202, –301, –311, and –315 series airplanes. This proposal would require repetitive inspections for discrepancies of certain rear spar fittings between the flex shaft of the flap secondary drive and the wing-to-fuselage structure, and corrective action if necessary. This proposal also provides for an optional modification of the flex shaft installation, which would terminate the repetitive inspections. This action is necessary to find and fix

damage and subsequent failure of the rear spar fittings, which could result in loss of the wing. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by December 29, 2003.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2003–NM–154–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–154–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 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, 10 Fifth Street, Third Floor, Valley Stream, New York.

FOR FURTHER INFORMATION CONTACT: Jon Hjelm, Aerospace Engineer, Airframe and Propulsion Branch, ANE–171, FAA, New York Aircraft Certification Office, 10 Fifth Street, Third Floor, Valley Stream, New York 11581; telephone (516) 256–7523; fax (516) 568–2716.

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–154–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–154–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

Transport Canada Civil Aviation (TCCA), which is the airworthiness authority for Canada, notified the FAA that an unsafe condition may exist on certain Bombardier Model DHC–8 series airplanes. TCCA has informed the FAA that discrepancies (chafing, wear damage, cracking) have been found on the rear spar fittings (part numbers (P/N) 85320053, 85322060, and 85334180), located between the flex shaft of the flap secondary drive and the wing-to-fuselage structure. These discrepancies are due to inadequate clearance between the fittings and the flex shaft of the flap secondary drive mechanism, caused by vibration of the flex drive during flap extension/retraction. Such discrepancies could affect the fatigue life of the fittings, which could result in failure of the fittings and consequent loss of the wing.

Explanation of Relevant Service Information

Bombardier has issued Service Bulletin 8–27–83, Revision 'A', dated February 8, 2002, which describes procedures for repetitive inspections for discrepancies (chafing, wear damage, cracking) of certain rear spar fittings between the flex shaft of the flap secondary drive and the wing-to-fuselage structure, and corrective action if necessary. The service bulletin also provides procedures for an optional modification of the flex shaft, which would eliminate the need for the repetitive inspections. The inspections and corrective action are as follows:

- A visual inspection to determine the wear damage of each rear spar fitting, which includes the following actions:

If wear damage is found, measure the depth of the wear; and if wear depth is less than the limits specified in Table 1 of the service bulletin, continued operation is allowed for 4,000 flight cycles without blending out the wear; when 4,000 flight cycles have been accumulated, the wear damage must be blended out and must be within the limits specified in Table 3 of the service bulletin. After blending the fitting must be re-inspected (high frequency eddy current (HFEC) inspection) for any remaining discrepancies (wear, cracking). Discrepancies must be repaired before further flight. If no discrepancies are found the inspection is to be repeated at intervals not to exceed 12 months.

If the wear depth is outside the limits specified in Table 1 of the service bulletin, but is less than the limits specified in Table 2 of the service bulletin, temporary operation is allowed for 400 flight cycles without blending out the wear; when 400 flight cycles have been accumulated, the wear must be blended out and within the limits specified in Table 3. The inspection is to be repeated at intervals not to exceed 12 months.

If the wear depth is greater than the limits specified in Table 2, or after blending is greater than the limits specified in Table 3, or cracking is found after temporary operation, the fitting must be replaced before further flight.

- A HFEC inspection for cracking of damaged areas after continued operation and after blending out wear damage. If no cracking is found and the blended wear is within the limits specified in Table 3, permanent continued operation is allowed. If cracking is found or blended wear exceeds the limits specified in Table 3, the fitting must be replaced before further flight.
- Replacement of the rear spar fittings includes removal of the existing fittings, removal of old sealant, inspection of each hole through the rear spar and fuselage for damage, repair of any

damage before further flight, and application of new sealant, installation of new fittings, and application of anti-corrosive compound.

• The optional modification of the flex shaft includes installation of new brackets on the rear spar, rework of the torque tube support fittings in the flap primary drive, installation of a new torque tube retainer tray assembly, and installation of additional clamps to stabilize the flex shaft.

The service bulletin also describes procedures for functional tests after doing all applicable actions.

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–2001–42, dated November 23, 2001, to ensure the continued airworthiness of these airplanes in Canada.

FAA's Conclusions

These airplane models are manufactured in Canada 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, TCCA has kept us informed of the situation described above. We have 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 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.

This AD allows flight with wear damage, provided that (1) the wear damage is within the limits specified in the service bulletin, (2) no cracking is found, and (3) established inspection procedures would find wear damage in structure at intervals permitting repairs to be done before reduced structural integrity of the fuselage could occur.

To be consistent with the findings of the TCCA, this proposed AD allows operators to continue the repetitive inspections instead of doing the terminating action. In making this determination, we consider that, in the case of this AD, long-term continued operational safety is adequately assured by doing the repetitive inspections to detect discrepancies before they represent a hazard to the airplane, and by doing repairs within the specified time limits.

Differences Between Proposed AD, Canadian Airworthiness Directive, and Service Information

The service bulletin and Canadian airworthiness directive refer only to a "visual inspection" for discrepancies of the rear spar fittings. We have determined that the procedures in the service bulletin should be described as a "detailed inspection." Note 1 has been included in this proposed AD to define this type of inspection.

Although the service bulletin specifies to submit certain information to the manufacturer, this proposed AD does not include such a requirement.

The applicability specified in the service bulletin and Canadian airworthiness directive includes Model DHC–8–314 airplanes; however, those airplanes are not U.S. type certificated and are not included in the applicability in this proposed AD.

Cost Impact

The FAA estimates that 218 airplanes of U.S. registry would be affected by this proposed AD.

It would take about 16 work hours per rear spar fitting (two fittings per airplane) to accomplish the proposed inspection, at an average labor rate of $65 per work hour. Based on these figures, the cost impact of the inspection proposed by this AD on U.S. operators is estimated to be $453,440, or $2,080 per airplane, per inspection cycle.

The cost impact figure discussed above is based on assumptions that no operator has yet done any of the proposed requirements of this AD action, and that no operator would do 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 do 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 modification, if done, would take about 16 work hours, at an average labor rate of $65 per work hour. Required parts would cost about $365 per airplane. Based on these figures, we estimate the cost of the optional terminating modification to be $1,405 per airplane.

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:

Bombardier, Inc. (Formerly de Havilland, Inc.): Docket 2003–NM–154–AD.

Applicability: Model DHC–8–102, –103, –106, –201, –202, –301, –311, and –315 series airplanes; certificated in any category; as listed in Bombardier Service Bulletin 8–27–83, Revision "A", dated February 8, 2002.

Compliance: Required as indicated, unless accomplished previously. To find and fix damage and prevent subsequent failure of the rear spar fittings between the flex shaft of the flap secondary drive and the wing-to-fuselage structure, which could result in loss of the wing, accomplish the following:

Repetitive Inspections/Corrective Action

(a) For airplanes with rear spar fittings having part number (P/N) 85320053,

85322060, or 85334180: Within 12 months after the effective date of this AD; do a detailed inspection for discrepancies (chafing, wear damage, cracking) of the rear spar fittings located between the flex shaft of the flap secondary drive and the wing-to-fuselage structure. Do the inspection as defined in Parts III.A., III.B., and III.D. of the Accomplishment Instructions of Bombardier Service Bulletin 8–27–83, Revision "A", dated February 8, 2002; except where the service bulletin specifies to report inspection findings, this AD does not require such reporting. Do the inspection per the service bulletin, and repeat the inspection thereafter at the applicable time specified in Part I.D. "Compliance" of the service bulletin. Any applicable corrective action (high frequency eddy current inspection for cracking, blending out wear damage, replacement of rear spar fittings) must be done at the applicable time specified in Part I.D. "Compliance" of the service bulletin.

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

Optional Terminating Modification

(b) Modification of the flex shaft of the flap secondary drive per Part III.C. of the Accomplishment Instructions of Bombardier Service Bulletin 8–27–83, Revision "A", dated February 8, 2002, terminates the repetitive inspections required by paragraph (a) of this AD.

Actions Done per Previous Issue of Service Bulletins

(c) Accomplishment of the inspections or the modification before the effective date of this AD in accordance with Bombardier Service Bulletin 8–27–83, dated October 19, 2001, is considered acceptable for compliance with the applicable actions specified in this AD.

Alternative Methods of Compliance

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

Note 2: The subject of this AD is addressed in Canadian airworthiness directive CF–2001–42, dated November 23, 2001.

Issued in Renton, Washington, on November 21, 2003.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 03–29698 Filed 11–26–03; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–292–AD]

RIN 2120–AA64

Airworthiness Directives; McDonnell Douglas Model MD–11 and MD–11F 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 McDonnell Douglas Model MD–11 and MD–11F airplanes. This proposal would require repetitive inspections of the transfer pipe assembly installation for the tail tank for damage and cracks, and corrective action, if necessary. This action is necessary to detect and correct damage and cracks to the transfer pipe assembly installation for the tail tank, which could result in fuel leakage and possible ignition. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by January 12, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2002–NM–292–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–292–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: Samuel S. Lee, Aerospace Engineer, Propulsion Branch, ANM–140L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5338; 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–292–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–292–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The FAA has received reports of cracks and damage to the transfer pipe assembly installation for the tail tank on McDonnell Douglas Model MD–11 airplanes. The support brackets and clamps for the refuel and fuel transfer lines of the tail fuel tank are being cracked and damaged, resulting in chafing and denting of the transfer pipe assembly. The cause of the cracks and damage is transient pressure surges that are higher than designed for the fuel transfer piping configuration during fuel transfer operations. This condition, if not corrected, could result in damage and cracks to the transfer pipe assembly installation for the tail tank, which could result in fuel leakage and possible ignition.

The subject area on certain Model MD–11F airplanes is almost identical to that on the affected Model MD–11 airplanes. Therefore, those MD–11F airplanes may be subject to the unsafe condition revealed on the MD–11 airplanes.

Explanation of Relevant Service Information

The FAA has reviewed and approved McDonnell Douglas Alert Service Bulletin MD11–28A110, dated May 2, 2000, which describes procedures for performing repetitive inspections of the transfer pipe assembly installation for the tail tank for damage and cracks; and repairing and/or replacing any damaged or cracked part with a serviceable part.

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

Clarification of Service Bulletin Applicability

The FAA points out that McDonnell Douglas Model MD–11F airplanes are not specifically identified in the service bulletin. However, those airplanes are identified by manufacturer's fuselage numbers in the service bulletin effectivity listing. Therefore, the FAA has revised the applicability in the NPRM to include Model MD–11F airplanes, in addition to Model MD–11 airplanes.

Interim Action

This proposed AD is considered to be interim action. The manufacturer has advised that it currently is developing Service Bulletin MD11–28–111 that will address the unsafe condition addressed by this proposed AD. Once this new service bulletin is developed, approved, and available, the FAA may consider additional rulemaking.

Cost Impact

There are approximately 187 airplanes of the affected design in the worldwide fleet. The FAA estimates that 60 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 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 $7,800, or $130 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. Manufacturer warranty remedies may 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 adding the following new airworthiness directive:

McDonnell Douglas: Docket 2002–NM–292–AD.

Applicability: Model MD–11 and MD–11F airplanes, as listed in McDonnell Douglas Alert Service Bulletin MD11–28A110, dated May 2, 2000; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To detect and correct damage and cracks to the transfer pipe assembly installation for the tail tank, which could result in fuel leakage and possible ignition, accomplish the following:

Service Bulletin References

(a) The term "service bulletin," as used in this AD, means the Accomplishment Instructions of McDonnell Douglas Alert Service Bulletin MD11–28A110, dated May 2, 2000. Although the service bulletin referenced in this AD specifies to submit certain information to the manufacturer, this AD does not include such a requirement.

Initial Inspection

(b) Within 700 flight hours from the effective date of this AD, perform a general visual inspection to detect any damage and cracking on the transfer pipe assembly installation for the tail tank, in accordance with the service bulletin.

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."

Condition 1 (No Damage/Cracking)

(c) If no damage or cracking to the transfer pipe assembly installation for the tail tank is found during the inspection required by paragraph (b) of this AD, repeat that inspection thereafter at intervals not to exceed 700 flight hours.

Condition 2 (Damage/Cracking Found)

(d) If any damage or cracking to the transfer pipe assembly installation for the tail tank is found during the inspection required by paragraph (b) of this AD, before further flight, repair and/or replace any damaged or cracked part with a serviceable part, per the service bulletin. Repeat that inspection thereafter at intervals not to exceed 700 flight hours.

Alternative Methods of Compliance

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

Issued in Renton, Washington, on November 21, 2003.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 03–29699 Filed 11–26–03; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–176–AD]

RIN 2120–AA64

Airworthiness Directives; McDonnell Douglas Model DC–8–11, DC–8–12, DC–8–21, DC–8–31, DC–8–32, DC–8–33, DC–8–41, DC–8–42, DC–8–43, DC–8F–54, and DC–8F–55 Airplanes; and Model DC–8–50, –60, –60F, –70 and –70F 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 McDonnell Douglas airplane models. This proposal would require inspection of the captain's and first officer's seat locking pins for minimum engagement with the detent holes in the seat tracks; inspection of the seat lockpins for excessive wear; and corrective actions, if necessary. This action is necessary to prevent uncommanded seat movement during takeoff and/or landing, which could result in interference with the operation of the airplane and consequent temporary loss of control of the airplane. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by January 12, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2002–NM–176–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–176–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 Services 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: Cheyenne Del Carmen, Aerospace Engineer, Systems and Equipment Branch, ANM–130L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712–4137; telephone (562) 627–5338; 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–176–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–176–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The FAA has received reports that on three instances the captain's and/or first officer's seat(s) unexpectedly moved full aft during takeoff of certain McDonnell Douglas Model DC–9–41 and DC–9–33RC airplanes. The cause of the uncommanded seat movement has been attributed to marginal engagement between the seat locking pins and the detent holes of the seat track of the captain's and first officer's seat assemblies. This condition, if not corrected, could lead to uncommanded seat movement during takeoff and/or landing, which could result in interference with the operation of the airplane and consequent temporary loss of control of the airplane.

The captain's and first officer's seat assemblies on certain Model DC–9–41 and DC–9–33RC airplanes are identical

to those installed on certain Model DC–8–11, DC–8–12, DC–8–21, DC–8–31, DC–8–32, DC–8–33, DC–8–41, DC–8–42, DC–8–43, DC–8F–54, and DC–8F–55 airplanes and certain Model DC–8–50, –60, –60F, –70 and –70F series airplanes. Therefore, all of these models may be subject to the identified unsafe condition.

Explanation of Relevant Service Information

The FAA has reviewed and approved Boeing Alert Service Bulletin DC8–25A244, Revision 02, dated June 25, 2002, which describes procedures for a detailed inspection of the captain's and first officer's seat locking pins for minimum engagement with the detent holes in the seat tracks; a detailed inspection of the seat lockpins for excessive wear; and corrective actions, if necessary. The corrective actions include adjusting/replacing the seat locking pin with a new pin and/or adjusting/repairing/replacing the seat track with a new track. 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 require accomplishment of the actions specified in the service bulletin described previously.

Cost Impact

There are approximately 497 airplanes of the affected design in the worldwide fleet. The FAA estimates that 360 airplanes of U.S. registry would be affected by this proposed AD. Table 1 shows the estimated cost impact, based upon the action taken, for airplanes affected by this proposed AD. The average labor rate is $65 per work hour.

TABLE 1.—COST IMPACT

Action	Work hours per seat	Work hours per airplane	Cost per airplane	Maximum fleet cost
Inspection for Option 1	1	2	$130	$46,800
Inspection for Option 2	3	6	390	140,400

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:

McDonnell Douglas: Docket 2002–NM–176–D.

Applicability: Model DC–8–11, DC–8–12, DC–8–21, DC–8–31, DC–8–32, DC–8–33, DC–8–41, DC–8–42, DC–8–43, DC–8–51, DC–8–52, DC–8–53, DC–8F–54, DC–8–55, DC–8F–55, DC–8–61, DC–8–61F, DC–8–62, DC–8–62F, DC–8–63, DC–8–63F, DC–8–71, DC–8–71F, DC–8–72, DC–8–72F, DC–8–73, and DC–8–73F airplanes, as listed in Boeing Alert Service Bulletin DC8–25A244, Revision 02, dated June 25, 2002; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent uncommanded seat movement during takeoff and/or landing, which could result in interference with the operation of the airplane and consequent temporary loss of control of the airplane, accomplish the following:

Inspection for Engagement and Excessive Wear of the Seat Locking Pins

(a) Within 18 months after the effective date of this AD, do the actions specified in paragraphs (a)(1) and (a)(2) of this AD, per either Option 1 or Option 2 of the Accomplishment Instructions of Boeing Alert Service Bulletin DC8–25A244, Revision 02, dated June 25, 2002.

(1) Do a detailed inspection of the seat locking pin for minimum engagement with the detent holes in the seat track of the captain's and first officer's seat assemblies.

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."

(2) Do a detailed inspection of the seat lock pins for excessive wear.

Corrective Actions

(b) If any discrepancy is detected during the inspection required by paragraph (a) of this AD, before further flight, do the corrective action(s), per either Option 1 or Option 2 of the Accomplishment Instructions of Boeing Alert Service Bulletin DC8–25A244, Revision 02, dated June 25, 2002, as applicable. Those corrective actions include

adjusting/replacing the seat locking pin with a new pin and/or adjusting/repairing/replacing the seat track with a new track.

Alternative Methods of Compliance

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

Issued in Renton, Washington, on November 21, 2003.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 03–29700 Filed 11–26–03; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NM–376–AD]

RIN 2120–AA64

Airworthiness Directives; Aerospatiale Model ATR72 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 Aerospatiale Model ATR72 series airplanes, that currently requires initial and repetitive inspections to detect fatigue cracking in certain areas of the fuselage, and corrective actions if necessary. For certain airplanes, this action would require a new inspection for oversized fastener holes and cracking, and repair if necessary. The actions specified by the proposed AD are intended to prevent fatigue cracking of the fuselage and the passenger and service doors, which could result in reduced structural integrity of the airplane. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by December 29, 2003.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2001–NM–376–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–376–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 Aerospatiale, 316 Route de Bayonne, 31060 Toulouse, Cedex 03, France. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Tony Jopling, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2190; 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 2001–NM–376–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–376–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

On February 17, 2000, the FAA issued AD 2000–04–13, amendment 39–11596 (65 FR 10381, February 28, 2000), applicable to certain Aerospatiale Model ATR72 series airplanes, to require initial and repetitive inspections to detect fatigue cracking in certain areas of the fuselage, and corrective actions if necessary. That action was prompted by issuance of mandatory continuing airworthiness information by a foreign civil airworthiness authority. The requirements of that AD are intended to prevent fatigue cracking of the fuselage and the passenger and service doors, which could result in reduced structural integrity of the airplane.

Actions Since Issuance of Previous Rule

Since the issuance of AD 2000–04–13, the Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, notified the FAA that an unsafe condition may continue to exist on certain ATR72 series airplanes on which Aerospatiale Modification 3191 (specified in Service Bulletin ATR72–52–1018, dated May 18, 1995, which is required by the existing AD) has not been done, but Aerospatiale Modification 3184 (accomplished during production and unrelated to the actions of the existing AD) has been done. Investigation revealed that during fatigue testing of these airplanes, damage was found at the attachment holes at the hinge fitting of the cargo compartment door outer skin due to oversized fastener holes drilled during incorporation of Modification 3184.

Explanation of Relevant Service Information

The manufacturer has issued Avions de Transport Regional Service Bulletin ATR72–52–1018, Revision 1, dated March 13, 2001. The original issue of the service bulletin was referenced as the appropriate source of service information for the accomplishment of certain inspections and corrective actions specified in the existing AD. For

airplanes on which Aerospatiale Modification 3191 has not been done, but Aerospatiale Modification 3184 has been done, Revision 1 adds procedures for a detailed visual inspection of the fastener holes at the hinge fitting of the cargo compartment doors to determine if the holes are oversized, and the outer skin around the fastener holes for cracking, and repair of any discrepancies found. For airplanes on which neither modification 3191 nor 3184 has been done, the new actions specified in Revision 1 of the service bulletin need not be done. The DGAC classified this service bulletin as mandatory and issued French airworthiness directive 2001–142–056(B), dated April 18, 2001, to ensure the continued airworthiness of these airplanes in France. The new French airworthiness directive covers all the service bulletins specified in the existing AD, and replaces French airworthiness directive 92–046–012(B)R4, dated November 5, 1997; which was referenced in the existing AD.

FAA's Conclusions

This airplane model 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. Pursuant to this bilateral airworthiness agreement, the DGAC has kept us informed of the situation described above. We have 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 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 supersede AD 2000–04–13 to continue to require initial and repetitive inspections to detect fatigue cracking in certain areas of the fuselage, and corrective actions if necessary. For certain airplanes, the proposed AD also would require repair of oversized fastener holes. The actions would be required to be accomplished in accordance with the service bulletin described previously, except as discussed below.

Differences Between Proposed AD and Service Bulletin

The service bulletin specifies that the manufacturer should be notified if the measured diameter of the fastener holes is out of tolerance, but this proposed AD does not include such a requirement.

The service bulletin also describes procedures for completing an inspection report and submitting it to the manufacturer, but this proposed AD would not require those actions. We do not need this information from operators.

Cost Impact

There are approximately 39 airplanes of U.S. registry that would be affected by this proposed AD.

The actions that are currently required by AD 2000–04–13 are as follows:

For airplanes identified in Avions de Transport Regional Service Bulletin ATR72–53–1018 (14 U.S.-registered airplanes), it takes approximately 250 work hours per airplane to accomplish the required actions, at an average labor rate of $65 per work hour. Required parts will cost approximately $9,880 per airplane. Based on these figures, the cost impact of these actions required by this AD on U.S. operators is estimated to be $365,820, or $26,130 per airplane.

For airplanes identified in Avions de Transport Regional Service Bulletin ATR72–52–1013, Revision 2 (2 U.S.-registered airplanes), it will take approximately 3 work hours per airplane to accomplish the required actions, at an average labor rate of $65 per work hour. Based on these figures, the cost impact of these actions required by this AD on U.S. operators is estimated to be $390, or $195 per airplane.

For airplanes identified in Avions de Transport Regional Service Bulletin ATR72–52–1019, Revision 2 (2 U.S.-registered airplanes), it will take approximately 100 work hours per airplane to accomplish the required actions, at an average labor rate of $65 per work hour. Based on these figures, the cost impact of these actions required by this AD on U.S. operators is estimated to be $13,000, or $6,500 per airplane.

For airplanes identified in Avions de Transport Regional Service Bulletin ATR72–52–1028 (2 U.S.-registered airplanes), it will take approximately 5 work hours per airplane to accomplish the required actions, at an average labor rate of $65 per work hour. Based on these figures, the cost impact of these actions required by this AD on U.S. operators is estimated to be $650 or $325 per airplane, per inspection cycle.

For airplanes identified in Avions de Transport Regional Service Bulletin ATR72–52–1033, and ATR72–52–1029, Revision 1 (2 U.S.-registered airplanes), it will take approximately 145 work hours per airplane to accomplish the required door stop fitting replacement, at an average labor rate of $65 per work hour. Required parts are provided by the manufacturer at no cost to the operators. Based on these figures, the cost impact of the stop fittings replacement required by this AD on U.S. operators is estimated to be $18,850 or $9,425 per airplane.

For airplanes identified in Avions de Transport Regional Service Bulletin ATR72–53–1021, Revision 1 (2 U.S.-registered airplanes) it will take approximately 30 work hours per airplane to accomplish the proposed actions, at an average labor rate of $65 per work hour. Based on these figures, the cost impact of these actions required by this AD on U.S. operators is estimated to be $3,900, or $1,950 per airplane.

For airplanes identified in Avions de Transport Regional Service Bulletin ATR72–53–1014, Revision 2 (2 U.S.-registered airplanes), it will take approximately 8 work hours per airplane to accomplish the required actions, at an average labor rate of $65 per work hour. Based on these figures, the cost impact of these actions required by this AD on U.S. operators is estimated to be $1,040, or $520 per airplane.

For airplanes identified in Avions de Transport Regional Service Bulletin ATR72–53–1020 (14 U.S.-registered airplanes), it will take approximately 6 work hours per airplane to accomplish the required actions, at an average labor rate of $65 per work hour. Based on these figures, the cost impact of these actions required by this AD on U.S. operators is estimated to be $5,460, or $390 per airplane.

The new actions proposed in this AD are as follows:

For airplanes identified in Avions de Transport Regional Service Bulletin ATR72–53–1018, Revision 1, accomplishment of the new proposed actions, if required, would take approximately 250 work hours per airplane to accomplish, at an average labor rate of $65 per work hour. Required parts would cost approximately $9,880 per airplane. Based on these figures, the cost impact of the new actions proposed by this AD on U.S. operators is estimated to be $26,130 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 39–11596 (65 FR 10381, February 28, 2000), and by adding a new airworthiness directive (AD), to read as follows:

Aerospatiale: Docket 2001–NM–376–AD. Supersedes AD 2000–04–13, Amendment 39–11596.

Applicability: Model ATR72 series airplanes; certificated in any category; listed in the following Avions de Transport Regional Service Bulletins:

- ATR72–52–1018, dated May 18, 1995;
- ATR72–52–1018, Revision 1, dated March 13, 2001;
- ATR72–53–1013, Revision 2, dated March 22, 1993;
- ATR72–53–1019, Revision 2, dated October 15, 1996;
- ATR72–52–1028, dated July 5, 1993;
- ATR72–52–1033, dated April 28, 1995;
- ATR72–52–1029, Revision 1, dated November 16, 1994;
- ATR72–53–1021, Revision 1, dated February 20, 1995;
- ATR72–53–1014, Revision 2, dated October 15, 1992; and
- ATR72–53–1020, dated October 6, 1992.

Compliance: Required as indicated, unless accomplished previously.

To prevent fatigue cracking of the fuselage and the passenger and service doors, which could result in reduced structural integrity of the airplane, accomplish the following:

Restatement of Requirements of AD 2000–04–13

Inspections/Corrective Actions

(a) For airplanes on which Aerospatiale Modification 03191 (reference Avions de Transport Regional Service Bulletin ATR72–52–1018) has not been accomplished as of April 3, 2000 (the effective date of AD 2000–04–13, amendment 39–11596); prior to the accumulation of 27,000 total flight cycles, or within 30 days after April 3, 2000: Perform a preliminary inspection of the existing fasteners to determine if the fasteners are out of tolerance in accordance with paragraph 2.C.(1) of the Accomplishment Instructions of Avions de Transport Regional Service Bulletin ATR72–52–1018, dated May 18, 1995. Depending on the results of the inspection, prior to further flight, accomplish the requirements in paragraphs (a)(1) and (a)(2), or (a)(2) and (a)(3) of this AD, as applicable.

(1) Remove the fasteners and inspect the fastener holes to determine if they are out of tolerance or cracking, in accordance with Part A of the Accomplishment Instructions of the service bulletin. Perform a visual inspection of the holes for correct tolerance, and a high frequency eddy current (HFEC) inspection for cracking, in accordance with the service bulletin.

(i) If any discrepancy is detected, prior to further flight, repair in accordance with Part C of the Accomplishment Instructions of the service bulletin.

(ii) If no discrepancy is detected, prior to further flight, replace the cargo compartment door hinges with new hinges in accordance with Part A of the Accomplishment Instructions of the service bulletin.

(2) Remove the existing fasteners and inspect the fastener holes for correct tolerance in accordance with Part B of the Accomplishment Instructions of the service bulletin.

(i) If any discrepancy is detected, prior to further flight, repair in accordance with a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate; or the Direction Générale de l'Aviation Civile (DGAC) (or its delegated agent).

(ii) If no discrepancy is detected, prior to further flight, replace the cargo compartment door hinges with new hinges in accordance with Part B of the Accomplishment Instructions of the service bulletin.

(3) Remove the existing fasteners, repair, and replace the cargo compartment door hinges with new hinges in accordance with Part C of the Accomplishment Instructions of the service bulletin.

(b) For airplanes having serial numbers 108 through 210 inclusive: Prior to the accumulation of 36,000 total flight cycles, or within 1 month after April 3, 2000, whichever occurs later, perform a one-time visual inspection to determine if rivets are installed in the key holes located on main frames 25 and 27 of the fuselage, between stringers 14 and 15, in accordance with Avions de Transport Regional Service Bulletin ATR72–53–1013, Revision 3, dated January 22, 1999.

(1) If all rivets are installed, no further action is required by paragraph (b) of this AD.

(2) If any rivet is missing, prior to further flight, perform an eddy current inspection of the affected key holes to detect cracks, in accordance with the service bulletin.

(i) If no crack is detected during the inspection required by paragraph (b)(2) of this AD, prior to further flight, install rivets in all affected key holes, in accordance with the service bulletin. If installation of rivets is not possible, prior to further flight, repair in accordance with a method approved by the Manager, International Branch, ANM–116; or the DGAC (or its delegated agent).

(ii) If any crack is detected during the inspection required by paragraph (b)(2) of this AD, prior to further flight, repair in accordance with a method approved by the Manager, International Branch, ANM–116; or the DGAC (or its delegated agent).

(c) For airplanes having serial numbers 108 through 207 inclusive: Prior to the accumulation of 36,000 total flight cycles, or within 1 month after April 3, 2000, whichever occurs later, perform a one-time visual inspection to determine if rivets are installed in the tooling and key holes located on the standard frames of the fuselage, in accordance with Avions de Transport Regional Service Bulletin ATR72–53–1019, Revision 3, dated January 22, 1999.

(1) If all rivets are installed, no further action is required by paragraph (c) of this AD.

(2) If any rivet is missing, prior to further flight, perform a visual inspection of the affected tooling and key holes to detect cracks, in accordance with the service bulletin.

(i) If no crack is detected during the inspection required by paragraph (c)(2) of this AD, prior to further flight, install new rivets in all affected tooling and key holes, in accordance with the service bulletin.

(ii) If any crack is detected during the inspection required by paragraph (c)(2) of

this AD, prior to further flight, repair in accordance with a method approved by the Manager, International Branch, ANM–116; or the DGAC (or its delegated agent).

(d) For airplanes on which Aerospatiale Modification 03775 (reference Avions de Transport Regional Service Bulletin ATR72–52–1029, Revision 1, dated November 16, 1994) or Aerospatiale Modification 03776 (reference Avions de Transport Regional Service Bulletin ATR72–52–1033, dated April 28, 1995) has not been accomplished as of April 3, 2000: Prior to the accumulation of 12,000 total flight cycles, or within 1 month after April 3, 2000, whichever occurs later, perform an eddy current inspection to detect cracks in the plug door stop fittings of the forward and aft passenger and service doors, in accordance with Avions de Transport Regional Service Bulletin ATR72–52–1028, dated July 5, 1993.

(1) If no crack is detected, repeat the eddy current inspection required by paragraph (d) of this AD thereafter at intervals not to exceed 6,000 flight cycles.

(2) If any crack is detected, prior to further flight, replace the cracked stop fittings with new, improved fittings, in accordance with Avions de Transport Regional Service Bulletin ATR72–52–1033, dated April 28, 1995, or ATR72–52–1029, Revision 1, dated November 16, 1994; as applicable. Accomplishment of the replacement constitutes terminating action for the repetitive inspection requirements of paragraph (d)(1) of this AD for that fitting.

(e) For airplanes on which Aerospatiale Modification 03775 or Aerospatiale Modification 03776 has not been accomplished as of April 3, 2000: Prior to the accumulation of 18,000 total flight cycles, or within 1 month after April 3, 2000, whichever occurs later, replace the plug door stop fittings of the forward and aft passenger and service doors with new, improved fittings, in accordance with Avions de Transport Regional Service Bulletin ATR72–52–1033, dated April 28, 1995; or ATR72–52–1029, Revision 1, dated November 16, 1994; as applicable. Accomplishment of the replacement constitutes terminating action for the repetitive inspection requirements of paragraph (d)(1) of this AD.

(f) For airplanes on which Aerospatiale Modification 02986 (reference Avions de Transport Regional Service Bulletin ATR72–53–1021, Revision 1, dated February 20, 1995) has not been accomplished as of April 3, 2000: Prior to the accumulation of 18,000 total flight cycles, or within 1 month after April 3, 2000, whichever occurs later, perform a one-time eddy current inspection to detect cracks in the rivet holes of the door surround corners of the forward and aft passenger and service doors, in accordance with Avions de Transport Regional Service Bulletin ATR72–53–1021, Revision 1, dated February 20, 1995.

(1) If no crack is detected during the inspection required by paragraph (f) of this AD, prior to further flight, modify the rivet holes, and replace the door surround corners with modified corners, in accordance with the service bulletin.

(2) If any crack is detected during the inspection required by paragraph (f) of this AD, prior to further flight, repair and modify in accordance with a method approved by the Manager, International Branch, ANM–116; or the DGAC (or its delegated agent).

(g) For airplanes on which Aerospatiale Modification 02397 (reference Avions de Transport Regional Service Bulletin ATR72–53–1014, Revision 2, dated October 15, 1992) has not been accomplished as of April 3, 2000: Prior to the accumulation of 12,000 total flight cycles, or within 1 month after April 3, 2000, whichever occurs later, perform a one-time eddy current inspection to detect cracks of the rivet holes located on the left and right sides of external stringer 4 at frames 24 and 28 of the fuselage, in accordance with Avions de Transport Regional Service Bulletin ATR72–53–1014, Revision 2, dated October 15, 1992.

(1) If no crack is detected during the inspection required by paragraph (g) of this AD, prior to further flight, install reinforcement angles on the left and right sides of external stringer 4 at frames 24 and 28 of the fuselage, in accordance with the service bulletin.

(2) If any crack is detected during the inspection required by paragraph (g) of this AD, prior to further flight, repair in accordance with a method approved by the Manager, International Branch, ANM–116; or the DGAC (or its delegated agent).

(h) For airplanes on which Aerospatiale Modification 03185 (reference Avions de Transport Regional Service Bulletin ATR72–53–1020, dated October 6, 1992) has not been accomplished as of April 3, 2000: Prior to the accumulation of 12,000 total flight cycles, or within 1 month after April 3, 2000, whichever occurs later, perform a one-time eddy current inspection to detect cracks of the rivet holes located on stringer 11 of frame 26 of the fuselage, in accordance with Avions de Transport Regional Service Bulletin ATR72–53–1020, dated October 6, 1992.

(1) If no crack is detected during the inspection required by paragraph (h) of this AD, prior to further flight, install doublers and stringer clips on the left and right sides on stringer 11 of frame 26 of the fuselage, in accordance with the service bulletin.

(2) If any crack is detected during the inspection required by paragraph (h) of this AD, prior to further flight, repair in accordance with a method approved by the Manager, International Branch, ANM–116; or the DGAC (or its delegated agent).

Note 1: Inspections and repairs accomplished prior to the effective date of this AD in accordance with Avions de Transport Regional Service Bulletins ATR72–53–1013, dated June 10, 1991, or Revision 1, dated June 12, 1992; ATR72–53–1019, dated May 13, 1993, or Revision 1, dated November 11, 1994; ATR72–52–1029, dated July 20, 1994; or ATR72–53–1014, Revision 1, dated June 30, 1992; are considered acceptable for compliance with the applicable actions specified in this AD.

New Requirements of This AD

(i) Prior to the accumulation of 27,000 total flight cycles, or within 30 days after the effective date of this AD, whichever is later; do the actions specified in paragraph (i)(1) or (i)(2) of this AD, as applicable.

(1) For airplanes on which Aerospatiale Modification 3191 and Aerospatiale Modification 3184 have not been accomplished as of the effective date of this AD: No further action is required by paragraph (i) of this AD.

(2) For airplanes on which Aerospatiale Modification 3191 has not been accomplished as of the effective date of this AD, and Aerospatiale Modification 3184 has been accomplished as of the effective date of this AD: Do a detailed inspection of the fastener holes at the hinge fitting of the cargo compartment doors to determine if the holes are oversized, and inspect the outer skin around the fastener holes for cracking, in accordance with the Accomplishment Instructions of Avions de Transport Regional Service Bulletin ATR72–52–1018, Revision 1, dated March 13, 2001.

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."

(j) Prior to further flight, repair any discrepancies detected during any inspection required by paragraph (i) of this AD in accordance with the Accomplishment Instructions of Avions de Transport Regional Service Bulletin ATR72–52–1018, Revision 1, dated March 13, 2001. Where the service bulletin specifies contacting the manufacturer for repair disposition, prior to further flight, repair in accordance with a method approved by the Manager, International Branch, ANM–116; or the DGAC (or its delegated agent).

Alternative Methods of Compliance

(k) 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 3: The subject of this AD is addressed in French airworthiness directive 2001–142–056(B), dated April 18, 2001.

Issued in Renton, Washington, on November 21, 2003.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 03–29701 Filed 11–26–03; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–106486–98 and INTL–0015–91]

RIN 1545–AW33 and RIN 1545–PP78

Guidance Regarding the Treatment of Certain Contingent Payment Debt Instruments With One or More Payments That Are Denominated in, or Determined by Reference to, a Nonfunctional Currency; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to notice of proposed rulemaking; notice of public hearing; and withdrawal of previous proposed regulations section.

SUMMARY: This document contains corrections to proposed regulations (Reg–106486–98; INTL–0015–91) that were published in the **Federal Register** on August 29, 2003 (68 FR 51944) regarding the treatment of contingent payment debt instruments for which one or more payments are denominated in, or determined by reference to, a currency other than the taxpayer's functional currency.

FOR FURTHER INFORMATION CONTACT: Milton Cahn at (202) 622–3860 (not a toll free number).

SUPPLEMENTARY INFORMATION:

Background

The proposed regulations that are the subject of these corrections are under Section 1275 of the Internal Revenue Code.

Need for Correction

As published, the notice of proposed rulemaking; notice of public hearing; and withdrawal of previous proposed regulations (REG–106486–98; INTL–0015–91), contains errors that may prove to be misleading and are in need of clarification.

Correction of Publication

Accordingly, the publication of the notice of proposed rulemaking, notice of public hearing; and withdrawal of previous proposed regulations (REG–106486–98; INTL–0015–91), which was the subject of FR Doc. 03–21827, is corrected as follows:

On page 51944, column 2, in the preamble under the subject heading **FOR FURTHER INFORMATION CONTACT**, line 2, the language "Milton Cahn at (202) 622–3870;" is corrected to read "Milton Cahn at (202) 622–3860;".

Cynthia E. Grigsby,

Acting Chief, Publication and Regulations Branch, Legal Processing Division, Associate Chief Counsel, (Procedure and Administration).

[FR Doc. 03–29728 Filed 11–26–03; 8:45 am]

BILLING CODE 4830–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 15 and 76

[CS Docket No. 97–80; PP Docket No. 00–67; FCC 03–225]

Commercial Availability of Navigation Devices and Compatibility Between Cable Systems and Consumer Electronics Equipment

AGENCY: Federal Communications Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: In this document, the Commission seeks comment on the mechanisms and standards by which new connectors and associated content protection technologies can be approved for use with unidirectional digital cable products. The Second Further Notice of Proposed Rulemaking also seeks comment on: the potential extension of digital cable system transmission requirements to digital cable systems with an activated channel capacity of 550 MHz or higher; whether it is necessary to require consumer electronics manufacturers to provide pre-sale information to consumers regarding the functionalities of unidirectional digital cable televisions; and whether the Commission should ban or permit the down-resolution of non-broadcast MVPD programming. Potential Commission action in these areas is intended to further the commercial availability of unidirectional digital cable products and other navigation devices pursuant to section 629 of the Communications Act.

DATES: Comments due January 14, 2004; reply comments are due February 13, 2004.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554. For further filing information, *see* **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Susan Mort, 202–418–1043 or *Susan.Mort@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a synopsis of the Second Further Notice of Proposed Rulemaking portion of the Commission's Second Report and Order and Second Further Notice of Proposed Rulemaking ("Second FNPRM"), FCC 03–225, adopted September 10, 2003; released October 9, 2003. The full text of the Commission's Second FNPRM is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY–A257) at its headquarters, 445 12th Street, SW, Washington, DC 20554, or may be purchased from the Commission's copy contractor, Qualex International, (202) 863–2893, Portals II, Room CY–B402, 445 12th St., SW, Washington, DC 20554, or may be reviewed via Internet at *http://www.fcc.gov/mb.*

Synopsis of the Second Further Notice of Proposed Rulemaking

1. Although the Commission believes that its adoption of the technical, labeling and encoding rules set forth herein will further the digital transition and facilitate the wider availability of digital cable services to consumers, further comment is needed on several issues. As an initial matter, we seek comment on whether the transmission standards applicable to digital cable systems with an activated channel capacity of 750 MHz or greater should be extended to digital cable systems with an activated channel capacity of 550 MHz or greater. In particular, we seek comment on the potential cost impact on such cable systems and whether waivers or other relief mechanisms are appropriate for cable systems that might experience economic hardship as a result of these obligations.

2. With respect to the issue of consumer information disclosures, we seek comment on whether the Commission should require consumer electronics manufacturers to provide consumers with pre-sale information regarding the functionalities of unidirectional digital cable televisions. For example, we seek comment on whether it is appropriate to require consumer electronics manufacturers to inform potential purchasers of unidirectional digital cable televisions of: (1) The need to use a set-top box in order to receive interactive services, (2) the necessity to obtain a POD from their cable operator, or (3) any other relevant information disclosing the functionalities or limitations of these devices. If so, we seek comment on the appropriate mechanism to communicate this information to consumers, including but not limited to point of sale marketing materials to be provided to retailers, more informative labeling

on device packaging, the use of Internet web sites, or any other appropriate format designed to reach consumers before they make purchasing decisions.

3. Another area in which we seek additional comment relates to the down-resolution of non-broadcast MVPD programming. As discussed above, content providers assert that down-resolution is a necessary tool to incite the retirement of component analog outputs. Despite this assertion, the cable and consumer electronics industries have been unable to reach agreement on whether down-resolution was an appropriate content protection tool. We seek comment on whether the Commission should prohibit the activation by MVPDs of down-resolution for non-broadcast MVPD programming content. If so, we seek comment on the potential impact of such a ban on the availability of high value digital content to consumers. In the alternative, if the Commission were to permit the use of down-resolution in this manner, we seek comment on the potential impact on consumers with DTV equipment that only has component analog outputs. In particular, we seek comment on the number of consumers that might be affected and on the number of sets to be produced in the future with only analog outputs. Finally, we seek comment on the potential impact of down-resolution upon consumers who own DTV equipment with both digital and analog outputs.

4. As discussed above, we are concerned that because CableLabs is not a standards-setting body, its proposed role as the sole initial arbiter of outputs and associated content protection technologies to be used in unidirectional digital cable products could affect innovation and interoperability. This Second Further Notice seeks comment on whether standards and procedures should be adopted for the approval of new connectors or content protection technologies to be used with unidirectional digital cable televisions and products. If so, we seek comment on whether these standards and procedures should encompass other related consumer electronics equipment, including non-cable compatible DTV receivers. We also seek comment on the various types of content protection technologies that should be considered as a part of this process, including but not limited to digital rights management, wireless and encryption-based technologies.

5. With respect to the particular standards and procedures to be employed, we seek comment on whether objective criteria should be used to evaluate new connectors and content protection technologies and, if so, what specific criteria should be used. For example, Microsoft Corporation and Hewlett Packard Corporation have submitted a detailed proposal suggesting functional requirements that could be used to evaluate digital rights management technologies for use with digital cable ready products. We seek comment on this proposal, as well as other proposals relying on objective criteria, and any new proposals that commenters may submit to the Commission.

6. We also seek comment on whether CableLabs is the appropriate entity to make initial approval determinations, or whether another entity should have decision-making authority. In particular, we seek comment on whether the Commission, a qualified third party, or an independent entity representing various industry and consumer interests should make approval determinations.

7. As to the issue of how approved connectors or content protection technologies may be revoked should their security be compromised, we seek comment on the appropriate standard for revocation. Specifically, we seek comment on whether revocation is appropriate where a connector or content protection technology is perceived to be insecure, or whether the appropriate standard is where security has been compromised in a significant, widespread manner. Once a connector or content protection technology has been revoked, we seek comment on the appropriate mechanism by which revocation should be effectuated. For example, should revoked connectors or content protection technologies be eliminated on a going-forward basis, while preserving their functionality for existing devices? We also seek comment on whether there are technological or other means of revoking connectors or content protection technologies while preserving the functionality of consumer electronics devices.

8. *Authority.* This Second FNPRM is issued pursuant to authority contained in sections 1, 4(i) and (j), 303, 403, 601, 624A and 629 of the Communications Act of 1934, as amended.

9. *Ex Parte Rules—Non-Restricted Proceeding.* This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's Rules. *See generally* 47 CFR 1.1202, 1.1203, and 1.1206(a).

10. *Accessibility Information.* Accessible formats of this Second Further Notice (computer diskettes, large print, audio recording and Braille) are available to persons with disabilities by contacting Brian Millin, of the Consumer & Governmental Affairs Bureau, at (202) 418–7426, TTY (202) 418–7365, or at *Brian.Millin@fcc.gov.*

11. *Comment Information.* Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments on or before January 14, 2004, and reply comments on or before February 13, 2004. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

12. Comments filed through the ECFS can be sent as an electronic file via the Internet to *http://www.fcc.gov/e-file/ecfs.html.* Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to *ecfs@fcc.gov,* and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail)

must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, DC 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

13. *Regulatory Flexibility Act.* As required by the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on a substantial number of small entities of the proposals addressed in this Second FNPRM. The IRFA is set forth below. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the Second FNPRM, and they should have a separate and distinct heading designating them as responses to the IRFA.

14. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this Second FNPRM, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Initial Regulatory Flexibility Analysis

15. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA") the Commission has prepared this present Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the Second FNPRM portion of this item. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Second FNPRM portion of this item provided above. The Commission will send a copy of this entire Second Order and Second Further Notice of Proposed Rulemaking, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA"). In addition, the Second FNPRM portion of this item and the IRFA (or summaries thereof) will be published in the **Federal Register**.

16. *Need for, and Objectives of, the Proposed Rules.* In connection with the Commission's efforts to ensure the commercial availability of navigation devices pursuant to section 629 of the Communication's Act, the Second Report and Order part of the Second Report and Order and Second FNPRM adopts technical, labeling and encoding rules which will set a one-way specification for digital cable "plug and play" compatibility for DTV equipment. The negotiations between the consumer electronics and cable television industries which led to the agreement underlying these rules call for the cable television industry to make initial determinations about which new device connectors and associated content protection technologies may be used in connection with unidirectional digital cable products produced under this specification. Commenters have indicated that the cable industry should not be the sole arbiter of such decisions, however, the record currently before the Commission is insufficient on this matter. In order to ensure the connectivity and interoperability of unidirectional digital cable products, and to fulfill the Commission's commercial availability mandate under section 629, we are initiating the Second FNPRM to seek comment on the mechanisms and standards by which new connectors and associated content protection technologies can be approved for use in this context. The Second FNPRM also seeks comment on: (1) The potential extension of the transmission requirements applicable to digital cable systems with an activated channel capacity of 750 MHz or higher to digital cable systems with an activated channel capacity of 550 MHz or higher; (2) whether it is necessary to require consumer electronics manufacturers to provide pre-sale information to consumers regarding the functionalities of unidirectional digital cable televisions; and (3) whether the Commission should ban or permit the down-resolution of non-broadcast MVPD programming.

17. *Legal Basis.* The authority for this proposed rulemaking is contained in sections 1, 4(i) and (j), 303, 403, 601, 624A and 629 of the Communications Act of 1934, 47 U.S.C 151, 154(i) and (j), 303, 403, 521, 544a and 549.

18. *Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply.* The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules. The RFA generally defines the term "small entity" as encompassing the terms "small business," "small organization," and "small governmental entity." In addition, the term "small Business" has the same meaning as the term "small business concern" under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").

19. *Television Broadcasting.* The Small Business Administration defines a television broadcasting station that has no more than $12 million in annual receipts as a small business. Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound." According to Commission staff review of the BIA Publications, Inc. Master Access Television Analyzer Database as of May 16, 2003, about 814 of the 1,220 commercial television stations in the United States have revenues of $12 million or less. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. There are also 2,127 low power television stations (LPTV). Given the nature of this service, we will presume that all LPTV licensees qualify as small entities under the SBA definition.

20. In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also as noted, an additional element of the definition of "small business" is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

21. *Cable and Other Program Distribution.* The SBA has developed a small business size standard for cable and other program distribution services, which includes all such companies generating $12.5 million or less in revenue annually. This category includes, among others, cable operators, direct broadcast satellite ("DBS") services, home satellite dish ("HSD") services, multipoint distribution services ("MDS"), multichannel multipoint distribution service ("MMDS"), Instructional Television

Fixed Service ("ITFS"), local multipoint distribution service ("LMDS"), satellite master antenna television ("SMATV") systems, and open video systems ("OVS"). According to the Census Bureau data, there are 1,311 total cable and other pay television service firms that operate throughout the year of which 1,180 have less than $10 million in revenue. We address below each service individually to provide a more precise estimate of small entities.

22. *Cable Operators.* The Commission has developed, with SBA's approval, our own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide. We last estimated that there were 1,439 cable operators that qualified as small cable companies. Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators that may be affected by the decisions and rules proposed in this Second FNPRM.

23. The Communications Act, as amended, also contains a size standard for a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1% of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000." The Commission has determined that there are 68,500,000 subscribers in the United States. Therefore, an operator serving fewer than 685,000 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate. Based on available data, we find that the number of cable operators serving 685,000 subscribers or less totals approximately 1,450. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

24. *Direct Broadcast Satellite ("DBS") Service.* Because DBS provides subscription services, DBS falls within the SBA-recognized definition of cable and other program distribution services. This definition provides that a small entity is one with $12.5 million or less in annual receipts. There are four licensees of DBS services under part 100 of the Commission's rules. Three of those licensees are currently operational. Two of the licensees that are operational have annual revenues that may be in excess of the threshold for a small business. The Commission, however, does not collect annual revenue data for DBS and, therefore, is unable to ascertain the number of small DBS licensees that could be impacted by these proposed rules. DBS service requires a great investment of capital for operation, and we acknowledge, despite the absence of specific data on this point, that there are entrants in this field that may not yet have generated $12.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

25. *Home Satellite Dish ("HSD") Service.* Because HSD provides subscription services, HSD falls within the SBA-recognized definition of cable and other program distribution services. This definition provides that a small entity is one with $12.5 million or less in annual receipts. The market for HSD service is difficult to quantify. Indeed, the service itself bears little resemblance to other MVPDs. HSD owners have access to more than 265 channels of programming placed on C-band satellites by programmers for receipt and distribution by MVPDs, of which 115 channels are scrambled and approximately 150 are unscrambled. HSD owners can watch unscrambled channels without paying a subscription fee. To receive scrambled channels, however, an HSD owner must purchase an integrated receiver-decoder from an equipment dealer and pay a subscription fee to an HSD programming package. Thus, HSD users include: (1) Viewers who subscribe to a packaged programming service, which affords them access to most of the same programming provided to subscribers of other MVPDs; (2) viewers who receive only non-subscription programming; and (3) viewers who receive satellite programming services illegally without subscribing. Because scrambled packages of programming are most specifically intended for retail consumers, these are the services most relevant to this discussion.

26. *Multipoint Distribution Service ("MDS"), Multichannel Multipoint Distribution Service ("MMDS") Instructional Television Fixed Service ("ITFS") and Local Multipoint Distribution Service ("LMDS").* MMDS systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of the MDS and ITFS. LMDS is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.

27. In connection with the 1996 MDS auction, the Commission defined small businesses as entities that had annual average gross revenues of less than $40 million in the previous three calendar years. This definition of a small entity in the context of MDS auctions has been approved by the SBA. The MDS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas ("BTAs"). Of the 67 auction winners, 61 met the definition of a small business. MDS also includes licensees of stations authorized prior to the auction. As noted, the SBA has developed a definition of small entities for pay television services, which includes all such companies generating $12.5 million or less in annual receipts. This definition includes multipoint distribution services, and thus applies to MDS licensees and wireless cable operators that did not participate in the MDS auction. Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of $12.5 million annually. Therefore, for purposes of the IRFA, we find there are approximately 850 small MDS providers as defined by the SBA and the Commission's auction rules.

28. The SBA definition of small entities for cable and other program distribution services, which includes such companies generating $12.5 million in annual receipts, seems reasonably applicable to ITFS. There are presently 2,032 ITFS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in the definition of a small business. However, we do not collect annual revenue data for ITFS licensees, and are not able to ascertain how many of the 100 non-educational licensees would be categorized as small under the SBA definition. Thus, we tentatively conclude that at least 1,932 licensees are small businesses.

29. Additionally, the auction of the 1,030 LMDS licenses began on February 18, 1998, and closed on March 25, 1998. The Commission defined "small entity" for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years. An additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the

preceding calendar years. These regulations defining "small entity" in the context of LMDS auctions have been approved by the SBA. There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 40 winning bidders. Based on this information, we conclude that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission's auction rules.

30. In sum, there are approximately a total of 2,000 MDS/MMDS/LMDS stations currently licensed. Of the approximate total of 2,000 stations, we estimate that there are 1,595 MDS/MMDS/LMDS providers that are small businesses as deemed by the SBA and the Commission's auction rules.

31. *Satellite Master Antenna Television ("SMATV") Systems.* The SBA definition of small entities for cable and other program distribution services includes SMATV services and, thus, small entities are defined as all such companies generating $12.5 million or less in annual receipts. Industry sources estimate that approximately 5,200 SMATV operators were providing service as of December 1995. Other estimates indicate that SMATV operators serve approximately 1.5 million residential subscribers as of July 2001. The best available estimates indicate that the largest SMATV operators serve between 15,000 and 55,000 subscribers each. Most SMATV operators serve approximately 3,000–4,000 customers. Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten SMATVs, we believe that a substantial number of SMATV operators qualify as small entities.

32. *Open Video Systems ("OVS").* Because OVS operators provide subscription services, OVS falls within the SBA-recognized definition of cable and other program distribution services. This definition provides that a small entity is one with $ 12.5 million or less in annual receipts. The Commission has certified 25 OVS operators with some now providing service. Affiliates of Residential Communications Network, Inc. ("RCN") received approval to operate OVS systems in New York City, Boston, Washington, DC and other areas. RCN has sufficient revenues to assure us that they do not qualify as small business entities. Little financial information is available for the other entities authorized to provide OVS that are not yet operational. Given that other entities have been authorized to provide OVS service but have not yet begun to generate revenues, we conclude that at least some of the OVS operators qualify as small entities.

33. *Electronics Equipment Manufacturers.* Rules adopted in this proceeding could apply to manufacturers of DTV receiving equipment and other types of consumer electronics equipment. The SBA has developed definitions of small entity for manufacturers of audio and video equipment as well as radio and television broadcasting and wireless communications equipment. These categories both include all such companies employing 750 or fewer employees. The Commission has not developed a definition of small entities applicable to manufacturers of electronic equipment used by consumers, as compared to industrial use by television licensees and related businesses. Therefore, we will utilize the SBA definitions applicable to manufacturers of audio and visual equipment and radio and television broadcasting and wireless communications equipment, since these are the two closest NAICS Codes applicable to the consumer electronics equipment manufacturing industry. However, these NAICS categories are broad and specific figures are not available as to how many of these establishments manufacture consumer equipment. According to the SBA's regulations, an audio and visual equipment manufacturer must have 750 or fewer employees in order to qualify as a small business concern. Census Bureau data indicates that there are 554 U.S. establishments that manufacture audio and visual equipment, and that 542 of these establishments have fewer than 500 employees and would be classified as small entities. The remaining 12 establishments have 500 or more employees; however, we are unable to determine how many of those have fewer than 750 employees and therefore, also qualify as small entities under the SBA definition. Under the SBA's regulations, a radio and television broadcasting and wireless communications equipment manufacturer must also have 750 or fewer employees in order to qualify as a small business concern. Census Bureau data indicates that there 1,215 U.S. establishments that manufacture radio and television broadcasting and wireless communications equipment, and that 1,150 of these establishments have fewer than 500 employees and would be classified as small entities. The remaining 65 establishments have 500 or more employees; however, we are unable to determine how many of those have fewer than 750 employees and therefore, also qualify as small entities under the SBA definition. We therefore conclude that there are no more than 542 small manufacturers of audio and visual electronics equipment and no more than 1,150 small manufacturers of radio and television broadcasting and wireless communications equipment for consumer/household use.

34. *Computer Manufacturers.* The Commission has not developed a definition of small entities applicable to computer manufacturers. Therefore, we will utilize the SBA definition of electronic computers manufacturing. According to SBA regulations, a computer manufacturer must have 1,000 or fewer employees in order to qualify as a small entity. Census Bureau data indicates that there are 563 firms that manufacture electronic computers and of those, 544 have fewer than 1,000 employees and qualify as small entities. The remaining 19 firms have 1,000 or more employees. We conclude that there are approximately 544 small computer manufacturers.

35. *Description of Projected Reporting, Recordkeeping and other Compliance Requirements.* At this time, we do not expect that the proposed rules would impose any additional reporting or recordkeeping requirements. However, compliance with the rules, if they are adopted, may require consumer electronics manufacturers to seek approval for new device connectors and associated content protection technologies to be used in conjunction with unidirectional digital cable products. These requirements could have an impact on consumer electronics manufacturers, including small entities. We seek comment on the possible burden these requirements would place on small entities. Also, we seek comment on whether a special approach toward any possible compliance burdens on small entities might be appropriate.

36. *Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered.* The RFA requires an agency to describe any significant alternatives that it has

considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

37. As indicated above, the Second FNPRM seeks comment on whether the Commission should adopt rules establishing an approval mechanism for new connectors and associated content protection technologies to be used with unidirectional digital cable products. Consumer electronics manufacturers may be required to seek such approval prior to implementing new connectors and associated content protection technologies in unidirectional digital cable products. We welcome comment on modifications of this proposal to lessen any potential impact on small entities, while still remaining consistent with our policy goals.

38. The Second FNPRM also seeks comment on the potential applicablity of certain transmission standards for digital cable systems to systems with an activated channel capacity of 550 MHz or greater. Since such cable systems are often owned by small cable operators, we seek comment on the potential impact of this proposed rule upon small cable operators and whether some relief mechanism, such as waivers, would help alleviate any potential impact on small entities.

39. With respect to the proposed requirement for consumer electronics manufacturers to provide consumers with pre-sale information regarding the functionalities of unidirectional digital cable televisions, we seek comment on how this might affect small manufacturers. We also seek comment on whether the potential economic burden on small entities might be lessened, while still generally retaining the requirement or the intended effect of the requirements.

40. Finally, the Second FNPRM seeks comment on whether to permit or ban the down-resolution by MVPDs of non-broadcast MVPD programming. We believe this requirement would largely impact the DBS industry, which is primarily composed of large entities. To the extent that small entities might be adversely affected by this potential requirement, we welcome comments on possible small entity-related alternatives.

41. *Federal Rules Which Duplicate, Overlap, or Conflict with the Commission's Proposals.* None.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 03–29521 Filed 11–26–03; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 03–2930, MB Docket No. 03–210, RM–10791]

Digital Television Broadcast Service; Elmira, NY

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; correction.

SUMMARY: The Federal Communications Commission published in the **Federal Register** of October 7, 2003, (68 FR 57861), a document to change the DTV Table of Allotments to reflect the substitution of DTV channel 33 for DTV channel 2 at Elmira, New York. This document contained incorrect dates.

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Media Bureau, (202) 418–1600.

Correction

In the **Federal Register** of October 7, 2003, on page 57861, correct the reply comment date to read: December 10, 2003.

Dated: November 20, 2003.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Division, Media Bureau.

[FR Doc. 03–29627 Filed 11–26–03; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 03–3561, MB Docket No. 03–233, RM–10699]

Digital Television Broadcast Service; Pocatello, ID

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by Compass Communications of Idaho, Inc., licensee of station KFXP–TV, NTSC channel 31–, proposing the allotment of DTV channel 38 at Pocatello. DTV Channel 38 can be allotted to Pocatello, Idaho, at reference coordinates 42–55–15 N. and 112–20–44 W.

DATES: Comments must be filed on or before January 5, 2004, and reply comments on or before January 20, 2004.

ADDRESSES: The Commission permits the electronic filing of all pleadings and comments in proceeding involving petitions for rule making (except in broadcast allotment proceedings). *See Electronic Filing of Documents in Rule Making Proceedings,* GC Docket No. 97–113 (rel. April 6, 1998). Filings by paper can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Vistronix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners.

Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Lee G. Petro, Fletcher, Heald & Hildreth, PLC, 11th Floor, 1300 North 17th Street, Arlington, Virginia 22209–3801 (Counsel for Compass Communications of Idaho, Inc.).

FOR FURTHER INFORMATION CONTACT: Pam Blumenthal, Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 03–233, adopted November 6, 2003, and released November 14, 2003. The full text of this document is available for public inspection and copying during regular business hours in the FCC

Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–863–2893, facsimile 202–863–2898, or via-e-mail *qualexint@aol.com*.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Digital television broadcasting, Television.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

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

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

§ 73.622 [Amended]

2. Section 73.622(b), the Table of Digital Television Allotments under Idaho is amended by adding DTV channel 38 at Pocatello.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Division, Media Bureau.

[FR Doc. 03–29626 Filed 11–26–03; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 03–3551; MB Docket No. 03–232, RM–10819]

Radio Broadcasting Services; Ahoskie, North Carolina and Chase City, Virginia, and Creedmoor, Gatesville, and Nashville, NC

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document sets forth a proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's rules, 47 CFR 73.202(b). The Commission requests comment on a petition filed by Joyner Radio, Inc., licensee of Station WFXQ(FM), Chase City, Virginia. Petitioner proposes to delete Channel 260C3 at Chase City, Virginia to allot Channel 260C3 at Creedmoor, North Carolina, and to modify the license of Station WFXQ(FM) accordingly. In order to facilitate the allotment of Channel 260C3 at Creedmoor, petitioner proposes the substitution of Channel 257A for Channel 259A at Nashville, North Carolina, and the modification of the license of Station WZAX(FM) accordingly. Finally, in order to accommodate the substitution of Channel 257A at Nashville, petitioner requests the deletion of Channel 257A at Ahoskie, North Carolina, the addition of Channel 257A at Gatesville, North Carolina, and the modification of the license of FM Station WQDK accordingly. Channel 260C3 can be allotted at Creedmoor in compliance with the Commission's minimum distance separation requirements with a site restriction of 16.3 km (10.1 miles) east of Creedmoor. The coordinates for Channel 260C3 at Creedmoor are 36–06–56 North Latitude and 78–30–22 West Longitude. Channel 257A can be allotted at Gatesville in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.9 km (8.0 miles) south of Gatesville. The coordinates for Channel 257A at Gatesville are 36–17–02 North Latitude and 76–43–40 West Longitude. Channel 257A can be allotted at Nashville in compliance with the Commission's minimum distance separation requirements at the current reference coordinates for Channel 259A. *See* Supplementary Information *infra*.

DATES: Comments must be filed on or before January 5, 2004, and reply comments on or before January 20, 2004.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve counsel for the petitioner as follows: Gregg P. Skall, Peter Gutmann, Joan Stewart, Womble Carlyle Sandridge & Rice, PLLC, 1401 Eye Street, NW.—Seventh Floor, Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Deborah A. Dupont, Media Bureau (202) 418–7072.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 03–232, adopted November 12, 2003 and released November 14, 2003. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Information Center (Room CY–A257), 445 12th Street, SW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone (202) 863–2893.

The Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. *See* 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, *see* 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

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

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

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under North Carolina, is amended by removing Ahoskie, Channel 257A, by adding Creedmoor, Channel 260C3, by adding Gatesville, Channel 257A, and by removing Channel 259A and by adding Channel 257A at Nashville.

3. Section 73.202(b), the Table of FM Allotments under Virginia, is amended by removing Chase City, Channel 260C3.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 03–29628 Filed 11–26–03; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[I.D. 112403A]

Atlantic Highly Migratory Species; Supplemental Environmental Impact Statement (SEIS) for Sea Turtle Bycatch Mitigation in the Atlantic Pelagic Longline Fishery

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

ACTION: Notice of intent (NOI) to prepare an SEIS; request for comments.

SUMMARY: NMFS announces its intent to prepare an SEIS under the National Environmental Policy Act to assess the potential effects on the human environment of proposed alternatives and actions under a proposed rule to reduce sea turtle bycatch in the Atlantic pelagic longline fishery. The SEIS is intended to address issues regarding allowable fishing gears and techniques in the pelagic longline fishery; possession and use of onboard equipment to minimize sea turtle bycatch and bycatch mortality; modification of time and area closures; and minimum levels of observer coverage. NMFS is requesting comments on the above measures.

DATES: Comments on this action must be received no later than 5 p.m., local time, on December 29, 2003.

ADDRESSES: Written comments on this action should be mailed to Christopher Rogers, Chief, Highly Migratory Species Management Division, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910; or faxed to (301) 713–1917. Comments will not be accepted if submitted via email or Internet.

FOR FURTHER INFORMATION CONTACT: Russell Dunn, Rick Pearson, or Greg Fairclough at (727) 570–5447.

SUPPLEMENTARY INFORMATION: The Atlantic pelagic longline fishery for Atlantic HMS primarily targets swordfish, yellowfin tuna, and bigeye tuna in various areas and seasons. The Atlantic tuna, swordfish, and billfish fisheries are managed under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and the Atlantic Tunas Convention Act. The Fishery Management Plan for Atlantic Tunas, Swordfish, and Sharks (HMS FMP) is implemented by regulations at 50 CFR part 635.

Background

On June 14, 2001, NMFS released a Biological Opinion (BiOp) that found that the continued operation of the Atlantic pelagic longline fishery is likely to jeopardize the existence of Atlantic leatherback and loggerhead sea turtles. To avoid jeopardy, the Reasonable and Prudent Alternative (RPA) in the BiOp included a closure of the Northeast Distant (NED) Statistical Area of the Atlantic Ocean and a research program to develop or modify fishing gear and techniques to reduce sea turtle interactions and the mortality associated with such interactions.

As a result of this RPA, NMFS closed the NED (67 FR 45393, July 9, 2002) and undertook a 3-year (2000–2003) experiment in the NED intended to identify fishing gear and technique modifications that may reduce sea turtle interactions. The experiment examined various hook and bait combinations (treatments). Preliminary data suggest the treatments examined may reduce sea turtle interactions by between 50 and 92 percent, depending on species and treatment, and appear to have widely varying impacts, both positive and negative, on target species. Among the hook and bait combinations tested were: 18/0 offset circle hooks using squid as bait, 18/0 offset circle hooks using mackerel as bait, 18/0 non-offset circle hooks using squid as bait, and 9/0 J-hooks using mackeral as bait. NMFS is currently evaluating data from the final year of the experiment and will analyze that data as appropriate.

Based on preliminary data and a review of the current status of the species, NMFS is considering implementing various management measures to reduce sea turtle takes in the Atlantic pelagic longline fishery, including, but not limited to: modification of fishing gears and techniques in the pelagic longline fishery; possession and use of on-board equipment to minimize sea turtle bycatch and bycatch mortality; modification of time and area closures; and increased minimum levels of observer coverage.

Hook and Bait Combinations

Vessels participating in the pelagic longline fishery are currently required to use non-stainless steel corrodible hooks during fishing operations. Vessels participating in this fishery in the Gulf of Mexico are also prohibited from using live bait in the western Gulf of Mexico. NMFS may examine the mandatory use of various hook and bait combinations, as evaluated in the NED experiment, as a potential means of reducing sea turtle bycatch.

Area Closures

There are currently five distinct area closures intended to reduce bycatch in the Atlantic pelagic longline fishery, only one of which, the Northeast Distant Statistical area, was specifically intended to address sea turtle bycach. Current area closures include: the Northeast Distant Statistical Area, closed year-round; the Northeastern United States, closed during the month of June; the Charleston Bump, closed February through April; the East Florida Coast, closed year-round; and, the DeSoto Canyon, closed year-round. NMFS may examine additional and or modifications to existing area closures as a potential means of reducing sea turtle bycatch.

Onboard Bycatch Mitigation

NMFS currently requires pelagic longline vessels to possess and use a variety of equipment to mitigate sea turtle bycatch and bycatch mortality. These include: turtle handling procedures that must be posted in the wheel house; line cutters; and dipnets. NMFS may consider additional gear possession and use requirements, such as dehooking equipment, or moving one nautical mile after an interaction, as a potential means of reducing sea turtle bycatch.

Observer Coverage

The June 14, 2001, BiOp and Recommendations from the International Commission for the Conservation of Atlantic Tunas both require a minimum of five-percent observer coverage in the Atlantic pelagic longline fishery. NMFS may examine the possibility of increasing minimum observer coverage levels in this fishery to improve the quality and quantity of data on bycatch of turtles and other species.

Pelagic Longline Definition

In addition, NMFS is considering possible clarifications of either the pelagic or bottom longline definition.

Request for Comments

NMFS requests comments on management options for this action. Specifically, NMFS requests comments on the following issues and possible options to reduce sea turtle bycatch and bycatch mortality: modification of fishing gears and techniques in the pelagic longline fishery, area closures, onboard bycatch mitigation, and minimum observer coverage levels.

NMFS will proceed with preparation of a draft SEIS and proposed rule, incorporating comments received during the comment period associated with this NOI as appropriate. The draft EIS and proposed rule will include additional opportunities for public comment. NMFS anticipates completing this amendment and any related documents by June 1, 2004.

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

Dated: November 25, 2003.

Richard W. Surdi,

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

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 031119283–3283–01; I.D. 110703A]

RIN 0648–AQ80

Fisheries of the Northeastern United States; Summer Flounder, Scup, and Black Sea Bass Fisheries; 2004 Specifications; 2004 Research Set-Aside Projects

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes specifications for the 2004 summer flounder, scup, and black sea bass fisheries. The implementing regulations for the Fishery Management Plan for the Summer Flounder, Scup, and Black Sea Bass Fisheries (FMP) require NMFS to publish specifications for the upcoming fishing year for each of the species and to provide an opportunity for public comment. NMFS requests comment on proposed management measures for the 2004 summer flounder, scup, and black sea bass fisheries. The intent of this action is to establish 2004 harvest levels and other measures to attain the target fishing mortality (F) or exploitation rates, as specified for these species in the FMP. In addition, NMFS has conditionally approved three research projects for the harvest of the quota that has been recommended by the Council to be set aside for research purposes. In anticipation of receiving applications for Experimental Fishing Permits (EFPs) to conduct this research, the Assistant Regional Administrator for Sustainable Fisheries, Northeast Region, NMFS (Assistant Regional Administrator), has made a preliminary determination that the activities authorized under the EFPs issued in response to the approved Research Set-Aside (RSA) projects would be consistent with the goals and objectives of the FMP. However, further review and consultation may be necessary before a final determination is made to issue any EFP.

DATES: Comments on this proposed rule must be received on or before December 15, 2003.

ADDRESSES: Copies of the specifications document, including the Environmental Assessment, Regulatory Impact Review, and Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) and other supporting documents for the specifications are available from Daniel Furlong, Executive Director, Mid-Atlantic Fishery Management Council, Room 2115, Federal Building, 300 South Street, Dover, DE 19901–6790. The specifications document is also accessible via the Internet at *http://www.mafmc.org*. Written comments on the proposed rule should be sent to Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, One Blackburn Drive, Gloucester, MA 01930. Mark the outside of the envelope "Comments—2004 Summer Flounder, Scup, and Black Sea Bass Specifications." Comments may also be sent via facsimile (fax) to (978) 281–9135. Comments will not be accepted if submitted via e-mail or the Internet.

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

SUPPLEMENTARY INFORMATION:

Background

The summer flounder, scup, and black sea bass fisheries are managed cooperatively by the Atlantic States Marine Fisheries Commission (Commission) and the Mid-Atlantic Fishery Management Council (Council), in consultation with the New England and South Atlantic Fishery Management Councils. The management units specified in the FMP include summer flounder (*Paralichthys dentatus*) in U.S. waters of the Atlantic Ocean from the southern border of North Carolina (NC) northward to the U.S./Canada border, and scup (*Stenotomus chrysops*) and black sea bass (*Centropristis striata*) in U.S. waters of the Atlantic Ocean from 35°13.3′ N. lat. (the latitude of Cape Hatteras Lighthouse, Buxton, NC) northward to the U.S./Canada border. Implementing regulations for these fisheries are found at 50 CFR part 648, subparts A, G (summer flounder), H (scup), and I (black sea bass).

The regulations outline the process for specifying annually the catch limits for the summer flounder, scup, and black sea bass commercial and recreational fisheries, as well as other management measures (*e.g.*, mesh requirements, minimum fish sizes, gear restrictions, possession restrictions, and area restrictions) for these fisheries. The measures are intended to achieve the annual targets set forth for each species in the FMP, specified either as an F rate or an exploitation rate (the proportion of fish available at the beginning of the year that are removed by fishing during the year). Once the catch limits are established, they are divided into quotas based on formulas contained in the FMP.

As required by the FMP, a Monitoring Committee for each species, made up of members from NMFS, the Commission, and both the Mid-Atlantic and New England Fishery Management Councils, is required to review annually the best available scientific information and to recommend catch limits and other management measures that will achieve the target F or exploitation rate for each fishery. The Council's Demersal Species Committee and the Commission's Summer Flounder, Scup, and Black Sea Bass Management Board (Board) then consider the Monitoring Committees' recommendations and any public comment and make their own recommendations. While the Board action is final, the Council's recommendations must be reviewed by NMFS to assure that they comply with FMP objectives. The Council and Board made their annual recommendations at a joint meeting held August 4–7, 2003.

Explanation of Research Set-Aside

In 2001, regulations were implemented under Framework Adjustment 1 to the FMP to allow up to 3 percent of the Total Allowable Landings (TAL) for each of the species to be set aside each year for scientific research purposes. For the 2004 fishing year, a Request for Proposals was published in January 2003 to solicit research proposals based upon the research priorities that were identified by the Council (68 FR 3864, January 27, 2003). The deadline for submission of proposals was March 28, 2003. Three applicants were notified in August 2003 that their research proposals had received favorable preliminary review. For informational purposes, this proposed rule includes a statement

indicating the amount of quota that has been preliminarily set aside for research purposes, as recommended by the Council and Board, and a brief description of the three RSA projects. The RSA amounts may be adjusted in the final rule establishing the annual specifications for the summer flounder, scup, and black sea bass fisheries or, if the total amount of the quota set-aside is not awarded, NMFS will publish a notice in the **Federal Register** to restore the unused RSA amount to the applicable TAL.

For 2004, three RSA projects have been conditionally approved by NMFS, and are currently awaiting award by the NOAA Grants Office. The total RSA quota, approved by the Council and Board, allocated for all three projects are: 174,750 lb (79 metric tons (mt)) of summer flounder; 160,000 lb (73 mt) of scup; 134,792 lb (61 mt) of black sea bass; 281,250 lb (128 mt) of *Loligo* squid; and 297,750 lb (135 mt) of bluefish.

The University of Rhode Island submitted a proposal to develop a fishery-independent scup survey that utilizes unvented fish traps fished on hard bottom areas in southern New England waters to characterize the size composition of the scup population. Survey activities would be conducted from May 1 through November 30, 2004, at six rocky bottom study sites located offshore, where there is a minimal scup pot fishery and no active trawl fishery. One vessel would conduct the project. Sampling would occur off the coasts of Rhode Island and southern Massachusetts. The RSA allocated for this project is 12,292 lb (5.6 mt) of black sea bass and 40,000 lb (18 mt) of scup.

The National Fisheries Institute and Rutgers University submitted a proposal to conduct a second year of work on the development/refinement of a commercial vessel-based survey program in the Mid-Atlantic region that tracks the migratory behavior of selected recreationally and commercially important species. Information gathered during this project would supplement the NMFS finfish survey databases and include development of ways to better evaluate how seasonal migration of fish in the Mid-Atlantic influences stock abundance estimates. One vessel would conduct research trawl survey work in the Mid-Atlantic along six offshore transects near Alvin, Hudson, Wilmington, Baltimore, and Washington Canyons. Up to 16, 2-hour tows would be conducted among 10 sites along each transect from 45 to 225 fathoms (82 to 411 meters). The Baltimore and Hudson Canyons transects would be surveyed in January and May and all six transects would be surveyed in March. Additional transects may be conducted if necessary. Approximately 20 vessels operating from Rhode Island to North Carolina would participate in the project over the period of January 1 through December 31, 2004. The RSA allocated for the project is 74,750 lb (40 mt) of summer flounder; 120,000 lb (54 mt) of scup; 281,250 lb (128 mt) of *Loligo* squid; 51,000 lb (23 mt) of black sea bass; and 104,816 lb (48 mt) of bluefish.

The Cornell Cooperative Extension of Suffolk County, New York, submitted a proposal to evaluate fish escapement from certain gear and fish behavior of black sea bass, and is intended to enhance fishery information relative to the black sea bass pot fishery in the Mid-Atlantic region. With the use of experimental pots and underwater video, various escape vent configurations would be investigated. The project would also explore black sea bass mortality in pots left fishing during closed periods. Additionally, a sea sampling and dockside sampling program for black sea bass that supplements the NMFS black sea bass tagging program would be implemented. One vessel would conduct the project, and sampling would occur off Long Island, New York, from April 1 through December 31, 2004. The RSA allocated for the project is 71,500 lb (32 mt) of black sea bass.

Regulations under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) require publication of this notification to provide interested parties the opportunity to comment on applications for proposed EFPs.

Explanation of Quota Adjustments Due to Quota Overages

This proposed rule calculates commercial quotas based on the proposed TALs and Total Allowable Catches (TACs) and the formulas for allocation contained in the FMP. In 2002, NMFS published final regulations to implement a regulatory amendment (67 FR 6877, February 14, 2002) that revised the way in which the commercial quotas for summer flounder, scup, and black sea bass are adjusted if landings in any fishing year exceed the quota allocated (thus resulting in a quota overage). If NMFS approves a different TAL or TAC at the final rule stage, the commercial quotas will be recalculated based on the formulas in the FMP. Likewise, if new information indicates that overages have occurred and deductions are necessary, NMFS will publish notice of the adjusted quotas in the **Federal Register**. NMFS anticipates that the information necessary to determine whether overage deductions are necessary will be available by time of publication of the final rule to implement these specifications. The commercial quotas contained in this proposed rule for summer flounder, scup, and black sea bass do not reflect any deductions for overages. The final rule, however, will contain quotas that have been adjusted consistent with the procedures described above and contained in the regulatory amendment. Accordingly, landings information will be based upon: (1) Landings reported for the period January 1–October 31, 2003; (2) landings from the period November 1–December 31, 2002; and (3) late reported landings for the period January 1–October 31, 2002.

Summer Flounder

The FMP specifies a target fishing mortality rate (F) of F_{max}, that is, the level of fishing that produces maximum yield per recruit. The best available scientific information indicates that, for 2004, F_{max} for summer flounder is 0.26 (equal to an exploitation rate of about 22 percent from fishing).

The status of the summer flounder stock is evaluated annually. The most recent stock assessment, updated by the Northeast Fisheries Science Center (NEFSC) Southern Demersal Working Group in June 2003, indicated that the summer flounder stock is not overfished and overfishing is not occurring, according to the definitions in the FMP. This conclusion was derived from the fact that, in 2002, the estimated total stock biomass of 124 million lb (56,246 mt) is 5 percent above the biomass threshold of 117.3 million lb (53,200 mt) under which the stock is considered overfished ($½B_{msy}$), and the estimated F of 0.23 was below the FMP overfishing definition of $F=F_{max}=0.26$. In addition, spawning stock biomass (SSB) has increased steadily from 20.5 million lb (9,303 mt) in 1993 to 93 million lb (42,185 mt) in 2002, the highest value in the time series. Although the stock is no longer considered overfished, additional rebuilding is necessary because the Magnuson-Stevens Act requires that stocks be rebuilt to the level that produces maximum sustainable yield on a continuing basis, *i.e.*, 234.6 million lb (106,400 mt) for summer flounder.

The Summer Flounder Monitoring Committee reviewed the stock status and recommended a TAL of 28.2 million lb (12,791 mt), an increase of 21 percent relative to the 2003 TAL. The Monitoring Committee determined that this TAL would have at least a 50-percent probability of achieving the

F_{target} (0.26) that is specified in the FMP, if the 2003 TAL and assumed discard levels are not exceeded. The TAL associated with the target F is allocated 60 percent to the commercial sector and 40 percent to the recreational sector; therefore, the initial TAL would be allocated 16.92 million lb (7,675 mt) to the commercial sector and 11.28 million lb (5,117 mt) to the recreational sector. The commercial quota is then allocated to the coastal states based upon percentage shares specified in the FMP.

The Council and Board adopted the Summer Flounder Monitoring Committee's recommendation. The Council and Board also agreed to set aside 174,750 lb (79.3 mt) of the summer flounder TAL for research activities. After deducting the RSA, the TAL would be divided into a commercial quota of 16.82 million lb (7,630 mt) and a recreational harvest limit of 11.21 million lb (5,085 mt).

In addition, the Commission is expected to maintain the voluntary measures currently in place to reduce regulatory discards that occur as a result of landing limits established by the states. The Commission established a system whereby 15 percent of each state's quota would be voluntarily set aside each year to enable vessels to land an incidental catch allowance after the directed fishery has been closed. The intent of the incidental catch set-aside is to reduce discards by allowing fishermen to land summer flounder caught incidentally in other fisheries during the year, while also ensuring that the state's overall quota is not exceeded. These Commission set-asides are not included in any tables in this document, because NMFS does not have authority to establish such subcategories.

NMFS proposes to implement the 28.2-million lb (12,791-mt) TAL with a 174,750-lb (79.3-mt) RSA, as recommended by the Council and Board. The 11.21-million lb (5,085-mt) recreational harvest limit would be allocated on a coastwide basis. The commercial quota would be allocated to the states as shown in Table 1. Table 1 presents the allocations by state, with and without the commercial portion of the 174,750-lb (79.3-mt) RSA deduction. These state quota allocations are preliminary and are subject to a reduction if there are overages of a state's 2003 quota (using the landings information and procedures described earlier). Any commercial quota adjustments will be published in the **Federal Register** in the final rule implementing these specifications.

TABLE 1.—2004 PROPOSED INITIAL SUMMER FLOUNDER STATE COMMERCIAL QUOTAS

State	Percent share	Commercial quota		Commercial quota less RSA	
		lb	kg [1]	lb	kg [1]
ME	0.04756	8,047	3,650	7,997	3,628
NH	0.00046	78	35	77	35
MA	6.82046	1,154,022	523,461	1,146,871	520,217
RI	15.68298	2,653,560	1,203,647	2,637,117	1,196,188
CT	2.25708	381,898	173,228	379,531	172,154
NY	7.64699	1,293,871	586,896	1,285,853	583,259
NJ	16.72499	2,829,868	1,283,620	2,812,332	1,275,665
DE	0.01779	3,010	1,365	2,991	1,357
MD	2.03910	345,016	156,498	342,878	155,528
VA	21.31676	3,606,796	1,636,032	3,584,445	1,625,894
NC	27.44584	4,643,836	2,106,430	4,615,059	2,093,377
Total	100.00001	16,920,002	7,674,862	16,815,152	7,627,303

[1] Kilograms are as converted from pounds and do not add to the converted total due to rounding.

Scup

Scup was most recently assessed at the 35th Northeast Regional Stock Assessment Review Committee (SARC 35) in June 2002. SARC 35 concluded that scup are no longer overfished, but stock status with respect to overfishing cannot currently be evaluated, due to a lack of reliable discard estimates and information regarding the length composition of scup landings and discards. Scup SSB is increasing. The NEFSC spring survey 3-year average (2001 through 2003) for scup SSB was 3.31 kg/tow, which is about 19 percent higher than the threshold that defines the stock as overfished (2.77 kg/tow).

SARC 35 indicated that relative exploitation rates on scup have declined in recent years, although the absolute value of F cannot be determined. Overall, most recent scup survey observations indicate strong recruitment and some rebuilding of age structure. SARC 35 noted that the stock can likely sustain modest increases in catch, but that such increases should be taken with due consideration of the uncertainties associated with the stock status determination.

The target exploitation rate for scup for 2004 is 21 percent. The FMP specifies that the TAC associated with a given exploitation rate be allocated 78 percent to the commercial sector and 22 percent to the recreational sector. Scup discard estimates are deducted from both sectors' TACs to establish TALs for each sector (TAC less discards = TAL). The commercial TAL is then allocated on a percentage basis to three quota periods, as specified in the FMP: Winter I (January–April)—45.11 percent; Summer (May–October)—38.95 percent; and Winter II (November–December)—15.94 percent.

The proposed scup specifications for 2004 are based on an exploitation rate in the rebuilding schedule that was approved when scup was added to the FMP in 1996, prior to passage of the Sustainable Fisheries Act (SFA). Subsequently, to comply with the SFA amendments to the Magnuson-Stevens Act, the Council prepared Amendment 12, which proposed to maintain the existing rebuilding schedule for scup established by Amendment 8. On April 28, 1999, NMFS disapproved that rebuilding plan for scup because the rebuilding schedule did not appear to be sufficiently risk-averse. NMFS advised the Council that the exploitation rate reflects the overfishing definition (converted to an F rate) which is conceptually sound and supported by NMFS. Therefore, for the short term, the proposed scup specifications for 2004 are based on an exploitation rate of 21 percent. NMFS believes that the long-term risks associated with the disapproved rebuilding plan are not

applicable to the proposed specifications since they apply only for one fishing year and will be reviewed, and modified as appropriate, by the Council and NMFS annually. The scup stock has shown signs of significant rebuilding and is no longer overfished. It is, therefore, not necessary for 2004 to deviate from the specified exploitation rate. Furthermore, setting the scup specifications using an exploitation rate of 21 percent is a more risk-averse approach to managing the resource than not setting any specifications until the Council submits, and NMFS approves, a revised rebuilding plan that complies with all Magnuson-Stevens Act requirements.

The Scup Monitoring Committee reviewed the available data in making its recommendation to the Council. The Scup Monitoring Committee recommended a scup TAC of 13.15 million lb (5,965 mt), and a TAL of 11.0 million lb (4,990 mt), *i.e.*, a 33-percent reduction from the 2003 TAL. The Council and Board rejected the Monitoring Committee's TAC and TAL recommendations, and instead adopted an 18.65-million lb (8,460-mt) TAC and a 16.5-million lb (7,484-mt) TAL (*i.e.*, the same amounts as implemented in 2003). The reduction proposed by the Monitoring Committee was in response to lower survey biomass index in the spring 2003 survey than in the spring 2002 survey. However, the reference point measure specified in the FMP is a three-year moving average of the survey biomass index rather than a single index data point. The rationale of the Council and the Board for the rejection of the Monitoring Committee recommendation was based on a comparison of the three-year moving average biomass index calculated this year (3.31 kg/tow) compared with the index value calculated last year (3.30 kg/tow). Because the value for 2001 through 2003 is slightly higher than the value for 2000 through 2002, the Council did not support a recommendation for a 33-percent decrease in the scup quota. NMFS is proposing to implement the Council's and Board's TAC/TAL recommendation because it is considered likely to achieve the 21-percent exploitation rate that is required by the FMP.

Using the sector allocation specified in the FMP (commercial—78 percent; recreational—22 percent), the Council's recommendation would result in a commercial TAC of 14.55 million lb (6,600 mt) and a recreational TAC of 4.10 million lb (1,860 mt). Using the same commercial and recreational discard estimates used for the 2003 specifications (*i.e.*, 2.08 million lb (943 mt) for the commercial sector, and 70,000 lb (32 mt) for the recreational sector), the Scup MC recommendation would result in an initial commercial TAL of 12.47 million lb (5,656 mt) and recreational harvest limit of 4.03 million lb (1,828 mt). The Council and Board also agreed to set aside 160,000 lb (73 mt) of the scup TAL for research activities. The TAL, after deducting the 160,000-lb (73-mt) RSA, would result in a commercial quota of 12.35 million lb (5,600 mt) and a recreational harvest limit of 3.99 million lb (1,812 mt).

NMFS is proposing to retain the current Winter period possession limits of 15,000 lb (6.8 mt) for Winter I (January–April), with a reduction to 1,000 lb (454 kg) when 80 percent of the Winter I quota is projected to be harvested, and 1,500 lb (680 kg) for Winter II (November–December). Public comments are requested on these proposed measures.

The final rule to implement Framework 3 to the FMP (68 FR 62250, November 3, 2003) implemented a process, for years in which the full Winter I commercial scup quota is not harvested, to allow unused quota from the Winter I period to be rolled over to the quota for the Winter II period. In any year that NMFS determines that the landings of scup during Winter I are less than the Winter I quota for that year, NMFS will, through a notification in the **Federal Register**, increase the Winter II quota for that year by the amount of the Winter I underharvest, and adjust the Winter II possession limits consistent with the amount of the quota increase, based on the possession limits presented in Table 2.

TABLE 2.—POTENTIAL INCREASE IN WINTER II POSSESSION LIMITS BASED ON THE AMOUNT OF SCUP ROLLED OVER FROM WINTER I TO WINTER II PERIOD

Initial Winter II possession limit		Rollover from Winter I to Winter II		Increase in initial Winter II possession limit		Final Winter II possession limit after rollover from Winter I to Winter II	
lb	kg	lb	mt	lb	kg	lb	kg
1,500	680	0–499,999	0–227	0	0	1,500	680
1,500	680	500,000–999,999	227–454	500	227	2,000	907
1,500	680	1,000,000–1,499,999	454–680	1,000	454	2,500	1134
1,500	680	1,500,000–1,999,999	680–907	1,500	680	3,000	1361
1,500	680	2,000,000–2,500,000	907–1,134	2,000	907	3,500	1587

Table 3 presents the 2004 commercial allocation recommended by the Council with, and without, the 160,000-lb (73-mt) RSA deduction. These 2004 allocations are preliminary and may be subject to downward adjustment due to 2003 overages in the final rule implementing these specifications, using the procedures for calculating overages described earlier.

TABLE 3.—2004 PROPOSED INITIAL TOTAL ALLOWABLE CATCH, COMMERCIAL SCUP QUOTA, AND POSSESSION LIMITS, IN LB (KG)

Period	Percent	TAC	Discards	Commercial quota	Commercial quotas less RSA	Possession limits
Winter I	45.11	6,563,505 (2,977,186)	938,288 (425,605)	5,625,217 (2,551,582)	5,568,920 (2,526,045)	[1] 15,000 (6,804)
Summer	38.95	5,667,225 (2,570,636)	810,160 (367,486)	4,857,065 (2,203,150)	4,808,455 (2,181,101)	[3] .....

TABLE 3.—2004 PROPOSED INITIAL TOTAL ALLOWABLE CATCH, COMMERCIAL SCUP QUOTA, AND POSSESSION LIMITS, IN LB (KG)—Continued

Period	Percent	TAC	Discards	Commercial quota	Commercial quotas less RSA	Possession limits
Winter II	15.94	2,319,270 (1,052,014)	331,522 (150,391)	1,987,718 (901,623)	1,967,825 (892,600)	1,500 (680)
Total[2]	100.00	14,550,000 (6,599,837)	2,080,000 (943,482)	12,470,000 (5,656,355	12,345,200 (5,599,745)	....

[1] The Winter I landing limit would drop to 1,000 lb (454 kg) upon attainment of 80 percent of the seasonal allocation.
[2] Totals subject to rounding error.
[3] Not applicable.

The Council and Board did not recommend any other changes to the existing commercial minimum mesh size, minimum mesh threshold possession limit, or the commercial minimum fish size. Therefore, these management measures are proposed to remain unchanged.

Scup Gear Restricted Areas (GRAs)—Request for Comments

In 2000, the 31st Stock Assessment Review Committee (SARC 31) emphasized the need to reduce scup mortality resulting from discards in the scup fishery and in other fisheries. In response to that recommendation, GRAs were established during the 2000 fishing year (65 FR 33486, May 24, 2000, and 65 FR 81761, Dec. 27, 2000) and modified for the 2001 fishing year (66 FR 12902, March 1, 2001). The GRAs prohibit trawl vessels from fishing for, or possessing, certain non-exempt species (*Loligo* squid, black sea bass, and silver hake (whiting)) when fishing with mesh smaller than that required to fish for scup during the effective periods (January 1 through March 15 for the Southern GRA, and November 1 through December 31 for the Northern GRA).

For 2003, the Council recommended allowing vessels to fish for non-exempt species with small mesh in the GRAs, provided they use specially modified trawl nets, and carry observers, consistent with Atlantic Coastal Cooperative Statistics Program observer standards. Instead, NMFS implemented an alternative program (the GRA Exemption Program), requiring 100-percent observer coverage for all vessels fishing with small mesh for non-exempt species in the GRAs, using the modified gear. This alternative imposed significantly fewer administrative and enforcement complexities, and was intended to provide more data to evaluate the effectiveness of the gear modifications (68 FR 60, January 2, 2003).

Since the final rule for the 2003 fishing year, the Council has reviewed a number of analyses conducted by Council staff and others and noted that in some years the distribution of *Loligo* squid and scup overlapped, increasing the potential for scup discards. However, they were concerned that *Loligo* squid fishermen would be restricted from areas and during times when *Loligo* squid and scup did not co-occur. As such, the Council recommended a GRA Access Program, patterned after the program used to provide access to sea scallops in the groundfish closed areas in 1999 through 2001, that would allow small mesh fisheries to occur in the GRAs until a pre-determined level of scup discards was reached to trigger a closure to small mesh gear. The triggers for the Northern and Southern GRA would be 50,000 lb (22.68 mt) and 70,000 lb (31.75 mt) of scup discards, respectively. These were chosen by the Council as appropriate levels to indicate that discards had become significant and that the areas should be closed to small mesh fisheries. The Council recommended that the NMFS Northeast Fisheries Science Center determine the level of observer coverage necessary to provide an accurate estimate of scup discards with a high confidence level.

The Council recommended the following requirements of the GRA Access Program:

(1) All qualified vessels that wish to participate in the GRA Exemption Program must enroll in the program and obtain a Letter of Authorization from the Regional Administrator;

(2) All participating vessels must have installed on board an operational vessel monitoring system (VMS) unit;

(3) A vessel planning to fish in the GRAs must submit a report through the VMS e-mail messaging system of its intention to fish in the GRA prior to the 25th of the month before the month in which the anticipated trip(s) are to be taken. The report must include the following information: Vessel name and permit number; owner and operator's names; owner and operator's phone numbers; and number of trips anticipated in the GRA during the month;

(4) In addition to the above advance notice for accessing the GRA, for the purpose of randomly selecting vessels to carry a NMFS-certified observer, a vessel must notify NMFS of its intention to fish in the GRA at least 5 working days prior to the date it intends to depart on each trip into a GRA. For each of these reports, vessels must submit the following information: Vessel name and permit number; owner and operator's names; owner and operator's phone numbers; date and time of departure; port of departure; and the specific GRA to be fished;

(5) A vessel which does not have a valid Coast Guard Inspection Sticker is deemed inadequate or unsafe for purposes of carrying a NMFS-certified observer and will be prohibited from participating in the Area Access Program until the vessel is inspected by the Coast Guard and receives its inspection sticker;

(6) On the day that the vessel leaves port to fish under the GRA Access Program, the vessel owner or operator must declare the vessel into the GRA Access Program through the VMS prior to leaving port;

(7) The vessel owner will be responsible for paying the cost of the observer; and

(8) The GRA Access Program for each area would end when the discard of scup was projected to be 50,000 lb (22.68 mt) for the Northern GRA and 70,000 lb (31.75 mt) for the Southern GRA. Termination of the GRA Access Program for each area will be made through notification in the **Federal Register**.

The Council recommended that once the triggers are reached and the GRAs are closed to small mesh fishermen, the existing GRA Exemption Program (described at 68 FR 60) resume.

NMFS proposes to implement the Council's recommendations regarding access to the GRAs as described above, with the exception of the resumption of the GRA Exemption program once a

discard trigger is met, the requirement to notify NMFS of the intention to fish in the GRA the month before the month in which the anticipated trip(s) are to be taken, and the random selection of vessels to carry a NMFS-certified observer. NMFS maintains that the purpose of the GRA Access Program should be to record data regarding the use and effectiveness of gear modifications employed by the participating vessels in attempts to reduce scup bycatch, and also to monitor scup discards so that the GRA Access Program can be discontinued when the trigger is reached. Also, because the trigger amount involves only scup that are discarded, only limited information must be collected under the GRA Access Program. The Northeast Fisheries Science Center has recommended that NMFS utilize individuals to serve as "scup GRA monitors," rather than NMFS-certified observers as required under the current regulations, to collect data on scup discards. A similar system exists for monitoring in the Atlantic sea scallop fishery. NMFS proposes that approved scup GRA monitors be placed on 100 percent of the vessels that participate in the GRA Access program. NMFS is seeking comment on the implementation of the proposed GRA Access Program and the use of NMFS-approved scup GRA monitors.

Black Sea Bass

Black sea bass was last assessed in June 1998 at SARC 27, which indicated that the species was overexploited and at a low biomass level. However, the best available current information on stock status indicates that the stock has increased in recent years and is no longer overfished. The SSB estimate for 2003 (using a 3-year moving average of 2001–2003) is 0.509 kg/tow, about 30 percent higher than the 2000–2002 average of 0.391 kg/tow.

For 2004, the target exploitation rate for black sea bass is 25 percent. The Black Sea Bass Monitoring Committee reviewed the stock status and the projections based upon these data and recommended that the TAL for 2004 be set at 8 million lb (3,629 mt), an increase of almost 18 percent relative to the 2003 TAL. The FMP specifies that the TAL associated with a given exploitation rate be allocated 49 percent to the commercial sector and 51 percent to the recreational sector; therefore, the initial TAL would be allocated 3.92 million lb (1,778 mt) to the commercial sector and 4.08 million lb (1,851 mt) to the recreational sector. The Council and Board adopted this TAL, indicating that it would achieve the 25-percent exploitation rate, and agreed to set aside 134,792 lb (61 mt) for research activities. After deducting the RSA, the TAL would be divided into a commercial quota of 3.86 million lb (1,751 mt) and a recreational harvest limit of 4.01 million lb (1,819 mt). The Council and Board recommended that all other measures remain unchanged. NMFS proposes to implement the 8.0-million lb (3,629-mt) TAL with a 134,792-lb (61-mt) RSA, as recommended by the Council and Board. The final rule to implement Amendment 13 to the FMP (68 FR 10181, March 4, 2003) established an annual (calendar year) coastwide quota for the commercial black sea bass fishery to replace the quarterly quota allocation system.

Classification

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

The Council prepared an Initial Regulatory Flexibility Analysis (IRFA) that describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action are contained in the preamble to this rule. This proposed rule does not duplicate, overlap, or conflict with other Federal rules. A copy of the complete IRFA can be obtained from the Northeast Regional Office of NMFS (*see* **ADDRESSES**) or via the Internet at *http:/www.nero.nmfs.gov*. A summary of the analysis follows.

The economic analysis assessed the impacts of the various management alternatives. In the EA, the no action alternative is defined as follows: (1) No proposed specifications for the 2004 summer flounder, scup, and black sea bass fisheries would be published; (2) the indefinite management measures (minimum sizes, bag limits, possession limits, permit and reporting requirements, etc.) would remain unchanged; (3) there would be no quota set-aside allocated to research in 2004; (4) the existing GRA regulations would remain in place for 2004; and (5) there would be no specific cap on the allowable annual landings in these fisheries (*i.e.*, there would be no quota). Implementation of the no action alternative would be inconsistent with the goals and objectives of the FMP, its implementing regulations, and the Magnuson-Stevens Act. In addition, the no action alternative would substantially complicate the approved management program for these fisheries, and would very likely result in overfishing of the resources. Therefore, the no action alternative is not considered to be a reasonable alternative to the preferred action.

Alternative 1 consists of the harvest limits proposed by the Council and Board for summer flounder, scup, and black sea bass. Alternative 2 consists of the most restrictive quotas (*i.e.*, lowest landings) considered by the Council and the Board for all of the species. Alternative 3 consists of the least restrictive quotas (*i.e.*, highest landings) considered by the Council and Board for all three species. Although Alternative 3 would result in higher landings for 2004, it would also likely exceed the biological targets specified in the FMP.

First, a preliminary adjusted quota was calculated by deducting the RSA from the TAL. Then, the preliminary commercial quota overages for the 2003 fishing year were deducted from the initial 2004 quota alternatives. The quota overages were calculated according to the procedures described earlier, using available data as of September 2003. The resulting preliminary adjusted commercial quotas alternatives presented in Table 4 are provisional and may be further adjusted in the final rule implementing the 2004 specifications.

TABLE 4.—COMPARISON OF THE ALTERNATIVES OF QUOTA COMBINATIONS REVIEWED

[In million lb]

	2004 initial TAL	2004 RSA	2003 Commercial quota overage	2004 Preliminary adjusted commercial quota*	2004 Preliminary recreational harvest limit
Quota Alternative 1 (Preferred)					
Summer Flounder Preferred Alternative	*28.20	0.17	0.05	16.77	11.21
Scup Preferred Alternative (Status quo)	16.50	0.16	0.00	12.35	3.99

TABLE 4.—COMPARISON OF THE ALTERNATIVES OF QUOTA COMBINATIONS REVIEWED—Continued

[In million lb]

	2004 initial TAL	2004 RSA	2003 Commercial quota overage	2004 Preliminary adjusted commercial quota*	2004 Preliminary recreational harvest limit
Black Sea Bass Preferred Alternative	8.00	0.13	0.00	3.86	4.01
Quota Alternative 2 (Most Restrictive)					
Summer Flounder	23.30	0.17	0.05	13.83	9.25
Scup Alternative 2	11.00	0.16	0.00	8.06	2.78
Black Sea Bass Alternative 2 (Status Quo)	6.80	0.13	0.00	3.27	3.40
Quota Alternative 3 (Least Restrictive)					
Summer Flounder Alternative 3	30.10	0.17	0.05	17.91	11.97
Scup Alternative 3	22.00	0.16	0.00	16.64	5.20
Black Sea Bass Alternative 3	8.90	0.13	0.00	4.30	4.47

*Note that preliminary quotas are provisional and may change to account for overage of the 2003 quotas.

Table 5 presents the percent change associated with each of commercial quota alternatives (adjusted for overages and RSA) compared to the final adjusted quotas for 2003.

TABLE 5.—PERCENT CHANGE ASSOCIATED WITH ADJUSTED COMMERCIAL QUOTA ALTERNATIVES COMPARED TO 2003 ADJUSTED QUOTA

	Total changes including overages and RSA		
	Quota alternative 1 (preferred)	Quota alternative 2 (most restrictive)	Quota alternative 3 (least restrictive)
Summer Flounder			
Aggregate Change	+21.30	*+0.03	+29.55
Scup			
Aggregate Change	*+2.07	−33.39	+37.52
Black Sea Bass			
Aggregate Change	+28.24	*+8.64	+42.86

*Denotes status quo management measures. The status quo or "no action" measure for summer flounder, scup, and black sea bass refers to what most likely will occur in the absence of implementing the proposed regulation.

All vessels that would be impacted by this proposed rulemaking are considered to be small entities; therefore, there would be no disproportionate impacts between large and small entities. The categories of small entities likely to be affected by this action include commercial and charter/party vessel owners holding an active Federal permit for summer flounder, scup, or black sea bass, as well as owners of vessels that fish for any of these species in state waters. The Council estimates that the proposed 2004 quotas could affect 2,122 vessels that held a Federal summer flounder, scup, and/or black sea bass permit in 2002. However, the more immediate impact of this rule will likely be felt by the 1,041 vessels that actively participated (*i.e.*, landed these species) in these fisheries in 2002.

The Council estimated the total revenues derived from all species landed by each vessel during calendar year 2002 to determine a vessel's dependence and revenue derived from a particular species. This estimate provided the base from which to compare the effects of the proposed quota changes from 2003 to 2004.

The Council's analysis of the harvest limits in Alternative 1 (Preferred Alternative) indicated that these harvest levels would produce a revenue increase for 1,036 commercial vessels that are expected to be impacted by this rule. The remaining 5 vessels, which landed scup only, were projected to incur small revenue losses (*i.e.*, less than 5 percent) due to the decrease in the adjusted scup quota. No vessels were expected to have revenue losses of greater than 5 percent.

The Council also analyzed changes in total gross revenue that would occur as a result of the quota alternatives. Assuming 2002 ex-vessel prices (summer flounder—$1.51/lb; scup—$0.66/lb; and black sea bass—$1.73/lb), the 2004 quotas in Preferred Alternative 1 (after overages have been applied) would increase total summer flounder, scup, and black sea bass revenues by approximately $4.4 million, $165,000, and $1.5 million, respectively, relative to 2003 revenues.

Assuming that the total ex-vessel gross revenue associated with the Preferred Alternative for each fishery is

distributed equally among the vessels that landed that species in 2002, the average increase in gross revenue per vessel associated with the preferred quota would be $5,585 for summer flounder, $331 for scup, and $1,998 for black sea bass. The number of vessels landing summer flounder, scup, and black sea bass in 2002 was 796, 499, and 736, respectively.

The overall increase in gross revenue associated with the three species combined in 2004 compared to 2003 is approximately $6.1 million (assuming 2002 ex-vessel prices) under the Preferred Alternative. If this amount is distributed equally among the 1,041 vessels that landed summer flounder, scup, and/or black sea bass in 2002, the average increase in revenue would be approximately $5,842 per vessel.

The Council's analysis of the harvest limits of Alternative 2 (*i.e.*, the most restrictive harvest limits) indicated that these harvest limits would produce a revenue increase for 371 commercial vessels, primarily because a large proportion of their revenues were derived from black sea bass, and a revenue loss for the other 670 commercial vessels expected to be impacted by this rule. Assuming 2002 ex-vessel prices as described above, the 2004 quotas in Alternative 2 (after overages have been applied) would increase total summer flounder and black sea bass revenues by approximately $6,600 and $400,000, respectively, and decrease total scup revenues by approximately $2.7 million, relative to 2003 revenues.

Assuming that the total ex-vessel gross revenue associated with Alternative 2 is distributed equally among the vessels that landed that species in 2002, the average change in gross revenue per vessel associated with Alternative 2 would be an $8 increase for summer flounder, a $5,343 decrease for scup, and a $611 increase for black sea bass. The number of vessels landing summer flounder, scup, and black sea bass in 2002 was 796, 499, and 736, respectively.

The overall reduction in gross revenue associated with the three species combined in 2004 compared to 2003 is approximately $2.2 million (assuming 2002 ex-vessel prices) under Alternative 2. If this amount is distributed equally among the 1,041 vessels that landed summer flounder, scup, and/or black sea bass in 2002, the average decrease in revenue would be approximately $2,123 per vessel.

The Council's analysis of the harvest limits of Alternative 3 (*i.e.*, the least restrictive harvest limits) indicated that these harvest limits would produce a revenue increase for all 1,041 commercial vessels. Assuming 2002 ex-vessel prices as described above, the 2004 quotas in Alternative 3 (after overages have been applied) would increase total summer flounder, scup, and black sea bass revenues by approximately $6.2 million, $3.0 million, and $2.2 million, respectively, relative to 2003 revenues.

Assuming that the total ex-vessel gross revenue associated with Alternative 3 is distributed equally between the vessels that landed that species in 2002, the average increase in gross revenue per vessel associated with Alternative 3 would be $7,748 for summer flounder, $6,005 for scup, and $3,032 for black sea bass. The number of vessels landing summer flounder, scup, and black sea bass in 2002 was 796, 499, and 736, respectively.

The overall increase in gross revenue associated with the three species combined in 2004 compared to 2003 is approximately $11.4 million (assuming 2002 ex-vessel prices) under Alternative 3. If this amount is distributed equally among the 1,041 vessels that landed summer flounder, scup, and/or black sea bass in 2002, the average increase in revenue would be approximately $10,947 per vessel.

The Council also prepared an analysis of the alternative recreational harvest limits. The 2004 recreational harvest limits were compared with previous years through 2002, the most recent year with complete recreational data.

Landing statistics from the last several years show that recreational summer flounder landings have generally exceeded the recreational harvest limits, ranging from a 5-percent overage in 1993 to a 122-percent overage in 2000. In 2001, summer flounder recreational landings were 11.64 million lb (5,280 mt), exceeding the harvest limit of 7.16 million lb (3,248 mt) by 63 percent. In 2002, recreational landings were 7.96 million lb (3,611 mt), 18 percent below the recreational harvest limit of 9.72 million lb (4,409 mt).

For summer flounder, the adjusted 2004 preferred recreational harvest limit of 11.21 million lb (5,085 mt) in Alternative 1 would be greater than the recreational harvest limits for the years 1993 through 2003. The adjusted summer flounder Alternative 2 recreational harvest limit of 9.25 million lb (4,196 mt) (the status quo alternative) would be less than 1 percent lower than the 2003 recreational harvest limit, and represents a 16-percent increase from 2002 recreational landings. The adjusted Alternative 3 recreational harvest limit of 11.97 million lb (5,430 mt) would be a 29-percent increase from the 2003 recreational harvest limit, and represents a 50-percent increase from 2002 landings. If Alternative 1, 2, or 3 is chosen, it is possible that more restrictive management measures may be required to prevent anglers from exceeding the 2004 recreational harvest limit, depending upon the effectiveness of the 2003 recreational management measures. More restrictive regulations could affect demand for party/charter boat trips. However, party/charter activity in the 1990s has remained relatively stable, so the effects may be minimal. Currently, neither behavioral or demand data are available to estimate how sensitive party/charter boat anglers might be to proposed fishing regulations. Overall, it is expected that positive social and economic impacts would occur as a result of the 21-percent increase in the recreational harvest limit, relative to 2003. The Council intends to recommend specific measures to attain the 2004 summer flounder recreational harvest limit in December 2003, and will provide additional analysis of the measures upon submission of its recommendations in early 2004.

Scup recreational landings declined over 89 percent for the period 1991 to 1998, then increased by 517 percent from 1998 to 2000. In 2002, recreational landings were 3.62 million lb (1,642 mt). Under Preferred Alternative 1 (the status quo alternative), the adjusted scup recreational harvest limit for 2004 would be 3.99 million lb (1,810 mt), less than 1 percent lower than the 2003 recreational harvest limit, and represents a 10-percent increase from 2002 recreational landings. The Alternative 2 scup recreational harvest limit of 2.78 million lb (1,261 mt) for 2004 would be 31 percent less than the 2003 recreational harvest limit, and 23 percent less than 2002 recreational landings. The Alternative 3 scup recreational harvest limit of 5.20 million lb (2,359 mt) in 2004 would be an increase of 30 percent from the 2003 recreational harvest limit and an increase of 44 percent from 2002 recreational landings. With Alternative 2, and possibly Alternative 1, more restrictive management measures might be required to prevent anglers from exceeding the 2003 recreational harvest limit, depending largely upon the effectiveness of the 2003 recreational management measures. As described above for the summer flounder fishery, the effect of greater restrictions on scup party/charter boats is unknown at this time. Although the proposed recreational harvest limit is approximately 20,000 lb (9.07 mt) less

than the adjusted limit for 2003, it is not likely that more effort controls (e.g., bag limits) will be required to constrain 2004 recreational landings. Overall, positive social and economic impacts are expected to occur as a result of the scup recreational harvest limit for 2004. The Council intends to recommend specific measures to attain the 2004 scup recreational harvest limit in December 2003, and will provide additional analysis of the measures upon submission of its recommendations early in 2004.

Black sea bass recreational landings increased slightly from 1991 to 1995. Landings decreased considerably from 1996 to 1999, and then substantially increased in 2000. In 2001 and 2002, recreational landings were 3.42 million lb (1,551 mt) and 4.46 million lb (2,023 mt), respectively. For the recreational fishery, the adjusted 2004 harvest limit under Alternative 1 is 4.01 million lb (1,558 mt), a 2-percent increase from the 2003 recreational harvest limit and a 10-percent decrease from 2002 recreational landings. Under Alternative 2, the 2004 recreational harvest limit would be 3.40 million lb (1,542 mt), a less than 1-percent decrease from the 2003 recreational harvest limit and a 23-percent decrease from 2002 recreational landings. As such, this alternative could cause some negative economic impacts due to decreased fishing opportunity, depending upon the effectiveness of the 2002 recreational black sea bass measures. The 2004 recreational harvest limit under Alternative 3 would be 4.47 million lb (2,027 mt), a 30-percent increase from the 2003 recreational harvest limit and a less than 1-percent decrease from 2002 recreational landings. Alternative 3 would likely result in positive economic impacts on the recreational fishery because of an increase in fishing opportunities. The Council intends to recommend specific measures to attain the 2004 black sea bass recreational harvest limit in December 2003, and will provide additional analysis of the measures upon submission of its recommendations early in 2004. Overall, positive social and economic impacts are expected to occur as a result of the preferred black sea bass recreational harvest limit for 2004.

The costs and benefits of allowing small mesh experimental nets to fish in the GRAs under the GRA Exemption Program were described in the proposed rule (67 FR 70904, November 27, 2002) and the final rule (68 FR 60, January 2, 2003) implementing the 2003 specifications. Those impacts are not repeated here. These costs and benefits could also be realized under the proposed 2004 GRA Access Program. The costs would include gear changes to accommodate mesh modifications and fees for at-sea observer coverage; the benefits would be derived from an increase in *Loligo* squid landings. Thus, positive economic impacts on the *Loligo* squid fishery would be expected relative to the GRA measure without the small mesh experimental net provision. However, in order to participate in the 2004 GRA Access Program, vessels would have to comply with new requirements that are analyzed below.

All vessels participating in the GRA Access Program must have installed on board an operational VMS unit. VMS is a comprehensive information system that serves as an important enforcement and catch monitoring tool, and has been in place in New England for the past several years for Atlantic sea scallops, Northeast multispecies, and Atlantic herring. In New England, this type of system has been employed to replace the Days-at-Sea call-in system, provide accurate location data, and provide information used in other analyses. VMS requirements are located at 50 CFR 648.9.

It is estimated that the initial maximum cost of a VMS to vessel owners will be approximately $5,000 to $6,000 per vessel. The annual maintenance fee for the VMS system is approximately $1,800 per vessel. Based on the number of vessels that had directed *Loligo* squid trips (i.e., greater than 50 percent of the total landings were *Loligo* squid) in the GRAs (1996–1999) it is expected that up to 72 vessels may participate in this program. The VMS monitoring system currently employed by NMFS to monitor vessel activity for the Atlantic Sea Scallop FMP, Northeast Multispecies FMP, and Atlantic Herring FMP is expected to be sufficient to monitor additional vessel activity (up to 72 more vessels) proposed under the GRA Access Program. Therefore, the implementation of the VMS system under the GRA Access Program is not expected to increase government costs.

A survey of small Northeast fishing vessels (less than 65 feet in length) whose primary gear was otter trawl and reported landings in New England indicated that average total operating cost per trip for small trawlers in 1996 was $267. A survey of large Northeast fishing vessels (greater than 65 feet in length) whose primary gear was otter trawl and reported landings in New England in 1997 indicated that the average total operating cost per trip for large trawlers in 1997 was $2,608. For both surveys, trip expenses were divided into eight categories (fuel, oil, ice, food and water, lumpers fees, supplies, consignment fees, and other expenses). More detail on the surveys is presented in Amendment 13 to the Summer Flounder, Scup, and Black Sea Bass FMP.

The utilization of the proposed VMS system under the GRA Access Program may substantially increase operating costs and decrease profits for vessels that elect to participate in the program. Nevertheless, participation in this program is not mandatory and it is expected that individual vessels will assess changes in costs and revenues to their operations before they participate in this program. If a vessel owner chooses to participate in the program, it is likely that the additional costs of carrying an observer and using the modified gear would be offset by increased landings of non-exempt species (*Loligo* squid, silver hake (whiting), and black sea bass). As such, an increase in *Loligo* landings relative to 2003 would have positive economic impacts on the *Loligo* fishery, relative to the status quo. However, it is not possible to assess the exact monetary value associated with the additional harvest because quantitative data on these nets are limited.

The cost of one at-sea observer day for a NMFS-certified observer is approximately $1,150, which would be paid by the vessel owner intending to fish in the GRAs. Fishing trips to the Southern GRA are expected to last approximately 4 days, and trips to the Northern GRA are expected to last approximately 3 days. Therefore, the total observer costs are estimated to be $4,600 and $3,450 for trips in the Southern and Northern GRAs, respectively. The observer costs would be in addition to operating costs. The average ex-vessel value (1996–1999) of *Loligo* in directed trips in the Southern GRA is $24,013 and in the Northern GRA was $4,456. These values are based on the average landings of *Loligo* from 1996–1999 in the GRAs, and the average ex-vessel value (1996–1999) of *Loligo*, adjusted to 2001 dollars. Therefore, the requirement to carry at-sea observers would increase vessel operating costs. However, larger vessels fishing in the Southern GRA would be most likely to recoup any increased operating costs due to their greater harvest capacity. The observer requirement is anticipated to impose a larger negative impact on the profits of vessels fishing in the Northern GRA given the average ex-vessel value of *Loligo* in directed trips, as described above. However, as described above, because only limited information must be collected under the GRA Access Program, NMFS is

proposing to use approved scup GRA monitors rather than NMFS-certified observers. This likely would reduce the costs associated with data collection for each participating vessel. Individual vessels would need to assess changes in costs and revenues upon their operations before participating in the non-mandatory Scup GRA Access Program. An analysis of Vessel Trip Report (VTR) data (1996–1999) indicates that, on average, 72 vessels had directed *Loligo* trips (i.e., greater than 50 percent of the total landings were *Loligo*) in the GRAs, for a total of 209 trips. Assuming that all of these vessels choose to fish the same number of trips in the GRAs, a 100-percent observer requirement would mean that approximately 209 trips would be required to carry observers in the GRAs. The actual total number of trips required to carry an observer would vary, depending upon the individual decisions of vessel owners regarding the potentially increased profitability of fishing in the GRAs versus additional observer costs.

The proposed (status quo) commercial scup possession limits for Winter I (15,000 lb (6.8 mt) per trip) and Winter II (1,500 lb (680 kg) per trip) were chosen as an appropriate balance between the economic concerns of the industry (e.g., landing enough scup to make the trip economically viable) and the need to ensure the equitable distribution of the quota over the period. The proposed Winter I possession limit was selected specifically to coordinate with the 15,000 lb (6.8 mt) per week possession limits recommended by the Commission to be implemented by most states while satisfying concerns about enforcement of possession limits. Changes in possession limits can impact profitability in various ways. These impacts would vary depending on fishing practices. These possession limits are expected to constrain commercial landings to the commercial TAL, and distribute landings equitably throughout the periods to avoid derby-style fishing effort and associated market gluts. According to anecdotal information potential price fluctuations occur as result of irregular supply. The recommended possession limits for Winter I would allow fishermen to determine when the best time for them to fish and further help to avoid market gluts and unsafe fishing practices. Because the Council determined that the status quo scup possession limits minimize negative economic impacts on the industry, alternatives to the proposed possession limits were not analyzed.

The final rule to implement Framework 3 to the FMP (68 FR 62250, November 3, 2003) implemented a process, for years in which the full Winter I commercial scup quota is not harvested, to allow unused quota from the Winter I period to be rolled over to the quota for the Winter II period. In any year that NMFS determines that the landings of scup during Winter I are less than the Winter I quota for that year, NMFS will, through a notification in the **Federal Register,** increase the Winter II quota for that year by the amount of the Winter I underharvest, and adjust the Winter II possession limits consistent with the amount of the quota increase, based on the possession limits established through the annual specifications-setting process.

Framework 3 allows for the transfer of unused scup quota from Winter I to Winter II period. A complete description and impact analysis of the provision allowing the rollover of unused quota from Winter I to Winter II period is found in Framework 3. Overall it is anticipated that allowing the transfer of unused quota from Winter I to Winter II period will result in positive economic and social impacts to fishermen and communities as quota not landed in Winter I due to poor weather conditions, changes in the distribution of scup, or market conditions (*i.e.*, low price) will not be lost. In addition, any scup regulatory discards which have occurred in Winter II (*i.e.*, when the fishery closes early) can be converted into landings.

The summer flounder RSA allocation in the Preferred Alternative, if made available to the commercial fishery, could be worth as much as $263,873 dockside, based on a 2002 ex-vessel price of $1.51/lb. Assuming an equal reduction in fishing opportunity among all active vessels (*i.e.*, the 796 vessels that landed summer flounder in 2002), this could result in a loss in potential revenue of approximately $331 per vessel. Changes in the summer flounder recreational harvest limit as a result of the 174,750-lb (79-mt) RSA are not expected to be significant. The RSA would reduce the recreational harvest limit from 11.28 million lb (5,117 mt) to 11.21 million lb (5,085 mt). It is unlikely that the recreational possession, size, or seasonal limits would change as the result of the RSA allocation.

The scup RSA allocation in the Preferred Alternative, if made available to the commercial fishery, could be worth as much as $105,600 dockside, based on a 2002 ex-vessel price of $0.66/lb. Assuming an equal reduction in fishing opportunity for all active commercial vessels (*i.e.*, the 499 vessels that landed scup in 2002), this could result in a loss of potential revenue of approximately $212 per vessel. Changes in the scup recreational harvest limit as a result of the RSA allocation would be insignificant. The 160,000-lb (73-mt) RSA would reduce the scup recreational harvest limit from 4.03 million lb (1,828 mt) to 3.99 million lb (1,812 mt). It is unlikely that scup recreational possession, size, or seasonal limits would change as the result of the RSA allocation.

The black sea bass RSA allocation in the Preferred Alternative, if made available to the commercial fishery, could be worth as much as $233,190 dockside, based on a 2002 ex-vessel price of $1.73/lb. Assuming an equal reduction in fishing opportunity for all active commercial vessels (*i.e.*, the 736 vessels that caught black sea bass in 2002), this could result in a loss of approximately $317 per vessel. Changes in the black sea bass recreational harvest limit as a result of the RSA allocation would be insignificant. The 134,792-lb (61-mt) RSA would reduce the black sea bass recreational harvest limit from 4.08 million lb (1,851 mt) to 4.01 million lb (1,819 mt). It is unlikely that the black sea bass possession, size, or seasonal limits would change as the result of this RSA allocation.

Overall, long-term benefits are expected as a result of the RSA program due to improved fisheries data and information. If the total amount of quota set-aside is not awarded for any of the three fisheries, the unused set-aside amount will be restored to the appropriate fishery's TAL.

In summary, the 2004 commercial quotas and recreational harvest limits contained in the Preferred Alternative would result in substantially higher summer flounder and black sea bass landings and a small increase in scup landings, relative to 2003. The proposed specifications contained in the Preferred Alternative were chosen because they allow for the maximum level of landings, yet still achieve the fishing mortality and exploitation targets specified in the FMP. While the commercial quotas and recreational harvest limits specified in Alternative 3 would provide for even larger increases in landings and revenues, they would not achieve the fishing mortality and exploitation targets specified in the FMP.

The proposed possession limits for scup were chosen in part because they are intended to provide for economically viable fishing trips that will be equitably distributed over the entire quota period.

The economic effects of the existing GRAs will not change as a result of this proposed rule. The proposed action would allow small-mesh vessels to fish for non-exempt species in the GRAs until a pre-determined level of scup discards is reached to trigger a closure to small mesh gear. Although the Scup GRA Access Program does impose additional voluntary compliance and operating costs, this alternative is expected to minimize both the reporting burden on small entities and the administrative support required of NMFS to oversee the program. The intent of the observer coverage is to record data regarding the use and effectiveness of any gear modifications employed by the observed vessels in attempts to reduce scup bycatch, and also to monitor scup discards so that the GRA Exemption Program can be discontinued when the trigger is reached.

Finally, the revenue decreases associated with the RSA program are expected to be minimal, and are expected to yield important long-term benefits associated with improved fisheries data. It should also be noted that fish harvested under the RSAs would be sold, and the profits would be used to offset the costs of research. As such, total gross revenue to the industry would not decrease if the RSAs are utilized.

This proposed rule contains collection-of-information requirements subject to review and approval by OMB under the Paperwork Reduction Act (PRA). These requirements have been submitted to OMB for approval. Public reporting burden for these collections of information, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information, is estimated to average 5 seconds per response for automatically-transmitted data from a VMS (transmitted 24 times per day), 10 minutes per response for the daily transmission of discard data collected by the scup GRA monitor, 2 minutes per response for a request for GRA authorization, 2 minutes for a notification at least 5 days prior to departing on a fishing trip to a GRA, and 2 minutes for a report declaring into the fishery on the day the vessel leaves port to fish under the GRA Access Program.

Public comment is sought regarding whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to Patricia A. Kurkul (*see* **ADDRESSES**), and by e-mail to *David_Rostker@omb.eop.gov*, or fax to (202) 395–7285.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: November 21, 2003.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 648 is proposed to be amended as follows:

PART 648—FISHERIES OF THE NORTHEASTERN UNITED STATES

1. The authority citation for part 648 continues to read as follows:

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

2. In § 648.14, paragraph (a)(122) is revised to read as follows:

§ 648.14 Prohibitions.

(a) * * *

(122) Fish for, catch, possess, retain or land *Loligo* squid, silver hake, or black sea bass in or from the areas and during the time periods described in § 648.122(a) or (b) while in possession of any trawl nets or netting that do not meet the minimum mesh restrictions or that are obstructed or constricted as specified in § 648.122 and § 648.123(a), unless the nets or netting are stowed in accordance with § 648.23(b), or unless the vessel is in compliance with the Gear Restricted Area Access Program requirements specified at § 648.122(d).

3. In § 648.122, paragraphs (a)(1), (b)(1), and (d) are revised to read as follows:

§ 648.122 Time and area restrictions.

(a) * * *

(1) *Restrictions.* From January 1 through March 15, all trawl vessels in the Southern Gear Restricted Area that fish for or possess non-exempt species as specified in paragraph (a)(2) of this section, except for vessels participating in the Gear Restricted Area Access Program as specified in paragraph (d) of this section, must fish with nets that have a minimum mesh size of 4.5 inches (11.43 cm) diamond mesh, applied throughout the codend for at least 75 continuous meshes forward of the terminus of the net. For codends with fewer than 75 meshes, the minimum-mesh-size codend must be a minimum of one-third of the net, measured from the terminus of the codend to the headrope, excluding any turtle excluder device extension, unless otherwise specified in this section. The Southern Gear Restricted Area is an area bounded by straight lines connecting the following points in the order stated (copies of a chart depicting the area are available from the Regional Administrator upon request):

SOUTHERN GEAR RESTRICTED AREA

Point	N. Lat.	W. Long.
SGA1	39°20′	72°50′
SGA2	39°20′	72°25′
SGA3	38°00′	73°55′
SGA4	37°00′	74°40′
SGA5	36°30′	74°40′
SGA6	36°30′	75°00′
SGA7	37°00′	75°00′
SGA8	38°00′	74°20′
SGA1	39°20′	72°50′

(b) * * *

(1) *Restrictions.* From November 1 through December 31, all trawl vessels in the Northern Gear Restricted Area I that fish for or possess non-exempt species as specified in paragraph (b)(2) of this section, except for vessels participating in the Gear Restricted Area Access Program as specified in paragraph (d) of this section, must fish with nets that have a minimum mesh size of 4.5 inches (11.43 cm) diamond mesh, applied throughout the codend for at least 75 continuous meshes forward of the terminus of the net. For codends with fewer than 75 meshes, the minimum-mesh-size codend must be a minimum of one-third of the net, measured from the terminus of the codend to the headrope, excluding any turtle excluder device extension, unless otherwise specified in this section. The Northern Gear Restricted Area I is an area bounded by straight lines connecting the following points in the order stated (copies of a chart depicting the area are available from the Regional Administrator upon request):

NORTHERN GEAR RESTRICTED AREA I

Point	N. Lat.	W. Long.
NGA1	41°00′	71°00′
NGA2	41°00′	71°30′
NGA3	40°00′	72°40′
NGA4	40°00′	72°05′
NGA1	41°00′	71°00′

* * * * *

(d) *Gear Restricted Area Access Program*—Vessels that are subject to the provisions of the Southern and Northern Gear Restricted Areas, as specified in paragraphs (a) and (b) of this section, respectively, may fish for, or possess, non-exempt species using trawl nets having a minimum mesh size less than that specified in paragraphs (a) and (b) of this section, provided that:

(1) The vessel possesses on board all valid required Federal fishery permits and a Scup GRA Access Program Authorization issued by the Regional Administrator, Northeast Region, and is in compliance with all conditions and restrictions specified in the Scup GRA Access Program Authorization;

(2) The vessel carries a NMFS-approved scup GRA monitor on board if any portion of the trip will be, or is, in a GRA;

(3) The vessel has installed on board an operational VMS unit that meets the requirements specified in § 648.9;

(4) In addition to the above advance notice for accessing a GRA, a vessel owner or operator must notify NMFS of his/her intention to fish in the GRA at least 5 working days prior to the date he/she intends to depart on each trip into a GRA. For each of these reports, a vessel owner or operator must submit the following information: Vessel name and permit number; owner and operator's names; owner and operator's phone numbers; date and time of departure; port of departure; and the specific GRA to be fished;

(5) On the day that the vessel leaves port to fish under the GRA Access Program, the vessel owner or operator must declare the vessel into the GRA Access Program, in accordance with instructions to be provided by the Regional Administrator prior to the vessel leaving port;

(6) The owner or operator of a vessel with a GRA Access Authorization submit reports through the VMS, in accordance with instructions to be provided by the Regional Administrator, for each day fished when declared into the GRA Access Program. The reports must be submitted in 24-hour intervals, for each day beginning at 0000 hours and ending at 2400 hours. The reports must be submitted by 0900 hours of the following day and must include the following information:

(i) Total pounds/kilograms of scup discarded.

(ii) [Reserved]

(7) A vessel which does not have a valid Coast Guard Inspection Sticker is deemed inadequate or unsafe for purposes of carrying a NMFS-approved GRA monitor and will be prohibited from participating in the GRA Access Program until the vessel is inspected by the Coast Guard and receives its inspection sticker;

(8) The vessel owner will be responsible for paying the cost of the GRA monitor; and

(9) The GRA Access Program for each GRA will end when the discard of scup is projected to be 50,000 lb (22.68 mt) for the Northern GRA and 70,000 lb (31.75 mt) for the Southern GRA. Termination of the GRA Access Program for each area will be made through notification in the **Federal Register** and notification of vessel operators by fax.

[FR Doc. 03–29598 Filed 11–26–03; 8:45 am]
BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 68, No. 229
Friday, November 28, 2003

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

DEPARTMENT OF AGRICULTURE

Forest Service

Catron County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Catron County Resource Advisory Committee will meet in Reserve, New Mexico, on December 8, 2003, at 10 a.m. MST. The purpose of the meeting is to discuss use of project proposal form, establish process for project submission, evaluate submitted projects and select projects for recommendation.

DATES: The meeting will be held December 8, 2003.

ADDRESSES: The meeting will be held at the Catron County Courtroom of the Catron County Court House, 101 Main Street, Reserve, New Mexico 87830. Send written comments to Michael Gardner, Catron County Resource Advisory Committee, c/o Forest Service, USDA, 3005 E. Camino del Bosque, Silver City, New Mexico 88061–7863 or electronically to *mgardner01@fs.fed.us*.

FOR FURTHER INFORMATION CONTACT: Michael Gardner, Rural Community Assistant Staff, Gila National Forest, (505) 388–8212.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Committee discussion is limited to Forest Service staff and Committee members unless provided for on the agenda. However, persons who wish to bring Pub. L. 106–393 related matters to the attention of the Committee may file written statements with the Committee Staff before or after the meeting. Public input sessions will be provided and individuals may address the committee at times provided on the agenda in the morning and afternoon.

Dated: November 21, 2003.

Marcia R. Andre,

Forest Supervisor, Gila National Forest.

[FR Doc. 03–29635 Filed 11–26–03; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Resource Advisory Committee Meeting

AGENCY: Lassen Resource Advisory Committee, Susanville, California, USDA Forest Service.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the authorities in the Federal Advisory Committees Act (Pub. L. 92–463) and under the Secure Rural Schools and Community Self-Determination Act of 2000 (Pub. L. 106–393) the Lassen National Forest's Lassen County Resource Advisory Committee will meet Wednesday, December 10, 2003, and Thursday, December 11, 2003 in Susanville, California for business meetings. The meetings are open to the public.

SUPPLEMENTARY INFORMATION: The meeting December 10th begins at 9 a.m., at the Eagle Lake Ranger District Office, 477–050 Eagle Lake Road, Susanville, CA 96130. The meeting objectives are for RAC members and the public to hear project presentations from proponents. The meeting on December 11th begins at 9 a.m. at the Eagle Lake Ranger District Office, 477–050 Eagle Lake Road, Susanville, CA 96130. Agenda topics will include: Selection of proposed RAC projects, develop January meeting agenda, and meeting calendar for 2004. Time will also be set aside for public comments at the end of the meeting.

FOR FURTHER INFORMATION: Contact Robert Andrews, Eagle Lake District Ranger and Designated Federal Officer, at (530) 257–4188; or RAC Coordinator, Heidi Perry, at (530) 252–6604.

Edward C. Cole,

Forest Supervisor.

[FR Doc. 03–29714 Filed 11–26–03; 8:45 am]

BILLING CODE 3410–11–M

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List Additions and Deletions

AGENCY: Committee for Purchase from People Who Are Blind or Severely Disabled.

ACTION: Additions to and Deletions from Procurement List.

SUMMARY: This action adds to the Procurement List products and a service to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and deletes from the Procurement List products previously furnished by such agencies.

EFFECTIVE DATE: December 28, 2003.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

FOR FURTHER INFORMATION CONTACT: Sheryl D. Kennerly, (703) 603–7740.

SUPPLEMENTARY INFORMATION:

Additions

On August 29, and October 3, 2003, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice (68 FR 51962 and 57403) 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 service and impact of the additions on the current or most recent contractors, the Committee has determined that the products and service listed below are 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 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 service to the Government.

2. The action will result in authorizing small entities to furnish the products and 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 products and service proposed for addition to the Procurement List.

End of Certification

Accordingly, the following products and service are added to the Procurement List:

Products

Product/NSN: CD/DVD Label Kit and Refills, 7530–00–NIB–0660 (Kit), 7530–00–NIB–0688 (Refill).

NPA: North Central Sight Services, Inc., Williamsport, Pennsylvania.

Contract Activity: Office Supplies & Paper Products Acquisition Center, New York, New York.

Product/NSN: Dustpan and Brush Set, M.R. 1020.

NPA: The Lighthouse for the Blind, Inc. (Seattle Lighthouse), Seattle, Washington.

Contract Activity: Defense Commissary Agency (DeCA), Ft. Lee, VA.

Product/NSN: GOJO/SKILCRAFT Hair & Body Shampoo, 8520–00–NIB–0028, 800 mL, 8520–00–NIB–0029, 2000 mL, 8520–00–NIB–0066, 1000 mL.

Product/NSN: GOJO/SKILCRAFT Lotion Hand Soap, 8520–00–NIB–0012, 12 oz., 8520–00–NIB–0024, 800 mL, 8520–00–NIB–0025, 2000 mL, 8520–00–NIB–0065, 1000 mL.

Product/NSN: GOJO/SKILCRAFT Natural Orange Hand Cleaner with Pumice, 8520–00–NIB–0069, .5 Gal, 8520–00–NIB–0070, 1 Gal.

Product/NSN: MICRELL/SKILCRAFT Antibacterial Hand Soap, 8520–00–NIB–0010, 800 mL, 8520–00–NIB–0027, 2000 mL, 8520–00–NIB–0067, 1000 mL.

Product/NSN: PURELL/SKILCRAFT Instant Hand Sanitizer, 8520–00–NIB–0008, 800 mL, 8520–00–NIB–0017, 2 oz., 8520–00–NIB–0058, 1000 mL.

Product/NSN: PURELL/SKILCRAFT Instant Hand Sanitizer with Aloe, 8520–00–NIB–0060, 4.25 oz., 8520–00–NIB–0061, 12 oz., 8520–00–NIB–0062, 800 mL, 8520–00–NIB–0063, 1000 mL.

Product/NSN: GOJO/SKILCRAFT Wall Dispenser, 4510–00–NIB–0001, 800 mL, 4510–00–NIB–0002, 2000 mL, 4510–00–NIB–0003, 1000 mL, 4510–00–NIB–0007, 1000 mL., 4510–00–NIB–0008, 800 mL, 4510–00–NIB–0009, 2000 mL.

Product/NSN: PURELL/SKILCRAFT Wall Dispenser, 4510–00–NIB–0005, 1000 mL, 4510–00–NIB–0006, 1000 mL.

NPA: Travis Association for the Blind, Austin, Texas.

Contract Activity: Office Supplies & Paper Products Acquisition Center, New York, New York.

Product/NSN: Hydration On-the-Move System, 8465–00–NIB–0071, Bravo 70 oz Woodland, 8465–00–NIB–0072, Bravo 70 oz Desert, 8465–00–NIB–0073, Bravo 70 oz Black Night Ops, 8465–00–NIB–0074, Delta 100 oz Woodland, 8465–00–NIB–0075, Delta 100 oz Desert, 8465–00–NIB–0076, Delta 100 oz Black Night Ops, 8465–00–NIB–0077, Alpha 120 oz Woodland, 8465–00–NIB–0078, Alpha 120 oz Desert, 8465–00–NIB–0079, Alpha 120 oz Black Night Ops, 8465–00–NIB–0092, Warrior 100 oz Woodland, 8465–00–NIB–0093, Warrior 100 oz Desert, 8465–00–NIB–0094, Warrior 100 oz Black Night Ops, 8465–00–NIB–0095, Sierra 100 oz Woodland, 8465–00–NIB–0096, Sierra 100 oz Desert, 8465–00–NIB–0097, Sierra 100 oz Black Night Ops.

Product/NSN: Canteen, One Quart, Flexible, 8465–00–NIB–0041, Echo 1 qt.

NPA: The Lighthouse for the Blind, Inc. (Seattle Lighthouse), Seattle, Washington.

Contract Activity: Office Supplies & Paper Products Acquisition Center, New York, New York.

Service

Service Type/Location: Grounds Maintenance, Darnall Army Community Hospital/Clinics (Buildings 420, 2242, 2245, 2255, 2250, 7015, 9440, 56503, 4222, 33001, 33003, 39033, 4441, 4909, 76022, 90043, 36000, 36001, 36007, 36014, 36017), Fort Hood, Texas.

NPA: Professional Contract Services, Inc., Austin, Texas.

Contract Activity: III Corps and Fort Hood Contracting Command, Fort Hood, Texas.

Deletions

On October 3, 2003, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice (68 FR 57403/57404) of proposed deletions to the Procurement List. After consideration of the relevant matter presented, the Committee has determined that the products listed below are no longer suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

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 any additional reporting, recordkeeping or other compliance requirements for small entities.

2. The action may result in authorizing small entities to furnish the products to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the products deleted from the Procurement List.

End of Certification

Accordingly, the following products are deleted from the Procurement List:

Products

Product/NSN: Cleaner, Water Soluble, 6840–01–367–2913, 7930–01–367–2964, 7930–01–367–2967, 7930–01–367–2968, 7930–01–367–2970.

NPA: Association for the Blind & Visually Impaired & Goodwill Industries of Greater Rochester, Rochester, New York.

Contract Activity: GSA, Southwest Supply Center, Fort Worth, Texas.

Product/NSN: Clipboard File, 7520–01–439–3404.

NPA: Industries of the Blind, Inc., Greensboro, North Carolina.

Contract Activity: Office Supplies & Paper Products Acquisition Center, New York, New York.

Sheryl D. Kennerly,

Director, Information Management.

[FR Doc. 03–29709 Filed 11–26–03; 8:45 am]

BILLING CODE 6353–01–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Institute of Standards and Technology (NIST).

Title: National Voluntary Laboratory Accreditation Program (NVLAP) Information Collection System.

Form Number(s): None.

OMB Approval Number: 0693–0003.

Type of Review: Regular submission.

Burden Hours: 2,338.

Number of Respondents: 850.

Average Hours Per Response: 2.75 hours.

Needs and Uses: This information is collected from all laboratories, testing and calibration, that apply for NVLAP accreditation. It is used by NVLAP to assess laboratory conformance with applicable criteria as defined in 15 CFR part 285, section 285.14. An accredited laboratory's contact information and scope of accreditation are published annually in the *NVLAP Directory of Accredited Laboratories*, and quarterly on NVLAP's Web site. The information provides a service to customers in business and industry, including regulatory agencies and purchasing authorities that are seeking competent laboratories to perform testing and calibration services.

Affected Public: Business or other for-profit organizations, not-for-profit institutions, and Federal, State or Local government.

Frequency: Annually.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: Jacqueline Zeiher, (202) 395–4638.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Jacqueline Zeiher, OMB Desk Officer.

Dated: November 21, 2003.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 03–29625 Filed 11–26–03; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

Bureau of the Census

[Docket Number 031119282–3282–01]

Annual Surveys in the Manufacturing Area

AGENCY: Census Bureau, Commerce.

ACTION: Notice of determination.

SUMMARY: The Bureau of the Census (Census Bureau) is conducting the 2003 Annual Surveys in the Manufacturing Area. The 2003 Annual Surveys consist of the Current Industrial Reports surveys, the Annual Survey of Manufactures, the Survey of Industrial Research and Development, and the Survey of Plant Capacity Utilization. We have determined that annual data collected from these surveys are needed to aid the efficient performance of essential governmental functions and have significant application to the needs of the public and industry. The data derived from these surveys, most of which have been conducted for many years, are not publicly available from nongovernmental or other governmental sources.

FOR FURTHER INFORMATION CONTACT: William G. Bostic, Jr., Chief, Manufacturing and Construction Division, on (301) 763–4593.

SUPPLEMENTARY INFORMATION: The Census Bureau is authorized to conduct surveys necessary to furnish current data on the subjects covered by the major censuses authorized by Title 13, United States Code (U.S.C.), sections 61, 81, 182, 193, 224, and 225. These surveys will provide continuing and timely national statistical data on manufacturing for the period between economic censuses. The next economic censuses will be conducted for the year 2007. The data collected in these surveys will be within the general scope and nature of those inquiries covered in the economic censuses.

Current Industrial Reports

Most of the following commodity or product surveys provide data on shipments or production, stocks, unfilled orders, orders booked, consumption, and so forth. Reports will be required of all, or a sample of, establishments engaged in the production of the items covered by the following list of surveys:

Survey Title

MA313F Yarn Production
MA313K Knit Fabric Production
MA314Q Carpets and Rugs
MA315D Gloves and Mittens
MA316A Footwear Production
MA321T Lumber Production and Mill Stocks
MA325F Paint and Allied Products
MA325G Pharmaceutical Preparations, except Biologicals
MA327C Refractories
MA327E Consumer, Scientific, Technical, and Industrial Glassware
MA331A Iron and Steel Castings
MA331B Steel Mill Products
MA331E Nonferrous Castings
MA332Q Antifriction Bearings
MA333A Farm Machinery and Lawn and Garden Equipment
MA333D Construction Machinery
MA333F Mining Machinery and Mineral Processing Equipment
MA333L Internal Combustion Engines
MA333M Refrigeration, Air Conditioning, and Warm Air Equipment
MA333P Pumps and Compressors
MA334B Selected Instruments and Related Products
MA334M Consumer Electronics
MA334P Communication Equipment
MA334Q Semiconductors, Printed Circuit Boards, and Electronic Components
MA334R Computers and Office and Accounting Machines
MA334S Electromedical and Irradiation Equipment
MA335A Switchgear, Switchboard Apparatus, Relays, and Industrial Controls
MA335E Electric Housewares and Fans
MA335F Major Household Appliances
MA335H Motors and Generators
MA335J Insulated Wire and Cable
MA335K Wiring Devices and Supplies

The following list of surveys represents annual counterparts of monthly and quarterly surveys and will cover only those establishments that are not canvassed, or do not report, in the more frequent surveys. Accordingly, there will be no duplication in reporting. The content of these annual reports will be identical with that of the monthly and quarterly reports.

Survey Title

M311H Animal and Vegetable Fats and Oils (Stocks)
M311J Oilseeds, Beans, and Nuts (Primary Producers)
M311L Fats and Oils (Renderers)
M311M Animal and Vegetables Fats and Oils (Consumption and Stocks)
M311N Animal and Vegetables Fats and Oils (Production, Consumption, and Stock)
M313P Consumption on the Cotton System
M313N Cotton and Raw Linters in Public Storage
M327G Glass Containers
M331J Inventories of Steel Producing Mills
M336G Civil Aircraft and Aircraft Engines
MQ311A Flour Milling Products
MQ313D Consumption on the Woolen System and Worsted Combing
MQ313T Broadwoven Fabrics (Gray)
MQ314X Bed and Bath Furnishings
MQ315A Apparel
MQ325A Inorganic Chemicals
MQ325B Fertilizer Materials
MQ325C Industrial Gases
MQ327D Clay Construction Products
MQ333W Metalworking Machinery
MQ335C Fluorescent Lamp Ballasts

Annual Survey of Manufactures

The Annual Survey of Manufactures collects industry statistics, such as total

value of shipments, employment, payroll, workers' hours, capital expenditures, cost of materials consumed, supplemental labor costs, and so forth. This survey, conducted on a sample basis, covers all manufacturing industries, including data on plants under construction but not yet in operation.

Survey of Industrial Research and Development

The Survey of Industrial Research and Development measures spending on research and development activities in private U.S. businesses. The Census Bureau collects and compiles this information in accordance with a joint project between the National Science Foundation (NSF) and the Census Bureau. The Census Bureau and the NSF publish the results in their respective publication series. Five data items in the survey provide interim statistics collected in the Census Bureau's economic censuses. These items (total company sales, total employment, total expenditures for research and development conducted within the company, federally-funded expenditures for research and development within the company, and total expenditures and federally-funded expenditures for research and development within the company by state) are collected on a mandatory basis under the authority of Title 13, U.S.C. Responses to all other data collected are voluntary.

Survey of Plant Capacity Utilization

The Survey of Plant Capacity Utilization is designed to measure the use of industrial capacity. The survey collects information on actual output and estimates of potential output in terms of value of production. These data are the basis for calculating rates of utilization of full production capability and use of production capability under national emergency conditions.

Notwithstanding any other provision of law, no person is required to respond to, nor shall a person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that collection of information displays a current valid Office of Management and Budget (OMB) control number. In accordance with the PRA, 44 U.S.C., chapter 45, the OMB approved the 2003 Annual Surveys under the following OMB Control Numbers: Current Industrial Reports—0607–0206, 0607–0392, 0607–0395, and 0607–0476; Annual Survey of Manufactures—0607–0449; Survey of Industrial Research and Development—3145–0027; and Survey of Plant Capacity Utilization—0607–0175. We will provide copies of each form upon written request to the Director, U.S. Census Bureau, Washington, DC 20233–0001.

Based upon the foregoing, I have directed that the Annual Surveys in the Manufacturing Area be conducted for the purpose of collecting these data.

Dated: November 24, 2003.

Charles Louis Kincannon,

Director, Bureau of the Census.

[FR Doc. 03–29654 Filed 11–26–03; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Bureau of the Census

[Docket Number 031113278–3278–01]

Annual Retail Trade Survey

AGENCY: Bureau of the Census, Commerce.

ACTION: Notice of determination.

SUMMARY: The Bureau of the Census (Census Bureau) is conducting the Annual Retail Trade Survey. The Census Bureau has determined that it needs to collect data covering annual sales, e-commerce sales, percent of e-commerce sales to customers located outside the United States, year-end inventories, purchases, accounts receivables, and, for select industries, merchandise line sales and percent of sales by class of customer.

FOR FURTHER INFORMATION CONTACT: Nancy Piesto, Service Sector Statistics Division, on (301) 763–2747.

SUPPLEMENTARY INFORMATION: The Annual Retail Trade Survey is a continuation of similar retail trade surveys conducted each year since 1951 (except 1954). It provides on a comparable classification basis, annual sales, e-commerce sales, and purchases for 2003 and year-end inventories for 2002 and 2003. These data are not available publicly on a timely basis from nongovernmental or other governmental sources.

The Census Bureau will require a selected sample of firms operating retail establishments in the United States (with sales size determining the probability of selection) to report in the 2003 Annual Retail Trade Survey. We will furnish report forms to the firms covered by this survey and will require their submissions within 30 days after receipt. The sample will provide, with measurable reliability, statistics on the subjects specified above.

The Census Bureau is authorized to take surveys that are necessary to furnish current data on the subjects covered by the major censuses authorized by Title 13, United States Code, sections 182, 224, and 225. This survey will provide continuing and timely national statistical data on retail trade for the period between economic censuses. For 2003, the survey will, as it has in the past, operate as a separate sample of retail companies. The data collected in this survey will be similar to that collected in the past and within the general scope and nature of those inquiries covered in the economic census. These data will provide a sound statistical basis for the formation of policy by various government agencies. These data also apply to a variety of public and business needs.

Notwithstanding any other provision of law, no person is required to respond to, nor shall a person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that collection of information displays a current valid Office of Management and Budget (OMB) control number. In accordance with the PRA, 44 United States Code, Chapter 35, the OMB approved the Annual Retail Trade Survey under OMB Control Number 0607–0013. We will furnish report forms to organizations included in the survey. Additional copies are available on written request to the Director, U.S. Census Bureau, Washington, DC 20233–0101.

Based upon the foregoing, I have directed that an annual survey be conducted for the purpose of collecting these data.

Dated: November 24, 2003.

Charles Louis Kincannon,

Director, Bureau of the Census.

[FR Doc. 03–29653 Filed 11–26–03; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Antidumping and Countervailing Duty Administrative Reviews

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

ACTION: Notice of initiation of antidumping and countervailing duty administrative reviews.

SUMMARY: The Department of Commerce (the Department) has received requests

to conduct administrative reviews of various antidumping and countervailing duty orders and findings with October anniversary dates. In accordance with the Department's regulations, we are initiating those administrative reviews.

EFFECTIVE DATE: November 28, 2003.

FOR FURTHER INFORMATION CONTACT: Holly A. Kuga, Office of AD/CVD Enforcement, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230, telephone: (202) 482–4737.

SUPPLEMENTARY INFORMATION:

Background

The Department has received timely requests, in accordance with 19 CFR 351.213(b)(2002), for administrative reviews of various antidumping and countervailing duty orders and findings with October anniversary dates.

Initiation of Reviews

In accordance with 19 CFR 351.221(c)(1)(i), we are initiating administrative reviews of the following antidumping and countervailing duty orders and findings. We intend to issue the final results of these reviews not later than October 31, 2004.

	Period to be reviewed
Antidumping Duty Proceedings	
Brazil: Carbon and Certain Alloy Steel Wire Rod, A–351–832	4/15/02–9/30/03
Companhia Siderurgica Belgo Mineira	
Belgo Mineira Participacoes Industria e Comercio S.A.	
BMP Siderurgia S.A.	
Canada: Carbon and Certain Alloy Steel Wire Rod, A–122–840	4/10/02–9/30/03
Ivaco Inc.	
Mexico: Carbon and Certain Alloy Steel Wire Rod, A–201–830	4/10/02–9/30/03
Hylsa Puebla, S.A. de C.V.	
Hylsamex, S.A. de C.V.	
Siderurgica Lazaro Cardenas Las Truchas S.A. de C.V.	
Spain: Stainless Steel Wire Rod,[1] A–469–807	9/1/02–8/31/03
Roldan, S.A.	
The People's Republic of China: Helical Spring Lock Washers,[2] A–570–822	10/1/02–9/30/03
Hang Zhou Spring Washer Co., Ltd./(dba Zhejiang Wanxin Group Co., Ltd.)	
Trinidad and Tobago: Carbon and Certain Alloy Steel Wire Rod, A–274–804	4/10/02–9/30/03
Caribbean Ispat Limited	
Countervailing Duty Proceedings	
Brazil: Carbon and Certain Alloy Steel Wire Rod, C–351–833	8/30/02–12/31/02
Companhia Siderurgica Belgo Mineira	
Belgo Mineira Participacoes Industria e Comercio S.A.	
BMP Siderurgia S.A.	
Canada: Carbon and Certain Alloy Steel Wire Rod, C–122–841	2/8/02–12/31/02
Ispat Sidbec Inc.	
Suspension Agreements	
None.	

[1] Inadvertently omitted from previous initiation notice.

[2] If one of the above-named companies does not qualify for a separate rate, all other exporters of helical spring lock washers from the People's Republic of China who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part.

During any administrative review covering all or part of a period falling between the first and second or third and fourth anniversary of the publication of an antidumping duty order under § 351.211 or a determination under § 351.218(f)(4) to continue an order or suspended investigation (after sunset review), the Secretary, if requested by a domestic interested party within 30 days of the date of publication of the notice of initiation of the review, will determine whether antidumping duties have been absorbed by an exporter or producer subject to the review if the subject merchandise is sold in the United States through an importer that is affiliated with such exporter or producer. The request must include the name(s) of the exporter or producer for which the inquiry is requested.

Interested parties must submit applications for disclosure under administrative protective orders in accordance with 19 CFR 351.305.

These initiations and this notice are in accordance with section 751(a) of the Tariff Act of 1930, as amended (19 U.S.C. 1675(a)), and 19 CFR 351.221(c)(1)(i).

Dated: November 18, 2003.

Holly A. Kuga,

Acting Deputy Assistant Secretary, Group II for Import Administration.

[FR Doc. 03–29720 Filed 11–26–03; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–884]

Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China

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

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

SUMMARY: We preliminarily determine that certain color television receivers

from the People's Republic of China are being, or are likely to be, sold in the United States at less than fair value, as provided in section 733(b) of the Tariff Act of 1930, as amended. In addition, we preliminarily determine that there is a reasonable basis to believe or suspect that critical circumstances exist with respect to imports of subject merchandise from the People's Republic of China.

Interested parties are invited to comment on this preliminary determination. We will make our final determination not later than 135 days after the date of publication of this preliminary determination.

EFFECTIVE DATE: November 28, 2003.

FOR FURTHER INFORMATION CONTACT: Irina Itkin or Elizabeth Eastwood, Office of AD/CVD Enforcement, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0656 or (202) 482–3874, respectively.

Preliminary Determination

We preliminarily determine that certain color television receivers (CTVs) from the People's Republic of China (PRC) are being sold, or are likely to be sold, in the United States at less than fair value (LTFV), 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. In addition, we preliminarily determine that there is a reasonable basis to believe or suspect that critical circumstances exist with respect to CTVs from all exporters in the PRC. The critical circumstances analysis for the preliminary determination is discussed below under the section "Critical Circumstances."

Case History

Since the initiation of this investigation (*Notice of Initiation of Antidumping Duty Investigations: Certain Color Television Receivers From Malaysia and the People's Republic of China*, 68 FR 32013 (May 29, 2003)) (*Initiation Notice*), the following events have occurred: On June 16, 2003, the United States International Trade Commission (ITC) preliminarily determined that there is a reasonable indication that imports of certain color televisions from Malaysia and the People's Republic of China are materially injuring the United States industry. *See* ITC Investigation Nos. 731–TA–1034 and 1035 (*Certain Color Television Receivers from China and Malaysia*, 68 FR 38089 (June 26, 2003)).

Also on June 16, 2003, we issued an antidumping questionnaire to the Chinese Ministry of Commerce (MOFCOM) requesting that it forward the questionnaire to Chinese producers/exporters accounting for all known exports of subject merchandise from the PRC during the period of investigation (POI). The Department also sent courtesy copies of the antidumping questionnaire to the China Chamber of Commerce for Import & Export of Machinery & Electronic Products, to all companies identified in U.S. customs data as exporters of the subject merchandise during the POI with shipments in commercial quantities, and to any additional companies identified in the petition as exporters of CTVs. These companies included: Gain Star International Ltd. (Gain Star); Guangdong Stationery & Sporting Goods Import & Export Corporation (Guangdong Stationery); Haier Electric Appliances International Co. (Haier); Hisense Import and Export Co., Ltd. (Hisense); Konka Group Company, Ltd. (Konka); New Great Wall Digital Electronics Co.; Philips Consumer Electronics Co. of Suzhou Ltd. (Philips); Sichuan Changhong Electric Co., Ltd. (Changhong); Sanyo Sales & Marketing Corp.; Shanghai SVW DD and TT Electronic Enterprise Co., Ltd.; Star Light Electronics Co., Ltd. (Star Light); Supra Corporation (Supra); SVA Group Co., Ltd. (SVA); TCL Holding Company Ltd. (TCL); and Xiamen Overseas Chinese Electornic Co., Ltd. (XOCECO). The letters sent to MOFCOM and individual exporters provided deadlines for responses to the different sections of the questionnaire.

On June 18, 2003, XOCECO requested that high definition televisions (HDTVs) be excluded from the scope of this investigation. For further discussion, see the "Scope Comments" section of this notice, below.

On June 24, 2003, we issued a courtesy copy of the questionnaire to XS Cargo, an additional exporter of PRC CTVs to the United States.

Also on June 24, 2003, Guangdong Stationery informed the Department that it did not export subject merchandise to the United States during the POI. For further discussion, see the June 24, 2003, memorandum from Jill Pollack to the file entitled "Placing Information on the Record in the Antidumping Duty Investigation on Color Television Receivers from the People's Republic of China (PRC)."

On June 25, 2003, XS Cargo informed the Department that it also did not export subject merchandise to the United States during the POI, but merely returned broken sets purchased in the United States. For further discussion, see the June 25, 2003, memorandum from Shawn Thompson to the file entitled "Telephone Conversation with a Third Country Exporter in the Antidumping Duty Investigation of Certain Color Television Receivers from the People's Republic of China."

On June 30, 2003, an additional PRC exporter of CTVs, Shenzhen Chaungwei-RGB Electronics Co., Ltd. (Skyworth), contacted the Department and requested that it be issued a copy of the questionnaire. We provided a copy to Skyworth on July 1, 2003.

From July 7 through July 21, 2003, we received responses to section A of the questionnaire from the following exporters: Changhong, Haier, Hisense, Konka, Philips, Skyworth, Starlight International Holdings, Ltd. (the parent company of Star Light, Star Fair Electronics Co. Ltd., and Starlight Marketing Development Ltd.), SVA, TCL, and XOCECO. We did not receive properly-filed section A responses from any other company.[1]

On July 15, 2003, Changhong requested that the Department find that the CTV industry in the PRC is a market-oriented industry (MOI). On July 21, 2003, the Department notified Changhong that its MOI claim must be made on behalf of the CTV industry as a whole, rather than on behalf of a specific exporter. Also on July 21, 2003, the petitioners submitted a letter in which they opposed Changhong's claim that the CTVs industry is market-oriented.

On July 22, 2003, pursuant to section 777A(c) of the Act, the Department determined that, due to the large number of exporters of the subject merchandise, it would limit the number of mandatory respondents in this investigation. Therefore, we selected Changhong, Konka, TCL, and XOCECO as the mandatory respondents, in addition to the PRC government. The Department also issued a separate memorandum concerning those exporters and producers who submitted a complete response to section A of the questionnaire and the conditions under which they may be considered for treatment other than inclusion in the rate applicable to the government-controlled enterprise. For further

[1] In July 2003, we also received improperly-filed section A responses from Gain Star and Supra. Neither company responded to our request to file its response properly, despite the fact that we afforded each an additional opportunity to do so and we provided explicit instructions as to how to file properly; therefore, we have returned these responses to Gain Star and Supra and will not consider these responses for purposes of this proceeding.

discussion, see the "Respondent Selection" section of this notice, below, and the July 22, 2003, memorandum from the team to the file entitled "Antidumping Duty Investigation of Certain Color Television Receivers from the People's Republic of China—Selection of Respondents" (the "Respondent Selection memo"). *See also* the "Margins for Exporters Whose Responses Were Not Analyzed" section of this notice, below.

On July 24, 2003, the Department invited interested parties to comment on surrogate country selection and to provide publicly available information for valuing the factors of production.

On July 31, 2003, the petitioners submitted comments opposing XOCECO's June 18, 2003, scope exclusion request.

During July and August 2003, we issued supplemental section A questionnaires to each of the four mandatory participating respondents in this case (*i.e.*, Changhong, Konka, TCL, and XOCECO) as well as to each of the exporters not selected as mandatory respondents which properly filed a section A response. We received responses to these questionnaires in August 2003.

From August 1 through August 22, 2003, we received responses to the remaining sections of the questionnaire from the four participating mandatory respondents, as well as two exporters who requested to be examined on a voluntary basis (*i.e.*, Haier and Philips).

On August 12, 2003, Changhong, Philips, TCL, and XOCECO submitted additional information related to the claim that the CTVs industry in the PRC is market-oriented.[2]

From August 18 through October 24, 2003, we issued supplemental questionnaires to Changhong, Konka, TCL, and XOCECO. We received responses to these questionnaires from August 26 through October 31, 2003.

On August 22, 2003, the petitioners responded to the respondents' August 12, 2003, MOI submission. Also on August 22, 2003, the petitioners submitted information on surrogate values. On September 5, 2003, Skyworth submitted company-specific information to support the MOI claim made in this case. Also on September 5, 2003, we received information related to surrogate values from Changhong, Philips, and TCL, as well as comments on surrogate country selection from Haier.

On September 9, 2003, Haier submitted company-specific information to support the MOI claim made in this case.

On September 15, 2003, we notified Changhong, Philips, TCL, and XOCECO that their MOI claim did not sufficiently address the three prongs of the Department's MOI test, and that, as a consequence, we were unable to conclude that the experiences of the firms making the claim are representative of the industry. In the letter, we provided further guidance as to what was necessary for an MOI investigation. Copies of this letter were also provided to Haier, Skyworth, and the PRC government.

On September 16, 2003, Changhong, Haier, Philips, TCL, and XOCECO responded to the petitioners' August 22, 2003, comments on the MOI issue.

On September 17, 2003, pursuant to section 733(c)(2) of the Act and 19 CFR 351.205(f), the Department determined that the case was extraordinarily complicated and postponed the preliminary determination until no later than November 21, 2003. *See Postponement of Preliminary Determinations of Antidumping Duty Investigations: Certain Color Television Receivers From Malaysia (A–557–812) and the People's Republic of China (A–570–884)*, 68 FR 55372 (Sept. 25, 2003).

From October 3 through November 3, 2003, the petitioners submitted additional surrogate value information. Changhong provided comments on certain of these submissions on October 16, October 31, and November 6, 2003.

Also on October 16, 2003, the petitioners alleged that critical circumstances exist with respect to imports of CTVs from the PRC. Accordingly, pursuant to section 732(e) of the Act, on October 17, 2003, we requested information from Changhong, Konka, TCL, and XOCECO regarding monthly shipments to the United States during the period January 2001 through October 2003. We received the requested information on October 31 and November 3, 2003. The critical circumstances analysis for the preliminary determination is discussed below under "Critical Circumstances."

On October 24 and October 31, 2003, Changhong submitted additional information related to surrogate values.

On October 30, 2003, we issued an additional supplemental questionnaire to Changhong. We received Changhong's responses to this questionnaire on November 10, 2003, and November 12, 2003. Although these responses were received too late for use in the preliminary determination, we intend to verify this information and consider it for use in the final determination.

On October 31, 2003, Changhong submitted a request regarding its MOI claim, stating that before making its final determination in this case, the Department should identify any additional specific MOI information required from the PRC CTVs producers.

On November 10, 2003, the petitioners submitted additional surrogate value information. Although this information was received too late for use in the preliminary determination, we will consider it for use in the final determination.

Also on November 10, 2003, Konka requested that the Department postpone the final determination until 135 days after the publication of the preliminary determination. For further discussion, see the "Postponement of Final Determination" section of this notice.

Postponement of Final Determination

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. The Department's regulations, at 19 CFR 351.210(e)(2), require that requests by respondents for postponement of a final determination be accompanied by a request for extension of provisional measures from a four-month period to not more than six months.

On November 10, 2003, Konka, which represents a significant proportion of exports, requested that the Department postpone its final determination until 135 days after the publication of the preliminary determination. Konka also included a request to extend the provisional measures to not more than six months. Accordingly, since we have made an affirmative preliminary determination and no compelling reasons for denial exist, we have postponed the final determination until not later than 135 days after the publication of the preliminary determination.

Period of Investigation

Pursuant to 19 CFR 351.204(b)(1), the POI for an investigation involving merchandise from a non-market economy (NME) is the two most recent fiscal quarters prior to the month of the filing of the petition (*i.e.*, May 2002). Therefore, in this case, the POI is

[2] Changhong provided additional documentation supporting this claim on August 20, 2003.

October 1, 2002, through March 31, 2003.

Scope of 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 subheading is provided for convenience and customs purposes, the written description of the scope of the merchandise under investigation is dispositive.

Scope Comments

In accordance with the preamble to our regulations (*see Antidumping Duties;* Countervailing Duties, 62 FR 27296, 27323 (May 19, 1997)), we set aside a period of time for parties to raise issues regarding product coverage and encouraged all parties to submit comments within 20 calendar days of publication of the *Initiation Notice* (*see* 68 FR at 32013). Interested parties submitted such comments by June 18, 2003.

Pursuant to the Department's solicitation of scope comments in the *Initiation Notice,* XOCECO requested that HDTVs be excluded from the scope of this investigation because: (1) These CTVs are produced by the petitioners only in limited amounts; and (2) they differ from the CTVs covered by the scope of the investigation in terms of physical characteristics, ultimate uses, purchaser expectations, channels of trade, and the manner of advertising and display. On July 31, 2003, the petitioners opposed this request.

After considering the respondent's comments and the petitioners' objections to XOCECO's request regarding HDTVs, we find that the CTVs in question fall within the scope of this investigation. All CTVs, including the CTVs in question, have the same fundamental characteristics—that is they are capable of receiving a broadcast signal and displaying a video image. Therefore, we conclude that all CTVs, including HDTVs, are appropriately included in the scope of this investigation, and constitute a single class or kind of merchandise. For a further discussion, see the November 21, 2003, memorandum to Louis Apple, Director, Office 2 from the team entitled "Scope Exclusion Request."

Respondent Selection

In June 2003, the Department designated the PRC government as the mandatory respondent in this case and issued it the questionnaire for distribution to appropriate parties. The Department also sent courtesy copies of the questionnaire to PRC companies which the Department identified as exporters/producers of subject merchandise.

In July 2003, we received section A responses from 12 producers/exporters of CTVs in the PRC. Each of these exporters requested to be selected as a respondent in this case and requested a separate rate. In addition, we received information from two additional companies issued a questionnaire indicating that they did not export CTVs to the United States during the POI. We did not receive responses from the remaining companies who were sent courtesy copies of the questionnaire.

On July 22, 2003, the Department determined that it did not have the resources to investigate all producers/exporters of the subject merchandise requesting a separate rate. Rather, we found that it was practicable to examine a maximum of four producers/exporters. Therefore, we selected as mandatory respondents in this case the four companies with the largest export volumes during the POI (*i.e.*, Changhong, Konka, TCL, and XOCECO). For further discussion, see the Respondent Selection memo.

Nonmarket Economy Country Status

The Department has treated the PRC as an NME country in all past antidumping investigations. *See, e.g., Final Determination of Sales at Less Than Fair Value and Critical Circumstances: Certain Malleable Iron Pipe Fittings From the People's Republic of China,* 68 FR 61395, 61396 (Oct. 28, 2003). A designation as an NME remains in effect until it is revoked by the Department. *See* section 771(18)(C) of the Act.

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

No party in this investigation has requested a revocation of the PRC's NME status. We have, therefore, preliminarily continued to treat the PRC as an NME.

Market Oriented Industry

On July 15, 2003, Changhong requested that the Department make a determination that the CTV industry in the PRC is an MOI. Changhong submitted certain company-specific data in support of its request. On July 21, 2003, the petitioners submitted a letter in which they opposed Changhong's claim that the CTVs industry is market-oriented. Specifically, the petitioners stated that Changhong has not provided evidence to support its claim that the majority of its material inputs are valued at market prices. The petitioners also stated that Changhong has not provided evidence to rebut allegations that the PRC government regulates prices in the CTV industry, and that CTV producers in the PRC have been assisted by direct government involvement in financing, advertising, labor, utilities, currency exchange, and government ownership of CTV-producing companies.

Also on July 21, 2003, the Department notified Changhong that its MOI claim must be made on behalf of the CTV industry as a whole, rather than on behalf of a specific exporter. On August 12, 2003, Changhong, Konka, Philips, TCL, and XOCECO submitted additional information related to the claim that the CTVs industry in the PRC is market-oriented. On August 22, 2003, the petitioners responded to this submission. In their August 22, 2003, submission, the petitioners stated that the respondents' August 12, 2003, submission did not provide data on substantially all of the CTV industry in the PRC and that the respondents did adequately address the allegations contained in the petitioners' July 21, 2003, submission, *i.e.*, that non-market economy forces in the PRC have a significant impact on the CTV industry and distort the true cost of production.

On September 5 and September 9, 2003, Skyworth and Haier, respectively, submitted company-specific information to support the MOI claim made in this case.

On September 15, 2003, we notified Changhong, Konka, Philips, TCL, and XOCECO that their MOI claim did not

sufficiently address the three prongs of the Department's MOI test (*see* below), and that, as a consequence, we were unable to conclude that the experiences of the firms making the claim are representative of the industry. Copies of this letter were also provided to Haier, Skyworth, and the PRC government. On September 16, 2003, Changhong, Haier, Philips, TCL, and XOCECO responded to the petitioners' August 22, 2003, comments on the MOI issue, but they did not address the Department's concerns.

On October 31, 2003, Changhong submitted a request regarding its MOI claim, stating that before making its final determination in this case, the Department should identify the specific MOI information required from the PRC CTV producers.

In order to consider a MOI claim, the Department requires information on each of the three prongs of the MOI test regarding the situation and experience of the PRC CTV industry as a whole. Specifically, the MOI test requires that: (1) There be virtually no government involvement in production or prices for the industry; (2) the industry is marked by private or collective ownership that behaves in a manner consistent with market considerations; and (3) producers pay market-determined prices for all major inputs, and for all but an insignificant proportion of minor inputs. Even in those cases where the number of investigated firms is limited by the Department, a MOI allegation must cover all (or virtually all) of the producers in the industry in question. *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Synthetic Indigo From the People's Republic of China*, 64 FR 69723, 69725 (Dec. 14, 1999). *See also Notice of Final Determination of Sales at Less Than Fair Value: Freshwater Crawfish Tail Meat From the People's Republic of China*, 62 FR 41347, 41353 (Aug. 1, 1997).

As a threshold matter, we note that the respondents have not provided information for the record that covers virtually all of the producers of the industry. Rather, the respondents provided certain data related to companies which appear to be export-oriented without demonstrating that this data applies equally to other CTV producers within the PRC. Because the MOI allegation made in this case has not provided an adequate basis for considering the three factors of the Department's MOI test, we are unable to consider the MOI request.

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, 19027–28 (Apr. 30, 1996) (*Bicycles*). Changhong, Konka, TCL, XOCECO, and the cooperative non-selected exporters named in the "Suspension of Liquidation" section below have provided the requested company-specific separate rates information and have indicated that there is no element of government ownership or control over their export operations. We have considered whether the mandatory respondents are eligible for a separate rate as discussed below.

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, 61758–60 (Nov. 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, 61279 (Nov. 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, 14727 (Mar. 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, 20589 (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, 25586–87 (May 2, 1994) (*Silicon Carbide*). Under the separate rates criteria, the Department assigns separate rates in NME cases only if the respondents 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, 22545 (May 8, 1995) (*Furfuryl Alcohol*).

1. 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; (2) any legislative enactments decentralizing control of companies; and (3) any other formal measures by the government decentralizing control of companies.

The mandatory respondents have placed on the record a number of documents to demonstrate absence of *de jure* control, including the "Law of the People's Republic of China on Industrial Enterprises Owned By the Whole People."

In prior cases, the Department has analyzed these laws and found that they establish an absence of *de jure* control. *See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Partial-Extension Steel Drawer Slides With Rollers From the People's Republic of China*, 60 FR 29571, 29573 (June 5, 1995);[3] *Notice of Final Determination of Sales at Less Than Fair Value: Manganese Metal From the People's Republic of China*, 60 FR 56045, 56046 (Nov. 6, 1995). We have no new information in this proceeding which would cause us to reconsider this determination.

According to the mandatory respondents, CTV exports are not affected by export licensing provisions or export quotas. These respondents claim to have autonomy in setting the contract prices for sales of CTVs through independent price negotiations with their foreign customers without interference from the PRC government. Based on the assertions of the respondents, we preliminarily determine that there is an absence of *de jure* government control over the pricing and marketing decisions of the respondents with respect to their CTV export sales.

[3] This was unchanged in the final determination. *See, Notice of Final Determination of Sales at Less Than Fair Value: Certain Partial-Extension Steel Drawer Slides with Rollers from the People's Republic of China*, 60 FR 54472, 54474 (Oct. 24, 1995).

2. 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, 72256 (Dec. 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 export prices are set by, or subject to, the approval of a governmental 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. *See Id.*

The mandatory respondents have asserted the following: (1) They establish their own export prices; (2) they negotiate contracts without guidance from any governmental entities or organizations; (3) they make their own personnel decisions; and (4) they retain the proceeds of their export sales and use profits according to their business needs. Additionally, the respondents' questionnaire responses indicate that they 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 these companies. Consequently, we preliminarily determine that the mandatory respondents have met the criteria for the application of separate rates.

Margins for Cooperative Exporters Not Selected

For those exporters: (1) Who submitted a timely response to section A of the Department's questionnaire, but were not selected as mandatory respondents, and (2) for whom the section A response indicates that the exporter is eligible for a separate rate, we assigned a weighted-average of the rates of the fully analyzed companies, excluding any rates that were zero, *de minimis*, or based entirely on facts available. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Circular Welded Carbon-Quality Steel Pipe from the People's Republic of China*, 67 FR 36570, 36571 (May 24, 2002) (*Welded Steel Pipe*). Companies receiving this rate are identified by name in the "Suspension of Liquidation" section of this notice.

PRC-Wide Rate and Use of Facts Otherwise Available

As in all NME cases, the Department implements a policy whereby there is a rebuttable presumption that all exporters or producers located in the NME comprise a single exporter under common government control, the "NME entity." The Department assigns a single NME rate to the NME entity unless an exporter can demonstrate eligibility for a separate rate.

Section 776(a)(2) of the Act provides that if an interested party or any other person: (A) withholds information that has been requested by the administering authority; (B) fails to provide such information by the deadline, or in the form or manner requested; (C) significantly impedes a proceeding; or (D) provides such information that cannot be verified, the Department shall use, subject to sections 782(d) and (e) of the Act, facts otherwise available in reaching the applicable determination.

Pursuant to section 782(e) of the Act, the Department shall not decline to consider submitted information if all of the following requirements are met: (1) The information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

Information on the record of this investigation indicates that there are numerous producers/exporters of the subject merchandise in the PRC. As noted in the "Case History" section above, all exporters were given the opportunity to respond to the Department's questionnaire. Based upon our knowledge of the PRC and the fact that U.S. import statistics show that the responding companies did not account for all imports into the United States from the PRC, we have preliminarily determined that certain PRC exporters of CTVs failed to respond to our questionnaire. As a result, use of facts available (FA), pursuant to section 776(a)(2)(A) of the Act, is appropriate.

In selecting among the facts otherwise available, section 776(b) of the Act authorizes the Department to use adverse facts available (AFA) if the Department finds that an interested party failed to cooperate by not acting to the best of its ability to comply with the request for information. *See, e.g., Bicycles*, 61 FR at 19028; *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products From the Russian Federation*, 65 FR 5510, 5518 (Feb. 4, 2000). MOFCOM was notified in the Department's questionnaire that failure to submit the requested information by the date specified might result in use of FA. The producers/exporters that decided not to respond to the Department's questionnaire failed to act to the best of their ability in this investigation. Absent a response, we must presume government control of these companies. The Department has determined, therefore, that in selecting from among the facts otherwise available an adverse inference pursuant to section 776(b) of the Act is warranted.

In accordance with our standard practice, as AFA, we are assigning as the PRC-wide rate the higher of: (1) The highest margin stated in the notice of initiation (*i.e.*, the recalculated petition margin); or (2) the highest margin calculated for any respondent in this investigation. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Quality Steel Products from the People's Republic of China*, 65 FR 34660 (May 31, 2000) and accompanying decision memorandum at *Comment 1*. In this case, the preliminary AFA margin is 78.45 percent, which is the highest margin stated in the notice of initiation. *See Initiation Notice*, 68 FR at 32016.

Corroboration of Information

Section 776(b) of the Act authorizes the Department to use AFA information derived from the petition, the final determination from the LTFV investigation, a previous administrative review, or any other information placed on the record.

Section 776(c) of the Act requires the Department to corroborate, to the extent practicable, secondary information used as FA. Secondary information is defined as "[i]nformation derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review

under section 751 concerning the subject merchandise." *See* Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316 at 870 (1994) and 19 CFR 351.308(d). The SAA clarifies that "corroborate" means that the Department will satisfy itself that the secondary information to be used has probative value. *See* the SAA at 870. The SAA also states that independent sources used to corroborate such evidence may include, for example, published price lists, official import statistics, customs data, and information obtained from interested parties during the particular investigation. *See* the SAA at 870.

In order to determine the probative value of the margins in the petition for use as AFA for purposes of this determination, we examined evidence supporting the calculations in the petition. We reviewed the adequacy and accuracy of the information in the petition during our pre-initiation analysis of the petition, to the extent appropriate information was available for this purpose. *See* the May 22, 2003, *Initiation Checklist,* on file in the Central Records Unite (CRU), Room B–099, of the Main Commerce Department building, for a discussion of the margin calculations in the petition. In accordance with section 776(c) of the Act, to the extent practicable, we examined the key elements of the export price (EP) and NV calculations on which the margins in the petition were based.

In order to corroborate the petition's EP calculations, we compared the prices in the petition for CTVs to the prices submitted by the mandatory respondents. In order to corroborate the petitioners' NV calculation, we compared the petitioners' factor consumption and/or surrogate value data for CTVs to the data reported by the respondents for the most significant factors—color picture tubes (CPTs), cabinets, woofer speakers, remotes with tuners, other parts and components, electricity, factory overhead, selling, general, and administrative (SG&A) expenses, profit, and packing expenses—and to surrogate values selected by the Department for the preliminary determination, as discussed below.

As discussed in the November 21, 2003, memorandum from the team to the file entitled "Corroboration of Data Contained in the Petition for Assigning an Adverse Facts Available Rate," we found the U.S. price and factors of production information in the petition to be reasonable and of probative value. As a number of the surrogate values selected for the preliminary determination differed from those used in the petition, we compared the petition margin calculations to the calculations based on the selected surrogate values wherever possible and found they were reasonably close. Therefore, we preliminarily determine that the petition information has probative value. Accordingly, we find that the highest margin stated in the notice of initiation, 78.45 percent, is corroborated within the meaning of section 776(c) of the Act. For further discussion, see the November 21, 2003, memorandum from the team to the file entitled "Corroboration of Data Contained in the Petition for Assigning an Adverse Facts Available Rate."

Fair Value Comparisons

To determine whether sales of CTVs from the PRC were made at LTFV, we compared the EP or constructed export price (CEP) to the NV, as described in the "Export Price/Constructed Export Price," and "Normal Value" sections of this notice, below. In accordance with section 777A(d)(1)(A)(i) of the Act, we compared POI-wide weighted-average EPs and CEPs by product to the appropriate product-specific NV.

Export Price/Constructed Export Price

A. Changhong

For Changhong, we used EP methodology in accordance with section 772(a) of the Act because the subject merchandise was sold directly to unaffiliated customers in the United States prior to importation and CEP methodology was not otherwise appropriate. We based EP on the packed FOB PRC port or CIF U.S. port prices to unaffiliated purchasers in the United States, as appropriate. We made deductions for movement expenses, in accordance with 772(c)(2)(A) of the Act; these included, where appropriate, foreign inland freight, foreign brokerage and handling, ocean freight, and marine insurance. As certain of these movement services were provided by NME suppliers, we valued them using Indian rates. For further discussion of our use of surrogate data in an NME proceeding, as well as selection of India as the appropriate surrogate country, see the "Normal Value" section of this notice, below.

With respect to ocean freight, Changhong asserted that it used both PRC and market-economy suppliers for its shipments of CTVs. However, based on Changhong's submitted information, we could only establish that one of Changhong's market-economy carriers charged market-economy prices. Specifically, Changhong's questionnaire responses indicate that, for Changhong's remaining market-economy carriers, ocean freight was paid to a PRC company, not a market-economy supplier. Therefore, we valued ocean freight expenses for Changhong's remaining market-economy carriers, as well as its PRC carriers, using the substantiated market-economy carrier's rates. For further discussion, see the November 21, 2003, memorandum from Elizabeth Eastwood to the file entitled, "U.S. Price and Factors of Production Adjustments for Sichuan Changhong Electric Co., Ltd. for the Preliminary Determination."

Where appropriate, we adjusted the values to reflect inflation up to the POI using the wholesale price indices (WPI) or the purchase price indices (PPI) published by the International Monetary Fund (IMF), as appropriate.

B. Konka

For Konka, we used EP methodology in accordance with section 772(a) of the Act because the subject merchandise was sold directly to unaffiliated customers in the United States prior to importation and CEP methodology was not otherwise appropriate. We based EP on the packed FOB PRC port prices to unaffiliated purchasers in the United States, as appropriate. We made deductions for movement expenses, in accordance with 772(c)(2)(A) of the Act; these included, where appropriate, foreign inland freight and foreign brokerage and handling. As certain of these movement services were provided by NME suppliers, we valued them using Indian rates. For further discussion of these values, see the "Normal Value" section of this notice, below.

C. TCL

For TCL, we used EP methodology in accordance with section 772(a) of the Act because the subject merchandise was sold directly to unaffiliated customers in the United States prior to importation and CEP methodology was not otherwise appropriate. In accordance with our practice, we excluded sales made to the United States through a Japanese reseller as well as a sample sale to the United States from our analysis for purposes of the preliminary determination because they were made in small quantities. *See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan,* 64 FR 8291, 8295 (Feb. 19, 1999) and *Notice of Preliminary Determination of Sales at Not Less Than*

Fair Value: Pure Magnesium From the Russian Federation, 66 FR 21319, 21322–23 (Apr. 30, 2001).

We based EP on the packed FOB PRC prices to unaffiliated purchasers in the United States. We made deductions for movement expenses, in accordance with 772(c)(2)(A) of the Act; these included, where appropriate, foreign inland freight and foreign brokerage and handling. As certain of these movement services were provided by NME suppliers, we valued them using Indian rates. For further discussion of these values, see the "Normal Value" section of this notice, below.

D. XOCECO

For XOCECO, we used CEP methodology in accordance with section 772(b) of the Act, because sales to the first unaffiliated purchaser in the United States took place after importation. We calculated CEP based on ex-warehouse or delivered prices to unaffiliated purchasers in the United States. We made deductions for movement expenses, in accordance with 772(c)(2)(A) of the Act; these included, where appropriate, foreign inland freight, foreign brokerage and handling, ocean freight, marine insurance, U.S. inland freight, U.S. warehousing, other U.S. transportation expenses, U.S. customs brokerage fees and duties in accordance with section 772(c)(2)(A) of the Act. For freight services provided by market-economy companies and paid for in a market currency, we used the actual prices which XOCECO paid to the freight supplier in our CEP calculation. Where these movement services were provided by NME suppliers, we valued them using Indian rates.

Regarding U.S. warehousing and other U.S. transportation expenses, XOCECO attempted to respond to our requests for information but failed to properly include this information in its sales database. Because XOCECO was only partially responsive, we have not relied on its control-number-specific U.S. warehousing and other U.S. transportation expenses, and instead have based the amount of these expenses on FA, pursuant to section 776(a)(2)(A) of the Act. In selecting among the facts otherwise available, we applied the average of the reported model-specific warehouse and other transportation expenses for every transaction during the POI.

We made additional deductions from CEP for credit expenses, warranty expenses, and U.S. indirect selling expenses, including U.S. inventory carrying costs and other indirect selling expenses, in accordance with section 772(d)(1) of the Act. Regarding warranty expenses, XOCECO twice failed to provide requested documentation substantiating the breakdown of warranty expenses between subject and non-subject merchandise. As a result, we find that the use of FA, pursuant to section 776(a)(2)(A) of the Act, is appropriate. Furthermore, since the Department finds that XOCECO failed to cooperate by not acting to the best of its ability to comply with the request for information, an adverse inference is warranted under section 776(b) of the Act. As AFA, we applied the highest reported model-specific warranty expense for every transaction during the POI.

Pursuant to section 772(d)(3) of the Act, we further reduced the starting price by an amount for profit to arrive at CEP. We calculated the CEP profit ratio for XOCECO based on the financial data reported in the income statements of three Indian producers of CTVs, BPL Limited (BPL), Onida Saka Limited (Onida Saka), and Videocon International Limited (Videocon) for the year ended 2002.

Normal Value

A. Surrogate Country

Section 773(c)(4) of the Act requires the Department to value an NME producer's factors of production, to the extent possible, 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 Department has determined that India, Pakistan, Indonesia, Sri Lanka, and the Philippines are countries comparable to the PRC in terms of overall economic development. *See* the July 10, 2003, memorandum from Ron Lorentzen to Louis Apple entitled "Antidumping Duty Investigation of Color Television Receivers from the People's Republic of China (PRC): Request for a List of Surrogate Countries."

According to the available information on the record, we have determined that India is a significant producer of CTVs. *See* the November 21, 2003, memorandum from the team to the file entitled "Preliminary Determination Factors Valuation Memorandum," (the Factors Memorandum), on file in the CRU. For purposes of the preliminary determination, we have selected India as the surrogate country, based on the quality and contemporaneity of the currently available data. Accordingly, we have calculated NV using Indian values for the PRC producers' factors of production. We have obtained and relied upon publicly available information wherever possible.

Factors of Production

In accordance with 19 CFR 351.408(c)(1), the Department will normally use publicly available information to value factors of production. However, the Department's regulations also provide that where a producer sources an input from a market economy and pays for it in market economy currency, the Department employs the actual price paid for the input to calculate the factors-based NV. *Id.; see also Lasko Metal Products* v. *United States*, 43 F. 3d 1442, 1445–1446 (Fed. Cir. 1994). Changhong, Konka, TCL, and XOCECO reported that some of their inputs were purchased from market economies and paid for in a market economy currency. Where respondents were unable to provide sufficient documentation that certain inputs were purchased from market-economy suppliers, we valued these inputs using surrogate values.

In accordance with section 773(c) of the Act, we calculated NV based on factors of production reported by each respondent for the POI. To calculate NV, the reported per-unit factor quantities were multiplied by publicly available Indian surrogate values. For purposes of calculating NV, we valued PRC factors of production, in accordance with section 773(c)(1) of the Act. Factors of production include, but are not limited to: (1) Hours of labor required; (2) quantities of raw materials employed; (3) amounts of energy and other utilities consumed; and (4) representative capital cost, including depreciation. In examining surrogate values, we selected, where possible, the publicly available value which was: (1) an average non-export value; (2) representative of a range of prices within the POI or most contemporaneous with the POI; (3) product-specific; and (4) tax-exclusive. For a more detailed explanation of the methodology used in calculating various surrogate values, see the Factors Memorandum.

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. We added to Indian surrogate values surrogate freight costs using the shorter of the reported distance from the domestic supplier to the factory or the distance from the nearest seaport to the factory. This adjustment is in accordance with the Court of Appeals for the Federal

Circuit's decision in *Sigma Corporation v. United States*, 117 F. 3d 1401, 1407–08 (Fed. Cir. 1997). For a discussion of the valuation of Changhong, Konka, and TCL's freight costs, see the "Export Price/Constructed Export Price" section of this notice, above. Regarding the valuation of foreign inland freight for XOCECO, we note that XOCECO failed to amend its factors of production database to include distances and modes of transportation from NME suppliers, despite a specific request that it do so. As a result, we find that the use of FA, pursuant to section 776(a)(2)(A) of the Act, is appropriate. Furthermore, because XOCECO failed to cooperate by not acting to the best of its ability to comply with the request for information, we find that an adverse inference is warranted under section 776(b) of the Act. In calculating freight on factor inputs, as AFA, we multiplied the factor input by the highest freight surrogate value on the record of this case and the distance from the applicable port to the factory.

Where appropriate, we adjusted surrogate values to reflect inflation up to the POI using the WPI or the PPI published by the IMF, as appropriate.

Some inputs were purchased from market-economy suppliers and paid for in convertible currency. Following our normal practice, we used the actual price paid for these inputs, where possible. However, where the input was not purchased from a market-economy supplier and paid for in a market-economy currency, or where the input was purchased from a market-economy country which the Department has found to maintain broadly-available, non-industry-specific subsides which may benefit all exporters to all export markets (*i.e.*, Korea, India, Indonesia, and Thailand), it was necessary to select a surrogate value.

Regarding color picture tubes and speakers, where the respondents purchased these inputs from suppliers in the PRC or from one of the market economies identified above, we valued these inputs using import data obtained from *http://www.infodriveindia.com*, a fee-based Web site providing Indian customs data. We used this source because it provided the most specific information available for the color picture tubes and speakers used by the respondents. *See* the Factors Memorandum. We valued all other major raw material inputs not purchased by the respondents from market economies using India import statistics published by the Directorate General of Commercial Intelligence and Statistics of the Ministry of Commerce and Industry, Government of India, Calcutta and published by the *World Trade Atlas Trade Information System (World Trade Atlas)* covering the period October 2002 through March 2003.

Regarding sales of scrap metal, XOCECO twice failed to provide requested documentation demonstrating sales of scrap metal during the POI. As a result, use of FA, pursuant to section 776(a)(2)(A) of the Act, is appropriate. Furthermore, since the Department finds that XOCECO failed to cooperate by not acting to the best of its ability to comply with the request for information, an adverse inference is warranted under section 776(b) of the Act. As AFA, we are denying XOCECO any offset on sales of tin scrap to its consumption of tin. Rather, we allocated this quantity of scrap across the production of subject merchandise during the POI, thereby increasing the per-unit consumption of this metal.

We valued natural gas using a price obtained from the website of the Gas Authority of India Ltd., a supplier of natural gas in India, covering the period January through June 2002. For further discussion, *see* the Factors Memorandum.

For aluminum paper, cardboard, carton, inner cardboard paper, labels, manuals, nails, outside cardboard paper, package bags, packing tape, plastic accessory bags, plastic bags, plastic strap, polyethylene plastic bags, polyfoam, polypropylene sheet, and staples (*i.e.*, the packing materials reported by the respondents), we used import values from the *World Trade Atlas*.

Regarding the remaining raw material factors of production reported by the respondents, we did not value these factors because: (1) Surrogate value information was not available; and (2) the materials were reported as used in very small amounts. *See* the memorandum entitled "Concurrence Memorandum for the Preliminary Determination in the Investigation of Certain Color Television Receivers from the People's Republic of China," dated November 21, 2003. We valued electricity using electricity rate data from the International Energy Agency's Key World Energy Statistics 2002 report (*see http://www.iea.org/statist/keyworld2002/key2002/keystats.htm*) used in the 2002–2003 antidumping duty administrative review of creatine from the PRC. *See Creatine Monohydrate From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 68 FR 62767, 62769 (Nov. 6, 2003).

We valued labor based on a regression-based wage rate, in accordance with 19 CFR 351.408(c)(3).

To determine factory overhead, depreciation, SG&A expenses, interest expenses, and profit for the finished product, we relied on rates derived from the financial statements of BPL, Onida Saka, and Videocon, Indian producers of identical merchandise. We applied these ratios to the respondents' costs (determined as noted above) for materials, labor, and energy.

Critical Circumstances

On October 16, 2003, the petitioners alleged that there is a reasonable basis to believe or suspect critical circumstances exist with respect to the antidumping investigation of CTVs from the PRC. In accordance with 19 CFR 351.206(c)(2)(i), because petitioners submitted a critical circumstances allegation more than 20 days before the scheduled date of the preliminary determination, the Department must issue its preliminary critical circumstances determination not later than the date of the preliminary determination.

Section 733(e)(1) of the Act provides that the Department, upon receipt of a timely allegation of critical circumstances, will determine whether there is a reasonable basis to believe or suspect that: (A)(i) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise, or (ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and there was likely to be material injury by reason of such sales, and (B) there have been massive imports of the subject merchandise over a relatively short period.

According to 19 CFR 351.206(h)(1), in determining whether imports of the subject merchandise have been "massive," the Department normally will examine: (i) The volume and value of the imports; (ii) seasonal trends; and (iii) the share of domestic consumption accounted for by the imports. In addition, 19 CFR 351.206(h)(2) provides that "unless the imports during a "relatively short period" have increased by at least 15 percent over the imports during an immediately preceding period of comparable duration, the Secretary will not consider the imports massive."

In accordance with 19 CFR 351.206(i), the Department defines "relatively short period" as generally the period beginning on the date the proceeding

begins (*i.e.*, the date the petition is filed) and ending at least three months later.

In determining whether the above statutory criteria have been satisfied, we examined: (1) The evidence presented in the petitioners' submission of October 16, 2003; (2) exporter-specific shipment data requested by the Department; (3) evidence obtained since the initiation of the LTFV investigation (*i.e.*, additional import statistics released by U.S. Customs and Border Protection (CBP)); and (4) the ITC preliminary injury determination.

To determine whether a history of dumping and material injury exists, the Department generally considers current or previous antidumping duty orders on the subject merchandise from the country in question in the United States and current orders in any other country. The Department will normally not consider the initiation of a case, or a preliminary or final determination of sales at LTFV in the absence of an affirmative finding of material injury by the ITC, as indicative of a history sufficient to satisfy this criterion. *See Preliminary Determinations of Critical Circumstances: Steel Concrete Reinforcing Bars From Ukraine and Moldova,* 65 FR 70696, 70696–97 (Nov. 27, 2000). With regard to imports of CTVs from the PRC, the European Union (EU) imposed antidumping duty measures on CTVs from the PRC in 1995. *See* Council Regulation 1531/2002 of 14 August 2002 on Imposing a Definitive Anti-dumping Duty on Imports of Colour Television Receivers, 2002 O.J. (L 231)1–28. Because there is a history of dumping and material injury by reason of dumped imports in the EU of the subject merchandise, the first criterion of the test for finding critical circumstances is met.

Because we have preliminarily found that section 733(e)(1)(A) of the Act is met, we must consider whether under section 733(e)(1)(B) of the Act imports of the merchandise have been massive over a relatively short period. According to 19 CFR 351.206(h), we consider the following to determine whether imports have been massive over a relatively short period of time: (1) The volume and value of the imports; (2) seasonal trends (if applicable); and (3) the share of domestic consumption accounted for by the imports.

When examining volume and value data, the Department typically compares the export volume for equal periods immediately preceding and following the filing of the petition. Unless the imports in the comparison period have increased by at least 15 percent over the imports during the base period, we will not consider, under 19 CFR 351.206(h), the imports to have been "massive."

To determine whether imports of subject merchandise have been massive over a relatively short period, we compared the respondents' export volumes for the five months before the filing of the petition (*i.e.*, December 2002 through April 2003) to that during the five months following the filing of the petition (*i.e.*, May through September 2003). These periods were selected based on the Department's practice of using the longest period for which information is available from the month that the petition was filed through the effective date of the preliminary determination.

The Department requested and obtained from Changhong, Konka, TCL, and XOCECO monthly shipment data for 2001, 2002, and 2003. According to the monthly shipment information, we found the volume of shipments of CTVs by each of these companies increased by more than 15 percent. Therefore, we analyzed the time series data for the two years prior to the petition (*i.e.*, 2001 and 2002), to address the issue of seasonality. Although this data shows there have also been significant surges in imports from the respondents between those same base and comparison periods, we find that this seasonal pattern does not account entirely for the increase in imports. Specifically, we note that imports have increased substantially over their normal seasonal levels. We therefore find that imports of subject merchandise were massive in the comparison period. For further discussion of this analysis, see the November 21, 2003, memorandum from the team to Louis Apple, Office Director, entitled "Antidumping Duty Investigation of Certain Color Televisions (CTVs) from the People's Republic of China Preliminary Affirmative Determination of Critical Circumstances," (Critical Circumstances Memo).

With regard to the share of domestic consumption accounted for by imports, we were unable, pursuant to 19 CFR 351.206(h)(iii), to consider the share of domestic consumption accounted for by the imports because the available data did not permit such analysis. It is the Department's practice to conduct its critical circumstances analysis of companies in the "All Others" category based on the experience of the investigated companies. Because we are determining that critical circumstances exist for each of the mandatory respondents in this investigation, we are concluding that critical circumstances exist for companies covered by the "All Others" rate.

As discussed above, no other party responded to the Department's request for information and thus we relied on AFA for the rate applicable to the "PRC entity" (*i.e.*, the PRC-wide rate). Therefore, the use of AFA is also warranted in the critical circumstances analysis for the PRC entity. As AFA in this case, we relied on the import statistics through September 2003 (the latest month for which such data was available for the preliminary determination). The import statistics showed an increase in imports that was significantly greater than 15 percent. Even if we were to subtract the shipment data provided by the mandatory respondents from the aggregate import data and to compare the remaining volume of imports in the base period to the remaining imports in the comparison period, this comparison would indicate that massive imports occurred. *See* the Critical Circumstances Memo.

In summary, we find there is a reasonable basis to believe or suspect importers had knowledge of dumping and the likelihood of material injury with respect to CTVs from the PRC. We further find there have been massive imports of CTVs over a relatively short period from each of the mandatory respondents. Given the analysis summarized above, and described in more detail in the Critical Circumstances Memo, we preliminarily determine critical circumstances exist for imports of CTVs produced in and exported from the PRC.

In accordance with section 733(e)(2) of the Act, upon issuance of an affirmative preliminary determination of sales at LTFV in the investigation with respect to CTVs from the PRC, the Department will direct the CBP to suspend liquidation of all entries of CTVs from the PRC that are entered, or withdrawn from warehouse, for consumption on or after 90 days prior to the date of publication in the **Federal Register** of our preliminary determination in this investigation. The CBP shall require a cash deposit or posting of a bond equal to the estimated preliminary dumping margins reflected in the preliminary determinations published in the **Federal Register**. The suspension of liquidation to be issued after our preliminary determination will remain in effect until further notice. We will make a final determination concerning critical circumstances for all producers and exporters of subject merchandise from the PRC when we make our final determination in this investigation, which will be 135 days after the date of publication of the preliminary determination.

Verification

As provided in section 782(i) of the Act, we intend to verify all information relied upon in making our final determination.

Suspension of Liquidation

In accordance with section 733(d)(2) of the Act, we are directing the CBP to suspend liquidation of all imports of subject merchandise from the PRC entered, or withdrawn from warehouse, for consumption on or after 90 days prior to the date of publication of this notice in the **Federal Register**. We are also instructing the CBP to require a cash deposit or the posting of a bond equal to the weighted-average dumping margin for all entries of CTVs from the PRC. These suspension of liquidation instructions will remain in effect until further notice.

The weighted-average dumping margins are as follows:

Manufacturer/Exporter	Weighted-average margin (in percent)	Critical circumstances
Haier Electric Appliances International Co.	40.84	Yes.
Hisense Import and Export Co., Ltd.	40.84	Yes.
Konka Group Company, Ltd.	27.94	Yes.
Philips Consumer Electronics Co. of Suzhou Ltd.	40.84	Yes.
Shenzhen Chaungwei-RGB Electronics Co., Ltd.	40.84	Yes.
Sichuan Changhong Electric Co., Ltd.	45.87	Yes.
Starlight International Holdings, Ltd.	40.84	Yes.
Star Light Electronics Co., Ltd.	40.84	Yes.
Star Fair Electronics Co., Ltd.	40.84	Yes.
Starlight Marketing Development Ltd.	40.84	Yes.
SVA Group Co., Ltd.	40.84	Yes.
TCL Holding Company Ltd.	31.35	Yes.
Xiamen Overseas Chinese Electronic Co., Ltd.	31.70	Yes.
PRC-wide	78.45	Yes.

The PRC-wide rate applies to all entries of the subject merchandise except for entries from exporters/producers that are identified individually above.

Disclosure

We will disclose the calculations performed within five days of the date of publication of this notice to parties in this proceeding in accordance with 19 CFR 351.224(b).

ITC Notification

In accordance with section 733(f) of the Act, we have notified the ITC of our determination. If our final determination is affirmative, the ITC will determine whether these imports are materially injuring, or threaten material injury to, the U.S. industry. The deadline for that ITC determination would be the later of 120 days after the date of this preliminary determination or 45 days after the date of our final determination.

Public Comment

Case briefs for this investigation must be submitted no later than seven days after the date of the final verification report issued in this proceeding. Rebuttal briefs must be filed five days from the deadline date for case briefs. A list of authorities used, a table of contents, and an executive summary of issues should accompany any briefs submitted to the Department. Executive summaries should be limited to five pages total, including footnotes. *See* 19 CFR 351.309.

Section 774 of the Act provides that the Department will hold a hearing to afford interested parties an opportunity to comment on arguments raised in case briefs, provided that such a hearing is requested by any interested party. If a request for a hearing is made in this investigation, the hearing will tentatively be held two days after the deadline for submission of the rebuttal briefs at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Parties should confirm by telephone the time, date, and place of the hearing 48 hours before the scheduled time. Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request within 30 days of the publication of this notice. Requests should specify the number of participants and provide a list of the issues to be discussed. Oral presentations will be limited to issues raised in the briefs. *See* 19 CFR 351.310.

We will make our final determination no later than 135 days after the date of this preliminary determination, pursuant to section 735(a)(2) of the Act.

This determination is published pursuant to sections 733(f) and 777(i) of the Act.

Dated: November 21, 2003.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. 03–29721 Filed 11–26–03; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–557–812]

Notice of Negative Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Preliminary Determination of Critical Circumstances: Certain Color Televisions From Malaysia

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

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

SUMMARY: We preliminarily determine that certain color televisions from Malaysia are not being, nor are likely to be, sold in the United States at less than fair value, as provided in section 733(b) of the Tariff Act of 1930, as amended. In addition, we preliminarily determine that there is no reasonable basis to believe or suspect that critical circumstances exist with respect to subject merchandise exported from Malaysia.

Interested parties are invited to comment on this preliminary determination. We will make our final determination not later than 135 days after the date of this preliminary determination.

EFFECTIVE DATE: November 28, 2003.

FOR FURTHER INFORMATION CONTACT: Mike Strollo or Gregory E. Kalbaugh, Office of AD/CVD Enforcement, Office 2, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0629 or (202) 482–3693, respectively.

Preliminary Determination

We preliminarily determine that certain color televisions (CTVs) from Malaysia are not being sold, nor are likely to be sold, in the United States at less than fair value (LTFV), 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. In addition, we

preliminarily determine that there is no reasonable basis to believe or suspect that critical circumstances exist with respect to CTVs produced in and exported from Malaysia. The critical circumstances analysis for the preliminary determination is discussed below under the section "Critical Circumstances."

Case History

Since the initiation of this investigation ((*Notice of Initiation of Antidumping Duty Investigations: Certain Color Television Receivers From Malaysia and the People's Republic of China*, 68 FR 32013 (May 29, 2003)) (*Initiation Notice*), the following events have occurred:

On June 13, 2003, Algert Co., Inc., and Panasonic AVC Networks Kuala Lumpur Malaysia Sdn. Bhd (collectively, Algert/Panasonic) requested that Panasonic multi-system, dual/auto voltage CTVs be excluded from the scope of this investigation.

On June 16, 2003, the United States International Trade Commission (ITC) preliminarily determined that there is a reasonable indication that imports of CTVs from Malaysia are materially injuring the United States industry. See ITC Investigation Nos. 731–TA–1034 and 1035 (*Certain Color Television Receivers from China and Malaysia*, 68 FR 38089 (June 26, 2003)).

Also on June 16, 2003, we issued an antidumping questionnaire to Funai Electric (Malaysia) Sdn. Bhd. (Funai Malaysia), the producer/exporter accounting for the largest volume of known exports of subject merchandise from Malaysia during the period of investigation (POI). For further discussion, see the memorandum to Louis Apple, Director, Office 2, from the Team entitled "Antidumping Duty Investigation of Certain Color Televisions from Malaysia—Selection of Respondents," dated May 30, 2003.

On July 8, 2003, Funai Malaysia submitted information stating that it had no viable home market or third country market during the POI. On July 21, 2003, Funai Malaysia submitted a response to section A of the Department's questionnaire.

On July 30, 2003, the Department issued a section A supplemental questionnaire to Funai Malaysia.

On August 6, 2003, Funai Malaysia submitted responses to sections C and D of the Department's questionnaire.

On August 19, 2003, the Department issued its first section C supplemental questionnaire to Funai Malaysia.

On August 20, 2003, Funai Malaysia submitted its response to the Department's section A supplemental questionnaire.

On August 22, 2003, the Department issued its first section D supplemental questionnaire to Funai Malaysia. On September 4, 2003, Funai Malaysia responded to this supplemental questionnaire.

On September 9, 2003, Funai Malaysia submitted its response to the Department's August 19, 2003, section C supplemental questionnaire.

On September 11 and September 16, 2003, the Department issued section D supplemental questionnaires.

On September 23, 2003, the petitioners submitted comments opposing Algert/Panasonic's June 13, 2003, scope exclusion request.

On September 24, 2003, the Department issued an additional sections A and C supplemental questionnaire to Funai Malaysia.

On September 17, 2003, pursuant to section 733(c)(2) of the Act and 19 CFR 351.205(f), the Department determined that the case was extraordinarily complicated and postponed the preliminary determination until no later than November 21, 2003. *See Postponement of Preliminary Determinations of Antidumping Duty Investigations: Certain Color Television Receivers From Malaysia (A–557–812) and the People's Republic of China (A–570–884)*, 68 FR 55372 (Sept. 25, 2003).

On October 3, 2003, Funai Malaysia submitted its response to the questions pertaining to section A of the Department's September 24, 2003, supplemental questionnaire.

On October 9, 2003, Funai Malaysia submitted its response to the Department's September 11 and September 16, 2003, supplemental questionnaires.

On October 14, 2003, Funai Malaysia submitted its response to the questions pertaining to section C of the Department's September 24, 2003, supplemental questionnaire.

On October 16, 2003, the petitioners alleged that critical circumstances exist with respect to imports of CTVs from Malaysia. Accordingly, pursuant to section 732(e) of the Act, on October 17, 2003, we requested information from Funai Malaysia regarding monthly shipments to the United States during the period January 2001 through October 2003. We received the requested information on October 31, 2003. The critical circumstances analysis for the preliminary determination is discussed below under "Critical Circumstances."

On November 17, 2003, Funai Malaysia requested that, in the event of an affirmative preliminary determination in this investigation, the Department postpone its final determination until not later than 135 days after the the date of the publication of the preliminary determination in the **Federal Register**. In addition, in Funai Malaysia's request for a postponement, it also requested an extension of provisional measures from a four-month period to not more than six months in accordance with 19 CFR 351.210(e)(2). On November 18, 2003, the petitioners requested that, in the event of a negative preliminary determination in this investigation, the Department postpone its final determination until not later than 135 days after the date of the publication of the preliminary determination in the **Federal Register**.

Postponement of Final Determination

Section 735(a)(2) of the Act provides that a final determination may be postponed until not later than 135 days after the date of the publication of the preliminary determination if, in the event of an affirmative preliminary determination, a request for such postponement is made by exporters who account for a significant proportion of exports of the subject merchandise, or in the event of a negative preliminary determination, a request for such postponement is made by the petitioner. The Department's regulations, at 19 CFR 351.210(e)(2), require that requests by respondents for postponement of a final determination be accompanied by a request for extension of provisional measures from a four-month period to not more than six months.

Pursuant to section 735(a)(2) of the Act, the petitioners requested that, in the event of a negative preliminary determination in this investigation, the Department postpone its final determination until not later than 135 days after the date of the publication of the preliminary determination in the **Federal Register**. In accordance with 19 CFR 351.210(b), because our preliminary determination is negative and no compelling reasons for denial exist, we are granting the petitioners' request and are postponing the final determination until no later than 135 days after the publication of this notice in the **Federal Register**.

Period of Investigation

The POI is April 1, 2002, through March 31, 2003. This period corresponds to the four most recent fiscal quarters prior to the month of the filing of the petition (*i.e.*, May 2003).

Scope of 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 subheading is provided for convenience and customs purposes, the written description of the scope of the merchandise under investigation is dispositive.

Scope Comments

In accordance with the preamble to our regulations (*see Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27323 (May 19, 1997)), we set aside a period of time for parties to raise issues regarding product coverage and encouraged all parties to submit comments within 20 calendar days of publication of the *Initiation Notice* (*see* 68 FR at 32013). Interested parties submitted such comments by June 13, 2003.

Pursuant to the Department's solicitation of scope comments in the *Initiation Notice*, Algert/Panasonic requested that Panasonic multi-system, dual/auto voltage CTVs be excluded from the scope of this investigation because: (1) These CTVs are not produced domestically; and (2) they do not compete in any meaningful way with CTVs that are produced in the United States. On September 23, 2003, the petitioners opposed this request.

After considering the interested party comments and the petitioners' objections to the exclusion request regarding the Panasonic multi-system, dual/auto voltage CTVs, we find that the CTVs in question fall within the scope of this investigation. All CTVs, including the CTVs in question, have the same fundamental characteristics—that is they are capable of receiving a broadcast signal and displaying a video image. Therefore, we conclude that all CTVs, whether having multiple signal capability or dual/auto voltage, including the multi-system, dual/auto voltage CTVs produced by PAVCKM and sold by Algert, are appropriately included in the scope of this investigation. For a further discussion, see the memorandum to Louis Apple, Director, Office 2 from Michael Strollo entitled "Scope Exclusion Request," dated November 21, 2003.

Class or Kind

As part of its scope request, Algert/Panasonic argued that the Panasonic multi-system, dual/auto voltage CTVs fall into a separate class or kind of merchandise from other color televisions. In considering whether this product should be considered a separate class or kind, we analyzed the arguments submitted by all of the interested parties in the context of the criteria enumerated in the court decision *Diversified Products Corp.* v. *United States*, 572 F. Supp. 883, 889 (CIT 1983) (*Diversified*). For this analysis, we relied upon the petition, the submissions by all interested parties, the preliminary determination made by the ITC, and other information.

The criteria set forth in *Diversified* to examine whether differences in class or kind exist are as follows: (1) The general physical characteristics of the merchandise; (2) the expectations of the ultimate purchaser; (3) the ultimate use of the merchandise; (4) the channels of trade in which the merchandise moves, and; (5) the manner in which the product is advertised or displayed. Based upon the evaluation of these criteria, we preliminarily find that Panasonic multi-system, dual/auto voltage CTVs are the same class or kind of merchandise as the other CTVs included within the scope of this investigation. Specifically, we note that the essential physical characteristics of a Panasonic multi-system, dual/auto voltage CTV and a standard CTV are the same (*i.e.*, an electronic product capable of receiving a broadcast television signal and producing a video image); the ultimate use of the product (*i.e.*, the receipt of a broadcast television signal and the production of a video image) and as such, the expectations of the ultimate purchasers, are the same for all CTVs; channels of distribution (*i.e.*, retail outlets) are the same; and finally, the CTVs in question are clearly advertised and displayed as CTVs. Consequently, we preliminarily find that the CTVs in question do not constitute a separate class or kind of merchandise.

Fair Value Comparisons

To determine whether sales of certain color televisions from Malaysia to the United States were made at LTFV, we compared the export price (EP) or constructed export price (CEP) to the Normal Value (NV), as described in the "Export Price/Constructed Export Price" and "Normal Value" sections of this notice, below. In accordance with section 777A(d)(1)(A)(i) of the Act, we compared POI weighted-average EPs and CEPs to NVs.

For this preliminary determination, we have determined that Funai Malaysia did not have a viable home or third country market. Therefore, as the basis for NV, we used constructed value (CV) when making comparisons in accordance with section 773(a)(4) of the Act.

Export Price/Constructed Export Price

In accordance with section 772(a) of the Act, we calculated EP for those sales where the merchandise was sold to the first unaffiliated purchaser in the United States prior to importation by the exporter or producer outside the United States. We based EP on the packed price to unaffiliated purchasers in the United States. We made deductions for movement expenses in accordance with section 772(c)(2)(A) of the Act; these included, where appropriate, foreign warehousing, foreign inland freight, foreign inland insurance, and foreign brokerage and handling expenses.

In accordance with section 772(b) of the Act, we calculated CEP for those sales where the merchandise was sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter, or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter.

We based CEP on the packed delivered prices to unaffiliated purchasers in the United States. We made deductions for movement expenses, in accordance with section 772(c)(2)(A) of the Act; these included, where appropriate, foreign inland freight, foreign warehousing expenses, foreign inland insurance, foreign brokerage and handling expenses, ocean freight, marine insurance, U.S. brokerage and handling, U.S. customs duties (including harbor maintenance fees and merchandise processing fees), U.S. inland insurance, U.S. inland freight expenses (*i.e.*, freight from port to warehouse and freight from warehouse to the customer), post-sale warehousing expenses, and intra-warehousing transfer expenses. In accordance with section 772(d)(1) of the Act and 19 CFR 351.402(b), we deducted those selling expenses associated with economic activities

occurring in the United States, including direct selling expenses (*i.e.*, bank charges and imputed credit expenses), and indirect selling expenses (including inventory carrying costs and other indirect selling expenses).

We note that, in their November 6, 2003, comments on the preliminary determination, the petitioners argued that the Department should deduct from CEP the indirect selling expenses incurred by Funai Electric Co., Ltd. (Funai Electric) in Japan on sales to the United States. The petitioners claim that these indirect expenses incurred by Funai Electric are associated with sales to unaffiliated customers made by Funai Corporation, Inc. (Funai Corporation), Funai Malaysia's affiliated reseller in the United States.

As noted above, pursuant to 19 CFR 351.402(b), we deduct from CEP those selling expenses associated with commercial activities occurring in the United States that relate to the sale to an unaffiliated purchaser, no matter where or when paid. This regulation also states that the Department will not make any adjustment to CEP for any expense that is related solely to the sale to an affiliated importer in the United States. The information on the record indicates that Funai Electric's selling functions are limited to: (1) Inputting and processing of orders of Funai Malaysia's merchandise made by Funai Corporation; (2) customer interaction (*i.e.*, with Funai Corporation); and (3) sales logistics associated with transporting the merchandise from Malaysia to Funai Corporation's designated place of delivery. None of these selling functions indicate that Funai Electric incurred selling expenses associated with economic activities occurring in the United States on the sale to unaffiliated customers. Rather, the selling functions performed, and the selling expenses incurred, appear to be associated only with Funai Electric's sales to Funai Corporation. Therefore, because the evidence on the record does not support the petitioners' contention that Funai Electric's indirect selling expenses incurred in Japan are: (1) Associated with commercial activities in the United States; and (2) related to the sale to an unaffiliated purchaser, we have not deducted these expenses from CEP.

Pursuant to section 772(d)(3) of the Act, we further reduced the starting price by an amount for profit to arrive at CEP. In accordance with section 772(f) of the Act, we calculated the CEP profit rate using the expenses incurred by Funai Malaysia and its affiliate on their sales of the subject merchandise in the United States and the profit associated with those sales.

Normal Value

A. Home Market Viability

In order to determine whether there was a sufficient volume of sales in the home market to serve as a viable basis for calculating NV (*i.e.*, the aggregate volume of home market sales of the foreign like product is equal to or greater than five percent of the aggregate volume of U.S. sales), we compared the respondent's volume of home market sales of the foreign like product to the volume of U.S. sales of the subject merchandise, in accordance with section 773(a)(1)(C) of the Act.

Funai Malaysia reported that during the POI it made no home market sales of foreign like product. Sales to Funai Malaysia's largest third-country market, Japan, were not greater than five percent of the aggregate volume of U.S. sales of the subject merchandise. Therefore, we determined that neither the home market nor any third country market was a viable basis for calculating NV. As a result, we used CV as the basis for calculating NV, in accordance with section 773(a)(4) of the Act.

B. Level of Trade

In accordance with section 773(a)(1)(B) of the Act, to the extent practicable, we determine NV based on sales in the comparison market at the same level of trade as the EP or CEP. The NV level of trade (LOT) is that of the starting-price sales in the comparison market or, when NV is based on CV, that of the sales from which we derive selling, general and administrative expenses (SG&A) and profit. For EP, the U.S. LOT is also the level of the starting-price sale, which is usually from exporter to importer. For CEP, it is the level of the constructed sale from the exporter to the importer.

To determine whether NV sales are at a different LOT than EP or CEP sales, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. If the comparison-market sales are at a different LOT, and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison market sales at the level of trade of the export transaction, we make an LOT adjustment under section 773(a)(7)(A) of the Act. Finally, for CEP sales, if the NV level is more remote from the factory than the CEP level and there is no basis for determining whether the difference in levels between NV and CEP affects price comparability, we adjust NV under section 773(a)(7)(B) of the Act (the CEP-offset provision). *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from South Africa*, 62 FR 61731, 23761 (Nov. 19, 1997).

In this investigation, we found that Funai Malaysia had no viable home or third country market. When NV is based on CV, the NV LOT is that of the sales from which we derive SG&A expenses and profit (*see Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Fresh Atlantic Salmon from Chile*, 63 FR 2664 (Jan. 16, 1998)). In accordance with 19 CFR 351.412(d), the Department will make its LOT determination under paragraph (d)(1) of this section on the basis of sales of the foreign like product by the producer or exporter. Because it is not possible in the instant case to make an LOT determination on the basis of sales of the foreign like product in the home or third country market, the Department may use sales of different or broader product lines, sales by other companies, or any other reasonable basis. Because we based the selling expenses and profit for Funai Malaysia on the weighted average selling expenses incurred and profits earned by another Malaysian producer of comparable merchandise who was not party to this investigation, there is insufficient information on the record in this investigation to allow the Department to make an LOT adjustment or grant a CEP offset to the CVs reported by Funai Malaysia.

Calculation of Constructed Value

In accordance with section 773(e) of the Act, we calculated CV based on the sum of Funai's cost of materials and fabrication for the foreign like product, plus amounts for SG&A, profit, and U.S. packing costs. We relied on the submitted CV information for Funai Malaysia, except in the following instances where the reported costs were not appropriately quantified or valued.

- We revised the company's reported general and administrative (G&A) expenses to include Funai Malaysia's net G&A expenses.
- We calculated the company's CV profit and domestic selling expense ratios using the financial statements of a surrogate Malaysian company that sold merchandise that is in the same general category of products as the subject merchandise, using data that was contemporaneous to the POI.

For further discussion of these adjustments, see the memorandum from Mark Todd to Neal Halper, entitled

"Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination," dated November 21, 2003.

During the POI, Funai Malaysia purchased a major input, printed circuit boards (PCBs), from an affiliated PCB-board producer in Hong Kong. This affiliate purchased the raw materials necessary to produce the PCB from both market and NME suppliers, and then it subcontracted the assembly operations with an entity located in the People's Republic of China (PRC). In order to demonstrate that the affiliate's purchases from its PRC suppliers reasonably reflect the costs associated with the production and sale of the merchandise, Funai Malaysia provided quotes from various market economy suppliers of the same parts which showed that the prices recorded in the normal books and records closely approximated market values.

The petitioners have requested that, in applying the major input rule under section 773(f)(3) of the Act, the Department disregard the Hong Kong affiliate's actual costs as recorded in its books and records and instead determine the costs incurred in the PRC using a factors of production approach. Specifically, the petitioners assert that the Hong Kong affiliate and its subcontractor are themselves affiliated by virtue of an exclusive supply relationship between the two entities, and thus the Department is required to rely on surrogate values for labor and overhead incurred by the Chinese subcontractor, as well as for those transactions where raw material inputs are transferred from Chinese suppliers to the Chinese subcontractor through Funai Hong Kong.

We find that there is no legal basis to adopt the petitioner's approach, given that the Act directs the Department to employ a factors of production methodology only in cases involving non-market economy producers. In contrast, in cases involving market economy producers, section 773(f)(1)(A) of the Act requires the Department to calculate costs on the basis of a company's financial records, provided that such records are maintained in accordance with generally accepted accounting principles (GAAP) and reasonably reflect the costs associated with the production and sale of the merchandise. *See Certain Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review*, 64 FR 56759–02 (Oct. 21, 1999); *see also Notice of Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke the Antidumping Duty Order: Brass Sheet and Strip From the Netherlands*, 65 FR 742 (Jan. 6, 2000).

In accordance with our practice and 19 CFR 351.401(h), in this case we find that the Hong Kong company is the producer of the PCBs in question because it provides the design of the PCB, purchases all of the raw materials necessary to produce it, arranges for the conversion of these materials into the finished product, and then controls the relevant sale to Funai Malaysia. *See, e.g., Remand Redetermination: Static Random Access Memory Semiconductors from Taiwan* (June 30, 2000); *Notice of Final Determination of Sales at Less Than Fair Value: Polyvinyl Alcohol From Taiwan*, 61 FR 14064, 14070 (Mar. 29, 1996); *Notice of Final Determination of Sales at Less Than Fair Value. Certain Forged Stainless Steel Flanges from India*, 58 FR 68853, 68855 (Dec. 29, 1993). Therefore, we have looked to the books and records of the Hong Kong affiliate to determine the cost of the PCB, rather than to the books and records of the PRC subcontractor.

In addition, we have examined the information on the record regarding the relationship between Funai Malaysia and its subcontractor and preliminarily find that these companies are not affiliated within the meaning of section 771(33) of the Act. Specifically, we find that there is no cross-ownership in these entities, and that neither Funai Malaysia nor Funai Hong Kong is in a position to exercise control or restraint over the subcontractor. Rather, the subcontractor has numerous manufacturing facilities in the PRC, not all of which assemble PCBs, and it makes a variety of other products. *See* Funai Malaysia's October 14, 2003, submission at pages 10–11 and Exhibit 1. Additionally, we find that the subcontractor is not in a position to exercise control or restraint over Funai Hong Kong, as the technical know-how, designs, and equipment needed to manufacture the PCBs are all owned and controlled by Funai Hong Kong. Moreover, Funai Hong Kong and the subcontractor have not entered into formal exclusive supplier arrangements which would prohibit this company from sourcing its PCB assembly elsewhere or the subcontractor from assembling merchandise for other producers. Thus, we find that the indicia of control necessary to find these parties affiliated are not present here.

Given these factual conclusions, we disagree with the petitioners that it would be appropriate to determine the cost of producing the PCBs using a factors of production methodology based on the production experience of the subcontractor because the Chinese subcontractor is not the "producer" of the PCB and, thus, the subcontracting services provided by this entity merely represents one of the inputs into the final PCB product. In any event, we disagree with the petitioners that, even assuming that these parties were deemed to be affiliated, it would be appropriate to collect factors data from the subcontractor because the assembly operations constitute a minor portion of the total cost of the CTV (and thus the major input rule does not apply to the assembly operations).

Because the Hong Kong company is the producer of the PCB and the Department treats Hong Kong as a market economy, the statute directs us to use the company's recorded costs unless they are not consistent with GAAP or do not reasonably reflect the costs of production or sale. The Department may find that a respondent's costs recorded in its normal books and records do not reasonably reflect the costs of the merchandise where the costs are allocated to the merchandise under consideration in a manner which distort the dumping analysis. *See, e.g., Final Determination of Sales at Less Than Fair Value: Oil Country Tubular Goods From Argentina*, 60 FR 33539, 33547 (June 28, 1995); and *Elemental Sulphur From Canada; Final Results of Antidumping Finding Administrative Review*, 61 FR 8239, 8241–8243 (Mar. 4, 1996). While the Hong Kong company made purchases from unaffiliated PRC suppliers, these purchases were made in a market economy (*i.e.*, Hong Kong) by a market-economy entity which maintains that its books and records are kept in accordance with Hong Kong GAAP. Thus, we preliminarily find that its purchases from PRC entities reasonably reflect the costs associated with the production and sale of a PCB. Therefore, in determining the cost of the PCBs under the major input rule for purposes of the preliminary determination, we have relied upon the costs stated in this company's normal books and records.

Price-to-CV Comparisons

In accordance with section 773(a)(4) of the Tariff Act, we based NV on CV because there was no viable home or third-country market.

For comparisons to EP, we made circumstances-of-sale adjustments by deducting home market direct selling expenses and adding U.S. direct selling expenses. We made no adjustment for differences in credit expenses between markets because we had inadequate information to do so.

When we compared CV to CEP, we deducted from CV the weighted-average home market direct selling expenses. For a discussion of the calculation of these expenses, see the memorandum from Michael Strollo to the File entitled: Calculations Performed for Funai Electric (Malaysia) Sdn. Bhd. (Funai Malaysia) for the Preliminary Determination in the 2002–2003 Antidumping Duty Investigation of Certain Color Television Receivers from Malaysia, dated November 21, 2003.

Currency Conversion

We made currency conversions into U.S. dollars in accordance with section 773A(a) of the Act based on the exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank.

Critical Circumstances

On October 16, 2003, the petitioners alleged that there is a reasonable basis to believe or suspect critical circumstances exist with respect to the antidumping investigation of CTVs from Malaysia. In accordance with 19 CFR 351.206(c)(2)(i), because petitioners submitted a critical circumstances allegation more than 20 days before the scheduled date of the preliminary determination, the Department must issue its preliminary critical circumstances determination not later than the date of the preliminary determination.

Section 733(e)(1) of the Act provides that the Department, upon receipt of a timely allegation of critical circumstances, will determine whether there is a reasonable basis to believe or suspect that: (A)(i) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise, or (ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and there was likely to be material injury by reason of such sales, and (B) there have been massive imports of the subject merchandise over a relatively short period.

According to 19 CFR 351.206(h)(1), in determining whether imports of the subject merchandise have been "massive," the Department normally will examine: (i) The volume and value of the imports; (ii) seasonal trends; and (iii) the share of domestic consumption accounted for by the imports. In addition, 19 CFR 351.206(h)(2) provides that "unless the imports during a "relatively short period" have increased by at least 15 percent over the imports during an immediately preceding period of comparable duration, the Secretary will not consider the imports massive."

In accordance with 19 CFR 351.206(i), the Department defines "relatively short period" as generally the period beginning on the date the proceeding begins (*i.e.*, the date the petition is filed) and ending at least three months later.

In determining whether the above statutory criteria have been satisfied, we examined: (1) the evidence presented in the petitioners' submission of October 16, 2003; (2) exporter-specific shipment data requested by the Department; and (3) the ITC preliminary injury determination.

To determine whether a history of dumping and material injury exists, the Department generally considers current or previous antidumping duty orders on the subject merchandise from the country in question in the United States and current orders in any other country. The Department will normally not consider the initiation of a case, or a preliminary or final determination of sales at LTFV in the absence of an affirmative finding of material injury by the ITC, as indicative of a history sufficient to satisfy this criterion. *See Preliminary Determination of Critical Circumstances: Steel Concrete Reinforcing Bars From Ukraine and Moldova*, 65 FR 70696 (Nov. 27, 2000). With regard to imports of CTVs from Malaysia, the European Union (EU) imposed antidumping duty measures on CTVs from Malaysia in 1995. Because there is a history of dumping and material injury by reason of dumped imports in the EU of the subject merchandise, the first criterion of the test for finding critical circumstances is met.

Because we have preliminarily found that section 733(e)(1)(A) of the Act is met, we must consider whether under section 733(e)(1)(B) of the Act imports of the merchandise have been massive over a relatively short period. According to 19 CFR 351.206(h), we consider the following to determine whether imports have been massive over a relatively short period of time: (1) The volume and value of the imports; (2) seasonal trends (if applicable); and (3) the share of domestic consumption accounted for by the imports.

When examining volume and value data, the Department typically compares the export volume for equal periods immediately preceding an following the filing of the petition. Unless the imports in the comparison period have increased by at least 15 percent over the imports during the base period, we will not consider, under 19 CFR 351.206(h), the imports to have been "massive."

To determine whether imports of subject merchandise have been massive over a relatively short period, we compared the respondent's export volumes for the four months before the filing of the petition (*i.e.*, January through April 2003) to that during the four months after the filing of the petition (*i.e.*, May through August 2003). These periods were selected based on the Department's practice of using the longest period for which information is available from the month that the petition was filed through the effective date of the preliminary determination.

The Department requested and obtained from Funai Malaysia monthly shipment data for 2001, 2002, and 2003. According to its monthly shipment information, we found the volume of shipments of CTVs increased by more than 15 percent. However, in comparing the time series data for the two years prior to the petition (*i.e.*, 2001 and 2002), we note that there have also been significant surges in imports from Funai Malaysia between those same base and comparison periods. In *Certain Color Television Receivers from China and Malaysia*, Investigations Nos. 731–TA–1034 and 1035 (Preliminary), USITC Pub. No. 3607 (*ITC Prelim*), the ITC indicated that subject imports of CTVs: (1) Account for only a small percentage of everyday sales; (2) represent the bulk of product advertised and sold during the holiday season; and (3) arrive in containers months before in preparation for the holiday season. *See ITC Prelim* at 17–18. Therefore, based on the time series data and the information contained in the ITC Prelim, we conclude that imports of CTVs are subject to seasonal trends. Moreover, our analysis shows that these seasonal trends account for the increase in imports during the time periods examined. Consequently, despite the greater than 15 percent increase in imports from Funai Malaysia between the base and comparison periods, we find that subject imports are not considered "massive" pursuant to 19 CFR 351.206(h)(1)(ii). *See* the memorandum from The CTVs Team to Louis Apple, Director, entitled: "Antidumping Duty Investigation of Certain Color Televisions from Malaysia—Preliminary Negative Determination of Critical Circumstances," (Critical Circumstances Memo) dated November 21, 2003.

It is also the Department's practice to conduct its critical circumstances analysis of companies in the "All Others" category based on the experience of the investigated companies. Because we are determining

that critical circumstances do not exist for Funai Malaysia, and Funai Malaysia is the only respondent in this investigation, we are concluding that critical circumstances do not exist for companies covered by the "All Others" rate.

In summary, we find that there is a reasonable basis to believe or suspect importers had knowledge of dumping and the likelihood of material injury with respect to CTVs from the PRC. We, however, do not find that there have been massive imports of CTVs over a relatively short period from Funai Malaysia due to seasonality. Given the analysis summarized above, and described in more detail in the Critical Circumstances Memo, we preliminarily determine that critical circumstances do not exist for imports of CTVs produced in and exported from Malaysia.

Verification

As provided in section 782(i) of the Act, we will verify all information relied upon in making our final determination.

Suspension of Liquidation

Exporter/manufacturer	Weighted-average margin percentage	Critical circumstances
Funai Electric (Malaysia) Sdn. Bhd.	0.03	No.

Because the estimated weighted-average dumping margin for the examined company is *de minimis*, we are not directing Customs and Border Protection to suspend liquidation of entries of certain color television receivers from Malaysia.

Disclosure

The Department will disclose calculations performed within five days of the date of publication of this notice to the parties in this proceeding in accordance with 19 CFR 351.224(b).

ITC Notification

In accordance with section 733(f) of the Act, we have notified the ITC of our determination. If our final determination is affirmative, pursuant to section 735(b)(3) of the Act, the ITC will determine within 135 days after our final determination whether these imports are materially injuring, or threaten material injury to, the U.S. industry.

Public Comment

Case briefs for this investigation must be submitted no later than seven days after the date of the final verification report issued in this proceeding. Rebuttal briefs must be filed five days from the deadline date for case briefs. A list of authorities used, a table of contents, and an executive summary of issues should accompany any briefs submitted to the Department. Executive summaries should be limited to five pages total, including footnotes. See 19 CFR 351.309.

Section 774 of the Act provides that the Department will hold a hearing to afford interested parties an opportunity to comment on arguments raised in case briefs, provided that such a hearing is requested by any interested party. If a request for a hearing is made in this investigation, the hearing will tentatively be held two days after the deadline for submission of the rebuttal briefs, at the U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Parties should confirm by telephone the time, date, and place of the hearing 48 hours before the scheduled time. Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request within 10 days of the publication of this notice. Requests should specify the number of participants and provide a list of the issues to be discussed. Oral presentations will be limited to issues raised in the briefs. *See* 19 CFR 351.310.

We will make our final determination no later than 135 days after the date of this preliminary determination, pursuant to section 735(a)(1) of the Act.

This determination is issued and published pursuant to sections 733(f) and 777(i) of the Act.

Dated: November 21, 2003.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. 03–29722 Filed 11–26–03; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–888]

Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof From the People's Republic of China: Postponement of Preliminary Determination of Antidumping Duty Investigation

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

EFFECTIVE DATE: November 28, 2003.

FOR FURTHER INFORMATION CONTACT: Paige Rivas or Sam Zengotitabengoa at (202) 482–0651 or (202) 482–4195, respectively; AD/CVD Enforcement, Office 4, Group II, Import Administration, Room 1870, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Statutory Time Limits

Section 733(b)(1)(A) of the Tariff Act of 1930, as amended (the Act), requires the Department of Commerce (the Department) to issue the preliminary determination of an antidumping duty investigation within 140 days after the date of initiation. However, if the petitioner makes a timely request for an extension of the period, section 733(c)(1)(A) of the Act allows the Department to postpone the preliminary determination until not later than 190 days after the date of initiation.

Background

On July 21, 2003, the Department initiated an antidumping duty investigation on floor-standing, metal-top ironing tables and certain parts thereof from the People's Republic of China. *See Notice of Initiation of Antidumping Investigation: Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China,* 68 FR 44040 (July 25, 2003). The notice states that the Department will issue its preliminary determination no later than 140 days after the date of initiation. The preliminary determination currently is due no later than December 7, 2003.

Extension of Preliminary Determination

On November 7, 2003, the Department received a timely request for postponement of the preliminary determination from Home Products International, Inc. (the petitioner), in accordance with section 733(c)(1)(A) of the Act and 19 CFR 351.205(e). The Department has reviewed the petitioner's request for postponement and agrees to postpone this preliminary determination. Therefore, pursuant to section 733(c)(1)(A) of the Act, the Department is postponing the preliminary determination until January 26, 2004.

This notice of postponement is in accordance with section 733(c)(2) of the Act and 19 CFR 351.205(f).

Dated: November 21, 2003.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. 03–29719 Filed 11–26–03; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A 588–707]

Granular Polytetrafluroetheylene Resin From Japan: Rescission of Antidumping Duty Administrative Review

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

ACTION: Notice of rescission of antidumping duty administrative review.

SUMMARY: On September 30, 2003, the Department of Commerce initiated an administrative review of the antidumping duty order on granular polytetrafluoroetheylene resin from Japan for the period August 1, 2002, through July 31, 2003. The Department is rescinding this review after receiving timely withdrawals from the parties requesting the review.

EFFECTIVE DATE: November 28, 2003.

FOR FURTHER INFORMATION CONTACT: Dunyako Ahmadu or Richard Rimlinger, AD/CVD Enforcement 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–0198 or (202) 482–4477, respectively.

Background

On August 1, 2003, the Department of Commerce (the Department) published in the **Federal Register** a notice of opportunity to request an administrative review of the antidumping duty order on granular polytetrafluoroetheylene resin from Japan. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review* (68 FR 45218). On August 28, 2003, Asahi Glass Fluoropolymers Co., Ltd. and Asahi Glass Fluoropolymers USA Inc. (collectively AGF) requested that the Department conduct an administrative review of AGF's exports and imports for the period August 1, 2002, through July 31, 2003. On September 30, 2003, the Department published in the **Federal Register** a notice of initiation of this administrative review. *See Notice of Initiation of Antidumping and Countervailing Duty Administrative Reviews, Request for Revocation in Part and Deferral of Administrative Review* (68 FR 56262).

On October 20, 2003, AGF withdrew its request for review and requested that Department rescind the administrative review.

Rescission of Review

Pursuant to 19 CFR 351.213(d)(1), the Department will rescind an administrative review if a party that requested the review withdraws the request within 90 days of the date of publication of the notice of initiation of the requested review. Because AGF submitted its request for rescission within the 90-day time limit and there were no requests for a review from other interested parties, we are rescinding this review. As such, we will issue appropriate appraisement instructions directly to the U.S. Customs and Border Protection.

This notice is in accordance with section 777(i) of the Act and 19 CFR 351.213(d)(4).

Dated: November 21, 2003.

Jeffrey May,

Deputy Assistant Secretary, Import Administration.

[FR Doc. 03–29718 Filed 11–26–03; 8:45 am]

BILLING CODE 3510–DS–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D.112103B]

Proposed Information Collection; Comment Request; Marine Mammal Stranding Report/Marine Mammal Rehabilitation Disposition Report

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before January 27, 2004.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW, Washington, DC 20230 (or via the Internet at dHynek@doc.gov).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Janet Whaley, 301–713–2322 (or via the Internet at Janet.Whaley@noaa.gov).

SUPPLEMENTARY INFORMATION:

I. Abstract

The marine mammal stranding report provides information on strandings so that the National Marine Fisheries Service (NMFS) can compile and analyze by region the species, numbers, conditions, and causes of illnesses and deaths in stranded marine mammals. The Agency requires this information to fulfill its management responsibilities under the Marine Mammal Protection Act (16 U.S.C. 1421a). The Agency is also responsible for the welfare of marine mammals while in rehabilitation status. The data from the marine mammal rehabilitation disposition report are required for monitoring and tracking of marine mammals held at various NMFS-authorized facilities. This information is submitted primarily by volunteer members of the marine mammal stranding networks who are authorized by the Agency.

II. Method of Collection

Paper forms are used. Online entry of data into the national database is also used.

III. Data

OMB Number: 0648–0178.

Form Number: NOAA Form 89–864.

Type of Review: Regular submission.

Affected Public: Not-for-profit institutions; business or other for-profit organizations; Federal government; and State, Local, or Tribal Government.

Estimated Number of Respondents: 400.

Estimated Time Per *Response:* 30 minutes.

Estimated Total Annual Burden Hours: 2,400.

Estimated Total Annual Cost to Public: $2,500.

IV. Request for Comments

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 (including hours and cost) 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.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: November 19, 2003.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 03–29732 Filed 11–26–03; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D.112103C]

Proposed Information Collection; Comment Request; NOAA Space-Based Data Collection System (DCS) Agreements.

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before January 27, 2004.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW, Washington, DC 20230 (or via the Internet at dHynek@doc.gov).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Robert Bassett at 301–757–5681 or at Robert.Bassett@noaa.gov.

SUPPLEMENTARY INFORMATION:

I. Abstract

NOAA operates two space-based data collection systems: the Geostationary Operational Environmental Satellite (GOES) Data Collection System and the Argos Data Collection System. Both systems are operated to support environmental applications. Since the entire capacity of the systems is not used by NOAA, this extra capacity is made available to other users who meet certain criteria set forth in 15 CFR Part 911.

II. Method of Collection

Applications are submitted on paper forms, which can be mailed or faxed to NOAA.

III. Data

OMB Number: 0648–0157.

Form Number: None.

Type of Review: Regular submission.

Affected Public: Not-for-profit institutions; business or other for-profit organizations; individuals or households; and State, Local, or Tribal Government.

Estimated Number of Respondents: 390.

Estimated Time Per Respons: 3 hours for a GOES application, and 1 hour for an Argos application.

Estimated Total Annual Burden Hours: 440.

Estimated Total Annual Cost to Public: $488.

IV. Request for Comments

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 (including hours and cost) 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.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: November 19, 2003.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 03–29733 Filed 11–26–03; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D.112103D]

Proposed Information Collection; Comment Request; Red Crab and Exempted Fishing Permit Interactive Voice Response (IVR) System Collection

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before January 27, 2004.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW, Washington, DC 20230 (or via the Internet at dHynek@doc.gov).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Brian Hooker, National Marine Fisheries Service, 1 Blackburn Drive, Gloucester, MA 01930.

SUPPLEMENTARY INFORMATION:

I. Abstract

Vessels with red crab limited access permits, or vessels bearing an Exempted (Experimental) Fishing Permit (EFP), are required to report their catches. This submission seeks to authorize the collection of this information via an Interactive Voice Response (IVR) system. The collection of information in this manner is necessary to monitor catch levels in a timely manner, so that effort controls can be implemented before catch limits are attained. The information necessary for IVR catch reports is a fraction of that required by vessel logbooks.

The collection of catch data for red crab is authorized at 50 CFR 648.7(b)(iii), which requires catch reports to be submitted via IVR within 24 hours after offloading. The authorization for the collection of EFP catch reports is at § 600.745(c)(2).

Currently the reports are submitted in paper form, but NOAA proposes that some bearers of an EFP be subject to an IVR reporting requirement and be required to call within 24 hours of the start of a fishing trip and within 24 hours of landing and offloading.

II. Method of Collection

The IVR system is an automated system that operates electronically. The respondent is prompted to enter data via the keypad of the telephone. It is a toll-free call.

III. Data

OMB Number: 0648–0212.

Form Number: None.

Type of Review: Regular submission.

Affected Public: Business or other for-profit organizations; individuals or households; not-for-profit institutions; and State, Local or Tribal Government.

Estimated Number of Respondents: 55.

Estimated Time Per Response: 4 minutes.

Estimated Total Annual Burden Hours: 25.

Estimated Total Annual Cost to Public: $0.

IV. Request for Comments

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 (including hours and cost) 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.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: November 19, 2003.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 03–29734 Filed 11–26–03; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 112003D]

Endangered and Threatened Species; Take of Anadromous Fish

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

ACTION: Receipt of applications for research permits (1185, 1280, 1452) and request for comment.

SUMMARY: Notice is hereby given that NMFS has received applications for a permit for scientific research from Natural Resource Scientists, Inc (NRS) in Red Bluff, CA (1185), Turlock Irrigation District (TID) in Turlock, CA (1280), and California Rivers Restoration Fund (CRRF) in El Dorado, CA (1452). The permits would affect federally threatened Central Valley steelhead. This document serves to notify the public of the availability of the permit applications for review and comment.

DATES: Written comments on the permit applications must be received at the appropriate address or fax number (see **ADDRESSES**) no later than 5 p.m. Pacific Standard Time on December 29, 2003.

ADDRESSES: Written comments on the permit applications should be sent to the appropriate office as indicated below. Comments may also be sent via fax to the number indicated for the request. Comments will not be accepted if submitted via e-mail or the Internet. The applications and related documents are available for review by appointment, for permits 1185, 1280, and 1452: Protected Resources Division, NMFS, 650 Capitol Mall, Suite 8–300, Sacramento, CA 95814 (ph:916–930–3614, fax: 916–930–3629). Documents may also be reviewed by appointment in the Office of Protected Resources, F/PR3, NMFS, 1315 East-West Highway, Silver Spring, MD 20910 3226 (301–713–1401).

FOR FURTHER INFORMATION CONTACT: Rosalie del Rosario at phone number 916–930–3614, or e-mail: *Rosalie.delRosario@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Authority

Issuance of permits and permit modifications, as required by the Endangered Species Act of 1973 (16 U.S.C. 1531–1543) (ESA), is based on a finding that such permits/modifications: (1) are applied for in good faith; (2) would not operate to the disadvantage of the listed species which are the subject of the permits; and (3) are consistent with the purposes and policies set forth in section 2 of the ESA. Authority to take listed species is subject to conditions set forth in the permits. Permits and modifications are issued in accordance with and are subject to the ESA and NMFS regulations governing listed fish and wildlife permits (50 CFR parts 222 226).

Those individuals requesting a hearing on an application listed in this notice should set out the specific reasons why a hearing on that application would be appropriate (see **ADDRESSES**). The holding of such a hearing is at the discretion of the Assistant Administrator for Fisheries, NOAA. All statements and opinions contained in the permit action summaries are those of the applicant and do not necessarily reflect the views of NMFS.

Species Covered in This Notice

This notice is relevant to federally threatened Central Valley steelhead (*Oncorhynchus mykiss*).

Applications Received

NRS requests a 5–year permit (1185) for take of adult and juvenile Central Valley steelhead to monitor outmigrant salmonids in the Merced River. NRS requests authorization for an estimated annual take of 5 adult and 10 juvenile Central Valley steelhead (with no incidental mortality) resulting from capturing, measuring, and releasing fish.

TID requests a 5–year permit (1280) for take of adult and juvenile Central Valley steelhead to study the relationship between fall-run Chinook salmon outmigration patterns and flow fluctuation patterns in the Tuolumne River. TID requests authorization for an estimated annual take of 36 juvenile Central Valley steelhead (number includes 3 percent incidental mortality) and 5 adult Central Valley steelhead (no incidental mortality) resulting from seining, trapping, electrofishing, and angling activities. CRRF requests a 3–year permit (1452) to measure and collect scale samples from adult *O. mykiss* using hook and line and adult carcasses in the lower Tuolumne River. CRRF requests authorization for an estimated annual take of 340 adult Central Valley steelhead, with less than 1 percent incidental mortality, resulting from capture by hook and line fishing.

Dated: November 21, 2003.

Lamont D. Jackson,

Acting Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 03–29731 Filed 11–26–03; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[I.D.110503G]

Final Environmental Impact Statement for an Incidental Take Permit Application and Habitat Conservation Plan (Plan), by J.L. Storedahl & Sons, Inc.(Storedahl), Clark County, WA

AGENCY: National Marine Fisheries Service, National Oceanic and Atmospheric Administration (NOAA), Commerce; U.S. Fish and Wildlife Service (USFWS), Interior.

ACTION: Notice of availability of final environmental impact statement.

SUMMARY: This document announces the availability of the Final Environmental Impact Statement (Statement) for public review. The Statement addresses the proposed issuance of Incidental Take Permits (Permits) to J.L. Storedahl & Sons, Inc., Clark County, WA. The proposed Permits relate to gravel mining, gravel processing, and mining reclamation activities on approximately 300 acres of Storedahl-owned lands adjacent to the East Fork Lewis River, Clark County, WA. The proposed Permits would authorize the take of the following threatened species incidental to otherwise lawful activities: steelhead (*Oncorhynchus mykiss*), bull trout (*Salvelinus confluentus*), chum salmon (*Oncorhynchus keta*), and Chinook salmon (*Oncorhynchus tshawytscha*). Storedahl is also seeking coverage for five currently unlisted species (including anadromous and resident fish) under specific provisions of the Permits, should these species be listed in the future. The duration of the proposed Permits is 25 years. This notice is provided pursuant to the Endangered Species Act (ESA) and National Environmental Policy Act (NEPA).

DATES: Written comments on the Statement must be received from all interested parties on or before December 29, 2003. A Record of Decision will occur no sooner than 30 days after the publication date of the Environmental Protection Agency's published notice in the **Federal Register**.

ADDRESSES: See **SUPPLEMENTARY INFORMATION** section for addresses of locations at which hard-copies of the Plan and associated documents may be obtained or reviewed. To request documents on CD-ROM, call the USFWS at (360) 534–9330.

Comments and requests for information should be sent to Tim Romanski, Storedahl FEIS/HCP Comments, U.S. Fish and Wildlife Service, 510 Desmond Drive, S.E., Suite 102, Lacey, Washington 98503–1263, telephone (360) 753–5823, facsimile (360) 753–9518. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Tim Romanski, Project Manager, U.S. Fish and Wildlife Service, (360) 753–5823; or Laura Hamilton, Project Manager, National Marine Fisheries Service, (360) 753–5820.

SUPPLEMENTARY INFORMATION: Hard bound copies are available for viewing, or duplication, at the following libraries: Woodland Community Library, 770 Park St, Woodland, WA (360) 225–2115; Battle Ground Community Library, 12 W Main St. Battle Ground, WA (360) 687–2322; Ridgefield Community Library, 210 N Main Ave, Ridgefield, WA (350)887–8281; Vancouver Community Library, 1007 E Mill Plain Blvd, Vancouver, WA (360) 695–1566; and, Olympia Timberland Library, Reference Desk, 313 8th Avenue SE, Olympia, WA (360)352–0595.

Background

J.L. Storedahl & Sons, Inc., owns and operates a gravel processing plant in rural Clark County, WA, adjacent the East Fork Lewis River. This site is known as the Daybreak Mine. It is located approximately 4 miles (6.4 km)southeast of the town of LaCenter, and approximately 1 mile (1.6 km) downstream of Clark County's Daybreak Park. The 300–acre (121.4 ha) site is composed of two parcels. One parcel is approximately 82 acres (33.2 ha) and consists of five pits, which were mined intermittently, under different owners, from 1968 to 1995. No active extraction of gravel from this site is now occurring. Current operations are limited to processing and distributing sand and gravel that is mined off-site. Processing involves separating the sand from the gravel, and separating the gravel into different size classes. The second parcel is located immediately to the north and east of this previously mined area, on a low terrace above the 100–year floodplain. This 178–acre (72.0 ha) parcel contains high quality sand and gravel deposits that have not been mined. Current operations on this parcel include cattle grazing and hay and crop production.

Storedahl proposes to mine the sand and gravel deposits from 101 acres (40.9 ha) of this 178–acre parcel, and continue processing operations at the other parcel. These operations would continue until sand and gravel extraction at the 178–acre parcel is complete, projected to be 15 years or less. Concurrent with, and following sand and gravel extraction, Storedahl would implement a site reclamation plan.

The proposed mining, processing, and reclamation activities have the potential to affect fish and wildlife associated with the East Fork Lewis River ecosystem. The majority of the gravel to be mined is located just below the water table in a shallow aquifer, and the proposed gravel mining and reclamation plan would create a series of open water ponds and emergent wetlands. The created ponds and wetlands would drain via a controlled outlet to a small creek (Dean Creek) and then to the East Fork Lewis River. The shallow aquifer is connected to the East Fork Lewis River. The proposed mining and reclamation plan has the potential to affect a suite of habitat conditions, including, but not limited to, water quality, channel morphology, riparian function, off-channel connections, and the conversion of pastureland to forest, wetland, and open water habitats. Some of these effects could involve species subject to protection under the ESA.

Section 10 of the ESA contains provisions for the issuance of Incidental Take Permits to non-Federal land owners for the take of endangered and threatened species. Any such take must be incidental to otherwise lawful activities, and must not appreciably reduce the likelihood of the survival and recovery of the species in the wild. As required under the Permit application process, Storedahl has developed, with assistance from the Services, a Habitat Conservation Plan (Plan) containing a strategy for minimizing and mitigating take associated with the proposed activities to the maximum extent practicable for their proposed activities adjacent to the East Fork Lewis River.

Activities proposed for coverage under the Permits include the following:

(1) Gravel mining and related activities in the terrace above the 100–year floodplain, with potential impacts

on groundwater quality and quantity, potential impacts on surface water quality and quantity, potential influence on channel migration, and potential access to gravel ponds by anadromous salmonids.

(2) Gravel processing.

(3) Site reclamation activities including, but not limited to, the creation of emergent and open water wetland habitat and riparian and valley-bottom forest restoration; habitat rehabilitation, riparian irrigation, and low flow augmentation to Dean Creek; and construction of facilities (such as trails and parking lots) to support future incorporation of the site into the open space and greenbelt reserve.

(4) Monitoring and maintenance of conservation measures.

The duration of the proposed Permits and Plan is 25 years, though some aspects of the conservation measures associated with the proposed Plan would continue in-perpetuity.

The Services formally initiated an environmental review of the project through publication of a Notice of Intent to prepare an Environmental Impact Statement in the **Federal Register** on December 27, 1999 (64 FR 72318). That notice also announced a 30–day public scoping period during which interested parties were invited to provide written comments expressing their issues or concerns relating to the proposal. A second **Federal Register** notice was published on November 22, 2002 (67 FR 70408), announcing a 60–day public comment period for a draft Statement, draft Plan with appendices, and a draft Implementing Agreement. The comment period was extended an additional 30 days in direct response to requests from the public. This resulted in a total comment period of 90 days. Comments received on the draft documents and responses to those comments are included in the final Statement.

The final Statement compares Storedahl's proposal against two no-action alternatives. Differences between the no-action alternatives and the proposed action are considered to be the effects that would occur if the proposed action were implemented. One alternative to Storedahl's proposal is also analyzed against the two no-action alternatives. The analysis comparing these alternatives is contained in the final Statement.

Alternatives considered in the analysis include the following:

(1) Alternative A–1: Partition the property into 20–acre (8.1 ha) parcels and sell as rural residential/agricultural tracts - No Action.

(2) Alternative A–2: Mine the property without an ITP and avoid take - No Action.

(3) Alternative B: Mine and undertake habitat enhancement and reclamation activity at the Daybreak property implementing the May 2001 Public Review Draft HCP - Preferred Alternative.

(4) Alternative C: Mine and undertake habitat enhancement and reclamation activity at the Daybreak property following design and conservation measures presented to the Services in July, 2000.

One alternative was considered during scoping but not analyzed in detail. That alternative is essentially a combination of the two no-action alternatives listed above, Alternatives A–1 and A–2. That alternative would have involved mining on the portion of the property currently zoned for mining, with subsequent partitioning and sale of the mined and unmined property for low-density rural residential development. This was dismissed from detailed analysis because the vast majority of marketable sand and gravel on the portion of the property currently zoned for mining has already been extracted, rendering the alternative not feasible.

This notice is provided pursuant to section 10(a) of the ESA, and NEPA regulations. The Services will evaluate the application, associated documents, and comments submitted thereon to determine whether the application meets the requirements of the ESA and NEPA. If it is determined that the requirements are met, Permits will be issued for the incidental take of listed species. The final permit decision will be made no sooner than 30 days from the date of this notice.

Dated: October 30, 2003.

David J. Wesley,

Deputy Regional Director, Fish and Wildlife Service, Region 1, Portland Oregon.

November 10, 2003.

Phil Williams,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 03–29730 Filed 11–26–03; 8:45 am]

BILLING CODES 3510–22–S, 4310–55–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 112403B]

Gulf of Mexico 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 Gulf of Mexico Fishery Management Council (Council) will convene a joint public meeting via conference call of the Standing and Special Reef Fish Scientific and Statistical Committee (SSC).

DATES: The meeting will be via conference call on December 12, 2003 beginning at 10 a.m. EDT.

ADDRESSES: Listening stations will be available at the following locations:

NMFS Southeast Regional Office, 9721 Executive Center Drive, North, St. Petersburg, FL 33702; Contact: Peter Hood at 727-570-5305;

NMFS Panama City Laboratory, 3500 Delwood Beach Road, Panama City, FL; Contact: Gary Fitzhugh at 850-234-6541, extension 214.

Council address: Gulf of Mexico Fishery Management Council, 3018 U.S. Highway 301 North, Suite 1000, Tampa, FL 33619.

FOR FURTHER INFORMATION CONTACT: Steven Atran, Population Dynamics Statistician, Gulf of Mexico Fishery Management Council; telephone: 813-228-2815.

SUPPLEMENTARY INFORMATION: The SSC will be convened to evaluate the socioeconomic information contained in Reef Fish Secretarial Amendment 1, red grouper rebuilding plan and deep-water grouper quotas. The SSC will be asked specifically to provide the Council with guidance on the economic impacts of trip limits vs. closed seasons.

Red grouper were declared overfished by NMFS in October 2000. Following additional analyses and a subsequent stock assessment in 2002, the Council, in May 2003, submitted Reef Fish Secretarial Amendment 1 to NMFS. This amendment contained a rebuilding plan that called for approximately a 10 percent reduction in harvest, to be achieved through a reduction in the commercial shallow-water grouper quota, replacing the February 15 to March 15 commercial closed season on gag, red and black grouper with a shallow-water grouper trip limit, and a recreational bag limit of no more than

two red grouper (out of the 5 aggregate grouper bag limit). The rebuilding plan also proposed a reduction in the deep-water grouper quota and setting of a tilefish quota in order to discourage effort shifting to those stocks. Because more than one year had passed since the designation of red grouper as overfished, the amendment was submitted as a Secretarial Amendment rather than as a Council Plan Amendment.

NMFS reviewed the plan as submitted by the Gulf Council and made revisions to it. The revisions included retaining the February 15-March 15 commercial closed season, implementing a hard quota on red grouper so that the commercial shallow-water grouper fishery will close when either the red grouper or shallow-water grouper quota is met, whichever comes first, and not implementing a trip limit.

A draft of the revised Secretarial Amendment was reviewed by the SSC at a meeting held October 28-29, 2003. However, the NMFS revisions were not provided to the SSC until just prior to the meeting, and the SSC was unable to review the socioeconomic information contained in the amendment's regulatory impact review section. At the November 9-12, 2003 Council meeting in Biloxi, Mississippi, Council members debated whether it would be less economically disruptive to the commercial shallow-water grouper fishery to have a potential quota closure or a shallow-water grouper trip limit set low enough to prevent a quota closure. Since the Council will have another opportunity to review and comment on Secretarial Amendment 1 at its January 12-16, 2004 meeting in Austin, TX, the Council decided to ask the SSC to reconvene by conference call to evaluate the socioeconomic information in the amendment, with particular emphasis on the economic impacts of trip limits vs. closed seasons.

To obtain a copy of Reef Fish Secretarial Amendment 1, contact Phil Steele, NMFS Southeast Regional Office, 9721 Executive Center Drive, North, St. Petersburg, FL 33702; telephone: 727-570-5305, fax: 727-570-5583, e-mail: *Phil.Steele@noaa.gov*

A copy of the agenda can be obtained by contacting the Council (see addresses above).

Although non-emergency issues not contained in the agenda may come before the AP/SSC for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA), those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the MSFCMA, provided the public has been notified of the Council's intent to take final action to address the emergency.

The listening stations are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Anne Alford at the Council (see ADDRESSES) by December 5, 2003.

Dated: November 24, 2003.

Richard W. Surdi,

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

[FR Doc. 03–29737 Filed 11–26–03; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF DEFENSE

Office of the Secretary

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Title, Form Number, and OMB Number: Civil Aircraft Landing Permit System; OMB Number 0701–0050; DD Form 2400, 2401, 2402; OMB Number 0701–0050.

Type of Request: Reinstatement.

Number of Respondents: 3,600.

Responses per Respondent: 1.

Annual Responses: 3,600.

Average Burden per Response: 30 minutes.

Annual Burden Hours: 1,800.

Needs and Uses: The information collection requirement is necessary to ensure that the security and operational integrity of military airfields are maintained; to identify the aircraft operator and the aircraft to be operated; to avoid competition with the private sector by establishing the purpose for use of military airfields; and to ensure the U.S. Government is not held liable if the civil aircraft becomes involved in an accident or incident while using military airfields, facilities, and services.

Affected Public: Business of Other For-Profit; Not-For-Profit Institutions; Individuals or Households.

Frequency: On Occasion.

Respondent's Obligation: Required to obtain or retain benefits.

Pamela Fitzgerald,

Air Force Federal Register Liaison Officer.

[FR Doc. 03–29710 Filed 11–26–03; 8:45 am]

BILLING CODE 3810–01–P

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

Sunshine Act; Notice of Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given of the Defense Nuclear Facilities Safety Board's (Board) meeting described below. The Board will also conduct a series of public hearings pursuant to 42 U.S.C. 2286b and invites any interested persons or groups to present any comments, technical information, or data concerning safety issues related to the matters to be considered.

TIME AND DATE OF MEETING: 9 a.m., December 16, 2003.

PLACE: Defense Nuclear Facilities Safety Board, Public Hearing Room, 625 Indiana Avenue, NW., Suite 300, Washington, DC 20004–2001. Additionally, as a part of the Board's E-Government initiative, the meeting will be presented live through Internet video streaming. A link to the presentation will be available on the Board's Web site (*http://www.dnfsb.gov*).

STATUS: Open. While the Government in the Sunshine Act does not require that the scheduled discussion be conducted in a meeting, the Board has determined that an open meeting in this specific case furthers the public interests underlying both the Sunshine Act and the Board's enabling legislation.

MATTERS TO BE CONSIDERED: The Board has been reviewing the Department of Energy's (DOE) current oversight and management of the contracts and contractors it relies upon to accomplish the mission assigned to DOE under the Atomic Energy Act of 1954, as amended. We will focus on what impact, if any, DOE's new initiatives may have or might have had upon assuring adequate protection of the health and safety of the public and workers at DOE's defense nuclear facilities. The sixth public meeting will collect information needed to understand and address any health or safety concerns that may require Board action. This will include, but is not limited to, presentations by the National Nuclear Security Administration (NNSA) to explain their contract management and oversight initiatives and possibly further presentations by Board staff.

The Board has identified several key areas that will be examined in public meetings. In the December 16th meeting, the Board will explore in more depth the field application of Federal management and oversight policies being developed by DOE and NNSA for defense nuclear facilities. The Board will hear from NNSA Site Managers and Contractor General Managers. The information gathered will explore Federal contract management and oversight experience and will provide relevant reference experience. The public hearing portion is independently authorized by 42 U.S.C. 2286b.

FOR FURTHER INFORMATION CONTACT: Kenneth M. Pusateri, General Manager, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901, (800) 788–4016. This is a toll-free number.

SUPPLEMENTARY INFORMATION: Requests to speak at the hearing may be submitted in writing or by telephone. The Board asks that commentators describe the nature and scope of their oral presentation. Those who contact the Board prior to close of business on December 15, 2003, will be scheduled for time slots, beginning at approximately 11:30 a.m. The Board will post a schedule for those speakers who have contacted the Board before the hearing. The posting will be made at the entrance to the Public Hearing Room at the start the 9 a.m. meeting.

Anyone who wishes to comment or provide technical information or data may do so in writing, either in lieu of, or in addition to, making an oral presentation. The Board Members may question presenters to the extent deemed appropriate. Documents will be accepted at the meeting or may be sent to the Defense Nuclear Facilities Safety Board's Washington, DC office. The Board will hold the record open until January 16, 2004, for the receipt of additional materials. A transcript of the meeting will be made available by the Board for inspection by the public at the Defense Nuclear Facilities Safety Board's Washington office and at DOE's public reading room at the DOE Federal Building, 1000 Independence Avenue, SW., Washington, DC 20585.

The Board specifically reserves its right to further schedule and otherwise regulate the course of the meeting and hearing, to recess, reconvene, postpone, or adjourn the meeting and hearing, conduct further reviews, and otherwise exercise its power under the Atomic Energy Act of 1954, as amended.

Dated: November 24, 2003.

John T. Conway,

Chairman.

[FR Doc. 03–29825 Filed 11–25–03; 1:14 pm]

BILLING CODE 3670–01–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Leader, Regulatory Information Management Group, Office of the Chief Information Officer invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before December 29, 2003.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Melanie Kadlic, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10235, New Executive Office Building, Washington, DC 20503 or should be electronically mailed to the Internet address *Melanie_Kadlic@omb.eop.gov.*

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: November 24, 2003.

Angela C. Arrington,

Leader, Regulatory Information Management Group, Office of the Chief Information Officer.

Institute of Education Sciences

Type of Review: Reinstatement.

Title: School Survey on Crime and Safety: 2004 (SSOCS: 2004).

Frequency: Every four years.

Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 2,550.

Burden Hours: 2,703.

Abstract: Authorized under the Education Sciences Reform Act of 2002, the School Survey on Crime and Safety: 2004 (SSOCS) is the only recurring federal survey which collects detailed information on crime and safety from the public school principals' perspective. The survey collects information on frequency and types of crimes at schools and disciplinary actions; information about perceptions of disciplinary problems in school; and a description of school policies and programs concerning crime and safety.

Requests for copies of the submission for OMB review; comment request may be accessed from *http://edicsweb.ed.gov*, by selecting the "Browse Pending Collections" link and by clicking on link number 2352. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, SW., Room 4050, Regional Office Building 3, Washington, DC 20202–4651 or to the e-mail address *vivan.reese@ed.gov.* Requests may also be electronically mailed to the Internet address *OCIO_RIMG@ed.gov* or faxed to 202–708–9346. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Katrina Ingalls at *Katrina.Ingalls@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 03–29708 Filed 11–26–03; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6645–9]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared pursuant to the Environmental Review Process (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 FR dated April 04, 2003 (68 FR 16511).

Draft EISs

ERP No. D–AFS–L65436–OR Rating LO, Juncrock Timber Sale Project, Treat Forest Vegetation, MT. Hood National Forest, Barlow Ranger District, Wasco County, OR.

Summary: EPA expressed lack of objections. However, EPA recommend the final EIS include water quality analysis information on temperature and sediment, and address project goals for Northern Spotted Owl habitat.

ERP No. D–DOE–K08025–00 Rating EC2, Sahuartia-Nogales Transmission Line, Construction and Operation of a 345,00-volt (345 kV) Electric Transmission Line across the United States Border with Mexico, Application for Presidential Permit, Tucson Electric Power (TEP), Nogales, AZ.

Summary: EPA expressed concerns about potential water and air quality impacts of the project. EPA requested the final EIS contain information on DOE's public involvement methods in support of their environmental justice findings and on how identified conflicts with affected Tribes will be resolved. EPA also sought clarification on potential transboundary effects, cumulative effects, and the underlying basis for selecting the Western Corridor as the Preferred Alternative.

ERP No. D–IBR–K39082–AZ Rating EC2, Wellton-Mohawk Title Transfer Project, Transfer of the Facilities, Works, and Lands, Wellton-Mohawk Division of the Gila Project, Wellton-Mohawk Irrigation and Drainage District, Yuma County, AZ.

Summary: EPA expressed environmental concerns about potential hazardous waste associated with underground and above ground storage tanks, environmental justice, and indirect air quality impacts due to anticipated changes in existing land use. EPA also urged a comprehensive evaluation of connected actions in future NEPA documents related to proposed power plant development and construction of a new transmission pipeline.

Final EISs

ERP No. F–AFS–F65039–WI, McCaslin Project, Vegetation Management Activities Consistent with Direction in the Nicolet Forest Plan, Lakewood/Laona District, Chequamegon-Nicolet National Forest, Oconto and Forest Counties, WI.

Summary: EPA expressed lack of objections for this project.

ERP No. F–AFS–L67042–OR, Steamboat Mountain Mining Operations, Surface Quarry or "Open Pit" Mineral Extraction, Plan-of-Operation Approval, Applegate Adaptive Management Area, Rogue River National Forest, Applegate Ranger District, Jackson County, OR.

Summary: EPA has expressed concerns with environmental impacts from changes made from the draft EIS to the final EIS regarding the transportation route and additional storage. EPA also continues to have concerns regarding potential adverse impacts to water quality from chemical processing, lack of reclamation and contingency planning, financial assurance and adequate monitoring from agency's preferred alternative.

ERP No. F–FRC–C05148–NY, St. Lawrence—FDR Hydroelectric Project, Application for New License (Relicense), (FERC No. 200–036), Located on the St. Lawrence River, Messina, NY.

Summary: EPA had no objections to the relicensing of the St. Lawrence—FDR Hydroelectric Project.

Dated: November 24, 2003.

Joseph C. Montgomery,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 03–29689 Filed 11–26–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6645–8]

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 November 17, 2003 Through November 21, 2003

Pursuant to 40 CFR 1506.9.

EIS No. 030527, Final EIS, AFS, AZ, Buck Springs Range Allotment Rangeland Management, Implementation, Blue Ridge Coconino National Forest, Coconino County, AZ, Wait Period Ends: December 29, 2003, Contact: Cathy Taylor (928) 477–2255.

EIS No. 030528, Draft EIS, AFS, CA, McNally/Sherman Pass Restoration Project, Proposal to Remove Fire-Kill Trees, Road Construction and Associated Restoration of the Area Burned, Sequoia National Forest, Cannell Meadow Ranger District, Tulare County, CA, Comment Period Ends: January 12, 2004, Contact: Tom Simonso Ext. 1187 (559) 784–1500.

EIS No. 030529, Final EIS, AFS, SD, Elk Bugs and Fuels Project, Vegetation Management to Reduce the Spread of Mountain Pine Beetles and the Threat and Severity of Potential Wildfires, Black Hills National Forest Land and Resource Management Plan, Implementation, Northern Hills Ranger District, Black Hills National Forest, Lawrence and Meade Counties, SD, Wait Period Ends: December 29, 2003, Contact: Elizabeth Krueger (307) 283–1361.

EIS No. 030530, Final EIS, USA, NY, Thomas Jefferson Hall and Other Construction Activities in the Cadet Zone of the United States Military Academy, Implementation, West Point, Hudson River Valley, Orange and Putnam Counties, NY, Wait Period Ends: December 29, 2003, Contact: Douglas R. Cubbison (845) 938–3522.

EIS No. 030531, Final EIS, AFS, WA, Crupina Integrated Weed Management Project, Control and Eradication of Crupina, Implementation, Okanogan and Wenatchee National Forests, Chelan Ranger District, Chelan County, WA, Wait Period Ends: December 29, 2003, Contact: Mallory Lenz (509) 682–2576.

EIS No. 030532, Draft EIS, DOI, UT, Lower Duchesne River Wetlands Mitigation Project (LDWP), To Implement Restoration Measures in the Lower Duchesne River Area, Strawberry Aqueduct and Collection System (SACS) on portions of the, Strawberry Reservoir, Ute Indian Tribe, NPDES and US Army COE Section 404 Permits, Duchesne, Utah, Uintah Counties, UT, Comment Period Ends: January 16, 2004, Contact: Ralph G. Swanson (801) 379–1254.

EIS No. 030533, Final EIS, AFS, ID, Clean Slate Ecosystem Management Project, Aquatic and Terrestrial

Restoration, Nez Perce National Forest, Salmon River Ranger District, Idaho County ID, Wait Period Ends: December 29, 2003, Contact: Mike Mcgee (208) 983–1950.

EIS No. 030534, Draft EIS, COE, NC, Bogus 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, Comment Period Ends: January 13, 2004, Contact: Mickey T. Sugg (910) 251–4811.

EIS No. 030535, Draft EIS, AFS, MT, Judith Restoration Project, Proposal to Maintain and/or Restore Healthy Soil, Water and Vegetation Conditions, Lewis and Clark National Forest, Judith Ranger District, Judith Basin County, MT, Comment Period Ends: January 12, 2004, Contact: Jennifer Johnsten (406) 791–7700.

EIS No. 030536, Final EIS, SFW, WA, Daybreak Mine Expansion and Habitat Enhancement Project, Habitat Conservation Plan, and Issuance of a Multiple Species Permit for Incidental Take, Implementation, Clark County, WA, Wait Period Ends: December 29, 2003, Contact: Tim Romanski (360) 753–5823.

EIS No. 030537, Final EIS, BLM, AK, Northwest National Petroleum Reserve-Alaska (NPR–A) Integrated Plan, Multiple-Use Management of 8.8 million Acres, Lands within the North Slope Borough, AK, Wait Period Ends: December 29, 2003, Contact: Curtis Wilson (907) 271–5546.

EIS No. 230538, Draft EIS, AFS, NB, Pine Ridge Geographic Area Rangeland Allotment Management Planning, To Permit Livestock Grazing on 34 Allotments, Nebraska National Forest, Pine Ridge Ranger District, Dawes and Sioux Counties, NB, Comment Period Ends: January 12, 2004, Contact: Jeffrey S. Abegglen (308) 432–4475.

EIS No. 030539, Draft EIS, DOE, OR, COB Energy Facility, Proposes to Construct a 1,160-megawatt (MW) Natural Gas-Fired and Combined-Cycle Electric Generating Plant, Right-of-Way Permit across Federal Land under the Jurisdiction of BLM, Klamath Basin, Klamath County, OR, Comment Period Ends: February 13, 2004, Contact: Thomas C. McKinney (503) 230–4749. This document is available on the Internet at: *http://www.bpa.gov.*

EIS No. 030540, Draft EIS, DOE, OH, Portsmouth, Ohio Site Depleted Uranium Hexafluoride Conversion Facility, Construction and Operation, Pike County, OH, Comment Period Ends: February 02, 2004, Contact: Gary S. Hartman (866) 530–0944. This document is available on the Internet at: *http://www.eh.doe.gov/nepa/documents.html.*

EIS No. 030541, Draft EIS, DOE, KY, Paducah, Kentucky, Site Depleted Uranium Hexafluoride Conversion Facility, Construction and Operation, McCraken County, KY, Comment Period Ends: February 02, 2004, Contact: Gary S. Hartman (866) 530–0944. This document is available on the Internet at: *http://www.eh.doe.gov/nepa/documents/html.*

Amended Notices

EIS No. 030407, Draft EIS, EPA, CT, NY, Central and Western Long Island Sound Dredged Material Disposal Sites, Designation, CT and NY, Comment Period Ends: December 15, 2003, Contact: Ann Rodney (617) 918–1538. Revision of FR Notice Published on 9/12/2003: CEQ Comment Period Ending on 10/27/2003 has been Extended to 12/15/2003.

Dated: November 24, 2003.

Joseph C. Montgomery,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 03–29690 Filed 11–26–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7592–3]

Illinois Central Railroad Company's Johnston Yard Superfund Site, Memphis, Tennessee Notice of Proposed Settlement and Remedial Investigation/Feasibility Study

AGENCY: Environmental Protection Agency.

SUMMARY: The United States Environmental Protection Agency is proposing to enter into a proposed settlement and remedial investigation/feasibility study (RI/FS) with the settling parties pursuant to Sections 104, 122(a), and 122(d)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, 42 U.S.C. 9604, 9622(a), and 9622(d)(3) concerning the Illinois Central Railroad Company's Johnston Yard Superfund Site located in Memphis, Shelby County, Tennessee. EPA will consider public comments on the proposed settlement until December 29, 2003. EPA may withdraw from or modify the proposed settlement should such comments disclose facts or considerations which indicate the proposed settlement is inappropriate, improper or inadequate. Copies of the proposed settlement are available from: Ms. Paula V. Batchelor, U.S. EPA, Region 4, Waste Management Division, 61 Forsyth Street, SW, Atlanta, Georgia 30303, (404) 562–8887.

Written comments may be submitted to Ms. Batchelor within 30 calendar days of the date of the publication.

Dated: November 14, 2003.

Rosalind H. Brown,

Chief, Superfund Enforcement & Information Management Branch, Waste Management Division.

[FR Doc. 03–29694 Filed 11–26–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7592–2]

Lakewood Treating, Inc., Superfund Site, Newberry, SC; Notice of Proposed Settlement and Removal Action

AGENCY: Environmental Protection Agency.

SUMMARY: The United States Environmental Protection Agency is proposing to enter into a proposed settlement and a removal action with the settling parties pursuant to Section 104, 106(a), 107, and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, 42 U.S.C. 9604, 9606(a), 9607 and 9622 concerning the Lakewood Treating, Inc., Superfund Site in Newberry, Newberry County, South Carolina. EPA will consider public comments on the proposed settlement until December 29, 2003. EPA may withdraw from or modify the proposed settlement should such comments disclose facts or considerations which indicate the proposed settlement is inappropriate, improper or inadequate. Copies of the proposed settlement are available from: Ms. Paula V. Batchelor, U.S. EPA, Region 4, Waste Management Division, 61 Forsyth Street, SW., Atlanta, Georgia 30303, (404) 562–8887.

Written comments may be submitted to Ms. Batchelor within 30 calendar days of the date of the publication.

Dated: November 14, 2003.

Rosalind H. Brown,

Chief, Superfund Enforcement & Information Management Branch, Waste Management Division.

[FR Doc. 03–29693 Filed 11–26–03; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7591–9]

Notice of Availability of Draft National Pollution Discharge Elimination System (NPDES) General Permit for Discharges at Hydroelectric Generating Facilities in the States of Massachusetts and New Hampshire and Indian Lands in the State of Massachusetts

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability of Draft NPDES General Permits MAG360000 and NHG360000.

SUMMARY: The Director of the Office of Ecosystem Protection, Environmental Protection Agency-Region 1, is today providing notice of availability of the Draft National Pollutant Discharge Elimination System (NPDES) general permit for specific discharges at Hydroelectric Generating Facilities to certain waters of the States of Massachusetts and New Hampshire and Indian Lands in the State of Massachusetts. This draft general permit establishes Notice of Intent (NOI) requirements, effluent limitations, standards, prohibitions, and best management practices for classes of discharges at hydroelectric generating facilities.

Owners and/or operators of hydroelectric generating facilities with discharges, including those facilities currently authorized to discharge under individual NPDES permits, will be encouraged to submit an NOI to EPA-Region 1 to be covered by the general permit and will receive a written notification from EPA of permit coverage and authorization to discharge under one of the general permits. The eligibility requirements are discussed in detail in the fact sheet and in the general permit. This general permit does not cover new sources as defined under 40 CFR 122.2.

DATES: Comments must be received or postmarked by midnight on December 29, 2003. Interested persons may submit comments on the draft general permit as part of the administrative record to the EPA-Region 1 at the address given below. Within the comment period, interested persons may also request in writing a public hearing pursuant to 40 CFR 124.12 concerning the draft general permit. All public comments or requests for a public hearing must be submitted to the address below.

ADDRESSES: Written comments may be hand delivered or mailed to: EPA-Region 1, Office of Ecosystem Protection (CPE), 1 Congress Street, Suite 1100, Boston, Massachusetts 02114–2023 and also sent via e-mail to *wandle.bill@ep.gov*. No facsimiles (faxes) will be accepted. The draft permit is based on an administrative record available for public review at EPA-Region 1, Office of Ecosystem Protection (CPE), 1 Congress Street, Suite 1100, Boston, Massachusetts 02114–2023. Copies of information in the record are available upon request. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Additional information concerning the draft permit may be obtained between the hours of 8 a.m. and 4 p.m. Monday through Friday excluding holidays from: William Wandle, Office of Ecosystem Protection, Environmental Protection Agency, 1 Congress Street, Suite 1100 (CPE), Boston, MA 02114—2023, telephone: 617–918–1605, email: *wandle.bill@epa.gov*.

SUPPLEMENTARY INFORMATION: The draft general permit may be viewed over the Internet via the EPA-Region 1 web site for dischargers in Massachusetts at *http://www.epa.gov/ne/npdes/mass.html* and for dischargers in New Hampshire at *http://www.epa.gov/ne/npdes/newhampshire.html*. The draft general permit includes the standard permit conditions in Part II, the Best Management Practices Plan in Part III, and the fact sheet which sets forth principal facts and the significant factual, legal, and policy questions considered in the development of the draft permit. To obtain a paper copy of the documents, please contact William Wandle using the contact information provided above. A reasonable fee may be charged for copying requests.

When the general permit is issued, the notice of final issuance will be published in the **Federal Register**. The general permit shall be effective on the date specified in the notice of final issuance of the general permit published in the **Federal Register** and it will expire five years from the effective date.

Dated: November 17, 2003.

Ira W. Leighton,

Acting Regional Administrator, Region 1.

[FR Doc. 03–29691 Filed 11–26–03; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK

Notice of Open Special Meeting of the Advisory Committee of the Export-Import Bank of the United States (Ex-Im Bank)

SUMMARY: The Advisory Committee was established by Pub. L. 98–181, November 30, 1983, to advise the Export-Import Bank on its programs and to provide comments for inclusion in the reports of the Export-Import Bank of the United States to Congress.

Time and Place: Thursday, December 18, 2003, at 10 a.m. to 12:30 p.m. The meeting will be held at Ex-Im Bank in the Main Conference Room 1143, 811 Vermont Avenue, NW., Washington, DC 20571.

Agenda: Agenda items include briefing of the Advisory Committee members on their responsibilities and discussion of the Advisory Committee Theme—"What fundamental changes in products and approaches need to be made to better serve middle market exporters?"

Public Participation: The meeting will be open to public participation, and the last 10 minutes will be set aside for oral questions or comments. Members of the public may also file written statement(s) before or after the meeting. If any person wishes auxiliary aids (such as a sign language interpreter) or other special accommodations, please contact, prior to December 11, 2003, Teri Stumpf, Room 1203, 811 Vermont Avenue, NW., Washington, DC 20571, Voice: (202) 565–3542 or TDD (202) 565–3377.

FOR FURTHER INFORMATION CONTACT: Teri Stumpf, Room 1203, 811 Vermont Ave., NW., Washington, DC 20571, (202) 565–3502.

Peter Saba,

General Counsel.

[FR Doc. 03–29663 Filed 11–26–03; 8:45 am]

BILLING CODE 6690–01–M

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority

November 19, 2003.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection(s), as

required by the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Persons wishing to comment on this information collection should submit comments January 27, 2004. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Judith B. Herman, Federal Communications Commission, 445 12th Street, SW, Room 1–C804, Washington, DC 20554 or via the Internet to *Judith-B.Herman@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collections contact Judith B. Herman at 202–418–0214 or via the Internet at *Judith-B.Herman@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–0392.

Title: 47 CFR Part 1, Subpart J, Pole Attachment Complaint Procedures.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for profit and state, local, or tribal government.

Number of Respondents: 1,802.

Estimated Time Per Response: 5 hours.

Frequency of Response: On occasion reporting requirement and third party disclosure requirement.

Total Annual Burden: 2,693 hours.

Annual Cost Burden: $300,000.

Needs and Uses: The rules and regulations contained in 47 CFR part 1, subpart J, provide complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way on rates, terms and conditions that are just and reasonable. The information collected under these rules will be used by FCC to hear and resolve petitions for stay and complaints as mandated by Section 224 of the Communications Act of 1934, as amended. Information filed is used to determine the merits of the petitions and complaints. Additionally, state certifications are used to make public notice of the states' authority to regulate rates, terms, and conditions for pole attachments, and to determine the scope of the FCC's jurisdiction.

OMB Control No.: 3060–0961.

Title: 2000 Biennial Regulatory Review—Comprehensive Review of the Accounting Requirements and ARMIS Reporting Requirements for Incumbent Local Exchange Carriers; Phase 2 and Phase 3, CC Docket No. 00–199.

Form Nos. and Report Nos.: FCC Reports 43–01, 43–02, 43–03, 43–04, 43–05, 43–07, 43–08, FCC Forms 495A and 495–B.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 1.

Estimated Time Per Response: 1 hour.

Frequency of Response: On occasion and annual reporting requirements and recordkeeping requirement.

Total Annual Burden: 1 hour.

Annual Cost Burden: N/A.

Needs and Uses: The Commission is extending this information collection (no change) for the three year OMB clearance. In 2001, the Commission sought comment on streamlining our Part 32 chart of accounts, modified our affiliate transaction rules, and revised our expense limits rules. In addition, the NPRM sought comment on streamlining the accounting and reporting requirements specifically for mid-sized carriers by eliminating mandatory CAM filing and CAM audits for those carriers. The NPRM also proposed raising the indexed revenue threshold to $200 million. In addition, with respect to ARMIS reporting requirements, the NPRM sought comment on revising various ARMIS reports. The proposals sought to eliminate or substantially simplify the reporting requirements for both large incumbent LECs and mid-sized incumbent LECs.

OMB Control No.: 3060–0782.

Title: Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service (ELCS) at Various Locations.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for profit.

Number of Respondents: 20 respondents; 100 responses.

Estimated Time Per Response: 8 hours.

Frequency of Response: On occasion reporting requirement.

Total Annual Burden: 800 hours.

Annual Cost Burden: N/A.

Needs and Uses: The Commission has provided voluntary guidelines for filing expanded local calling service requests. These guidelines will allow the Commission to conduct smooth and continuous processing of these requests. The collection of information will enable the Commission to determine if there is a public need for expanded local calling service in each area subject to the request.

OMB Control No.: 3060–0786.

Title: Petitions for LATA Association Changes by Independent Telephone Companies.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for profit.

Number of Respondents: 20.

Estimated Time Per Response: 6 hours.

Frequency of Response: On occasion reporting requirement.

Total Annual Burden: 120 hours.

Annual Cost Burden: N/A.

Needs and Uses: The Commission has provided voluntary guidelines for filing LATA association change requests. These guidelines will allow the Commission to conduct smooth and continuous processing of these requests. The collection of information will enable the Commission to determine if there is a public need for changes in LATA association in each area subject to the request.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 03–29655 Filed 11–26–03; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of Agency Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that the Federal Deposit Insurance Corporation's Board of Directors will

meet in open session at 10 a.m. on Tuesday, December 2, 2003, to consider the following matters:

Summary Agenda: No substantive discussion of the following items is anticipated. These matters will be resolved with a single vote unless a member of the Board of Directors requests that an item be moved to the discussion agenda.

Disposition of minutes of a previous Board of Directors' meeting.

Summary reports, status reports, and reports of actions taken pursuant to authority delegated by the Board of Directors.

Memorandum and resolution re: Beneficial Ownership Filings (Securities Exchange Act)—Notice of a New Privacy Act System of Records.

Discussion Agenda:

Memorandum and resolution re: Advanced Notice of Proposed Rulemaking—12 CFR Part 332, Short-Form Financial Institution Privacy Notices.

Memorandum and resolution re: Notice and Request for Public Comment Pursuant to the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA)—Phase II.

Memorandum and resolution re: Proposed 2004 Corporate Operating Budget.

The meeting will be held in the Board Room on the sixth floor of the FDIC Building located at 550—17th Street, NW., Washington, DC.

The FDIC will provide attendees with auxiliary aids (e.g., sign language interpretation) required for this meeting. Those attendees needing such assistance should call (202) 416–2089 (Voice); (202) 416–2007 (TTY), to make necessary arrangements.

Requests for further information concerning the meeting may be directed to Mr. Robert E. Feldman, Executive Secretary of the Corporation, at (202) 898–3742.

Dated: November 25, 2003.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. E3–00414 Filed 11–25–03; 4:17 pm]

BILLING CODE 6714–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Notices

DATE AND TIME: Tuesday, December 2, 2003 at 10 a.m.

PLACE: 999 E Street, NW., Washington, DC.

STATUS: This meeting will be closed to the public.

Items To Be Discussed

Compliance matters pursuant to 2 U.S.C. 437g.

Audits conducted pursuant to 2 U.S.C. 437g, 438(b), and Title 26, U.S.C.

Matters concerning participation in civil actions or proceedings or arbitration.

Internal personnel rules and procedures or matters affecting a particular employee.

DATE AND TIME: Thursday, December 4, 2003 at 10 a.m.

PLACE: 999 E Street, NW., Washington, DC (Ninth Floor).

STATUS: This meeting will be open to the public.

Items To Be Discussed.

Correction and Approval of Minutes.

Draft Advisory Opinion 2203–31: Senator Mark Dayton by counsel, Marc E. Elias and Brian T. Svoboda.

Routine Administrative Matters.

FOR FURTHER INFORMATION CONTACT: Mr. Ron Harris, Press Officer, Telephone: (202) 694–1220.

Mary W. Dove,

Secretary of the Commission.

[FR Doc. 03–29804 Filed 11–25–03; 11:13 am]

BILLING CODE 6715–01–M

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Reissuances

Notice is hereby given that the following Ocean Transportation Intermediary licenses have been reissued by the Federal Maritime Commission pursuant to section 19 of the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 (46 U.S.C. app. 1718) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR 515.

License No.	Name/Address	Date reissued
14617N	Asiana Transport Inc., 182–11 150th Road, 2nd Floor, Jamaica, NY 11413	October 9, 2003.
12757N	Ocean Conco Line, Inc., 39 Broadway, Suite 750, New York, NY 10004	October 8, 2003.
12190N	Reliable Overseas Shipping & Trading, Inc., 239–241 Kingston Avenue, Brooklyn, NY 11213	September 5, 2003.
13266N	Trans—Aero—Mar, Inc., 1203 NW 93rd Ct., Miami, FL 33172	September 17, 2003.
12895N	United Trans-Trade, Inc., 646 Highway 18, Plaza Hill, Bldg. A, Suite 204, East Brunswick, NJ 08816.	August 23, 2001.

Sandra L. Kusumoto,

Director, Bureau of Consumer Complaints and Licensing.

[FR Doc. 03–29612 Filed 11–26–03; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for license as a Non-Vessel Operating Common Carrier and Ocean Freight Forwarder—Ocean Transportation Intermediary pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. app. 1718 and 46 CFR 515).

Persons knowing of any reason why the following applicants should not receive a license are requested to contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573.

Non-Vessel Operating Common Carrier Ocean Transportation Intermediary Applicants:

G.C. International Forwarding Company, 8518 Turpin Street, Rosemeade, CA 91770, George C. Cheng, Sole Proprietor

Seabright Shipping Inc., 1525 Seabright Avenue, Long Beach, CA 90803, Officer: Robert Rong Tang Wang, President (Qualifying Individual)

Non-Vessel Operating Common Carrier and Ocean Freight Forwarder Transportation Intermediary Applicants:

Codotrans, Inc., 857 Nandina Drive, Weston, FL 33327, Officers: Jaime Grullon, President (Qualifying Individual), Mayra Noboa, Director

AAC Perishables Logistics, Inc., dba A

America Container Lines, 8202 NW 70th Street, Miami, FL 33166, Officers: Jairo Rivas, Manager/ Secretary (Qualifying Individual), Carlos del Corral, President

Carico USA Corporation, 8378 NW 68th Street, Miami, FL 33166, Officers: Raul Amprimo, President (Qualifying Individual), Rocio Amprimo, Vice President

Ocean Freight Forwarder—Ocean Transportation Intermedidary Applicants:

Bruzzone Shipping Miami, LLC, 11421 NW 39th Street, Miami, FL 33178, Officers: Victor Bruzzone, Managing Member (Qualifying Individual) Fred Bruzzone, Member

Transportes Zuleta Inc., 6309 New Hampshire Avenue, Takoma Park, MD 20912, Officers: Jose Alfredo Munoz, President (Qualifying Individual), Delmy Zuleta, Vice President

FMD International Business Inc., dba Triton Cargo USA, 576 NW 87th Terrace, Coral Springs, FL 33071, Officer: Felipe Madrigal, General Manager (Qualifying Individual)

Bryant L. VanBrakle,

Secretary.

[FR Doc. 03–29613 Filed 11–26–03; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Revocations

The Federal Maritime Commission hereby gives notice that the following Ocean Transportation Intermediary licenses have been revoked pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. app. 1718) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, effective on the corresponding date shown below:

License Number : 17893N.
Name: All World Logistics, Inc. dba Internet Shipping Line.
Address: 969 Newark Turnpike, Kearny, NJ 07032.
Date Revoked: November 14, 2003.
Reason: Failed to maintain a valid bond.

License Number: 3945F.
Name: Alumar, Incorporated.
Address: 4809 N. Armenia Avenue, Suite 105, Tampa, FL 33603.
Date Revoked: October 25, 2003.
Reason: Failed to maintain a valid bond.

License Number: 14617N.
Name: Asiana Transport Inc.
Address: 182–11 150th Road, 2nd Floor, Jamaica, NY 11413.
Date Revoked: October 9, 2003.
Reason: Failed to maintain a valid bond.

License Number: 16363N.
Name: Capitol Transportation, Inc.
Address: 2000 Avenue, J.F. Kennedy, P.O. Box 363008, San Juan, PR 00936.
Date Revoked: April 23, 2003.
Reason: Failed to maintain a valid bond.

License Number: 17953N.
Name: Caribbean Consolidator Shipping Services, Inc.
Address: 1521 NW 82nd Avenue, Miami, FL 33126
Date Revoked: November 3, 2003.
Reason: Failed to maintain a valid bond.

License Number: 17656NF.
Name: Coltrans (USA), Inc.
Address: 10925 NW 27th Street, Suite 102, Miami, FL 33172.
Date Revoked: October 31, 2003.
Reason: Failed to maintain valid bonds.

License Number: 16859NF.
Name: Global Cargo Jamaica Shipping, Inc.
Address: 6151 NW 72nd Avenue, Miami, FL 33166.
Date Revoked: November 2, 2003.
Reason: Failed to maintain valid bonds.

License Number: 2638F.
Name: Intercorp Forwarders, Ltd.
Address: 3534 84th Street, Unit B–7, Jackson Heights, NY 11372.
Date Revoked: October 30, 2003.
Reason: Failed to maintain a valid bond.

License Number: 17232N.
Name: International Cargo Consolidators, Corp.
Address: 10049 NW 89th Avenue, Bay #3, Medley, FL 33178.
Date Revoked: October 15, 2003.
Reason: Failed to maintain a valid bond.

License Number: 3110F.
Name: International Freight Transport, Inc.
Address: 88 South Avenue, Fanwood, NJ 07023.
Date Revoked: November 6, 2003.
Reason: Failed to maintain a valid bond.

License Number: 14623N.
Name: NRS International Transport Limited.
Address: Roycraft House, 15 Linton Road, Barking, Essex IG11 8JB, United Kingdom.
Date Revoked: October 8, 2003.
Reason: Failed to maintain a valid bond.

License Number: 12757N.
Name: Ocean Conco Line, Inc.
Address: 39 Broadway, Suite 750, New York, NY 10004.
Date Revoked: October 8 2003.
Reason: Failed to maintain a valid bond.

License Number: 18364N.
Name: Polo Logistics, Inc.
Address: 267 5th Avenue, Suite B–1, New York, NY 10016.
Date Revoked: October 30, 2003.
Reason: Failed to maintain a valid bond.

License Number: 14125N.
Name: Transtainer Corp.
Address: 8100 NW 29th Street, Suite 2A, Miami, FL 33122.
Date Revoked: November 6, 2003.
Reason: Failed to maintain a valid bond.

Sandra L. Kusumoto,

Director, Bureau of Consumer Complaints and Licensing.

[FR Doc. 03–29611 Filed 11–26–03; 8:45 am]

BILLING CODE 6730–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Cooperative Agreement for Research on the Association Between Exposure to Media Violence and Youth Violence

Announcement Type: New.

Funding Opportunity Number: 04060.

Catalog of Federal Domestic Assistance Number: 93.136.

Key Dates:

Letter of Intent Deadline: December 29, 2003.

Application Deadline: February 17, 2004.

I. Funding Opportunity Description

Authority: This program is authorized under section 301 (a) [42 U.S.C. 241(a)] of the Public Health Service Act and section 391 (a)[42 U.S.C. 280b (a)] of the Public Service Health Act, as amended.

Purpose: The purpose of the program is to conduct methodologically sound research on how media violence affects youth violent behavior. This program addresses the "Healthy People 2010" focus area of Injury and Violence Prevention.

Measurable outcomes of the program will be in alignment with the following performance goal for the National Center for Injury Prevention and Control (NCIPC): Conduct a targeted program of research to reduce injury-related death and disability.

Research Objectives

There has been a longstanding concern about the consequences of youths' exposure to violence in the media, with particular concern about the effects of such exposure on violent behavior. Recent studies have documented the profusion of different types of media in United States homes [1 ndash;3] and the widespread presence of violence in these media outlets.[4,5] The emergence and proliferation of new media (*e.g.*, video games, music videos, Internet sites, and DVD) have increased opportunities for children and youth to be exposed to violence. Despite the fact that there has been extensive research on this subject, at least three key gaps remain in our understanding of the relationship between youth exposure to media violence and violent behavior. First, more information is needed about the effects of different types of new media and their content on violent behavior. Second, while substantial research has described associations between exposure to violent media on attitudes and measures of aggression, less is known about the extent to which exposure to violent media is associated with risk for more serious forms of violence, including victimization and perpetration resulting in injury. Third, a relatively small subset of youth may be particularly susceptible to the effects of exposure to violent media. Additional research is needed to understand the individual and contextual factors that influence the association between exposure to violent media and risk for violence.

The purpose of the current program announcement is to conduct methodologically sound research on how media influences youth susceptibility to violence. Project proposals should be designed to: (1) Examine the association between exposure to violent media and serious violent behavior, including victimization and perpetration resulting in injury; (2) include an assessment of the specific aspects of media (*e.g.*, type and content) that are likely to contribute to risk for violence; and (3) identify individual and contextual factors that mediate or moderate the association between exposure to violent media and serious violent behavior, with particular attention to the potential moderating effects of gender and prior exposure to real-life violence.

Funding Priority

Priority will be given to research proposals that include a focus on (a) new forms of media; (b) serious forms of violence, including victimization and perpetration resulting in injury; and (c) describing the individual and contextual factors that influence the association between exposure to violent media and risk for violence.

Activities

Awardee activities for this program are as follows:

1. In collaboration with CDC finalize the research design and methodology, data collection measures, analyses, and dissemination of the study results through publication and presentations.

2. In collaboration with CDC finalize a research protocol for Institutional Review Board (IRB) review by all cooperating institutions participating in the research project.

3. Conduct one reverse site visit to meet with CDC staff in Atlanta on an annual basis.

4. Complete all required reports as specified under "Reporting· Requirements" of this program announcement.

In a cooperative agreement, CDC staff is substantially involved in the program activities, above and beyond routine grant monitoring.

CDC activities for this program are as follows:

1. Serve as co-investigator and provide scientific oversight. CDC will actively collaborate with project staff on decision-analyses, interpretation of findings, and dissemination of the study results through involvement in the production of publications and presentations.

2. Assist in finalizing the research protocol for IRB review by all cooperating institutions participating in the research project. The CDC IRB will review and approve the protocol initially and on at least an annual basis until the research project is finished.

3. Facilitate regular communication between CDC and the grantee to include, but not limited to site visits, conference calls, meetings, etc.

II. Award Information

Type of Award: Cooperative Agreement. CDC involvement in this program is listed in the Activities Section above.

Fiscal Year Funds: 2004.

Approximate Total Funding: $600,000.

Approximate Number of Awards: Two.

Approximate Average Award: $300,000.

Floor of Award Range: None.

Ceiling of Award Range: $300,000.

Anticipated Award Date: August 2, 2004.

Budget Period Length: 12 months.

Project Period Length: Three years.

Throughout the project period, CDC's commitment to continuation 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.

III. Eligibility Information

1. *Eligible applicants:* Applications may be submitted by public and private nonprofit organizations and by governments and their agencies, such as:

- Public nonprofit organizations
- Private nonprofit organizations
- Small, minority, women-owned businesses
- Universities
- Colleges
- Research institutions
- Hospitals
- Community-based organizations
- Faith-based organizations
- Federally recognized Indian tribal governments
- Indian tribes
- Indian tribal organizations
- State and local governments or their bona fide agents (this includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, the Commonwealth of Mariana Islands, American Samoa, Guam, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau)
- Political subdivisions of States (in consultation with States)

A Bona Fide Agent is an agency/organization identified by the state as eligible to submit an application under the state eligibility in lieu of a state application. If you are applying as a bona fide agent of a state or local government, you must provide a letter from the state as documentation of your status. Place this documentation behind the first page of your application form.

2. *Cost Sharing or Matching:* Matching funds are not required for this program.

3. *Other Eligibility Requirements:*

Applications that are incomplete or non-responsive to the below requirements will be returned to the applicant without further consideration. You will be notified that your application did not meet submission requirements.

The following are applicant requirements:

1. A principal investigator who has conducted research, published the

findings in peer-reviewed journals, and has specific authority and responsibility to carry out the proposed project.

2. Demonstrated experience on the applicant's project team in conducting, evaluating, and publishing violence prevention research in peer-reviewed journals.

3. Effective and well-defined working relationships within the performing organization and with outside entities, which will ensure implementation of the proposed activities.

4. The overall match between the applicant's proposed research objectives and the program priorities as described under the heading, "Funding Priority".

5. The requested funding amount should not be greater than the ceiling of the award amount.

6. Principal investigators (PI's) are encouraged to submit only one proposal in response to this program announcement. With few exceptions (*e.g.*, research issues needing immediate public health attention), only one application per PI will be funded under this announcement.

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.

IV. Application and Submission Information

1. Address to Request Application Package

To apply for this funding opportunity, use application Form PHS 398 (OMB Number 0925–0001 rev. 5/2001). Forms and instructions are available in an interactive format on the CDC Web site, at the following Internet address: *http://www.cdc.gov/od/pgo/forminfo.htm.*

Forms and instructions are also available in an interactive format on the National Institutes of Health (NIH) web site at the following Internet address: *http://grants.nih.gov/grants/funding/phs398/phs398.html.* If you do not have access to the Internet, or if you have difficulty accessing 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.

2. Content and Form of Application Submission Letter of Intent (LOI)

CDC requests that you send a LOI if you intend to apply for this program. Although the LOI is not required, not binding, and does not enter into the review of your subsequent application, the LOI will be used to gauge the level of interest in this program, and to allow CDC to plan the application review. Your LOI must be written in the following format:

- Maximum number of pages: Two
- Font size: 12-point unreduced
- Paper size: 8.5 by 11 inches
- Single Spaced
- Page margin size: One inch
- Printed only on one side of page
- Written in English, avoid jargon

Your LOI must contain the following information:

- Descriptive title of the proposed research
- Name, address, E-mail address, and telephone number of the Principal Investigator
- Names of other key personnel
- Participating institutions
- Number and title of this Program Announcement (PA)

Application: Follow the PHS 398 application instructions for content and formatting of your application. See all attachments of this announcement as it is posted on the CDC Web site for guidance on how to complete Form 398 for this Program Announcement. The Program Announcement Title and number must appear in the application. For further assistance with the PHS 398 application form, contact GrantsInfo, Telephone (301) 435–0714, email: *GrantsInfo@nih.gov.*

You must include a research plan with your application. The research plan should be no more than 25 pages (8.5″ x 11″ in size), single-spaced, printed on one side only, with one-inch margins on all sides, and unreduced 12-point font.

Your application will be evaluated on the criteria listed under Section V. Application Review Information, so it is important to follow them, as well as the Research Objectives and the Administrative and National Policy Requirements (AR's), in laying out your research plan. Your research plan should address activities to be conducted over the entire project period.

The research plan should consist of the following information:

1. *Abstract.* Provide a one page brief description of proposed research activities and project outcomes. It is important to include an abstract that reflects the project's focus, because the abstract will be used to help determine the responsiveness of the application.

2. *Goals and Objectives.* Describe the goals and objectives the proposed research is designed to achieve in the short and long term. Specific research questions and hypotheses should also be included. In addition, the research plan should include an outline of a three-year plan with timeline.

3. *Program Participants.* Describe the study population for the proposed research and how participants will be selected (*i.e.*, sampling strategy). In addition, the research plan should provide evidence that the recipient (or a collaborating partner) has access to the study population, and that the participation by the study population will be adequate to test hypotheses.

4. *Methods.* Describe the proposed study design; methods, and analysis plan to test the proposed study hypotheses.

5. *Project Management.* Provide evidence of the expertise, capacity, and existing staff necessary to successfully conduct the research. Each existing or proposed position for the project should be described by job title, function, general duties, level of effort and allocation of time. Management operation principles, structure, and organization should also be noted.

6. *Collaborative Efforts.* List and describe the current and proposed collaborations with government, health, or youth agencies, community- or faith-based organizations, minority organizations, and other researchers. Include letters of support and memoranda of understanding that specify the nature of past, present, and proposed collaborations, and the products/services/activities that will be provided by and to the applicant.

7. *Data Sharing and release:* Describe plans for the sharing and release of data (See AR–25 for additional information).

8. *Project Budget.* Provide a detailed budget for each activity undertaken, with accompanying justification of all operating expenses that is consistent with the stated objectives and planned activities of the project. This announcement does not use the modular budget format. The budget should include at least one trip per year to CDC for program related meetings.

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. Your DUNS number must be entered in item 11 of the face page of the PHS 398 application form. 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/pubcommt.htm.*

3. Submission Dates and Times

LOI Deadline Date: December 29, 2003.

Application Deadline Date: February 17, 2004.

Explanation of Deadlines: 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 application by the United States Postal Service or commercial delivery services, you must ensure that the carrier will be able to guarantee delivery of the application by the closing date and time. If an application is received 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, CDC will upon receipt of proper documentation, consider the application as having been received by the deadline.

This announcement is the definitive guide on application submission address and deadline. It supersedes information provided in the application instructions. If your application does not meet the deadline above, it will not be eligible for review, and will be discarded. You will be notified that you did not meet the submission requirements.

CDC will not notify you upon receipt of your application. If you have a question about the receipt of your application, first contact your courier. If you still have any questions, contact the PGO–TIM staff at: 770–488–2700. Before calling, please wait two to three days after the application deadline. This will allow time for applications to be processed and logged.

4. *Intergovernmental Review:* Executive Order 12372 does not apply to this program.

5. *Funding Restrictions:* Restrictions, which must be taken into account while writing your budget, are as follows: None

If you are requesting indirect costs in your budget, you must include a copy of your indirect cost rate agreement. If your indirect cost rate is a provisional rate, the agreement must be less than 12 months of age.

Awards will not allow reimbursement of pre-award costs.

6. Other Submission Requirements

LOI Submission Address: Submit your LOI by express mail, delivery service, fax, or E-mail to: Robin Forbes, National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, 4770 Buford Hwy, NE., Mailstop K–62, Atlanta, GA 30341, Fax: 770–488–1662. Telephone: 770–488–4037. Email: *CIPERT@cdc.gov.*

Application Submission Address: Submit the signed original and five copies of your application by mail or express delivery to: Technical Information Management—PA #04060, Procurement and Grants Office, Centers for Disease Control and Prevention, 2920 Brandywine Road, Atlanta, GA 30341.

Applications may not be submitted electronically at this time.

V. Application Review Information

1. *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.

The goals of CDC-supported research are to advance the understanding of biological systems, improve the control and prevention of disease, and enhance health. In the written comments, reviewers will be asked to evaluate the application in order to judge the likelihood that the proposed research will have a substantial impact on the pursuit of these goals. The scientific review group will address and consider each of the following criteria in assigning the application's overall score, weighting them as appropriate for each application.

The application does not need to be strong in all categories to be judged likely to have major scientific impact and thus serve a high priority score. For example, an investigator may propose to carry out important work that by its nature is not innovative, but is essential to move a field forward.

The criteria are as follows:

Significance: Does this study address an important problem? If the aims of the application are achieved, how will scientific knowledge be advanced? What will be the effect of these studies on the concepts or methods that drive this field?

Approach: Are the conceptual framework, design, methods, and analyses adequately developed, scientifically rigorous, well-integrated, and appropriate to the aims of the project? Does the applicant acknowledge potential problem areas and consider alternative tactics?

Innovation: Does the project employ novel concepts, approaches or methods? Are the aims original and innovative? Does the project challenge existing paradigms or develop new methodologies or technologies?

Investigator: Is the investigator appropriately trained and well suited to carry out this work? Is the work proposed appropriate to the experience level of the principal investigator and other researchers (if any)?

Environment: Does the scientific environment in which the work will be done contribute to the probability of success? Does the proposed research take advantage of unique features of the scientific environment or employ useful collaborative arrangements? Is there evidence of institutional support?

Additional Review Criteria:

Protection of Human Subjects from Research Risks: Does the application adequately address the requirements of Title 45 CFR Part 46 for the protection of human subjects? This will not be scored, however, an application can be disapproved if the research risks are sufficiently serious and protection against risks is so inadequate as to make the entire application unacceptable.

Inclusion of Women and Minorities in Research: Does the application adequately address the CDC Policy requirements regarding the inclusion of women, ethnic, and racial groups in the proposed research? This includes: (1) The proposed plan for the inclusion of both sexes and racial and ethnic minority populations for appropriate representation; (2) The proposed justification when representation is limited or absent; (3) A statement as to whether the design of the study is adequate to measure differences when warranted; and (4) A statement as to whether the plans for recruitment and outreach for study participants include the process of establishing partnerships with community(ies) and recognition of mutual benefits.

Inclusion of Children as Participants in Research Involving Human Subjects:

The NIH maintains a policy that children (*i.e.*, individuals under the age of 21) must be included in all human subjects research, conducted or supported by the NIH, unless there are scientific and ethical reasons not to include them. This policy applies to all initial (Type 1) applications submitted for receipt dates after October 1, 1998.

All investigators proposing research involving human subjects should read the "NIH Policy and Guidelines" on the inclusion of children as participants in research involving human subjects that is available at: *http://grants.nih.gov/grants/funding/children/children.htm.*

Budget: The reasonableness of the proposed budget and the requested period of support in relation to the proposed research.

2. *Review and Selection Process:* Applications will be reviewed for completeness by the Procurement and Grants Office (PGO) and for responsiveness by the NCIPC. Incomplete applications and applications that are non-responsive will not advance through the review process. Applicants will be notified that their application did not meet submission requirements.

Applications that are complete and responsive to the PA will be subjected to a preliminary evaluation (streamline review) by a peer review committee, the Initial Review Group (IRG) convened by NCIPC, to determine if the application is of sufficient technical and scientific merit to warrant further review by the IRG. CDC will withdraw from further consideration applications judged to be noncompetitive and promptly notify the principal investigator or program director and the official signing for the applicant organization. Those applications judged to be competitive will be further evaluated by a dual review process.

1. The primary review will be a peer review conducted by the IRG. All applications will be reviewed for scientific merit in accordance with the review criteria listed above. Applications will be assigned a priority score based on the National Institutes of Health (NIH) scoring system of 100–500 points.

2. The secondary review will be conducted by the Science and Program Review Subcommittee (SPRS) of NCIPC's Advisory Committee for Injury Prevention and Control (ACIPC). The ACIPC Federal agency experts will be invited to attend the secondary review, and will receive modified briefing books (*i.e.*, abstracts, strengths and weaknesses from summary statements, and project officer's briefing materials). ACIPC Federal agency experts will be encouraged to participate in deliberations when applications address overlapping areas of research interest, so that unwarranted duplication in federally-funded research can be avoided and special subject area expertise can be shared. The NCIPC Division Associate Directors for Science (ADS) or their designees will attend the secondary review in a similar capacity as the ACIPC Federal agency experts to assure that research priorities of the announcement are understood and to provide background regarding current research activities. Only SPRS members will vote on funding recommendations, and their recommendations will be carried to the entire ACIPC for voting by the ACIPC members in closed session. If any further review is needed by the ACIPC, regarding the recommendations of the SPRS, the factors considered will be the same as those considered by the SPRS.

The committee's responsibility is to develop funding recommendations for the NCIPC Director based on the results of the primary review, the relevance and balance of proposed research relative to the NCIPC programs and priorities, and to assure that unwarranted duplication of federally-funded research does not occur. The secondary review committee has the latitude to recommend to the NCIPC Director, to reach over better-ranked proposals in order to assure maximal impact and balance of proposed research. The factors to be considered will include:

a. The results of the primary review including the application's priority score as the primary factor in the selection process.

b. The relevance and balance of proposed research relative to the NCIPC programs and priorities.

c. The significance of the proposed activities in relation to the priorities and objectives stated in "Healthy People 2010," the Institute of Medicine report, "Reducing the Burden of Injury," and the "CDC Injury Research Agenda."

All awards will be determined by the Director of the NCIPC based on priority scores assigned to applications by the IRG, recommendations by the secondary review committee, *e.g.*, NCIPC's Advisory Committee for Injury Prevention and Control (ACIPC), consultation with NCIPC senior staff, and the availability of funds.

VI. Award Administration Information

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.

2. *Administrative and National Policy Requirements:*

45 CFR Part 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–1 Human Subjects Requirements
AR–2 Requirements for Inclusion of Women and racial and Ethnic Minorities in Research
AR–9 Paperwork Reduction Act Requirements Projects that involve the collection of information from ten or more persons and that are funded by cooperative agreements will be subject to review and approval by the Office of Management and Budget (OMB).
AR–10 Smoke-Free Workplace Requirements
AR–11 Healthy People 2010
AR–12 Lobbying Restrictions
AR–13 Prohibition on Use of CDC Funds for Certain Gun Control Activities
AR–21 Small, Minority, Women-Owned Businesses
AR–22 Research Integrity
AR–23 States and Faith-Based Organizations
AR–24 Health Insurance Portability and Accountability Requirements
AR–25 Release and Sharing of Data

Starting with the December 1, 2003 receipt date, all NCIPC funded investigators seeking more than $250,000 in total costs in a single year are expected to include a plan describing how the final research data will be shared/released or explain why data sharing is not possible. Details on data sharing/release, including the timeliness and name of the project data steward, should be included in a brief paragraph immediately following the Research Plan Section of the PHS 398 form. References to data sharing/release may also be appropriate in other sections of the application (*e.g.* background and significance, human subjects requirements, etc.) The content of the data sharing/release plan will vary, depending on the data being collected and how the investigator is planning to share the data. The data sharing/release plan will not count towards the application page limit and will not factor into the determination scientific merit or priority scores. Investigators should seek guidance from their institutions, on issues related to institutional policies, local IRB rules, as well as local, state and Federal laws and regulations, including the Privacy Rule.

Further detail on the requirements for addressing data sharing in applications for NCIPC funding may be obtained by contacting NCIPC program staff or visiting the NCIPC Internet Web site: at *http://www.cdc.gov/ncipc/osp/sharing_policy.htm.*

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*.

3. Reporting: You must provide the CDC with original and two copies of the following reports:

1. Interim progress report (PHS 2590, OMB Number 0925–0001, rev. 5/2001) no less than 90 days before the end of the budget period. The progress report will serve as your non-competing continuation application, and must contain the following elements:

a. Current Budget Period Activities Objectives

b. Current Budget Period Financial Progress.

c. New Budget Period Program Proposed Activity Objectives.

d. Detailed Line-Item Budget and Justification.

e. Additional Requested Information.

2. Financial status report, no more than 90 days after the end of the budget period.

3. Final financial status and performance reports, no more than 90 days after the end of the project period.

VII. Agency Contacts

For general questions about this announcement, contact: Technical Information Management Section, Procurement and Grants Office, Centers for Disease Control and Prevention, 2920 Brandywine Road, Atlanta, GA 30341–4146. Telephone: (770) 488–2700.

For questions about scientific/research program technical issues contact, Marci Feldman, M.S., Project Officer, Division of Violence Prevention, National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, 4770 Buford Highway, NE MS K–60, Atlanta, GA 30341, Telephone: (770) 488–4478. FAX: (770) 488–4349. Email: *MFeldman@cdc.gov*.

For questions about peer review issues, contact, Gwen Cattledge, Scientific Review Administrator, National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, 4770 Buford Hwy, NE, Mailstop K–02, Atlanta, GA 30341, Telephone: 770–488–1430. Email: *gxc8@cdc.gov*.

For budget assistance, contact: James Masone, Contracts Specialist, Procurement and Grants Office, Centers for Disease Control and Prevention, 2920 Brandywine Road, Atlanta, GA 30341–4146, Telephone: 770–488–2736. FAX: 770–488–2671. Email: *zft2@cdc.gov*.

VIII. Other Information

References:

1. National Center for Injury Prevention and Control. CDC Injury Research Agenda. Atlanta, GA: Centers for Disease Control and Prevention, 2002.

2. Roberts DF, Foehr UG, Rideout VJ, Vrodie M. Kids & media @ the new millennium. Menlo Park, CA: Henry J. Kaiser Family Foundation, 1999.

3. Woodward EH. Media in the home 2000: The fourth annual survey of parents and children (Survey Series No. 7). Philadelphia, PA: The Annenberg Public Policy Center of the University of Pennsylvania, 1998.

4. Wilson BJ, Kunkel D, Linz D, Potter J, Donnerstein E, Smith SL, Blumenthal E, Gray T. Violence in television programming overall: University of California, Santa Barbara study. In Seawall M. (Ed.), National television violence study (Vol. 1, pp. 3–184). Thousand Oaks, CA: Sage Publications, 1997.

Wilson BJ, Kunkel D, Linz D, Potter J, Donnerstein E, Smith SL, Blumenthal E, Berry M. Violence in television programming overall: University of California, Santa Barbara study. In Seawall M. (Ed.), National television violence study (Vol. 2, pp. 3–204). Thousand Oaks, CA: Sage Publications, 1998.

Dated: November 20, 2003.

Edward Schultz,

Acting Director, Procurement and Grants Office, Centers for Disease Control and Prevention.

[FR Doc. 03–29632 Filed 11–26–03; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Community Trial to Test the Effectiveness of the Smoke Alarm Installation and Fire Safety Education (SAIFE) Program

Announcement Type: New.

Funding Opportunity Number: 04058.

Catalog of Federal Domestic Assistance Number: 93.136.

Key Dates:

Letter of Intent Deadline: December 29, 2003.

Application Deadline: February 17, 2004.

I. Funding Opportunity Description

Authority: This program is authorized under section 317 and 391 of the Public Health Service Act (42 U.S.C. 247b and 280b), as amended.

Purpose

The purpose of this program is to evaluate strategies to reduce the number of residential fire-related injuries and fatalities in high-risk communities.

This program addresses the "Healthy People 2010," focus area of Injury and Violence Prevention.

Measurable outcomes of the program will be in alignment with one or more of the following performance goals for the National Center for Injury Prevention and Control (NCIPC):

1. Increase the capacity of injury prevention and control programs to address the prevention of injuries and violence.

2. Monitor and detect fatal and non-fatal injuries.

3. Conduct a targeted program of research to reduce injury-related death and disability.

Research Objectives

The objective of this cooperative agreement is to rigorously evaluate strategies to reduce the number of residential fire-related injuries and fatalities in high-risk communities. Smoke alarms have proven effective in reducing the fire death and injury toll. Research shows that functioning smoke alarms are more likely to be present in a home when a fire safety program provides and installs them, rather than simply providing vouchers and/or discounts to individuals to obtain alarms that require resident installation. There are CDC programs currently being funded by PA 01076 in 16 states that provide for home installation of smoke alarms plus general fire safety education in households at high risk for fire, fire-related injury, and death. Programs of this type seem reasonable, but have not been studied scientifically to assess their impact on fire-related injury outcomes. This study will assess, through a community trial, the effectiveness of the program operating prospectively in multiple communities in one state.

Activities

Awardee activities for this program are as follows:

(a) Develop and implement a community trial to test the effectiveness of the smoke alarm installation and fire safety education (SAIFE) Program Announcement 01076 (intervention). Each year a minimum of three different communities having the capacity and willingness to implement smoke alarm installation combined with fire safety education for one year (intervention communities) will participate; and three comparison communities will not receive the intervention (control communities). Control communities should not become intervention communities in subsequent years to

ensure research findings are not contaminated during follow-up. At least nine intervention and nine control communities must be enrolled over three years. Program activities at the intervention sites are funded by program announcement 01076, and should be used for these sites only. Additionally, in order to test for the effectiveness of the intervention accurately, intervention and control communities must not have previously received funding from CDC or United States Fire Administration (USFA) for residential fire-related injury prevention programs. Non-intensive, relatively small awards, such as funding for equipment or education only programs, will not disqualify a community.

(b) Study sites must target vulnerable populations (*e.g.*, children under five, adults age 65 and older, persons with low social economic status) and include each year at least one urban, one suburban, and one rural community. All communities should have a population of approximately 50,000. These may be counties, cities, or neighborhoods. All communities should demonstrate fire incidence rates above the national average.

(c) Control communities should be matched on urban/suburban/rural status, type(s) of vulnerable populations, and approximate population size.

(d) Intervention communities will receive the smoke alarm installation and fire safety education program funded by program announcement 01076. Therefore, the intervention should facilitate the acquisition, distribution and proper installation of long-lasting, lithium-powered smoke alarms and fire safety education for targeted communities through the collaborative efforts of fire safety personnel and/or community workers.

(e) In partnership and collaboration with an academic or research institution, develop a community trial study design with intervention and control communities (as described above). Follow-up assessments for each intervention community should include assessment of the continued presence and functionality of intervention-installed smoke alarms. Outcomes to be measured in both intervention and control communities should include a comparison of pre- and post-intervention residents' knowledge, attitudes, beliefs, and behaviors; fire incidence, injuries, and deaths. Follow-up on injuries and deaths will require partnering with local hospitals. Depending upon when communities enter the study, some communities will have longer follow-up periods than others.

(f) The research team, including a research project coordinator, should provide oversight for the research activities to each community selected. Year one will address design and preparation issues, including the development of materials for Institutional Review Board (IRB). Years two through four will emphasize implementation of intervention and control community activities including data collection. Year five will include final months of follow-up activities and data analysis.

In a cooperative agreement, CDC staff is substantially involved in the program activities, above and beyond routine grant monitoring.

CDC Activities for this program are as follows:

(a) Partner in a substantial way in all activities, especially with regard to understanding best practices and evidence that can be applied to intervention design for fire prevention.

(b) Provide technical consultation and advice through routine meetings and conference calls with the awardee and any local partners on all aspects of intervention design, methods, analysis planning, and other recipient activities.

(c) Provide up-to-date scientific information about fire-related injuries on a national scope and with respect to specific regions and population groups.

(d) Partner and collaborate with the awardee in development and refinement of the intervention.

(e) Partner in developing a research protocol for annual IRB review by all cooperating institutions participating in the research study. The CDC IRB will review and approve the protocol initially and on at least an annual basis until the research study is completed.

(f) Ensure human subjects assurances are in place and in effect.

(g) Monitor and evaluate the scientific and operational accomplishments of the project. This will be accomplished through periodic site visits, telephone calls, electronic communication, technical and data reports and interim data analyses.

(h) Facilitate collaborative efforts to compile and disseminate research results through presentations at scientific conferences and publications in peer-reviewed public health journals.

II. Award Information

Type of Award: Cooperative Agreement.

CDC involvement in this program is listed in the Activities Section above.

Fiscal Year Funds: FY 2004.

Approximate Total Funding: $250,000.

Approximate Number of Awards: One.

Approximate Average Award: $250,000.

Floor of Award Range: $250,000.

Ceiling of Award Range: $250,000.

Anticipated Award Date: September 1, 2004.

Budget Period Length: 12 months.

Project Period Length: Five 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. With satisfactory progress on this community trial, funding for program activities (program announcement 01076) is expected to continue so that this community trial can be completed.

III. Eligibility Information

1. Eligible Applicants

Applications may be submitted by public and private nonprofit and for profit organizations and by governments and their agencies, such as:

- Public nonprofit organizations.
- Private nonprofit organizations.
- For profit organizations.
- Small, minority, women-owned businesses.
- Universities.
- Colleges.
- Research institutions.
- Hospitals.
- Community-based organizations (including faith-based organizations).
- State and local governments or their Bona Fide Agents (this includes the District of Columbia, 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)
- Political subdivisions of States (in consultation with States).

A Bona Fide Agent is an agency/organization identified by the state as eligible to submit an application under the state eligibility in lieu of a state application. If you are applying as a bona fide agent of a state or local government, you must provide as a letter from the state or local government as documentation of your status. Place this documentation behind the first page of your application form.

2. Cost Sharing or Matching

Matching funds are not required for this program.

3. Other Eligibility Requirements

If your application is incomplete or non-responsive to the requirements listed below, it will not be entered into the review process. You will be notified that your application did not meet the submission requirements.

1. The applicant (or team) must provide evidence of prior experience in designing, implementing, and evaluating community-based programs, including evaluation of knowledge, attitudes, beliefs, and behaviors; evidence of prior experience with implementing rigorous experimental studies; and/or experience with accessing and linking appropriate community level data with clinical, medical, and fire data. The applicant must include documentation of this experience such as publications from peer-reviewed journals.

2. The applicant must provide evidence of effective and well-defined collaborative relationships needed to ensure the implementation of the proposed activities. The collaboration must include at least a State Health Department (to provide leadership regarding local public health priorities), academic or research institution (to provide scientific and methodological expertise), fire prevention agencies (to provide guidance in community implementation activities), and local hospitals for follow-up of medical outcomes. The applicant must include letters of support that describe the specific commitments and responsibilities that will be undertaken by the collaborating organizations.

3. The applicant must be funded currently by CDC Program Announcement 01076 to perform community-based smoke alarm installation and fire safety education activities, and their project period does not need to extend through the period of this community trial.

4. Requested funding amount should not be greater than the ceiling of the award range.

5. Principal investigators (PI's) are encouraged to submit only one proposal in response to this program announcement. With few exceptions (*e.g.*, research issues needing immediate public health attention), only one application per PI will be funded under this announcement.

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.

IV. Application and Submission Information

1. Address To Request Application Package

To apply for this funding opportunity, use application form PHS 398 (OMB number 0925–0001 rev. 5/2001). Forms and instructions are available in an interactive format on the CDC Web site, at the following Internet address: *www.cdc.gov/od/pgo/forminfo.htm.* Forms and instructions are also available in an interactive format on the National Institutes of Health (NIH) Web site at the following Internet address: *http://grants.nih.gov/grants/funding/phs398/phs398.html.*

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.

2. Content and Form of Application Submission

Letter of Intent (LOI)

CDC requests that you send a LOI if you intend to apply for this program. Although the LOI is not required, not binding, and does not enter into the review of your subsequent application, your LOI will be used to gauge the level of interest in this program, and to allow CDC to plan the application review. Your LOI must be written in the following format:

- Maximum number of pages: 2.
- Font size: 12-point unreduced.
- Paper size: 8.5 by 11 inches.
- Single spaced.
- Page margin size: one inch.
- Printed only on one side of page.
- Written in English, avoid jargon.

Your LOI must contain the following information:

- Descriptive title of the proposed research.
- Name, address, E-mail address, and telephone number of the Principal Investigator.
- Names of other key personnel.
- Participating institutions.
- Number and title of this Program Announcement (PA).

Application

Follow the PHS 398 application instructions for content and formatting of your application. For further assistance with the PHS 398 application form, contact GrantsInfo, Telephone (301) 435–0714, e-mail: *GrantsInfo@nih.gov.*

Your research plan should address activities to be conducted over the entire project period.

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. Your DUNS number must be entered in item 11 of the face page of the PHS 398 application form. 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 *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/pubcommt.htm.*

3. Submission Dates and Times

LOI Deadline Date: December 29, 2003.

Application Deadline Date: February 17, 2004.

Explanation of Deadlines: 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 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 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 carrier's guarantee. If the documentation verifies a carrier problem, CDC will consider the application as having been received by the deadline.

This announcement is the definitive guide on application submission address and deadline. It supersedes information provided in the application instructions. If your application does not meet the deadline above, it will not be eligible for review, and will be discarded. You will be notified that you did not meet the submission requirements.

CDC will not notify you upon receipt of your application. If you have a question about the receipt of your 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 application deadline. This will allow time for applications to be processed and logged.

4. Intergovernmental Review

Executive Order 12372 does not apply to this program.

5. Funding Restrictions

Restrictions, which must be taken into account while writing your budget, are as follows: None

If you are requesting indirect costs in your budget, you must include a copy of your indirect cost rate agreement. If your indirect cost rate is a provisional rate, the agreement must be less than 12 months of age.

6. Other Submission Requirements

LOI Submission Address: Submit your LOi by express mail, delivery mail, delivery service, fax or e-mail to: Robin Forbes, Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, 4770 Buford Hwy., NE., Mailstop K–62, Atlanta, GA 30341, Fax: 770–488–1662, Telephone: 770–488–4037, E-mail: *cipert@cdc.gov*.

Application Submission Address: Submit the signed original and five copies of your application by mail or express delivery service to: Technical Information Management—PA# 04058, Procurement and Grants Office, Centers for Disease Control and Prevention, 2920 Brandywine Road, Atlanta, GA 30341.

Applications may not be submitted electronically at this time.

V. Application Review Information

1. 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.

The goals of CDC-supported research are to advance the understanding of biological systems, improve the control and prevention of disease, and enhance health. In the written comments, reviewers will be asked to evaluate the application in order to judge the likelihood that the proposed research will have a substantial impact on the pursuit of these goals. The scientific review group will address and consider each of the following criteria in assigning the application's overall score, weighting them as appropriate for each application.

The application does not need to be strong in all categories to be judged likely to have major scientific impact and thus deserve a high priority score. For example, an investigator may propose to carry out important work that by it's nature is not innovative, but is essential to move a field forward.

The criteria are as follows:

Significance: Does this study address an important problem? If the aims of the application are achieved, how will scientific knowledge be advanced? What will be the effect of these studies on the concepts or methods that drive this field?

Approach: Are the conceptual framework, design, methods, and analyses adequately developed, well-integrated, and appropriate to the aims of the project? Does the applicant describe the specific questions this research is intended to address? Does the applicant describe the hypotheses to be tested, the specific study goals, measurable objectives, and outcomes? Does the applicant acknowledge potential problem areas and consider alternative tactics?

Does the project include plans to measure progress toward achieving the stated objectives? Is there an appropriate work plan included? Does the applicant provide a detailed time-line for the first year of the study as well as a projected time-line for the subsequent four years?

Has the applicant clearly described how intervention and comparison communities will be selected?

Is there a statement as to whether the plans for recruitment and outreach for study participants include the process of establishing partnerships with communities and recognition of mutual benefits? Is there evidence of effective working relationships between the applicant and community organizations? Does the applicant describe experience in developing community partnerships and the community's current and anticipated capacity to carry out the proposed activities? Is there evidence that the applicant is successfully reaching communities and households under Program Announcement 01076?

Are there adequate plans for data collection and data management including security of data, assurance of participant confidentially, data entry, editing, and quality assurance procedures? Is there a statistical analysis plan appropriate for the study design?

Innovation: Does the project employ novel concepts, approaches or methods? Are the aims original and innovative? Does the project challenge existing paradigms or develop new methodologies or technologies?

Investigator: Is the investigator appropriately trained and well suited to carry out this work? Is the work proposed appropriate to the experience level of the principal investigator and other researchers? Is there a prior history of implementing injury-related research? Does the applicant document capacity to accomplish the proposed study as demonstrated by relevant past or current injury prevention studies and smoke alarm program activities?

Environment: Does the scientific environment in which the work will be done contribute to the probability of success? Do the proposed experiments take advantage of unique features of the scientific environment or employ useful collaborative arrangements?

Is there evidence of institutional support? Does the applicant describe the personnel and study collaborators needed to accomplish the proposed activities? Does the applicant provide evidence that the study personnel have the expertise and capacity to accomplish the proposed activities and to provide appropriate scientific oversight necessary to fulfill study goals and objectives?

Is there an appropriate degree of commitment and cooperation of other interested parties as evidenced by letters detailing the nature and extent of their involvement? Is there evidence of the experience and capacity for all key staff members including Curriculum Vitaes and position descriptions?

Is there a continuation plan in the event that key staff leave the project? How will new staff be integrated smoothly into the project, and what assurances are there that resources will be available when needed for this project?

Additional Review Criteria: In addition to the above criteria, the following items will be considered in the determination of scientific merit and priority score:

Study Samples: Are the samples rigorously defined to permit complete independent replication at another site? Have the referral sources been described, including the definitions and criteria? What plans have been made to include women and minorities and their subgroups as appropriate for the scientific goals of the research? How will the applicant deal with recruitment and retention of subjects?

Dissemination: What plans have been articulated for sharing the research findings?

Measures of Effectiveness: Applicants are required to provide measures of effectiveness that will demonstrate the accomplishment of the various identified objectives of the cooperative

agreement. Measures must be objective and quantitative and must measure the intended outcomes. These measures of effectiveness will be submitted with the application and will be an element of evaluation. The Special Emphasis Panel shall assure that measures set forth in the application are in accordance with CDC's performance plans. How adequately has the applicant addressed these measures?

Protection of Human Subjects from Research Risks: Does the application adequately address the requirements of title 45 CFR part 46 for the protection of human subjects? This will not be scored; however, an application can be disapproved if the research risks are sufficiently serious and protection against risks is so inadequate as to make the entire application unacceptable.

Inclusion of Women and Minorities in Research: Does the application adequately address the CDC Policy requirements regarding the inclusion of woman, ethnic, and racial groups in the proposed research? This includes: (1) The proposed plan for the inclusion of both sexes and racial and ethnic minority populations for appropriate representation; (2) The proposed justification when representation is limited or absent; (3) A statement as to whether the design of the study is adequate to measure differences when warranted; and (4) A statement as to whether the plans for recruitment and outreach for study participants include the process of establishing partnerships with community(ies) and recognition of mutual benefits.

Inclusion of Children as Participants in Research Involving Human Subjects: The NIH maintains a policy that children (*i.e.*, individuals under the age of 21) must be included in all human subjects research, conducted or supported by the NIH, unless there are scientific and ethical reasons not to include them. This policy applies to all initial (Type 1) applications submitted for receipt dates after October 1, 1998.

Budget: The reasonableness of the proposed budget and the requested period of support in relation to the proposed research.

2. Review and Selection Process

Applications will be reviewed for completeness by the Procurement and Grants Office (PGO) and for responsiveness by the NCIPC. Incomplete applications and applications that are non-responsive will not advance through the review process. You will be notified that you did not meet submission requirements.

Applications that are complete and responsive to the Program Announcement will be evaluated for scientific and technical merit by an appropriate peer review group convened by the NCIPC in accordance with the review criteria listed above. As part of the initial merit review, all applications will:

- Undergo a process in which only those applications deemed to have the highest scientific merit, generally the top half of the applications under review, will be discussed and assigned a priority score.
- Receive a written critique.
- Receive a second level review by the Science and Program Review Section (SPRS) of the Advisory Committee for Injury Prevention and Control (ACIPC).

Applications which are complete and responsive may be subjected to a preliminary evaluation (streamline review) by a peer review committee, the NCIPC Initial Review Group (IRG), to determine if the application is of sufficient technical and scientific merit to warrant further review by the IRG. CDC will withdraw from further consideration applications judged to be noncompetitive and promptly notify the principal investigator/program director and the official signing for the applicant organization. Those applications judged to be competitive will be further evaluated by a dual review process.

All awards will be determined by the Director of the NCIPC based on priority scores assigned to applications by the primary review committee IRG, recommendations by the secondary review committee of the SPRS of the ACIPC, consultation with NCIPC senior staff, and the availability of funds.

The primary review will be a peer review conducted by the IRG. All applications will be reviewed for scientific merit using current National Institutes of Health (NIH) criteria (a scoring system of 100–500 points) to evaluate the methods and scientific quality of the application.

The secondary review will be conducted by the SPRS of the ACIPC. The ACIPC Federal agency experts will be invited to attend the secondary review and will receive modified briefing books (*i.e.*, abstracts, strengths and weaknesses from summary statements, and project officer's briefing materials). ACIPC Federal agency experts will be encouraged to participate in deliberations when applications address overlapping areas of research interest, so that unwarranted duplication in federally-funded research can be avoided and special subject area expertise can be shared. The NCIPC Division Associate Directors for Science (ADS) or their designees will attend the secondary review in a similar capacity as the ACIPC Federal agency experts to assure that research priorities of the announcement are understood and to provide background regarding current research activities. Only SPRS members will vote on funding recommendations, and their recommendations will be carried over to the entire ACIPC for voting by the ACIPC members in closed session. If any further review is needed by the ACIPC, regarding the recommendations of the SPRS, the factors considered will be the same as those considered by the SPRS.

The committee's responsibility is to develop funding recommendations for the NCIPC Director based on the results of the primary review, the relevance and balance of proposed research relative to the NCIPC programs and priorities, and to assure that unwarranted duplication of federally-funded research does not occur. The secondary review committee has the latitude to recommend to the NCIPC Director, to reach over better ranked proposals in order to assure maximal impact and balance of proposed research. The factors to be considered will include:

a. The results of the primary review including the application's priority score as the primary factor in the selection process.

b. The relevance and balance of proposed research relative to the NCIPC programs and priorities.

c. The significance of the proposed activities in relation to the priorities and objectives stated in "Healthy People 2010" (*http://www.healthypeople.gov/*), the Institute of Medicine report, "Reducing the Burden of Injury," and the "CDC Injury Research Agenda" (*http://www.cdc.gov/ncipc/pub-res/research_agenda*).

d. Budgetary considerations.

VI. Award Administration Information

1. Award Notices

Successful applicant 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 (GMO), and mailed to the recipient fiscal officer identified in the application.

2. Administrative and National Policy Requirements

45 CFR Part 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–1 Human Subjects Requirements
- AR–2 Requirements for Inclusion of Women and Racial and Ethnic Minorities in Research
- 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
- AR–14 Accounting System Requirements
- AR–15 Proof of Non-Profit Status
- AR–16 Security Clearance Requirement
- AR–21 Small, Minority, and Women-Owned Business
- AR–22 Research Integrity
- AR–23 States and Faith-Based Organizations
- AR–24 Health Insurance Portability and Accountability Act Requirements
- AR–25 Release and Sharing of Data

Starting with the December 1, 2003, receipt date, all NCIPC funded investigators seeking more than $500,000 in total costs in a single year are expected to include a plan describing how the final research data will be shared/released or explain why data sharing is not possible. Details on data sharing/release, including the timeliness and name of the project data steward, should be included in a brief paragraph immediately following the Research Plan Section of the PHS 398 form. References to data sharing/release may also be appropriate in other sections of the application (*e.g.*, background and significance, human subjects requirements, etc.) The content of the data sharing/release plan will vary, depending on the data being collected and how the investigator is planning to share the data. The data sharing/release plan will not count towards the application page limit and will not factor into the determination scientific merit or priority scores. Investigators should seek guidance from their institutions, on issues related to institutional policies, local IRB rules, as well as local, state and Federal laws and regulations, including the Privacy Rule.

Further detail on the requirements for addressing data sharing in applications for NCIPC funding may be obtained by contacting NCIPC program staff or visiting the NCIPC Internet Web site at *http://www.cdc.gov/ncipc/osp/sharing_policy.htm.*

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.*

3. Reporting

You must provide CDC with an original, plus two copies of the following reports:

1. Interim progress report, (PHS 2590, OMB Number 0925–0001, rev. 5/2001) no less than 90 days before the end of the budget period. The progress report will serve as your non-competing continuation application, and must contain the following elements:

a. Current Budget Period Activities Objectives.

b. Current Budget Period Financial Progress.

c. New Budget Period Program Proposed Activity Objectives.

d. Detailed Line-Item Budget and Justification.

e. Additional Requested Information.

2. Financial status report, no more than 90 days after the end of the budget period.

3. Final financial and performance reports, no more than 90 days after the end of the project period.

VII. Agency Contacts

For general questions about this announcement, contact: Technical Information Management Section—PA#04058, Procurement and Grants Office, Centers for Disease Control and Prevention, 2920 Brandywine Road, Atlanta, GA 30341, Telephone: 770–488–2700.

For scientific/research program technical assistance, contact: Mick Ballesteros, PhD, Project Officer, Division of Unintentional Injury Prevention, National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, 4770 Buford Highway, NE., Mailstop K–63, Atlanta, GA 30341, Telephone: 770–488–1308, E-mail address: *mballesteros@cdc.gov.*

For questions about peer review, contact: Gwen Cattledge, Scientific Review Administrator, National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, 4770 Buford Highway, NE., Mailstop K–02, Atlanta, GA 30341, Telephone: 770–488–1430, E-mail address: *gxc8@cdc.*

For financial, grants management, or budget assistance, contact: Nancy Pillar, Grants Management (or Contract) Specialist, Procurement and Grants Office, Centers for Disease Control and Prevention, 2920 Brandywine Road, Atlanta, GA 30341, Telephone: 770–488–2721, E-mail address: *nfp6@cdc.gov.*

VIII. Other Information—None

Dated: November 20, 2003.

Edward J. Schultz,

Acting Director, Procurement and Grants Office, Centers for Disease Control and Prevention.

[FR Doc. 03–29634 Filed 11–26–03; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the National Deafness and Other Communication Disorders Advisory Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Deafness and Other Communication Disorders Advisory Council.

Date: January 23, 2004.

Open: 8:30 a.m. to 11:30 a.m.

Agenda: Staff reports on divisional, programmatic and special activities.

Place: National Institutes of Health, Building 31, 31 Center Drive, Conference Room 6, Bethesda, MD 20892.

Closed: 11:30 a.m. to Adjournment.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 31, 31 Center Drive, Conference Room 6, Bethesda, MD 20892.

Contact Person: Craig A. Jordan, PhD, Director, Division of Extramural Activities, NIDCD, NIH, Executive Plaza South, Room 400C, 6120 Executive Blvd., Bethesda, MD

20892–7180, 301–496–8693, *jordanc@nidcd.nih.gov*.

If the interest of security, NIH has instituted stringent procedures for entrance into the building by non-government employees. Persons without a government I.D. will need to show a photo I.D. and sign-in at the security desk upon entering the building.

Information is also available on the Institute's/Center's Home page: *www.nidcd.nih.gov/about/councils/ndccdac/ndccdac.htm*, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: November 20, 2003.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 03–29636 Filed 11–26–03; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Special Emphasis Panel, ZAA1 CC (02) National Alcohol Screening Day AEM Department Collaboration—RFA AA04–001.

Date: December 16, 2003.

Time: 8:30 a.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Double Tree Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Mahadev Murthy, PhD, Scientific Review Administrator, Extramural Project Review Branch, Office of Scientific Affairs, National Institute on Alcohol Abuse, and Alcoholism, 6000 Executive Blvd, Suite 409, Bethesda, MD 20892–7003, (301) 443–2860.

(Catalogue of Federal Domestic Assistance Program Nos. 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants, National Institutes of Health, HHS)

Dated: November 20, 2003.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 03–29638 Filed 11–26–03; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Dental & Craniofacial Research; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Dental and Craniofacial Research Special Emphasis Panel, 04–23, Review of R21s.

Date: December 2, 2003.

Time: 10:30 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, 45 Center Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Rebecca Roper, MS, MpH, Scientific Review Administrator, Scientific Review Branch, Division of Extramural Research, National Inst of Dental & Craniofacial Research National Institutes of Health, 45 Center Dr., room 4AN32E, Bethesda, MD 20892, 301 451–5096.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute of Dental and Craniofacial Research Special Emphasis Panel, 04–26, Review of R13s.

Date: December 11, 2003.

Time: 2 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, 45 Center Drive Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: H. George Hausch, PhD, Acting Director, 4500 Center Drive, Natcher Building, Rm 4AN44F, National Institutes of Health, Bethesda, MD 20892, (301) 594–2372, *george_hausch@nih.gov*.

Name of Committee: National Institute of Dental and Craniofacial Research Special Emphasis Panel, 04–29, Review of R21s..

Date: December 18, 2003.

Time: 1 p.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, 45 Center Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Rebecca Roper, MS, MpH, Scientific Review Administrator, Scientific Review Branch, Division of Extramural Research, National Inst of Dental & Craniofacial Research, National Institutes of Health, 45 Center Dr., room 4AN32E, Bethesda, MD 20892, 301 451–5096.

Name of Committee: National Institute of Dental and Craniofacial Research Special Emphasis Panel, 04–27, Review of R13s.

Date: January 22, 2004.

Time: 2 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, 45 Center Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: H. George Hausch, PhD, Acting Director, 4500 Center Drive, Natcher Building, Rm. 4AN44F, National Institutes of Health, Bethesda, MD 20892, (303) 594–2372, *george_hausch@nih.gov*.

Name of Committee: National Institute of Dental and Craniofacial Research Special Emphasis Panel, 04–24, Review of R01s.

Date: February 18, 2004.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Bethesda Marriott Suites, 6711 Democracy Boulevard, Bethesda, MD 20817.

Contact Person: Rebecca Roper, MS MpH, Scientific Review Administrator, Scientific Review Branch, Division of Extramural Research, National Inst of Dental & Craniofacial Research, National Institutes of Health, 45 Center Dr., room 4AN32E, Bethesda, MD 20892, 301 451–5096.

(Catalogue of Federal Domestic Assistance Program Nos. 93.121, Oral Diseases and Disorders Research, National Institutes of Health, HHS)

Dated: November 20, 2003.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 03–29639 Filed 11–26–03; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel, B Cell Regulation and Function.

Date: December 16, 2003.

Time: 10 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health/NIAID, 6700 B Rockledge Drive, Room 3131, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Katherine L. White, PhD, Scientific Review Administrator, AIDS Preclinical Research Review Branch, Scientific Review Program, NIH/NIAID, 6700 B Rockledge Drive, Room 3131, Bethesda, MD 20892, (301) 435–1615, *kw17b@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: November 21, 2003.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 03–29725 Filed 11–26–03; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(b), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Environmental Sciences Special Emphasis Panel. To Review Program Project Applications.

Date: February 2–3, 2004.

Time: 7 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Guest Suites, 2515 Meridian Parkway, Research Triangle Park, NC 27713.

Contact Person: Linda K. Bass, PhD., Scientific Review Administrator, Scientific Review Branch, Office of Program Operations, Division of Extramural Research and Training, National Institute of Environmental Health Sciences, PO Box 12233, MD EC–30, Research Triangle Park, NC 27709, (919) 541–1307.

(Catalogue of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposure; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143; NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazardous; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: November 21, 2003.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 03–29726 Filed 11–26–03; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Genomics of Eye Disorder.

Date: December 2, 2003.

Time: 3 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Camilla E. Day, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2212, MISC 7890, Bethesda, MD 20892, (301) 435–1037, *dayc@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Gene Expression in Neural Development in the Frog.

Date: December 4, 2003.

Time: 2 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: James P. Harwood, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5168, MISC 7840, Bethesda, MD 20892, (301) 435–1256, *harwoodj@csr.noh.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Biomechanics and Molecular Genetics.

Date: December 4, 2003.

Time: 4:30 p.m. to 6:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Daniel F. McDonald, PhD, Chief, Musculoskeletal, Oral and Skin Sciences IRG, Center for Scientific Review, NIH, 6701 Rockledge Drive, Room 4214, MSC 7814, Bethesda, MD 20892, (301) 435–1215, *mcdonald@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Cortical Pathways.

Date: December 11, 2003.

Time: 1 p.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Michael A. Steinmetz, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5172, MSC 7844, Bethesda, MD 20892, (301) 435–1247, *steinmem@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Oral, Dental and Craniofacial Sciences SBIR/STTR Review Panel.

Date: December 16, 2003.

Time: 10 a.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: George Washington University Inn, 824 New Hampshire Ave., NW., Washington, DC 20037.

Contact Person: J. Terrell Hoffield, DDS, PhD, Dental Officer, USPHS, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4116, MSC 7816, Bethesda, MD 20892, (301) 435–1781, *th88q@nih.gov.*

(Catalogue of Federal Domestic Assistant Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: November 20, 2003.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 03–29637 Filed 11–26–03; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Notice of a Meeting

Pursuant to Public Law 92–463, notice is hereby given of a meeting of the Substance Abuse and Mental Health Services Administration (SAMHSA) National Advisory Council in December 2003.

The SAMHSA National Advisory Council meeting will be open and will include a report by the SAMHSA Administrator on how the Agency is managing its Matrix priorities and cross-cutting principles, the President's Management Agenda, and SAMHSA's work in partnership with other Federal agencies. There will be updates on SAMHSA's Budget, SAMHSA's FY 2004 Appropriation's, the Charitable Choice Regulations, and the Program Assessment Rating Tool review. In addition, the meeting will include a presentation by SAMHSA's newly appointed CMHS Director who will describe her vision for CMHS and mental health. There will also be discussions on workforce development, national disaster and trauma, SAMHSA's Children and Families Agenda, and SAMHSA's data strategy.

Attendance by the public will be limited to space available. Public comments are welcome. Please communicate with the individual listed as contact below to make arrangements to comment or to request special accommodations for persons with disabilities.

Substantive program information, a summary of the meeting, and a roster of Council members may be obtained either by accessing the SAMHSA Council Web site, *www.samhsa.gov/council/council* or by communicating with the contact whose name and telephone number is listed below. The transcript for the open session will also be available on the SAMHSA Council Web site.

Committee Name: SAMHSA National Advisory Council.

Date/time: Thursday, December 11, 2003, 9 a.m. to 4:30 p.m. (Open); Friday, December 12, 2003, 9 a.m. to 11:15 p.m. (Open).

Place: Embassy Suites Hotel, Chevy Chase Room, 4300 Military Road, NW., Washington, DC 20015.

FOR FURTHER INFORMATION CONTACT: Toian Vaughn, Executive Secretary, 5600 Fishers Lane, Parklawn Building, Room 12C–05, Rockville, MD 20857, *Telephone:* (301) 443–7016; Fax: (301) 443–7590 and *E-mail: tvaughn@samhsa.gov.*

Dated: November 18, 2003.

Toian Vaughn,

Committee Management Officer, SAMHSA.

[FR Doc. 03–29614 Filed 11–26–03; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Notice Designating University of Southern California as Center for Homeland Security

AGENCY: Department of Homeland Security.

ACTION: Notice.

SUMMARY: The Department of Homeland Security has designated the University of Southern California as a Center for Homeland Security (HS-Center).

FOR FURTHER INFORMATION CONTACT: Laura Petonito, Deputy Director, University Programs, Science and Technology Division, Department of Homeland Security, Washington, DC 20528; telephone 202–401–1113, facsimile 202–772–9916; e-mail *laura.petonito@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

Section 308 of the Homeland Security Act of 2002, Pub. L. 107–296, (Homeland Security Act), as amended by the Omnibus Appropriation Act of 2003, Pub. L. 108–7, directs the Department of Homeland Security (Department) to sponsor extramural research, development, demonstration, testing and evaluation programs relating to homeland security. As part of this program, the Department is to establish a university-based center or centers for homeland security.

The purpose of these centers is to provide a locus to attract and retain academic scholars in pursuit of homeland security-related disciplines. The Centers are envisioned to be an integral and critical component of the Department's capability to anticipate, prevent, respond to, and recover from terrorist attacks. The Centers will leverage multidisciplinary capabilities of universities and fill gaps in current knowledge.

Section 308(b)(2)(B) of the Homeland Security Act lists fourteen areas of substantive expertise that, if demonstrated, might qualify universities for designation as university-based centers. The listed areas of expertise include, among others, food safety, first responders, multi-modal transportation, and responding to incidents involving weapons of mass destruction. However, the list is not exclusive. Section 308(b)(2)(C) gives the Secretary discretion to consider additional criteria beyond those specified in section 308(b)(2)(B) in selecting universities for this program, as long as the Department issues a **Federal Register** notice explaining the criteria used for the designation.

Criteria

In 2002, the National Research Council (NRC) issued a report entitled "Making the Nation Safer: The Role of Science and Technology in Countering Terrorism." In this report, the NRC recommended a number of substantive areas for research that could contribute to national security. Among other issues, the NRC report identified the need to perform risk analysis and modeling of vulnerabilities and economic analysis of security enhancements as areas for which research is needed.

The Department agrees that research in these areas will contribute

significantly to the Department's ability to identify, and select among, options for enhancing national security. Risk-based modeling, and economic analysis, will help the Department understand the impact and consequences of potential acts of terrorism, thus providing decision makers with validated tools to evaluate vulnerabilities and identify countermeasures and response actions.

Solicitation of Interest and Designation

In August 2003, the Department sought white papers from universities that wished to be designated as HS-Centers. The HS-Centers are envisioned to be an integral and critical component of the new "homeland security complex" that will provide the nation with a robust, dedicated and enduring capability that will enhance our ability to anticipate, prevent, respond to, and recover from terrorist attacks. The notice, made available on the DHS Internet site (*http://www.dhs.gov*) and (*http://www.orau.gov/dhsuce*), identified risk-based economic modeling as one of the areas of expertise (criteria) that might merit designation.

The Department received a number of proposals and evaluated them through a process that included the participation of federal government and outside experts. After the panels of experts selected final potential designees, the Department conducted site visits to interview the individuals who would be performing the research. Based on this evaluation, the Department has selected the University of Southern California (USC) as the first HS-Center for this program.

USC will conduct research on risk-based modeling, with a particular emphasis on the economic aspects. U.S.C. will develop an integrated set of models and modeling capabilities that cut across several threats and targets—impacts on buildings and structures, airborne biological and chemical agents, and cyber-terrorism. Other research areas besides modeling and analysis of risks, will be in emergency response, consequences, economics, advanced computation and infrastructure. U.S.C. is committed to ensuring that students will have opportunities to develop and contribute to these important areas through hands-on training and internships, as examples. Workshops for the scientific community, collaboration with federal laboratories, and support for sabbatical visitors are additional activities planned for this HS-Center.

Dated: November 21, 2003.

Melvin Bernstein,

Director, University Programs, Science and Technology Division, Department of Homeland Security.

[FR Doc. 03–29646 Filed 11–24–03; 11:36 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOMELAND SECURITY

Citizenship and Immigration Services

Agency Information Collection Activities: Comment Request

ACTION: 60-day notice of information collection under review; application for replacement/initial nonimmigrant arrival-departure document; form I–102.

The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Service (CIS) has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until January 27, 2004.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(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 he accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Application for Replacement/Initial Nonimmigrant Arrival-Departure Document.

(3) *Agency form, number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–102. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or Households. The information collection will be used by an alien temporarily residing in the United States to request a replacement of his or her arrival evidence. The information provided can be used to verify status and for determination as to the eligibility of the applicant for replacement.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 20,000 responses at 25 minutes (.416 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 8,320 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please contact Richard A. Sloan 202–514–3291, Director, Regulations and Forms Services Division, Department of Homeland Security, 425 I Street, NW., Room 4034, Washington, DC 20536. Additionally, comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time may also be directed to Mr. Richard A. Sloan.

If additional information is required contact: Mr. Steve Cooper, PRA Clearance Officer, Department of Homeland Security, Office of the Chief Information Officer, Regional Office Building 3, 7th and D Streets, SW., Suite 4636–26, Washington, DC 20202.

Dated: November 21, 2003.

Richard A. Sloan,

Department Clearance Officer, Department of Homeland Security, U.S. Citizenship and Immigration Services.

[FR Doc. 03–29704 Filed 11–26–03; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF HOMELAND SECURITY

Citizenship and Immigration Services

Agency Information Collection Activities: Comment Request

ACTION: 60-day notice of information collection under review; application to

file declaration of intention; form N–300.

The Department of Homeland Security (DHS) and the U.S. Citizenship and Immigration Services (CIS) has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until January 27, 2003.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one ore more of the following four points:

(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 agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Application to File Declaration of Intention.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form N–300. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or Households. This form will be used by permanent residents to file a declaration of intention to become a citizen of the United States. This collection is also used to satisfy documentary requirements for those seeking to work in certain occupations or professions, or to obtain various licenses.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 433 responses at 45 minutes per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 325 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please contact Richard A. Sloan 202–514–3291, Director, Regulations and Forms Services Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, Room 4304, 425 I Street, NW., Washington, DC 20536. Additionally, comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time may also be directed to Mr. Richard A. Sloan.

If additional information is required contact: Mr. Steve Cooper, PRA Clearance Officer, Department of Homeland Security, Office of the Chief Information Officer, Regional Office Building 3, 7th and D Streets, SW., Suite 4636–26, Washington, DC 20202.

Dated: November 21, 2003.

Richard A. Sloan,

Department Clearance Officer, Department of Homeland Security, U.S. Citizenship and Immigration Services.

[FR Doc. 03–29705 Filed 11–26–03; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF HOMELAND SECURITY

Citizenship and Immigration Services

Agency Information Collection Activities: Comment Request

ACTION: 60-day notice of information collection under review; request for certification of military or naval service; form N–426.

The Department of Homeland Security (DHS) and the U.S. Citizenship and Immigration Services (CIS), has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until January 27, 2004.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(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 agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical or other technological collection techniques or other forms of information technology, *e.g.* permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Request for Certification of Military or Naval Service.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security* sponsoring the collection: Form N–426. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or Households. This form will be used by the CIS to request a verification of the military or naval service claim by an applicant filing for naturalization on the basis of honorable service in the U.S. armed forces.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 45,000 responses at 45 minutes per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 33,750 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please contact Richard A. Sloan 202–514–3291, Director, Regulations and Forms Services Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, Room 4034, 425 I Street, NW., Washington, DC 20536. Additionally, comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden

and associated response time may also be directed to Mr. Richard A. Sloan.

If additional information is required contact: Mr. Steve Cooper, PRA Clearance Officer, Department of Homeland Security, Office of the Chief Information Officer, Regional Office Building 3, 7th and D Streets, SW., Suite 4636–26, Washington, DC 20202.

Dated: November 21, 2003.

Richard A. Sloan,

Department Clearance Officer, Department of Homeland Security, U.S. Citizenship and Immigration Services.

[FR Doc. 03–29706 Filed 11–26–03; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[CGD05–03–184]

Area Maritime Security Committee, Captain of the Port Baltimore, Maryland

AGENCY: Coast Guard, DHS.

ACTION: Notice of meeting.

SUMMARY: The Area Maritime Security (AMS) Committee for the Captain of the Port Baltimore, MD zone will meet to discuss various issues relating to maritime security for the Captain of the Port Baltimore zone. The meeting will be open to the public.

DATES: The meeting will be held on Thursday, December 18, 2003, from 1 p.m. to 4 p.m. Comments and related material must reach the Coast Guard on or before December 8, 2003.

ADDRESSES: The meeting will be held at the Maritime Institute of Technology and Graduate Studies (MITAGS), 5700 Hammonds Ferry Road, Linthicum Heights, MD. You may mail comments and related material to Commander, U.S. Coast Guard Activities, 2401 Hawkins Point Road, Baltimore, MD 21226–1791. Comments and materials received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket [CGD05–03–184] and are available for inspection of copying at U.S. Coast Guard Activities, 2401 Hawkins Point Road, Baltimore, MD, 21226–1791.

FOR FURTHER INFORMATION CONTACT: Lieutenant Charles Bright at U.S. Coast Guard Activities Baltimore, telephone 410–576–2676 or Petty Officer Courtney Dawkins, telephone 410–576–2616, of the Planning and Preparedness Division. Comments and related material may be faxed to 410–576–2553.

SUPPLEMENTARY INFORMATION: Section 102 of the Maritime Transportation Security Act (MTSA) of 2002 (Pub. L. 107–295) added section 70112 to Title 46 of the U.S. Code, and authorizes the Secretary of the Department in which the Coast Guard is operating to establish Area Maritime Security Advisory Committees (AMS Committees) for any port area of the United States. The MTSA includes a provision exempting these AMS Committees from the Federal Advisory Committee Act (FACA), Pub. L. 92–436, 86 Stat. 470 (5 U.S.C. App. 2). The Coast Guard COTP Baltimore is holding a public meeting, in order to introduce the public to the purpose of and applications procedure for their AMS Committee. This meeting will serve as a general overview of the work that AMS Committee members will be completing, as well as offer the public the opportunity to ask questions regarding membership on the AMS Committee.

Agenda of Meeting

The agenda includes the following:

(1) General Welcome and Introduction.

(2) Review and Discussion of Maritime Security Regulations.

(3) General Committee Structure and Processes.

(4) Review and Discussion Area Maritime Plan.

(5) Frequency of Area Maritime Security meetings.

(6) Open Forum.

Procedural

The meeting is open to the public. Please note that the meeting may close early if all business is finished. At the Captain of the Port's discretion, members of the public may make oral presentations during the meeting. If you would like to make an oral presentation at the meeting, please notify Petty Officer Dawkins listed under **FOR FURTHER INFORMATION CONTACT** no later than December 8, 2003. Written material for distribution at the meeting should reach the Coast Guard no later than December 8, 2003. If you would like a copy of your material distributed at the meeting, please submit 40 copies to the Coast Guard listed under **ADDRESSES**.

Information on Services for Individuals With Disabilities

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact the Maritime Institute of Technology and Graduate Studies (MITAGS) as soon as possible.

Dated: November 14, 2003.

Curtis A. Springer,

Captain, Coast Guard, Captain of the Port, Baltimore, Maryland.

[FR Doc. 03–29651 Filed 11–26–03; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2003–16546]

Merchant Marine Personnel Advisory Committee

AGENCY: Coast Guard, DHS.

ACTION: Notice of meeting.

SUMMARY: The Merchant Marine Personnel Advisory Committee (MERPAC) will hold a working group meeting to discuss training requirements and certification for a vessel security officer. MERPAC agreed at its September 19, 2003, meeting to accept task statement number 44 on security training and certification for vessel security officer and other vessel personnel. To facilitate the development of any additional training requirements in support of the U.S. Coast Guard Maritime Transportation Security regulations and complete the task statement, the working group will meet to discuss both training requirements and certification of vessel security officers. This meeting will be open to the public.

DATES: The MERPAC working group will meet on Wednesday, January 7, 2004, from 11 a.m. to 5 p.m. The meeting may adjourn early if all business is finished.

ADDRESSES: The MERPAC working group will meet in room 6319, U.S. Coast Guard Headquarters, 2100 Second Street, SW., Washington, DC. This notice and task statement number 44 are available on the Internet at *http://dms.dot.gov* under docket number USCG–2003–16546.

FOR FURTHER INFORMATION CONTACT: For questions on this notice, contact Commander Brian J. Peter, Executive Director of MERPAC, or Mr. Mark C. Gould, Assistant to the Director, telephone 202–267–6890, fax 202–267–4570, or e-mail *mgould@comdt.uscg.mil.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. App. 2. The Merchant Marine Personnel Advisory Committee advises the Secretary of Homeland Security on matters relating to the training,

qualifications, licensing, certification, and fitness of seamen serving in the U.S. merchant marine.

Procedural

The meeting is open to the public and we request your participation. Members of the public who plan to attend should notify Mr. Mark Gould at 202–267–6890 so that he may notify building security officials. Please note that the meeting may adjourn early if all business is finished. If you would like a copy of your material distributed to each member of the subcommittee in advance of the meeting, please submit 25 copies to the Executive Director no later than December 23, 2003.

Information on Services for Individuals With Disabilities

For information on facilities or services for individuals with disabilities or to request special assistance at the meetings, contact the Assistant Executive Director, listed above in **FOR FURTHER INFORMATION CONTACT,** as soon as possible.

Dated: November 20, 2003.

Joseph J. Angelo,

Director of Standards, Marine Safety, Security and Environmental Protection.

[FR Doc. 03–29652 Filed 11–26–03; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Immigration and Customs Enforcement

Agency Information Collection Activities: Comment Request

ACTION: Request OMB emergency approval; exemption from NSEERS registration requirements (file no. OMB–40).

The Department of Homeland Security (DHS) and the U.S. Immigration and Customs Enforcement (ICE) has submitted an emergency information collection request (ICR) utilizing emergency review procedures, to the Office of Management and Budget (OMB) for review and clearance in accordance with section 1320.13(a)(1)(ii) and (a)(2)(iii) of the Paperwork Reduction Act of 1995. The DHS has determined that it cannot reasonably comply with the normal clearance procedures under this part because normal clearance procedures are reasonably likely to prevent or disrupt the collection of information. Therefor, immediate OMB approval has been requested. If granted, the emergency approval is only valid for 180 days. ALL comments and/or questions pertaining to this pending request for emergency approval MUST be directed to OMB, Office of Information and Regulatory Affairs, Attention: Ms. Karen Lee, Department of Homeland Security Desk Officer, 725–17th Street, NW., Suite 10235, Washington, DC 20503; 202–395–5806.

During the first 60 days of this same period, a regular review of this information collection is also being undertaken. During the regular review period, the DHS requests written comments and suggestions from the public and affected agencies concerning this the information collection. Comments are encouraged and will be accepted until January 27, 2004. During 60-day regular review, *all* comments and suggestions, or questions regarding additional information, to include obtaining a copy of the information collection instrument with instructions, should be directed to Mr. Richard A. Sloan, 202–514–3291, Director, Regulations and Forms Services Division, Department of Homeland Security, Room 4034, 425 I Street, NW., Washington, DC 20536. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(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 agencies estimate of the burden of the proposed collection of information. including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* New information collection.

(2) *Title of the Form/Collection:* Exemption from NSEERS Registration Requirements.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* No Agency Form Number. File No. OMB–40. U.S. Immigration and Customs Enforcement.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals and Households. This information collection allows an alien to seek an exemption from the NSEERS registration requirements by submitting a letter to the Department of Homeland Security containing specific information.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 5,800 responses at 30 minutes (.5 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 2,900 annual burden hours.

If additional information is required contact: Mr. Steve Cooper, PRA Clearance Officer, Department of Homeland Security, Office of Chief Information Officer, Regional Office Building 3, 7th and D Streets, SW., Suite 4636–26, Washington, DC 20202.

Dated: November 21, 2003.

Richard A. Sloan,

Department Clearance Officer, Department of Homeland Security, U.S. Citizenship and Immigration Services.

[FR Doc. 03–29702 Filed 11–26–03; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF HOMELAND SECURITY

Immigration and Customs Enforcement

Agency Information Collection Activities: Comment Request

ACTION: 60-day notice of information collection under review; nonimmigrant checkout letter; Form G–146.

The Department of Homeland Security (DSH) and the U.S. Immigration and Customs Enforcement (ICE) has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until January 27, 2004.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(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 agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of currently approved collection.

(2) *Title of the Form/Collection:* Nonimmigrant Checkout Letter.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form G–146. U.S. Immigration and Customs Enforcement.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals and Households. This form is used in making inquiries of persons in the United States or abroad concerning the whereabouts of aliens, and to request departure information by the ICE when initial investigation to locate the alien or verify his or her departure is unsuccessful.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 20,000 responses at 10 minutes (.166) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 3,320 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please contact Richard A. Sloan, 202–514–3291, Director, Regulations and Forms Services Division, U.S. Citizenship and Immigration Services. Department of Homeland Security, Room 4034, 425 I Street, NW., Washington, DC 20536. Additionally, comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time may also be directed to Mr. Richard A. Sloan.

If additional information is required contact: Mr. Steve Cooper, PRA Clearance Officer, Department of Homeland Security, Office of the Chief Information Officer, Regional Office Building 3, 7th and D Streets, SW., Suite 4636–26, Washington, DC 20202.

Dated: November 21, 2003.

Richard A. Sloan,

Department Clearance Officer, Department of Homeland Security, U.S. Immigration and Customs Enforcement.

[FR Doc. 03–29703 Filed 11–26–03; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4815–N–93]

Notice of Submission of Proposed Information Collection to OMB: Public Housing Financial Management Template

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

Public Housing Authorities are required to submit financial information on an annual basis to HUD in accordance with the Uniform Financial Reporting Standards and the Public Housing Assessment System.

DATES: Comments Due Date: December 29, 2003.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval number (2535–0107) and should be sent to: Lauren Wittenberg, OMB Desk Officer, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Fax number (202) 395–6974; e-mail *Lauren_Wittenberg@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Wayne Eddins, Reports Management Officer, AYO, Department of Housing and Urban Development, 451 Seventh Street, Southwest, Washington, DC 20410; e-mail *Wayne_Eddins@HUD.gov;* telephone (202) 708–2374. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Mr. Eddins or on HUD's Web site at *http://www5.hud.gov:63001/po/i/icbts/collectionsearch.cfm.*

SUPPLEMENTARY INFORMATION: The Department has submitted the proposal for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. chapter 35). The notice lists the following information: (1) The title of the information collection proposal; (2) the office of the agency to collect the information; (3) the OMB approval number, if applicable; (4) the description of the need for the information and its proposed use; (5) the agency form number, if applicable; (6) what members of the public will be affected by the proposal; (7) how frequently information submissions will be required; (8) an estimate of the total number of hours needed to prepare the information submission including number of respondents, frequency of response, and hours of response; (9) whether the proposal is new, an extension, reinstatement, or revision of an information collection requirement; and (10) the name and telephone number of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

This notice also lists the following information:

Title of Proposal: Public Housing Financial Management Template.

OMB Approval Number: 2535–0107.

Form Numbers: None.

Description of the Need for the Information and Its Proposed Use: Public Housing Authorities are required to submit financial information on an annual basis to HUD in accordance with the Uniform Financial Reporting Standards and the Public Housing Assessment System.

Respondents: Not-for-profit institutions; State, local or tribal government.

Frequency of Submission: Annually.

Reporting Burden: Number of respondents, 3,173; Average annual responses per respondent, 1.88; Total annual responses, 5,987; Average burden per response, 5.41 hrs.

Total Estimated Burden Hours: 32,393.

Status: Extension of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: November 20, 2003.

Wayne Eddins,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 03–29607 Filed 11–26–03; 8:45 am]

BILLING CODE 4210–72–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4815–N–94]

Notice of Submission of Proposed Information Collection to OMB: General Conditions of the Construction Contract: Public Housing Programs (Development and Modernization)

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

The General Conditions provide PHAs, contractors and subcontractors performance and compliance requirements for project construction under the conventional bid method and modernization. PHAs include this contract document in with the project specifications.

DATES: *Comments Due Date:* December 29, 2003.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval number (2577–0094) and should be sent to: Lauren Wittenberg, OMB Desk Officer, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Fax number (202) 395–6974; e-mail *Lauren_Wittenberg@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Wayne Eddins, Reports Management Officer, AYO, Department of Housing and Urban Development, 451 Seventh Street, Southwest, Washington, DC 20410; e-mail *Wayne_Eddins@HUD.gov;* telephone (202) 708–2374. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Mr. Eddins or on HUD's Web site at *http://www5.hud.gov:63001/po/i/icbts/collectionsearch.cfm.*

SUPPLEMENTARY INFORMATION: The Department has submitted the proposal for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. chapter 35). The notice lists the following information: (1) The title of the information collection proposal; (2) the office of the agency to collect the information; (3) the OMB approval number, if applicable; (4) the description of the need for the information and its proposed use; (5) the agency form number, if applicable; (6) what members of the public will be affected by the proposal; (7) how frequently information submissions will be required; (8) an estimate of the total number of hours needed to prepare the information submission including number of respondents, frequency of response, and hours of response; (9) whether the proposal is new, an extension, reinstatement, or revision of an information collection requirement; and (10) the name and telephone number of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

This notice also lists the following information:

Title of Proposal: General Conditions of the Construction Contract: Public Housing Programs (Development and Modernization).

OMB Approval Number: 2577–0094.

Form Numbers: HUD–5370.

Description of the Need for the Information and its Proposed Use: The General Conditions provide PHAs, contractors and subcontractors performance and compliance requirement for project construction under the conventional bid method and modernization. PHAs include this contract document in with the project specifications.

Respondents: Local or tribal government.

Frequency of Submission: On occasion.

Reporting Burden: Number of respondents, 2,694; Average annual responses per respondent, 1; Total annual responses, 2,694; Average burden per response, 1 hrs.

Total Estimated Burden Hours: 2,694.

Status: Extension of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35. as amended.

Dated: November 21, 2003.

Donna Eden,

Director, Office of the Chief Information Officer, Office of Investment, Strategy, Policy, and Management.

[FR Doc. 03–29608 Filed 11–26–03; 8:45 am]

BILLING CODE 4210–72–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4815–N–95]

Notice of Submission of Proposed Information Collection to OMB: Research on Socioeconomic Changes in cities

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

Identifying the social, economic, demographic, and fiscal change occurring in American cities is an important part of HUD's mission. Empirical research on urban dynamics will provide an understanding of what factors are driving change and the impact of public policy on change.

DATES: *Comments Due Date:* December 26, 2003.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval number (2528–0227) and should be sent to: Lauren Wittenberg, OMB Desk Officer, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Fax number (202) 395–6974; e-mail *Lauren_Wittenberg@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Wayne Eddins, Reports Management Officer, AYO, Department of Housing and Urban Development, 451 Seventh Street, Southwest, Washington, DC 20410; e-mail *Wayne_Eddins@HUD.gov;* telephone (202) 708–2374. This is not a toll-free number. Copies of the proposed forms and other available documents submitted to OMB may be obtained from Mr. Eddins or on HUD's Web site at *http://www5.hud.gov:63001/po/i/icbts/collectionsearch.cfm.*

SUPPLEMENTARY INFORMATION: The Department has submitted the proposal for the collection of information, as described below, to OMB for review, as required by the Paperwork Reduction Act (44 U.S.C. chapter 35). The notice lists the following information: (1) The title of the information collection proposal; (2) the office of the agency to collect the information; (3) the OMB approval number, if applicable; (4) the description of the need for the

information and its proposed use; (5) the agency form number, if applicable; (6) what members of the public will be affected by the proposal; (7) how frequently information submissions will be required; (8) an estimate of the total number of hours needed to prepare the information submission including number of respondents, frequency of response, and hours of response; (9) whether the proposal is new, an extension, reinstatement, or revision of an information collection requirement; and (10) the name and telephone number of an agency official familiar with the proposal and of the OMB Desk Officer for the Department.

This notice also lists the following information:

Title of Proposal: Research on Socioeconomic Changes in Cities.

OMB Approval Number: 2528–0227.

Form Numbers: HUD–424, HUD–424–B, HUD–424CB, HUD–424CBW, SF LLL, HUD–2880, HUD–2993, HUD–2994.

Description of the Need for the Information and Its Proposed Use: Identifying the social, economics, demographic, and fiscal change occurring in American cities ins an important part of HUD's mission. Empirical research on urban dynamics will provide an understanding of what factors are driving change and the impact of public policy on change.

Respondents: Not-for-profit institutions State, local or tribal government.

Frequency of Submission: On occasion, Quarterly, Other Final.

Reporting Burden: Number of respondents, 120; Average annual responses per respondent, 1.5; Total annual responses, 180; Average burden per response, 27.2 hrs.

Total Estimated Burden Hours: 4,910.

Status: Extension of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: November 21, 2003.

Donna Eden,

Director, Office of the Chief Information Officer, Office of Investment, Strategies, Policy, and Management.

[FR Doc. 03–29609 Filed 11–26–03; 8:45 am]

BILLING CODE 4210–72–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4809–N–48]

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: November 28, 2003.

FOR FURTHER INFORMATION CONTACT: Mark Johnston, 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: November 20, 2003.

John D. Garrity,

Director, Office of Special Needs Assistance Programs.

[FR Doc. 03–29514 Filed 11–26–03; 8:45 am]

BILLING CODE 4210–29–M

DEPARTMENT OF THE INTERIOR

Office of the Assistant Secretary—Indian Affairs; Gaming on Trust Lands Acquired After October 17, 1988

AGENCY: Office of Indian Gaming Management, Interior.

ACTION: Notice of submission of information collection to the Office of Management and Budget.

SUMMARY: As required by the Paperwork Reduction Act of 1995, the Assistant Secretary—Indian Affair (AS–IA) is submitting the information collection titled Gaming on Trust Lands Acquired After October 17, 1988, OMB Control Number 1076–0158, for review and renewal by the Desk Officer for the Department of the Interior, Office of Management and Budget.

DATES: Submit comments or suggestions on or before December 29, 2003, to be assured of consideration.

ADDRESSES: Comments should be sent to the Attention: Desk Officer for the Department of the Interior. You may submit comments on the information by facsimile at (202) 395–6566 or you may send an e-mail to: *OIRA_DOCKET@omb.eop.gov*.

Please send copy of comments to: George Skibine, Office of Indian Gaming Management, Mail Stop 4543–MIB, 1849 C Street NW., Washington, DC 20240, facsimile at (202) 273–3153.

FOR FURTHER INFORMATION CONTACT: You may request further information or obtain copies of the information collection request submission from George Skibine at 202–219–4066.

SUPPLEMENTARY INFORMATION: The collection of information will ensure that the provisions of IGRA, the relevant provisions of Federal law and the trust obligations of the United States are met when federally recognized tribes seek a Secretarial determination that a gaming establishment would be in the best interest of the tribe and would not be detrimental to the surrounding community. Section 292.8 specifies the information collection requirement. An Indian tribe must ask the Secretary to make a determination that a gaming establishment would be in the best interest of the tribe and would not be detrimental to the surrounding community. The information to be collected includes: name of the tribe, tribal documents, description of the land to be acquired, proof of ownership, distance of land from the Indian tribe's reservation or trust lands and other documents deemed necessary. Collection of this information is currently authorized under an approval by OMB (OMB Control Number 1076–0158). All information is collected when the tribe submits a request for a secretarial determination that a gaming establishment would be in the best interest of the tribe and would not be detrimental to the surrounding community. Annual reporting and record keeping burden for this collection of information is estimated to average 1000 hours each for approximately 2 respondents, including the time for reviewing instructions, researching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Thus, the

total annual reporting and record keeping burden for this collection is estimated to be 2,000 hours. A request for comments on this information collection request appeared in the **Federal Register** on August 25, 2003 (68 FR 51030). No comments have been received.

Request for Comments: The Bureau of Indian Affairs requests you to send your comments on this collection to the two locations listed in the **ADDRESSES** section. Your comments should address: (a) The necessity of this information collection for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden (hours and cost) of the collection of information, including the validity of the methodology and assumptions used; (c) ways we could enhance the quality, utility and clarity of the information to be collected; and (d) ways we could minimize the burden of the collection of the information on the respondents, such as through the use of automated collection techniques or other forms of information technology.

Please note that an agency may not sponsor or request, and an individual need not respond to, a collection of information unless it has a valid OMB Control Number.

It is our policy to make all comments available to the public for review at the location listed in the **ADDRESSES** section, room 4543, during the hours of 9 a.m. to 4 p.m., EST Monday through Friday except for legal holidays. If you wish to have your name and/or address withheld, you must state this prominently at the beginning of your comments. We will honor your request according to the requirements of the law. All comments from organizations or representatives will be available for review. We may withhold comments from review for other reasons.

OMB has up to 60 days to make a decision on the submission for renewal, but may make the decision after 30 days. Therefore, to receive the best consideration of your comments, you should submit them closer to 30 days than 60 days.

OMB Approval Number: 1076–0158.

Title: Gaming on Trust Lands Acquired After October 17, 1988, 25 CFR 292.

Brief Description of collection: This is a voluntary submission by respondents.

Type of review: Renewal.

Respondents: Federally recognized Indian tribes.

Number of Respondents: 2.

Estimated Time per Response: 1000 hours.

Frequency of Response: One time only.

Total Annual Burden to Respondents: 2000 hours.

Dated: November 6, 2003.

Aurene M. Martin,

Principal Deputy Assistant Secretary—Indian Affairs.

[FR Doc. 03–29715 Filed 11–26–03; 8:45 am]

BILLING CODE 4310–4N–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

[GWCRC Meeting Notice No. 3–03]

Guam War Claims Review Commission

The Guam War Claims Review Commission, pursuant to section 10 of the Federal Advisory Committee Act (5 U.S.C. App. 10) and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of meetings for the transaction of Commission business, as follows:

Date and Time: Monday, December 8, 2003, 8 a.m.–2 p.m., and Tuesday, December 9, 2003, 8 a.m.–6 p.m. (local time).

Place: Guam Legislature Building, 155 Hesler Place, Hagatna, Guam 96910.

Subject Matter: Public hearings to take testimony of witnesses who survived the Japanese taking and occupation of Guam between 1941 and 1944.

Status: Open.

Witnesses will be selected from among the residents of Guam who have completed questionnaires describing their experiences during the World War II Japanese occupation of Guam. Members of the public interested in observing the meeting may do so either in person, as space permits, or via live television broadcast. Requests for information concerning the hearings should be addressed either to the Commission's local office, located in Building 15, Chamorro Village, 153 West Marine Drive, Hagatna, Guam 96910, telephone (671) 479–1941 or (671) 479–1942, FAX (671) 479–1943, or to David Bradley, Executive Director, Guam War Claims Review Commission, c/o Foreign Claims Settlement Commission of the United States, 600 E St., NW., Washington, DC 20579, telephone (202) 616–6975, FAX (202) 616–6993.

Mauricio J. Tamargo,

Chairman.

[FR Doc. 03–29707 Filed 11–26–03; 8:45 am]

BILLING CODE 4310–93–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Issuance of Permits

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of issuance of permits for endangered species and/or marine mammals.

SUMMARY: The following permits were issued.

ADDRESSES: Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents to: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 700, Arlington, Virginia 22203; fax (703) 358–2281.

FOR FURTHER INFORMATION CONTACT: Division of Management Authority, telephone (703) 358–2104.

SUPPLEMENTARY INFORMATION: Notice is hereby given that on the dates below, as authorized by the provisions of the Endangered Species Act of 1973, *as amended* (16 U.S.C. 1531, *et seq.*), and/or the Marine Mammal Protection Act of 1972, *as amended* (16 U.S.C. 1361 *et seq.*), the Fish and Wildlife Service issued the requested permits subject to certain conditions set forth therein. For each permit for an endangered species, the Service found that (1) the application was filed in good faith, (2) the granted permit would not operate to the disadvantage of the endangered species, and (3) the granted permit would be consistent with the purposes and policy set forth in section 2 of the Endangered Species Act of 1973, as amended.

Endangered Species

Permit No.	Applicant	Receipt of application **Federal Register** notice	Permit issuance date
059244	New York State Museum	68 FR 25620; May 13, 2003	Sept. 3, 2003.
067574	Omaha's Henry Doorly Zoo	68 FR 33179; June 3, 2003	Sept. 17, 2003.
072747	Yale University	68 FR 50804; August 22, 2003	Nov. 12, 2003.

Marine Mammals

Permit No.	Applicant	Receipt of application Federal Register notice	Permit issuance date
075014	Norman L. Delan, Jr.	68 FR 55989; Sept. 29, 2003	Nov. 4, 2003.

Dated: November 14, 2003.

Michael S. Moore,

Senior Permit Biologist, Branch of Permits, Division of Management Authority.

[FR Doc. 03–29716 Filed 11–26–03; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Receipt of Applications for Permit

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications for permit.

SUMMARY: The public is invited to comment on the following applications to conduct certain activities with endangered species and/or marine mammals.

DATES: Written data, comments or requests must be received by December 29, 2003.

ADDRESSES: Documents and other information submitted with these applications are available for review, subject to the requirements of the Privacy Act and Freedom of Information Act, by any party who submits a written request for a copy of such documents within 30 days of the date of publication of this notice to: U.S. Fish and Wildlife Service, Division of Management Authority, 4401 North Fairfax Drive, Room 700, Arlington, Virginia 22203; fax (703) 358–2281.

FOR FURTHER INFORMATION CONTACT: Division of Management Authority, telephone (703) 358–2104.

SUPPLEMENTARY INFORMATION:

Endangered Species

The public is invited to comment on the following applications for a permit to conduct certain activities with endangered species. This notice is provided pursuant to section 10(c) of the Endangered Species Act of 1973, *as amended* (16 U.S.C. 1531, *et seq.*). Written data, comments, or requests for copies of these complete applications should be submitted to the Director (address above).

PRT–078237

Applicant: Thomas L. Engleby, Castle Rock, CO

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus dorcas*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

PRT–079370

Applicant: James F. Swidryk, Jersey City, NJ

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus dorcas*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

PRT–079716

Applicant: David F. Chadwick, Bartlett, TN, PRT–079716

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus dorcas*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

PRT–078687

Applicant: Department of Natural & Environmental Resources of Puerto Rico, San Juan, PR

The applicant requests a permit to export biological samples obtained from non-viable eggs and/or non-surviving hatchlings of hawksbill sea turtle (*Eretmochelys imbricata*) collected from the wild, for the purpose of diagnostic and scientific research. This notification covers activities to be conducted by the applicant over a five-year period.

Marine Mammals

The public is invited to comment on the following application for a permit to conduct certain activities with marine mammals. The application was submitted to satisfy requirements of the Marine Mammal Protection Act of 1972, *as amended* (16 U.S.C. 1361 *et seq.*), and the regulations governing marine mammals (50 CFR part 18). Written data, comments, or requests for copies of the complete applications or requests for a public hearing on these applications should be submitted to the Director (address above). Anyone requesting a hearing should give specific reasons why a hearing would be appropriate. The holding of such a hearing is at the discretion of the Director.

PRT–079622

Applicant: Christopher M. Bieniek, Hannibal, MO

The applicant requests a permit to import a polar bear (*Ursus maritimus*) sport hunted from the Southern Beaufort Sea polar bear population in Canada for personal use.

Dated: November 14, 2003.

Michael S. Moore,

Senior Permit Biologist, Branch of Permits, Division of Management Authority.

[FR Doc. 03–29717 Filed 11–26–03; 8:45 am]

BILLING CODE 4310–55–P

INTERNATIONAL TRADE COMMISSION

[Investigations Nos. 701–TA–437 and 731–TA–1060 and 1061 (Preliminary)]

Carbazole Violet Pigment 23 From China and India

AGENCY: United States International Trade Commission.

ACTION: Institution of antidumping investigations and scheduling of preliminary phase investigations.

SUMMARY: The Commission hereby gives notice of the institution of investigations and commencement of preliminary phase antidumping investigations No. 701–TA–437 and 731–TA–1060 and 1061 (Preliminary) under section 703(a) of the Tariff Act of 1930 (19 U.S.C. 1671b(a)) (the Act) and 733(a) of the Act (19 U.S.C. 1673b(a)) to determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports from China and India of carbazole violet pigment 23,[1] provided

[1] The merchandise covered by these investigations is carbazole violet pigment 23, identified as Color Index No. 51319 and Chemical Abstract No. 6358–30–1, with the chemical name of diindolo [3,2-b:3′,2′-m]triphenodioxazine, 8,18-dichloro-5,15-diethyl-5,15-dihydro-, and molecular formula of $C_{34}H_{22}C_{12}N_4O_2$. The subject merchandise includes the crude pigment in any form (*e.g.*, dry powder, paste, wet cake) and finished pigment in the form of presscake and dry color. Pigment dispersions in any form (*e.g.*, pigments dispersed in

Continued

for in subheading 3204.17.90 of the Harmonized Tariff Schedule of the United States, that are alleged to be subsidized by the Government of India and alleged to be sold in the United States at less than fair value. Unless the Department of Commerce extends the time for initiation pursuant to section 732(c)(1)(B) of the Act (19 U.S.C. 1673a(c)(1)(B)), the Commission must reach a preliminary determination in antidumping investigations in 45 days, or in this case by January 5, 2004. The Commission's views are due at Commerce within five business days thereafter, or by January 12, 2004.

For further information concerning the conduct of these investigations and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and B (19 CFR part 207).

EFFECTIVE DATE: November 21, 2003.

FOR FURTHER INFORMATION CONTACT: Olympia Hand (202–205–3182), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

SUPPLEMENTARY INFORMATION:

Background.—These investigations are being instituted in response to a petition filed on November 21, 2003, by Nation Ford Chemical Co., Fort Mill, SC, and Sun Chemical Corp., Fort Lee, NJ.

Participation in the investigations and public service list.—Persons (other than petitioners) wishing to participate in the investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in sections 201.11 and 207.10 of the Commission's rules, not later than seven days after publication of this notice in the **Federal Register**. Industrial users and (if the merchandise under investigation is sold at the retail level) representative consumer organizations have the right to appear as parties in Commission antidumping investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to these investigations upon the expiration of the period for filing entries of appearance.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in these investigations available to authorized applicants representing interested parties (as defined in 19 U.S.C. 1677(9)) who are parties to the investigations under the APO issued in the investigations, provided that the application is made not later than seven days after the publication of this notice in the **Federal Register**. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Conference.—The Commission's Director of Operations has scheduled a conference in connection with these investigations for 9:30 a.m. on December 12, 2003, at the U.S. International Trade Commission Building, 500 E Street, SW., Washington, DC. Parties wishing to participate in the conference should contact Olympia Hand (202–205–3182) not later than December 9, 2003, to arrange for their appearance. Parties in support of the imposition of antidumping duties in these investigations and parties in opposition to the imposition of such duties will each be collectively allocated one hour within which to make an oral presentation at the conference. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the conference.

Written submissions.—As provided in sections 201.8 and 207.15 of the Commission's rules, any person may submit to the Commission on or before December 17, 2003, a written brief containing information and arguments pertinent to the subject matter of the investigations. Parties may file written testimony in connection with their presentation at the conference no later than three days before the conference. If briefs or written testimony contain BPI, they must conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules (19 CFR 201.18) (*see* Handbook for Electronic Filing Procedures, *ftp://ftp.usitc.gov/pub/reports/electronic_filing_handbook.pdf*).

In accordance with sections 201.16(c) and 207.3 of the rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.12 of the Commission's rules.

Issued: November 21, 2003.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 03–29647 Filed 11–26–03; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–489]

In the Matter of Certain Sildenafil or Any Pharmaceutically Acceptable Salt Thereof, Such as Sildenafil Citrate, and Products Containing Same; Notice of Commission Decision Not To Review an Initial Determination Finding a Violation of Section 337 and That the Domestic Industry Requirement Is Met; Schedule for Written Submissions on Remedy, Public Interest, and Bonding

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination ("ID") (Order No. 19) issued by the presiding administrative law judge ("ALJ") finding a violation of section 337 and that the domestic industry requirement has been met in the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Wayne Herrington, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone 202–205–3090. Copies of all nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E

oleoresins, flammable solvents, water) are not included in these investigations.

Street, SW., Washington, DC 20436, telephone 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*. Hearing-impaired persons are advised that information on the matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on March 6, 2003, based on a complaint filed by Pfizer, Inc. ("Pfizer") of New York, New York. 68 FR 10749 (March 6, 2003). The complaint, as supplemented, alleged violations of section 337 of the Tariff Act of 1930 in the importation into the United States, sale for importation, and sale within the United States after importation of certain sildenafil or any pharmaceutically acceptable salt thereof, including sildenafil citrate, and products containing same by reason of infringement of claims 1–5 of Pfizer's U.S. Patent No. 5,250,534 ("the "534 patent").

Fifteen respondents were named in the Commission's notice of investigation. Of these, eleven were found to be in default. Two other respondents were never found to have been served with the complaint and notice of investigation, and have not otherwise participated in the investigation. Another respondent has been terminated from the investigation on the basis of a settlement agreement. One respondent is the subject of a motion to terminate the investigation on the basis of a consent order, which the ALJ has granted and which is currently before the Commission.

On October 6, 2003, Pfizer filed a motion pursuant to Commission rule 210.18 (19 CFR 210.18) for summary determination on the issues of the existence of a domestic industry and violation of section 337. Pfizer's motion sought a general exclusion order and a cease and desist order against respondent #1 Aabaaca Viagra LLC ("Aabaaca"). On October 16, 2003, the Commission investigative attorney filed a response in support of Pfizer's motion. No other responses to the motion were filed.

On October 27, 2003, the ALJ issued the subject ID finding that Pfizer has demonstrated that there is a violation of section 337 by reason of the defaulting respondents' importation and sale of sildenafil, sildenafil salts, or sildenafil products that infringe one or more of claims 1–5 of the "534 patent. He also found the domestic industry requirement satisfied. As to remedy, the ALJ found that the legal framework for considering whether to issue a general exclusion order in the circumstances of this case is section 337(g)(2), not section 337(d)(2). He recommended the issuance of a general exclusion order, but did not recommend the issuance of a cease and desist order against respondent Aabaaca. He also recommended that the bond permitting temporary importation during the Presidential review period be set at 100 percent of entered value. No party petitioned for review of the ID.

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or issue one or more cease and desist orders that could result in respondents being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, it should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, see In the Matter of Certain Devices for Connecting Computers via Telephone Lines, Inv. No. 337–TA–360, USITC Pub. No. 2843 (December 1994) (Commission Opinion). The Commission considers the question of remedy to include the ALJ's finding that the legal framework for considering whether to issue a general exclusion order in the circumstances of this case is section 337(g)(2), not section 337(d)(2).

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider in this investigation include the effect that a remedial order would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the President has 60 days to approve or disapprove the Commission's action. During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed.

Written Submissions: The parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on remedy, the public interest, and bonding. Such submissions should address the October 27, 2003, recommended determination by the ALJ on remedy and bonding. Complainant and the Commission investigative attorney are also requested to submit proposed orders for the Commission's consideration. The written submissions and proposed orders must be filed no later than close of business on December 12, 2003. Reply submissions, if any, must be filed no later than the close of business on December 19, 2003. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file with the Office of the Secretary the original document and 14 true copies thereof on or before the deadlines stated above. Any person desiring to submit a document (or portion thereof) to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment during the proceedings. All such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. See section 201.6 of the Commission's Rules of Practice and Procedure, 19 CFR 201.6. Documents for which confidential treatment by the Commission is sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

This action is taken under the authority of section 337 of the Tariff Act of 1930, 19 U.S.C. 1337, and section 210.42 of the Commission's Rules of Practice and Procedure, 19 CFR 210.42.

Issued: November 24, 2003.

By order of the Commission.

Marilyn R. Abbott,

Secretary.

[FR Doc. 03–29648 Filed 11–26–03; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Antitrust Division

Response to Public Comments on the Proposed Final Judgment in United States v. Univision Communications Inc.

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), the United States hereby publishes the two public comments on the proposed Final Judgment in *United States* v. *Univision Communications Inc.*, Civil No. 1:03V00758, filed in the United States District Court for the District of Colombia, together with the responses of the United States to the comments. On March 26, 2003, the United States filed a Complaint alleging that Univision Communications Inc.'s proposed acquisition of Hispanic Broadcasting Corp. would substantially lessen competition in the sale of advertising time on Spanish-language radio stations in many geographic markets, in violation of Section 7 of the Clayton Act. The proposed Final Judgment, filed at the same time as the Complaint, requires Univision to exchange its Entravision shares for a nonvoting equity interest, divest a substantial portion of its ownership in Entravision, give up its seat on Entravision's Board of Directors, eliminate certain rights Univision has to veto important Entravision actions, and restrain certain conduct that would interfere with the governance of Entravision's radio business. The proposed Final Judgment particularly requires Univision, presently owning approximately thirty percent of Entravision, to divest down to fifteen-percent ownership within three years, and ten-percent ownership within six years. Public comment was invited within the statutory 60-day comment period. The public comments and the repsonses of the United States thereto are hereby published in the **Federal Register,** and shortly thereafter these documents will be attached to a Certificate of Compliance with Provisions of the Antitrust Procedures and Penalties Act and filed with the Court, together with a motion urging the Court to enter the proposed Final Judgment. Copies of the Complaint, the proposed Final Judgment, and the Competitive Impact Statement are currently available for inspection in Room 200 of the Antitrust Division, Department of Justice, 325 Seventh Street, NW., Washington, DC 20530 (telephone: 202–514–2481) and at the Clerk's Office, United States District Court for the District of Columbia, 333 Constitution Avenue, NW., Washington, DC 20001. (The United State's Certificate of Compliance with Provisions of the Antitrust Procedures and Penalties Act will be made available at the same location shortly after they are filed with the Court.) Copies of any of these materials may be obtained upon request and payment of a copying fee.

J. Robert Kramer II,

Director of Operations, Antitrust Division.

In the United States District Court for the District of Columbia

Civil Action No. 1:03CV00758; Judge: Hon. Rosemary M. Collyer

United States of America, Plaintiff, v. Univision Communications Inc., and Hispanic Broadcasting Corporation, Defendants, Response to Public Comments

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h) ("Tunney Act"), the United States hereby responds to the public comments received regarding the proposed Final Judgment in this case. After careful consideration of these comments, the United States continues to believe that the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violation alleged in the Complaint. The United States will move the Court for entry of the proposed Final Judgment after the public comments and this Response have been published in the **Federal Register,** pursuant to 15 U.S.C. 16(d).

On March 26, 2003, the United States filed the Complaint in this matter alleging that the proposed acquisition of Hispanic Broadcasting Corporation ("HBC") by Univision Communications, Inc. ("Univision") would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

Simultaneously with the filing of the complaint, the United States filed a proposed Final Judgment and a Stipulation signed by the United States and the defendants consenting to the entry of the proposed Final Judgment after compliance with the requirements of the Tunney Act. Pursuant to those requirements, the United States filed a Competitive Impact Statement ("CIS") in this Court on May 7, 2003; published the proposed Final Judgment and CIS in the **Federal Register** on May 21, 2003; and published a summary of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, in the Washington Post for seven days on May 23, 2003, through May 29, 2003. The 60-day period for public comments, during which two comments were received as described below, expired on July 23, 2003.[1]

I. Background

As explained more fully in the Complaint and CIS, this transaction raised competitive concerns relating to the sale of advertising time on Spanish-language radio stations in several geographic markets. HBC is the nation's largest Spanish-language radio broadcaster. Univision, the largest Spanish-language media company in the United States, owns a significant equity interest, and possesses governance rights, in Entravision Communications Corporation ("Entravision"), another Spanish-language media company that is HBC's principal competitor in Spanish-language radio in many markets. The Complaint alleges that, due to Univision's substantial equity interest and governance rights in Entravision, Univision's proposed acquisition of HBC would substantially lessen competition in provision of Spanish-language radio advertising time to a significant number of advertisers in several geographic markets in the United States.

The proposed Final Judgment, if entered, would require Univision to reduce its equity interest in Entravision to 15 percent of the outstanding shares within three years from the filing of the proposed decree and to 10 percent within six years of such filing. The proposed decree would also require Univision to convert all of its Entravision equity into a nonvoting class of stock; to relinquish its right to place directors on Entravision's Board of Directors; to eliminate certain of Univision's rights to veto important Entravision actions; and to refrain from certain conduct that would interfere with the governance of Entravision's radio business.

Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

[1] On September 22, 2003, the Federal Communications Commission announced that it granted Univision's and HBC's applications for transfer of control that were required in order for the transaction to proceed. See Memorandum Opinion and Order, FCC 03–218 (located at *http://hraunfoss.fcc.gov/edocs&_public/attachmatch/FCC–03–218A1.pdf.*). Univision and HBC closed their merger the same day.

II. Legal Standard Governing the Court's Public Interest Determination

Upon the publication of the public comments and this Response, the United States will have fully complied with the Tunney Act and will move the Court for entry of the proposed Final Judgment as being "in the public interest." 15 U.S.C. 16(e). The Court, in making its public interest determination, should apply to deferential standard and should withhold its approval only under limited conditions. Specifically, the Court should review the proposed Final Judgment in light of the violations charged in the complaint and "withhold approval only if any of the terms appear ambiguous, if the enforcement mechanism is inadequate, if third parties will be positively injured, or if the decree otherwise makes 'a mockery of judicial power.'" *Mass. School of Law* v. *United States,* 118 F.3d 776, 783 (D.C. Cir. 1997) (quoting *United States* v. *Microsoft Corp.*, 56 F.3d 1448, 1462 (D.C. Cir. 1995)).

It is not proper during a Tunney Act review "to reach beyond the complaint to evaluate claims that the government did not make and to inquire as to why they were not made." *Microsoft*, 56 F.3d at 1459; *see also United States* v. *Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6–7 (D.D.C. 2003) (rejecting argument that court should consider effects in markets other than those raised in the complaint); *United States* v. *Pearson PLC,* 55 F. Supp. 2d 43, 45 (D.D.C. 1999) (noting that a court should not "base its public interest determination on antitrust concerns in markets other than those alleged in the government's complaint"). Because "[t]he court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,"[2] it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters the United States might have but did not pursue. *Microsoft*, 56 F.3d at 1459–60; *see also United States* v. *Western Elec. Co.*, 993 F.2d 1572, 1577 (DC Cir. 1993) (noting that a Tunney Act proceeding does not permit "*de novo* determination of facts and issues" because "[t]he balancing of competing social and political interests affected by a proposed antitrust decree must be left, in the first instance, to the discretion of the Attorney General" (citations omitted)).

Moreover, the United States is entitled to "due respect" concerning its "prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case." *Archer-Daniels-Midland Co.*, 272 F. Supp. 2d at 6 (*citing Microsoft,* 56 F.3d at 1461).

[2] It is the United States' responsibility to investigate a transaction and decide what allegations to raise in any challenge it may bring. *See Heckler* v. *Chaney,* 470 U.S. 821, 831–32 (1985) ("[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is generally committed to an agency's absolute discretion.").

III. Summary of Public Comments

The United States received comments from two entities, the American Antitrust Institute ("AAI," comment attached as Exhibit 1) and Spanish Broadcasting System, Inc. ("SBS," comment attached as Exhibit 2).

AAI takes the position that the United States' CIS fails to address and evaluate "the consequences of this merger in conventional terms in an overall market consisting of Spanish-language media, examining such traditional criteria as advertising effects [and] the consumer interest in diversity of sources of political and cultural information." AAI cmt. at 1. AAI also states that the United States' CIS fails to explain why the proposed Final Judgment does not require the elimination of all rights Univision currently possesses in Entravision and the divestiture of all stock Univision holds in Entravision. AAI cmt. at 1 n.2. These points are similar to SBS's comments on these issues and are addressed below. Additionally, AAI argues that the Division should have considered indicia of harm to non-price competition, such as quality and innovation.

SBS, a Spanish-language radio company that competes in many markets with HBC and Entravision, states that the United States should have alleged harm in its Complaint based on purported effects of the transaction on a "Spanish-language broadcasting market." SBS cmt. at 1–2. SBS further claims that the transaction will increase Univision's incentives (1) to refuse to deal with or discriminate against Spanish-language radio competitors who seek to advertise through Univision and (2) to force advertisers who wish to advertise through both radio and television to purchase time from both Univision and HBC. *Id.* at 3. In addition, SBS argues that the United States' remedy fails to solve the competitive concerns in the Spanish-language radio markets raised in the Complaint because, according to SBS, Univision will be able to exercise undue influence over Entravision. *Id.* at 1, 4–6.

IV. The United States' Response to Specific Comments

Because both comments raise the general issue of whether the effects of the merger should be analyzed in light of an "overall" Spanish-language media market, the United States will first respond to that issue. It will then respond to the specific points AAI and SBS raised concerning whether the remedy addresses the competitive harm raised in the Complaint.

A. Allegations Not Raised in the Compliant Are Irrelevant to Whether the Proposed Final Judgment Is in the Public Interest

1. SBS's Proposed Market and Alleged Harm Are Extraneous to the Competitive Issues Raised in the Complaint

The Complaint alleges that the relevant market consists of the provision of advertising time on Spanish-language radio stations to the significant number of advertisers that consider Spanish-language radio advertising to be a particularly effective advertising medium. *See* Complaint ¶¶12–15. SBS, however, takes the position that the complaint should have raised additional allegations of harm based on purported effects in a combined Spanish-language radio and television market. SBS cmt. at 1–2.

The Complaint's market definition does not extend to the issues raised by SBS, nor should it. The market definition analysis in the Complaint properly begins by examining how advertisers individually negotiate transactions with radio broadcasters such as Entravision and HBC. The resulting price for advertising time reflects the circumstances of these individual negotiations and the preferences of each advertiser. The Complaint's market definition reflects these individualized negotiations by looking at the options available to individual advertisers. The Complaint alleges that a significant number of advertisers exist who do not have reasonable alternatives to advertising on Spanish-language radio; in other words, these advertisers cannot effectively switch to other media in the face of a small but significant increase in the price of advertising time on Spanish-language radio. This set of advertisers forms the relevant market alleged in the Complaint.

SBS does not appear to take issue with the theoretical framework underlying the Complaint's market definition. Rather, it alleges that there is another market to consider; namely, a purported market consisting of a set of advertisers that are dependent on

Spanish-language television and radio. The Complaint, however, makes no such factual allegation. The proposed market differs significantly from the one alleged in the Complaint and would require markedly different supporting facts to be justified. Moreover, market definition is but one step toward the ultimate goal of determining competitive effects. The Complaint alleges that the transaction would likely cause anticompetitive effects with regard to Spanish-language radio (Complaint ¶¶ 24–27); it makes no such allegations regarding a combined television and radio market. So, SBS asks not only that the court redraft the complaint to include an additional market but also that the court impose a competitive effects analysis based on that new market to find cognizable harm.

As discussed above, the United States is entitled to deference as to the case it brings, and, as *Microsoft* makes clear, it is not proper during a Tunney Act review "to each beyond the complaint to evaluate claims that the government did not make and to inquire as to why they were not made." *Microsoft,* 56 F.3d at 1459. The Tunney Act does not authorize the Court to consider allegations not raised in the Complaint based on concerns raised by a member of the public. Accordingly, SBS's suggestion that the Complaint is defective for failing to allege harm in a combined Spanish-language television and radio market should be rejected as a matter of law.

The CIS Properly Addresses the Market Effects Relevant to the Allegations in the Complaint

AAI takes the position that the United States has not satisfied its requirements under the Tunney Act because the CIS fails to identify the competitive effects of the transaction in an "overall" Spanish-language media market and fails to justify the United States' decision not to challenge the transaction based on those purported effects. This position is not valid. Not only is the Court's review limited to the case actually brought by the United States, there is no requirement that the United States disclose its decision-making as to cases it chooses not to initiate. Rather, the Tunney Act provides that the United States must inform the public about the case it did initiate and explain how the proposed decree serves to resolve the competitive effects alleged in the Complaint.

The purpose of a CIS is to provide the public with "basic data about the decree" to allow for informed comment. *See generally United States* v. *Microsoft Corp.*, 215 F. Supp. 2d 1, 14–15 (D.D.C. 2002) (describing legislative history relating to CIS) (quoting 119 *Cong. Rec.* at 3452 (1973) (statement of Senator Tunney)). To that end, the Tunney Act provides that the CIS shall "recite" the following:

(1) The nature and purpose of the proceeding;

(2) A description of the practices or events giving rise to the alleged violation of the antitrust laws;

(3) An explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;

(4) The remedies available to potential private plaintiffs damages by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;

(5) A description of the procedures available for modification of such proposal; and

(6) A description and evaluation of alternatives to such proposal actually considered by the United States.

15 U.S.C. 16(b). The United States' CIS has satisfied all of these requirements. More specifically, the CIS explains the nature and purpose of the proceeding (at 1–3), describes the events that gave rise to the alleged violation of the antitrust law (at 3–9), explains the proposed Final Judgment (at 9–15), explains the remedies available to potential private litigants (at 15), explains the procedures available for modifying the proposed Final Judgment (at 15–16), and describes and evaluates alternatives to the proposed Final Judgment (at 16–17). There is simply no requirement that the Government identify purported effects it did not allege in the Complaint or explain why it did not make certain allegations in the Complaint. Accordingly, AAI's challenge to the sufficiency of the CIS fails.

3. The Government's Investigation Did Not Demonstrate the Likelihood of Substantial Harm in an "Overall" Spanish-Language Media Market

Although the United States has no legal obligation to address matters raised in the Complaint, we note that the United States conducted an extensive inquiry into the issue of whether the combination of Univision's Spanish-language television stations with HBC's Spanish-language radio stations in geographic regions where both are located was likely to cause significant anticompetitive effects. The inquiry included numerous interviews of a wide range of advertisers and review of over a million pages of documents provided by the defendants and other entities. In the end, the evidence did not support the claims proffered by the comments.

a. *The evidence did not justify a combined media market for advertisers.* The United States has traditionally treated radio and television as separate antitrust markets. Past investigations involving general-market (English-language) media mergers revealed that few advertisers consider the two media to be close substitutes; rather, most advertisers viewed the two media as separate or complementary products given the qualitative differences between the two media.[3] In examining whether this "separate market" conclusion applied in this transaction, the United States recognized that Univision has a strong presence in Spanish-language television and that, in certain geographic markets, there are a limited number of other Spanish-language television stations with ratings that would be attractive to advertisers trying to reach Spanish-language viewers. Nevertheless, the evidence garnered in this investigation showed the same qualitative differences between television and radio that exist for general-market advertisers also exist for Spanish-language advertisers. In the end, the investigation did not produce sufficient evidence to support the proposition that a significant number of advertisers considered Spanish-language television and Spanish-language radio to be sufficiently interchangeable to support the "combined" market proposed by the comments.[4]

b. *The United States considered non price competition.* AAI also argues that the United States should examine indicia of harm other than price, such as quality and innovation. AAI cmt. at 4–5. The United States, in fact, considered such indicia during this

[3] *See, e.g.*, Complaint ¶¶ 11–14, *United States* v. *Clear Channel Communications,* No. 1:00CV02063 (D.D.C. filed Aug. 29, 2000); Complaint ¶¶ 34–41, *United States* v. *Chancellor Media Company, Inc.*, No. CV–97–496 (E.D. N.Y. filed Nov. 6, 1997); Complaint ¶ 12, *United States* v. *EZ Communications, Inc.*, No. 1:97CV00406 (D.D.C. filed Feb. 27, 1997).

[4] SBS's submission does not provide a basis to establish a combined Spanish-language television and radio market. The letters that SBS attached to its comment as Exhibit A for the most part discuss how certain advertisers depend on Spanish-language media (a point with which the United States does not disagree). Only two of the letters, however, discuss the interchangeability of Spanish-language television and radio (May 27, 2003 letter from Castor A. Fernandez; May 27, 2003 letter from Caballero TV & Cable sales); the rest are silent on the issue.

investigation. In this case, the market is comprised of the competitive alternatives for certain advertisers seeking to purchase commercial time on Spanish-language radio stations. Market participants compete on the basis of both price and service (or "quality" or "innovation"). *See, e.g.*, Complaint ¶ 14 (relevant product market defined in terms of options available to certain advertisers facing "a small but significant increase in the price of advertising time on Spanish-language radio, *or a reduction in the value of services provided"*) (emphasis added). As the Complaint and CIS state, Entravision and HBC heavily promote their stations against each other in an effort to gain high ratings; they program and format their stations in an effort to attract listeners away from each other; they aggressively seek to acquire stations; and they closely monitor each other's competitive positions. Complaint ¶ 19; CIS at 6. As explained in the CIS, the goal of the proposed Final Judgment is to protect such vigorous price and nonprice competition between Entravision and HBC by foreclosing the ability of a combined Univision/HBC to improperly influence Entravision's strategic decision making with regard to its radio business. *See* CIS at 9–11. Contrary to AAI's assumption, the United States considered the many ways in which advertisers benefit from competition—not just price competition—in crafting its remedy.

c. *The consideration of political and cultural viewpoints are extraneous to antitrust enforcement.* AAI also asserts that the United States should take into account under its antitrust analysis "consumer interest in diversity of sources of political and cultural information" within a combined Spanish-language television and radio market. AAI cmt. at 1, 3–4. It is not the role of the United States to use the antitrust laws to regulate actual content or to establish quotas for the types of programming that media stations must broadcast. Accordingly, we do not seek to ensure in the context of a merger review that media companies provide a balance of political views or a proper mix of cultural issues as part of their programming. The United States does seek to ensure that content is determined in a competitive marketplace, however. The relevant product identified in the Complaint is the provision of advertising time on Spanish-language radio stations; the customer is an advertiser purchasing that time. In order to supply this product, media stations compete to gain audience ratings, as it is audience access that is being sold to the advertisers. That competition benefits advertisers as discussed above. It also benefits individual audience members (listeners of radio stations) because stations will compete for their attention by offering high quality content. In this way, the relief in the Final Judgment that protects advertising competition also serves to protect individual audience members by maintaining vigorous competition between the Spanish-language radio stations owned by Univision/HBC and those owned by Entravision.

d. *The allegation that Univision may refuse to deal with certain advertisers or impose tying arrangements does not warrant condemning the transaction.* SBS alleges that the merger will provide Univision an enhanced incentive to refuse to deal with or discriminate against Spanish-language radio competitors who seek to advertise on Univision and will also provide Univision the ability to "tie" radio and television advertising time for advertisers who seek to use both mediums. (SBS Cmt. at 3). The United States did not find evidence upon which to base a cause of action pursuant to SBS's theory. If Univision engages in the alleged conduct in the future, and if the conduct satisfies the requirements of an antitrust violation, then the United States (or a private plaintiff with standing) could challenge the conduct at that time. The mere speculation that Univision will violate the antitrust laws, however, does not justify enjoining this transaction.

B. SBS's Assertions That the Proposed Final Judgment Will Not Remedy the Competitive Concerns Raised in the Complaint Are Unfounded

SBS asserts that the remedy will not address the competitive harms raised in the Complaint because Univision will still have the ability to improperly influence Entravision's actions to the detriment of radio competition between Entravision and Univision/HBC. Specifically, SBS contends that (1) the existence of the television affiliation agreement between Univision and Entravision will cause Entravision to mitigate its radio competition with a combined Univision/HBC; (2) Univision's continued retention of limited shareholder "veto" rights in Entravision might foreclose competition-enhancing transactions; (3) the time period to complete the stock divestitures called for in the proposed Final Judgment is too long; and (4) Univision's ability to hold 10 percent of Entravision's stock will cause Univision/HBC to compete less aggressively against Entravision. SBS cmt. at 1, 4–6.[5]

Contrary to SBS's assertions, the proposed Final Judgment will preserve competition between Entravision and HBC by restricting Univision's ability to control or influence Entravision's radio business and by significantly reducing Univision's equity stake in Entravision. *See* CIS at 9–13 (describing specific means by which the proposed Final Judgment will preserve competition).

Addressing SBS's first contention, as stated in the CIS, Univision and Entravision have a long-standing television relationship in which Entravision broadcasts Univision programming on television stations owned by Entravision. This relationship is embodied in a pre-existing, long-term affiliation agreement that assigns rights and responsibilities to both parties and also provides for Univision to act as Entravision's national sales representative for television advertising. In addition to the fact that this vertical integration may yield certain efficiencies and consumer benefits, there is nothing in this affiliation agreement that allows Univision to control any Entravision radio decision, including decisions regarding the acquisition of radio stations. Moreover, the decree itself mandates that the two companies act as independent entities and there s no reason to believe that Univision will violate the terms of the decree (and thereby subject itself to contempt of court proceedings) by using its television relationship to influence any Entravision strategic decision. The Division found no evidence to suggest that the mere fact that a television affiliation agreement exists between them enables Univision to unduly influence Entravision's decisions with respect to its radio business, the only area in which the combined Univision/HBC will compete with Entravision. Finally, Entravision has every incentive to operate its radio stations in a fully competitive manner.

As to SBS's second contention, although Univision will maintain a few limited governance rights in Entravision that it held prior to the contemplation of this merger, the proposed Final Judgment eliminates Univision's ability to exercise these rights over Entravision radio decisions. The rights that are retained relate to the two entities' television relationship, which is not a basis of concern alleged in the

[5] As noted above, AAI asserts that the CIS fails to explain why Univision was not forced to relinquish all its shareholder "veto" rights in Entravision and to divest all its Entravision equity. AAI cmt. at 1 n.2. These points are addressed in this response to SBS's comments.

Complaint. Univision will retain a modified right to veto a merger or transfer of ownership of Entravision. Although this right does impact ultimate ownership of Entravision, it cannot be used to veto or influence day-to-day decisions relating to radio competition or strategic decisions such as the buying or selling of individual radio stations.

With respect to SBS's third contention, while the United States traditionally requires defendants to divest business assets as expeditiously as possible to maintain their value and ongoing capabilities, the relief sought here is for divestiture of stock, the retention of which does not raise the same spoliation concerns as the retention of business assets raises. Moreover, based on our investigation, we concluded that a forced divestiture of equity within a short amount of time could cause material hardship to Entravision's vitality as a significant competitor (for example, a "fire-sale" of Univision's stock holdings in Entravision could depress Entravision's stock price to the point that it would not be able to issue equity to fund potential acquisitions). Such hardship should be avoided or minimized if at all possible so as to maintain Entravision as a strong competitor to the unified Univision/HBC. The time period relfects a balancing designed to minimize the potential harms to competition that might arise from a divestiture that proceeds either too slowly or too rapidly.

Finally, responding to SBS's fourth contention, under the circumstances of this case, Univision's ability to hold no more than 10 percent of Entravision's equity will not give it control or even significant influence over Entravision's business decisions. The decree significantly restrains Univision's ability to participate in Entravision's governance. For example, Univision will not be allowed: To suggest or nominate any candidate for Entravision's board of directors; to have Univision employees serve as Entravision employees; to participate in any Entravision board of directors meeting ; to vote its equity; and to have access to any of Entravision's competitively sensitive information. *See* Final Judgment, Section VI. Moreover, Univision's reduced equity stake in Entravision is not sufficiently large to affect competition between them given the market structure of the relevant geographic markets at issue.[6]

[6] *Cf. Archer-Daniels-Midland*, 272 F. Supp. 2d at 8 (crediting the Government's statement in Tunney Act proceeding that factual investigation showed that two companies operated as independent competitors notwithstanding one company's partial equity ownership in the other).

V. Conclusion

After careful consideration of these public comments, the United States has concluded that entry of the Proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violation alleged in the Complaint and is, therefore, in the public interest. Pursuant to Section 16(d) of the Tunney Act, the United States is submitting these public comments and this Response to the **Federal Register** for publication. After these comments and this Response are published in the **Federal Register**, the United States will move this Court to enter the Proposed Final Judgment.

Dated this 31st day of October, 2003.

Respectfully submitted,

/s/

William H. Stallings,

Litigation III Section, Antitrust Division, United States Department of Justice, 325 7th Street, NW., Suite 300, Washington, DC 20530.

Certificate of Service

The undersigned certifies that a copy of the foregoing Response to Public Comments was served on the following counsel, by electronic mail in PDF format, this 31st day of October, 2003:

John M. Taladay, Howrey, Simon, Arnold & White L.L.P., 1299 Pennsylvania Avenue, NW., Washington, DC 20004–2402;

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and on the following entities by facsimile and U.S. Mail, on this same date:

Albert A. Foer, The American Antitrust Institute, 219 Ellicott Street, NW., Washington, DC 20008, (202) 276–6002 (phone), (202) 966–8711 (facsimile);

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/s/

William H. Stallings

June 12, 2003

James R. Wade

Chief, Litigation III Section, Antitrust Division, United States Dept. of Justice, 325 7th Street, N.W., Suite 300, Washington, DC 20530

Ce: Chairman Michael Powell, Federal Communications Commission

Re: U.S. v. Univision Communications, Civ. Action No. 1:03CV00758

Dear Mr. Wade: These constitute the Tunney Act comments of the American Antitrust Institute ("AAI") in regard to the acquisition of Hispanic Broadcasting Corporation ("HBC") by Univision Communications Inc. ("Univision").[1]

The Competitive Impact Statement ("CIS") in this case appears to reflect an unduly narrow interpretation of the Clayton Act. We have only minor quarrels with the standard analysis embodied in the CIS insofar as it identifies horizontal overlaps in the Spanish-language radio industry and seeks to eliminate these overlaps through divestitures.[2] Our principal concern is with what the CIS fails to address. It should evaluate the consequences of this merger in conventional terms in an overall market consisting of Spanish-language media, examining such traditional criteria as advertising effects. In addition, it should evaluate the consumer interest in diversity of sources of political and cultural information within this more general market.

I. The CIS Ignores the Elephant in the Room

The CIS states that HBC is the nation's largest Spanish-language radio broadcaster and that Univision is the largest Spanish-language media company in the U.S.

Univision is described as having two Spanish-language broadcast networks, Univision and Telefutura, one cable channel, Galavision, and several other Spanish-language media operations, including Internet sites and services, music recording, distribution, and publishing. Univision also has a 30-percent equity share in Entravision, which owns or operates 55 mostly-Spanish radio stations and 49 television stations that broadcast Univision programming. We are not informed of Univision's market share in Spanish-language television.

HBC owns or operates more than 60 radio stations, virtually all broadcasting in Spanish. We are not informed of HBC's market share in Spanish-language radio. And, of course, we are not informed of market shares in any combined Spanish-language media market.

The Complaint is limited to the provision of advertising time on Spanish-language radio stations to advertisers that consider Spanish-language radio to be a particularly effective medium. This is the only product market deemed relevant. Six metropolitan areas are designated as the relevant geographic markets.

The "elephant in the room" whose presence has been mentioned in the CIS but given no antitrust importance, is television. We recognize that the Antitrust Division has traditionally treated radio and television as

[1] The AAI is an independent 501(c)(3) research, education, and advocacy organization described at *www.antitrustinstitute.org*.

[2] For example, we are puzzled by the CIS's failure to explain why the Proposed Final Judgment does not require elimination of all shareholder rights that Univision currently possesses in Entravision and for failing to explain why it allows Univision to retain any stock in Entravision. If these are simply the best compromises the Division could get, why not say so?

separate markets, in that there are so many sources of information for English-speakers that diversity of sources has not appeared to rise to an antitrust concern. But here we are potentially face with a different situation. Should television and radio directed at a Spanish-speaking audience be deemed a relevant market, not on the basis of competition for advertising but on the basis of competition for the consumer's attention? Even though the merger, after the divestiture of overlap radio markets, will arguably not increase concentration in either the television or the radio market, will it reduce in a significant way the diversity of sources of political and cultural information available to the Spanish-speaking consumer? This also raises the question of the role of other aspects of Spanish-language media, such as newspaper publishing and the Internet, which are not discussed in the CIS. An appropriate larger Spanish-language market should be analyzed not only in traditional (advertising) terms but also in terms of diversity of content sources.[3]

II. The Hypothetical of the Dominating Voice

Consider the following hypothetical. There is a substantial group of Americans who only speak Spanish and whose sources of information are limited to Spanish-speaking TV, Spanish-speaking radio, and Spanish-speaking newspapers. A single corporation by acquisition gains control over all three media. The head of that corporation would be in the position to wield enormous political and economic influence by determining what the Spanish-speaking community will know and believe. He or she could determine what political candidates will gain exposure to the Spanish-speaking electorate and whether that exposure will be positive, negative, or neutral. Being able to sway a substantial part of the Hispanic vote could determine the outcome of local, state, and national elections and the owner of this political power would be in position to make deals with a political party and with an Administration. The same corporation could dramatically influence within the Spanish-speaking community which cultural trends, products and services will be ignored, denigrated or positively portrayed, thereby having a significant impact on the economy. This is the Hypothetical of a Dominating Voice.

Are the assumptions of this hypothetical far removed from the reality of the present acquisition?[4] Aside from the distinction that the present merger does not involve newspapers, one can not tell from the CIS because the implications of putting the leading Hispanic radio and TV stations under the same corporate control is not addressed. In the section on Alternatives to the Proposed Final Judgment, we are only told that the Department considered a full trial on the merits and a proposal by the defendants for placing Entravision stock into a long-term trust.

Having advised the public that the leading Spanish-language TV conglomerate was acquiring the leading Spanish-language radio company, the DOJ has the Tunney Act obligation to explain why it has made the determination that this highly suggestive scenario is of no antitrust concern. The fact that there are relevant antitrust markets for Hispanic radio and Hispanic TV does not perclude the possibility that in certain circumstances there may also be a larger relevant antitrust market, depending on what types of anticompetitive effects one is concerned about. There is no inconsistency in being concerned both with advertising rates in radio markets and diversity of producers/editors of content in a more general market for information or specifics categories of information.

Let us be more precise about what information is lacking.

1. What proportion of Spanish-speaking consumers in the U.S. are completely or highly dependent upon Spanish-language sources of information? (Call this the "highly dependent consumer market.")

2. What proportion of the highly dependent consumer market pre- and post-merger depend on the merging parties as a principal source of information?

3. What options apart from Univision and HBC are available to the highly dependent consumer market, pre- and post-merger?

4. Using a variety of measures (e.g., advertising dollars, number of message recipients, contact hours), how substantial are these options in comparison to Univision and HBC? What are the relevant market shares and HHI's?

We recognize that these are not easy questions to answer, and that the answers will depend on the assumptions made about such matters as the definition of 'highly dependent'. Nevertheless, with answers to these questions and explicitness about the assumptions used, one can begin to evaluate whether the Hypothesis of a Dominating Voice represents a realistic threat.

III. Protecting the Public Interest Requires Analysis of the Impact of This Acquisition on Consumer Choice

Based on what is said in the CIS, there is no evidence that the DOJ has considered anything other than the probability of short-term price increases. Why no discussion of such other traditional antitrust concerns as the effect on consumer choice?[5] There have been many antitrust cases in which non-price factors were considered.[6] As one example, in *United States* v. *Philadelphia National Bank*, the Court expressed a concern with possible adverse effects of a bank merger on "price, variety of credit arrangements, convenience of location, attractiveness of physical surroundings, credit information, investment advice, service charges, personal accommodations, advertising, miscellaneous special and extra services* * *"[7]

Theories of possible antitrust liability in First Amendment-related cases come from many reputable sources. For example, Robert H. Lande and Neil W. Averitt have argued that consumer choice is no less a goal of antitrust than competitive pricing.[8] Maurice E. Stucke and Allen P. Grunes, two DOJ attorneys, have argued that it is proper to look beyond price effects to "the marketplace of ideas" in order to consider non-price dimensions of economic competition, such as diminished quality and choice.[9] Joseph Farrell, a former Chief Economist for the Antitrust Division, argued that price is merely a synecdoche (a part representing the whole) for what we desire from competition (i.e., innovation, quality, and price), and that it does not always adequately represent the package of desirables.[10] Robert Pitofsky has argued that non-economic political values such as the First Amendment can be relevant and may justify a higher degree of scrutiny in certain cases.[11] FTC Commissioner Thomas Leary has argued that diversity is an appropriate goal of antitrust.[12]

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[3] It is true that for much of radio and TV, the consumer is not directly charged for consuming the product, although higher advertising costs may be passed on to the consumer in product prices and the consumer has opportunity costs that represent a kind of price to be paid for consumption. Nonetheless, producers of, *e.g.*, news, are in competition with one another not only to gain advertisers, but to gain the consumer's business. Compare this with doctors who compete with one another for their patient's business, even though the medical bill may be paid by a third party. Would not the importance of consumer choice in medical care justify an antitrust case if the only two medical practices in a community were to merge, even if the merger would be guaranteed by the doctors not to affect the fees charged to health insurers?

[4] According to various sources, at least 9% of Hispanics do not speak English at all, and at least 15% do not speak the language well. Spanish is said to be the language most frequently spoken by nearly 75% of adults in the top ten Hispanic metropolitan areas. If these figures are approximately correct, there appears to be reason to believe that at least a significant section of the Spanish-speaking community in the U.S. is highly dependent on information it receives in Spanish and that English is in these situations an inadequate substitute. There are also studies demonstrating that commercial information conveyed in Spanish is far more persuasive to this group than information conveyed in English, even among those who are bilingual. Arguably, the same would be true of political information.

[5] Although the Federal Communications Commission has the opportunity to stop this merger on "public interest" grounds, this possibility would not relieve the Department of Justice from fully considering legitimate antitrust theories of competitive harm that coincidentally have the benefit of protecting First Amendment values.

[6] *See* Robert H. Lande, "Consumer Choice and Antitrust," 62 U. Pitt. L. Rev. 503, 508–512, and cases cited therein.

[7] 374 U.S. 363, 368 (1968).

[8] "Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law," 65 Antitrust L.J. 713, 715 (1997).

[9] "Antitrust and the Marketplace of Ideas," 69 Antitrust L.J. 249 at 297 (2001).

[10] "Thoughts on Antitrust and Innovation," Speech to the National Economists Club, Washington, DC (Jan. 25, 2001), at *http://www.usdoj.gov/atr/public/speeches/7402.pdf.*

[11] Robert Pitofsky, The Political Content of Antitrust, 127 U. PA. L. REV. 1051 (1979).

[12] See Thomas B. Leary, "The Significance of Variety in Antitrust Analysis," based on a speech delivered at the Steptoe & Johnson 2000 Antitrust Conference, on May 18, 2000, and available at *http://www.ftc.gov/speeches/leary/atljva4.htm:*

"It does not make sense to simply ignore the issue, however, because for many consumers variety may be a more significant issue than price. Consider the example of two chains of bookstores

Continued

We are told in the CIS that the Court may only review the remedy in relation to the violations that the U.S. has alleged in its Complaint. It might be argued that the DOJ decision not to include a general Spanish-language media market in its complaint is the end of the story. But, as the CIS quotes the Ninth Circuit, "The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest.*" United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981)." Because in practice a complaint is drawn up by the DOJ at the same time as a settlement order is drafted, the complaint is to some degree, in reality, not merely the cause of the settlement, but the result of the settlement. Although we do not want courts to displace the DOJ role of determining what goes into a complaint, a settlement that does not deal with obvious antitrust issues should not be approved until the CIS adequately explains what is going on.

In this acquisition, the Complaint includes facts about the two companies that would suggest to many observers that there may be critically important competitive issues that go beyond the radio market. If the Tunney Act is to protect the public interest, including the perception that antitrust settlements are not based on political considerations, both the public and the court must be provided with sufficient information to determine whether the complaint itself was unreasonably limited.

The legislative genesis of the Tunney Act was concern that settlements might be made on the basis of political rather than strictly professional analysis. To expand the Hypothetical of a Dominating Voice, if the ownership of the merging parties happened to be of the same political party as a particular national Administration, allowing the merger to proceed, subject only to a mild radio divestiture, with the potential of political gain for the political party, this would be the type of politicization of antitrust that the Tunney Act was intended to remove.

We certainly do not charge that this specific merger is being approved for political gain, but are trying to make a larger point. In order to protect antitrust from perceptions of political influence, it is essential that the Tunney Act's public interest oversight be fully informed, with all relevant major antitrust theories fully ventilated in the CIS.

Sincerely,

Albert A. Foer
President.

July 18, 2003

James R. Wade
Chief, Litigation III Section, Antitrust Division, U.S. Department of Justice, 325 Seventh Street, NW., Suite 300, Washington, DC. 20530

Re: *United States* v. *Univision Communications Inc.*, Civ. Action No. 1:03CV00758

Dear Mr. Wade: Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. §§ 16(b)–(h), Spanish Broadcasting System, Inc. ("SBS") respectfully submits its comments on the proposed Final Judgment filed on March 26, 2003, by the Antitrust Division of the U.S. Department of Justice ("Department") in connection with the proposed acquisition of Hispanic Broadcasting Corporation ("HBC") by Univision Communications Inc. ("Univision").

A Univision and HBC combination raises serious antitrust issues that the Department's proposed Final Judgment fails to address. The draft decree leaves unremedied significant harm to competition and consumers that surely will result from the combination of the dominant firm in Spanish-language radio (HBC) with the dominant firm in Spanish-language television (Univision). Even if, as the Department of Complaint posits, Spanish-language radio and television belong in separate markets, the remedy the Department selected fails to solve the competitive problem it identified: Univision's significant influence over one of HBC's closest competitors in Spanish-language radio, Entravision Communications Corporation ("Entravision"). The settlement only partially and incompletely disentangles Univision and Entravision. Moreover, the inadequate remedy the Department selected requires six years to implement, a period during which the transaction will continue to harm competition and consumers. Accordingly, the Court should reject the proposed Final Judgment as not within the reaches of the public interest.

1. SBS initially notes its disagreement with the Department's decision to confine its analysis to the product market for the "provision of advertising time on Spanish-language radio" (Compl. ¶ 14). The Department defined this market because "[m]any local and national advertises" would "not turn to other media, including radio that is not broadcast in Spanish, if faced with a small but significant increase in the price of advertising time on Spanish-language radio" or its equivalent (*Id.* emphasis added. The Department, however, provides no justification for ignoring the *many other* advertisers for whom Spanish-language radio and television *are* good substitutes.[1] From the perspective of these advertisers, an HBC/Univision combination is effectively a merger to monopoly, for it combines the dominant Spanish-language radio broadcaster (HBC) with the dominant Spanish-language television broadcaster (Univision).[2] This Spanish-language broadcasting market (defined from the perspective of advertisers for which Spanish-language television and radio are good substitutes) easily coexists with a Spanish-language radio-only market (defined form the perspective of other advertisers). The Department's Complaint and Competitive Impact Statement are entirely silent on why the Department has chosen to ignore the interests of advertisers who are vulnerable to the enhanced market power HBC and Univision will enjoy as a result of their combination.

Even accepting that Spanish-language radio and Spanish-language television belong in separate markets, SBS disagrees with the Department's conclusion that the only competitive harm from this acquisition flows from Univision's ownership of a significant stake in both Entravision and HBC. Specifically, Univision's acquisition of the dominant Spanish-language radio broadcaster, HBC, will give Univision, the dominant Spanish-language television broadcaster, an enhanced inventive to refuse to deal with or discriminate against Spanish-language radio competitors (such as SBS) who seek to advertise through Univision. Advertising on television is important for promoting Spanish-language radio stations and thus for surmounting the high entry barriers in Spanish-radio language that the Complaint identifies (Compl. ¶27).

Moreover, after the merger, Univision/HBC will have the power to insist that Spanish-

(or video rental stores) that compete in myriad neighborhoods, with a largely local clientele. One of the chains features best sellers or the most popular films, the other chain has a more eclectic offering; including a wider range of special interest and "artistic" selections. If the first chain were to acquire the second, there might well be some local price effects, but the most important effect on most consumers (but, not all) is likely to be the effect on variety if the combined store adopts the buyer's business model.

"This reality does not mean that the merger should be attacked on that account. It might well be, for example, that it is a lot easier for a potential new entrant to provide variety competition for the merged enterprise than it would be to provide price competition. What it does mean is that an initial focus on a hypothetical price effect, according to traditional Guidelines analysis, might miss the most important questions.".

[1] Letters expressing the views of such advertisers can be found in a number of letters filed with the Federal Communications Commission. *See, e.g.*, Letter from Phillip L. Verveer *et al.*, Attorneys Willkie Farr & Gallagher to Marlene H. Dortch, Secretary, Federal Communications Commission (June 2, 2003) (attachments), *available at http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi* (proceeding No. MB02–235) (attached hereto as Exhibit A). These letters demonstrate that there are many advertisers for whom the relevant market for analyzing this transaction is not properly confined to Spanish-language radio.

[2] HBC's 2003 10–K explains that it "is the largest Spanish-language radio broadcasting company." Hispanics Broadcasting Corp. Form 10–K (Mar. 31, 2003), o*voilable* ot *http://www.sec.gov/Archives/edgor/doto922503/000104746903011344/o2107188z10-k.htm.* Univision "is the dominant broadcaster of Spanish-language television in the United States, capturing an approximate 81% audience share." Entravision Communications Corporation Annual Report for 2001, at 25, o*voilable at www.entrovision.com.* HBC's and Univision's combined dominance is illustrated by letters and charts filed with the Federal Communications Commission. *See* Letter from Phillip L. Verveer *et ol.*, Attorneys Willkie Farr & Gallagher to Marlene H. Dortch, Secretary, Federal Communications Commission (June 11, 2003) (attached as Exhibit B) and Letter from Andres Jay Schwartzman, President and CEO, Media Access Project to Marlene H. Dortch, Secretary, Federal Communications Commission (June 9, 2003) o*voilable at http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi* (proceeding No. MB02–235) (attached as Exhibit C).

language advertisers who wish to advertise through both radio and television purchase time from both Univision and HBC rather than from the merged firm's rivals, including SBS. Such difficult-to-detect and subtle tying arrangements or refusals to deal—realistic possibilities here—impair competition. *See, e.g., Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951). It is unrealistic to expect that, following the acquisition, advertisers will stand up to the HBC/Univision colossus and challenge such practices themselves. The Clayton Act properly is invoked to restrain these restraints in their incipiency.

The Department's failure to grapple with *any* of the competitive problems posed by combining the dominant Spanish-language radio broadcaster with the dominant Spanish-language television broadcaster should cause this Court to conduct an especially careful Tunney Act review. To be sure, that review is largely confined to determining whether the remedy the Department selected is a reasonable one for the competitive problem identified in the Department's Complaint. *See United States v. Microsoft Corp.*, 56 F.3d 1448, 1461–62 (D.C. Cir. 1995). But when as here, the Department has exercised its prosecutorial discretion to tailor its Complaint narrowly to the remedy selected, the Court must pay special attention to ensure that the fit between remedy and Complaint is indeed within the reaches of the public interest. As explained below, the fit here is very poor indeed.

2. The competitive problem the Compliant identifies is that Univision's significant control over, and its equity stake in, Entravision will cause HBC and Entravision to pull their competitive punches once HBC falls under Univision's control. The proposed Final Judgment seeks to preserve HBC/Entravision competition by requiring Univision to reduce its equity stake in Entravision and to relinquish certain rights Univision holds to control or influence Entravision's competitive activities. For a number of reasons, the proposed Final Judgment will not adequately protect purchasers of radio advertising from the adverse consequences of Univision's proposed acquisition of HBC.

First, the Department's requirement that Univision surrender certain rights and dilute its stock holding in Entravision fails to address the most significant way in which Univision influences Entravision: through the Univision/Entravision affiliate agreement. As the Department's Complaint explains, pursuant to this "long-term" agreement, "Extravision broadcasts Univision programming from Univision's two networks on 49 television stations. As part of this affiliation agreement, Univision serves as Entravision's sole representative for the sale of television advertisements sold on a national basis" (Compl. ¶ 23). This agreement is Entravision's lifeblood. From it, Entravision obtains key programming and significant advertising revenue. As Entravision's 2001 Annual Report explains, "Entravision has benefited enormously from a close relationship with Univision" which is "the dominant broadcaster of Spanish-language television in the United States."[3] A recent Entravision securities filing also strikingly illustrates the importance of the affiliate agreement: Of an overall increase of $1.5 million in revenue for Entravision over the prior year, "$1.4 million was attributable to our Univision stations and 0.1 million was attributable to our Telfutura stations [a Univision network]."[4]

The affiliate agreement plainly will give Entravision significant reason to pull its competitive punches against HBC once HBC is acquired by Univision. The Department recognizes this; for the proposed Final Judgment prohibits Univision from "using or attempting to use any rights or duties" under the affiliate agreement "to influence Entravision in the conduct of Entravision's radio business" (Proposed Final Judgment § VI.A.5). This remedy, however, is a mirage. Univision need not *actually* use the affiliate agreement to influence Entravision's behavior. The mere fact that Univision *might* deny Entravision rights under the agreement, or even create disputes under the agreement, will cause Entravision to compete less vigorously with HBC.[5] Strikingly, the Department has rejected such "behavioral" remedies in other circumstances, even when punishable by contempt if violated.[6] The Competitive Impact Statement provides no basis for believing that a "behavioral" remedy relating to the affiliate agreement will be effective here. By contrast, blocking Univision's acquisition of HBC will preserve competition.

Second, the proposed Final Judgment would allow Univision to retain shareholder rights to veto major strategic decisions of Entravision, including any plans i) to merge, consolidate or reorganize all or substantially all of its assets; ii) to transfer a majority of its voting power; iii) to dissolve, liquidate or terminate itself; as well as iv) to dispose of any interest in any FCC licenses relating to television stations that are Univision affiliates (Competitive Impact Statement ("CIS") at 11). Each of these actions that Univision can veto may have significant competitive impact. If, for example, Entravision wanted to sell a radio station to, or merge with, a rival, the proposed Final Judgment leaves Univision with the power to prevent possible competition-enhancing transactions. It plainly harms rather than benefits competition to require Entravision to obtain its rival's approval to undertake such actions. The Department should not hinder the competitive activities of third parties through consent judgments.

Third, the proposed Final Judgment would require Univision to reduce its equity stake in Entravision over a very lengthy period: to no more than 15 percent by March 2006 and to no more than 10 percent by March 2009. The Department acknowledges that this divestiture is necessary to preserve competition; for Univision's significant stake in Entravision means that Univision/HBC "would receive some significant benefit even on sales it loses to Entravision" (CIS at 12). The Department nonetheless is willing to tolerate the lessened competition and consumer harm for as long as six years. Although the rapid sale of stock may be difficult to accomplish and impose costs upon Univision, the costs of accomplishing the transaction should not be borne by consumers. If owning the stock is competitively harmful, Univision should be required to sell the stock as expeditiously as possible. The Department's explanation for its unprecedented six-year divestiture period—that requiring a faster sale by Univision protects against "adversely affecting Entravision's ability to raise capital" (CIS at 12)—fails to persuade. If the Department's reasoning were valid, it would always permit divestitures to be made over the course of several years; but that is obviously not the Division's policy. And with good reason: The longer the merging parties hold assets that must be divested to preserve competition, the longer the period during which competition and consumers suffer. The speculative fear that Entravision's ability to raise capital will be harmed by requiring a shorter divestiture period is no warrant for inflicting competitive harm on advertisers and others.

Fourth, the divestiture the Department negotiated is insufficient to preserve competition. If the proposed Final Judgment is approved, Univision will continue to hold a ten percent stake in Entravision. Moreover, the Complaint alleges that Entravision and HBC have combined market shares ranging from 70 percent to as much as 95 percent in the several geographic markets (Compl. ¶ 21). It is plain that Univision will still financially benefit from every advertising dollar HBC loses to Entravision and, therefore, that Univision/HBC will compete less vigorously than if Univision's equity interest were divested completely. The Competitive Impact Statement fails to explain why a complete divestiture is inappropriate here.

Thus, for several reasons, the proposed Final Judgment leaves Entravision entangled with Univision in ways that will seriously harm competition. The Court accordingly should find that the Department's proposed Final Judgment is not within the reaches of the public interest.

Respectfully submitted,

Claudia R. Higgins
Kaye Scholer LLP
901 15th Street, NW., Suite 1100, Washington, DC 20005, (202) 682–3653, Counsel for Spanish Broadcasting System, Inc.

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[3] Entravision Communications Corporation Annual Report for 2001, at 25, *available at www.entravision.com.*

[4] Entravision Communications Corporation 10–Q, at 7 (May 12, 2003), *available at www.entravision.com.*

[5] *See, e.g.*, Letter from Arthur V. Belendiuk, Counsel to National Hispanic Policy Institute, Inc., to W. Kenneth Ferree, Esq., Chief, Media Bureau, Federal Communication Commission (July 11, 2003) (attached as Exhibit D).

[6] For instance, the Department rejected Northwest Airline's suggestion that creating a voting trust for the stock it acquired in Continental Airlines would prevent a diminution of competition between the two airlines. The Department explained: "Courts are understandably loathe to rely on 'behavioral rules' as a substitute for divestiture, *even where the rules are court-ordered.*" Trial Br. of the United States at 18, *United States* v. *Northwest Airlines Corp.* (No. 98–74611, filed Oct. 24, 2000) (emphasis added), *available at www.usdoj.gov/atr/cases/f7200/7288.htm.*

Dated: July 18, 2003.

Exhibits Attached.

United States v. Univision Communications, Inc., Civ. Action No. 1:03CV00758, Comments on Behalf of Spanish Broadcasting Inc., July 18, 2003, Exhibits A–D

Exhibit A

June 2, 2003

Marlene H. Dortch
Secretary, Federal Communications Commission, 445 12th Street, SW., Washington, D.C. 20554

Re: *Applications for Transfer of Control of Hispanic Broadcasting Corp., and Certain Subsidiaries, Licensees of KGBT (AM, Harlingen, Texas et al. (Docket No. MB 02–235, FCC File Nos. BTC–20020723ABL, et al.)*

Dear Ms. Dortch: Spanish Broadcasting System, Inc. ("SBS") has asked more than twenty advertising agencies and advertisers with special knowledge of the Hispanic community to address the nature and extent of the media marketplace in which they conduct their business. Their responses are attached.

All of the responses indicate that English-language broadcasting and Spanish-language (Hispanic) broadcasting constitute separate markets. Many of them observe that the Spanish-language broadcasting market includes both radio and television.

These propositions are fundamental to the Commission's analysis of the proposed Univision Communications, Inc.—Hispanic Broadcasting Corp. merger. The agency and advertiser perspectives on the market address both competition and diversity, just as the Commission must in connection with its public interest determination on the permissibility of requested transfers.

The conclusions of the agency and advertiser executives conform with those the Commission has reached in other contexts. The Commission often and recently has recognized the existence of a separate Spanish language broadcasting market. It also has recognized that television and radio are part of the same product market for fundamental Communications Act purposes.

The separate nature of the Hispanic broadcasting market means that the FCC may not rely exclusively on its cross-ownership and multiple ownership rules in making its public interest determination. These heuristic devices may be a sufficiently reliable basis for decision where transfers implicate majority-language broadcasting. Their reliability cannot be assumed where minority-language broadcasting is concerned. In this case, the proposed merger moves the Hispanic market very decidedly in the direction of monopoly. Both the statute and ordinary prudence require that the decision in this matter be the product of careful analysis of record evidence and that it be reflected in a reasoned explanation.

In this regard, SBS will respond to the many factual assertions contained in the May 14, 2003, Univision submission shortly. Unsurprisingly, we do not find Univision's propositions probative of the substantive issues nor do we find Univision's legal and policy points relevant to the resolution of this important matter. (We note that the submission, inexplicably, is not posted on the ECFS site and thus remains unavailable to anyone seeking to follow the proposed transaction through the Commission's Web site).

Finally, we note the unusual circumstance presented by today's Commission vote fundamentally changing its principal media ownership regulations (following the most exhaustive and comprehensive review of [the] broadcast rules ever undertaken") and the pendency of this major broadcasting transfer application. As we are able to learn the details of the new ownership rules, we will submit our analysis of their significance for the Univision proposal.

Respectfully submitted,

/s/ Philip L. Verveer
Philip L. Verveer
Sue D. Blumenfeld
Michael G. Jones
David M. Don
WILLKIE FARR & GALLAGHER, 1875 K Street NW, Washington, DC 20006, Telephone: (202) 303–1000, Facsimile: (202) 303–2000

and

Bruce A. Eisen
Allan G. Moskowitz
KAYE SCHOLER FIERMAN HAYS & HANDLER, LLP, 901 15th Street NW, Suite 1100, Washington, DC 20005
Attorneys for Spanish Broadcasting System, Inc.

cc: Chairman Powell, Commissioner Abernathy, Commissioner Copps, Commissioner Martin, Commissioner Adelstein, Susan Eid, Stacy Robinson, Jordan Goldstein, Catherine Crutcher Bohigian, Johanna Mikes, Ken Ferree, David Brown, Scott R. Flick, Counsel for Univision Communications, Inc., Roy R. Russo, Counsel for Hispanic Broadcasting Corp.

May 27, 2003

To Whom It May Concern

Dear Sir or Madam: I have been involved in the Hispanic Market USA since 1966 and have owned my own firm for over 31 years.

During that time, I have placed national and local ads for a very wide variety of companies, government agencies, and other public and private institutions, large and small including Coca Cola, McDonald's, Procter & Gamble, General Motors, Anheuser Busch, Castrol, Pizza Hut, Burger King to mention just a few. I am also the single largest individual receiver of Creative Awards in the industry, and was placed in the Hispanic Market Hall of Fame (only 4 recipients so far), in 2002.

I have been asked to address two issues:

First: Is there a separate advertising product market defined by the Spanish language? In other words, are Spanish language media and English language media substitutable for one another?

The answer is an unequivocal: NO! English language media and Spanish language media are NOT substitutable. There definitely is a separate advertising product market defined by the Spanish language.

Let Me explain: One could safety say that for the first time in U.S. History, there has been a CATERING to Spanish language, not so much out of a sociological sense of responsibility, but out of the dire necessity of the large and small American corporations to open new markets to replace maturing ones in the U.S. They do this by attracting an ever growing group of people (the largest single minority in the U.S.) which could not be otherwise addressed. There are 27 Latin American countries with endless political and economic travails, which only serve to increase the CONTINUOUS, NON-STOPPING Immigration WAVE to the LAND of opportunity.

Second: Are Spanish language video (television and cable) and radio substitutes for one another?

I have no doubt that Spanish and English language media are in different markets from the perspective of advertising buys. A small, but significant non-transitory increase in price in English language media will not induce the advertisers with whom I am familiar to shift their advertising to Spanish language media. Instead, they will absorb the price increase.

The reverse also is true. The reason is that for many products the target audience simply cannot be reached unless it is addressed in their familiar language. Among other obvious bits of evidence, the major television networks virtually never present a commercial in Spanish (or any language other than English, for that matter).

Spanish language video and radio are substitutes for many advertisers. Many advertise on both. Many sponsors are quite willing to allocate and reallocate percentages of their ad budgets to video or to radio depending upon shifts in the price and ratings of one or the other. A small, but significant increase in price in one will shift purchases to the other for many products.

It is very common in negotiations over advertising rates, for agencies and clients to make the claim, for example, that if concessions in price are not made, the advertising will be placed on the other medium, video or radio as the case may be.

I hope that you find this information helpful. I would be happy to discuss it at greater length if you would find it useful.

Sincerely,

Castor A. Fernandez,
President/Creative Director, Castor

May 27, 2003

The Honorable Michael K. Powell
Chairman, Federal Communications Commission, Washington, DC 20554

Dear Mr. Chairman, My name is Eduardo Caballero, President/CEO of Caballero TV & Cable Sales, an independent-Spanish TV stations sales representative.

I started selling Spanish Media in February of 1962, as a local salesman for Radio Station WBNX, New York City. I became its General Sales Manager that same year.

I resigned in March of 1968 to become General Sales Manager of Spanish TV Station WXTV, Channel 41, New York Market (licensed to Paterson, NJ).

Also in 1968, I became a VP and Director of National Sales for Spanish International

Network (S.I.N., the predecessor of Univision), with affiliate stations in San Antonio, Los Angeles, Fresno, New York, Miami, San Francisco and Chicago.

In 1973 I resigned that position, as the first—and only—Hispanic to be in charge of national sales for any "national network" in U.S., to start the first Spanish Radio National Sales Representative in this Country (Caballero Spanish Media, Inc.), representing over 140 Spanish radio stations.

Amongst stations represented by CSM were those owned and operated by Heftel Broadcasting, Tichenor Broadcasting Co. (both of these Companies were the predecessors of the actual Hispanic Broadcasting Company—HBC), Spanish Broadcasting System, Liberman Broadcasting, Excel Broadcasting, the Z Network, etc.

CSM was sold in 1995 to the Interep Company (a General Market—English language—radio representative). Interep has kept CSM, to this day, as a separate Spanish division.

I remained with the Company until 1998, when I undertook the creation of a TV (low power stations) Network—MasMusica TeVe—to broadcast Spanish music, 24/7. At the present moment this programming is broadcast over 21 Spanish TV stations within the U.S.

Most recently, since there is no any advertising sales organization representing independent TV stations—including mine and others—I have started a new—and only—independent Spanish TV representative sales organization. Caballero TV & Cable Sales.

I have been selling time for Spanish Media in United States (both radio and TV), for the last 42 years, uninterruptedly. I can say, unequivocally and based on my professional experience, the following:

Unless an advertiser makes the decision to promote its products or services to the Hispanic consumer, in Spanish and, subsequently, creates a "Hispanic Budget", there will not be schedules placed on any Spanish Media.

Unfortunately, that "Hispanic Budget", when it does exist, amounts, at best, to a 1 to 3% of the "general market budget" (although Hispanic consumers represent about 14% of the total U.S. population, according to the Census Bureau). That brings, as a result, the situation where many of those advertisers' Hispanic budgets cannot afford both television and radio schedules.

Many of those advertisers are willing to allocated and reallocate parts of their Hispanic budgets to TV or to radio, depending on changes of rates and the ability of a particular medium to negotiate those rates. The fact is that Spanish language TV and radio are substitutes for many advertisers.

Every advertiser in the U.S. considers this to be a SEPARATE AND DISTINCTIVE MARKET. In fact, most, if not all, of the still very few advertisers who have decided to advertise in the Spanish language have, first, funded a SPANISH ADVERTISING BUDGETS, then created a SPANISH MARKETING DEPARTMENT and, lastly, chosen a SPANISH ADVERTISING AGENCY. Without those three elements, the Spanish speaking consumer does not play any role in the marketing plans of ANY of the hundred of national advertisers who are NOT advertising in the Spanish language, simply because the Spanish market is not integrated in their general market strategy, and as they say, "it has to be treated differently", language and otherwise.

Many times we were confronted with situations when general market agencies placed schedules on some of our represented stations; when they found out that we were broadcasting in Spanish, they canceled that schedule because, according to them, they were buying "radio" not "Spanish radio" or they were buying "television" not "Spanish television".

Still, today, we confront many situations where most national (or general market) advertisers do not buy any Spanish language media because they (the advertisers) are not "prepared" to go into the Spanish market.

Another point I want to make is the following. A General Market Network (radio or television), to be considered as such, has to guarantee advertisers to cover about 80% of the total U.S. population. In the case of Spanish Networks, they are required to cover ONLY ABOUT 80% OF THE HISPANIC POPULATION. Certainly, those Hispanic ADIs where about 80% of the National Hispanic population resides do not even get close to cover 80% of the General Population of the U.S. This marks another very clear separation between the General and the Spanish Markets.

If I can be of any help to this Commission, please, do not hesitate to have any of your associates to contact me.

Sinceramente,

Eduardo Caballero, Personal Bio

Eduardo Caballero was born in the Oriente Province, Cuba. Went to school in Sagua de Tánamo and Havana, where he obtained a Degree as Doctor in Law from the Jose Marti University.

Started his own law firm with his wife, Raquel Miller-Caballero, also a lawyer, and practiced that profession in Havana, until the end of 1961, when, in view of the political situation in his country, decided to come to the United States as a political refugee.

Under a program of relocation sponsored by the U.S. Government, he and Raquel went, first, to Dallas where he worked, simultaneously, at a restaurant, as a host, and at a department store, as a salesman; later on, they went to New York where, in 1962, Eduardo started his career in broadcasting, landing a job as a salesman for a local Spanish radio station (WBNX), through the offices of a client of his former law firm in Cuba.

Soon he became the first Hispanic in USA to hold the position of General Sales Manager of a radio station.

In 1968 he helped to create what was known as Spanish International Network (SIN), today Univision. He was appointed first General Sales Manager for WXTV, Channel 41, New York and soon after that, in 1969, he became an Executive VP and Director of National Sales for the Network.

In March of 1973 he resigned his position, and, again, together with wife Raquel, started Caballero Spanish Media Inc., the Spanish media sales representative in this country.

His company started representing four Spanish TV stations (all of the independent Spanish stations existing at that time), and fourteen Spanish radio stations (out of less than 35 existing stations). Eduardo also syndicated a weekly Spanish movie, which ran in twenty-nine television stations, almost all of them general market stations, using Ricardo Montalban as the presenter, and with the sponsorship of the Bristol Myers company.

In 1976 Eduardo decided that he should be involved exclusively in radio, where he saw the greatest potential for C.S.M. His company grew to represent over 140 Spanish radio stations from coast to coast, covering over 95% of the Hispanic consumers in the country, opening opportunities for new radio operators and hundreds of jobs for both, Hispanics and non-Hispanics.

In 1995, Eduardo sold C.S.M. to Interep, and remained with the Company until the beginning of 1999, when he left work on his new project, Caballero Television, owner and operator of twelve LP television stations, all of them located in Central California and Texas. He created his own network—Mas Música Teve-broadcasting 24 hours of music videos. Caballero Television has offices in Dallas, New York Miami and Bakersfield, CA. Recently, the Broadcasters' Foundation presented to Eduardo, The American Broadcast Pioneer Award, as the first Hispanic to receive this award.

In September 2002, Eduardo was honored by the American Advertising Federation with the Mosaic Award.

Eduardo lives with his wife of 41 years, Raquel, in Miami, Florida. They have a daughter, Rosamaria, also a lawyer, who graduated from Georgetown Law School. Married, with two daughters, Sofia and Paloma, she lives, with husband P.J. Stafford, in New York City.

Eduardo is, or has been, involved in the following organizations:

Chairman-founder of the Hispanic arm of the Media Partnership for a Drug Free America.

Member of the U.S. Postal Service Marketing Advisory Board.

Founder of the Spanish Radio Association of America.

Former Member of the Board of the Stations Representative Association (S.R.A.).

Former Member of the Board of Directors of the Advertising Counsel.

Former Member of the Arbitron Bi-lingual Advisory Committee.

Founder of the Association of Hispanic Advertising Agencies (A.H.A.A.).

Former Member of the Board of Trustees of the National Hispanic University (San Jose, CA).

Former Member of the Board of the National Drop-out Prevention Foundation.

He is also a proud member of the N.A.B. and of the Pioneer Broadcasters, among many other organizations.

Hi Albert, as per your request, following are my thoughts on why the Hispanic market should be treated separately from the general market. As you know, I have over 15 years in the industry. Most of these years have

been with agencies specializing in Hispanic marketing and advertising. I am currently with Diario Las Americas, South Florida's first Hispanic daily newspaper.

The U.S. Hispanic media market should be treated separately from the non-Hispanic media market. Hispanics differ in many ways from non-Hispanics:

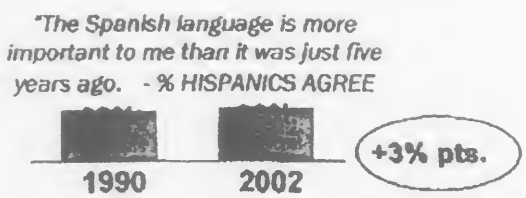
- Larger households 3.4 vs. 2.5.
- Hispanics are younger 27.6 vs. 37.2.
- More HH with children 18 58% vs. 34%.
- Religion is more important in their lives, 80% vs. 46%.
- Language preference—over 90% of Hispanics speak some Spanish, over 70% prefer to speak Spanish at home and over 50% prefer to speak Spanish on social occasions.

Sources: Nielsen Universe Estimates 2002, Strategy Research, Yankelovich 2000, Center for Media Research 10/7/02.

Advertising in Spanish-language is proven to be far more effective with Hispanics. According to the Roslow 2000 study on advertising effectiveness among U.S. Hispanics: ad recall rises 61% for those viewing in Spanish, communication is 57% more effective and persuasion is 5 times greater.

Marketing to Hispanics should not only be in Spanish-language but should also be culturally relevant. Translation of general market copy is not an effective or efficient approach for delivering the target. Advertising should be culturally relevant and dialect sensitive. Agencies specializing in Hispanic advertising and marketing understand that accents and terminologies differ based on country of origin. They exercise sensitivities to these differences when creating an advertising message. Important, as well, is not to stereotype this market.

Spanish language preference has not decreased throughout the years as many had predicted. It has actually increased. One contributor to the increase could be the increasing acceptance of Spanish-language, as well as, what many are calling 'retro-acculturation.' Latinos are feeling more comfortable with their culture and the use of Spanish-language. Great contributions by Latinos in the areas of sports, entertainment, and business have laid out a new dynamic for Latino youths. They are more proud to be a part of the Hispanic community and to be considered Latinos.



Source: Yankelovich Partners 1990 & 2002 Hispanic Monitor Study

The Hispanic market is **separated from general market by language and culture.** Hispanics have different viewing and listening patterns. That is why the top rated programs (overall—Hispanic & general market—source Nielsen Hispanic Station Index) on television for Hispanics are 'novelas' on Univision; and why the top radio stations in major Hispanic markets are Hispanic stations. Some Hispanics can be reached through general market advertising efforts (spill), but the effectiveness and impact of the message is not the same (per Roslow 2000). Hispanics are more likely to buy brands that advertise to them in Spanish-language. Many advertisers have become saver to the fact. In November Burger King Inc. set aside swathes of aisle space in nearly 1,000 of its stores for videos dubbed in Spanish. In December, Kmart Corp. announced the launch of an apparel line named after Mexican pop star Thalia. P&G created a magazine-style direct mail piece specific to Hispanics.

Some companies early to see the potential are cashing in Sales of Ford brand cars and light trucks to the Hispanic market grew 40% in the past five years. After the company started using Mexican bombshell Salma Hayek to market its Lincoln brand last year, Hispanic purchases of Lincoln Navigators grew 12%, while sales to non-Hispanics were flat, says a Ford Motor Co. spokeswoman. At Honda Motor Co.'s American arm, Latino purchases grew to 8.4% of all vehicles sold last year from about 7% five years ago.

With the nation's economy as a whole stagnating, the U.S. Hispanic population is emerging as one of the most promising motors for growth. Driving the growth is the population's higher-than-average birth rate and immigration. Additionally, Hispanic household incomes are starting to catch up with national averages. The Global Insight report estimates that Hispanic household incomes should grow from 77% of the national average in 2000 to 82% by 2020. The Selig Center for Economic Growth at the University of Georgia says Hispanic disposable income will reach $926 billion in 2007, up some 60% from $580.5 billion last year. Meanwhile, non-Hispanic buying power will grow less than 28%, to $8.9 trillion. The Selig Center estimates that in five years Hispanics will account for 9.4% of the nation's disposable income, up from 5.2% in 1990.

Both television and radio have seen the growth. Advertising on Spanish-language TV grew 16.5% last year, over twice the 7.6% growth by all broadcast TV, estimates Gordon Hodge of investment bank Thomas Weisel Partners. Today there are 8 times the number of Hispanic radio stations than there were 20 years ago.

1980: 67 Hispanic Radio Stations
2002: 600 Hispanic Radio Stations

Get the picture? It seems some major companies have, and it sell $$$. They understand the importance of the Hispanic market. They see it as a **separate market**, and so should we.

Sincerely,
Leticla R. Pelaez
Director of Advertising

May 22, 2003

Federal Communications Commission
445 Twelfth Street South, Washington, DC. 20554

To Whom It May Concern, My name is Raquel Tomasino, I am Media Director of Castells & Associados and have been asked to comment on whether the U.S. Hispanic media market is a separate market for the purpose of assisting the FCC in its ongoing review and analysis of the pending merger of Univision Communications and Hispanic Broadcasting Corporation.

From a marketing standpoint the US Hispanic market is a separate marketplace. Marketing to Hispanics requires understanding of the cultural differences that exist versus the General Consumer, understanding that creatively Spanish-language commercials need to reflect Latino cultural nuances and queues to be fully effective in producing similar results versus the General English-language commercials.

More than 50% of the US Hispanics are Spanish-dominant. In the West Coast that number is closer to 60%. While long time residents and US born Latinos speak English so that they can function in mainstream America, various factors which include, the growing population, strong Hispanic communities, and immigration keep fueling the desire for Hispanics to hang on to their culture, their language and entertainment preferences.

The Hispanic market is not one Monolithic segment of the population, it is a complex group comprised of many segments with different cultural nuances and origins, united by one language.

Spanish-language media plays a very big part in reaching out to the different segments of the population by continuing to supply programming that feature relevant content that speak to the Latino preferences.

In the case of Spanish-language TV, Experience has shown that original productions with familiar content such as Latino entertainers, International dramas and Futbol/Soccer is a formula for success. The English-TV programming, such as "Charlie's

Angels" and "Reyes Y Ray" (Starsky & Hutch) remakes in Spanish that some networks tried to reproduce and run on Spanish-TV proved to be unsuccessful.

Radio has become the optional source of information and news not only about our homeland but our communities, with commercials that we can actually understand and follow in our language. Radio also offers the variety in programming needed to finely target the different segments of the Hispanic communities.

Like the Central American who listen to Cumbias, the Caribbean's who prefer Salsa, the South American's like Spanish-Rock and the Mexican Community who love their Rancheras and traditional sounds of Mexico.

As an agency it is important for us to educate our clients on the most effective way to reach the Hispanic consumer. We are responsible for creating advertising that is compelling, that builds awareness and consumer loyalty and at the end of the day we need to deliver these through the various, relevant forms of media vehicles.

That's why we have a list of ten things to avoid when marketing to Hispanics. Below is a top line of the top ten things not to do by Liz Castell-Heard, President of Castells & Asoicado:

10. Approaching the Market as if It Were a Monolithic Segment

"One-Size Fits All" Approach No Longer Works, Unless It's just the Start. Hispanic marketing has evolved from the '70's "orphan" to the "childish" '80's regional efforts; the post-pubescent 90's of homogenization; and now to bicultural segmentation, as "Hispanic" grows up as an adult rich with complexities. It's beyond country of origin—one generic "broadcast" Spanish can be effective. It's knowing what makes us tick; foreign-born (58%) or US born; Spanish-dominants (58%) or reaching bilinguals/English-dominants with culturally-relevant English ads (like African-American). It's targeting various age targets and influencers. Companies like McDonald's who do this well, have very strong Hispanic positions.

9. Not Understanding Your "Hispanic" Category

Category Dynamics Don't Automatically Apply. Know & Embrace The Differences. Your "Hispanic" category is not at the same point of its lifecycle development; and Latinos are often behind on the learning curve. Cultural and lifestyle differences affect perceptions, needs, motivations and advertising. Demographic barriers may not exist; but perceptual barriers need to be addressed, like in cable or banking.

8. Not Having a Long-Term Hispanic Market Plan

Have a Consistent & Integrated Hispanic Strategic Branding and Retail Plan. You need to have bilingual training, people, operations; multi-media advertising, promotions and PR. Some believe you don't need a Hispanic branding campaign due to the *myth* of Hispanic brand loyalty. Hispanics will respond and brand-switch. You can't assume your established General Market or Latin American efforts will bleed over. Classic examples are Colgate-Palmolive left behind by P&G, or Toyota topping Chevrolet. Continual short-term messages lead to poor brand perception, discounting and brand erosion. You need a branding campaign with "legs" and a multi-media mix, beyond TV to radio, OOH, DR, on-line, print, etc.

7. Consistently Opting for General Market "Transactions"

Stay True To The Brand, Seek Synergies With Hispanic Consumer Relevance. Look for synergies and commonalities between General and Hispanic consumer segments, but don't force-fit. Transcreating GM strategies or creative may work when the concept transcends ethnicities or for short-term promotions, but *consistently* employing this approach becomes ineffective. Just think about all the GM money you spend to identify that key consumer nugget, or that breakthrough ad. Know the cultural nuances that affect your direction and define ad relevance.

6. Oversimplifying and Underestimating the Potential of the HCM

Quantify the Hispanic Business Potential With Sound Research and Analysis. Put the stats to work and figure out the actual potential, by market, by account. Once you assess the huge potential, "package" it internally. Call it a profitable "division" or establish a multi-discipline Hispanic committee to facilitate its viability.

5. Inadequate Allocation of Company Resources to "Hispanic"

Proper Allocation of Hispanic Marketing Budgets and Resources Is Key. Inadequate pre-planning, sub-standard concepts, limited "test efforts," poor tactical executions and lack of performance metrics devalue Hispanic potential. Don't say, "This is all we have for Hispanic this year." Hispanic should be an integral part of the budget pre-planning process. Assess Hispanic share vs. the GM; and weigh the trade-offs of where you spend. The $2.4 Billion spent in Spanish is still less than 4% of all ad dollars—But it's changing quickly as companies spend more; traditional categories *like packaged goods*, newer categories like telecomm, health, travel, entertainment, or high-tech.

4. Thinking Hispanics Are Effectively Reached Via English Media

Spanish Ads are Critical; English-language Spillover Is Not Necessarily Effective. Don't say, "Half of Hispanics see our spots, they're the ones with the money." Spanish media continues to grow; 70% of Hispanic TV viewing goes to Spanish, up from 45% in 1995. Spanish broadcast gets the majority of share even among bilinguals. To know what to spend, apply a systematic budget formula that accounts for Nielsen spill, Roslow comprehension, population and CPP's. Nationally, 10% of total dollars should go to Spanish, 4% to English-Hispanic; in L.A., 30% to Spanish, 11–18% to English-Hispanic. Hispanic median income is $49K (85 index vs. GM), so it's highly likely Hispanics can afford your product.

3. Recruiting a Native Spanish Speaker To Critique Your Agency's Creative

Just Like the General Market, Let the Hispanic Consumers Be The Judge. Please don't say, "Juanita Garcia says the words are not right." Regis & Kelly are not asking you to write their monologue, so don't rely on your housekeeper to critique the work done by a creative with a Masters and 15 years experience. Do the same type of copy research as the GM, qualitative or quantitative, it all exists. Assure your Hispanic ads deliver the strategic and communication goals.

2. Hispanic Programs Must Pay Out in Incremental Volume

Have a Measurable, Realistic and Agreed-Upon Hispanic ROI and Report Card. There is a base cost for customer retention and maintaining brand share, and the Hispanic program should not payout solely on incremental sales. The reprt card should be based on cumulative measures; Hispanic sales tracking, field surveys and pre/post quantitive tracking studies. Don'trelegate Hispanic research to the back shelf. Employ the proper research size and methodology to ensure the Hispanic sub-segments are well defined and represented.

1. Not Allowing Your Hispanic Agency To Challenge Status Quo

Demand High Performance From Your Hispanic Agency. Demand the same level of excellence as your General Market agencies. Be inclusive with your agency and set clear goals and expectations. Think of your agency as a marketing partner, as the more knowledge shared, the better the work. Allow Hispanic programs to evolve, flourish and increase. Hire a true Hispanic agency, not a Hispanic "division," or one—**like Castells & Asociados.**

Sincerely,
Raquael Tomasino,
EVP, Director of Media Services

The Honorable Michael Powell, Chairman
Federal Communications Commission, 445 12th Street, Southwest, Washington, D.C. 20554

Dear Chairman Powell: My name is Linda Lane González, president of The VIVA Partnership, Inc., a Miami-based advertising agency specializing in the U.S. Hispanic market. My professional experience over the past 15 years has been almost exclusively in the U.S. Hispanic market, having worked with some of the greatest pioneers of our field, Lionel Sosa, Carlos Montemayor, Paul Castillo and others over the years on a variety of accounts including Chrysler, Builder's Square, Cuervo, CBS, Verizon Wireless, Uniroyal, Meow Mix, and Entenmann's.

I have been asked to comment on whether or not I believe the U.S. Hispanic media market is actually a separate market. My answer is an emphatic yes. To which could be added an emphatic of course! Hispanics are different in many ways: be it culture, language, or the numerous customs and traditions. Research shows that in-language programming is more impactful to the Hispanic target when it connects on a deeper level, in language and culturally relevant.

The Hispanic media market and its numerous vehicles are a separate, relevant entity. From Nielsen to Arbitron—media is adapting and adjusting to the ever-growing Hispanic population. Nielsen has adjusted the way it measures audience levels due to the exploding Hispanic numbers. Arbitron continues to be challenged and is currently modifying their methodology on how to accurately measure Hispanic audience levels.

I hope my comments will be useful in the commission's consideration of the U.S. Hispanic media market as a separate and relevant entity and in its review of the Univision/HBC merger.

Very sincerely yours,
Linda Land González,
President, The VIVA Partnership, Inc., 4141 N.E. 2nd Avenue, Suite 203E, Miami, FL 33137

May 27, 2003

The Honorable Michael K. Powell
Federal Communications Commission, 445 12th Street, SW, Washington, 20024

Dear Chairman Powell: My name is Tere Zubizarreta, President & CEO of Zubi Advertising.

I have been asked to comment on whether the U.S. Hispanic media market is a separate market. There's no doubt that the Hispanic media market is an entity completely separate from the "general market".

As will be shown below, there is ample evidence and factual corroboration to conclude that the U.S. Hispanic media market is a separate market.

The Hispanic media market stands alone since it caters strictly to those U.S. residents (33 million by 2000 census). In their native language, taking into account cultural idiosyncrasies and family values.

The media availability to address this market is professional in its programming and formats are according to the demographics in each of the major Hispanic markets.

This fact is particularly important when looking at the radio and TV networks as the primary source of communication with this fast growing market.

I hope the information provided will be useful in the consideration of the U.S. Hispanic media market as a separate relevant market.

Sincerely,
Tere A. Zubizarreta

May 21, 2003

To Whom It May Concern, I'm Richard Cotter, Senior Partner and Director of Local Broadcast for Mindshare. We're one of the largest buyers of time on radio and television stations in America.

I've been asked to weigh in on the question if Hispanics in the United States represent a discreet market. The question is important because it's being used in the analysis by the F.C.C. concerning the proposed merger of Univision Communications and Hispanic Broadcasting Corporation. There's ample evidence and factual corroboration to conclude that the U.S. Hispanic media market is a separate market.

First, the Hispanic media market is separated from the rest by it's own radio and television stations broadcasting in their own language. The Spanish language radio and TV stations serve a distinct consumer base with different brand awareness, tastes and preferences. To be sure it's a separate population with different growth rates.

As the F.C.C. reviews the Univision/HBC merger I hope the information highlighted here will help provide direction and the right decision to this important question.

Sincerely.
Richard Cotter
Senior Partner, USA Director of Local Broadcast

May 2003

As a media executive, I've been asked to comment on whether the US Hispanic media market is a separate market from the general market. There is no question that the Hispanic market is indeed separate and should always be considered as such.

There is ample evidence and factual corroboration to conclude that this to be true. The language of preference for many Hispanics, whether they are recent arrivals or US born, is Spanish. The importance of the culture to Hispanics is such that parents instill pride in language, customs, music and dance to their children. In the mid seventies, the US had about 50 Spanish-language radio stations in the entire country. Today over 600 radio stations dot the landscape with stations cropping up in markets where just 10 years ago no one would have guessed the need for Spanish formats would be.

The same holds true for Spanish-language TV. We've seen the growth in the number of networks and independent stations everywhere. Some markets, such as Chicago, Miami and Los Angeles have at least five Spanish-language TV options.

The bottom line is, if you don't speak Spanish, chances are you ignore Spanish-language media. Similarly, if you don't speak English, or just simply prefer Spanish, chances are you ignore English-language media. So if you're not speaking to me in the language I prefer, I'm not listening to your message. Few advertisers can afford to ignore this market.

There is no question as to the relevance of this market, and ample evidence exists that it reached through Spanish-language media.

Emma Moya
VP/Client Services, Amistad Media Group, 815 Brazos Street, Austin, Texas 78701

May 21, 2003

Ladies and Gentlemen: I am the Marketing Director for the Historical Museum of Southern Florida. My career in marketing and advertising expands more than twenty years of experience in TV, radio and major publications in the Caribbean and United States.

I have been asked to offer some observations about whether Hispanic media in the United States should be considered a separate market venue from that of the general market. My answer is a definite, *si, por surpuesto.*

For the last two decades, major U.S. corporations have debated whether or not to consider Hispanics just a minority group who will, in time, assimilate to the American culture or a growing consumer powerhouse loyal to their ethinicity. Time has proven that the latter is the correct assessment of this market. Almost everyday, articles are published in major newspapers throughout the United States confirming the importance of reaching Hispanics in their own language, showing sensitivity to their particular customs.

The Hispanic market has evolved into a rich mosaic of cultures. Each segment with its own set of goals, music preferences and interests. There are two common denominators· Language and pride of culture.

Endless research has shown time and time again that Hispanics respond better when approached in *español.* The message is even more effective if it is tailored to their particular cultural background. Hispanic media, particularly radio and TV play a key role in the success of any promotional effort targeted to this important market. Hispanics depend on radio and TV for their news, entertainment and lifestyle trends. Hispanic radio and TV are their emotional link to their roots.

Hispanic media, in particular radio and TV, has evolved into a market in itself. Using the most efficient technology and combing it with the characteristics of the Hispanics' *simpatía,* makes it stand out and be different from any other mass communication venue.

I trust that the views offered here may be useful in the consideration of the U.S. Hispanic media market as a separate and relevant venue.

May 27, 2003

To Whom it May Concern: My name is Pat Delaney. I am President of DMA and have been in the advertising industry for over 27 years. I have planned and purchased all mediums throughout the US for clients such as: Reebok, Wendy's International, BMW, AutoNation, Terminix, Rite Aid Drugs, Toys R Us, just to name a few.

I have been asked to comment on whether the US Hispanic media market is a separate market. Also, whether there is ample evidence and factual corroboration to conclude that the US Hispanic media market is a separate market:

The US Hispanic market is a separate market. Hispanics listen and watch various mediums differently than Anglos. With the available research on Hispanics, it clearly shows that while many Hispanics are bilingual, they still speak Spanish at home and do listen or watch Hispanic radio or TV. It's also substantiated by research that the number one radio or tv station in a given market (eg. Los Angeles, Miami, etc.) is Hispanic. This reflects all stations in a market, not just Hispanic and indicates to an advertiser that a large percentage of their potential customers are being missed if Hispanic media is not being purchased. In many markets, Hispanics account for over 50% of the market.

Over the years I have found that with the available research an advertiser can effectively reach their potential customers by using both Hispanic and Anglo mediums. The research provides duplicated and unduplicated listenership/viewership of the media purchased to assure full coverage of

both Hispanics and Anglos. Without this research it would be a shot in the dark.

I hope this information provided will be useful in the consideration of the US Hispanic media market as a separate relevant market.

Sincerely,
Pat Delaney

May 23, 2003

To: Federal Communications Commission, Honorable Michael Powel

I am Mike Herrera. My experience is Florida Distributor Coordinator. I have worked in the Florida Market for 17 years in the beer Industry. Fourteen years with Anheuser Busch and the last three with Presidente U.S.A. Presidente Beer is one of the leading beers in the U.S. that markets to Hispanic consumers across the country.

I have been asked to comment on whether the U.S. Hispanic media market is a separate market.

There is ample evidence and factual corroboration to conclude that the U.S. Hispanic media market is a separate market. Research companies such as Simmons measures media habits, product and service usage, demographics and psychographics of Hispanic consumers across the country.

In addition to the Nielsen media research is one of the market leaders in terms of providing quality measurement of Hispanic TV audiences.

When Presidente Beer commences its marketing planning and forecast our strategic approach is to identify the key markets within our Demographic group and separate within each market the hispanic and general market. This strategic marketing approach is used in all of our key markets across the United States.

I hope the information provided will be useful in the consideration of the U.S. Hispanic media market as a separate relevant market.

Sincerely,
Mike Herrera
Presidente U.S.A.

To: Ana Figueroa
From: Nelson Quintero
Date: May 22, 2003
Re: Hispanic Survey

In reference to your questions regarding the Hispanic media survey my personal opinion is that Hispanic media should be maintained separate from the general market. The Hispanic market is a different segment and should be targetted differently. In the beer industry we face these challenges everyday trying to cross over to a complex ethnic market with such a Latin American influx and diversity. We are struggling trying to convey the same message.

In reference to Radio, the audience of most listeners are probably working people or traveling in vehicles. During the most busy traffic hours and lunch time most people are listening to the radio. This is a key time for messages and commercials to get across. For example; lunch hour at any restaurant, bar or café usually has a radio station playing. I think today's TV viewer's are looking for specific shows, movies or the nightly news.

Ana, I hope this information helps you with your survey and please understand this is my opinion and not of Labatt USA.

Sincerely Yours,
Nelson Quintero
District Manager Southeast Florida

May 21, 2003

Federal Communications Commission
445 Twelfth St. South, Washington, DC 20554

To Whom It May Concern: My name is Marci Neill I am the advertising coordinator for Glendale Nissan/Infiniti.

I have been asked to comment on whether the U.S. Hispanic media market is a separate market, for the purpose of assisting the FCC in its ongoing review and analysis of the pending merger of Univision Communications and Hispanic Broadcasting Corporation.

The first and most obvious example would be separate languages. From there the list goes on and on to include the following, separate location, population, growth rate, income level, brand preferences, and cost basis, to name just a few of the reasons why as an advertiser it is critical to able to target Hispanic media, both TV and Radio as a separate market.

I hope the Commission will take these factors into consideration when reviewing the Univision/HBC merger.

Sincerely,
Maric Neill
Advertising Coordinator.

To Whom It May Concern, my name is Jaime Amoroso, general manager of Toyota of Manhattan. I've been in automotive sales for over 15 years.

I've been asked to give my opinion on the question, "Do Hispanics in United States represent a unique market?" The question is been used in the consideration of the pending merged between Univion Communications and Hispanic Broadcasting.

The answer is clearly "YES". While we are Americans we are also Hispanics with so many different things that make us unique such as the foods we eat, our traditions, our culture and so much more. We have our own separate language with our own tastes, preferences and brand awareness. We have our own population with it's own unique growth rate.

We have distinct radio, television stations, and programs that appeal specifically to us. These stations and programs broadcast directly to our community in our language with it's own cost base, discreet demographics and targets. It is unique and separate.

As the F.C.C. reviews the Univision/HBC merger I hope the information highlighted here will help provide direction and the right decision to this most important question.

Sincerely,
Jaime Amoroso

June 2, 2003

To Whom It May Concern: I've owned and operated a radio and TV buying service in New York City for many years.

I'd like to share my thoughts with you concerning the Hispanic market in the hopes my comments will be useful in the Commissions consideration as it reviews the Univision/HBC merger. The central point is the US Hispanic media market is a separate entity. First, the radio and TV stations which make up this market deal a separate consumer base and communicate to it in a different language. Secondly, the markets population base differs as does its brand awareness and cost structure.

Turn the channel-tune your radio. Your eyes and ears should convince your mind and heart this truly is a distinct market.

Sid Paterson

Miami, May 21, 2003

To Whom it may concern: I am Gonzalo J. Gonzalez, Managing Officer at BVK/Meka in Miami. My experience in the advertising industry includes over 15 years working with most product categories in the United States, Spain and Latin America.

BVK MEKA is one the leading Hispanic advertising and Public Relations marketing firms, and the Hispanic Division of BVK in Milwaukee, ranked among the top 50 Advertising Agencies in the United States.

Our current client list for the US Hispanic market include SouthWest Airlines, Sprint PCS, Pfizer, South East Toyota, Samsonite, Samsung and the Florida Anti-Tobacco campaign among others.

I have been asked to comment on whether the U.S. Hispanic media Market should be considered as a separate market. Not only for the proven effectiveness of the Spanish Language in communicating messages, but also because of the different media habits and cultural relevance of programming, the Hispanic media is and should be considered separate when planning, buying and evaluating broadcast media.

This fact has been proven by numerous research developed by the most prestigious research companies, such as Nielsen, Roslow Institute, Scarborough, Strategy research, among others.

As a result of this, companies that measure and monitor broadcast media, such as Nielsen and Arbitron, has adapted their methodology in term of measuring Hispanics across the country, publishing separate Hispanic books with the results of their surveys.

I hope the Point of View will be useful in the consideration of the U.S. Hispanic media market as a separate relevant market, and feel free to contact me should you need to further discuss this matter.

Sincerely,
Gonzalo J. Gonzalez,
Managing Officer.

May 21, 2003

Federal Communications Commission
445 12th Street, SW., Washington, DC 20554

To Whom It May Concern: It is with great concern that our firm has approached you regarding the proposed merger between HBC and Univision.

As a boutique firm in Coral Gables providing counsel in the areas of Advertising, event marketing and public relations, we foresee the ramifications of this proposed merger. We are a young firm, comprised of individuals who have been active in the advertising industry in the South Florida

marketplace for over a decade, particularly in Hispanic media. We live in this market, and understand the unique elements it's comprised of including how cyclical it is. The South Florida market will severely suffer if this merger happens.

Our philosophy rests on the shoulders of innovation and we stand strong in our focus on providing unique and cost effective methods for our clients to achieve their marketing goals. However, we believe that the uniting of the nation's number-one Spanish-language television operator and the number-one Spanish-language radio owner resembles the Clear Channel model. Formulas such as this have truly made it difficult for agencies and local businesses such as ours to thrive in a marketplace where as it relates to placing media, there are very few competitors.

We are convinced that with such a merger taking effect, many areas of our industry will be directly affected. Our concerns are the strong negative effects on both the general as well as the Hispanic market. We are specifically concerned about the business practices and methodology that will ultimately impact the consumer.

We would also like to comment on the issue of whether the Hispanic media market is a separate one. Our firm firmly believes it is. Just to begin, this is a market that has its own consumer base that possess their own tastes, brand awareness, brand preferences, media, cost basis, population and language. How can one ignore the facts listed above? Including both television and radio, it is evident that this market has its own unique set of *separate* characteristics, its own buying power, and its own consumer psychographics.

We implore the Commission to consider the ample evidence aforementioned. My firm could not feel more strongly about this matter. We respectfully seek your assistance in protecting the industry comprised of agencies and advertisers alike who realize how critical this matter is and how this proposed merger will affect the future of our industry. We trust in the judgment of the Commission and rely on its plight to protect the overall public's interest. Please take our plea into consideration. If need be, our firm is at your disposition as it relates to the Commission's consideration of the U.S. Hispanic media market as a autonomous market and its review of the Univision/HBC merger.

Sincerely,

Liza M. Santana,

President, Creativas Group Inc.

May 22, 2003

To Whom It May Concern: As an advertising agency in the South Florida market for over 7 years, and as an advertising professional for over 13 years, I am always asked the same question from many of my advertisers: "How can I reach the Hispanic market?"

The question would seem to have a simple answer: "Just through some budget dollars to a couple of Hispanic stations, translate our current spot (some advertisers actually use their English spot in Spanish language stations), and go with it!"

The more I see the situations occur, the more I realize that there are still many people in South Florida and the U.S. that still *don't get it.*

The Hispanic market is more than just a true and separate market from the general market. It has several "sub-markets" within itself. It is more suffice to think that with just one campaign, or one spot, or one theory, we can reach the entire Hispanic market. Hispanics in the U.S. are truly diverse. South Florida alone has possibly the most diverse Hispanic market in the country, comprised mostly of people from the Caribbean, Central and South America.

Unquestionably, the same applies to all the Hispanic markets across the U.S. Hispanics have become an important part of our population with their rapid growth, as well as their increasing buying power as consumers. This is a market with different cultures, ideas, values and customs.

Therefore, it is critical that Hispanics be considered as a separate market in order to reach them effectively and allow prospective advertisers to communicate with their powerful and evolving segment of our country.

Thank you

Tony Garcia

President, The Menda Group

To Whom It May Concern, I'm Helane Naiman. I have worked in media in New York City for over twenty five years and have for the past five years owned my own ad agency/buying service, HN Media & Marketing, Inc.

I've been asked to comment on whether the U.S. Hispanic media market is a separate market for the purpose of assisting the F.C.C. in its ongoing review and analysis of the pending merger between Univision Communications and Hispanic Broadcasting Corporation. In my opinion it certainly is. Here are just a few reasons why. The Hispanic population has separate tastes. It differs in brand awareness with a uniquely different consumer base. Hispanics in the United States have their own media. The market includes both radio and television stations that broadcast in the Spanish language.

I hope this information is useful to the Commission in their consideration of this issue. As the FCC reviews the question of whether Hispanics in the United States are a separate market the answer is clearly-yes.

Yours Truly,

Helane Naiman,

President

Note: The letter dated May 27, 2003 from Accentmarketing was not able to be published in the **Federal Register** but a copy can be obtained from the U.S. Department of Justice, 601 D Street, NW., Room 10–013, Washington, D.C. 20530 or you may call and request a copy at (202) 514–2558.

May 23, 2003.

Mr. Raul Alarcon Jr.

Chairman, Spanish Broadcasting System, 2601 South Bayshore Drive, Penthouse II, Coconut Grove, FL 33133

Dear Raul, enclosed is a synopsis of my position paper on the U.S. Hispanic market. I have delivered this or very similar presentations on numerous occasions to a broad spectrum of general business and Hispanic marketing audiences. The most recent was at the Central Florida Hispanic Chamber of Commerce.

I have edited out only my personal (humorous) anecdotes; actually, they were the best part.

Best regards,

A COUNTRY WITHIN A COUNTRY

The U.S. Hispanic market is frequently referred to as "a country within a country * * * larger than Canada * * * the fourth largest Spanish speaking country in the hemisphere larger than Peru, Venezuela, Chile or Ecuador.". 42.6 million strong (including Puerto Rico), the population is expected to grow by more than 1.7 million per year. That's 100,000 people every three weeks or 5,000 every day.

Hispanic purchasing power exceeded $630 billion in 2002. In and of itself, it represents the 9th largest economy in the world, larger than the GDP of Brazil, Spain and even Mexico. All indices and economic measurement standards reflect growth and increased prosperity. In the decade between 1979 and 1999, the number of Hispanic families reaching the middle class (defined as those earning between $40,000 and $140,000) increased 71.3% to 2.5 million, fully one-third of the total.

The numbers get even more interesting in terms of business ownership. According to American Demographics Magazine, Hispanics now account for the largest share of minority entrepreneurs in the United States, owning 40% of all such businesses. The Census Bureau's last economic census reported 1.2 million Hispanic owned businesses with aggregate revenue in excess of $1.86 billion. The 2002 estimate put the figure at 2.3 million with $380 billion in sales. In 2001, the census also reported Hispanic labor-force participation at 80.4% (FYE 2000), higher than non-Hispanic white males as a whole

It is evident that even official agencies consider this market a discrete entity within the larger marketplace measured and reported accordingly. And while other minority markets are similarly measured in a number of areas, the Hispanic market stands alone as a self-contained, differentiated, "country-like" entity within U.S. borders; one from which specialized disciplines, professions, governmental institutions, NGOs and even foreign policy initiatives, have arisen and will continue to arise well into the foreseeable future. This is not a matter of opinion. It is a matter of fact extremely well grounded in logic, as we shall see:

1. Let's consider the other two large minority segments in the United States, African-Americans (excluding Haitian-Americans) and Asian Americans. African-Americans speak English almost exclusively. There are few direct linkages to African countries of origin. Non-African Americans may easily communicate and participate in this sub-segment at will. They are tied to the mainstream culture by language if not by color.

2. The Asian-American segment is composed by a multiplicity of cultures

divided by language—Chinese (Mandarin and Cantonese), Japanese, Korean, Vietnamese, Hindi, Bengali, Urdu, Malay, Punjabi—the influence and economic advantages (cost-effectiveness) that spring from critical mass are elusive if not impossible. Therefore, other than grassroots marketing or media outlets serving small enclaves, any Pan-Asian network or national print vehicle would be either highly fragmented in a multiplicity of languages or require English as the common denominator.

3. Language is the single most important characteristic of culture and Hispanics in the United States are united by a common language traced to Spanish colonizers regardless of whether these are viewed as ruthless conquistadors (Mexico) or brothers from the mother country (Cubans). If this were not the case, neither national broadcast networks nor national print media would be viable business models. This isn't to say that there aren't English dominant Latinos, but rather that for marketing and communications purposes we include them in the mainstream universe just as we exclude non-Spanish speakers from the Hispanic consumer pool. Spanish dominant Latinos then, by necessity, must rely on Spanish language media even to exercise their right to vote; bilingual Latinos may choose either language based on content or self-identification. Considering that Latinos are basically absent from general market media, being depicted as less than 2% of all characters (while more than 12% of the population) and often in the most negative roles, bilingual Hispanics are practically compelled to turn to Spanish language media to see and/or hear themselves.

4. This cultural phenomenon known as Hispanic-America, and its need for in-language communications that respects and embraces our multiracial identities, musical preferences and folkloric richness created the Hispanic advertising industry. The Association of Hispanic Advertising Agencies was organized in recognition that ours is a marketing sector that could not and would not be well served by general market entities; the very same who for more than 30 years had been predicting with almost evangelical fervor our assimilation and demise. The truth is that Hispanic advertising and media professionals constitute a unique business specialty. As managers, we must have as thorough an understanding of the disciplines as our monolingual, general market counterparts and communicate in English with our clients, bankers, the IRS and the 21 year old brand manager who has never traveled outside of Indiana, yet transcreate, transform, interpret and connect with our consumers in Spanish, the language most likely to produce the sales and economic benefits sought by our clients. "Compre nuestro auto, nuestro jugo y traiga su dinero a nuestro banco." It's the American way. Consumer spending is the backbone of our economy. And let's be realistic, the mainstream population base is experiencing negative birth rates. All U.S. population growth is directly attributable to minority and immigrant sub-segments. The Census says so.

5. The wave of Hispanic agency acquisitions by general market firms shows that they were wrong about assimilation (which did not and will not take place), were wrong to remain intransigently monolingual as if it were a badge of honor and thus, with very few exceptions and these only in the multi-national arena, incapable of creating Hispanic divisions organically. Ultimately, they had to buy the agencies. Most were motivated by profit potential others to keep the market in check and under control.

6. The increasing acceptance of Mexican Matriculas, the strengthening of Radio Marti's signal, NAFTA and the proposed FTAA, point to Hispanic interests influencing the national agenda well beyond the Congressional Hispanic Caucus. This is understandable as Hispanics represent the country's largest pool of bilingual, transnational citizens. It may be a small percentage of the vast United States of America, but a critical component of the country's hemispheric—perhaps global—aspirations. A country within a country indeed.

Exhibit B

May 20, 2003

To Whom it May Concern: I am Julio Amparo. I have worked in the Hispanic market as an owner of an independent advertising agency for over 15 years.

I have been asked to comment on the pending merger between Univision Communications and Hispanic Broadcasting Corporation. An important question the F.C.C. is facing is whether or not the U.S. Hispanic market is separate market.

First, we speak a different language. We have our own consumer base, our own and separate tastes. As an owner of an ad agency I can tell you Hispanics have their own brand awareness for our own products. Our population growth is different, the cost structure of media is separate—we are a separate consumer base.

The Hispanic Media market—radio and TV combined—is a separate and distinct market. Listen and you will hear with your ears we are a separate market.

I hope my comments will be useful in the Commission's consideration of the U.S. Hispanic media market as a separate relevant entity and in it review of the Univision/HBC merger.

Julio Ampara,
President.
June 11, 2003

Marlene H. Dortch
Secretary, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554

Re: *Applications for Transfer of Control of Hispanic Broadcasting Corp., and Certain Subsidiaries, Licensees of KGBT (AM, Harlingen, Texas et al. (Docket No. MB 02–235, FCC File Nos. BTC–20020723ABL, et al.)*

Dear Ms. Dortch: Spanish Broadcasting System, Inc. ("SBS") has submitted several filings for the record of this proceeding demonstrating that Spanish-language media does not compete with English-language media. In other words, Enligh-language and Spanish-language broadcasting constitute separate markets for competition and diversity purposes. The proposed Univision/HBC merger threatens to create substantial market power in numerous geographic markets for Spanish-language broadcasting to the detriment of advertisers, consumers, competition, and diversity. This letter submits data demonstrating the severity of that threat in the ten metropolitan areas with the largest Hispanic populations.

Attached hereto is a chart for each of the top ten Spanish-language broadcast markets displaying the market share of each participant in terms of combined television and radio advertising revenues for 2002.[1] In seven of the top ten markets, the combined entity's (Univision + HBC) post-merger market share will equal or exceed 60%, and in two of the top ten markets the combined entity's market share will exceed 70%. Indeed, in San Antionio, the combined entity will control a striking 80% of the market. Only in Brownsville/McAllen (13%) and New York (48%) will the combined entity have a market share below 50%. When Entravision's market share is included (Univision + HBC + Entravision), the combined entity's market share ranges from 48% in new York to 84% in Phoenix. For convenience, the table below summarized the distribution of revenue shares for the combined entity, with and without Entravision. As illustrated by the data in this table, the combined entity would account for a large majority of advertising revenues in 8 (or 9) of the top ten markets.

[1] The charts were prepared using the following methodology: The advertising data for both broadcast radio and broadcast television were obtained from BIA, In., through its *Media Access Pro* software (current as of June 5, 2003). BIA provides station-level revenue and ownership data for more than 13,000 radio stations and nearly 2,000 commercial television stations in the United States. Revenues from BIA are estimated using data from its proprietary survey of station managers and owners. For radio stations, BIA reports information on station format. These data were supplemented with information from the *2002 Television and Cable Factbook, 2002 U.S. Hispanic Market* (a publication of Strategy Research Corporation), and various internet websites, including *www.100000watts.com.*

First, all of the radio and television stations broadcasting to the ten metropolitan areas with the largest Hispanic populations were identified. Using information from BIA as well as internet-based research, each station's language format was determined. A radio station was classified as a Spanish-language station if a portion of the BIA format description was Spanish)BIA reports the current format, which may not necessarily correspond to the station's format in 2002, although we believe relevant changes, if any, to be minimal) or, alternatively, if it could be determined that a portion of the station's programming was in Spanish. Similarly, for television stations, a station was classified as Spanish-language if a portion of the station's programming was in Spanish. Because all Univision television stations broadcast in Spanish, this decision rule provides a conservative estimate of Univision's revenue share.

CUMULATIVE DISTRIBUTION OF 2002 BROADCAST ADVERTISING REVENUE SHARES*

Share	Univision + HBC	Univision + HBC + Entravision
>80%		1
>70%	2	5
≥60%	7	7
>50%	8	9
>40%	9	10

*Numbers may differ from those obtained from the charts due to rounding.

These high market shares—including above 70% in several markets—demonstrate that the merger will enable the new Univision/HBC to exercise substantial market or monopoly power to the detriment of both Spanish-speaking consumers and advertisers who seek to reach that audience. For "a share above 70% is usually strong evidence of monopoly power" and "a share between 50% and 70% can occasionally show monopoly power." *Broadway Delivery Corp.* v. *United Parcel Service of Am., Inc.*, 651 F.2d 122, 129 (2nd Cir. 1981). Even a share below 50% can support a finding of monopoly power when other indicia of such power—such as the high entry barriers present here—exist. *See id.* The consequences of a monopoly in Spanish-language broadcasting is not only higher rates for advertisers, but also a substantial loss in diversity of voices. Moreover, where, as here, the combined entity will control over 40% in all or virtually all of the major relevant markets, diminished economic performance is likely. *See FTC* v. *Swedish match*, 131 F. Supp. 2d 151, 166 (D.D.C. 2000) ("Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents a threat." *quoting United States* v. *Philadelphia National Bank*, 374 U.S. 321, 364 (1963)). In sum, the market shares shown here present a real risk of anticompetitive harm to Spanish-language advertisers, as well as a critical loss of diversity to Spanish-speaking Americans in these markets.

Moreover, the merger threatens both competition and diversity whether or not Spanish-language television and radio compete in the same market. The reason is that the merger gives Univision/HBC the power to exclude competition even if Spanish-language TV and radio belong in different markets. First, the Univision/HBC merger would raise already high entry barriers into Spanish-language radio. Advertising on Spanish-language TV is important to a Spanish-language radio station's ability to obtain significant audience. Indeed, several of SBS's stations only succeeded because of risky and expensive television advertising campaigns. However, after its acquisition of HBC, Univision—which dominates Spanish-language television—will have an incentive to refuse to deal with, or discriminate against, Spanish-language radio competitors (including SBS) who seek to advertise through Univision (and other properties) in order to advantage HBC. Second, after the merger, the combined entity will have the power to insist that Spanish-language advertisers who wish to advertise through both radio and television purchase time from both Univision and HBC rather than from the combined entity's rivals. Such difficult-to-detect and subtle tying arrangements or refusals to deal—realistic possibilities here—impair competition. *See, e.g., Lorain Journal Co.* v. *U.S.*, 342 U.S. 143 (1951). The resulting harm to competitors, including SBS, that is sure to follow will not only harm advertisers, but also will impair diversity.

To meet its obligations under the Communications Act, the FCC must undertake a detailed analysis of diversity and competition specific to a Spanish-language media markets implicated by this merger. In addition to the materials submitted last week and filed today, SBS intends to file shortly with the Commission further information demonstrating the severity of the threat to competition and diversity presented by the proposed merger.

Respectfully submitted,

/s/ Philip L. Verveer
Philip L. Verveer
Sue D. Blumenfeld
Michael G. Jones
David M. Don
WILLKIE FARR & GALLAGHER, 1875 K Street, NW., Washington, DC 20006, Telephone: (202) 303–1000

and

Bruce A. Eisen
Allan G. Moskowitz
KAYE SCHOLER, LLP, 901 15th Street, NW., Suite 1100, Washington, DC 20005
Attorneys for Spanish Broadcasting System Inc.

cc: Chairman Michael K. Powell, Commissioner Kathleen Q. Abernathy, Commissioner Michael J. Copps, Commissioner Kevin J. Martin, Commissioner Jonathan S. Adelstein, Susan M. Eid, Stacy R. Robinson, Jordan B. Goldstein, Catherine Crutcher Bohigian, Johanna Mikes, W. Kenneth Ferree, David Brown, Scott R. Flick, Counsel for Univision Communications, Inc., Roy R. Russo, Counsel for Hispanic Broadcasting Corp., Harry F. Cole, Counsel for Elgin FM Limited Partnership

SPANISH-LANGUAGE BROADCAST ADVERTISING REVENUES, 2002

[Los Angeles: Hispanic Population of 7.0 million]

	Percent
Univision	41
HBC	19
Entravision	5
SBS	6
Telemundo	13
Other	15

Notes: Advertising revenue-based satellite program services that also offer Spanish-language programming include services such as Galavision Cable Network, MTV Latin America and Viva Television Network.

Sources: 2002 BIA, Inc.; *2002 Television and cable Factbook; 2002 U.S. Hispanic Market, Strategy Research Corporation.*

SPANISH-LANGUAGE BROADCAST ADVERTISING REVENUES, 2002

[New York: Hispanic Population of 4.0 million]

	Percent
Univision	41
SBS	28
Telemundo	18
HBC	7
Other	6

Notes: Advertising revenue-based satellite program services that also offer Spanish-language programming include services such as Galavision Cable Network, MTV Latin America and Viva Television Network.

Sources: 2002 BIA, Inc.; *2002 Television and cable Factbook; 2002 U.S. Hispanic Market, Strategy Research Corporation.*

SPANISH-LANGUAGE BROADCAST ADVERTISING REVENUES, 2002

[*Miami:* Hispanic Population of 1.7 million]

	Percent
Univision	35
Telemundo	20
HBC	20
SBS	15
Other	9
Entravision	0.20

Notes: Advertising revenue-based satellite program services that also offer Spanish-language programming include services such as Galavision Cable Network, MTV Latin America and Viva Television Network.

Sources: 2002 BIA, Inc.; *2002 Television and cable Factbook; 2002 U.S. Hispanic Market, Strategy Research Corporation.*

SPANISH-LANGUAGE BROADCAST ADVERTISING REVENUES, 2002

[Chicago: Hispanic Population of 1.6 million]

	Percent
Univision	33
HBC	30
SBS	22
Telemundo	8
Entravision	4
Other	4

Notes: Advertising revenue-based satellite program services that also offer Spanish-language programming include services such as Galavision Cable Network, MTV Latin America and Viva Television Network.

Sources: 2002 BIA, Inc.; *2002 Television and cable Factbook; 2002 U.S. Hispanic Market,* Strategy Research Corporation.

SPANISH-LANGUAGE BROADCAST ADVERTISING REVENUES, 2002

[Houston: Hispanic Population of 1.6 million]

	Percent
Univision	32
HBC	42
Other	19

SPANISH-LANGUAGE BROADCAST ADVERTISING REVENUES, 2002—Continued

[Houston: Hispanic Population of 1.6 million]

	Percent
Telemundo	6

Notes: Advertising revenue-based satellite program services that also offer Spanish-language programming include services such as Galavision Cable Network, MTV Latin America and Viva Television Network.

Sources: 2002 BIA, Inc.; *2002 Television and cable Factbook; 2002 U.S. Hispanic Market,* Strategy Research Corporation.

SPANISH-LANGUAGE BROADCAST ADVERTISING REVENUES, 2002

[San Francisco/San Jose: Hispanic Population of 1.4 million]

	Percent
Univision	48
Other	19
Entravision	17
HBC	14
Telemundo	2

Notes: Advertising revenue-based satellite program services that also offer Spanish-language programming include services such as Galavision Cable Network, MTV Latin America and Viva Television Network.

Sources: 2002 BIA, Inc.; *2002 Television and cable Factbook; 2002 U.S. Hispanic Market,* Strategy Research Corporation.

SPANISH-LANGUAGE BROADCAST ADVERTISING REVENUES, 2002

[Dallas/Ft. Worth: Hispanic Population of 1.3 million]

	Percent
Univision	47
HBC	22
Telemundo	20
Entravision	8
Other	3

Notes: Advertising revenue-based satellite program services that also offer Spanish-language programming include services such as Galavision Cable Network, MTV Latin America and Viva Television Network.

Sources: 2002 BIA, Inc.; *2002 Television and cable Factbook; 2002 U.S. Hispanic Market,* Strategy Research Corporation.

SPANISH-LANGUAGE BROADCAST ADVERTISING REVENUES, 2002

[San Antonio: Hispanic Population of 1.2 million]

	Percent
Univision	43
HBC	37
SBS	10
Telemundo	7

SPANISH-LANGUAGE BROADCAST ADVERTISING REVENUES, 2002—Continued

[San Antonio: Hispanic Population of 1.2 million]

	Percent
Other	3

Notes: Advertising revenue-based satellite program services that also offer Spanish-language programming include services such as Galavision Cable Network, MTV Latin America and Viva Television Network.

Sources: 2002 BIA, Inc.; *2002 Television and cable Factbook; 2002 U.S. Hispanic Market,* Strategy Research Corporation.

SPANISH-LANGUAGE BROADCAST ADVERTISING REVENUES, 2002

[Phoenix: Hispanic Population of 1.0 million]

	Percent
Univision	47
HBC	22
Entravision	15
Telemundo	9
Other	7

Notes: Advertising revenue-based satellite program services that also offer Spanish-language programming include services such as Galavision Cable Network, MTV Latin America and Viva Television Network.

Sources: 2002 BIA, Inc.; *2002 Television and cable Factbook; 2002 U.S. Hispanic Market,* Strategy Research Corporation.

SPANISH-LANGUAGE BROADCAST ADVERTISING REVENUES, 2002

[Brownsville/McAllen: Hispanic Population of 1.0 million]

	Percent
Entravision	45
Other	30
HBC	13
Telemundo	12

Notes: Advertising revenue-based satellite program services that also offer Spanish-language programming include services such as Galavision Cable Network, MTV Latin America and Viva Television Network.

Sources: 2002 BIA, Incl; *2002 Television and cable Factbook; 2002 U.S. Hispanic Market,* Strategy Research Corporation.

July 9, 2003

Marlene H. Dortch
Secretary, Federal Communications Commission, TW–A325, 445 12th Street, SW., Washington, DC 20554

Re: Notice of *Ex parte* Presentation, MB 02–235

Dear Ms. Dortch: On July 8, Andrew Jay Schwartzman of the Media Access Project met with Susan Eid, Legal Advisor to the Chairman to discuss the proposed transfer of control of Hispanic Broadcasting Corporation.

Mr. Schwartzman took the position that the Commission should treat Spanish language radio as a separate market for purposes of this case, and that leads to the conclusion that the transaction is contrary to the public interest. He made two specific points.

First, Mr. Schwartzman discussed the extraordinary and insuperable barriers that any new entrant would face in trying to compete with the combined Univision/HBC entity. Unlike English language markets, a competitor would face great difficulty in making the audience aware of its service, as Univision would control the principal means of promoting and advertising a new radio station, *i.e.*, Spanish language broadcasting. Moreover, Clear Channel, which would be one of the largest shareholders of the combined companies, is the largest owner of outdoor advertising, which is the second most important advertising medium used for this purpose.

Mr. Schwartzman then turned to how the Spanish language market should be treated from a diversity perspective. He noted that under the FCC's 1981 radio deregulation decision, broadcasters were freed from the obligation to serve every enumerated audience segment in their community. They were, however, expected to demonstrate that they have met the problems needs and interests of whatever niche audience segment they might have chosen to serve. Plainly then, the Commission treated Hispanic other minority communities as distinct for this purpose as well.

In response to questioning from Ms. Eid, Mr. Schwartzman explained that he thought it was entirely logical for the Commission to conduct an analysis of the impact of a transaction on particular segments of the community while still including the same stations in voice counts and other analyses of the entire market. Thus, the question of how many stations a particular broadcaster might own in a market would be a separate issue from whether it held excessive power within the Spanish language submarket.

Sincerely,
Andrew Jay Schwartzman
President and CEO

cc. Susan Eid

July 11, 2003

W. Kenneth Ferree, Esquire
Chief, Media Bureau, Federal Communications Commission, 445 12th Street, NW., Room 3–C740, Washington, DC 20554

Re: Applications for Transfer of Control of Hispanic Broadcasting Corp., and Certain Subsidiaries, Licensees of KGBT(AM), Harlingen, Texas *et al.* (Docket No. MB 02–235, FCC File Nos. BTC–20020723ABL *et al.*).

Dear Ms. Dortch: The National Hispanic Policy Institute, Inc. ("NHPI") hereby replies to the June 25, 2003 letter filed by Univision Communications, Inc. ("Univision"). In its letter Univision again restates its contention that, if the proposed merger with Hispanic Broadcasting Corporation ("HBC") is granted, Univision's interest in Entravision Communications Corporation ("Entravision") will be non-attributable.

In arguing for a "bright-line" attribution test, Univision claims that it demonstrated in a December 9, 2002 letter to the Media

Bureau that its interest in Entravision is below the 33% threshold equity/debt plus ("EDP") ratio. In fact, Univision failed to make any such showing.

Univision's December 9, 2002 letter was filed in response to a November 29, 2002 Commission request for further information. The Commission was responding to a NHPI showing, that Entravision had outstanding debts owed to Univision. Univision had previously represented to the Commission that "Univision has no debt interest in Entravision."[1] The Commission ordered Univision to "explain the origin and nature of such accounts." It further ordered Univision to, "[p]rovide an audited financial statement to support any factual assertion, and a detailed showing demonstrating compliance with the Equity/Debt Plus Rule."[2]

In response to the Commission's letter, Univision submitted certain documentation, which it claimed showed that it was in compliance with the Commission's EDP rule. However, the evidence Univision provided was incomplete and not audited.[3] As NHPI stated in its December 16, 2002 letter:

"Univision has again misled the Commission and has failed to be forthcoming and candid in its representations to the Commission. * * * Entravision's DEF 14A shows that "Andrew Hobson, Executive Vice President of Univision, holds 211,136 Class A shares of Entravision. The DEF 14A also shows that Michael D. Wortsman, Co-President of Univision Television Group, Inc., holds 56,136 Class A shares of Entravision.

"Entravision's DEF 14A reports stock ownership of (1) persons or entities known to be the beneficial owners of more than 5% of the outstanding shares of stock, (2) each of its directors, and (3) certain key executives of the company. Mr. Hobson and Mr. Wortsman's share holdings were reported because, at the time, they were members of Entravision's board of directors. Entravision's DEF 14A does not require it to report shares held by Univision insiders unless their individual holdings exceed 5% of the outstanding shares. Thus, in addition to Mr. Hobson and Mr. Wortsman, it is quite possible that other Univision officers and directors hold Entravision shares. There may also be other Entravision debts owed to Univision that are not reported in SEC filings. Had an independent audit been conducted, an honest and complete answer could have been provided."

For the Commission to make a bright-line determination concerning compliance with the EPD rule, it must know the percentage of equity and debt a party holds. In this case, the commission knows that Entravision has outstanding debts owed to Univision. What the Commission does not know, is the amount and percentage of Entravision's debt owed to Univision. Also unknown, is how many shares of Entravision's stock are held by Univision's officers and directors. See, Section 73.3555, note 2. Here again Univision has refused to provide this information. Without knowing the extent of equity, and the extent of debt Univision, its officers and directors hold in Extravision, the FCC cannot determine whether Univision complies with the EDP rule.

Univision's failure to produce information, which is easily obtained and uniquely within its control, permits the Commission to draw the negative conclusion that if the information were produced it would show that Univision, post-merger, will still have an attributable interest in Entravision. *Tendler* v. *Jaffe*, 203 F.2d 14, 19 (D.C. Cir. 1953) ("The omission by a party to produce relevant and important evidence of which he has knowledge, and which is peculiarly within his control, raises the presumption that if produced the evidence would be unfavorable to his cause."); *International Union, UAW* v. *National Labor Relations Board*, 459 F.2d 1329, 1336 (D.C. Cir. 1972) ("the failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the * * * document, if brought, would have exposed facts unfavorable to the party.") (quoting J. Wigmore, Evidence § 284, 3rd ed. 1940); *United States* v. *Robinson*, 233 F.2d 517, 519 (D.C. Cir. 1956) ("[u]nquestionably the failure of a defendant in a civil case to testify or offer other evidence within his ability to produce and which would explain or rebut a case made by the other side, may, in a proper case, be considered a circumstance against him and may raise presumption that the evidence would not be favorable to his position"); *Washoe Shoshone Broadcasting*, 3 FCC Rcd 3948, 3952–53 (Rev. Bd. 1988); *Thomell Barnes* v. *Illinois Bell Telephone Co.*, 1 FCC 2d 1247, 1274 (Rev. Bd. 1965). Univision's failure to produce evidence permits the Commission to include that Univision's interest in Entravision is attributable as a matter of law.

Univision does not meet the FCC's bright-line EDP test. Even if Univision could demonstrate that its interest in Entravision is below the 33% debt/equity threshold, its relationship with Entravision is such that it would still be able to continue to exert significant influence over key licensee deicsions. As the Commission has said:

"In adopting the EDP rule, we affirm our tentative conclusion * * * that there is the potential for certain substantial investors or creditors to exert significant influence over key licensee decisions, even through they do not hold a direct voting interest * * * which may undermine the diversity of voices we seek to promote. They may, through their contractual rights and their ongoing right to communicate freely with the licensee, exert as much, if not more, influence or control over some corporate decisions as voting equity holders whose interests are attributable.[4]"

Univision's relationship with Entravision is significantly different from previous relationships that the FCC has found to be non-attributable. For this reason, the cases Univision cites in support of its claim that its interest in Entravision, will be nonattributable are inapposite.

Univision debt and equity interests in Entravision have historically been attributable interest. Univision has a long relationship with Entravision as a business partner, program supplier, creditor and financial backer. In return for Univision's support, Entravision has granted Univision significant rights, including the right to appoint two directors to its board and the right to influence its core operations. As Entravision's SEC 10K acknowledges, "*Univision has significant influence over our business.*" Univision proposes to convert its voting shares into non-voting shares and to give up its rights to appoint directors, to Entravision's board. This, however, will not change the fundamental well-established relationship between Univision and Entravision.

In none of the case Univision sites, did the Commission permitted an applicant to convert a long-standing attributable relationship with another party into a non-attributable interest. For example, General Electric's purchase of Telemundo fully complied with the multiple ownership rules without the need to convert previously held attributable interests into non-voting, non-attributable interests.[5] If, for example, General Electric's proposed purchase of Telemundo did not comply with the FCC's multiple ownership rules and General Electric proposed to convert its attributable interest in NBC into a non-voting interest, and further, if the FCC had permitted such a transaction, then Univision would have a case on point.

Univision's letter has little to say about its plan to retain the exclusive right to make national sales on behalf Entravision. Section 73.658(i) prohibits a television network from representing individual stations, affiliated with the network, for the sale of non-network time. In the 1970s, Univision's predecessor entity argued that, as fledgling network, a waiver of this rule was required to enhance the development of Spanish language television.[6] Univision's letter merely states that Telemundo was given the "exact same waiver." Here again the situation is quite different. In *Telemundo II*, there was no issue concerning Telemundo's inappropriate exercise of control over its affiliates. In this case, the central question is, will Univision's exclusive right to make national sales on behalf of Entravision give Univision the right to influence Entravision's core operations, especially its radio station holdings?

Univision's letter cites, with approval, the Commission's statement, "[t]he mass media attribution rules seek to identify those interests in or relationships to licensees that confer on their holders a degree of influence or control such that the holders have a

[1] Univision Opposition to Petition to Deny, at p. 11.

[2] FCC letter dated November 29, 2002.

[3] Univision letter dated December 9, 2003.

[4] *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Report and Order*, 14 FCC Rcd 12559, 12582–3 (1999) ("*Attribution Order*").

[5] *Telemundo Communications, Group, Inc.*, 17 FCC Rcd 6958 (2002). *Telemundo II).*

[6] *Amendment of § 73.658(i) of the commission's Rules*, 5 FCC Rcd 7280 (1990).

realistic potential *to affect the programming decisions of licensees* or other core operating functions."[7] The FCC, while granting a waiver of the national spot sales rule to Univision and Telemundo, maintained the rule for other, non-Spanish language television networks. The FCC reasoned that without the rule networks would be able to exert undue influence over affiliate programming decisions. The right to sell national spot advertising gives Univision significant rights to influence Entravision, including, as the Commission has stated, the power to influence programming decisions. At a minimum, the FCC should forbid Univision from making national spot sales on behalf of Entravision, if the proposed merger is approved.

Converting Univision's voting shares in Entravision into non-voting shares will not fundamentally change the existing relationship. Entravision has been and will continue to be dependent on Univision for it continued survival. Univision, through its control of national sales and it absolute right to grant or deny new network affiliations, will be able to control financial decisions, programming and personnel at Entravision owned radio stations, thus ensuring that Entravision's radio stations will not compete with HBC's radio stations. Such influence will diminish diversity and stifle competition, two key aspects of the FCC local ownership rules.

Sincerely,
Arthur, Belendiuk
Counsel to National Hispanic Policy Institute, Inc.

cc: Chairman Michael K. Powell, Commissioner Kathleen Q. Abernathy, Commissioner Michael J. Copps, Commissioner Kevin J. Martin, Commissioner Jonathan S. Adelstein, David Brown, Esquire (Media Bureau, FCC), Barbara Kreisman, Esquire (Video Division, Media Bureau, FCC), Lawrence N. Cohn, Esquire, (Counsel for The Shareholders of Hispanic Broadcasting Corp.), Scott R. Flick, Esquire (Counsel for Univision Communications, Inc.), Harry F. Cole, Esquire (Counsel to Elgin FM Limited Partnership)

[FR Doc. 03–28791 Filed 11–20–03; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under section 221(a) of the Trade Act of 1974 ("the Act") and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Division of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to section 221(a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than December 8, 2003.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Division of Trade Adjustment Assistance, at the address shown below, not later than December 8, 2003.

The petitions filed in this case are available for inspection at the Office of the Director, Division of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room C–5311, 200 Constitution Avenue, NW., Washington, DC 20210.

Signed at Washington, DC, this 17th day of November 2003.

Timothy Sullivan,

Director, Division of Trade Adjustment Assistance.

APPENDIX

[Petitions instituted between 11/03/2003 and 11/07/2003]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
53,405	Authentic Fitness Corp. (Wkrs)	Los Angeles, CA	11/03/2003	10/16/2003
53,406	F/V Patricia Diann (Comp)	Cordova, AK	11/03/2003	10/13/2003
53,407	Alice Manufacturing (Wkrs)	Easley, SC	11/03/2003	10/28/2003
53,408	Elastic Corp. of America (Comp)	Woolwine, VA	11/03/2003	10/21/2003
53,409	Delta International Machinery (Comp)	Tupelo, MS	11/03/2003	10/11/2003
53,410	Nidec America Corporation (MA)	Canton, MA	11/03/2003	10/28/2003
53,411	Cognati Industries (GMP)	Bluffton, IN	11/03/2003	10/08/2003
53,412	Fort Payne Socks, Inc. (Comp)	Fort Payne, AL	11/03/2003	10/29/2003
53,413	MTD Southwest, Inc. (Comp)	Chandler, AZ	11/03/2003	10/31/2003
53,414	DuPont Photomasks, Inc. (Wkrs)	Danbury, CT	11/03/2003	10/31/2003
53,415	Elementis Chromium LP (Wkrs)	Corpus Christi, TX	11/03/2003	05/02/2003
53,416	Wolverine Pattern and Machine (IAM)	Saginaw, MI	11/03/2003	10/31/2003
53,417	National Pattern, Inc. (IAM)	Saginaw, MI	11/03/2003	10/31/2003
53,418	Springfield LLC (Comp)	Gaffney, SC	11/03/2003	10/27/2003
53,419	Encee Inc. (Wkrs)	Eden, NC	11/03/2003	10/24/2003
53,420	Surgical Specialties Corp. (Wkrs)	Ada, OK	11/04/2003	11/04/2003
53,421	Seamless Textiles (PR)	Humacao, PR	11/04/2003	10/10/2003
53,422	United Airlines (Wkrs)	Elk Grove, IL	11/04/2003	11/03/2003
53,423	Drexel Heritage Furniture Industries (Wkrs)	Hildebran, NC	11/04/2003	10/24/2003
53,424	Clore Automotive (MN)	Eden Prairie, MN	11/04/2003	10/30/2003
53,425	Trane and American Standards Co's (MN)	White Bear Lake, MN	11/04/2003	10/30/2003
53,426	Neutronics, Inc. (Comp)	Phoenix, AZ	11/04/2003	10/27/2003
53,427	Puzzle-Craft (MN)	Wabasso, MN	11/04/2003	10/28/2003
53,428	Hawkeye Group (Wkrs)	Mediapolis, IA	11/04/2003	10/23/2003
53,429	R. Leon Williams Lumber Co. (ME)	Clifton, ME	11/04/2003	10/23/2003

[7] Univision, June 25, 2003 letter citing the *Attribution Order at p. 12560,* (emphasis added.

APPENDIX—Continued

[Petitions instituted between 11/03/2003 and 11/07/2003]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
53,430	EMF Corporation (Wkrs)	Burkesville, KY	11/04/2003	10/21/2003
53,431	Sweetwater Apparel, Inc. (Wkrs)	Collinwood, TN	11/04/2003	10/31/2003
53,432	Millennium A R Haire (Comp)	Thomasville NC	11/04/2003	10/28/2003
53,433	TT Electronics/IRC, Inc. (Comp)	Boone, NC	11/04/2003	10/28/2003
53,434	Sara Lee Coffee and Tea (OK)	Oklahoma City, OK	11/04/2003	10/10/2003
53,435	Manar, Inc. (Comp)	Henry, TN	11/04/2003	10/24/2003
53,436	Sanmina—SCI (ME)	Westbrook, ME	11/04/2003	10/27/2003
53,437	Sequel (Comp)	Willow Springs, MO	11/04/2003	11/03/2003
53,438	L. Handy Co., Inc. (Wkrs)	Worcester, MA	11/04/2003	10/31/2003
53,439	AM Communications, Inc. (Comp)	Quakertown, PA	11/04/2003	10/31/2003
53,440	Nestronix, Inc. (Comp)	Quakertown, PA	11/04/2003	10/31/2003
53,441	Coca Cola North America (NJ)	Hightstown, NJ	11/04/2003	11/03/2003
53,442	Planto Furniture Mfg. Co., Inc. (Comp)	San Antonio, TX	11/05/2003	11/04/2003
53,443	Deco Engineering, Inc. (Comp)	Royal Oak, MI	11/05/2003	10/03/2003
53,444	Emerson Process Management Power (Comp).	Pittsburgh, PA	11/05/2003	11/05/2003
53,445	Telewise Communications, Inc. (Wkrs)	San Jose, CA	11/05/2003	11/04/2003
53,446	Hexel (Comp)	Kent, WA	11/05/2003	10/31/2003
53,447	J.M. Smucker Co. (Wkrs)	Woodburn, OR	11/05/2003	11/03/2003
53,448	Texas Instruments (Wkrs)	Tucson, AZ	11/05/2003	10/30/2003
53,449	Chevron Phillips Chemical (PACE)	Port Arthur, TX	11/05/2003	10/14/2003
53,450	CHC Industries, Inc. (Comp)	Jacksonville FL	11/05/2003	11/03/2003
53,451	EDM Corporation (Comp)	Piqua, OH	11/05/2003	01/04/2003
53,452	Cadillac Curtain Corporation (Comp)	Covington, TN	11/05/2003	10/27/2003
53,453	Giddings Lewis (USWA)	Menominee, MI	11/05/2003	10/17/2003
53,454	Acusis (Wkrs)	Pittsburgh, PA	11/05/2003	10/30/2003
53,455	Cascade West Sportswear (WA)	Puyallup, WA	11/05/2003	11/04/2003
53,456	Asbury Fluxmaster of Utah, Inc. (Wkrs)	Ogden, UT	11/05/2003	11/04/2003
53,457	Thomson, Inc. (Comp)	Indianapolis, IN	11/06/2003	10/21/2003
53,458	807 Cutting Services, Inc. (Wkrs)	El Paso, TX	11/06/2003	10/28/2003
53,459	Lindberg, Div. of SPX (Wkrs)	Watertown, WI	11/06/2003	10/27/2003
53,460	Shelby Elastics of NC, LLC (Comp)	Mountain City, TN	11/06/2003	10/27/2003
53,461	Symtech, Inc. (Wkrs)	Spartanburg, SC	11/06/2003	10/15/2003
53,462	Marshall Brass (Comp)	Marshall, MI	11/06/2003	11/03/2003
53,463	Wings West (Comp)	Santa Ana, CA	11/06/2003	10/23/2003
53,464	TECT—Utica (NY)	Whitesboro, NY	11/06/2003	10/27/2003
53,465	Tomco Products, Inc. (Comp)	Painesville, OH	11/06/2003	10/27/2003
53,466	Berkar Knittin Corp. (Comp)	Brooklyn, NY	11/06/2003	10/22/2003
53,467	Gasboy International, LLC (Comp)	Lansdale, PA	11/07/2003	11/07/2003
53,468	LF Brands, Inc. (Comp)	New York, NY	11/07/2003	11/05/2003
53,469	Wexco Corp. (Comp)	Lynchburg, VA	11/07/2003	11/06/2003
53,470	Motorola, Inc. (Wkrs)	Rockford, IL	11/07/2003	11/04/2003
53,471	GE Automation Services (Wkrs)	Greenville, SC	11/07/2003	11/06/2003
53,472	Sherman-Feinberg Corp. (Comp)	South Boston, MA	11/07/2003	11/05/2003
53,473	Farnsworth Fibre Corp. (Comp)	S. Boston, MA	11/07/2003	11/05/2003
53,474	ETCO, Inc. (Comp)	Warwick, RI	11/07/2003	11/06/2003
53,475	Glenoit Fabrics (Wkrs)	Tarboro, NC	11/07/2003	10/31/2003
53,476	Weidmann Systems International, Inc. (Wkrs)	St. Johnsbury, VT	11/07/2003	10/27/2003
53,477	XDU Classics, Inc. (Comp)	Piedmont, AL	11/07/2003	10/29/2003
53,478	Edgcomb Metals (USWA)	Indianapolis, IN	11/07/2003	11/06/2003
53,479	Fabricating Engineering, Inc. (UAW)	Davisburg, MI	11/07/2003	11/05/2003
53,480	Lindberg Corp. (Wkrs)	Racine, WI	11/07/2003	10/31/2003
53,481	Springs Industries (Comp)	Laurel Hill, NC	11/07/2003	10/31/2003
53,482	Siemens Energy and Automation, Inc. (Comp).	Tucker, GA	11/07/2003	11/05/2003
53,483	Active Wear, Inc. (Comp)	Martinsville, VA	11/07/2003	11/04/2003
53,484	Powerwave Technologies (CA)	El Dorado Hills, CA	11/07/2003	10/30/2003
53,485	Coutts Library Services (Wkrs)	Niagara Falls, NY	11/07/2003	10/28/2003
53,486	Stanley Services (Wkrs)	Henderson, NC	11/07/2003	11/04/2003
53,487	National Textiles (Comp)	Eden, NC	11/07/2003	11/05/2003
53,488	FNW—Familiar Northwest (Wkrs)	Portland, OR	11/07/2003	10/27/2003
53,489	Bell Sponging (UNITE)	Allentown, PA	11/07/2003	10/28/2003
53,490	Phillips Plastics Corp. (Wkrs)	Post Falls, ID	11/07/2003	11/05/2003
53,491	State Pattern Works (WI)	Greendale, WI	11/07/2003	11/05/2003
53,492	Falcon Shoe (ME)	Lewiston, ME	11/07/2003	11/04/2003

[FR Doc. 03–29664 Filed 11–26–03; 8:45 am]
BILLING CODE 4510–30–M

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,776]

Biddle Precision Components, Sheridan, IN; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on September 8, 2003 in response to a petition filed on behalf of workers of Biddle Precision Components, Sheridan, Indiana.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 3rd day of October 2003.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29683 Filed 11–26–03; 8:45 am]
BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,545]

Bose Corporation, Park Place Manufacturing Plant, Framingham, Massachusetts; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on September 22, 2003, applicable to all workers of Bose Corporation, Framingham, Massachusetts. The notice will soon be published in the **Federal Register**.

At the request of the State Agency, the Department reviewed the certification for workers of the subject firm. The Department's review of the certification and new information obtained from a company official show that the worker group covered by the shift in production of home entertainment products to Mexico should have been limited to workers at the Park Place Manufacturing plant. Workers producing home entertainment products at the Park Place Manufacturing plant are separately identifiable from workers producing other products at Bose Corporation, Framingham, Massachusetts.

Accordingly, the Department is amending the certification to limit the certification to the workers of Bose Corporation, Park Place Manufacturing Plant in Framingham, Massachusetts.

The amended notice applicable to TA-W–52,545 is hereby issued as follows:

Workers of Bose Corporation, Park Place Manufacturing Plant, Framingham, Massachusetts, who became totally or partially separated from employment on or after July 25, 2002 through September 22, 2005, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974."

Signed at Washington, DC, this 3rd day of November 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29684 Filed 11–26–03; 8:45 am]
BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,021]

Carm Newsome Hosiery, Inc., Ft. Payne, AL; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on September 26, 2003, in response to a petition filed on behalf of workers at Carm Newsome Hosiery, Inc., Ft. Payne, Alabama.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 3rd day of October, 2003.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29679 Filed 11–26–03; 8:45 am]
BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,451]

EDM Corporation, Piqua, Ohio; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on November 5, 2003, in response to a petition filed by a company official on behalf of workers at EDM Corporation, Piqua, Ohio.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 10th day of November, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29676 Filed 11–26–03; 8:45 am]
BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,232]

Fall River Manufacturing II, Gaffney, SC; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on October 14, 2003, in response to a petition filed on by a company official on behalf of workers of Fall River Manufacturing II, Gaffney, South Carolina.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 10th day of November, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29678 Filed 11–26–03; 8:45 am]
BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,193]

Fishing Vessel (F/V) Eldorado, Mt. Vernon, WA; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on October 8, 2003, in response to a petition filed by a company official on behalf of workers of Fishing Vessel (F/V) Eldorado, Mt. Vernon, Washington.

All workers were separated from the subject firm more than one year before the date of the petition. Section 223 (b) of the Act specifies that no certification may apply to any worker whose last separation occurred more than one year before the date of the petition. Consequently, further investigation in

this case would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC, this 16th day of October, 2003.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29669 Filed 11–26–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,069]

Fishing Vessel (F/V) Family Pride, Kodiak, AK; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on September 30, 2003, in response to a petition filed by a company official on behalf of workers of F/V Joseph Booney, Cordova, Alaska. Workers at the subject firm produce frozen salmon.

The Department of Labor issued negative determinations applicable to the petitioning group of workers on August 27, 2003 (TA–W–52,462). No new information or change in circumstances is evident which would result in a reversal of the Department's previous determination. Consequently, further investigation would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC, this 16th day of October, 2003.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29670 Filed 11–26–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,068]

Fishing Vessel (F/V) Aquarius, Kodiak, AK; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on October 1, 2003, in response to a petition filed by a company official on behalf of workers of Fishing Vessel (F/V) Aquarius, Kodiak, Alaska.

The investigation revealed that the subject firm did not separate or threaten to separate a significant number or proportion of workers as required by section 222 of the Trade Act of 1974. Significant number or proportion of the workers means that at least three workers in a firm with a workforce of fewer than 50 workers would have to be affected. Separations by the subject firm did not meet this threshold level; consequently the investigation has been terminated.

Signed at Washington, DC, this 16th day of October, 2003.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29671 Filed 11–26–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,066]

Fishing Vessel (F/V) Deborah Renee, Clarkston, WA; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on October 1, 2003, in response to a petition filed by a company official on behalf of workers of F/V Deborah Renee, Clarkston, Washington.

The investigation revealed that the subject firm did not separate or threaten to separate a significant number or proportion of workers as required by section 222 of the Trade Act of 1974. Significant number or proportion of the workers means that at least three workers in a firm with a workforce of fewer than 50 workers would have to be affected. Separations by the subject firm did not meet this threshold level; consequently the investigation has been terminated.

Signed at Washington, DC, this 16th day of October, 2003.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29672 Filed 11–26–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,037; TA–W–53,037A]

Fishing Vessel (F/V) Big Dog, F/V Miss Julie, Palmer, Alaska; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on October 1, 2003, in response to a petition filed by a company official on behalf of workers of F/V Big Dog, Palmer, Alaska (TA–W–53,037) and F/V Miss Julie, Palmer, Alaska (TA–W–53,037A).

The investigation revealed that the subject firm did not separate or threaten to separate a significant number or proportion of workers as required by section 222 of the Trade Act of 1974. Significant number or proportion of the workers means that at least three workers in a firm with a workforce of fewer than 50 workers would have to be affected. Separations by the subject firm did not meet this threshold level; consequently the investigation has been terminated.

Signed at Washington, DC, this 16th day of October, 2003.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29674 Filed 11–26–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,342]

Halmode Apparel, Inc., Roanoke, Virgina; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on October 24, 2003, in response to a worker petition filed on behalf of workers at Halmode Apparel, Inc., Roanoke, Virginia.

The petitioning group of workers is covered by an earlier petition instituted on October 6, 2003 (TA–W–53,156), that is the subject of an ongoing investigation for which a determination has not yet been issued. Further investigation in this case would serve no purpose. Consequently, the investigation under this petition has been terminated.

Signed at Washington, DC, this 5th day of November, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29677 Filed 11–26–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,336]

Henredon Furniture, Industries, Spruce Pine, NC; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, an investigation was initiated on October 24, 2003, in response to a petition filed by a company official on behalf of workers at Henredon Furniture, Industries, Spruce Pine, North Carolina (TA–W–53,336).

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC, this 18th day of November, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29667 Filed 11–26–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,057]

Lucent Technologies, Phoenix, AZ; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on September 30, 2003, in response to a worker petition filed on behalf of workers at Lucent Technologies, Phoenix, Arizona.

This investigation has revealed, through the records of the State Agency, that none of the petitioners were employed by Lucent Technologies. They were employed, and released by, a predecessor firm at the same location, AG Communications Systems.

The Department issued a negative determination applicable to the workers of AG Communications Systems, Phoenix, Arizona, on September 2, 2003 (TA–W–53,057).

Consequently, further investigation would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC, this 18th day of November, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29673 Filed 11–26–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974, as amended, (19 U.S.C. 2273), the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers (TA–W) number and alternative trade adjustment assistance (ATAA) by (TA–W) number issued during the periods of October and November 2003.

In order for an affirmative determination to be made and a certification of eligibility to apply for directly-impacted (primary) worker adjustment assistance to be issued, each of the group eligibility requirements of section 222(a) of the Act must be met.

I. Section (a)(2)(A) all of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. the sales or production, or both, of such firm or subdivision have decreased absolutely; and

C. increased imports of articles like or directly competitive with articles produced by such firm or subdivision have contributed importantly to such workers' separation or threat of separation and to the decline in sales or production of such firm or subdivision; or

II. Section (a) (2) (B) both of the following must be satisfied:

A. A significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated;

B. there has been a shift in production by such workers' firm or subdivision to a foreign county of articles like or directly competitive with articles which are produced by such firm or subdivision; and

C. One of the following must be satisfied:

1. The country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;

2. the country to which the workers' firm has shifted production of the articles to a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act; or

3. there has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

Also, in order for an affirmative determination to be made and a certification of eligibility to apply for worker adjustment assistance as an adversely affected secondary group to be issued, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) Significant number or proportion of the workers in the workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The workers' firm (or subdivision) is a supplier or downstream producer to a firm (or subdivision) that employed a group of workers who received a certification of eligibility to apply for trade adjustment assistance benefits and such supply or production is related to the article that was the basis for such certification; and

(3) either—

(A) the workers' firm is a supplier and the component parts it supplied for the firm (or subdivision) described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) a loss or business by the workers' firm with the firm (or subdivision) described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

Negative Determinations for Worker Adjustment Assistance

In the following cases, the investigation revealed that the criteria for eligibility have not been met for the reasons specified.

The investigation revealed that criteria (a)(2)(A)(I.C.)(Increased imports) and (a)(2)(B)(II.B) (No shift in production to a foreign country) have not been met.

TA–W–53,014; Pulaski Furniture Corp., Martinsville, VA

TA–W–53,030; Dayton Superior Corp., Miamisburg, OH

TA–W–52,974; Corning Photonics Technology, Corning Lasertron Div., a subsidiary of Corning, Inc., Bedford, MA

TA–W–53,094; Eastman Machine Co., Buffalo, NY

TA–W–53,101; The Heil Co., d/b/a Heil Trailer International, a wholly owned subsidiary of Dover Corp., Lancaster, PA

TA–W–53,136; Edgerton Forge, Inc., a subsidiary of Avis Industrial Corp., Edgerton, OH

TA–W–53,048; General Shoelace Co., Lincolnton, NC
TA–W–53,019; Thermal Engineering International Utility Products Div., Joplin, MO
TA–W–52,922; Curtis Fine Papers, Adams Mill, Adams, MA
TA–W–53,257; Waggon-Cellers, Inc., Amarillo, TX
TA–W–53,047; Martin Automatic, Inc., Rockford, IL
TA–W–52,536; Wintron Technologies, Video Display Corp/Div., Howard, PA
TA–W–52,826; Tomak Precision, Lebanon, OH
TA–W–53,135; Castle Rubber, LLC, East Butler, PA
TA–W–53,168; Allegheny Foundry Co., Bolivar, PA
TA–W–52,770; Tower Mills, Inc., Burlington, NC
TA–W–52,999; Ace Packaging Systems, a subsidiary of International Paper, Monroe Facility, Monroe, MI
TA–W–53,027; Sennett Steel Corp., Warren, MI
TA–W–52,995; Pressed Steel Tank Co, Inc., West Allis, WI
TA–W–52,502; Norwood Promotional Products, Sleepy Eye, MN
TA–W–52,702; Atlas Castings and Technology, Tacoma, WA
TA–W–53,170; Tex Tech Industries, North Monmouth, ME
TA–W–53,188; Caliendo Savio Enterprises, Inc., New Berlin, WI
TA–W–53,204; CDI Corp., Corvalis, OR
TA–W–53,217; Rexnord Industries, Inc., Coupling Div., New Berlin, WI
TA–W–52,893; R and J Seafood, Kasilof, AK
TA–W–52,988; Simplot Meat Products, Nampa, ID
TA–W–52,620; Corbin Russwin, Inc., Clarksdale, MS
TA–W–52,630; Ramatech, LLC, Belleville, MI
TA–W–52,881; Mohican Mills, Lincolnton, NC
TA–W–53,018; O.P. Link Handle Co., Inc., Salem Facility, Salem, IN
TA–W–52,941; Grede Foundries, Inc., Milwaukee Steel Foundry, Milwaukee, WI

The investigation revealed that criteria (a)(2)(A)(I.C) (increased imports) and (a)(2)(B)(II.C) (has shifted production to a foreign country) have not been met.

TA–W–53,001; Sartorius Environmental Technology, Inc., Dubuque, IA
TA–W–53,025; Invensys-Robertshaw, Long Beach, CA
TA–W–53,012; Nitram, Inc., Tampa, FL
TA–W–52,749; Akin Industries, Inc., Case Goods Div., Monticello, AR

The workers firm does not produce an article as required for certification under Section 222 of the Trade Act of 1974.

TA–W–52,818; Hewlett-Packard Co., Open VMS Data Protector Team, Colorado Springs, CO
TA–W–52,816; Litton Systems, Inc., Anaheim, CA
TA–W–53,058; Seagate Technology, LLC, Research and Development Div., Oklahoma City, OK
TA–W–52,821; Intel Corp., Colorado Springs, CO
TA–W–53,065; Red Devil, Inc., Union, NJ
TA–W–53,085; Joe Greene Design and Co., LLC, Hickory, NC
TA–W–53,093; The William Carter Co., Operations Div., Central Planning Department, Griffin, GA
TA–W–53,177; Agilent Technologies, Automated Test Group, EMT Support and Delivery, Loveland, CO
TA–W–53,209; Computer Sciences Corp., Financial Services Group (FSG), East Hartford, CT
TA–W–53,243; Crown Media International, d/b/a Hallmark Channel, a div. of Crown Media Holdings, Greenwood Village, CO
TA–W–52,990; Murata Machinery USA, Inc., Charlotte, NC
TA–W–52,820; Telemundo Network Group, LLC, Hialeah, FL
TA–W–53,348; Sampo Corp. of America, Fremont, CA
TA–W–53,078; Advanced Technical Resources, Sunnyvale, CA
TA–W–52,979; Conocophillips, Odessa, TX
TA–W–53,097; Phycomp\Yageo America, El Paso, TX
TA–W–53,052; Rohm and Hass Co., Corp. Headquarters, Accounts Payable Dept., Philadelphia, PA
TA–W–53,282; JP Morgan Chase Bank, Shared Application Delivery and Consulting Services Group, Houston, TX and Commercial Loan Technology Div., Houston, TX
TA–W–52,672; Intel Corp., Quality Program Engineering Managers, Hillsboro, OR
TA–W–53,103; Microdyne Outsourcing, Inc., a div. of L3 Communications, Torrance, CA
TA–W–53,061; Consul Risk Management, Inc., Acton, MA
TA–W–53,185; Lawson Software, Inc., St. Paul, MN

The investigation revealed that criterion (a)(2)(A)(I.A) (no employment decline) has not been met.

TA–W–53,172; Meadwestvaco Corp., Envelope Div., Enfield, CT
TA–W–53,036; ABA–PGT, Inc., Manchester, CT
TA–W–53,161; ATC Distribution Group, Formerly Aceomatic Recon, McKees Rocks, PA
TA–W–52,791; Rothtec Engraving Corp., Spartanburg, SC

The investigation revealed that criteria (a)(2)(A)(I.B) (Sales or production, or both, did not decline) and (a)(2)(B)(II.B) (has shifted production to a county not under the free trade agreement with U.S.) have not been met.

TA–W–52,841; Wheeling-Pittsburgh Steel Corp., Steubenville, OH
TA–W–53,138; Amhil Enterprises, Inc., Dickson, TN
TA–W–53,063; J.L. Williams Co., Inc., Nampa, ID
TA–W–52,870; Shell Exploration and Production Co., Houston, TX
TA–W–52,624–A; Shell Exploration and Production Co., Houston, TX and New Orleans, LA
TA–W–52,538; Custom Tool & Design, Inc., Erie, PA

The investigation revealed that criteria (2) has not been met. The workers firm (or subdivision) is not a supplier or downstream producer to trade-affected companies

TA–W–52,927; Railway Handle Corp., Kenbridge, VA
TA–W–52,907; Dyecraftsmen, Inc., Taunton, MA

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued; the date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of (a) (2) (A) (increased imports) of section 222 have been met.

TA–W–53,109; Hickory Throwing Co., Hickory, NC: September 29, 2002.
TA–W–53,117; Quality Investment Castings, Inc., Blandon, PA: September 23, 2002.
TA–W–52,876; Excel Finishing Cporp., Ridgewood, NY: September 8, 2002.
TA–W–53,142; Century Furniture Industries, Case Goods Div., a subsidiary of CV Industries, Hickory, NC: September 30,2002.
TA–W–53,144; Thos. Moser Cabinetmakers, Auburn, ME:September 23, 2002.
TA–W–52,993; Chas W. House and Sons, Unionville, CT: September 16, 2002.
TA–W–53,197; Annjon Dress Corp., New York, NY: October 8, 2002.
TA–W–53,129; Bayer Pharmaceuticals Corp., Pharmaceutical Div., West Haven, CT: October 1, 2002
TA–W–53,090; MBU, Inc., New York, NY: September 19, 2002.
TA–W–53,039 &A; Planar Systems, Inc., Beaverton, OR and Medical

Business Unit, Waltham, MA: September 23, 2002.

TA–W–53,050; Sappi Fine Paper, Allentown Facility, Allentown, PA: September 29, 2002.

TA–W–53,276; H. Freeman & Son, Inc., Philadelphia, PA: October 3, 2002.

TA–W–52,954; Federal Mogul Corp., Wagner Lighting Div. including leased workers of Staffing Solutions, Sparta, TN: September 12, 2002.

TA–W–52,846; Brookman Cast Industries, Salem, OR: August 22, 2002.

TA–W–52,721; Cascade Fibers Co., Inc., Cascade Fibers Co of Sanford, LLC, including leased workers of Employer Options, LLC, Sanford, NC: August 28, 2002.

TA–W–53,235; Keith Dennis Co., LLC, Dandridge, TN: October 8, 2002.

TA–W–52,917; Hooven Allison, Xenia, OH: September 5, 2002.

TA–W–52,877; Sonoco Flexible Packaging, a div. of Sonoco Products Co., including leased workers of Workload, Inc., Fulton, NY: September 9, 2002.

TA–W–52,855; On Semiconductor, East Greenwich Div., including leased workers of Kelly Services, East Greenwich, RI: September 3, 2002.

TA–W–53,122; North Pacific Processors, Inc., Cordova, AK: September 3, 2002.

TA–W–53,128; Wilson Sporting Goods, Springfield, TN: October 1, 2002.

TA–W–53,031; Randco Tool and Die, Inc., Meadville, PA: September 12, 2002.

TA–W–53,007; Contempora Fabrics, Inc., Lumberton, NC: September 4, 2002.

TA–W–52,902; Buffalo China, Inc., Buffalo, NY: September 4, 2002.

TA–W–53,110; Zorlu Manufacturing Co., LLC, Warrenton, GA: September 24, 2002.

TA–W–53,015; Texas PMW, Inc., Pennsylvania Machine Works, Inc., Houston, TX: September 10, 2002

TA–W–53,028; BIC Corp., Lighters Div., Gaffney, SC: September 23, 2002

TA–W–52,924; Techneglas, Inc., Columbus, OH and Pittston, PA: October 20, 2003.

TA–W–52,925; SKF USA, Inc., Altoona Div., Altoona, PA: September 11, 2002.

TA–W–52,931; PCS Nitrogen Fertilizer, LP, a/k/a Memphis Plant, a div. of Potash Corp., Millington, TN: September 2, 2002.

TA–W–52,944; Chiquola Fabrics, LLC, Kingsport, TN: September 15, 2002

TA–W–52,973; Cortina Fabrics, Swepsonville, NC: September 24, 2002.

TA–W–52,983; Escod Industries, Inc., BKB, Inc., Insilso Technologies, North Myrtle Beach, SC: September 16, 2002.

TA–W–52,768; Titan Plastics Group, Portage, MI: August 27, 2002.

TA–W–52,874; PMW Illinois, Inc., Pennsylvania Machine Works, Inc., Carlinville, IL: September 10, 2002.

TA–W–52,858; Wetsel-Oviatt Lumber Co., El Dorado Hills, CA: August 25, 2002.

TA–W–52,796; Halliburton Energy Services, Alaska Operations, Prudhoe Bay, AK, A; Sterling, AK, B; Fairbanks, AK and C; Anchorage, AK: September 2, 2002.

TA–W–52,786; Excelsior Foundry Co., Belleville, IL: August 21, 2002.

TA–W–53,022; Ideal Forging Corp., Southington, CT: September 24, 2002.

TA–W–53,042; Solon Manufacturing Co., Rhinelander, WI: September 24, 2002.

TA–W–52,863; Thantex Specialties, Inc., Abbeville, SC: August 27, 2002

TA–W–52,565; Johns Manville Corp., Engineered Products Group, Vienna, VA: August 8, 2002

TA–W–52,762; TT Group, Inc., a wholly owned subsidiary of TT Group, LTD, Aurora, MO: August 29, 2002.

TA–W–52,792; RST&B Curtain and Drapery, Woodruff, SC: September 2, 2002.

TA–W–52,572; Allsteel, Inc., a div. of Hon Industries, West Hazleton, PA: August 14, 2002.

TA–W–52,664; Slater Steel Corp., a wholly owned subsidiary of Slater Steel, Inc., Fort Wayne, IN: April 7, 2003.

TA–W–52,793; Milligan and Higgins, a div. of Hudson Industries Corp., Johnstown, NY: September 2, 2002.

TA–W–52,573; Gentry Mills, Inc., Albemarle, NC: August 11, 2002.

TA–W–52,603; Sierra Pine Ltd, Medite Div., Medford, OR: August 18, 2002.

TA–W–53,141; Atlas Model Railroad Co., Inc., Hillside, NJ: October 2, 2002.

TA–W–53,238; West Linn Paper Co., West Linn, OR: October 7, 2002.

TA–W–53,151; Cole Hersee Co., Boston, MA: October 3, 2002.

TA–W–53,160; Biddle Precision Components, Sheridan, IN: September 10, 2002.

TA–W–53,127; Ault, Inc., Minneapolis, MN: October 2, 2002.

TA–W–53, 189; Campbell Foundry Co., Harrison, NJ: October 7, 2002.

TA–W–52,773; Lebanite Corp., Hardboard Div., Lebanon, OR: November 1, 2002.

TA–W–52,650; PPG Industries, Fiber Glass Div., Lexington, NC: July 26, 2002.

TA–W–52,961; IPAC Fabrics, Inc., a subsidiary of Industrial Polymers and Chemicals, Inc., Lewiston, ME: September 5, 2002.

TA–W–52,882; APW, Inc., Erie, PA: September 19, 2002.

TA–W–52,887; Connie Rose Manufacturing, Inc., Philadelphia, PA: September 17, 2002.

TA–W–53,240; Friedrich Air Conditioning Co., San Antonio, TX: September 30, 2002.

TA–W–52,834; The Safety Stitch, Inc., Harrisville, WV: August 22, 2002.

TA–W–52,623; Five Rivers Electronic Innovations, LLC, Greeneville, TN: August 15, 2002.

TA–W–52,654; Current Industries, Inc., Bellingham, WA: August 5, 2002.

TA–W–53,281; American Marketing Industries, Inc., Dunbrooke Div., Independence, MO: October 15, 2002.

TA–W–52,994; The Scotts Co., Temecula operation, including leased workers of Manpower and Remedy, Temecula, CA: September 5, 2002.

TA–W–52,919; The Keller Manufacturing Co., Inc., Furniture Manufacturing Div., Corydon, IN: September 5, 2002.

TA–W–52,490; Vernon Plastics, a wholly owned subsidiary of The Imperial Home Décor Group, including leased workers from Agentry, Haverhill, MA: August 7, 2002.

TA–W–52,609; Coastal Lumber Co., Bruceton Mills, WV: August 13, 2002.

TA–W–52,783; Crystal Creative Products, a div. of Cleo, Inc., Maysville, KY: August 20, 2002.

TA–W–52,700; Circuit Science, Inc., Plymouth, MN: August 27, 2002.

TA–W–52,688A; Howes Leather Corp., Clearfield Whole Leather Div., Curwensville, PA: September 25, 2003.

The following certifications have been issued. The requirements of (a) (2) (B) (shift in production) of section 222 have been met.

TA–W–52,951; T & W Forge, Inc., Div. of Durrell Corp., Alliance, OH: August 29, 2002.

TA–W–52,982; Glaxo Smith Kline Pharmaceuticals, Piscataway, NJ: October 18, 2003.

TA–W–53,010; New Generation Yarn Corp., Gibsonville, NC: September 15, 2002.

TA–W–53,227; Voith Paper, Voith Paper Service Southeast Div., Salisbury, NC: October 13, 2002.

TA–W–53,105; American & Efird, Inc., Mainden Facility, a div. of The Ruddick Corp., Mt. Holly, NC: October 1, 2002.

TA–W–53,187; Harriet and Henderson Yarns, Inc., Corp. Office, Henderson, NC: October 4, 2002.
TA–W–53,143; Erni Components, Inc., Chester, VA: September 30, 2002.
TA–W–53,002; Akzo Nobel Coatings, Inc., Carney's Point, NJ: September 5, 2002.
TA–W–52,891; C.O.W. Industries, Inc., including leased workers of CBS Companies, Columbus, OH: September 22, 2002.
TA–W–53,166; Arvin Meritor, Inc., Chickasha, OK: October 1, 2002.
TA–W–52,929; Kaydon Corp., Sumter, SC: September 15, 2002.
TA–W–53,261; International Stone Products, Inc., Barre, VT: October 3, 2002.
TA–W–52,831; SPX Dock Products, Mechanical Dock Lever Div., Carrollton, TX: September 3, 2002.
TA–W–53,133; Charlotte Trimming Co., Charlotte, NC: October 1, 2002.
TA–W–52,914; Gates Corp., Power Transmission Div., Belt Plant, Elizabethtown, KY: September 10, 2002.
TA–W–52,866; Dyno Nobel, Port Ewen Plant, Charge and Press Department, Ulster Park, NY: August 9, 2002.
TA–W–53,056; Toshiba America Information Systems, Inc. (TAIA), a subsidiary of Toshiba America, Inc., a subsidiary of Toshiba Corp., Irvine, CA: September 26, 2002.
TA–W–52,997; Fishing Vessel (F/V) Valeta H. Point Baker, AK: September 23, 2002.
TA–W–53,214; Rhodia, Inc., Chicago Heights, IL: September 22, 2002.
TA–W–53,286; Elox Corp., a div. of Agie Charmilles Holding Corp., Davidson, NC: October 17, 2002.
TA–W–52,904; York International Corp., York, PA: September 9, 2002.
TA–W–52,844; 4 D's Industries, Tellico Plains, TN: September 4, 2002.
TA–W–53,304; Molecular Bioproducts, Inc., Quality Scientific Plastics, Inc., Petaluma, CA: September 24, 2002.
TA–W–53,017; Sunbeam Products, Inc., Hattiesburg, MS: September 23, 2002.
TA–W–52,976; Upholstery Fabric Mill of Georgia, Inc., Jasper, GA: September 19, 2002.
TA–W–52,934; Lego Systems, Inc., Shows and Events Div., Enfield, CT: September 26, 2002.
TA–W–52,940; Motor Coach Industries International, Inc., Roswell, NM: September 14, 2002.
TA–W–53,239; Acme Mills Co., Fairway Products, Quincy, MI: September 26, 2002.
TA–W–53,199; Eudora Garments Corp., Eudora, AR: October 3, 2002.
TA–W–53,163; Zapata Industries, Inc., Muskogee, OK: October 3, 2002.
TA–W–52,998; Saint-Gobain Calmar, Inc., City of Industry, CA: September 25, 2002.
TA–W–52,991; Select Elastics of America, Inc., McAllen, TX: September 22, 2002.
TA–W–52,964; Phelps Dodge Mining Co., Tyrone Mining, LLC, Tyrone, NM: September 3, 2002.
TA–W–52,880; Dayton Superior Corp., Birmingham, AL: September 18, 2002.
TA–W–53,081; Robert Manufacturing Co., Rancho Cucamonga, CA: September 8, 2002.
TA–W–53,038; Coats and Clark, Inc., Toccoa, GA: September 26, 2002.
TA–W–53,043; Honeywell Airframe Systems, Torrance, CA: September 26, 2002.
TA–W–53,004; Xerox Corp., Business Group Operations (BGO), Webster, NY: September 15, 2002.
TA–W–52,718; I.T.W. Foils, East Brunswick, NJ: August 21, 2002.
TA–W–52,722; Conso International Corp., Union, SC: August 29, 2002
TA–W–52,754; ACS Industries, Inc., Villanova Plant, Woonsocket, RI: August 20, 2002.
TA–W–52,813; Eastman Kodak Co., HISIS Finishing Department B–313, Rochester, NY: September 2, 2002.
TA–W–52,853; Trenton Technology, Inc., Utica, NY: September 4, 2002.
TA–W–52,575; Volex, Inc., including leased workers of Accuforce, Manpower and Foothills, Conover, NC: August 13, 2002.
TA–W–52,631; Northland, A Scott Fetzer Co., Watertown, NY: August 12, 2002.
TA–W–52,649; Tellabs Operations, Inc., Bolingbrook, IL: August 19, 2002.
TA–W–52,655; Takata Petri, Inc., a subsidiary of TK Holdings, Port Huron, MI: August 22, 2002.
TA–W–52,862; Paxar Corp., Fabric Label Group, Lenoir, NC: August 26, 2002.
TA–W–53,165; Thermal Ceramics, RPC, Elgin, IL: October 1, 2002.
TA–W–53,108; The Hon Co., Chair Department, including leased workers of Corestaff and Kimco, South Gate, CA: September 22, 2002.
TA–W–53,125; Ranco North America, Invensys Climate Controls Div., including leased workers of Manpower, Link and Select, Brownsville, TX: September 23, 2002.
TA–W–53,073; OK–1 Manufacturing Co., Inc., Altus, OK: September 26, 2002.
TA–W–52,955; Andritz, Inc., Muncy Plant #2, a subsidiary of Andritz AG, Muncy, PA: September 5, 2002.
TA–W–52,986; Alcoa Fujikura Ltd, Telecommunications Div., Duncan, SC: September 15, 2002.
TA–W–53,212 & A; Heraeus Quartztech, LLC, a subsidiary of Heraeus Holding GMBH, Austin, TX and Round Rock, TX: October 8, 2002.
TA–W–53,186; Arlon, Inc., Engineered Coatings & Laminates Div., East Providence, RI: September 29, 2002.
TA–W–53,155; Brazeway, Inc., Brazeway DeWitt Div., including leased workers of Talent Tree, DeWitt, IA: October 6, 2002.
TA–W–53,005; Canton Drop Forge, Canton, OH: September 12, 2002.
TA–W–52,889; Fox River Paper Co., Appleton, WI: September 18, 2002.
TA–W–52,864; Cooper-Atkins Corp., Middlefield, CT: August 19, 2002.
TA–W–53,003; Honeywell International, Inc., Automation and Control Solutions Div., including leased workers of Manpower, Albuquerque, NM: September 18, 2002.
TA–W–52,929; Kaydon Corp., Sumter, SC: September 15, 2002.
TA–W–52,831; SPX Dock Products, Mechanical Dock Lever Div., Carrollton, TX: September 3, 2002.
TA–W–53,187; Harriet and Henderson Yarns, Inc., Corp. Office, Henderson, NC: October 4, 2002.
TA–W–52,647; PACCAR, Inc., a div. of Peterbilt Motors, Madison, TN: August 18, 2002.
TA–W–52,959; Maxxim Medical, Inc., Honea Path, SC: September 19, 2002.
TA–W–52,840; Merit Abrasive Products, Brookline, Ohio Division, Brookline, OH: August 18, 2002.
TA–W–52,794; Practice Partner, Inc., Goldsboro, NC: September 3, 2002.
TA–W–52,720; Amphenol T&M Antennas, Vernon Hills, IL: August 28, 2002
TA–W–52,857; Hart Tackle Company, LLC, Starford, OK: August 22, 2002.
TA–W–52,688; Howes Leather Corp., Currwensville and Cutting Div., Curwensville, PA: September 25, 2003.
TA–W–52,984; Samina-SCI, Cable Div., including leased workers of On-Point Personnel and Employee Solutions, Carrollton, TX: September 17, 2002.
TA–W–53,034; C&C Smith Lumber Co., Inc., Summerhill, PA: August 28, 2002.
TA–W–52,872; Beckton Dickinson and Co., Consumer Healthcare Div., Holdrege, NE: September 11, 2002.
TA–W–53,221; Intermetro Industries, a div. of Emerson Electric, Wilkes-Barre, PA: November 6, 2003.

The following certification has been issued. The requirement of upstream

supplier to a trade certified primary firm has been met.

TA–W–53,011; General Dynamics, Mosses Lake, WA: September 24, 2002.

TA–W–53,126; Siemens Energy and Automation, Inc., Machine Tool Business Unit, Lebanon, OH: September 23, 2002.

Negative Determinations for Alternative Trade Adjustment Assistance

In order for the Division of Trade Adjustment Assistance to issued a certification of eligibility to apply for Alternative Trade Adjustment Assistance (ATAA) for older workers, the group eligibility requirements of section 246(a)(3)(A)(ii) of the Trade Act must be met.

In the following cases, it has been determined that the requirements of section 246(a)3)ii) have not been met for the reasons specified.

Since the workers are denied eligibility to apply for TAA, the workers cannot be certified eligible for ATAA.

TA–W–53,135; Castle Rubber, LLC, East Butler, PA

TA–W–53,168; Allegheny Foundry Co., Bolivar, PA

TA–W–52,770; Tower Mills, Inc., Bulington, NC

TA–W–52,791; Rothtec Engraving Corp., Spartanburg, SC

TA–W–52,999; ACE Packaging Systems, a subsidiary of International Paper, Monroe Facility, Monroe, MI

TA–W–53,027; Sennett Steel Corp., Warren, MI

TA–W–53,052; Rohm and Hass Co., Corp. Headquarters, Accounts Payable Department, Philadelphia, PA

TA–W–53,138; Amhil Enterprises, Inc., Dickson, TN

TA–W–53,282 &A; JP Morgan Chase Bank, Shared Application Delivery and Consulting Services Group, Houston, TX and Commercial Loan Technology Div., Houston, TX

TA–W–52,995; Pressed Steel Tank Co., Inc., West Allis, WI

TA–W–52,502; Norwood Promotional Products Sleepy Eye, MN

TA–W–52,672; Intel Corp., Quality Program Engineering Managers, Hillsboro, OR

TA–W–52,702; Atlas Castings and Technology, Tacoma, WA

TA–W–53,103; Microdyne Outsourcing, Inc., a div. of L3 Communications, Torrance, CA

TA–W–53,170; Tex Tech Industries, North Monmouth, ME

TA–W–53,188; Caliendo Savio Enterprises, Inc., New Berlin, WI

TA–W–53,204; CDI Corp., Corvalis, OR

TA–W–53,217; Rexnord Industries, Inc., Coupling Div., New Berlin, WI

TA–W–53,061; Consul Risk Management, Inc., Acton, MA

TA–W–53,063; J.L. Williams Co., Inc., Nampa, ID

TA–W–52,870; Shell Exploration and Production Co., Houston, TX

TA–W–52,893; R and J Seafood, Kasilof, AK

TA–W–52,907; Dyecraftsmen, Inc., Taunton, MA

TA–W–52,988; Simplot Meat Products, Nampa, ID

TA–W–52,624 & A; Shell Exploration and Production Co., Houston, TX and New Orleans, LA

TA–W–52,749; Akin Industries, Inc., Case Goods Div., Monticello, AR

TA–W–52,620; Corbin Russwin, Inc., Clarksdale, MS

TA–W–52,630; Ramatech, LLC, Belleville, MI

TA–W–52,881; Mohican Mills, Lincolnton, NC

TA–W–53,018; O.P. Link Handle Co., Inc., Salem Facility, Salem, IN

TA–W–53,185; Lawson Software, Inc., St. Paul, MN

TA–W–52,941; Grede Foundries, Inc., Milwaukee Steel Foundry, Milwaukee, WI

Affirmative Determinations for Alternative Trade Ajdustment Assistance

In order for the Division of Trade Adjustment Assistance to issued a certification of eligibility to apply for Alternative Trade Adjustment Assistance (ATAA) for older workers, the group eligibility requirements of section 246(a)(3)(A)(ii) of the Trade Act must be met.

The following certifications have been issued; the date following the company name and location of each determination references the impact date for all workers of such determinations.

In the following cases, it has been determined that the requirements of section 246(a)(3)(ii) have been met.

I. Whether a significant number of workers in the workers' firm are 50 years of age or older.

II. Whether the workers in the workers' firm possess skills that are not easily transferable.

III. The competitive conditions within the workers' industry (*i.e.*, conditions within the industry are adverse).

TA–W–53,304; Molecular Bioproducts, Inc., Quality Scientific Plastics, Inc., Petaluma, CA: September 24, 2002.

TA–W–53,122; North Pacific Processors, Inc., Cordova, AK: September 3, 2002.

TA–W–53,128; Wilson Sporting Goods, Springfield, TN: October 1, 2002.

TA–W–53,017; Sunbeam Products, Inc., Hattiesburg, MS: September 23, 2002.

TA–W–53,031; Randco Tool and Die, Inc., Meadville, PA: September 12, 2002.

TA–W–53,105; American & Efird, Inc., Maiden Facility, a div. of The Ruddick Corp., Mt. Holly, NC: October 1, 2002.

TA–W–53,007; Contempora Fabrics, Inc. Lumberton, NC: September 4, 2002.

TA–W–52,976; Upholstery Fabric Mill of Georgia, Inc., Jasper, GA: September 19, 2002. 2002.

TA–W–52,902; Buffalo China, Inc., Buffalo, NY: September 4, 2002.

TA–W–52,934; Lego Systems, Inc., Shows and Events Div., Enfield, CT: September 26, 2002.

TA–W–52,940; Motor Coach Industries International, Inc., Roswell, NM: September 14, 2002.

TA–W–53,239; Acme Mills Co., Fairway Products, Quincy, MI: September 26, 2002.

TA–W–53,163; Zapata Industries, Inc., Muskogee, OK: October 3, 2002.

TA–W–53,110; Zorlu Manufacturing Co., LLC, Warrenton, GA: September 24, 2002.

TA–W–53,015; Texas PMW, Inc., Pennsylvania Machine Works, Inc., Houston, TX: September 10, 2002.

TA–W–53,028; Bic Corp., Lighters Div., Gaffney, SC:September 23, 2002.

TA–W–52,998; Saint-Gobain Calmar, Inc., City of Industry, CA: September 25, 2002.

TA–W–52,991; Select Elastics of America, Inc., McAllen, TX: September 22, 2002.

TA–W–52,924 A; Techneglas, Inc., Columbus, OH and Pittston, PA: October 20, 2003.

TA–W–52,925; SKF USA, Inc., Altoona, PA: September 11, 2002.

TA–W–52,931; PCS Nitrogen Fertilizer, LP, a/k/a Memphis Plant, a div. of Potash Corp., Millington, TN: September 2, 2002.

TA–W–52,944; Chiquola Fabrics, LLC, Kingsport, TN: September 15, 2002.

TA–W–52,964; Phelps Dodge Mining Co., Tyrone Mining, LLC, Tyrone, NM: September 3, 2002.

TA–W–52,973; Cortina Fabrics, Swepsonville, NC: September 24, 2002.

TA–W–52,983; Escod Industries, Inc., BKB, Inc., Insilso Technologies, North Myrtle Beach, SC: September 16, 2002.

TA–W–52,768; Titan Plastics Group, Portage, MI: August 27, 2002.

TA–W–52,874; PMW Illinois, Inc. Pennsylvania Machine Works, Inc., Carlinville, IL: September 10, 2002.

TA–W–52,880; Dayton Superior Corp., Birmingham, AL: September 18, 2002.
TA–W–52,858; Wetsel-Oviatt Lumber Company, El Dorado Hills, CA: August 25, 2002.
TA–W–52,796, A,B,C; Halliburton Energy Services, Alaska Operations, Prudhoe Bay, AK, Sterling, AK, Fairbanks, AK and Anchorage, AK: September 2, 2002.
TA–W–52,786; Excelsior Foundry Co., Belleville, IL: August 21, 2002.
TA–W–53,081; Robert Manufacturing Co., Rancho Cucamonga, CA: September 8, 2002.
TA–W–53,011; General Dynamics, Mosses Lake, WA: September 24, 2002.
TA–W–53,022; Ideal Forging Corp., Southington, CT: September 24, 2002.
TA–W–53,038; Coats and Clark, Inc., Toccoa, GA: September 26, 2002.
TA–W–53,042; Solon Manufacturing Co., Rhinelander, WI: September 24, 2002.
TA–W–53,043; Honeywell Airframe Systems, Torrance, CA: September 26, 2002.
TA–W–53,004; Xerox Corp., Business Group Operations (BGO), Webster, NY: September 15, 2002.
TA–W–52,863; Thantex Specialties, Inc., Abbeville, SC: August 27, 2002.
TA–W–52,565; Johns Manville Corp., Engineered Products Group, Vienna, VA: August 8, 2002.
TA–W–52,718; I.T.W. Foils, East Burnswick, NJ: August 21, 2002.
TA–W–52,722; Conso International Corp., Union, SC: August 29, 2002.
TA–W–52,754; ACS Industries, Inc., Villanova Plant, Woonsocket, RI: August 20, 2002.
TA–W–52,762; TT Group, Inc., a wholly owned subsidiary of TT Group, Ltd, Aurora, MO: August 29, 2002.
TA–W–52,792; RST&B Curtain and Drapery, Woodruff, SC: September 2, 2002.
TA–W–52,813; Eastman Kodak Co., HISIS Finishing Department B–313, Rochester, NY: September 2, 2002.
TA–W–52,853; Trenton Technology, Inc., Utica, NY: September 4, 2002.
TA–W–52,572; Allsteel, Inc., a div. of Hon Industries, West Hazleton, PA: August 14, 2002.
TA–W–52,575; Volex, Inc., including leased workers of Accuforce, Manpower and Foothills, Conover, NC: August 13, 2002.
TA–W–52,631; Northland, a Scott Fetzer Co., Watertown, NY: August 12, 2002.
TA–W–52,649; Tellabs Operations, Inc., Bolingbrook, IL: August 19, 2002.
TA–W–52,655; Takata Petri, Inc., a subsidiary of TK Holdings, Port Huron, MI: August 22, 2002.
TA–W–52,664; Slater Steel Corp., a wholly owned subsidiary of Slater Steel, Inc., Fort Wayne, IN: April 7, 2003.
TA–W–52,688; Howes Leather Corp., Curwensville and Cutting Div., Curwensville, PA and Clearfield Whole Leather Div., Curwensville, PA: September 25, 2003.
TA–W–52,793; Milligan and Higgins, a div. of Hudson Industries Corp., Johnstown, NY: September 2, 2002.
TA–W–52,862; Paxar Corp., Fabric Label Group, Lenoir, NC: August 26, 2002.
TA–W–52,573; Gentry Mills, Inc., Albemarle, NC: August 11, 2002.
TA–W–52,603; Sierra Pine Ltd, Medite Div., Medford, OR: August 18, 2002.
TA–W–53,141; Atlas Model Railroad Co., Inc., Hillside, NJ: October 2, 2002.
TA–W–53,238; West Linn Paper Co., West Linn, OR: October 7, 2002.
TA–W–53,151; Cole Hersee Co., Boston, MA: October 3, 2002.
TA–W–53,160; Biddle Precision Components, Sheridan, IN: September 10, 2002.
TA–W–53,165; Thermal Ceramics, RPC, Elgin, IL: October 1, 2002.
TA–W–53,108; The Hon Co., Chair Department including leased workers of Corestaff and Kimco, South Gate, CA: September 22, 2002.
TA–W–53,125; Ranco North America, Invensys Climate Controls Div., including leased workers of Manpower, Link, and Select, Brownsville, TX: September 23, 2002.
TA–W–53,126; Siemens Energy and Automation, Inc., Machine Tool Business Unit, Lebanon, OH: September 23, 2002.
TA–W–53,127; Ault, Inc., Minneapolis, MN: October 2, 2002.
TA–W–53,073; OK–1 Manufacturing Co., Inc., Altus, OK: September 26, 2002.
TA–W–52,955; Andritz, Inc., Muncy Plant #2, a subsidiary of Andritz AG, Muncy, PA: September 5, 2002.
TA–W–52,986; Alcoa Fujikura Ltd, Telecommunications Div., Duncan, SC: September 15, 2002.
TA–W–53,189; Campbell Foundry Co., Harrison, NJ: October 7, 2002.
TA–W–53,212&A; Heraeus Quartztech, LLC, a subsidiary Heraeus Holding GMBH, Austin, TX and Round Rock, TX: October 8, 2002.
TA–W–53,186; Arlon, Inc., Engineered Coatings and Laminates Div., East Providence, RI: September 29, 2002.
TA–W–53,155; Brazeway, Inc., Brazeway Dewitt Div., including leased workers of Talent Tree, DeWitt, IA: October 6, 2002.
TA–W–52,967; Stoneridge, Inc., Alphabet Div., Mebane, NC: September 20, 2002.
TA–W–52,773; Lebanite Corp., Hardboard Div., Lebanon, OR: November 1, 2002.
TA–W–52,650; PPG Industries, Fiber Glass Division, Lexington, NC: July 26, 2002.
TA–W–53,005; Canton Drop Forge, Canton, OH: September 12, 2002.
TA–W–52,961; IPAC Fabrics, Inc., a subsidiary of Industrial Polymers and Chemicals, Inc., Lewiston, ME: September 5, 2002.
TA–W–52,882; APW, Inc., Erie, PA: September 19, 2002.
TA–W–52,887; Connie Rose Manufacturing, Inc., Philadelphia, PA: September 17, 2002.
TA–W–52,889; Fox River Paper Co., Appleton, WI: September 18, 2002.
TA–W–52,864; Cooper-Atkins Corp., Middlefield, CT: August 19, 2002.
TA–W–53,240; Friedrich Air Conditioning Co., San Antonio, TX: September 30, 2002.
TA–W–52,834; The Safety Stitch, Inc., Harrisville, WV: August 22, 2002.

I hereby certify that the aforementioned determinations were issued during the months of October and November. Copies of these determinations are available for inspection in Room C–5311, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 during normal business hours or will be mailed to persons who write to the above address.

Dated: November 14, 2003.

Timothy Sullivan,

Director, Division of Trade Adjustment Assistance.

[FR Doc. 03–29680 Filed 11–26–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,506]

Romac Industries, Inc., Sultan, WA; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on November 12, 2003, in response to a worker petition filed by the company on behalf of workers at Romac Industries, Inc., Sultan, Washington.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 18th day of November, 2003.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29666 Filed 11–26–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–51,458]

Silicon Graphics, Inc., Worldwide Manufacturing Organization Including Leased Workers of Kelly Services Chippewa Falls, WI; Notice of Affirmative Determination Regarding Application for Reconsideration

By letter of July 22, 2003, a petitioner requested administrative reconsideration of the Department of Labor's Notice of Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance, applicable to workers of the subject firm. The Department's determination notice was signed on June 17, 2003. The notice was published in the **Federal Register** on July 3, 2003 (68 FR 39976).

The Department reviewed the request for reconsideration and has determined that the petitioner has provided additional information. Therefore, the Department will conduct further investigation to determine if the workers meet the eligibility requirements of the Trade Act of 1974.

Conclusion

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the Department of Labor's prior decision. The application is, therefore, granted.

Signed at Washington, DC this 3rd day of November, 2003.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29685 Filed 11–26–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,848]

Snap-Tite, Inc., Autoclave Engineers Division, Erie, PA; Notice of Termination of Investigation

Pursuant to Section 221 of the Trade Act of 1974, as amended, an investigation was initiated on September 12, 2003, in response to a petition filed on behalf of workers at Snap-Tite, Inc., Autoclave Engineers Division, Erie, Pennsylvania.

The petitioners have requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC this 3rd day of October 2003.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29681 Filed 11–26–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,835]

Southeastern Adhesives Company, Lenoir, NC; Notice of Revised Determination on Reopening

On November 10, 2003, the Department, on its own motion, reopened its investigation for the former workers of the subject firm.

The initial investigation was initiated on September 12, 2003, and resulted in a negative determination issued on October 21, 2003. The investigation findings showed that workers of the subject firm did not supply at least 20 percent of production or sales to a firm that employed a group of workers who received a certification of eligibility to apply for trade adjustment assistance (TAA). Consequently, workers of Southeastern Adhesives Company, Lenoir, North Carolina, could not be certified as a secondarily affected worker group. The denial notice was published in the **Federal Register** on November 6, 2003 (68 FR 62832).

The Department has obtained new information showing that the subject firm supplied adhesives to a furniture manufacturer whose workers were certified eligible to apply for TAA and the loss of business contributed importantly to worker separations at the Lenoir, North Carolina plant.

Conclusion

After careful consideration of the facts obtained on reopening, I determine that workers of Southeastern Adhesives Company, Lenoir, North Carolina, qualify as adversely affected secondary workers under Section 222 of the Trade Act of 1974, as amended.

In accordance with the provisions of the Act, I make the following revised determination:

All workers of Southeastern Adhesives Company, Lenoir, North Carolina, who became totally or partially separated from employment on or after September 2, 2002, through two years from the date of certification, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.

Signed in Washington, DC this 17th day of November 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29682 Filed 11–26–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,639]

Textron, Ferndale Fastener Division, Madison Heights, MI; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on August 21, 2003, in response to a worker petition filed on behalf of workers at Textron, Ferndale Fastener Division, Madison Heights, Michigan.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC, this 4th day of September, 2003.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29675 Filed 11–26–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,266]

West Coast Fashion, Inc., South El Monte, CA; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, an investigation was

initiated on October 16, 2003, in response to a petition filed by the TAA Division Coordinator Employment Development Department on behalf of workers at West Coast Fashion, Inc., South El Monte, California.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed in Washington, DC, this 18th day of November, 2003.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 03–29668 Filed 11–26–03; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

Proposed Information Collection Request; Submitted for Public Comment and Recommendations; Form ETA–232. The Domestic Agricultural In-Season Wage Report, and Form ETA–232–A, Wage Survey Interview Record

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on the proposed and/or continuing collection of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

DATES: Submit comments on or before January 27, 2004.

ADDRESSES: Send comments to John R. Beverly, III, Administrator, Office of National Programs, Employment and Training Administration, U.S. Department of Labor, Room C–4318, 200 Constitution Avenue, NW., Washington, DC 20210–0001, 202–693–3010 (this is not a toll-free number), fax 202–693–2769.

FOR FURTHER INFORMATION CONTACT: William Carlson. Chief, Division of Foreign Labor Certification, Employment and Training Administration, U.S. Department of Labor, Room C–4318, 200 Constitution Avenue, NW., Washington, DC 20210–0001, 202–693–3010 (this is not a toll-free number), fax 202–693–2769.

SUPPLEMENTARY INFORMATION:

I. Background

The Wagner-Peyser Act, as amended, provides that the Office of National Programs shall assist the State public employment services throughout the country in promoting uniformity in its administrative and statistical procedures, furnishing and publishing information as to opportunities for employment and other information of value in the operation of its system, and maintaining a system for clearing labor between the States.

Pursuant to the Wagner-Peyser Act, the U.S. Department of Labor has established regulations at 20 CFR 653.500 covering the processing of agricultural intrastate and interstate job orders. Section 563.501 provides that the wage offered by employers must not be less than the prevailing wage or the applicable Federal or State minimum wage; whichever is higher. Also, the regulations for the temporary employment of alien agricultural and logging workers in the United States, 20 CFR part 655, subparts B and C, for the H–2A program, under the Immigration Reform and Control Act of 1986, requires farmers and other agricultural employers to pay workers the adverse effect wage rate, the prevailing wage rate, or the legal Federal or State minimum wage rate; whichever is highest.

The prevailing wage rate is used to implement these regulations covering intrastate and interstate recruitment of farmworkers. The vehicle for establishing the prevailing wage rate is Form ETA–232, The Domestic Agricultural In-Season Wage Report, and Form ETA–232–A, Wage Survey Interview Record. The ETA–232 Report contains the prevailing wage finding based on survey data collected from employers and reported by the States on Form ETA–232–A.

II. Desired Focus of Comments

Currently, the Employment and Training Administration is soliciting comments concerning the proposed request to extend the expiration date of the collection request to:

*Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

*Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

*Enhance the quality, utility, and clarity of the information to be collected; and

*Minimize the burden of the collection of information on those who are required to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses.

A copy of the proposed information collection request (ICR) can be obtained by contacting the office listed above in the addressee section of this notice.

III. Current Actions

Activity covered by regulations at 20 CFR 653.500 and 20 CFR part 655, subparts B and C, particularly the H–2A program, continues to expand, further increasing the need for accurate and timely wage information on which to base prevailing agricultural wage determinations. There is no similar wage information which is available or can be used for these determinations which apply to a specific crop of livestock activity, in a specific agricultural wage reporting area for a specific period of time during the peak harvest season.

Type of Review: Extension.

Agency: Employment and Training Administration.

Title: Domestic Agricultural In-Season Wage Report, Form ETA–232 and Wage Survey Interview Record, Form ETA–232–A.

OMB Number: 1205–0017.

Cite/Reference/Form/etc: ETA–232 and ETA 232–A, *See* below.

Estimated Total Burden Hours: 16,301.

Form/activity	Total respondents	Frequency	Total responses	Average time per response (hours)	Burden (hours)
ETA–232	600	Annually	600	11	6600

Form/activity	Total respondents	Frequency	Total responses	Average time per response (hours)	Burden (hours)
ETA–232–A	38,805	Annually	38,805	¼	9,701
Totals			39,405		16,301

Total Burden Cost (capital/startup): 0.

Total Burden Cost (operating/maintaining):

Business: The salary range of representatives of business respondents (employees of small family owned farms up through large agribusiness farms) can be from the minimum wage to several hundred thousand dollars for a CEO. Therefore, the hourly salaries of individuals participating in the wage survey ranges from $5.15 to $300 or more per hour.

State Government: Average cost of the State agencies conducting the Agricultural Wage Surveys range from $1,500 to $6,000 per survey, depending upon the complexity of the crop or livestock activity to be surveyed, including considerations such as size of the employer and worker universe, and the geographic expanse of the wage reporting areas.

Comments submitted in response to this comment request will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: November 20, 2003.

Emily Stover DeRocco,

Assistant Secretary, Employment and Training Administration.

[FR Doc. 03–29665 Filed 11–26–03; 8:45 am]

BILLING CODE 4510–30–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 data made available from other sources. They specify the basic hourly wage rates and fringe benefits which are determined to be prevailing for the described classes of laborers and mechanics employed on construction projects of a similar character and in the localities specified therein.

The determinations in these decisions of prevailing rates and fringe benefits have been made in accordance with 29 CFR part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR part 1, appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as described 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 supersedea decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register,** or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under The Davis-Bacon And Related Acts," shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration by the Department.

Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue, NW., Room S–3014, Washington, DC 20210.

Modification to General Wage Determination Decisions

The number of the decisions listed to the Government Printing Office document entitled "General Wage Determinations Issued Under the Davis-Bacon and related Acts" being modified are listed by Volume and State. Dates of publication in the **Federal Register** are in parentheses following the decisions being modified.

Volume I

None

Volume II

Pennsylvania:
PA030001 (Jun. 13, 2003)
PA030002 (Jun. 13, 2003)
PA030004 (Jun. 13, 2003)
PA030006 (Jun. 13, 2003)
PA030007 (Jun. 13, 2003)
PA030008 (Jun. 13, 2003)
PA030009 (Jun. 13, 2003)
PA030011 (Jun. 13, 2003)
PA030016 (Jun. 13, 2003)
PA030017 (Jun. 13, 2003)
PA030018 (Jun. 13, 2003)
PA030023 (Jun. 13, 2003)
PA030024 (Jun. 13, 2003)
PA030025 (Jun. 13, 2003)
PA030026 (Jun. 13, 2003)
PA030030 (Jun. 13, 2003)
PA030031 (Jun. 13, 2003)
PA030038 (Jun. 13, 2003)
PA030059 (Jun. 13, 2003)
PA030060 (Jun. 13, 2003)
PA030065 (Jun. 13, 2003)
West Virginia:
WV030001 (Jun. 13, 2003)
WV030002 (Jun. 13, 2003)
WV030003 (Jun. 13, 2003)
WV030010 (Jun. 13, 2003)

Volume III

North Carolina:
NC030001 (Jun. 13, 2003)
NC030003 (Jun. 13, 2003)

Volume IV

None

Volume V

None

Volume VI

Alaska:
AK030001 (Jun. 13, 2003)
AK030002 (Jun. 13, 2003)
AK030003 (Jun. 13, 2003)
AK030005 (Jun. 13, 2003)
AK030006 (Jun. 13, 2003)
AK030008 (Jun. 13, 2003)
Montana
MT030001 (Jun. 13, 2003)

Volume VII

None

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 determinations 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 at Washington, DC this 20th day of November 2003.

Carl J. Poleskey,

Chief, Branch of Construction Wage Determinations.

[FR Doc. 03–29447 Filed 11–26–03; 8:45 am]

BILLING CODE 4510–27–M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (03–149)]

Notice of Prospective Patent License

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of prospective patent license.

SUMMARY: NASA hereby gives notice that Air Systems, Inc., of 821 Juniper Crescent, Chesapeake, Virginia 23320, has applied for a partially exclusive license to practice the inventions described and claimed in U.S. Patent No. 4,829,035 entitled "Reactivation Of A Tin Oxide-Containing Catalyst"; U.S. Patent No. 4,855,274 entitled "Process For Making A Noble Metal On Tin Oxide Catalyst"; U.S. Patent No. 4,912,082 entitled "Catalyst For Carbon Monoxide Oxidation;" U.S. Patent No. 4,991,181 entitled "Catalyst For Carbon Monoxide Oxidation;" U.S. Patent No. 5,585,083 entitled "Catalytic Process For Formaldehyde Oxidation;" U.S. Patent No. 6,132,694 entitled "Catalyst For Oxidation Of Volatile Organic Compounds;" and the invention disclosed in NASA Case No. LAR 15851–1–CU entitled "Process For Coating Substrates With Catalyst Materials," for which a U.S. Patent Application was filed; all of which are assigned to the United States of America as represented by the Administrator of the National Aeronautics and Space Administration. Written objections to the prospective grant of a license should be sent to NASA Langley Research Center. NASA has not yet made a determination to grant the requested license and may deny the requested license even if no objections are submitted within the comment period.

DATE(S): Responses to this notice must be received by December 15, 2003.

FOR FURTHER INFORMATION CONTACT: Helen M. Galus, Patent Attorney, Mail Stop 212, NASA Langley Research Center, Hampton, VA 23681–2199. Telephone (757) 864–3227; fax (757) 864–9190.

Dated: November 21, 2003.

Robert M. Stephens,

Deputy General Counsel.

[FR Doc. 03–29724 Filed 11–26–03; 8:45 am]

BILLING CODE 7510–01–P

NATIONAL COMMUNICATIONS SYSTEM

National Security Telecommunications Advisory Committee

AGENCY: National Communications System (NCS).

ACTION: Notice of closed meeting.

SUMMARY: A meeting of the President's National Security Telecommunications Advisory Committee (NSTAC) will be held via conference call on Thursday, December 4, 2003, from 3 p.m. to 4 p.m. The NSTAC is subject to the Federal Advisory Committee Act (FACA), Pub. L. 92–463, as amended (5 U.S.C. App. II). The conference call will be closed to the public to allow for discussion of:

- Industry Analysis of Open Infrastructures Information
- Preliminary Industry Work Products, including Financial Services Task Force Findings/Trusted Access Task Force Update
- Assessment of Impact of a Recent NSTAC Policy Publication

Since revealing details of the industry analysis of open infrastructures could reveal predominantly internal agency records that would significantly risk circumvention of industry regulations intended to protect critical infrastructures, closing this portion of the meeting is consistent with 5 U.S.C. 552b(c)(4). Also, in order to foster a frank discussion on the industry analysis of open infrastructure matters, consistent with 5 U.S.C. 552b(c)(4), it is necessary to close this portion of the meeting to protect proprietary information. Based on the sensitivity of these topics, this conference call will be closed.

FOR FURTHER INFORMATION CONTACT: Call Ms. Kiesha Gebreyes, (703) 607–6134, or write the Manager, National Communications System, 701 South Court House Road, Arlington, Virginia 22204–2198.

Gary D. Amato,

Federal Register Liaison Officer, National Communications System.

[FR Doc. 03–29629 Filed 11–28–03; 8:45 am]

BILLING CODE 5001–08–M

NEIGHBORHOOD REINVESTMENT CORPORATION

Regular Board of Directors Meeting

TIME AND DATE: 2 p.m. Wednesday, December 3, 2003.

PLACE: Federal Deposit Insurance Corporation, 550 17th Street, NW., Room 6221, Sixth Floor, Washington, DC 20429.

STATUS: Open/Closed.

FOR FURTHER INFORMATION CONTACT: Jeffrey T. Bryson, General Counsel/Secretary, (202) 220–2372; *jbryson@nw.org.*

AGENDA:

I. Call to Order
II. Approval of Minutes: September 5, 2003—Regular Meeting
III. Audit Committee Meeting—10/28/03
IV. Treasurer's Report
V. Executive Directors Quarterly Management Report
  a. NeighborWorks Center for Homeownership Presentation
  b. NeighborWorks Visibility Goals and Strategies
VI. Executive Session—(Closed)
  a. Personnel Committee Meeting—9/24/03
  b. Personnel Committee Meeting—11/5/03
  c. Update on Executive Director's Search
VII. Adjournment

Jeffrey T. Bryson,

General Counsel/Secretary.

[FR Doc. 03–29816 Filed 11–25–03; 11:55 am]

BILLING CODE 7570–01–M

NUCLEAR REGULATORY COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Nuclear Regulatory Commission.

DATES: Weeks of November 24, December 1, 8, 15, 22, 29, 2003.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

Matters to Be Considered:

Week of November 24, 2003

There are no meetings scheduled for the Week of November 24, 2003.

Week of December 1, 2003—Tentative

There are no meetings scheduled for the Week of December 1, 2003.

Week of December 8, 2003—Tentative

Tuesday, December 9, 2003

1:30 p.m. Briefing on Equal Employment Opportunity Program, (Public Meeting) (Contact: Corenthis Kelley, 301–415–7380).

Wednesday, December 10, 2003

9:30 a.m. Briefing on Strategic Workforce Planning and Human Capital Initiatives (Closed—Ex. 2).

Week of December 15, 2003—Tentative

Tuesday, December 16, 2003

9:30 a.m. Discussion of Security Issues (Closed—Ex.1).

Week of December 22, 2003—Tentative

There are no meetings scheduled for the Week of December 22, 2003.

Week of December 29, 2003—Tentative

There are no meetings scheduled for the Week of December 29, 2003.

* The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings call (recording)—(301) 415–1292. Contact person for more information: R. Michelle Schroll, (301) 415–1662.

* * * * *

Additional Information:

By a vote of 3–0 on November 19, the Commission determined pursuant to U.S.C. 552b(e) and § 9.107(a) of the Commission's rules that "Affirmationof (1) Final Rule to Rule to Revise 10 CFR Part 71 to be Compatible with IAEA Transportation Safety Standards [TS–R–1] and Make Other NRC–Initiated Changes" be held on November 20, and on less than one week's notice to the public.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *www.nrc.gov/what-we-do/policy-making/schedule.html.*

* * * * *

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to *dkw@nrc.gov.*

Dated: November 21, 2003.

Dave Gamberoni,

Office of the Secretary.

[FR Doc. 03–29785 Filed 11–25–03; 10:03 am]

BILLING CODE 7590–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–26259]

Notice of Applications for Deregistration Under Section 8(f) of the Investment Company Act of 1940

November 21, 2003.

The following is a notice of applications for deregistration under section 8(f) of the Investment Company Act of 1940 for the month of November, 2003. A copy of each application may be obtained for a fee at the SEC's Public Reference Branch, 450 Fifth St., NW., Washington, DC 20549–0102, tel. (202) 942–8090. An order granting each application will be issued unless the SEC orders a hearing. Interested persons may request a hearing on any application by writing to the SEC's Secretary at the address below and serving the relevant applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on December 16, 2003, and should be accompanied by proof of service on the applicant, 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 Secretary, SEC, 450 Fifth Street NW., Washington, DC 20549–0609.

FOR FURTHER INFORMATION CONTACT: Diane L. Titus at (202) 942–0564, SEC, Division of Investment Management, Office of Investment Company Regulation, 450 Fifth Street NW., Washington, DC 20549–0504.

The First Philippine Fund Inc. [File No. 811–5902]

Summary: Applicant, a closed-end investment company, seeks an order declaring that it has ceased to be an investment company. On October 29, 2003, applicant made a final liquidating distribution to its shareholders based on net asset value. Expenses of $95,115 incurred in connection with the liquidation were paid by applicant.

Filing Dates: The application was filed on August 4, 2003, and amended on October 30, 2003.

Applicant's Address: 575 Madison Ave., New York, NY 10022.

Morgan Stanley Strategic Adviser Fund Inc. [File No. 811–8303]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On April 1, 2003,

applicant made a final liquidating distribution to its shareholders, based on net asset value. Expenses of $20,200 incurred in connection with the liquidation were paid by applicant and applicant's investment adviser, Morgan Stanley Investment Management, Inc.

Filing Date: The application was filed on November 5, 2003.

Applicant's Address: 1221 Avenue of the Americas, New York, NY 10020.

Aon Funds [File No. 811–6422]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On December 3, 2002, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of $24,089 incurred in connection with the liquidation were paid by applicant.

Filing Date: The application was filed on October 31, 2003.

Applicant's Address: 200 East Randolph St., Chicago, IL 60601.

Venus Series Trust [File No. 811–9717]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On October 18, 2002, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of approximately $1,000 incurred in connection with the liquidation were paid by Venus Capital Management, applicant's investment adviser.

Filing Date: The application was filed on October 27, 2003.

Applicant's Address: 31 Milk St., Third Floor, Boston, MA 02109.

SmithGraham Institutional Funds [File No. 811–21112]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On September 22, 2003, applicant made a liquidating distribution to its shareholders, based on net asset value. Expenses of $8,350 incurred in connection with the liquidation were paid by Smith, Graham & Co. Investment Advisors, L.P., applicant's investment adviser.

Filing Date: The application was filed on October 28, 2003.

Applicant's Address: c/o PFPC Inc., 400 Bellevue Parkway, Wilmington, DE 19809.

Credit Suisse Investment Grade Bond Fund, Inc. [File No. 811–5600]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On October 10, 2003, applicant transferred its assets to Credit Suisse Fixed Income Fund, based on net asset value. Expenses of $145,000 incurred in connection with the reorganization were paid by applicant's investment adviser, Credit Suisse Asset Management, LLC, and/or its affiliates.

Filing Date: The application was filed on November 3, 2003.

Applicant's Address: 466 Lexington Ave., New York, NY 10017.

St. Clair Funds, Inc. [File No. 811–4038]

The Munder Funds Trust [File No. 811–5899]

Summary: Each applicant seeks an order declaring that it has ceased to be an investment company. By June 13, 2003, all series of applicants had transferred their assets to corresponding series of Munder Series Trust, based on net asset value. Expenses of $60,305 and $174,185, respectively, incurred in connection with the reorganizations were paid by applicants.

Filing Date: The applications were filed on November 5, 2003.

Applicants' Address: 480 Pierce St., Birmingham, MI 48009.

Credit Suisse Institutional International Fund, Inc. [File No. 811–8933]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On August 22, 2003, applicant transferred its assets to Credit Suisse Institutional Fund, Inc., based on net asset value. Expenses of $140,000 incurred in connection with the reorganization were paid by applicant's investment adviser, Credit Suisse Asset Management, LLC, and/or its affiliates.

Filing Date: The application was filed on November 4, 2003.

Applicant's Address: 466 Lexington Ave., New York, NY 10017.

Credit Suisse Global Health Sciences Fund, Inc. [File No. 811–7901]

Credit Suisse Global Technology Fund, Inc. [File No. 811–8935]

Summary: Each applicant seeks an order declaring that it has ceased to be an investment company. On September 26, 2003 and October 10, 2003, respectively, each applicant transferred its assets to Credit Suisse Global Post-Venture Capital Fund, Inc., based on net asset value. Expenses of $150,000 and $200,000, respectively, incurred in connection with the reorganizations were paid by applicants' investment adviser, Credit Suisse Asset Management, LLC, and /or its affiliates.

Filing Date: The applications were filed on November 4, 2003.

Applicants' Address: 466 Lexington Ave., New York, NY 10017.

Oppenheimer Concentrated Growth Fund [File No. 811–10047]

Summary: Applicant seeks an order declaring that it has ceased to be an investment company. On May 16, 2003, applicant made a liquidating distribution to its shareholders, based on net asset value. Applicant incurred no expenses in connection with the liquidation.

Filing Date: The application was filed on November 5, 2003.

Applicant's Address: 6803 South Tucson Way, Englewood, CO 80112.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–29621 Filed 11–26–03; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 26260; 812–13019]

Hennion & Walsh, Inc., et al.; Notice of Application

November 21, 2003.

AGENCY: Securities and Exchange Commission ("Commission").

ACTION: Notice of application under section 6(c) of the Investment Company Act of 1940 (the "Act") for an exemption from section 12(d)(3) of the Act.

SUMMARY OF APPLICATION: The requested order would permit certain series of unit investment trusts to invest up to 10.5%, 14.5% or 34.5% of their respective total assets in securities of issuers that derived more than 15% of their gross revenues in their most recent fiscal year from securities related activities ("Securities Related Issuers").

APPLICANTS: Hennion & Walsh, Inc. ("Sponsor"); Smart Trust, The Pinnacle Family of Trusts, Schwab Trusts, Equity Securities Trust, and EST Symphony Trust ("Trusts"); all presently outstanding and subsequently issued series of the Trusts ("Series"); and all future unit investment trusts ("UITs") containing qualified securities and sponsored or co-sponsored by the Sponsor or a sponsor controlling, controlled by, or under common control, within the meaning of section 2(a)(9) of the Act, with the Sponsor (these UITs are included in the term Trusts and their series included in the term Series).

FILING DATES: The application was filed on September 12, 2003, and amended on November 12, 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 December 16, 2003, 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, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC, 20549. Applicants, Hennion & Walsh, Inc., 2001 Route 46, Hilltop Plaza, Parsippany, NJ 07054.

FOR FURTHER INFORMATION CONTACT: Marc R. Ponchione, Senior Counsel, at (202) 942–7927, or Mary Kay Frech, 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 (telephone 202–942–8090).

Applicants' Representations

1. Each Trust is a UIT registered under the Act and consists of various Series. The Sponsor is a sponsor of the Series. The investment objective of certain Series is to seek a greater total return than the stocks comprising the Dow Jones Industrial Average ("DJIA," and the Series, "Dow Series"). Certain of the Dow Series ("Top Ten Series") will invest approximately 10% of the value of its total assets in each of the ten common stocks in the DJIA that have the highest dividend yields (the "Top Ten"). In no event will a Top Ten Series invest more than 10.5% of the value of its total assets in the common stock of a Securities Related Issuer in the Top Ten. Certain other Dow Series ("Triple Strategy Series") will invest 20% of the value of its total assets in the Top Ten, 60% of the value of its total assets in the five lowest priced stocks of the Top Ten (the "Focus Five"), and 20% of the value of its total assets in the single stock that is the second lowest priced stock of the Focus Five (the "Penultimate Pick"). A Triple Strategy Series will invest no more than 10.5% with respect to the Top Ten, 14.5% with respect to the Focus Five, or 34.5% with respect to the Penultimate Pick, if the Penultimate Pick is itself a Securities Related Issuer, of the value of its total assets in a Securities Related Issuer.

2. The DJIA comprises 30 widely-held common stocks listed on the New York Stock Exchange that are chosen by the editors of The Wall Street Journal. The DJIA is the property of Dow Jones & Company, Inc., which is not affiliated with any Series, the Sponsor, or any co-sponsor and does not participate in any way in the creation of any Series or the selection of its stocks. The securities deposited in each Dow Series will be chosen solely according to the formula described above. The Sponsor will not have any discretion as to which securities are purchased. Sales of securities in the Dow Series' portfolios will be made in connection with redemptions and at termination of the Trust on a date specified a year in advance. The Sponsor does not have discretion as to when the securities will be sold except in extremely limited circumstances, such as default by the issuer in the payment of amounts due on a security or the institution of certain legal proceedings against the issuer.

Applicants' Legal Analysis

1. Section 12(d)(3) of the Act prohibits, with limited exceptions, an investment company from acquiring any security issued by any person who is a broker, dealer, underwriter, an investment adviser of an investment company, or a registered investment adviser. Rule 12d3–1 under the Act exempts the purchase of securities of an issuer that derived more than fifteen percent of its gross revenues in its most recent fiscal year from securities related activities, provided that, among other things, immediately after an acquisition, the acquiring company has not invested more than 5% of the value of its total assets in the securities of the issuer.

2. Section 6(c) of the Act provides that the SEC may exempt a person from any provision of the Act or any rule under the Act, if and to the extent that the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

3. Applicants request an exemption under section 6(c) from section 12(d)(3) to permit a Top Ten Series to invest up to approximately 10%, but in no event more than 10.5%, of the value of its total assets in a Securities Related Issuer in the Top Ten, and to permit a Triple Strategy Series to invest up to approximately 10%, but in no event more than 10.5%, of the value of its total assets in a Securities Related Issuer in the Top Ten, approximately 14%, but in no event more than 14.5%, of the value of its total assets in a Securities Related Issuer in the Focus Five, and approximately 34%, but in no event more than 34.5%, of the value of its total assets in the Penultimate Pick, if the Penultimate Pick is itself a Securities Related Issuer. Each of the Top Ten Series and Triple Strategy Series will comply with all of the conditions of rule 12d3–1, except the condition prohibiting an investment company from investing more than 5% of the value of its total assets in securities of a Securities Related Issuer.

4. Applicants state that section 12(d)(3) was designed to prevent certain potential conflicts of interest and to eliminate certain reciprocal practices between investment companies and securities related businesses. One potential conflict of interest could occur if an investment company purchased securities or other interests in a broker-dealer to reward that broker-dealer for selling investment company shares, rather than solely on investment merit. Applicants state that this concern does not arise in connection with the Top Ten Series and the Triple Strategy Series because neither the Series nor the Sponsor has discretion in choosing the portfolio securities or the amount purchased. Applicants also state that the effect of a Series' purchase on the stock of a Securities Related Issuer would be *de minimis* because the common stocks represented in the DJIA are widely held and have active markets.

5. Applicants state that another potential conflict of interest could occur if an investment company directed brokerage to a broker-dealer in which the investment company has invested to enhance the broker-dealer's profitability or to assist it during financial difficulty, even though that broker-dealer may not offer the best price and execution. To preclude this type of conflict, applicants agree, as a condition to the requested order, that no company held in a Series' portfolio, nor any affiliated person of that company, will act as a broker for any Series in the purchase or sale of any security for its portfolio.

Applicants' Condition

Applicants agree that the order granting the requested relief will be subject to the following condition:

No company held in the Series' portfolios nor any affiliated person of that company will act as a broker for any Series in the purchase or sale of any securities for the Series' portfolios.

For the Commission, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–29656 Filed 11–26–03, 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 26261; 812–12877]

First Trust Portfolios, L.P., et al.; Notice of Application

November 21, 2003.

AGENCY: Securities and Exchange Commission ("Commission").

ACTION: Notice of an application for an order under section 12(d)(1)(J) of the Investment Company Act of 1940 (the "Act") for an exemption from sections 12(d)(1)(A), (B) and (C) of the Act and under sections 6(c) and 17(b) of the Act for an exemption from section 17(a) of the Act.

SUMMARY OF THE APPLICATION: FT Series (the "Trust") and any registered unit investment trusts ("UITs") organized in the future and sponsored by First Trust Portfolios, L.P. ("Sponsor"), and their respective series (together with the Trust, the "Trusts", and each series of the Trusts, a "Trust Series"), request an order to permit the Trusts to acquire shares of registered management investment companies and UITs both within and outside the same group of investment companies.

APPLICANTS: First Trust Portfolios, L.P. and FT Series.

FILING DATES: The application was filed on August 28, 2002 and amended on November 10, 2003.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief 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 December 16, 2003, and should be accompanied by proof of service on applicants, in the form of an affidvavit 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, 1001 Warrenville Road, Lisle, IL 60532.

FOR FURTHER INFORMATION CONTACT: Emerson S. Davis, Sr., Senior Counsel, at (202) 942–0714, or Annette Capretta, 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 (tel. 202–942–8090).

Applicants' Representations

1. The Trust is a UIT registered under the Act. Each Trust Series will be a series of a Trust, each a UIT which is or will be registered under the Act.[1] The Sponsor, an Illinois limited partnership, is registered under the Securities Exchange Act of 1934 as a broker-dealer.

2. Applicants request relief to permit a Trust Series to invest in (a) registered investment companies that are part of the same "group of investment companies" (as that term is defined in section 12(d))(1)(G) of the Act) as the Trust ("Affiliated Funds"), and (b) registered investment companies that are not part of the same group of investment companies as the Trust ("Unaffiliated Funds," together with Affiliated Funds, the "Funds"). The Unaffiliated Funds may include UITs ("Unaffiliated Underlying Trusts") and open-end or closed-end management investment companies ("Unaffiliated Underlying Funds"). Certain of the Unaffiliated Underlying Trusts or Unaffiliated Underlying Funds may be "exchange-traded funds" that are registered under the Act as UITs or open-end management investment companies and have received exemptive relief to sell their shares on a national securities exchange at negotiated prices.[1]

3. Applicants state that the requested relief will benefit unitholders by providing investors with a professionally selected, diversified portfolio of investment company shares through a single investment vehicle.

Applicants' Legal Analysis

A. Section 12(d)(1)

1. Section 12(d)(1)(A) of the Act prohibits a registered investment company from acquiring shares of an investment company if such securities represent more than 3% of the total outstanding voting stock of the acquired company, more than 5% of the total assets of the acquiring company, or, together with the securities of any other investment companies, more than 10% of the total assets of the acquiring company. Section 12(d)(1)(B) of the Act prohibits a registered open-end investment company from selling its shares 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 generally. Section 12(d)(1)(C) prohibits an investment company, other investment companies having the same investment adviser, and companies controlled by such investment companies, from acquiring more than 10% of the outstanding voting stock of a registered closed-end management investment company.

2. Section 12(d)(1)(G) provides, in relevant part, that section 12(d)(1) will not apply to securities of a registered open-end investment company or UIT acquired by a registered UIT if the acquired company and the acquiring company are part of the same group of investment companies, provided that certain other requirements contained in section 12(d)(1)(G) are met. Applicants state that they may not rely on section 12(d)(1)((G) because a Trust Series may invest in Unaffiliated Funds in addition to Affiliated Funds.

3. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction or any class or classes of persons, securities or transactions, from any provision of section 12(d)(1) if 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 a Trust Series to acquire shares of a Fund and to permit a Fund to sell shares to a Trust Series beyond the limits set forth in sections 12(d)(1)(A), (B) and (C).

4. Applicants state that the proposed arrangement will not give rise to the policy concerns underlying sections

[1] All Trusts that currently intend to rely on the requested order are named as applicants. Any other Trust that relies on the order in the future will comply with the terms and conditions of the application.

[1] All Trusts that currently intend to rely on the requested order are named as applicants. Any other Trust that relies on the order in the future will comply with the terms and conditions of the application.

12(d)(1)(A), (B) and (C), which include concerns about undue influence by a fund of funds over underlying funds, excessive layering of fees, and overly complex fund structures. Accordingly, applicants believe that the requested exemption is consistent with the public interest and the protection of investors.

5. Applicants state that the proposed arrangement will not result in undue influence by a Trust Series or its affiliates over Funds. To limit the control that a Trust Series may have over an Unaffiliated Fund, applicants propose a condition prohibiting the Sponsor, the Trust Series, and certain affiliates (individually or in the aggregate) from controlling an Unaffiliated Fund within the meaning of section 2(a)(9) of the Act. To further limit the potential for undue influence over Unaffiliated Funds, applicants propose conditions 2 through 6, stated below, to preclude a Trust Series and its affiliated entities from taking advantage of an Unaffiliated Fund with respect to transactions between the entities and to ensure that transactions will be on an arm's length basis.

6. As an additional assurance that an Unaffiliated Underlying Fund understands the implication of an investment by a Trust Series under the requested order, prior to a Trust Series investment in an Unaffiliated Underlying Fund in excess of the limit in section 12(d)(1)(A)(i), the Trust Series and Unaffiliated Underlying Fund will execute an agreement stating that the board of directors of the Unaffiliated Underlying Fund and the investment adviser to the Unaffiliated Underlying Fund understand the terms and conditions of the order and agree to fulfill their responsibilities under the order. Applicants note that an Unaffiliated Underlying Fund may choose to reject an investment from the Trust Series.

7. Applicants do not believe that the proposed arrangement will result in excessive layering of fees. Applicants state that a condition to the order would provide that any sales charges and/or service fees (as those terms are defined in Rule 2830 of the Conduct Rules of the National Association of Securities Dealers ("NASD Conduct Rules") charged with respect to Units of a Trust Series will not exceed the limits applicable to a fund of funds as set forth in Rule 2830 of the NASD Conduct Rules. In addition, the trustee to a Trust Series ("Trustee") will waive or offset fees otherwise payable by the Trust Series in an amount at least equal to any compensation (including fees paid pursuant to a plan adopted by an Unaffiliated Underlying Fund under rule 12b–1 under the Act ("12b1–Fees")) received by the Sponsor or Trustee, or an affiliated person of the Sponsor or Trustee, from an Unaffiliated Fund in connection with the investment by a Trust Series in the Unaffiliated Fund.

8. Applicants believe that the proposed arrangement will not create an overly complex fund structure. Applicants note that a Fund will be prohibited from acquiring securities of any investment company in excess of the limits contained in section 12(d)(1)(A) of the Act. Applicants also represent that a Trust Series' prospectus and sales literature will contain concise, "plain English" disclosure designed to inform investors of the unique characteristics of the trust of funds structure, including, but not limited to, its expense structure and the additional expenses of investing in Funds.

B. Section 17(a)

1. Section 17(a) of the Act generally prohibits sales or purchases of securities between a registered investment company and any affiliated person of the company. Section 2(a)(3) of the Act defines an "affiliated person" of another person to include (a) 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; (b) any person 5% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote by the other person; and (c) any person directly or indirectly controlling, controlled by, or under common control with the other person.

2. Applicants state that a Trust Series and Affiliated Funds might be deemed to be under the common control of the Sponsor or an entity controlling, controlled by, or under common control with the Sponsor. Applicants also state that a Trust Series and a Fund might become affiliated persons if the Trust Series acquires more than 5% of the Fund's outstanding voting securities. In light of these possible affiliations, section 17(a) could prevent a Fund from selling shares to and redeeming shares from a Trust Series.

3. Section 17(b) of the Act authorizes the Commission to grant an order permitting a transaction otherwise prohibited by section 17(a) if it finds that (a) the terms of the proposed transaction are fair and reasonable and do not involve overreaching on the part of any person concerned; (b) the proposed transaction is consistent with the policies of each registered investment company involved; and (c) the proposed transaction is consistent with the general purposes of the Act. Section 6(c) of the Act permits the Commission to exempt any person or transactions from any provision of the Act if such 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.

4. Applicants submit that the proposed arrangement satisfies the standards for relief under sections 6(c) and 17(b) of the Act. Applicants state that the terms of the arrangement are fair and reasonable and do not involve overreaching. Applicants note that the consideration paid for the sale and redemption of shares of the Funds will be based on the net asset values of the Funds. Applicants state that the proposed arrangement will be consistent with the policies of each Trust Series and Fund, and with the general purposes of the Act.

Applicants' Conditions

Applicants agree that the order granting the requested relief will be subject to the following conditions:

1. (a) The Sponsor, (b) any person controlling, controlled by, or under common control with the Sponsor, and (c) any investment company and any issuer that would be an investment company but for section 3(c)(1) or section 3(c)(7) of the Act sponsored or advised by the Sponsor or any person controlling, controlled by, or under common control with the Sponsor (collectively, the "Group") will not control (individually or in the aggregate) an Unaffiliated Fund within the meaning of section 2(a)(9) of the Act. If, as a result of a decrease in the outstanding voting securities of an Unaffiliated Fund, the Group, in the aggregate, becomes a holder of more than 25% of the outstanding voting securities of the Unaffiliated Fund, the Group will vote its shares in the same proportion as the vote of all other holders of the Unaffiliated Fund's shares.

2. A Trust Series and its Sponsor, promoter, and principal underwriter, and any person controlling, controlled by, or under common control with any of those entities (each, a "Trust Series Affiliate") will not cause any existing or potential investment by the Trust Series in shares of an Unaffiliated Fund to influence the terms of any services or transactions between the Trust Series or a Trust Series Affiliate and the Unaffiliated Fund or its investment adviser, sponsor, promoter, and principal underwriter, and any person controlling, controlled by, or under

common control with any of those entities.

3. Once an investment by a Trust Series in the securities of an Unaffiliated Underlying Fund exceeds the limits of section 12(d)(1)(A)(i) of the Act, the board of directors of the Unaffiliated Underlying Fund, including a majority of the disinterested directors, will determine that any consideratation paid by the Unaffiliated Underlying Fund to a Trust Series or a Trust Series Affiliate in connection with any services or transactions: (i) Is fair and reasonable in relation to the nature and quality of the services and benefits received by the Unaffiliated Underlying Fund; (ii) is within the range of consideration that the Unaffiliated Underlying Fund would be required to pay to another unaffiliated entity in connection with the same services or transactions; and (iii) does not involve overreaching on the part of any person concerned.

4. No Trust Series or Trust Series Affiliate will cause an Unaffiliated Fund to purchase a security from any underwriting or selling syndicate in which a principal underwriter is the Sponsor or a person of which the Sponsor is an affiliated person (each an "Underwriting Affiliate"). An offering during the existence of an underwriting or selling syndicate of which a principal underwriter is an Underwriting Affiliate is considered an "Affiliated Underwriting."

5. The board of directors of an Unaffiliated Underlying Fund, including a majority of the disinterested directors, will adopt procedures reasonably designed to monitor any purchases by the Unaffiliated Underlying Fund of securities in Affiliated Underwritings once an investment by a Trust Series in the securities of the Unaffiliated Underlying Fund exceeds the limits of section 12(d)(1)(A)(i) of the Act, including any purchases made directly from an Underwriting Affiliate. The board of directors will review these purchases periodically, but no less frequently than annually, to determine whether the purchases were influenced by the investment by the Trust Series in shares of the Unaffiliated Underlying Fund. The board of directors will consider, among other things, (i) whether the purchases were consistent with the investment objectives and policies of the Unaffiliated Underlying Fund; (ii) how the performance of securities purchased in an Affiliated Underwriting compares to the performance of comparable securities purchased during a comparable period of time in underwritings other than Affiliated Underwritings or to a benchmark such as a comparable market index; and (iii) whether the amount of securities purchased by the Unaffiliated Underlying Fund in Affiliated Underwritings and the amount purchased directly from Underwriting Affiliates have changed significantly from prior years. The board of directors shall take any appropriate actions based on its review, including, if appropriate, the institution of procedures designed to assure that purchases of securities from Affiliated Underwritings are in the best interests of shareholders.

6. An Unaffiliated Underlying Fund shall maintain and preserve permanently in an easily accessible place a written copy of the procedures described in the preceding condition, and any modifications, and shall maintain and preserve for a period not less than six years from the end of the fiscal year in which any purchase from an Affiliated Underwriting occurred, the first two years in an easily accessible place, a written record of each purchase made once an investment by a Trust Series in the securities of an Unaffiliated Underlying Fund exceeded the limits of section 12(d)(1)(A)(i) of the Act, setting forth from whom the securities were acquired, the identity of the underwriting syndicate's members, the terms of the purchase, and the information or materials upon which the board's determinations were made.

7. Prior to an investment by a Trust Series in an Unaffiliated Underlying Fund in excess of the limit in section 12(d)(1)(A)(i), the Trust Series and the Unaffiliated Underlying Fund will execute an agreement stating, without limitation, that the board of directors of the Unaffiliated Underlying Fund and the investment adviser to the Unaffiliated Underlying Fund understand the terms and conditions of the order and agree to fulfill their responsibilities under the order. At the time of its investment in shares of an Unaffiliated Underlying Fund in excess of the limit in section 12(d)(1)(A)(i), a Trust Series will notify the Unaffiliated Underlying Fund of the investment. At such time, the Trust Series also will transmit to the Unaffiliated Underlying Fund a list of the names of each Trust Series Affiliate and Underwriting Affiliate. The Trust Series will notify the Unaffiliated Underlying Fund of any changes to the list as soon as reasonably practicable after a change occurs. The Unaffiliated Underlying Fund and the Trust Series will maintain and preserve a copy of the order, the agreement, and the list with any updated information for a period not less than 6 years from the end of the fiscal year in which any investment occurred, the first 2 years in an easily accessible place.

8. The Trustee will waive or offset fees otherwise payable by a Trust Series in amount at least equal to any compensation (including 12b-1 Fees) received by the Sponsor or Trustee, or an affiliated person of the Sponsor or Trustee, from an Unaffiliated Fund in connection with the investment by a Trust Series in the Unaffiliated Fund.

9. Any sales charges and/or service fees (as those terms are defined in rule 2830 of the NASD Conduct Rules) charged with respect to Units of a Trust Series will not exceed the limits applicable to a fund of funds as set forth in rule 2830 of the NASD Conduct Rules.

10. No Fund will acquire securities of any other investment company in excess of the limits contained in section 12(d)(1)(A) of the Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48822; File No. SR–OPRA–2003–01]

Options Price Reporting Authority; Notice of Filing of and Order Approving on a Temporary Basis Not To Exceed 120 Days a Proposed Amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information and Amendments No. 1 and 2 Thereto To Revise the Manner in which the Options Price Reporting Authority Engages in Capacity Planning and Allocates Its Available System Capacity Among the Parties to the Plan

November 21, 2003.

I. Introduction

Pursuant to Section 11A of the Securities Exchange Act of 1934 ("Act")[1] and Rule 11Aa3–2 thereunder,[2] notice is hereby given that on April 15, 2003 the Options Price Reporting Authority ("OPRA") submitted to the Securities and Exchange Commission ("Commission") an amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information

[1] 15 U.S.C. 78k–1.

[2] 17 CFR 240.11Aa3–2.

("OPRA Plan" or "Plan").[3] The proposed amendment would revise the manner in which OPRA engages in capacity planning and allocates capacity among the exchanges that are parties to the Plan. On July 16, 2003, OPRA submitted Amendment No. 1 to the proposal.[4] On October 12, 2003, OPRA submitted Amendment No. 2 to the proposal.[5] This order approves the proposal as modified by Amendments No. 1 and 2 for a temporary period not to exceed 120 days, and solicits comment on the proposal, as amended by Amendments No. 1 and 2.[6] The text of the proposed Plan amendment, as amended, is available at OPRA, the Commission's Public Reference Room, and on the Commission's Web site.

II. Description and Purpose of the Amendment

Under the proposed Plan amendment, OPRA proposes to revise the manner in which OPRA engages in capacity planning and allocates its available system capacity among the exchanges that are parties to the Plan. OPRA also proposes to amend Subsections I(a) and I(b) of the OPRA Plan to make it clear that participation in OPRA is limited to those self-regulatory organizations ("SROs") that are engaged in the business of providing a market for the trading of securities options and other eligible securities under the OPRA Plan.

The principal purpose of the proposed amendment is to revise the OPRA Plan in response to the Commission's Order instituting public administrative proceedings against four of OPRA's participant exchanges (Amex, CBOE, PCX and Phlx, referred to collectively as the "respondent exchanges") pursuant to Section 19(h)(1) of the Act,[7] and specifically in response to Section IV.B.c. of the Order (the "Undertaking"). The Undertaking requires each of the four respondent exchanges, acting jointly with all other options exchanges,[8] to modify the structure and operation of OPRA in various ways that would eliminate much of the need for joint and collective action in the capacity planning and allocation process. The three specific requirements of the Undertaking and the manner in which the proposed amendment is intended to satisfy these requirements are described below.

The respondent exchanges must establish a system for procuring and allocating options market data transmission capacity that eliminates joint action by the participants in OPRA in determining the amount of total capacity procured and the allocation thereof, and provides that each participant in OPRA would independently determine the amount of capacity it would obtain.

The proposed amendment to the OPRA Plan (reflected in proposed new Section III(g) and related definitions) would require each party to the Plan from time to time to independently project the capacity it would need and to privately submit requests for capacity based on its projections to an ISCA, which would maintain these individual capacity projections and requests in confidence. The proposed definition of the ISCA in Section II(m) of the Plan would require the ISCA to maintain the confidentiality of this information, consistent with the provisions of Section III(g) of the Plan.[9] Revised Section III(g) of the Plan would clarify that confidential capacity-related information obtained by the ISCA would not be used by the ISCA in any of its other business activities in a manner that may result in the information being made available to any of the parties to the Plan, or to use it in any manner that is otherwise inconsistent with the ISCA's obligation to hold the information in confidence.[10] The ISCA may share this information with the parties only in the form of aggregate capacity requests that do not identify the individual capacity requests of any of the parties. The ISCA would then determine how and when to modify the OPRA System in order to provide to each party the capacity it has requested and how the cost of such modifications is to be allocated among the parties all in accordance with and subject to the proposed Capacity Guidelines that are incorporated in the Plan as part of the proposed amendment. Under the proposed amendment, each party would be entitled to the capacity it has requested and would be obligated to authorize and fund the modifications of the OPRA System in accordance with the ISCA's determinations and the specific cost allocation provisions of the proposed Capacity Guidelines.

The proposed Capacity Guidelines describe the function and authority of the ISCA and its procedures in greater detail than in the Plan itself. Under the procedures specified in the proposed Capacity Guidelines, the ISCA would promptly review the capacity projections and requests it receives from the parties, would discuss proposed modifications with OPRA's Policy and Technical Committees and the OPRA Processor, and would discuss with each party that has requested additional capacity the ISCA's estimate of the cost to that party of providing the capacity it requested. In every case, the ISCA would report to OPRA concerning any modifications to the OPRA System that it believes are called for in response to the parties' aggregate projections and requests. In these discussions and reports, no information from any party would be disclosed to any other party except in the form of aggregate projections or requests. In addition, OPRA proposes in Guideline No. 1 of the Capacity Guidelines to require the ISCA to maintain internal safeguards and procedures adequate to assure that the requirements of the Plan pertaining to the confidentiality of information provided to the ISCA would be satisfied.[11] Under the proposed amendment to the Plan, the person designated to act as the ISCA, before it begins to act in that capacity, would be required to furnish a written description

[3] OPRA is a national market system plan approved by the Commission pursuant to Section 11A of the Act and Rule 11Aa3–2 thereunder. *See* Securities Exchange Act Release No. 17638 (March 18, 1981), 22 S.E.C. Docket 484 (March 31, 1981).

The OPRA Plan provides for the collection and dissemination of last sale and quotation information on options that are traded on the participant exchanges. The five participants to the OPRA Plan are the American Stock Exchange LLC ("Amex"), the Chicago Board Options Exchange, Inc. ("CBOE"), the International Securities Exchange, Inc. ("ISE"), the Pacific Exchange, Inc. ("PCX"), and the Philadelphia Stock Exchange, Inc. ("Phlx").

[4] *See* letter from Michael L. Meyer, Counsel to OPRA, Schiff, Hardin & Waite, to Deborah Flynn, Assistant Director, Division of Market Regulation ("Division"), Commission, dated July 15, 2003, replacing in its entirety the initial proposal filed on April 15, 2003 ("Amendment No. 1"). In Amendment No. 1, OPRA provides additional discussion of the proposed Capacity Guidelines that describe the function, authority, and procedures of the Independent System Capacity Advisor ("ISCA") and clarified in the proposed Plan's language and corresponding discussion that the selection of the ISCA is subject to being filed with the Commission as an amendment to the Plan, to be put into effect upon filing.

[5] *See* letter from Michael L. Meyer, Counsel to OPRA, Schiff, Hardin & Waite, to Deborah Flynn, Assistant Director, Division, Commission, dated October 15, 2003 ("Amendment No. 2"). In Amendment No. 2, OPRA specifies in the proposed Plan's language and the proposed Capacity Guidelines the ISCA's obligation to maintain the confidentiality of the information entrusted to it by OPRA's participants in the capacity planning process.

[6] 17 CFR 240.11Aa3–2(c)(4).

[7] Order Instituting Public Administrative Proceedings Pursuant to Section 19(h)(1) of the Act, Making Findings and Imposing Remedial Sanctions. Securities Exchange Act Release No. 43268, dated September 11, 2000 and Administrative Proceeding File 3–10282 ("Order").

[8] ISE is not a respondent exchange subject to the Order. Nevertheless, as a party to the OPRA Plan, ISE participated fully in all of the discussions that led to the approval of the proposed amendment, and it joined with the other parties in approving the proposed amendment and authorizing its filing with the Commission.

[9] *See* Amendment No. 2, *supra* note .

[10] *Id.*

[11] *Id.*

of these internal safeguards and procedures to the Commission.[12]

The proposed Capacity Guidelines also provide that, in allocating OPRA's capacity-related costs among the parties, the first $5 million of costs in any year would be allocated as currently provided under the OPRA Plan, based on the relative trading volume of each of the parties. Costs above this amount would be allocated in a fair and equitable manner as determined by the ISCA. The $5 million amount would be subject to adjustment on an annual basis, if approved by 75% of the parties.

A prospective new options exchange would have to inform the ISCA, at least 6 months prior to the time it proposes to commence trading, of the initial amount of system capacity it would need. The costs of providing initial system capacity to an applicant in accordance with its request, as determined by the ISCA, would be included in the applicant's Participation Fee payable under Section 1(b) of the OPRA Plan. Also, under Guideline No. 6 of the proposed Capacity Guidelines, if the new party has not received the capacity it has requested at the time it has commenced trading options, and to the extent there is any excess capacity available in the system that has not been provided to any of the parties, the ISCA would be able to allocate to the new party all or a portion of any such excess capacity in order to provide the new party with the amount of capacity determined by the ISCA to be sufficient to satisfy the reasonable needs of the new party until it has been provided with the capacity it initially requested.

The proposed Capacity Guidelines would permit the ISCA to provide less than all of the capacity requested by the parties if the ISCA determines that: (1) The capacity requests of one or more of the parties are unreasonable, or (2) it is not reasonable to develop or maintain a system that has capacity sufficient to satisfy the requests of the parties.[13] The ISCA would be authorized to allocate system capacity among the parties under circumstances when available capacity is insufficient to provide each party with the capacity it has requested; however, the ISCA would not be authorized to require any party to give up any capacity previously provided to it at the party's request, other than in response to a major systems failure or other catastrophe.[14] In addition, the ISCA's authority to modify the OPRA System and to obligate the parties to pay the costs of such modifications would be limited as follows: (i) The ISCA could not authorize a modification to the OPRA System that, together with other capacity increases previously authorized by the ISCA, represents an increase in the total capacity of the System in excess of 15,000 messages per second over the immediately preceding twelve months unless at least 75% of the parties consent to such increase; (ii) the ISCA could not authorize a modification to the OPRA System if the Processor disagrees with any material aspect of the manner or scope of the modification unless at least 75% of the parties consent to such modification; and (iii) the ISCA could not authorize a modification to the OPRA System that makes major changes to the System, such as changing the types of servers used in the System or changing the communication protocols used in the network unless at least 75% of the parties consent to such modification.

As a limited exception to the allocation of System capacity in accordance with the parties' requests and the ISCA's determinations, a provision is made in proposed new Section III(h) of the Plan for a party, on an anonymous basis, to offer to acquire additional capacity from, or make excess capacity available to, another party. Furthermore, to promote the most efficient utilization of available capacity, OPRA proposes in Section III(g) of the Plan to provide for the continued utilization of a "dynamic throttle," so as to automatically make available to a party with an immediate need for additional capacity, on a short-term interruptible basis, any unused capacity that may then be available. A party receiving additional capacity by operation of the dynamic throttle would be required to pay for it at an above-cost rate, so as to discourage parties from submitting unrealistically low capacity requests in the belief that some unused capacity of other parties would always be available to them.

Furthermore, under the proposed amendment, future Plan amendments, including amendments to the proposed new provisions of the Plan pertaining to capacity planning and allocation, would continue to require the unanimous approval of the parties. However, decisions relating to the selection or termination of the ISCA, certain changes to the authority of the ISCA, and changes to the Capacity Guidelines may be authorized by a vote of 75% of the parties. In addition, the selection of the ISCA would be required to be filed with the Commission as an amendment to OPRA's national market system plan.

In accordance with this requirement, this filing reflects OPRA's selection of the Options Clearing Corporation ("OCC") to act as the ISCA upon the effectiveness of the proposed amendment to the Plan. OCC is a registered clearing agency that, while nominally owned by the five options exchanges, is an independent entity that is not controlled by any exchange. Each of the five exchanges owns a 20% interest in OCC, so that, on the basis of stock ownership alone, no exchange has a controlling interest. However, OPRA believes that OCC's independence is assured in ways that go beyond stock ownership. Pursuant to the bylaws of OCC, its 16-person Board of Directors consists of one Director from each of the five exchanges, nine representatives of OCC clearing member firms, one Public Director, and one Management Director. The exchanges have no voice in the selection of Member Directors, the Public Director, or the Management Director. Thus each exchange has only a 6.25% representation on the OCC Board, and all of the exchanges together represent only 31.25% of the Board.

OPRA believes that OCC's independence has long been recognized by the exchanges and by the Commission. This is reflected not only in the selection of OCC to act as the ISCA by the unanimous vote of all five exchanges, but in OCC's other roles as the central issuer and clearing agency for options traded on five competing exchanges, as the developer and manager of the intermarket options linkage facility pursuant to the Options Intermarket Linkage Plan,[15] and as the arbiter of the eligibility of underlying stocks for options trading pursuant to the Options Listing Procedures Plan.[16] OCC serves in these capacities with the approval of all five exchanges and with the Commission's approval, which OPRA believes stands as an acknowledgement of OCC's independence.

The respondent exchanges must establish a system for gathering and disseminating business information from and to participants of OPRA such that all nonpublic information specific to a participant in OPRA shall remain segregated and confidential from other

[12] *Id.*

[13] Guideline No. 1, Capacity Guidelines.

[14] Guideline No. 6, Capacity Guidelines.

[15] Securities Exchange Act Release Nos. 43086 (July 28, 2000), 65 FR 48023 (August 4, 2000) (order approving the Linkage Plan submitted by Amex, CBOE, and ISE); 43574 (November 16, 2000), 65 FR 70850 (November 28, 2000) (order approving PCX as participant in the Options Intermarket Linkage Plan); and 43573 (November 16, 2000), 65 FR 70851 (November 28, 2000) (order approving Phlx as a participant in the Options Intermarket Linkage Plan).

[16] *See* Securities Exchange Act Release No. 44521 (July 6, 2001), 66 FR 36809 (July 13, 2001) (order approving a proposed options listing procedures plan by Amex, CBOE, ISE, OCC, PCX, and Phlx).

participants (except for information that may be shared in connection with joint activities permitted as necessary to fulfill the functions and objectives of OPRA as stated in the Plan).

As noted in the discussion above, the proposed amendment would require each party's individual capacity projections and requests to be submitted to the ISCA in confidence, and the ISCA would be expressly prohibited from sharing this information with any of the other parties, except in the form of aggregate information that does not identify the individual capacity requests of any of the other parties. The ISCA would be required under Section II(m) of the Plan to maintain the confidentiality of this information, consistent with the provisions of Section III(g) of the Plan, which would specify that confidential capacity-related information obtained by the ISCA would not be used by the ISCA in any of its other business activities in a manner that may result in the information being made available to any of the parties to the Plan, or to use it in any manner that is otherwise inconsistent with the ISCA's obligation to hold the information in confidence.[17] Furthermore, Guideline No. 1 of the proposed Capacity Guidelines would require the ISCA to maintain internal safeguards and procedures adequate to assure that the requirements of the Plan pertaining to the confidentiality of information provided to the ISCA would be satisfied.[18] A written description of these internal safeguards and procedures would have to be furnished to the Commission before the ISCA begins to act in that capacity.[19]

In addition, OPRA proposes to amend Section III(b) of the Plan to make explicit the requirement that each person who performs administrative functions for OPRA, including its Executive Director and other officials and its processor, shall agree that any nonpublic business information pertaining to any party shall be held in confidence and not be shared with the other parties, except for information that may be shared in connection with permitted joint activities. Finally, OPRA proposes to make explicit in the preamble to the Plan that the parties themselves are each obligated to take reasonable steps to insure that their nonpublic business information remains segregated and confidential from the other parties, except for information that may be shared in connection with permitted joint activities.

[17] *See* Amendment No. 2, *supra* note 5.

[18] *Id.*

[19] *Id.*

The respondent exchanges must set forth a statement of OPRA's functions and objectives as permitted under the Exchange Act, and provide for rules and procedures that limit any joint action with respect to OPRA by the participants in OPRA to circumstances in which such joint action is necessary in order to fulfill the stated functions and objectives.

The functions and objectives of OPRA are specifically set forth in the OPRA Plan as it is proposed to be amended, most particularly in the preamble to the Plan and in Section III(b) thereof. These functions and objectives include: (1) Determining the manner in which last sale reports, quotation information, and other market information will be collected, consolidated, and disseminated in satisfaction of the requirements of the Act and establishing the formats for such consolidated information; (2) contracting for and maintaining facilities to support these activities, prescribing forms of contracts to be entered into by vendors, subscribers, and other persons, and making policy determinations pertaining to such contracts; (3) establishing standards concerning the qualifications of different categories of recipients of consolidated information; (4) determining fees to be paid for access to consolidated information as permitted under the Act; (5) determining policy questions pertaining to OPRA's budgetary and other financial matters; (6) managing the capacity of the OPRA System in accordance with determinations made by the ISCA as described above; and (7) otherwise making all policy decisions necessary in furtherance of the objectives of the Act. The proposed amendment makes explicit in the preamble to the Plan that joint action by the parties to the Plan is limited to those matters as to which they share authority under the Plan, and then only to circumstances where such joint action is necessary in order to fulfill the functions and objectives of OPRA as stated in the Plan.

In addition to the above described amendments pertaining directly to OPRA's capacity planning and allocation functions and conforming definitional and editorial modifications, OPRA also proposes to amend subsections I(a) and I(b) of the OPRA Plan to make it clear that a party to the OPRA Plan ceases to be a party at such time as it ceases to maintain a market for the trading of standardized options. This aspect of the amendment is directed at the anomalous situation that recently confronted OPRA when the New York Stock Exchange, Inc. ("NYSE"), after it disposed of its entire options trading program and thereby ceased to have any interest in the activities of OPRA, nevertheless remained a party to the OPRA Plan with the same voting rights and other rights of participation in OPRA as every other party to the Plan.

Although the situation pertaining to the status of the NYSE as a party to the OPRA Plan was recently resolved when the NYSE voluntarily withdrew from OPRA, the current parties to the Plan believe it is necessary to amend the Plan to clarify the status under the Plan of exchanges that continue to have rules governing the trading of options even though they no longer are involved in options trading. The parties believe it is especially important to clarify the matter of eligibility to be a party to the Plan in light of the other amendments to the OPRA Plan that are proposed herein dealing with capacity planning and capacity allocation. The parties believe that only those exchanges that actually maintain a market for the trading of standardized options should have a voice in these critical capacity-related issues.

The parties to the OPRA Plan believe it is consistent with Section 11A of the Act[20] and Rule 11Aa3–2 thereunder[21] to limit participation in OPRA to those SROs that provide a market in the types of securities that are covered by the OPRA Plan. OPRA believes that subparagraph (a)(3)(B) of Section 11A[22] authorizes the Commission, "in furtherance of the directive in paragraph (2) of this subsection [which includes the directive to assure the availability to brokers, dealers and investors of information with respect to quotations for and transactions in securities] * * * to authorize or require [SROs] to act jointly with respect to *matters as to which they share authority under this title* in planning, developing, operating, or regulating a national market system (or a subsystem thereof) or one of more facilities thereof." [Emphasis supplied.] Similarly, OPRA believes that paragraph (b)(3) of Rule 11Aa3–2 under the Act[23] authorizes SROs "to act jointly in (i) planning, developing, and operating any national market subsystem or facility contemplated by a national market system plan * * * or (iii) implementing or administrating an effective national market system plan." OPRA believes that if an SRO does not share authority for national market system activities in respect of a particular type of security

[20] 15 U.S.C. 78k–1.

[21] 17 CFR 240.11Aa3–2.

[22] 15 U.S.C. 78k–1(a)(3)(B).

[23] 17 CFR 240.11Aa3–2(b)(3).

because it does not provide a market for trading that type of security, then there appears to be no basis in the Act for authorizing or requiring that SRO to participate in that national market system.

Finally, the proposed amendment expands the types of persons to whom a party may disseminate proprietary information pertaining to quotations and transactions in its market as an exception to the requirement of the Plan that makes OPRA the exclusive channel for the dissemination of this information. Under Section V(c)(iii) of the current Plan, a party may disseminate its proprietary information outside of the OPRA System to its members for display on terminals used to enter or transmit orders or quotes to the party's market and to other parties, provided that those members who have access to a party's proprietary information must also have equivalent access to consolidated information provided by OPRA, and provided further that a party may not disseminate proprietary information outside of OPRA on any more timely basis than the same information is provided to OPRA. The proposed amendment to the Plan would allow a party to disseminate its proprietary information outside of the OPRA System to any person, provided that the requirements of the current Plan pertaining to equivalent access to consolidated data provided by OPRA and to the timeliness of providing data to OPRA would continue to apply. This proposed change reflects past experience with the electronic trading system of the ISE and the anticipated expanded use of electronic trading systems by other parties, all of which necessarily involve the dissemination of proprietary information over systems that are separate from the OPRA System. OPRA has come to recognize that persons in addition to members of a party who enter quotes or orders into a party's electronic market may benefit from having access to the party's electronic network. The proposed amendment is intended to facilitate this, while at the same time assuring that all persons who have access to a party's proprietary information would also have equivalent access to consolidated market information provided by OPRA.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the proposed Plan amendment, as modified by Amendments No. 1 and 2, including whether the proposal and Amendments No. 1 and 2 are consistent with the Act. Specifically, the Commission requests comment on OPRA's proposal that the first $5 million of OPRA's capacity-related costs in any year would be allocated based on the relative trading volume of each of the parties, while OPRA's costs above $5 million, as proposed in Capacity Guideline No. 7, would be allocated by the ISCA, and, in particular, whether $5 million appears to be an appropriate ceiling before the ISCA may begin allocating OPRA's capacity-related costs. Furthermore, as part the of the ISCA's limitations on authority in proposed Capacity Guideline No. 5, the ISCA may not authorize a modification to the OPRA System that, together with other capacity increases previously authorized by the ISCA, represents an increase in the total capacity of the System in excess of 15,000 messages per second over the immediately preceding twelve months unless at least 75% of the parties consent to such an increase. The Commission seeks comment on whether such a limitation is appropriate, and, if so, whether the 15,000 mps limitation imposed on the ISCA is reasonable, whether OPRA should use a higher threshold, and whether commenters recommend using a threshold percentage based on OPRA's capacity of the previous year instead of a specified amount.

Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, and all written statements with respect to the proposal and Amendments No. 1 and 2 that are filed with the Commission, and all written communications relating to the proposal and Amendments No. 1 and 2 between the Commission and any person, other than those withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing will also be available at the principal offices of OPRA. All submissions should refer to File No. SR–OPRA–2003–01 and should be submitted by December 19, 2003.

IV. Discussion

After careful review, the Commission finds that the proposed OPRA Plan amendment, as amended by Amendments No. 1 and 2, is sufficient under the Act and the rules and regulations thereunder for temporary approval of not more than 120 days.[24] Specifically, the Commission believes that the proposed OPRA Plan amendment, which would revise the manner in which OPRA engages in capacity planning and the allocation of system capacity among the exchanges that are parties to the Plan, is sufficient under Section 11A of the Act[25] and Rule 11Aa3–2 thereunder[26] for temporary approval not to exceed 120 days in that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities.

Specifically, the Commission believes that OPRA's proposal to require each party to the Plan to independently project the capacity it would need and to confidentially submit requests for capacity based on such projections to the ISCA is designed to eliminate joint action by the OPRA participants in determining the amount of total capacity procured and the allocation of such capacity. The Commission notes that the proposal would require that the ISCA maintain these individual capacity projections and requests in confidence, and not use such confidential, capacity-related information in any of its business activities that may result in the information being made available to any of the parties of the Plan, or to use such information in any manner that is inconsistent with its obligation to hold the information in confidence. Furthermore, the proposed Capacity Guidelines would require the ISCA to provide the Commission with a written description of its internal safeguards and procedures to ensure compliance with the Plan's confidentiality requirements prior to the time the ISCA first exercises its authority under the Plan. The Commission believes that these requirements provide additional assurance that each exchange's non-public business information would remain segregated would not be made available to its competitors. Furthermore, the Commission emphasizes that neither the Plan nor the Capacity Guidelines should be construed in any manner that would permit individual exchange capacity projections or requests or other confidential, capacity-related information to be shared with the other parties to the Plan.

[24] In approving this proposed OPRA Plan amendment, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[25] 15 U.S.C. 78k–1.

[26] 17 CFR 240.11Aa3–2.

The Commission also believes that the proposed grant to the ISCA of the responsibility to allocate capacity-related costs above a $5 million ceiling would allow the exchanges to avoid the difficult task of having to differentiate the costs and expenses attributable to capacity expansion from the costs and expenses attributable to maintaining and operating the OPRA system. However, as discussed above, the Commission specifically requests comment on whether $5 million would be an appropriate limit before the ISCA may begin allocating the capacity-related costs among the parties.

The Capacity Guidelines provide that the ISCA is ordinarily expected to provide the parties with the systems capacity they have requested. However, the ISCA has some discretion to provide less than all the capacity requested if it determines that the capacity requests of one or more of the parties are unreasonable. A party's request may be found by the ISCA to be unreasonable if it concludes that a party does not have a reasonable need for all the capacity it has requested within the timeframe to which the request applies.

In 1999, the Commission ordered the exchanges to discuss the feasibility of strategies to avoid quote traffic congestion, including quote mitigation strategies.[27] In that Order the Commission recognized that increases in quote message traffic have implications not only for the options exchanges, but all users of options market data. Moreover, the increase in quote message traffic has accelerated since the Commission issued that order. As of September 2003, the exchanges' peak dissemination of messages per second was 15,000 messages per second. As the options exchanges modify their trading rules to permit competing market makers to independently quote, it is anticipated that each exchange's demands on capacity will increase substantially. In addition, the Boston Stock Exchange ("BSE") has proposed to operate a fully electronic options exchange, which would, if approved by the Commission, place further demands on capacity. For these reasons, the Commission believes that the ISCA may consider whether a party has made reasonable efforts to mitigate the amount of systems capacity that its market data requires of OPRA and other market participants in determining whether a party does not have a reasonable need for all the capacity it has requested.

The Capacity Guidelines also provide that the ISCA may provide less than all the capacity requested if it determines that it is not reasonable to develop or maintain a system that has capacity sufficient to satisfy the request of the parties. In this regard, the Capacity Guidelines provide that the ISCA may determine that it is not reasonable to develop or maintain a system with all of the capacity that has been requested if it concludes that it is not technically feasible to do so, or that a significant number of OPRA vendors cannot or will not carry the amount of message traffic disseminated by such a system. Because of the implications that increases in message traffic have on all users of options market data, the Commission believes it is important that the ISCA consider the technical feasibility for all users of options market data, including vendors, brokers-dealers, and customers, to develop or maintain a system with all of the capacity that has been requested.

In addition, the Commission notes that, under the proposed Capacity Guidelines, the ISCA would not be permitted to increase systems capacity in excess of 15,000 mps during a twelve-month period without the approval of 75% of the parties to the Plan. The Commission believes that some restriction on the ISCA's authority is important to prevent large increases in systems capacity, which could have a significant impact on down-stream users of OPRA data, such as vendors and broker-dealers.

Furthermore, the Plan amendment would require OPRA to file its selection of the ISCA with the Commission as an amendment to the Plan, which would become effective upon filing.[28] This requirement would provide the Commission with the opportunity to review OPRA's choice of the ISCA. Under this Plan amendment, OPRA has proposed to select OCC to function as the ISCA. Because of OCC's status as an SRO, the Commission will be able to monitor its obligations under the Plan to maintain the exchanges' individual capacity projections and requests confidentially.

The Commission believes that the proposed Capacity Guidelines adequately provide for the allocation of capacity to new parties to OPRA. Under Guideline No. 2 of the proposed Capacity Guidelines, a prospective new options exchange would have to inform the ISCA, at least 6 months prior to the time it proposes to commence trading, of the initial amount of system capacity it would need. The ISCA would then aggregate this request for capacity with the requests received from the existing exchanges. Also, under Guideline No. 6 of the proposed Capacity Guidelines, if the new party has not received the capacity it has requested at the time it has commenced trading options, and to the extent there is any excess capacity available in the system that has not been provided to any of the parties, the ISCA would be able to allocate to the new party all or a portion of any such excess capacity in order to provide the new party with the amount of capacity determined by the ISCA to be sufficient to satisfy the reasonable needs of the new party until it has been provided with the capacity it initially requested. These provisions in the proposed Capacity Guidelines, which specifically contemplate new entrants and provide a mechanism for them to acquire capacity, together with the prohibitions imposed on the ISCA from using confidential capacity-related information in any of its other business activities that may result in the information being made available to any of the parties to the Plan or in any manner inconsistent with the ISCA's obligations to hold such information in confidence, are designed to ensure that the existing exchanges would not be able to restrain new entrants from joining OPRA and acquiring the capacity that they require.

Finally, the Commission finds that it is appropriate to put the proposed OPRA Plan amendment, as modified by Amendments No. 1 and 2, into effect summarily upon publication of notice on a temporary basis not to exceed 120 days to permit OPRA to implement the capacity planning process at the soonest practicable time. Since September 2000, when the respondent exchanges entered into the Settlement Order with the

[27] *See* Securities Exchange Act Release No. 41843 (September 8, 1999), 64 FR 50126 (September 15, 1999). In addition, the Commission staff sent a letter to each of the options exchanges stating that the exchanges should continue to work together to, among other things, implement strategies to mitigate quote message traffic. *See* letters from Annette L. Nazareth, Director, Division, Commission to Salvatore F. Sodano, Chairman and Chief Executive Officer, Amex; William J. Brodsky, Chairman and Chief Executive Officer, CBOE; David Krell, President and Chief Executive Officer, ISE; Philip D. DeFeo, Chairman and Chief Executive Officer, PCX; and Meyer S. Frucher, Chairman and Chief Executive Officer, Phlx, dated September 13, 2000.

[28] Although filed effective upon filing, the Commission may, at any time within 60 days of the filing of the amendment, summarily abrogate the amendment and require that such amendment be refiled in accordance with paragraph (b)(1) to Rule 11Aa3–2 under the Act and reviewed in accordance with paragraph (c)(2) of the Rule, if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors or the maintenance of fair and orderly markets, to remove impediments to, and perfect mechanisms of a national market system or otherwise in furtherance of the purposes of the Act. 17 CFR 240.11Aa3–2(c)(3).

Commission [29] and simultaneously, consented to the entry of a Final Judgment with the Department of Justice,[30] the options exchanges have interpreted those actions to preclude them from engaging in joint capacity planning under the current OPRA Plan. Since that time, the exchanges' peak dissemination of OPRA data has increased from approximately 3,500 messages per second to more than 15,000 messages per second, as of September 30, 2003. As the existing options exchanges modify their trading rules to permit competing market makers to independently quote, it is anticipated that each exchange's demands on capacity will increase substantially. In addition, the BSE has proposed to operate a fully electronic options exchange, which would, if approved by the Commission, place further demands on capacity. Accordingly, to permit the exchanges to commence capacity planning without the need for joint action, as required by the Settlement Order, the Commission believes it is necessary or appropriate in the public interest, for the protection of investors or the maintenance of fair and orderly markets, to remove impediments to, and perfect mechanisms of, a national market system to approve the proposed amendment to the OPRA Plan on a temporary basis not to exceed 120 days so that options market data can continue to be disseminated on a timely basis.[31]

V. Conclusion

It Is Therefore Ordered, pursuant to Section 11A of the Act,[32] and Rule 11Aa3–2(c)(4) thereunder,[33] that the proposed OPRA Plan amendment, as modified by Amendments No. 1 and 2, (SR–OPRA–2003–01) is approved on a temporary basis not to exceed 120 days.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[34]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–29658 Filed 11–26–03; 8:45 am]

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[29] *See* Order, *supra* note 7.

[30] *United States* v. *American Stock Exchange, LLC et al.* (December 6, 2000), Civ. No. 00–CV–02174 (EGS).

[31] 17 CFR 240.11Aa3–2(c)(4).

[32] 15 U.S.C. 78k–1.

[33] 17 CFR 240.11Aa3–2(c)(4).

[34] 17 CFR 200.30–3(a)(29).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48813; File No. SR–Amex–2003–21]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendments 1, 2, and 3 thereto by the American Stock Exchange LLC Relating to At-the-Close Orders and Auxiliary Opening Procedures

November 20, 2003.

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 March 27, 2003, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Amex. On September 10, 2003, the Amex amended the proposed rule change.[3] On October 20, 2003, the Amex amended the proposed rule change.[4] On November 14, 2003, the Amex amended the proposed rule change.[5] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Amex proposes (1) to adopt new Rule 131A to set forth Exchange rules and procedures regarding "at the close" orders; (2) to amend Amex Rules 131 and 156 relating to on-close orders (also known as "at-the-close" orders); (3) to implement additional procedures, relating to daily on-close procedures and expiration day auxiliary opening procedures; and (4) to adopt new Rule 118(m) to reflect procedures applicable to "at the close" orders in Nasdaq securities traded on the Exchange pursuant to unlisted trading privileges ("UTP"). The text of the proposed rule change is set forth below. Proposed new language is in *italics*; proposed deletions are in [brackets].

* * * * *

Types of Orders

Rule #131

(a) through (d) No change.

(e) [An at the close order is a market order which is to be executed at or as near to the close as practicable. The term "at the close order" shall also include a limit order that is entered for execution at the closing price, on the Exchange, of the stock named in the order pursuant to such procedures as the Exchange may from time to time establish.] *A market at the close (MOC) order is an order to buy or sell a stated amount of a security at the Exchange's closing price. If the MOC order cannot be so executed in its entirety at the Exchange closing price it will be cancelled. A limit at the close (LOC) order is an order to buy or sell a stated amount of a security at the Exchange's closing price if that closing price is at the order's limit price, or better. If the LOC order can not be so executed, in whole or in part, the amount of the order not sb executed is to be cancelled. Cancellation of MOC and LOC orders will only occur in certain circumstances such as (1) when trading has been halted in the security and does not reopen prior to the close of the market; (2) for tick sensitive orders whose execution will violate customer instructions (i.e., to buy only on a minus or zero minus tick or to sell only on a plus or zero plus tick) or Exchange Rule 7; (3) for LOC orders, when the Amex closing price is not at the limit price or better, or (4) for tick sensitive MOC/LOC orders and LOC orders, all of which are limited to the closing price, the limited quantity of shares to be traded and the rules of priority as to which orders would trade first left these orders unexecuted in whole or in part.*

(f) through (t) No change.

* * * * *

Market on Close Policy and Expiration Procedures

Rule 131A. The following procedures apply to stocks and do not apply to options or to any security the pricing of which is based on another security or an index (e.g., Exchange Traded Funds or Trust Issued Receipts, securities listed under Section 107 of the Exchange Company Guide, warrants and convertible securities).

(a) In an attempt to minimize price volatility on the close, all market-on-close (MOC) and limit-on-close (LOC)

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Claire P. McGrath, Senior Vice President and Deputy General Counsel, Amex, to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated September 9, 2003 ("Amendment No. 1"). In Amendment No. 1, the Amex restated the proposed rule change in its entirety.

[4] *See* letter from Claire P. McGrath, Senior Vice President and Deputy General Counsel, Amex, to Nancy Sanow, Assistant Director, Division, Commission, dated October 17, 2003 ("Amendment No. 2"). In Amendment No. 2, the Amex restated the proposed rule change in its entirety.

[5] *See* letter from Claire P. McGrath, Senior Vice President and Deputy General Counsel, Amex, to Nancy Sanow, Assistant Director, Division, Commission, dated November 13, 2003 ("Amendment No. 3"). In Amendment No. 3, the Amex restated the proposed rule change in its entirety.

orders should be entered as early in the day as possible to provide market participants an opportunity to better ascertain possible order imbalances that might exist at the close.

Between 3:00 and 3:40 p.m. (Eastern Time), imbalances of any size may be published with Floor Official approval. These are informational only and do not limit MOC/LOC order entry before 3:40 p.m.

At 3:40 p.m. or as close to this time as possible, MOC order imbalances of 25,000 shares or more must be published on the consolidated tape. In addition, an order imbalance below 25,000 shares may also be published by a specialist, with the concurrence of a Floor Official, if the specialist (i) anticipates that the execution of the MOC orders will result in a closing price which exceeds the price change parameters of Rule 154, Commentary .08 (the $2, $1, $.50 Rule), or (ii) believes that an order imbalance should otherwise be published in an attempt to minimize price volatility on the close. A "No Imbalance" notice will only be published for any stock at 3:40 p.m. if there had been a prior informational imbalance publication.

(1) MOC Imbalance Calculation Policy (3:40 p.m. calculation): Marketable LOC orders to buy (that is, LOC buy orders with limit prices above the last sale at 3:40 p.m.) are added to MOC orders to buy. Marketable LOC orders to sell (that is, LOC orders with limit prices below the last sale at 3:40 p.m.) are added to MOC orders to sell. The buy orders are then matched against sell orders. If there is a buy imbalance, it is offset and reduced by any tick-sensitive MOC orders to sell and tick-sensitive, marketable LOC orders to sell (including orders to sell short). If there is a sell imbalance it is offset and reduced by any tick-sensitive MOC orders to buy and tick-sensitive, marketable LOC orders to buy.

At 3:50 p.m. or as close to this time as possible, MOC order imbalances of 25,000 shares or more must be published on the consolidated tape. In addition, an order imbalance below 25,000 shares may also be published by a specialist, with the concurrence of a Floor Official, if the specialist (i) anticipates that the execution of the MOC orders will result in a closing price which exceeds the price change parameters of Rule 154, Commentary .08 (the $2, $1, $.50 Rule), or (ii) believes that an order imbalance should otherwise be published in an attempt to minimize price volatility on the close. If there had been an imbalance publication at 3:40 p.m. and the imbalance at 3:50 p.m. is less than 25,000 shares, either a "No Imbalance" notice will be published, or the size and side of the imbalance may be published with Floor Official approval.

MOC Imbalance Calculation Policy (3:50 p.m. calculation): Procedures for the 3:50 p.m. calculation are the same as the 3:40 p.m. calculation, except that the Exchange last sale at 3:50 p.m. would be used to determine whether or not a LOC order is marketable.

(2) Between 3:40 p.m. and 3:50 p.m., no MOC or LOC orders may be entered except to offset a published MOC imbalance at 3:40 p.m. A broker may represent an MOC or LOC order in the crowd, but must state irrevocable MOC interest by 3:40:00 p.m. After 3:40:00 p.m., an MOC order may not be taken from the book to be represented by a broker in the crowd.

Between 3:40 p.m. and 3:50 p.m., MOC and LOC orders are irrevocable, except to correct an error (e.g., incorrect stock, side, size, or price, or a duplication of a previously entered order). Properly cancelled MOC and LOC orders may not be replaced after 3:40 p.m. unless the replacement order offsets a published MOC imbalance.

After 3:50 p.m., no MOC or LOC orders may be entered except to offset a published MOC imbalance at 3:50 p.m.

Cancellation or reduction in size of MOC and/or LOC orders after 3:50 p.m. will not be permitted for any reason, including in case of legitimate error.

(3) Publication of Imbalances Following Trading Halt of Any Type: MOC order imbalances of 25,000 shares or more are required to be published by the specialist, if practicable, in the event a stock reopens after 3:50 p.m. following a trading halt of any type. An imbalance of less than 25,000 shares may be published with the concurrence of a Floor Official. Trading will not resume in the event a trading halt in a stock occurs after 3:55 p.m., and MOC/LOC orders in that stock will not be executed.

(4) Entry of MOC/LOC Orders During a Regulatory Halt. If a regulatory halt is in effect at 3:40 p.m. or occurs after that time, the entry of MOC/LOC orders is permitted until 3:50 p.m. or until the security reopens, whichever occurs first. If an order imbalance is published following a regulatory halt and reopening after 3:40 p.m., the entry of MOC/LOC orders is permitted only to offset the published imbalance.

(5) Cancellation of MOC/LOC Orders During a Regulatory Halt. When a regulatory halt (news pending or news dissemination) is in effect at 3:40 p.m. or occurs after that time, cancellation of MOC/LOC orders is permitted until 3:50 p.m. or the reopening of the security, whichever occurs first. This policy does not apply to non-regulatory (e.g., order imbalance or equipment changeover) halts, and cancellation of orders in such cases is prohibited after 3:40 p.m. except to correct an error. Cancellation or reduction in size of MOC and/or LOC orders after 3:50 p.m. will not be permitted for any reason, including in case of legitimate error.

(b) Printing the Close: In accordance with Rule 109(d), the imbalance of MOC and marketable LOC orders are printed against the bid or the offer as the case may be.

Following the printing of the imbalance, and in accordance with Rule 109, the specialist shall stop the remaining buy and sell orders against each other and pair them off at the price of the immediately preceding sale described above. The "pair off" transaction shall be reported to the tape as "stopped stock". Where the aggregate size of the MOC (and marketable LOC, i.e., orders with limits above the closing price) orders to buy equals the aggregate size of the MOC (and marketable LOC, i.e., orders with limits below the closing price) orders to sell, the buy orders and sell orders shall be stopped against each other and paired-off at the price of the last sale regular-way on the Exchange prior to the close of trading in that stock on that day. The transaction shall be reported to the consolidated last sale reporting system as "stopped stock". Any stop orders and percentage orders that would be elected and become executable as a result of the closing transaction should also be included in the close.

(c) Order of Execution of MOC and LOC Orders.

On the close orders are to be executed in the following order.

1. MOC orders (including "G");

2. Tick-sensitive, marketable (as defined in Rule 131A(b) above) MOC orders (not including sell short "G");

3. Tick-sensitive, marketable (as defined in Rule 131A(b) above) market orders and marketable (as defined in Rule 131A(b) above) limit orders;

4. Marketable (as defined in Rule 131A(b) above) LOC orders (including "G");

5. Tick-sensitive, marketable (as defined in Rule 131A(b) above) LOC orders (not including sell short "G");

6. Limit orders on the book and in the crowd limited to the closing price;

7. LOC orders limited to the closing price;

8. Tick-sensitive MOC orders limited to the closing price (not including sell short "G");

9. *Tick-sensitive LOC orders limited to the closing price (not including sell short "G");*

10. *All other "G" orders on book and in the crowd.*

Item numbers 1–5 above (Order of Execution of MOC Orders) are treated like MOC orders. Accordingly, the buy side is matched against the sell side to determine the imbalance. That imbalance will be executed against the prevailing bid or offer, as appropriate. (An imbalance of buy orders would be executed against the offer. An imbalance of sell orders would be executed against the bid.) The order of execution of the orders limited to that bid or offer (i.e., the orders that the imbalance will trade against) is set forth above in item numbers 6 through 10. The specialist then stops the remaining buy and sell "MOC" orders (i.e., those not part of the imbalance) against each other and pairs them off at the price of the imbalance trade. The "pair off" transaction is to be reported as a "stopped stock" transaction.

(d) Auxiliary Opening Procedures.

For each expiration settlement value day on which derivative, index-related products (e.g., options, futures, options on futures) settle against opening prices, several auxiliary procedures are necessary to integrate stock orders relating to expiring contracts into Amex's opening procedures in a manner that assures an efficient market opening in each stock as close to 9:30 a.m. as possible. An expiration settlement value day is a trading day prior to the expiration of index-related derivative products whose settlement value is based upon opening prices on the Exchange, as identified by a qualified clearing corporation (e.g., the Options Clearing Corporation). The twelve expiration days are "Expiration Fridays" which generally fall on the third Fridays in every month. If that Friday is an Exchange holiday, there will be an expiration Thursday in such a month.

Order Entry

Stock orders relating to index-related derivative contracts whose settlement pricing is based upon opening prices must be received by the Amex Order File (AOF) or by the specialist by 9 a.m. These orders may be cancelled or reduced in size. (Firms canceling these orders or reducing them in size shall prepare contemporaneously a written record describing the rationale for the change and shall preserve it as Rule 153 provides.) All other orders may be entered before or after 9 a.m.

To facilitate early order entry, AOF will begin accepting orders at 7:30 a.m. and will accept market orders of 99,900 shares or less. "Limit-at-the-opening" ("limit OPG") orders are permitted, including delivery through Exchange systems. Ordinary limit and market orders may also be entered.

Order Identification

Stock orders relating to expiring derivatives whose settlement pricing is based on opening prices must be identified "OPG".

Firms entering these orders through AOF, but unable to use "OPG" in the order instructions, may use a unique AOF branch code or a separate AOF subscription mnemonic to identify these orders. The Amex Market Surveillance Department must be advised in writing of the branch code or subscription mnemonics by the business day following the expiration trade date.

Firms unable to identify these orders in any of the above three ways, and firms not using AOF, must submit a list of all these orders and related details to the Amex Market Surveillance Department by the business day following the expiration trade date.

Dissemination of Order Imbalances

As soon as practicable after 9:00 a.m. on expiration days, the Exchange will publish market order imbalances of 25,000 shares or more in all stocks. In addition, imbalances of less than 25,000 shares may be published at that time with Floor Official approval. A "no imbalance" status will not be published for any stock.

* * * * *

Representation of Orders

Rule 156 (a) through (b) No change.

(c) The acceptance of *a market* [an] at the close *(MOC)* order by a broker [does not make him] *makes the broker* responsible for an execution at the *Exchange's* closing price, *and if the order can not be so executed, it is to be cancelled. A broker handling a limit at the close (LOC) order is to use due diligence to execute the order at the Exchange's closing price if that closing price is at the order's limit price, or better, and if the order can not be so executed, in whole or in part, the amount of the order not so executed is to be cancelled.* [Bids or offers qualified as at the close cannot be publicly made in the Trading Crowd.] *Cancellation of MOC and LOC orders will only occur in certain circumstances such as (1) when trading has been halted in the security and does not reopen prior to the close of the market; (2) for tick sensitive orders whose execution will violate customer instructions (i.e., to buy only on a minus or zero minus tick or to sell only on a plus or zero plus tick) or Exchange Rule 7; (3) for LOC orders, when the Amex closing price is not at the limit price or better, or (4) for tick sensitive MOC/LOC orders and LOC orders, all of which are limited to the closing price, the limited quantity of shares to be traded and the rules of priority as to which orders would trade first left these orders unexecuted in whole or in part.*

(d) through (e) No change.

* * * * *

Trading in Nasdaq National Market Securities

Rule 118

(a) through (k) No change.

(l) Reserved.

(m) Market-on-Close and Limit-on-Close Orders "The following procedures apply to market-on-close (MOC) and limit-on-close (LOC) orders in Nasdaq National Market securities

(i) A market at the close (MOC) order is an order to buy or sell a stated amount of a security at the Exchange's closing price. If the MOC order cannot be so executed in its entirety at the Exchange closing price it will be cancelled. A limit at the close (LOC) order is an order to buy or sell a stated amount of a security at the Exchange's closing price if that closing price is at the order's limit price, or better. If the LOC order can not be so executed, in whole or in part, the amount of the order not so executed is to be cancelled. Cancellation of MOC and LOC orders will only occur in certain circumstances such as (1) When trading has been halted in the security and does not reopen prior to the close of the market; (2) for tick sensitive orders whose execution will violate customer instructions (i.e., to buy only on a minus or zero minus tick or to sell only on a plus or zero plus tick) or Exchange Rule 7; (3) for LOC orders, when the Amex closing price is not at the limit price or better, or (4) for tick sensitive MOC/LOC orders and LOC orders, all of which are limited to the closing price, the limited quantity of shares to be traded and the rules of priority as to which orders would trade first left these orders unexecuted in whole or in part.

(ii) In an attempt to minimize price volatility on the close, all market-on-close (MOC) and limit-on-close (LOC) orders should be entered as early in the day as possible to provide market participants an opportunity to better ascertain possible order imbalances that might exist at the close.

Between 3:00 and 3:40 p.m. (Eastern Time), imbalances of any size may be

published with Floor Official approval. These are informational only and do not limit MOC/LOC order entry before 3:40 p.m.

(a) At 3:40 p.m. or as close to this time as possible, MOC order imbalances of 25,000 shares or more must be published in a manner specified by the Exchange. In addition, an order imbalance below 25,000 shares may also be published by a specialist, with the concurrence of a Floor Official, if the specialist (i) anticipates that the execution of the MOC orders will result in a closing price which exceeds the price change parameters of Rule 154, Commentary .08 (the $2, $1, $.50 Rule), or (ii) believes that an order imbalance should otherwise be published in an attempt to minimize price volatility on the close. A "No Imbalance" notice will only be published for any stock at 3:40 p.m. if there had been a prior informational imbalance publication.

(1) MOC Imbalance Calculation Policy (3:40 p.m. calculation): Marketable LOC orders to buy (that is, LOC buy orders with limit prices above the consolidated last sale at 3:40 p.m.) are added to MOC orders to buy. Marketable LOC orders to sell, (that is, LOC orders with limit prices below the last sale at 3:40 p.m.) are added to MOC orders to sell. The buy orders are then matched against sell orders to calculate the imbalance.

At 3:50 p.m. or as close to this time as possible, MOC order imbalances of 25,000 shares or more must be published in a manner specified by the Exchange. In addition, an order imbalance below 25,000 shares may also be published by a specialist, with the concurrence of a Floor Official, if the specialist (i) anticipates that the execution of the MOC orders will result in a closing price which exceeds the price change parameters of Rule 154, Commentary .08 (the $2, $1, $.50 Rule), or (ii) believes that an order imbalance should otherwise be published in an attempt to minimize price volatility on the close. If there had been an imbalance publication at 3:40 p.m. and the imbalance at 3:50 p.m. is less than 25,000 shares, either a "No Imbalance" notice will be published, or the size and side of the imbalance may be published with Floor Official approval.

MOC Imbalance Calculation Policy (3:50 p.m. calculation): Procedures for the 3:50 p.m. calculation are the same as the 3:40 p.m. calculation, except that the consolidated last sale at 3:50 p.m. would be used to determine whether or not a LOC order is marketable.

(2) Between 3:40 p.m. and 3:50 p.m., no MOC or LOC orders may be entered except to offset a published MOC imbalance at 3:40 p.m. A broker may represent an MOC or LOC order in the crowd, but must state irrevocable MOC interest by 3:40 p.m. After 3:40 p.m., an MOC order may not be taken from the book to be represented by a broker in the crowd.

Between 3:40 p.m. and 3:50 p.m., MOC and LOC orders are irrevocable, except to correct an error (e.g., incorrect stock, side, size, or price, or a duplication of a previously entered order). Properly cancelled MOC and LOC orders may not be replaced after 3:40 p.m. unless the replacement order offsets a published MOC imbalance.

After 3:50 p.m., no MOC or LOC orders may be entered except to offset a published MOC imbalance at 3:50 p.m.

Cancellation or reduction in size of MOC and/or LOC orders after 3:50 p.m. will not be permitted for any reason, including in case of legitimate error.

(b) Prohibition of Tick-Sensitive Orders—Tick-sensitive MOC and LOC orders (e.g., buy "minus" or sell "plus") shall not be entered. (Sell short MOC and LOC orders in Nasdaq securities are exempt from tick restrictions on the Amex and may be entered.)

(c) Publication of Imbalances Following Trading Halt of Any Type: MOC order imbalances of 25,000 shares or more are required to be published by the specialist, if practicable, in the event a stock reopens after 3:50 p.m. following a trading halt of any type. An imbalance of less than 25,000 shares may be published with the concurrence of a Floor Official. Trading will not resume in the event a trading halt in a stock occurs after 3:55 p.m., and MOC/LOC orders in that stock will not be executed.

(d) Entry of MOC/LOC Orders During a Regulatory Halt. If a regulatory halt is in effect at 3:40 p.m. or occurs after that time, the entry of MOC/LOC orders is permitted until 3:50 p.m. or until the security reopens, whichever occurs first. If an order imbalance is published following a regulatory halt and reopening after 3:40 p.m., the entry of MOC/LOC orders is permitted only to offset the published imbalance.

(e) Cancellation of MOC/LOC Orders During a Regulatory Halt. When a regulatory halt (news pending or news dissemination) is in effect at 3:40 p.m. or occurs after that time, cancellation of MOC/LOC orders is permitted until 3:50 p.m. or the reopening of the security, whichever occurs first. This policy does not apply to non-regulatory (e.g., order imbalance or equipment changeover) halts, and cancellation of orders in such cases is prohibited after 3:40 p.m. except to correct an error. Cancellation or reduction in size of MOC and/or LOC orders after 3:50 p.m. will not be permitted for any reason, including in case of legitimate error.

(iii) Printing the Close: In accordance with Rule 109(d), the imbalance of MOC and marketable LOC orders are printed against the Exchange bid or the Exchange offer as the case may be. Following the printing of the imbalance, and in accordance with Rule 109, the specialist shall stop the remaining buy and sell orders against each other and pair them off at the price of the immediately preceding sale described above. The "pair off" transaction shall be reported as stopped stock in accordance with Exchange Rule 109, Commentary .02. Where the aggregate size of the MOC (and marketable LOC, i.e., orders with limits above the closing price) orders to buy equals the aggregate size of the MOC (and marketable LOC, i.e., orders with limits below the closing price) orders to sell, the buy orders and sell orders shall be stopped against each other and paired-off at the price of the last regular-way consolidated sale prior to the close of trading in that stock on that day. The transaction shall be reported as stopped stock in accordance with Exchange Rule 109, Commentary .02. Stop orders and percentage orders elected by the execution of the MOC imbalance should be included in the close.

(iv) Order of Execution of MOC and LOC Orders.

On the close orders are to be executed in the following order.

1. MOC orders (including "G");

2. Marketable (as defined in Rule 118(m)(iii) above) LOC orders (including "G");

3. Limit orders on the book and in the crowd limited to the closing price;

4. LOC orders limited to the closing price;

5. All other "G" orders on book and in the crowd.

Item numbers 1 and 2 above (Order of Execution of MOC Orders) are treated like MOC orders. Accordingly, the buy side is matched against the sell side to determine the imbalance. That imbalance will be executed against the prevailing bid or offer, as appropriate. (An imbalance of buy orders would be executed against the offer. An imbalance of sell orders would be executed against the bid.) The order of execution of the orders limited to that bid or offer (i.e., the orders that the imbalance will trade against) is set forth above in item numbers 3 through 5. The specialist then stops the remaining buy and sell "MOC" orders (i.e., those not part of the imbalance) against each other and pairs them off at the price of the imbalance trade. The "pair off" transaction is to be reported as stopped

stock in accordance with Exchange Rule 109, Commentary .02.

(v) See Rule 156(c), which sets forth the responsibilities of a broker accepting MOC and LOC orders.

Specialist's Reports of MOC and LOC Orders

(vi) A Nasdaq UTP specialist is required to notify an Amex Floor Supervisor between 4:00 p.m. and 4:15 p.m. whenever the specialist (1) reports a trade at or after 4:00 p.m. that does not involve the execution of an MOC or LOC order, or (2), after reporting an MOC or LOC transaction(s) at or after 4:00 p.m., reports a trade after 4:00 p.m. (e.g., report of a "sold" sale) that is not, of course, a transaction involving the execution of MOC or LOC orders. This notification will be on an Exchange-approved form, with a duplicate copy for the specialist's records.

* * * * *

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 Amex included statements concerning the purpose of and basis for the proposed rule change, as amended, and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Amex has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Commission has previously approved rules and procedures governing market on close ("MOC") and limit on close ("LOC") orders entered on the Exchange.[6] The Exchange proposes to amend these rules and procedures as described below. The amended rules and procedures set forth in this proposal would supersede the procedures previously approved by the Commission as described in the releases cited above, with the exception of Rule 109 which would continue to apply. Further, the Exchange proposes to consolidate current Exchange procedures relating to MOC and LOC orders, other than orders in Nasdaq securities traded pursuant to unlisted trading privileges, in new Rule 131A, which would include procedures previously approved by the Commission as well as the proposed procedures set forth herein. In addition, the Exchange proposes to adopt Rule 118(m) to establish MOC and LOC procedures for Nasdaq securities, which procedures would be substantially similar to those in proposed Rule 131A.[7]

Proposed Rule 131A (Market on Close Policy and Expiration Procedures)

In an attempt to minimize price volatility on the close, Amex procedures currently provide that all MOC and LOC orders in stocks should be entered as early in the day as possible to provide market participants an opportunity to better ascertain possible order imbalances that might exist at the close. Under these procedures, Amex represents that, at 3:40 p.m. (Eastern Time) or as close to this time as possible, MOC order imbalances of 25,000 shares or more must be published on the tape. In addition, an order imbalance below 25,000 shares may also be published by a specialist, with the concurrence of a Floor Official, if the specialist (i) anticipates that the execution of the MOC orders on the book will result in a closing price which exceeds the price change parameters of Rule 154, Commentary .08 (the $2, $1, $.50 rule),[8] or (ii) believes that an order imbalance should otherwise be published in an attempt to minimize price volatility on the close. After 3:40 p.m., no MOC or LOC orders in stocks may be entered except to offset a published MOC imbalance.

New Rule 131A would incorporate existing Amex MOC/LOC procedures for stocks during the regular trading session as well as proposed new procedures, as described herein. These procedures would not be applicable to options or any security the pricing of which is based on another security or an index, such as Exchange-Traded Funds, Trust Issued Receipts, structured products, warrants and convertible securities. These procedures, however, would be applicable to closed-end funds.

The Exchange proposes to implement a MOC Imbalance Calculation Policy, and to adopt changes to the MOC Imbalance Publication Policy similar to those approved for the New York Stock Exchange ("NYSE") in Release No. 34–40094,[9] and stated in NYSE Rule 123C(5). The most salient feature of these revised policies is the additional imbalance dissemination at 3:50 p.m. The Exchange believes additional dissemination at 3:50 p.m. would provide useful information to market participants, who would be able to determine to enter offsetting buy or sell interest based on the latest imbalance information. Amex believes that this would enhance the value of imbalance publications in tempering market volatility at or near the close. In addition, the Exchange believes that implementing MOC/LOC procedures that are more similar to NYSE procedures in this area would enhance their utility for member organizations.

The Exchange proposes to require a 3:50 p.m. MOC imbalance calculation in addition to the current 3:40 p.m. calculation. For the 3:40 p.m. calculation, marketable buy LOCs (that is, LOCs with limit prices above the Exchange last sale at 3:40 p.m.) would be added to buy MOCs. Marketable sell LOCs (LOCs with limit prices below the Exchange last sale at 3:40 p.m.) would be added to sell MOCs. The buys would then be matched against the sells. If there were to be a buy imbalance, it would be offset and reduced by any tick-sensitive sell MOCs and tick-sensitive, marketable sell LOCs (including orders to sell short). If there were to be a sell imbalance, it would be offset and reduced by any tick-sensitive buy MOCs and tick-sensitive, marketable buy LOCs. A "no imbalance" notice would only be published for any stock at 3:40 p.m. if there had been a prior informational imbalance publication. Between 3 p.m. and 3:40 p.m., MOC/LOC imbalances of any size would be permitted to be published with Floor Official approval. These publications would be informational only and would not limit MOC/LOC order entry before 3:40 p.m. Amex represents that these proposed changes are similar to procedures currently in place at the NYSE and included in NYSE Rule 123C except as

[6] *See, e.g.*, Securities Exchange Act Release Nos. 41877 (September 14, 1999), 64 FR 51566 (September 23, 1999) (SR–Amex–99–32); 40123 (June 24, 1998), 63 FR 36280 (July 2, 1998) (SR–Amex–98–10); 35660 (May 2, 1995), 60 FR 22592 (May 8, 1995) (SR–Amex–95–09); 29312 (June 14, 1991); 56 FR 28583 (June 21, 1991) (SR–Amex–95–09).

[7] The Commission approved certain procedures for "at the close" orders in Nasdaq securities in Securities Exchange Act Release 47658 (April 10, 2003), 68 FR 19041 (April 17, 2003) (SR–Amex–2003–18). The procedures and rules proposed herein are in addition to, and do not supersede, those approved in Release No. 34–47658. Auxiliary opening procedures for Nasdaq securities were filed and became effective in Securities Exchange Act Release No. 48000 (June 6, 2003), 68 FR 35469 (June 13, 2003) (SR–Amex–2003–55).

[8] Amex Rule 154, Commentary .08 provides that no transaction in a stock at a price of $20 or more, $10 or more (but less than $20) or less than $10 per share may be at $2, $1, or $.50 or more, respectively, away from the last previous sale, without the prior approval of a Floor Official.

[9] *See* Securities Exchange Act Release No. 40094 (June 15, 1998), 63 FR 33975 (June 22, 1998) (SR–NYSE–97–36).

follows. In view of the generally lower trading volume and different trading characteristics of Amex stocks compared to NYSE issues, the Exchange believes it would be appropriate to continue to require dissemination of imbalances of 25,000 shares or more rather than 50,000 shares or more, as is required by NYSE Rule 123C.

At 3:50 p.m., or as close to this time as possible, any MOC order imbalances of 25,000 shares or more would be required by the Exchange to be published on the consolidated tape (Tape B). In addition, as with current 3:40 p.m. imbalance procedures, an order imbalance below 25,000 shares would also be permitted to be published by a specialist, with the concurrence of a Floor Official, if the specialist (i) anticipates that the execution of the MOC orders on the book would result in a closing price which exceeds the price change parameters of Rule 154, Commentary .08 (the $2, $1, $.50 rule),[10] or (ii) believes that an order imbalance should otherwise be published in an attempt to minimize price volatility on the close. If there was an imbalance publication at 3:40 p.m. and the imbalance at 3:50 p.m. were to be less than 25,000 shares, either a "no imbalance" notice would be published, or the size and side of the imbalance would be permitted to be published with Floor Official approval. The 3:50 p.m. calculation policy would be the same as that applicable to the 3:40 p.m. calculation, except the Exchange last sale at 3:50 p.m. would be used to determine whether or not a LOC order is marketable.

The Exchange proposes that after 3:50 p.m., no MOC or LOC orders in stocks would be permitted to be entered except to offset a published MOC imbalance in effect after 3:50 p.m. Amex represents that this is comparable to current procedures, whereby, after 3:40 p.m., no MOC or LOC orders in stocks may be entered except to offset a published MOC imbalance in effect after 3:40 p.m. Amex states that this restriction is intended to alleviate increased pricing pressure that may occur following an imbalance dissemination of buy or sell interest. Amex represents that this restriction is also the same as that imposed by the NYSE under NYSE Rule 123C.

A broker would be permitted to represent an MOC or LOC order in the trading crowd of a stock, but would be required to state irrevocable MOC interest by 3:40 p.m. Amex represents that this requirement is the same as that imposed by the NYSE under NYSE Rule 123C. After 3:40 p.m., no MOC or LOC order in a stock would be permitted to be taken from the book to be represented by a broker in the crowd. Amex states that these restrictions are intended to apply procedures for crowd orders consistent with MOC/LOC procedures generally. Policy regarding cancellation or reduction in size of MOC and/or LOC orders after 3:40 p.m. would remain the same (*i.e.*, between 3:40 p.m. and 3:50 p.m., MOC and LOC orders would be irrevocable, except to correct an error) except cancellation or reduction in size of MOC and/or LOC orders after 3:50 p.m. would not be permitted for any reason, including in case of legitimate error. Amex represents that this restriction is the same as that imposed by the NYSE under NYSE Rule 123C.

Proposed Rule 131A(a)(3) would require that the specialist publish an MOC order imbalance of 25,000 shares or more, if practicable, if a stock reopens after 3:50 p.m. following any type of trading halt. Paragraphs (a)(4) and (a)(5) propose procedures applicable to entry or cancellation of MOC/LOC orders during a regulatory halt in effect at or after 3:40 p.m. Amex represents that this rule text reflects procedures filed and made effective in Release No. 34–41877.[11] Amex states that this proposed rule change would supersede that filing and approval.

Procedures regarding printing the close would be amended to provide that stop orders and percentage orders elected by the execution of the MOC imbalance should be included in the close. Amex represents that this requirement is the same as that imposed by the NYSE under NYSE Rule 123C.

In the interest of providing for an orderly and consistent execution of various MOC and LOC order types at the close, proposed Rule 131A(c), would specify that on the close orders would be executed in the following order: (1) MOC orders (including "G");[12] (2) tick-sensitive (*e.g.*, buy minus, sell plus, and sell short, for securities subject to the "tick test" in Exchange Rule 7), MOC orders (not including sell short "G"); (3) tick-sensitive, marketable market orders and marketable limit orders; (4) marketable LOC orders (including "G"); (5) tick-sensitive, marketable LOC orders (not including sell short "G"); (6) limit orders on the specialist's book and in the crowd limited to the closing price; (7) LOC orders limited to the closing price; (8) tick-sensitive MOC orders limited to the closing price; (9) tick-sensitive LOC orders limited to the closing price; (10) all other "G" orders on the specialist's book and in the crowd. Amex represents that the requirement for sell short "G" orders to yield is the same as that imposed by the NYSE under NYSE Rule 123C.

The first five categories above would be treated like MOC orders. Accordingly, the buy side would be matched against the sell side to determine the imbalance. That imbalance would be executed against the prevailing bid or offer, as appropriate. (An imbalance of buy orders would be executed against the offer. An imbalance of sell orders would be executed against the bid.) The order of execution of the orders limited to that bid or offer (*i.e.*, the orders that the imbalance would trade against) would be as set forth in numbers 6 through 10. The specialist then would stop the remaining buy and sell "MOC" orders (*i.e.*, those not part of the imbalance) against each other and pair them off at the price of the imbalance trade. The "pair off" transaction would be reported as "stopped stock" so that those who entered orders limited to the closing price which were not executed would know that they were not entitled to participate on the "stopped stock" trade. Amex represents that the execution of the imbalance against the prevailing bid or offer followed by the printing of the "paired off" quantity as "stopped stock" is the Exchange's current procedure for executing and printing on-close orders as described in Amex Rule 109(d).

Rules 131(e) and 156(c)

Rule 131(e), which defines "at the close order," would be amended to specify that a MOC order is to be executed in its entirety at the Amex closing price or cancelled. Rule 131(e) would also be amended to specify that a limit at the close (LOC) order—an order to buy or sell a stated amount of a security at the Amex closing price if at the limit price or better "would have to be cancelled if not executed in whole or in part. Amex represents that these amendments are similar to NYSE Rule

[10] *See supra* note 8 for a discussion of Amex Rule 154.

[11] *See* Release No. 34–41877, *supra* note 6.

[12] "G" orders are entered for an account of either a member or member organization, or an associated person of a member or member organization, or for an account over which a member or member organization or associated person exercises investment discretion. Section 11(a) of the Act prohibits all orders for these accounts from being executed on the floor without an exemption. 15 U.S.C. 78k(a). The exemptions are contained in subparagraphs (1)(A) through (1)(I) of Section 11(a) of the Act. 15 U.S.C. 78k(a)(1)(A)—78k(a)(1)(I). The exemption in "G" requires that the member or member organization be primarily engaged in underwriting and/or brokerage (as opposed to effecting proprietary trades on the Floor) and that the "exempt" transaction yield priority, parity, and precedence to orders for those who are not members or associated with members.

123C procedures, and believes that they set forth more specifically members' responsibilities in executing or canceling MOC/LOC orders.

Rule 156(c), which relates to broker representation of an "at the close order," currently provides that a broker is not responsible for executing at the closing price an "at the close order" that the broker accepts. The Exchange believes that it is appropriate for the broker to be responsible for execution at the Amex closing price of a MOC order he or she accepts, and amended Rule 156(c) would so state. Rule 156(c) would further specify that a broker handling a LOC would have to use due diligence to execute the order at the Amex closing price if at the limit price or better, and to cancel the portion of the order that cannot be so executed.

Aside from the customer ordering the cancellation of an MOC or LOC order before 3:40 p.m. or for a legitimate error between 3:40 and 3:50 p.m., it should be noted with respect to both MOC and LOC orders that are to be cancelled if not executed in whole or in part, that such cancellations would occur only in the following circumstances and not at the discretion of either the specialist or floor broker. Cancellation of MOC and LOC orders would occur when (1) trading has been halted in the security and does not reopen prior to the close of the market; (2) tick sensitive orders, as described above, whose execution will violate customer instructions (*i.e.*, to buy only on a minus or zero minus tick or to sell only on a plus or zero plus tick) or Amex Rule 7; (3) for LOC orders, the Amex closing price is not at the limit price or better, or (4) for tick sensitive MOC/LOC orders and LOC orders all of which are limited to the closing price, the limited quantity of shares to be traded and the rules of priority as to which orders would trade first left these orders unexecuted in whole or in part.

Auxiliary Opening Procedures

The Exchange proposes to adopt Rule 131A(d) implementing the following auxiliary opening procedures for index options/futures expiration settlement value days.[13] Amex represents that these procedures are similar to NYSE Expiration Friday auxiliary opening procedures contained in NYSE Rule 123C(6). Amex represents that for each expiration day on which derivative, index—related products expire against opening prices, several auxiliary procedures are necessary to integrate stock orders relating to expiring contracts into Amex's opening procedures in a manner that assures an efficient market opening in each stock as close to 9:30 a.m. as possible. The index products include, but are not limited to the following: S&P 500 Index options and futures, Nasdaq 100 Index options, S&P MidCap 400 Index options and futures, Russell 1000 Index options and futures and Russell 2000 Index options and futures.

Amex represents that stock orders relating to index contracts whose settlement pricing is based upon opening prices would have to be received by the Amex Order File (AOF) or by the specialist by 9:00 a.m. These orders would be permitted to be cancelled or reduced in size. (Firms canceling these orders or reducing them in size would be required to prepare contemporaneously a written record describing the rationale for the change and would be required to preserve it as Rule 153 provides.) All other orders would be permitted to be entered before or after 9 a.m.

To facilitate early order entry, AOF would begin accepting orders at 7:30 a.m. and would accept market orders of 99,900 shares or less. "Limit-at-the-opening" ("limit OPG") orders would be permitted, including delivery through Exchange systems. Ordinary limit and market orders also would be permitted to be entered. Stock orders relating to expiring derivatives whose settlement pricing is based on opening prices would be required to be identified "OPG."

As soon as practicable after 9:00 a.m. on expiration days, the Exchange would publish market order imbalances of 25,000 shares or more in all listed stocks. In addition, imbalances of less than 25,000 shares would be permitted to be published at that time with Floor Official approval. A "no imbalance" status would not be published for any stock. Amex represents that these proposed changes are similar to procedures currently in place at the NYSE and included in NYSE Rule 123C except as follows. In view of the generally lower trading volume and different trading characteristics of Amex stocks compared to NYSE issues, the Exchange believes it is appropriate to continue to require dissemination of imbalances of 25,000 shares or more rather than 50,000 shares or more, as is required by NYSE Rule 123C. In addition, Amex systems accept market orders of 99,900 shares or less rather than orders of 500,000 shares or less accepted by the NYSE.

MOC/LOC Procedures for Nasdaq UTP Trading

In Release No. 34–47658,[14] the Commission approved rules relating to execution of MOC and LOC orders in Nasdaq securities traded on the Amex pursuant to unlisted trading privileges. These procedures, with certain exceptions described in Release No. 34–47658,[15] continue to apply previously approved rules and procedures governing MOC and LOC orders entered on the Exchange.[16] The procedures include publication of order imbalances beginning at 3:40 p.m. (or as close to this time as possible) in Nasdaq securities of 25,000 shares or more, and a prohibition on entry of MOC and LOC orders after 3:40 p.m. except to offset an at the close order imbalance. After 3:40 p.m., MOC and LOC orders are irrevocable except to correct an error.

The Exchange is proposing to incorporate into new Rule 118(m) current procedures relating to the 3:40 p.m. calculation and dissemination of order imbalances and entry of MOC and LOC orders in Nasdaq securities. The Exchange also proposes to modify current MOC and LOC procedures by adding an additional publication of MOC/LOC order imbalances of 25,000 shares or more at 3:50 p.m. These modifications would also be included in Rule 118(m). Once again, Amex represents that the amended rule and procedures would supersede the rules and procedures previously approved by the Commission as described in the releases referenced above with the

[13] The term "expiration settlement value day" refers to the days on which certain expiring index options and/or futures (see list below for examples) have settlement values determined. These index options and futures have settlement values based on the opening prices of their component securities on the trading day preceding their expiration. Index options and futures expire on the Saturday following the third Friday of each expiration month. The expiration settlement value day is the last trading day preceding expiration, which is normally a Friday.

[14] *See* Release No. 34–47658, *supra* note 7.

[15] In Release No. 34–47658, the Commission approved amendments to Amex Rule 109 (Stopping Stock), Amex Rule 118 (Trading in Nasdaq National Market Securities), Amex Rule 131 (Types of Orders) and Amex Rule 156 (Representation of Orders), relating to "at the close" orders (1) to specify that these rules apply to Amex trading in Nasdaq securities; (2) to provide for dissemination of order imbalance information to major news vendors by means of a structured communication process; and (3) to temporarily exempt from Amex Rule 109(d) information relating to "pair off" transactions under such rule, pending implementation of systems changes by the Nasdaq Unlisted Trading Privileges Plan Processor to accommodate printing of such transactions as "stopped stock." It should be noted, however, with respect to point number (3), that, effective September 15, 2003, the Nasdaq UTP Plan Processor was able to accommodate printing of pair-off transactions as "stopped stock." Thus, effective October 8, 2003, the temporary exemption from Amex Rule 109(d) was eliminated.

[16] *See supra*, note 6.

exception of Release No. 34–47658,[17] and Release No. 34–48000.[18]

The Exchange believes an additional publication is necessary at 3:50 p.m. in light of the price volatility in Nasdaq stocks, particularly near the close of trading. An additional imbalance publication at 3:50 p.m. would reflect any offsetting interest as well as any legitimate cancellations entered after the 3:40 p.m. publication and would reflect any shift in the imbalance from a buy to sell imbalance or vice versa. The 3:50 p.m. publication would provide additional, more timely market information to market participants, which Amex states is intended to encourage possible buy or sell interest offsetting the imbalance after 3:50 p.m., thereby promoting greater pricing stability at the close.

Proposed Rule 118(m) provides that at 3:40 p.m. and at 3:50 p.m., or as close to these times as possible, MOC order imbalances of 25,000 shares or more would be published in a manner specified by the Exchange. That is, the Exchange would utilize a structured communication process established with major news vendors (*e.g.*, Bloomberg and Dow Jones), utilizing, among other things, e-mail and file transfer protocol technology to permit public dissemination of order imbalance information at 3:50 p.m., or as soon thereafter as practicable.[19]

The imbalance calculation policy for the 3:40 p.m. calculation would be as follows: marketable LOC orders to buy (that is, LOC buy orders with limit prices above the consolidated last sale at 3:40 p.m.) would be added to MOC orders to buy. Marketable LOC orders to sell (that is, LOC sell orders including those to sell short, with limit prices below the consolidated last sale at 3:40 p.m.) would be added to MOC orders to sell. The buy orders are then matched against sell orders to calculate the imbalance and side. Procedures for the 3:50 p.m. imbalance calculation would be the same as those for the 3:40 p.m. calculation, except that the consolidated last sale at 3:50 p.m. would be used to determine whether or not a LOC order is marketable. After 3:50 p.m., no MOC or LOC orders would be permitted to be entered except to offset the latest published MOC imbalance. Between 3:40 p.m. and 3:50 p.m., MOC and LOC orders would be irrevocable, except to correct an error. Cancellation or reduction in size of MOC and/or LOC orders after 3:50 p.m. would not be permitted for any reason, including in case of legitimate error.

The Exchange proposes to prohibit entry of tick-sensitive MOC or LOC orders (*e.g.*, buy "minus" or sell "plus") in Nasdaq stocks. (Sell short orders in Nasdaq securities, which are exempt from "tick" restrictions on the Amex, would be accepted.) Such orders, (*e.g.*, buy "minus" or sell "plus") which account for less than one percent of "at the close" orders entered in Nasdaq stocks, may impede the specialist in providing an orderly and timely close, in so far as they are processed manually, which makes such orders more difficult to process in a timely manner.

An order imbalance at 3:40 p.m. or 3:50 p.m. below 25,000 shares also would be permitted to be published by a specialist, with the concurrence of a Floor Official, if the specialist (i) anticipates that the execution of the MOC orders on the book would result in a closing price which exceeds the price change parameters of Rule 154, Commentary .08 (the $2, $1, $.50 Rule), or (ii) believes that an order imbalance should otherwise be published in an attempt to minimize price volatility on the close. For 3:40 p.m. imbalance disseminations, a "No Imbalance" notice would only be published at 3:40 p.m. if there had been a prior informational imbalance publication between 3:00 p.m. and 3:40 p.m. For 3:50 p.m. imbalance disseminations, if there was an imbalance publication at 3:40 p.m. and the imbalance at 3:50 p.m. were to be less than 25,000 shares, either a "No Imbalance" notice will be published, or the size and side of the imbalance may be published with Floor Official approval.

Rule 118(m)(i), like Rule 131(e) as it is proposed to be amended, provides that a MOC order must be executed in its entirety at the Exchange closing price or is to be cancelled. Rule 118(m)(v) would reference Rule 156(c) as it is proposed to be amended, and would make the broker representing a MOC order in the Trading Crowd responsible for an execution at the Exchange's closing price. Aside from the customer ordering the cancellation of an MOC or LOC order before 3:40 p.m. or for a legitimate error between 3:40 and 3:50 p.m., it should be noted with respect to both MOC and LOC orders that are to be cancelled if not executed in whole or in part, that such cancellations would occur only in the following circumstances and not at the discretion of either the specialist or floor broker. Cancellation of MOC and LOC orders would occur when (1) trading has been halted in the Nasdaq UTP stock on the Amex and does not reopen prior to the close of the market; (2) for LOC orders, the Amex closing price is not at the limit price or better, or (3) for LOC orders which are limited to the closing price, the limited quantity of shares to be traded and the rules of priority as to which orders would trade first left these orders unexecuted in whole or in part.

Proposed Rule 118(m)(ii)(c) provides for identical MOC/LOC procedures to those in Rule 131A(a)(3) in the context of trading halts, discussed above. Rule 118(m)(iii), which references procedures in Rule 109(d) applicable to printing the close, would provide that stop orders and percentage orders elected by the execution of the MOC imbalance should be included in the close.

Procedures set forth in proposed Rule 118(m)(iv) (Order of Execution of MOC and LOC Orders) would be the same as those set forth in proposed Rule 131A(c), except that tick-sensitive orders would not be referenced in so far as entry of such orders would be prohibited for Nasdaq UTP securities.

Procedures for Reporting the Amex Official Closing Price and "M" Modifier

The Amex has received Commission approval for use of the "M" sale condition modifier on the UTP Trade Data Feed ("UTDF") to identify the Amex's Official Closing Price ("AOCP") in a Nasdaq security.[20] Amex represents that, as described in File No. SR–Amex–2003–18, at the close orders are subject to "pair off" procedures in Amex Rule 109(d)(1), which requires a member holding both buy and sell MOC orders to pair them off against each other and execute any imbalance against the prevailing Amex bid or offer at the close. Any imbalance at the close is executed at the current bid or offer, or as close as practicable to 4:00 p.m., and remaining buy and sell orders are stopped against each other and paired off at that same bid or offer price. Amex reports the first trade (execution of the imbalance) and second pair off trade separately at the same price, and then sends a third report with only the price of those transactions with an "M" identifier via UTDF as the Official Closing Price for the stock on the Amex.

The Exchange would disseminate an AOCP for a security only when the closing price for that security on the Amex has been determined as the result of the execution of MOC or LOC orders entered on the Exchange. If no MOC/LOC orders were to be executed, Amex would not disseminate an AOCP using the "M" modifier. The Exchange believes this is necessary in establishing an "official" close because MOC and

[17] *See supra* note 7.

[18] *Id.*

[19] *Id.*

[20] *Id.*

LOC orders are the only order types that must be executed at the Exchange closing price or not at all. Amex believes that restricting the use of the "M" modifier to executions of MOC and LOC orders would ensure that the closing price in the Exchange auction market accurately reflects buy and sell interest at the close.

In connection with dissemination of the "M" modifier, between 4:15 p.m. and 4:25 p.m. each trading day, an Exchange Floor Supervisor would review each Nasdaq transaction appearing on the tape at or after 4:00 p.m. to determine if that trade involved the execution of MOC/LOC orders. As the Exchange's systems are programmed to capture as "M" all Nasdaq transactions which appeared on the tape at or after 4:00 p.m. the Exchange Floor Supervisor would correct the list by removing all such trades not involving the execution of MOC/LOC orders to ensure that an "M" is disseminated only when the Amex closing price is the result of execution of MOC or LOC orders. By 4:25 p.m., Amex would finalize and complete dissemination of AOCP prices with the "M" modifier to the Nasdaq UTP Processor. At 4:30 p.m., the Processor would disseminate a closing trade recap message with the final AOCP prices. The 4:30 p.m. dissemination would be implemented as part of an enhancement to the Processor implemented on September 15, 2003.

In order to ensure that transactions reported by specialists at or after 4:00 p.m. that are not the result of executions of MOC or LOC orders are not reported as the AOCP with the "M" modifier, the Exchange would require Nasdaq UTP specialists to notify an Amex Floor Supervisor between 4:00 p.m. and 4:15 p.m. whenever the specialist (1) reports a trade at or after 4:00 p.m. that does not involve the execution of MOC/LOC orders, or (2), after reporting an MOC/LOC transaction(s) at or after 4:00 p.m., reports a trade after 4:00 p.m. (*e.g.*, report of a "sold" sale) that is, of course, not a transaction involving the execution of MOC or LOC orders. This notification would be on an Exchange-approved form, with a duplicate copy for the specialist's records.

2. Statutory Basis

The Amex believes that the proposed rule change is consistent with Section 6(b) of the Act,[21] in general, and Section 6(b)(5),[22] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change, as amended, will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change, as amended.

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, as amended, or

B. institute proceedings to determine whether the proposed rule change, as amended, should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Amex. All submissions should refer to File No. SR–Amex–2003–21 and should be submitted by December 19, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[23]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–29659 Filed 11–26–03; 8:45 am]

BILLING CODE 8010–01–P

[21] 15 U.S.C. 78f(b).

[22] 15 U.S.C. 78f(b)(5).

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48814; File No. SR–Amex–2003–96]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the American Stock Exchange LLC To Revise Its Registration Fees

November 20, 2003.

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 November 13, 2003, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange has designated this proposal as one establishing or changing a due, fee or other charge imposed by the self-regulatory organization under Section 19(b)(3)(A) of the Act [3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The American Stock Exchange LLC proposes to revise its registration fees. The text of the proposed rule change is set forth below. Proposed new language is in *italics;* proposed deletions are in [brackets].

* * * * *

Floor Fees and Booth Rental Fees. No change.

Member Fees. No change.

Registration and IDC Fees

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(2).

I. Registration

Initial Processing Fee [1]—$145

Disclosure Processing Fee [2]—95

Annual Renewal Processing Fee [3]—*80* [77]

Fingerprint Card Processing Fee [4]—35

Fingerprint Results Processed thru other [5]—13

Transfer Processing Fee [6]—125

Web CRD System Transition Fee [7]—85 (one time)

Terminations Fee [8]—*35* [30] (one time)

II. Options IDC No change

Notes

[1] The Initial Processing Fee will be assessed for all initial and dual registration Form U–4 filings. $85.00 of this fee will be retained by NASD as its CRD Processing Fee and $60.00 will be disbursed by NASD to Amex as its Initial Registration Fee.

[2] The Disclosure Processing Fee will be assessed in connection with Forms U–4 and U–5 for all filings that contain new or amended disclosure information. The $95.00 fee will be retained by NASD as its Disclosure Processing Fee.

[3] The Annual System Processing Fee will be assessed during the yearly renewal cycle. $30.00 of this fee will be retained by NASD as its Annual System Processing Fee assessed during renewals and *$50.00* [$47.00] will be disbursed by NASD to Amex as its Annual Maintenance Fee.

[4] The Fingerprint Processing Fee will be assessed for receiving hard copy fingerprint cards as part of the registration function and submitting and processing the results of each card received. The $35.00 fee will be retained by NASD as its Fingerprint Card Processing Fee.

[5] The Fee for Posting Fingerprint Results Processed through Other SROs will be assessed for processing the results of fingerprints processed by the FBI through an SRO other than NASD. The $13.00 fee will be retained by NASD.

[6] The Transfer Processing Fee will be assessed for all transfer and re-license Form U–4 filings. $85.00 of this fee will be retained by NASD as its CRD Processing Fee and $40.00 will be disbursed by NASD to Amex as its Transfer Fee.

[7] The Web CRD System Transition Fee is a one time fee that will be assessed on all individuals whose U–4s will be refiled electronically with Web CRD as part of the Exchange's migration to Web CRD. The $85.00 fee will be retained by NASD as its CRD Processing Fee.

[8] The Termination Fee will be assessed in connection with all Form U–5 filings. This *$35.00* [$30.00] fee will be disbursed by NASD to Amex as its Terminations Fee.

Amex Equity Fee Schedule through Other Fees. (No change)

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II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange requires persons who perform specified functions for members and member organizations to be registered with the Exchange. The Exchange also requires members and member organizations to report terminations of registered persons. All registration filings currently are made through the NASD's Central Registration Depository system. As a result, Amex registration fees typically reflect a combination of Amex and NASD charges. The Amex and other self-regulatory organizations use the registration process (1) to ensure that qualified persons are employed in the securities industry, and (2) to identify possible regulatory issues associated with individuals who seek to become associated with a member or member organization or whose registration is terminated.

The Exchange is proposing to increase the Amex portion of the annual registration renewal fee and the Exchange's termination fee. These increases would amount to $3.00 for the renewal fee and $5.00 for the termination fee.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act [5] in general and furthers the objectives of Section 6(b)(4) [6] in particular in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities.

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(4).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that the proposed fee change will impose no 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

The proposed rule change has become immediately effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[7] and subparagraph (f)(2) of Rule 19b–4 thereunder,[8] in that it establishes or changes a due, fee, or other charge imposed by the self-regulatory organization. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate the rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR–Amex–2003–96 and should be submitted by December 19, 2003.

[7] 15 U.S.C. 78s(b)(3)(A)(ii).

[8] 17 CFR 240.19b–4(f)(2).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–29661 Filed 11–26–03; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48815; File No. SR–CBOE–2003–33]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the Chicago Board Options Exchange, Inc., Relating to Non-Member Market Maker Transaction Fees

November 20, 2003.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 30, 2003, the Chicago Board Options Exchange, Inc. ("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 CBOE. On November 13, 2003, CBOE filed Amendment No. 1 by facsimile.[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

CBOE proposes to change its Fee Schedule to increase transaction fees for orders originating from non-member market makers by $.02 per contract. The text of the proposed rule change is available at the Office of the Secretary, CBOE and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, 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. 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, Proposed Rule Change

1. Purpose

Currently, the Exchange charges transaction fees for orders executed on behalf of non-member market makers (*i.e.*, those designated with an "N" origin code) that are equal to member market maker and member firm rates in the equities and QQQ options ($.19 per contract) and equal to customer rates in index products ($.15 to $.40). CBOE represents that Exchange members have complained that such equivalence of fees is unfair to Exchange members, who pay a variety of additional fees through their membership in the Exchange to help offset the Exchange's expenses. In order to more fairly assess Exchange costs among the individuals and organizations who avail themselves of the Exchange's trading opportunities, the Exchange proposes to increase transaction fees for N orders by $.02 per contract.

In connection with the $.02 increase, the Exchange notes two points. First, the Exchange notes that since it does not permit non-members to enter orders on the Exchange, the Exchange will not be directly assessing any such fees upon non-members. Second, the Exchange notes that the $.02 increase will not apply to linkage orders.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act[4] in general, and furthers the objectives of Section 6(b)(4) of the Act[5] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among Exchange members and issuers and other persons using its facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of 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 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. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. 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. Copies of such filing will also be available for inspection and copying at the principal office of CBOE. All submissions should refer to File No. SR–CBOE–2003–33 and should be submitted by December 19, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[6]

Margaret H. McFarland,

Deputy Secretary.

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[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Christopher R. Hill, Assistant General Counsel, CBOE to Leah Mesfin, Attorney, Division of Market Regulation, Commission, dated November 13, 2003 ("Amendment No. 1"). In Amendment No. 1, CBOE modified its argument in support of the proposal.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4).

[6] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48811; File No. SR–ISE–2003–25]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change and Amendment No. 1 Thereto by the International Stock Exchange, Inc. To Amend Rules 713 and 715 To Add Definitions for All-or-None Orders, Stop Orders and Stop Limit Orders

November 20, 2003.

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 October 16, 2003, the International Stock Exchange, Inc. ("ISE" 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 ISE. The Exchange has filed the proposal as a "non-controversial" rule change pursuant to section 19(b)(3)(A)(iii) of the Act,[3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposal effective upon filing with the Commission.[5] On November 13, 2003, the ISE filed Amendment No. 1 to the proposed rule change.[6] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to amend Rules 713 and 715 to add definitions for all-or-none orders, stop orders and stop limit orders. The text of the proposed rule change is set forth below. Proposed new language is in *italics;* proposed deletions are in [brackets].

* * * * *

Rule 715. Types of Orders

(c) All-Or-None Orders. An all-or-none order is a limit or market order that is to be executed in its entirety or not at all.

(d) Stop Orders. A stop order is an order that becomes a market order when the stop price is elected. A stop order to buy is elected when the option is bid or trades on the ISE at, or above, the specified stop price. A stop order to sell is elected when the option is offered or trades on the ISE at, or below, the specified stop price.

(e) Stop Limit Orders. A stop limit order is an order that becomes a limit order when the stop price is elected. A stop limit order to buy is elected when the option is bid or trades on the ISE at, or above, the specified stop price. A stop limit order to sell becomes a sell limit order when the option is offered or trades on the ISE at, or below, the specified stop price.

Rule 713. Priority of Quotes and Orders

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Supplementary Material to Rule 713

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.02 All-or-none orders, as defined in Rule 715(c), are contingency orders that have no priority on the book. Such orders are maintained in the system and remain available for execution after all other trading interest at the same price has been exhausted.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the ISE included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rules 713 and 715 to add definitions for all-or-none orders, stop orders and stop limit orders. The definitions of these three order types are consistent with the definitions contained in other exchanges' rules.[7] An all-or-none order is a limit or market order that is to be executed in its entirety or not at all. All-or-none orders are contingency orders that have no priority on the book. Such orders are maintained in the system and remain available for execution after all other trading interest at the same price has been exhausted.

Stop orders are defined as orders that become market orders when the stop price is elected. A stop order to buy is elected when the option is bid or trades on the ISE at, or above, the specified stop price. A stop order to sell is elected when the option is offered or trades on the ISE at, or below, the specified stop price. When the stop price is elected, the system releases a market order into the market and the order would be handled in the same manner as any other market order.

Stop limit orders are defined as orders that become limit orders when the stop price is elected. A stop limit order to buy is elected when the option is bid or trades on the ISE at, or above, the specified stop price. A stop limit order to sell is elected when option is offered or trades on the ISE at, or below, the specified stop price. Once the stop price is elected, the limit order is placed on the ISE book and would be handled in the same manner as any other limit order on the ISE book. In Amendment No. 1, the Exchange has represented that stop and stop limit orders will be elected automatically by the system without manual intervention by any market participant, and that no market participant on the ISE will be able to view pending stop and stop limit orders in the system.

2. Statutory Basis

The ISE believes that the rule change is consistent with section 6 of the Act in general [8] and Section 6(b)(5) of the Act in particular.[9] The Exchange believes that the proposed rule change is intended to remove impediments to and perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange also believes that new order types will offer investors new trading opportunities on the Exchange and enhance the Exchange's competitive position.

B. Self-Regulatory Organization's Statement on Burden on Competition

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.

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6)(iii).

[5] The ISE provided a five-day written notice to the Commission of its intent to file the proposal. The ISE has requested the Commission to waive the 30-day operative delay. *See* Rule 19b–4(f)(6)(iii) under the Act. 17 CFR 240.19b–4(f)(6)(iii).

[6] *See* letter from Katherine Simmons, Vice President and Associate General Counsel, ISE, to Theodore Lazo, Senior Special Counsel, Division of Market Regulation, Commission, Dated November 13, 2003 ("Amendment No. 1").

[7] *See, e.g.*, CBOE Rule 43.2.

[8] 15 U.S.C. 78f.

[9] 15 U.S.C. 78f(b)(5).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change, as amended, does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if the proposal is consistent with the protection of investors and the public interest; and the Exchange has given the Commission written notice of its intention to file the proposed rule change at least five business days prior to filing, or such shorter time as designated by the Commission, it has become effective pursuant to Section 19(b)(3)(A) of the Act[10] and Rule 19b-4(f)(6)[11] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[12] The Commission has decided to waive the 30 day operative delay and designates that the proposal become operative upon filing with the Commission because the proposed rule change permits the implementation of all-or-none, stop, and stop limit orders in a manner consistent with the protection of investors and the public interest.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the amended proposal is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the ISE.

All submissions should refer to File No. SR–ISE–2003–25 and should be submitted by December 19, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–29622 Filed 11–26–03; 8:45 am]

BILLING CODE 8010–01–P

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6).

[12] For purposes of calculating the 60-day abrogation period, the Commission considers the period to have commenced on November 13, 2003, the date the ISE filed Amendment No. 1.

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48812; File No. SR–NASD–2003–160]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by National Association of Securities Dealers, Inc. Regarding Reporting of Transactions Conducted Through Electronic Communications Networks to the Automated Confirmation Transaction Service

November 20, 2003.

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 October 27, 2003, the National Association of Securities Dealers, Inc. ("NASD"), through its subsidiary, The Nasdaq Stock Market, Inc. ("Nasdaq"), 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 Nasdaq. Nasdaq filed the proposal pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] which renders the proposal effective upon filing with the Commission.[5] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to amend NASD Rule 6130 to further clarify the reporting requirements applicable to transactions conducted through electronic communications networks ("ECNs") and reported to the Automated Confirmation Transaction Service ("ACT"). These reporting requirements were recently codified by SR–NASD–2003–98.[6] Nasdaq is also proposing to delay until November 10, 2003 the implementation of rule changes effected by SR–NASD–2003–98.

The text of the proposed rule change is set forth. Proposed new language is in italics; proposed deletions are in brackets.

* * * * *

6100. AUTOMATED CONFIRMATION TRANSACTION SERVICE (ACT)

6130. Trade Report Input

(a)–(b) No change.

(c) Which Party Inputs Trade Reports to ACT

ACT Participants shall, subject to the input requirements below, either input trade reports into the ACT system or utilize the Browse feature to accept or decline a trade within the applicable time-frames as specified in paragraph (b) of this Rule. Trade data input obligations are as follows:

(1)–(5) No change.

(6) in transactions conducted through two ACT ECNs or an ACT ECN AND an ECN that is not an ACT ECN, an ACT ENC shall be responsible for complying with the requirements of paragraph (5) above for reporting a transaction executed through its facilities, and an ECN that routed an order to it for execution shall be deemed to be *and Order Entry Firm* [a Market Maker] for purposes of the rules for determining reporting parties reflected in paragraphs (1), [(2),] *(3)*, and (4) above; and

(7) No change.

(d)–(e) No change.

* * * * *

[5] Nasdaq asked the Commission to waive the 5-day pre-filing notice requirement and the 30-day operative delay. See Rule 19b–4(f)(6)(iii) and 17 CFR 240.19b–4(f)(6)(iii).

[6] Securities Exchange Act Release No. 48442 (September 4, 2003), 68 FR 53767 (September 12, 2002).

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq 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. Nasdaq 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 SR–NASD–2003–98, Nasdaq recently amended the various NASD rules governing trade reporting to define with greater clarity the reporting obligations applicable to transactions executed through ECNs that are reported to ACT.[7] In general, SR–NASD–2003–98 was not intended to require ECNs to modify their current trade reporting practices. Rather, the purpose of the filing was to codify these practices in the form of clear, enforceable rules to provide greater guidance to market participants.

Since the approval of SR–NASD–2003–98, however, several ECNs have informed Nasdaq that one aspect of the rule change would result in an alternation of current practices (and associated programming costs), and Nasdaq has concluded that this alternation would not result in any offsetting benefit. NASD Rule 6130 provides that where one ECN routes an order to another ECN that executes the order, the ECN that executes the order would be responsible for reporting the transaction, or requiring a subscriber to report the transaction, in accordance with one of the three basic methods for trade reporting established by the rule. For purposes of allocating trade reporting responsibility between ECN subscribers, the routing ECN would be deemed to be a *market maker.* The ECNs that are affected by this rule have informed Nasdaq, however, that in such circumstances they have treated the routing ECN as an *order entry firm.* Thus, where an executing ECN reports trades for its subscribers and identifies a subscriber as the reporting party, when the ECN receives an order from a routing ECN that is matched against the order of an order entry firm or another ECN, the sell side has generally been identified as the reporting party. If the executing ECN matched the routed order against the order of a market maker, however, the market maker has been identified as the reporting party. The same priority rules would also apply when the executing ECN uses the trade reporting model in which it requires one of its subscribers to report the trade.

The benefit sought to be gained from SR–NASD–2003–98 was to enhance predictability and enforceability by codifying existing practices. In keeping with these goals, Nasdaq believes that it is acceptable for executing ECNs to treat routing ECNs as order entry firms. Thus, Nasdaq proposes to amend NASD Rule 6130(c)(6) accordingly.

In order to allow for adequate notice to market participants of this additional change, Nasdaq is also proposing to delay the effective date of SR–NASD–2003–98 for an additional two weeks, until November 10, 2003. Nasdaq had previously delayed this effective date from October 6, 2003 until October 27, 2003.[8] Nasdaq will inform market participants of the delay and the rule change through a Head Trader Alert posted on *www.nasdaqtrader.com.*

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,[9] in general, and with Section 15A(b)(6) of the Act,[10] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, and to protect investors and the public interest. The proposed rule change will clarify the trade reporting obligations associated with transactions conducted through ECNs but will minimize the extent to which ECNs will be required to implement non-substantive modifications to existing practices.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq 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.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate; and the Exchange has given the Commission written notice of its intention to file the proposed rule change at least five business days prior to filing, or such shorter time as designated by the Commission, it has become effective pursuant to Section 19(b)(3)(A) of the Act[11] and Rule 19b–4(f)(6)[12] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

Nasdaq has requested that the Commission waive the 5-day pre-filing notice requirement and the 30-day operative delay. The Commission believes waiving the 5-day pre-filing notice requirement and the 30-day operative delay is consistent with the protection of investors and the public interest. Acceleration of the operative date will allow both the trade reporting rules approved by the Commission in SR–NASD–2003–98 and the minor modification to those rules proposed in SR–NASD–2003–160 to take effect without undue delay, thereby lessening the extent to which ECNs that use ACT would be required to make non-substantive modifications to their existing trade reporting practices.[13]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Persons making

[7] Securities Exchange Act Release No. 48442 (September 4, 2003), 68 FR 53767 (September 12, 2002) (SR–NASD–2003–98) (approval order).

[8] Securities Exchange Act Release No. 48625 (October 10, 2003), 68 FR 59961 (October 20, 2003) (SR–NASD–2003–152).

[9] 15 U.S.C. 78*o*–3.

[10] 15 U.S.C. 78*o*–3(b)(6).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6).

[13] For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of Nasdaq. All submissions should refer to File No. SR–NASD–2003–160 and should be submitted by December 19, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[14]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–29623 Filed 11–26–03; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48816; File No. SR–Phlx–2003–10]

Self-Regulatory Organizations; Order Granting Approval to Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to Remote Primary Specialists

November 20, 2003.

On February 26, 2003, the Philadelphia Stock Exchange, Inc. ("Phlx") 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 permit "primary specialists" to trade away from the Phlx floor in limited circumstances. The proposed rule change was published for comment in the **Federal Register** on September 29, 2003.[3] The Commission received no comments on the proposal. This order approves the Phlx's proposed rule change.

Under Phlx Rule 460, multiple specialists, one of which is identified as the "primary specialist,"[4] currently may trade a particular security on the equity trading floor of the Phlx.[5] Prior to the adoption of Phlx Rules 460 and 229A, each equity security traded on the floor of the Phlx was allocated to only one specialist unit. Phlx Rule 460 allows approved specialist units to trade one or more securities as "competing specialists."[6] There must be a primary specialist in a particular security in order for there to be competing specialists in that security.[7] Competing specialists have the same affirmative and negative obligations under Phlx Rule 203 as primary specialists.

Pursuant to Phlx Rule 461, the Phlx also operates a program whereby competing Phlx specialist units conduct specialist trading activities off the Phlx trading floor using PACE[8] terminals and related equipment. The Commission granted approval of the Phlx's remote competing specialist program subject to the condition that the Phlx "have in place specific information barrier policies and surveillance policies that are consistent with the Exchange's existing rules and that are acceptable be the Commission's Office of Compliance Inspections and Examinations ("OCIE")."[9]

The Phlx now proposes to establish a similar program whereby primary specialists would be permitted to conduct specialist trading activities off the Phlx trading floor.[10] The Phlx has represented that its current rules, policies, and practices with respect to information barriers and surveillance are adequate to support remote trading by primary specialists at the Phlx.[11] Moreover, the Phlx has represented that it will examine remote primary specialist locations to ensure adequate compliance with Phlx rules.[12] Thus, the Commission believes that Phlx has addressed confidentiality issues associated with allowing remote primary specialists to trade from remote locations in proximity to a diversified broker-dealer's other off-floor operations. Member firms' traders should not get a market advantage because of their physical proximity to a specialist trading unit, and *vice versa*. Based, in part, on the Phlx's representation that it has in place adequate information barrier policies and surveillance procedures, the Commission is approving the Phlx's remote primary specialist proposal.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[13] Specifically, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,[14] which requires, among other things, that the Phlx's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in, securities, to remove impediments to and perfect the mechanism of a free and open market and a national market

[14] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 48515 (September 22, 2003), 68 FR 56031 (September 29, 2003).

[4] Phlx Rule 229A(b)(5) defines "primary specialist" as follows:

'Primary Specialist' shall mean the primary specialist identified as such by the Equity Allocation, Evaluation, and Securities Committee. The Primary Specialist may be either the Directed Specialist or the Non-Directed Specialist in the case of any particular Directed Order. The Primary Specialist shall be deemed to be the Directed Specialist with respect to any Non-Directed Order.

[5] *See* Securities Exchange Act Release No. 45183 (December 21, 2001), 67 FR 118 (January 2, 2002) (order approving establishment of a competing specialist program at the Phlx) (SR–Phlx–2001–97).

[6] Phlx Rule 229A(b)(6) defines "competing specialist" as follows:

'Competing Specialist' shall mean any competing specialist identified as such by the Equity Allocation, Evaluation, and Securities Committee pursuant to [Phlx] Rule 460. A Competing Specialist may be either the Directed Specialist or the Non-Directed Specialist in the case of any particular Directed Order.

[7] A Phlx specialist may trade some securities on a primary basis and other securities on a competing basis, or made trade all its securities on either a primary or a competing basis.

[8] PACE is the electronic order routing, delivery execution, and reporting system used to access the Phlx Equity Floor. *See* Phlx Rules 229 and 229A.

[9] Securities Exchange Act Release No. 45184 (December 21, 2001), 67 FR 622 (January 4, 2002) (order approving the establishment of the Phlx's remote specialist program) (SR–Phlx–2001–98).

[10] The Commission reiterates that while the remote specialist program, which now includes primary specialists, may have the effect of attracting additional order flow to the Phlx, this must occur consistent with best execution principles. Accordingly, the broker-dealer must rigorously and regularly examine the executions likely to be obtained for customer orders in the different markets trading the security, in addition to any other relevant considerations in routing customer orders.

[11] Telephone conversation between Carla Behnfeldt, Director, Legal Department New Product Development Group, Phlx, and Patrick M. Joyce, Special Counsel, Division of Market Regulation, Commission, on November 19, 2003.

[12] Telephone conversation between Edith Hallahan, Deputy General Counsel, Phlx, and Florence Harmon, Senior Special Counsel, Division of Market Regulation, Commission, on November 20, 2003.

[13] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[14] 15 U.S.C. 78f(b)(5).

system, and, in general, to protect investors and the public interest. The Commission believes that the Phlx's proposal to permit primary specialists to trade on a remote basis in limited circumstances may reduce costs, add liquidity, and promote competition, and lead to a greater number of securities trading on PACE, thereby benefiting investors.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act[15], that the proposed rule change (SR–Phlx–2003–10) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[16]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–29662 Filed 11–26–03; 8:45 am]

BILLING CODE 8010–01–P

SMALL BUSINESS ADMINISTRATION

Charter Re-establishment

Re-establishment of Advisory Committees

We publish this notice following the provisions of the Federal Advisory Committee Act (Pub. L. 92–463) to renew Small Business Administration (SBA) discretionary Advisory Committees. The General Services Administration's Committee Management Secretariat has determined that renewal is in the public interest.

1. National Advisory Council

The Council will provide advice, ideas and opinions on SBA programs and small business issues. The Council's scope of activities includes reviewing SBA programs and informing SBA of current small business issues. Its members provide an essential connection between SBA, SBA program participants, and the small business community nationwide.

2. District Advisory Councils

The District Advisory Councils provide advice and recommendations to the SBA regarding the effectiveness of and need for SBA programs, particularly within the local districts. Official designations include:

1. Alabama District Advisory Council (formerly Birmingham District Advisory Council)
2. Buffalo District Advisory Council
3. Columbus District Advisory Council
4. Connecticut District Advisory Council (formerly Hartford District Advisory Council)
5. Georgia District Advisory Council (formerly Atlanta District Advisory Council)
6. Hawaii District Advisory Council (formerly Honolulu District Advisory Council)
7. Houston District Advisory Council
8. Indiana District Advisory Council (formerly Indianapolis District Advisory Council)
9. Louisiana District Advisory Council (formerly New Orleans District Advisory Council)
10. Maine District Advisory Council (formerly Augusta District Advisory Council)
11. Minnesota District Advisory Council (formerly Minneapolis District Advisory Council)
12. Montana District Advisory Council (formerly Helena District Advisory Council)
13. North Florida District Advisory Council
14. Oregon District Advisory Council (formerly Portland District Advisory Council)
15. Pittsburgh District Advisory Council
16. Rhode Island District Advisory Council (formerly Providence District Advisory Council)
17. Richmond District Advisory Council
18. Santa Ana District Advisory Council
19. Utah District Advisory Council (formerly Salt Lake City District Advisory Council)
20. Vermont District Advisory Council (formerly Montpelier District Advisory Council)
21. Washington, DC District Advisory Council
22. West Virginia District Advisory Council (formerly Clarksburg District Advisory Council)
23. Wisconsin District Advisory Council (formerly Madison District Advisory Council)

FOR FURTHER INFORMATION CONTACT: For additional information, contact Kimberly Mace, Committee Management Specialist, 409 Third Street, NW., Washington, DC 20416; telephone (202) 401–8252.

Scott R. Morris,

Deputy Chief of Staff.

[FR Doc. 03–29713 Filed 11–26–03; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Public Federal Regulatory Enforcement Fairness Hearing; Region IV Regulatory Fairness Board

The Small Business Administration Region IV Regulatory Fairness Board and the SBA Office of the National Ombudsman will hold a Public Hearing on Tuesday, December 9, 2003 at 1 p.m. at 1720 Peachtree Street, Room 197, Atlanta, GA 30309, to receive comments and testimony from small business owners, small government entities, and small non-profit organizations concerning regulatory enforcement and compliance actions taken by federal agencies.

Anyone wishing to attend or to make a presentation must contact Annette Rodriguez in writing or by fax, in order to be put on the agenda. Annette Rodriguez, Georgia District Office, 233 Peachtree Street, NE Suite 1900, Atlanta, GA 30303, phone (404) 331–0100 x614, fax (404) 331–0101 or (202) 481–0288, e-mail: *annette.rodriguez@sba.gov.*

For more information, *see* our Web site at *www.sba.gov/ombudsman.*

Dated: November 21, 2003.

Peter Sorum,

National Ombudsman (Acting).

[FR Doc. 03–29712 Filed 11–26–03; 8:45 am]

BILLING CODE 8025–01–P

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Proposed Request and Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages that will require clearance by the Office of Management and Budget (OMB) in compliance with Pub. L. 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. The information collection packages that may be included in this notice are for new information collections, approval of existing information collections, revisions to OMB-approved information collections, and extensions (no change) of OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and on ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Written comments and recommendations regarding the information collection(s) should be submitted to the OMB Desk Officer and the SSA Reports Clearance Officer. The information can be mailed and/or faxed to the individuals at the addresses and fax numbers listed below:

(OMB), Office of Management and Budget, Attn: Desk Officer for SSA,

[15] 15 U.S.C. 78s(b)(2).

[16] 17 CFR 200.30–3(a)(12).

New Executive Building, Room 10235, 725 17th St., NW, Washington, DC 20503, Fax: 202–395–6974.

(SSA), Social Security Administration, DCFAM, Attn: Reports Clearance Officer, 1338 Annex Building, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–965–6400.

I. The information collections listed below are pending at SSA and will be submitted to OMB within 60 days from the date of this notice. Therefore, your comments should be submitted to SSA within 60 days from the date of this publication. You can obtain copies of the collection instruments by calling the SSA Reports Clearance Officer at 410–965–0454 or by writing to the address listed above.

1. Certificate of Support—20 CFR 404.408a, 404.370, and 404.750—0960–0001. The information collected by form SSA–760–F4 is used to determine whether a deceased worker provided one-half support required for entitlement to Social Security parent's or spouse's benefits. The information will also be used to determine whether the Government pension offset would apply to the applicant's benefit payments. The respondents are parents of deceased workers or spouses who may be subject to Government pension offset.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 18,000.

Frequency of Response: 1.

Average Burden Per Response: 15 minutes.

Estimated Annual Burden: 4,500 hours.

2. Notice Regarding Substitution of Party Upon Death of Claimant—20 CFR 404.957(c)(4) and 416.1457(c)(4)—0960–0288. When a claimant for Social Security or Supplemental Security Income benefits dies while a request for a hearing is pending, the hearing will be dismissed unless an eligible individual makes a written request to SSA showing that he or she would be adversely affected by the dismissal of the deceased's claim. An individual may satisfy this requirement by completing an HA–539. SSA uses the information collected to document the individual's request to be made a substitute party for a deceased claimant, and to make a decision on whom, if anyone, should become a substitute party for the deceased. The respondents are individuals requesting hearings on behalf of deceased claimants for Social Security benefits.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 10,548.

Frequency of Response: 1.

Average Burden Per Response: 5 minutes.

Estimated Annual Burden: 879 hours.

3. Request to Resolve Questionable Quarters of Coverage (QC); Request for QC History Based on Relationship—0960–0575. Form SSA–512 is used by States to request clarification from SSA on questionable QC information. The Personal Responsibility and Work Opportunity Reconciliation Act states that aliens admitted for lawful residence who have worked and earned 40 qualifying QCs for Social Security purposes can generally receive State benefits. Form SSA–513 is used by States to request QC information for an alien's spouse or child in cases where the alien does not sign a consent form giving permission to access his/her Social Security records. QCs can also be allocated to a spouse and/or to a child under age 18, if needed, to obtain 40 qualifying QCs for the alien. The respondents are State agencies that require QC information in order to determine eligibility for benefits.

Type of Request: Extension of an OMB-approved information collection.

Burden Information	SSA–512	SSA–513
Number of Respondents	200,000	350,000
Frequency of Response	1	1
Average Burden Per Response (minute)	2	2
Estimated Annual Burden (hours)	6,667	11,667

4. International Direct Deposit—31 CFR 210–0960–NEW. SSA uses the information collected on the International Direct Deposit (IDD) Form, SSA–1199 (Country), to enroll beneficiaries residing abroad in the IDD program. There are currently 39 countries where IDD is now available, and SSA plans to expand this service to other countries as it becomes available. The SSA–1199 (Country) is named according to the country for its intended use, but will always request the same basic enrollment information. This form is a variation of the SF–1199 A, Direct Deposit Sign-Up Form, which is used to enroll a beneficiary in direct deposit to a U.S. financial institution. The respondents are beneficiaries living in a foreign country that request Direct Deposit to a financial institution in their country of residence.

Type of Request: New information collection.

Number of Respondents: 5,000.

Frequency of Response: 1.

Average Burden Per Response: 5 minutes.

Estimated Annual Burden: 417 hours.

II. The information collections listed below have been submitted to OMB for clearance. Your comments on the information collections would be most useful if received by OMB and SSA within 30 days from the date of this publication. You can obtain a copy of the OMB clearance packages by calling the SSA Reports Clearance Officer at 410–965–0454, or by writing to the address listed above.

1. Annual Earnings Test Direct Mail Follow-Up Program Notices—20 CFR 404.452–455—0960–0369. In 1997, as part of the initiative to reinvent government, SSA began to use the information reported on W–2's and self-employment tax returns to adjust benefits under the earnings test rather than have beneficiaries make a separate report, which often showed the same information. As a result, beneficiaries under full retirement age (FRA) complete forms SSA–L9778–SM–SUP, SSA–L9779–SM–SUP and SSA–L9781–SM under this information collection. With the passage of the Senior Citizen Freedom to Work Act of 2000, the annual earnings test (AET) at FRA was eliminated. As a result, SSA designed two new Midyear Mailer Forms, SSA–L9784–SM and SSA–L9785–SM, to request an earnings estimate (in the year of FRA) for the period prior to the month of FRA. Social Security benefits may be adjusted based on the information provided and this information is needed to comply with the law. Consequently, the Midyear Mailer program has become an even more important tool in helping SSA to ensure that Social Security payments are correct. Respondents are beneficiaries who must update their current year estimate of earnings, give SSA an estimate of earnings for the following year and an earnings estimate (in the year of FRA) for the period prior to the month of FRA.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 225,000.

Frequency of Response: 1.

Average Burden Per Response: 10 minutes.

Estimated Annual Burden: 37,500 hours.

2. Application for Lump Sum Death Payment—20 CFR 404.390–404.392—0960–0013. The information collected on form SSA–8 by SSA is required to authorize payment of a lump-sum death benefit to a widow, widower, or children as defined in Section 202(i) of the Social Security Act. The respondents are widows, widowers or children who apply for a lump-sum death payment.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 43, 850.

Frequency of Response: 1.

Average Burden Per Response: 10 minutes.

Estimated Annual Burden: 7,308 hours.

3. Petition To Obtain Approval Of A Fee For Representing A Claimant Before the Social Security Administration—20 CFR Subpart R, 404.1720, 404.1725, Subpart F, 410.686b, Subpart O, 416.1520 and 416.1525—0960–0104. A representative of a claimant for Social Security benefits must file either a fee petition or a fee agreement with SSA in order to charge a fee for representing a claimant in proceedings before SSA. The representative uses Form SSA–1560 to petition SSA for authorization to charge and collect a fee. A claimant may also use the form to agree or disagree with the requested fee amount or other information the representative provides on the form. SSA uses the information to determine a reasonable fee that a representative may charge and collect for his or her services. The respondents are claimants, their attorneys and other persons representing them.

Type of Request: Extension of an OMB-approved information collection.

Number of Respondents: 34, 624.

Frequency of Response: 1.

Average Burden Per Response: 30 minutes.

Estimated Average Burden: 17,312 hours.

4. Student Statement Regarding School Attendance—20 CFR 404.351–352, 404.367–.368—0960–0105. The information collected on Form SSA–1372 is needed to determine whether children of an insured worker are eligible for benefits as a student. The respondents are student claimants for Social Security benefits and their respective schools.

Type of Request: Extension of an OMB approved information collection.

Number of Respondents: 200,000.

Number of Response: 1.

Average Burden Per Response: 10 minutes.

Estimated Annual Burden: 33,333 hours.

5. Application of Circuit Court Law—20 CFR 404.985 and 416.1485—0960–0581. SSA regulations at 20 CFR 404.985 and 416.1485 inform claimants of their right to request that a published Acquiescence Ruling (AR) be applied to a prior determination when we make a determination or decision on a claim between the date of the Circuit Court decision and the date we publish the AR. The regulations also specify that claimants can request that the AR be applied to a prior determination or decision by submitting a statement that demonstrates how the AR could change the prior determination or decision. SSA will use the information provided in the statement to readjudicate the claim if the claimant demonstrates the Ruling could change the prior determination. The respondents are claimants whose determinations or decisions on their claims may be affected by an AR.

Type of Request: Extension of an OMB-approved collection.

Number of Respondents: 100,000.

Frequency of Response: 1.

Average Burden Per Response: 17 minutes.

Estimated Annual Burden: 28,333 hours.

Dated: November 21, 2003.

Elizabeth A. Davidson,

Reports Clearance Officer, Social Security Administration.

[FR Doc. 03–29686 Filed 11–26–03; 8:45 am]

BILLING CODE 4191–02–P

SOCIAL SECURITY ADMINISTRATION

The Ticket to Work and Work Incentives Advisory Panel Teleconference

AGENCY: Social Security Administration (SSA).

ACTION: Notice of teleconference.

DATES: Friday, December 5, 2003.

Teleconference: Friday December 5, 2003, 1:30 p.m. to 3:30 p.m. Eastern time.

Ticket to Work and Work Incentives Advisory Panel Conference Call:
Call-in number: 888–323–2711.
Pass code: PANEL.
Leader/Host: Sarah Wiggins Mitchell.

SUPPLEMENTARY INFORMATION:

Type of meeting: This teleconference meeting is open to the public. The interested public is invited to participate by calling into the teleconference at the number listed above. Public testimony will not be taken.

Purpose: In accordance with section 10(a)(2) of the Federal Advisory Committee Act, the Social Security Administration (SSA) announces this teleconference meeting of the Ticket to Work and Work Incentives Advisory Panel (the Panel). Section 101(f) of Pub. L. 106–170 establishes the Panel to advise the President, the Congress and the Commissioner of SSA on issues related to work incentives programs, planning and assistance for individuals with disabilities as provided under section 101(f)(2)(A) of the Ticket to Work and Work Incentives Advisory Act (TWWIIA). The Panel is also to advise the Commissioner on matters specified in section 101(f)(2)(B) of that Act, including certain issues related to the Ticket to Work and Self-Sufficiency Program established under section 101(a) of that Act.

Agenda: The Panel will deliberate on the implementation of TWWIIA and conduct Panel business. The Panel will be discussing the Notice of Proposed Rule Making on Expedited Reinstatement, its Annual Report and follow up items from its November meeting. The agenda for this meeting will be posted on the Internet at *http://www.socialsecurity/work/panel* one week prior to the teleconference or can be received in advance electronically or by fax upon request.

Contact Information: Records are being kept of all Panel proceedings and will be available for public inspection by appointment at the Panel office. Anyone requiring information regarding the Panel should contact the TWWIIA Panel staff by:

- Mail addressed to Ticket to Work and Work Incentives Advisory Panel Staff, Social Security Administration, 400 Virginia Avenue, SW, Suite 700, Washington, DC, 20024;
- Telephone contact with Kristen Breland at (202) 358–6430;
- Fax at (202) 358–6440; or
- E-mail to *TWWIIAPanel@ssa.gov.*

Dated: November 14, 2003.

Carol Brenner,

Designated Federal Official.

[FR Doc. 03–29688 Filed 11–26–03; 8:45 am]

BILLING CODE 4191–02–P

SOCIAL SECURITY ADMINISTRATION

Senior Executive Service

AGENCY: Social Security Administration.

ACTION: Notice of Senior Executive Service Performance Review Board Membership.

Title 5, U.S. Code, Section 4314(c)(4) of the Civil Service Reform Act of 1978, Pub. L. 95–454, requires that the appointment of Performance Review Board members be published in the **Federal Register**.

The following persons will serve on the Performance Review Board which oversees the evaluation of performance appraisals of Senior Executive Service members of the Social Security Administration.

Nicholas M. Blatchford, Philip A. Gambino, Diane B. Garro, Terris A. King, Nancy A. McCullough, Carolyn L. Simmons, Felicita Sola-Carter,

Frederick G. Streckewald, Paul N. Van de Water, Manuel Vaz, Alice H. Wade, John B. Watson, Charles M. Wood

Dated: November 12, 2003.

Reginald F. Wells,

Deputy Commissioner for Human Resources.

[FR Doc. 03–29687 Filed 11–26–03; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 4544]

Defense Trade Advisory Group; Notice of Open Meeting

AGENCY: Department of State.

ACTION: Notice.

The Defense Trade Advisory Group (DTAG) will meet in open session from 9 a.m. to 12 noon on Wednesday, December 17, 2003, in Room 1912 at the U.S. Department of State, Harry S. Truman Building, Washington, DC. Entry and registration will begin at 8:15. Please use the building entrance located at 23rd Street, NW., Washington, DC, between C&D streets. The membership of this advisory committee consists of private sector defense trade specialists, appointed by the Assistant Secretary of State for Political-Military Affairs, who advise the Department on policies, regulations, and technical issues affecting defense trade. The purpose of the meeting will be to review progress of the working groups and to discuss current defense trade issues and topics for further study.

Although public seating will be limited due to the size of the conference room, members of the public may attend this open session as seating capacity allows, and will be permitted to participate in the discussion in accordance with the Chairman's instructions. Members of the public may, if they wish, submit a brief statement to the committee in writing.

As access to the Department of State facilities is controlled, persons wishing to attend the meeting must notify the DTAG Executive Secretariat by COB Tuesday, December 9, 2003. If notified after this date, the DTAG Secretariat cannot guarantee that State's Bureau of Diplomatic Security can complete the necessary processing required to attend the December 17 plenary.

Each non-member observer or DTAG member needing building access that wishes to attend this plenary session should provide his/her name, company or organizational affiliation, phone number, date of birth, social security number, and citizenship to the DTAG Secretariat, contact person Barbara Eisenbeiss via e-mail at *EisenbeissBK@state.gov*. DTAG members planning to attend the plenary session should notify the DTAG Secretariat, contact person Mary Sweeney via e-mail at *SweeneyMF@state.gov*. A list will be made up for Diplomatic Security and the Reception Desk at the 23rd Street Entrance. Attendees must present a driver's license with photo, a passport, a U.S. Government ID, or other valid photo ID for entry.

FOR FURTHER INFORMATION CONTACT: Mary F. Sweeney, DTAG Secretariat, U.S. Department of State, Office of Defense Trade Controls Management (PM/DTCM), Room 1200, SA–1, Washington, DC 20522–0112, (202) 663–2865, FAX (202) 663–261–8199.

Dated: November 24, 2003.

Michael T. Dixon,

Executive Secretary, Defense Trade Advisory Group, Department of State.

[FR Doc. 03–29736 Filed 11–26–03; 8:45 am]

BILLING CODE 4710–25–P

TENNESSEE VALLEY AUTHORITY

Paperwork Reduction Act of 1995, as Amended by Pub. L. 104–13; Proposed Collection; Comment Request

AGENCY: Tennessee Valley Authority.

ACTION: Proposed Collection; comment request.

SUMMARY: The proposed information collection described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended). The Tennessee Valley Authority is soliciting public comments on this proposed collection as provided by 5 CFR Section 1320.8(d)(1). Requests for information, including copies of the information collection proposed and supporting documentation, should be directed to the Agency Clearance Officer: Alice D. Witt, Tennessee Valley Authority, 1101 Market Street (EB–5B), Chattanooga, TN 37402–2801; (423) 751–6832. (SC: 0003D1Z)

Comments should be sent to the Agency Clearance Officer no later than January 27, 2004.

SUPPLEMENTARY INFORMATION:

Type of Request: Regular submission; proposal for an extension of a currently approved collection, which will expire February 29, 2004 (OMB control number 3316–0009).

Title of Information Collection: Salary Survey for Salary Policy Bargaining Unit Employees.

Frequency of Use: Annually.

Type of affected Public: State or local governments, Federal agencies, non-profit institutions, businesses, or other for-profit.

Small Businesses or Organizations Affected: No.

Federal Budget Functional Category Code: 999.

Estimated Number of Annual Responses: 45.

Estimated Total Annual Burden Hours: 180.

Estimated Average Burden Hours Per Response: 4.

Need For and Use of Information: TVA conducts an annual salary survey for employee compensation and benefits as a basis for labor negotiations in determining prevailing rates of pay and benefits for represented salary policy employees. TVA surveys firms, and Federal, State, and local governments whose employees perform work similar to that of TVA's salary policy employees.

Jacklyn J. Stephenson,

Senior Manager, Enterprise Operations, Information Services.

[FR Doc. 03–29631 Filed 11–26–03; 8:45 am]

BILLING CODE 8120–08–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Aviation Proceedings, Agreements Filed the Week Ending November 14, 2003

The following Agreements were filed with the Department of Transportation under the provisions of 49 U.S.C. Sections 412 and 414. Answers may be filed within 21 days after the filing of the application.

Docket Number: OST–2003–16525.

Date Filed: November 13, 2003.

Parties: Members of the International Air Transport Association.

Subject:

PAC/Reso/421 dated August 12, 2003.

Finally Adopted Resolutions r1–r42.

Minutes—PAC/Meet/179 dated August 12, 2003.

Intended effective date: January 1, 2004.

Andrea M. Jenkins,

Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. 03–29649 Filed 11–26–03; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

Reports, Forms and Recordkeeping Requirements; Agency Information Collection Activity Under OMB Review

AGENCY: Maritime Administration, DOT.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and approval. The nature of the information collection is described as well as its expected burden. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on September 12, 2003. No comments were received.

DATES: Comments must be submitted on or before December 29, 2003.

FOR FURTHER INFORMATION CONTACT: Keith Lesnick, Maritime Administration (MAR–830), 400 7th Street, SW., Washington, DC 20590. Telephone: (202) 366–1624; Fax: (202) 366–6988; or e-mail: *keith.lesnick@marad.dot.gov.* Copies of this collection also can be obtained from that office.

SUPPLEMENTARY INFORMATION: Maritime Administration (MARAD).

Title: Port Facility Conveyance Information.

OMB Control Number: 2133–0524.

Type of Request: Extension of currently approved collection.

Affected Public: Eligible port entities.

Forms: None.

Abstract: Pub. L. 103–160, which is included in 40 U.S.C. 554 authorizes the Department of Transportation to convey to public entities surplus Federal property needed for the development or operation of a port facility. The information collection will allow MARAD to approve the conveyance of property and administer the port facility conveyance program. The collection is necessary for MARAD to determine whether the community is committed to the redevelopment/reuse plan; the redevelopment/reuse plan is viable and is in the best interest of the public; and the property is being used in accordance with the terms of the conveyance and applicable statutes and regulations.

Annual Estimated Burden Hours: 768 hours.

ADDRESSES: Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention MARAD Desk Officer.

Comments are invited on: 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; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility and clarity of the information to be collected; and ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

Dated: November 21, 2003.

Joel C. Richard,

Secretary, Maritime Administration.

[FR Doc. 03–29619 Filed 11–26–03; 8.45 am]

BILLING CODE 4910–81–P

Federal Register

Friday,
November 28, 2003

Part II

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Parts 412, 413, and 424
Medicare Program; Prospective Payment System for Inpatient Psychiatric Facilities; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 412, 413, and 424

[CMS–1213–P]

RIN 0938–AL50

Medicare Program; Prospective Payment System for Inpatient Psychiatric Facilities

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

ACTION: Proposed rule.

SUMMARY: This rule proposes a prospective payment system for Medicare payment of inpatient hospital services furnished in psychiatric hospitals and psychiatric units of acute care hospitals. This rule proposes to implement section 124 of the Medicare, Medicaid, andSCHIP Balanced Budget Refinement Act of 1999 (BBRA), which requires the implementation of a per diem prospective payment system for hospital services of psychiatric hospitals and psychiatric units. The prospective payment system described in this proposed rule would replace the reasonable cost-based payment system currently in effect.

DATES: We will consider comments if we receive them at the appropriate address, as provided below, no later than 5 p.m. on January 27, 2004.

ADDRESSES: In commenting, please refer to file code CMS–1213–P. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission. Mail written comments (one original and two copies) to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–1213–P, P.O. Box 8012, Baltimore, MD 21244–8012. Please allow sufficient time for mailed comments to be received timely in the event of delivery delays.

If you prefer, you may deliver (by hand or courier) your written comments (one original and two copies) to one of the following addresses: Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, or Room C5–14–03, 7500 Security Boulevard, Baltimore, MD 21244–1850. (Because access to the interior of the HHH Building is not readily available to persons without Federal Government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.) Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and could be considered late.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Janet Samen, (410) 786–4533. Philip Cotterill, (410) 786–6598, for information regarding the regression analysis.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: Comments received timely will be available for public inspection as they are received, generally beginning approximately 4 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone (410) 786–9994.

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 toll-free at 1–888–293–6498) 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 document, 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 DSM–IV–TR Diagnostic and Statistical Manual of Mental Disorders Fourth Edition—Text Revision
DRGs Diagnosis-related groups
FY Federal fiscal year
HCRIS Hospital Cost Report Information System
ICD–9-CM International Classification of Diseases, 9th Revision, Clinical Modification
IPFs Inpatient psychiatric facilities
IRFs Inpatient rehabilitation facilities
LTCHs Long-term care hospitals
MedPAR Medicare provider analysis and review file
PIP Periodic interim payments
TEFRA Tax Equity and Fiscal Responsibility Act of 1982, (Pub. L. 97–248)

I. Background

A. General and Legislative History

When the Medicare statute was originally enacted in 1965, Medicare payment for hospital inpatient services was based on the reasonable costs incurred in furnishing services to Medicare beneficiaries. Section 223 of the Social Security Act Amendments of 1972 (Pub. L. 92–603) amended section 1861(v)(1) of the Social Security Act (the Act) to set forth limits on reasonable costs for hospital inpatient services. The statute was later amended by section 101(a) of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) (Pub. L. 97–248) to limit payment by placing a limit on allowable costs per discharge.

The Congress directed implementation of a prospective payment system for acute care hospitals in 1983, with the enactment of Pub. L. 98–21. Section 601 of the Social Security Amendments of 1983 (Pub. L. 98–21) added a new section 1886(d) to the Act that replaced the reasonable cost-based payment system for most hospital inpatient services with a prospective payment system.

Although most hospital inpatient services became subject to the prospective payment system, certain specialty hospitals were excluded from the prospective payment system and continued to be paid reasonable costs subject to limits imposed by TEFRA. These hospitals included psychiatric hospitals and psychiatric units in acute care hospitals, long-term care hospitals (LTCHs), children's hospitals, and rehabilitation hospitals and units. Cancer hospitals were added to the list of excluded hospitals by section 6004(a) of the Omnibus Budget Reconciliation Act of 1989 (Pub. L. 101–239).

The Congress enacted various provisions in the Balanced Budget Act of 1997 (BBA) (Pub. L. 105–33), the Medicare, Medicaid, and SCHIP [State Children's Health Insurance Program] Balanced Budget Refinement ACT (BBRA) (Pub. L. 106–113), and the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act (BIPA) (Pub. L. 106–554) to replace the cost-based methods of reimbursement with a prospective payment system for the following excluded hospitals:

- Rehabilitation hospitals (including units in acute care hospitals).
- Psychiatric hospitals (including units in acute care hospitals.
- LTCHs.

The BBA also imposed national limits (or caps) on hospital-specific target amounts (that is, annual per discharge limits) for these hospitals until cost reporting periods beginning on or after October 1, 2002. A detailed description of the TEFRA payment methodology is provided in section I.B.1. of this proposed rule.

Section 124 of the BBRA mandated that the Secretary—(1) develop a per diem prospective payment system for inpatient hospital services furnished in psychiatric hospitals and psychiatric units; (2) include in the prospective payment system an adequate patient classification system that reflects the differences in patient resource use and costs among psychiatric hospitals and psychiatric units; (3) maintain budget neutrality; (4) permit the Secretary to require psychiatric hospitals and psychiatric units to submit information necessary for the development of the prospective payment system; and (5) submit a report to the Congress describing the development of the prospective payment system.

Section 124 also required that the payment system for inpatient psychiatric services be implemented for cost reporting periods beginning on or after October 1, 2002. The creation of each new payment system requires an extraordinary amount of lead-time to develop and implement the necessary changes to our existing computerize claims processing systems. In order to meet the BBRA requirement to develop an adequate patient classification system, we undertook two research projects. It became apparent that the two research projects could not be completed in time for us to implement an inpatient psychiatric facility prospective payment system by October 1, 2002. It was impossible for us to analyze our existing administrative data in a sufficient amount of time to go through notice and comment rulemaking and implementation of the inpatient psychiatric facility prospective payment system by the statutory deadline. This delay enabled us to analyze our existing administrative data to determine the feasibility and validity of using these data to develop the proposed inpatient psychiatric facility prospective payment system. We are using a combination of available facility and patient specific data for this proposed rule. Our research efforts will

continue and will be used to refine the proposed system.

In this proposed rule, as required under section 124 of the BBRA, we set forth the proposed Medicare prospective payment system for psychiatric hospitals and psychiatric units of acute care hospitals. We note that many hospitals have "psychiatric units," however; only those units that are separately certified from the hospital and meet the requirements of § 412.23, § 412.25, and § 412.27 are excluded from the hospital inpatient prospective payment system and would be subject to this proposed prospective payment system. Psychiatric units that are currently paid under the hospital inpatient prospective payment system and do not meet the requirements of § 412.22, § 412.25 and § 412.27 would not be paid under the proposed IPF prospective payment system. The proposed system includes an adequate patient classification system that would result in higher prospective payments to providers treating more costly, resource intensive patients using statistically objective criteria.

We are proposing to establish a base payment rate that would be paid to inpatient psychiatric facilities for each day of inpatient psychiatric care (the Federal per diem base rate). The proposed base rate would be adjusted by certain proposed patient-level and facility-level characteristics.

B. Overview of the Payment System for Psychiatric Hospitals and Psychiatric Units Before the BBA

1. Description of the TEFRA Payment Methodology

Hospitals and units that are excluded from the hospital inpatient prospective payment system under section 1886(d)(1)(B) of the Act are paid for their inpatient operating costs under the provisions of Pub. L. 97–248 (TEFRA). The TEFRA provisions are found in section 1886(b) of the Act and implemented in regulations at 42 CFR Part 413. TEFRA established payments based on hospital-specific limits for inpatient operating costs. As specified in § 413.40, TEFRA established a ceiling on payments for hospitals excluded from the acute care hospital inpatient prospective payment system. A ceiling on payments is determined by calculating the product of a facility's base year costs (the year in which its target reimbursement limit is based) per discharge, updated to the current year by a rate-of-increase percentage, and multiplied by the number of total current year discharges. A detailed discussion of target amount payment limits under TEFRA can be found in the final rule concerning the hospital inpatient prospective payment system published in the **Federal Register** on September 1, 1983 (48 FR 39746).

The base year for a facility varied, depending on when the facility was initially determined to be a prospective payment system-excluded provider. The base year for facilities that were established before the implementation of the TEFRA provision was 1982. For facilities established after the implementation of the TEFRA provision, facilities were allowed to choose which of their first 3 cost-reporting years would be used in the future to determine their target limit. In 1992, the "new provider" period was shortened to 2 full years of cost-reporting periods (§ 413.40(f)(1)).

Excluded facilities whose costs were below their target amounts would receive bonus payments equal to the lesser of half of the difference between costs and the target amount, up to a maximum of 5 percent of the target amount, or the hospital's costs. For excluded hospitals whose costs exceeded their target amounts, Medicare provided relief payments equal to half of the amount by which the hospital's costs exceeded the target amount up to 10 percent of the target amount. Excluded facilities that experienced a more significant increase in patient acuity could also apply for an additional amount as specified in § 413.40(d) for Medicare exception payments.

2. BBA Amendments to TEFRA

The BBA amendments to section 1886 of the Act significantly altered the payment provisions for hospitals and units paid under the TEFRA provisions and added other qualifying criteria for certain hospitals excluded from the hospital inpatient prospective payment system. A complete explanation of these amendments can be found in the final rule concerning the hospital inpatient prospective payment system we published in the **Federal Register** on August 29, 1997 (62 FR 45966).

The BBA made the following changes to section 1886 of the Act for TEFRA hospitals:

- Section 4411 of the BBA amended section 1886(b)(3)(B) of the Act and restricted the rate-of-increase percentages that are applied to each provider's target amount so that excluded hospitals and units experiencing lower inpatient operating costs relative to their target amounts receive lower rates of increase.
- Section 4412 of the BBA amended section 1886(g) of the Act to establish a 15-percent reduction in capital payments for excluded psychiatric and rehabilitation hospitals and units and LTCHs, for portions of cost reporting periods occurring during the period of October 1, 1997, through September 30, 2002.
- Section 4414 of the BBA amended section 1886(b)(3) of the Act to establish caps on the target amounts for excluded hospitals and units at the 75th percentile of target amounts for similar facilities for cost reporting periods beginning on or after October 1, 1997, through September 30, 2002. The caps on these target amounts apply only to psychiatric and rehabilitation hospitals and units and LTCHs. Payments for these excluded hospitals and units are based on the lesser of a provider's cost per discharge or its hospital-specific cost per discharge, subject to this cap.
- Section 4415 of the BBA amended section 1886(b)(1) of the Act by revising the percentage factors used to determine the amount of bonus and relief payments and establishing continuous improvement bonus payments for excluded hospitals and units for cost reporting periods beginning on or after October 1, 1997. If a hospital is eligible for the continuous improvement bonus, the bonus payment is equal to the lesser of: (1) 50 percent of the amount by which operating costs are less than expected costs; or (2) 1 percent of the target amount.
- Sections 4416 and 4419 of the BBA amended sections 1886(b) of the Act to establish a new framework for payments for new excluded providers. Section 4416 added a new section 1886(b)(7) to the Act that established a new statutory methodology for new psychiatric and rehabilitation hospitals and units, and LTCHs. Under section 4416, payment to these providers for their first two cost reporting periods is limited to the lesser of the operating costs per case, or 110 percent of the national median of target amounts, as adjusted for differences in wage levels, for the same class of hospital for cost reporting periods ending during FY 1996, updated to the applicable period.

3. BBRA Amendments to TEFRA

The BBRA of 1999 refined some of the policies mandated by the BBA for hospitals and units paid under the TEFRA provisions. The provisions of the BBRA, which amended section 1886(b)(3)(H) of the Act, were explained in detail and implemented in the hospital inpatient prospective payment system interim final rule published in the **Federal Register** on August 1, 2000 (65 FR 47026) and in the hospital inpatient prospective payment system

final rule also published on August 1, 2000 (65 FR 47054).

With respect to the TEFRA payment methodology, section 4414 of the BBA had provided for caps on target amounts for excluded hospitals and units for cost reporting periods beginning on or after October 1, 1997. Section 121 of the BBRA amended section 1886(b)(3)(H) of the Act to provide for an appropriate wage adjustment to these caps on the target amounts for certain hospitals and units paid under the TEFRA provisions, effective for cost reporting periods beginning on or after October 1, 1999 through September 30, 2002.

4. BIPA Amendments to TEFRA

Section 306 of BIPA amended section 1886 of the Act by increasing the incentive payments for psychiatric hospitals and psychiatric units to 3 percent for cost reporting periods beginning on or after October 1, 2000 and before October 1, 2001.

II. Overview of the Proposed IPF Prospective Payment System

As required by statute, we are proposing a per diem prospective payment system for psychiatric hospitals and psychiatric units (hereinafter referred to as inpatient psychiatric facilities (IPFs)) that would replace the current reasonable cost-based payment system under the TEFRA provisions. In this rule, we are proposing to base the system on data from the 1999 Medicare Provider Analysis and Review (MedPAR) file, which includes patient characteristics (for example, patients' diagnoses and age), and data from the 1999 Hospital Cost Report Information System (HCRIS), which includes facility characteristics (for example, location and teaching status). We are using the 1999 MedPAR and HCRIS data because they are the best available data.

Based on our analysis, we are proposing the following methodology as the basis of the proposed IPF prospective payment system:

- Compute a Federal per diem base rate to be paid to all psychiatric hospitals and psychiatric units based on the sum of the average routine operating, ancillary, and capital costs for each patient day of psychiatric care in an IPF adjusted for budget neutrality (see section III.C. of this proposed rule). In computing the Federal per diem base rate, our analysis showed that routine operating and capital represent approximately 88 percent of total costs and the remaining 12 percent of total costs are for ancillary services.
- Adjust the Federal per diem base rate to reflect certain patient and facility characteristics that were found in the regression analysis to be associated with statistically significant cost differences (see section III.B. of this proposed rule). The variance explained by patient characteristics (19 percent) in the regression analysis is limited by the nature of the administrative data used to develop this system, which assigns average facility routine costs to individual patients. We are conducting research to better understand the relationship between individual patient characteristics and average facility routine costs that could be incorporated into the payment system in future updates. We note that ancillary costs are already identifiable at the individual patient level.
- Implement an April 1, 2004 effective date and a 3-year transition period. As explained in section IV of this proposed rule, it ultimately may be necessary to delay implementation beyond April 2004 as well as to increase the length of the transition period. However, the rate development, budget-neutrality adjustment, and impact analysis assume an April 1, 2004 effective date and a 3-year transition period.
- Include research information for future refinement of the proposed patient classification system. Part of this research could result in a new patient assessment instrument that could identify additional patient level characteristics.

In addition, we are proposing to make the following types of adjustments to appropriately make payments on a per-diem basis:

- Patient-level adjustments for age, specified diagnosis-related groups, and selected high cost comorbidity categories. These patient-level characteristics explain approximately 19 percent of the variance in the cost of psychiatric care in the administrative data, which establishes the empirical basis for this methodology.
- Facility adjustments that include a wage index adjustment, rural location adjustment, and an indirect teaching adjustment. These facility characteristics explain approximately 13 percent of the variance in the costs of psychiatric care in the administrative data.
- Variable per diem adjustments to recognize the higher costs incurred in the early days of a psychiatric stay.
- Outlier adjustments to target greater payment to the high cost cases.

We are also proposing the following policies:

- Interrupted stay policy for the purpose of applying the variable per diem adjustment and the outlier policy.
- Coding policy (see section II. A.) that would—(1) require IPFs to report patient diagnoses using the International Classification of Diseases-9th Revision, Clinical Modification (ICD–9–CM) code set to report the psychiatric diagnosis; and (2) select the diagnosis-related groups (DRGs) that would be used for payment adjustments in this proposed rule.

A. Use of Diagnostic Codes for Payment

The patient's principal diagnosis of his or her physical or mental condition is essential because it typically acts as a guide for treatment and validates payment. It is for these reasons that diagnostic information is routinely reported on hospital claims and is used in other prospective payment systems. In mental health treatment, the principal tool recognized and utilized by the psychiatric community for diagnostic assessment is the Diagnostic and Statistical Manual of Mental Disorders (DSM). The DSM provides a broad and comprehensive description of patients through behavioral domains, or "axes." This multiaxial system is routinely used by clinical staff to diagnose patients and plan treatment. The DSM is currently in its fourth revision text revision (DSM–IV–TR). Although, the DSM is used for patient assessment by IPFs, the ICD–9–CM coding system is used currently for reporting diagnostic information for payment purposes.

1. ICD

The ICD coding system was designed for the classification of morbidity and mortality information for statistical purposes and for the indexing of hospital records by disease. Chapter Five of the ICD–9–CM includes the codes for mental disorders.

In addition, the following definitions (as described in the 1984 Revision of the Uniform Hospital Discharge Data Set) are requirements of the ICD–9–CM coding system.

- 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 and have no bearing on the current hospital stay are excluded.

We are proposing to require IPFs to use the psychiatric diagnosis codes in Chapter Five ("Mental Disorder") of the ICD–9–CM to report diagnostic information for the proposed IPF prospective payment system. All changes to the ICD coding system that would affect the proposed IPF prospective payment system would be addressed annually in the hospital inpatient prospective payment system rules. The updated codes are effective October 1 of each year and must be used to report diagnostic or procedure information. (Additional information regarding updates to the ICD–9–CM and DRGs is included in section V.B. of this proposed rule). The official version of the ICD–9–CM is available on CD–ROM from the U.S. Government Printing Office. The FY 2004 version can be ordered by contacting the Superintendent of Documents, U.S. Government Printing Office, Department 50, Washington, D.C. 20402–9329, telephone: (202) 512–1800. The stock number is 017–022–01544–7, and the price is $25.00. In addition, private vendors publish the ICD–9–CM.

Questions and comments concerning the codes should be addressed to: Patricia E. Brooks, Co-Chairperson, ICD–9–CM Coordination and Maintenance Committee, CMS, Center for Medicare Management, Purchasing Policy Group, Division of Acute Care, Mailstop C4–08–06, 7500 Security Boulevard, Baltimore, Maryland 21244–1850. Comments may be sent via e-mail to: *pbrooks@cms.hhs.gov*.

2. DRGs

DRGs constitute the patient classification system used in the hospital inpatient prospective payment system. DRGs provide a means of relating the types of patients treated by a hospital to the costs incurred by the hospital. While each patient is unique, groups of patients have demographic, diagnostic, and therapeutic attributes in common that determine their level of resource intensity.

Currently, IPF claims include ICD–9–CM diagnosis coding information. The TEFRA payment methodology does not use the DRG classification of IPF cases. Nonetheless, when IPF claims are submitted to us, the DRG associated with the patient's principal ICD–9–CM diagnosis code is assigned to the claim by the GROUPER software program. As a result, our administrative data includes the DRG assignments for all IPF cases.

We are proposing to require IPFs to use the psychiatric diagnosis codes in Chapter Five ("Mental Disorders") of the ICD–9–CM. This decision is consistent with the Standards for Electronic Transaction final rule published in the **Federal Register** on August 17, 2000 (65 FR 50312). The ICD–9–CM coding system is currently designated as the standard medical data code set for capturing cause and manifestation of injury, disease, impairments, or other health problems. These guidelines are available through a number of sources, including the following Web site: *http://www.cdc.gov/nch/data/icdguide.pdf*.

Current regulations at § 412.27 require that a psychiatric unit admit only those patients who have a principal diagnosis that is listed in the DSM or classified in Chapter Five ("Mental Disorders") of the ICD–9–CM. The hospital must maintain records that substantiate the psychiatric diagnoses of its patients. We specifically request public comments on continuing to reference the DSM in light of the proposed requirement that IPFs use the ICD–9–CM code set in the proposed IPF prospective payment system.

B. Limitations of the DRG System for Psychiatric Patients

Adopting a patient classification system for IPFs based on diagnosis alone may not explain the wide variation in resource use among patients in IPFs for several reasons. For instance, the diagnosis may not fully capture the reasons for hospitalization. A patient with a chronic disorder, like schizophrenia, may be admitted for a variety of acute problems (suicide attempt, catatonic withdrawal, or psychotic episode) that require very different treatments (Goldman, H.H., Pincus, H.A., Taube, C.A., and Reiger, D.A. (1984). Hospital and Community Psychiatry, 35(5): 460–464).

Further, treatment patterns are more variable in psychiatry, with multiple clinically accepted methods of care. As a result, resource use varies substantially between acute care and chronic care patients, and between the facilities that treat predominately one type of patient. For example, public psychiatric hospitals tend to treat the chronically mentally ill, with substantially longer lengths of stay, compared to the patients generally treated in psychiatric units and private psychiatric hospitals.

Predicated on the analysis of the administrative data and pending refinements from the research, we believe the DRG is an appropriate method to account for certain, although not all, clinical characteristics and associated resources. Therefore, under this prospective payment system, we are proposing to assign a DRG to each case based on the principal diagnosis (ICD–9–CM code) reported by the IPF as one adjustment to the Federal per diem base rate.

In making this decision, we analyzed past research as well as a recent study supported by the American Psychiatric Association (APA). In the study, APA partnered with the Health Economics and Outcomes Research Institute (THEORI), a division of the Greater New York Hospital Association, to assess whether our existing administrative data could be used to develop a prospective payment system for IPFs. This study found that a prospective payment system for IPFs could be developed based on existing CMS administrative data, be clinically relevant, and limit the administrative burden on providers. The system they proposed included an adjustment for DRG assignment.

In summary, we acknowledge that the psychiatric community uses the DSM as a tool to diagnose a patient's mental illness and to aid in treatment planning. However, we are proposing to require IPFs to report diagnoses in Chapter Five of the ICD–9–CM as required by the Administrative Simplification Provisions found in 45 CFR subchapter C. In addition, we are proposing to identify specific DRGs for payment adjustment under the proposed IPF prospective payment system. The rationale for the selection of the proposed DRGs for use in the proposed IPF prospective payment system is described below.

C. Proposed DRG Adjustments Under the Proposed IPF Prospective Payment System

As noted above, the principal diagnosis is defined as the condition, after study (clinical evaluation), to be chiefly responsible for admitting the patient to the hospital for care. Despite this longstanding definition, our review of hospital claims data that were used to develop the proposed IPF prospective payment system indicates that a substantial number of claims have non-psychiatric diagnoses identified as the principal diagnosis.

Medicare regulations as specified in § 412.27(a) require psychiatric units of acute care hospitals to admit only those patients with a principal diagnosis in the DSM or Chapter Five ("Mental Disorders") in the ICD–9–CM. Therefore, if a patient is admitted to a general hospital for a medical condition such as pneumonia, and also presents psychiatric symptoms, which necessitates an admission to the psychiatric unit, the principal diagnosis for the admission to the psychiatric unit should be the psychiatric symptoms

exhibited by the patient in accordance with § 412.27(a). We note that current regulations applicable to psychiatric hospitals (§ 412.23(a)) do not include these requirements, however, historically, psychiatric hospitals have limited admissions to psychiatric patients. Section 412.27(a) also requires that patients be admitted to the psychiatric units for active treatment that is of an intensity that can be furnished appropriately only in an inpatient hospital setting. For this reason, in order to be paid under the proposed IPF prospective payment system, patients must be capable of participating in an active treatment program.

In selecting the proposed DRGs for payment adjustment, we analyzed the DRG assignments for ICD–9–CM diagnosis codes in Chapter Five. In addition, as noted previously, IPFs use the DSM–IV–TR to establish diagnoses and current regulations at § 412.27(a) refer to DSM diagnoses. However, most, but not all, DSM codes crosswalk to the codes in Chapter Five of the ICD–9–CM. Although, all the DSM codes are psychiatric, some of the corresponding ICD–9–CM codes are located in other chapters of the ICD–9–CM coding system and are linked to the body system affected. For example, the DSM diagnosis, Male Erectile Disorder, crosswalks to ICD–9–CM code 607.84, Impotence of Organic Nature which is found in Chapter 10, Diseases of the Genitourinary Systems. Accordingly, we also analyzed the DRG assignments for certain ICD–9–CM codes that are based on DSM diagnoses but are not in Chapter Five of the ICD–9–CM. These codes are discussed in the next section of this proposed rule.

As a result of this analysis, we identified 25 DRGs with one or more psychiatric diagnoses that are included in Chapter Five of the ICD–9–CM as well as those diagnoses that are in other chapters of the ICD–9–CM. We are proposing payment adjustments for 15 out of the 25 DRGs we analyzed. The remaining 10 DRGs include codes for a specific range of diseases other than psychiatric, but have a few codes for DSM diagnoses that are included in Chapter Five or other body system chapters of the ICD–9–CM. The rationale for our decisions regarding these 10 codes is provided in section II.D. below.

Table 1 below lists the DRGs that we are proposing to recognize under the proposed IPF prospective payment system and the proposed adjustment factors. This information also is presented in Addendum A.

TABLE 1.—PROPOSED IPF PROSPECTIVE PAYMENT SYSTEM DRGS

DRG	Description	Adjustment Factor
12	Degenerative Nervous System Disorders	1.07
23	Nontraumatic Stupor and Coma	1.10
424*	O.R. Procedure with Principal Diagnosis of Mental Illness	1.22
425	Acute Adjustment Reaction and Psychosocial Dysfunction	1.08
426	Depressive Neurosis	1.00
427	Neurosis Except Depressive	1.01
428	Disorders of Personality and Impulse Control	1.03
429	Organic Disturbances and Mental Retardation	1.02
430	Psychosis	1.00
431	Childhood Mental Disorders	1.02
432	Other Mental Disorder Diagnoses	0.96
433**	Alcohol/Drug Abuse or Dependence, Left Against Medical Advice	0.88
521	Alcohol/Drug Abuse or Dependence with Complication or Comorbidity	1.02
522	Alcohol/Drug Abuse or Dependence with Rehabilitation Therapy without Complication or Comorbidity	0.97
523	Alcohol/Drug Abuse or Dependence without Rehabilitation Therapy without Complication or Comorbidity	0.88

*DRG 424—is an O.R. procedure code that must be billed with a principal diagnosis of mental disorder.
**DRG 433—is used when providers indicate a patient left against medical advice (discharge status code 07).

D. DRGs Not Recognized in the Proposed IPF Prospective Payment System

We are proposing not to recognize the following 10 DRGs in the proposed IPF prospective payment system. They were determined not to be clinically significant because the principal diagnoses did not result in enough admissions to IPFs in order to establish an adjustment to the payment rate:

- DRGs 34 and 35 include a range of cases for disorders of the nervous system. The diagnoses in these DRGs also include five ICD–9–CM codes for DSM diagnoses: Codes 333.1 (Tremor not elsewhere classified), code 333.82 (Orofacial Dyskinesia), code 333.92 (Neuroleptic Malignant Syndrome), code 347 (Cataplexy and Narcolepsy), and code 307.23 (Gilles de La Tourette's Disorder). In the 1999 MedPAR records for admissions to IPFs, only one patient was grouped in these DRGs. In addition, patients with these diagnoses generally do not require management in an IPF unless there is a concomitant psychiatric disorder.
- DRGs 182, 183, and 184 include a range of gastrointestinal conditions, including esophagitis, gastroenteritis, and other digestive system diseases. The diagnoses in these DRGs include one that is listed in Chapter Five of the ICD–9–CM, code 306.4 (Psychogenic GI Disease). In the 1999 MedPAR records for admissions to IPFs, we found that only a few patients with this ICD–9–CM diagnosis were grouped in these DRGs.
- DRG 352 includes a range of diagnoses affecting the testes, prostate, and male external genitalia. This DRG includes DSM diagnoses that are not in Chapter Five of the ICD–9–CM: code 607.84 (Impotence of an Organic Origin), and code 608.89 (Male Genital Diseases, not elsewhere classified). In the 1999 MedPAR records for admissions to IPFs, we were able to identify only one patient grouped in DRG 352.
- DRGs 358, 359, and 369 include a range of cases in which procedures have been performed on the uterus and fallopian tubes (Adnexa). These DRGs include two diagnoses that are in Chapter Five of the ICD–9–CM: code 306.51 (Psychogenic Vaginismus), and code 306.52 (Psychogenic Dysmenorrhea). In the 1999 MedPAR records for admissions to IPFs, we were able to identify only 11 patients grouped into DRGs 358, 359, and 369, and there were no patients diagnosed with codes 306.51 or 306.52.

• DRG 467 includes a range of cases in which other factors influence health status. This DRG contains only one diagnosis code listed in Chapter Five of the ICD–9–CM, code 305.1 (tobacco use disorder). Patients with this diagnosis do not require inpatient treatment in an IPF unless there is a concomitant psychiatric disorder.

We are proposing not to recognize these 10 DRGs for payment adjustments (34, 35, 182, 183, 184, 352, 358, 359, 369, and 467) because they generally do not include a psychiatric diagnosis. We believe that failure to recognize these DRGs will not affect the care of Medicare beneficiaries because our analysis shows few, if any, of the patients with these diagnoses are admitted or treated in an IPF.

In addition, we believe that these cases would be classified into one of the selected DRGs and grouped with other beneficiaries with similar symptoms and requiring similar care. This approach would avoid creating case-mix groups based on small numbers of cases.

We believe there is value in selecting only those DRGs that contain a large enough number of psychiatric cases to ensure that individual variability can be averaged. We specifically invite public comments on this issue.

E. Applicability of the Proposed IPF Prospective Payment System

The following psychiatric hospitals and psychiatric units, currently paid under section 1886(b) of the Act, would be paid under the proposed IPF prospective payment system for cost reporting periods beginning on or after April 1, 2004. We are proposing that the IPF prospective payment system would apply to inpatient hospital services furnished by Medicare participating entities that are classified as psychiatric hospitals or psychiatric units as specified in § 412.22, § 412.23, § 412.25, and § 412.27. We note that psychiatric units that are currently paid under the hospital inpatient prospective payment system and do not meet the requirements of § 412.25 and § 412.27 would not be paid under the proposed IPF prospective payment system.

As specified in § 400.200, the United States means the fifty States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands. Therefore, IPFs located within the United States would be subject to the proposed IPF prospective payment system. However, the following hospitals are paid under special payment provisions specified in § 412.22(c) and, therefore, would not be paid under the proposed IPF prospective payment system:

• 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 specified in section 402(a) of Pub. L. 90–248 (42 U.S.C. 1395b–1) or section 222(a) of Pub. L. 92–603 (42 U.S.C. 1395b–1(note)).

• Non-participating hospitals furnishing emergency services to Medicare beneficiaries.

This proposed rule would not change the basic criteria for a hospital or hospital unit to be classified as a psychiatric hospital or psychiatric unit that is excluded from the hospital prospective payment systems under sections 1886(d) and 1886(g) of the Act, nor would it revise the survey and certification procedures applicable to entities seeking this classification.

We note that we are proposing a technical change to § 412.27(a). We are proposing to replace the Third Edition with the Fourth Edition, Text Revision, of the DSM so that our rules reflect the most current edition of the DSM.

As noted previously, we are requesting public comments on continuing to require a DSM diagnosis for patients admitted to a psychiatric unit in light of the proposed requirement that IPFs use the ICD–9–CM code set in the proposed IPF prospective payment system.

III. Development of the Proposed IPF Per Diem Payment Amount

The primary goal in developing the proposed IPF prospective payment system is to pay each IPF an appropriate amount for the efficient delivery of care to Medicare beneficiaries. The system must be able to account adequately for each IPF's case-mix in order to ensure both fair distribution of Medicare payments and access to adequate care for those beneficiaries who require more costly care.

The proposed IPF prospective payment system would establish a standard per diem payment amount for inpatient psychiatric services provided to Medicare beneficiaries. The proposed per diem amount would reflect the average daily cost of inpatient psychiatric care in an IPF, including capital-related costs. This proposed per diem payment amount, after adjustment for budget neutrality, is then modified by factors for patient and facility characteristics that account for variation in patient resource use. The proposed IPF prospective payment system would also include an outlier policy and account for interrupted stays. This section includes a discussion of how the proposed Federal per diem base rate was created, the factors that we considered to adjust the proposed Federal per diem base rate, and how the proposed per diem payment amount is calculated.

A. Proposed Market Basket

We are proposing to use a 1997-based excluded hospital with capital market basket. We periodically revise and rebase the market basket to reflect more current cost data. Rebasing means moving the base year for the structure of costs (in this case from 1992 to 1997), while revising means changing data sources, cost categories, or price proxies used. The proposed updated market basket would replace the 1992-based excluded hospital with capital market basket. This rebased (1997-base year) and revised market basket would be used to update FY 1999 IPF costs to the proposed 15-month period beginning April 1, 2004, the first year under the IPF prospective payment system.

The operating portion of the 1997-based excluded hospital with capital market basket is derived from the 1997-based excluded hospital market basket. The methodology used to develop the operating portion was described in the hospital inpatient prospective payment system final rule published in the **Federal Register** on August 1, 2002 (67 FR 50042 through 50044). In brief, the operating cost category weights in the 1997-based excluded hospital market basket were determined from the Medicare cost reports, the 1997 Business Expenditure Survey, and the 1997 Annual Input-Output data from the Bureau of the Census. As explained in that August 1, 2002 final rule, we revised the market basket by making two methodological revisions to the 1997-based excluded hospital market basket: (1) Changing the wage and benefit price proxies to use the Employment Cost Index (ECI) wage and benefit data for hospital workers; and (2) adding a cost category for blood and blood products.

When we add the weight for capital costs to the excluded hospital market basket, the sum of the operating and capital weights must still equal 100.0. Because capital costs account for 8.968 percent of total costs for excluded hospitals in 1997, it holds that operating costs must account for 91.032 percent. Each operating cost category weight in the 1997-based excluded hospital market basket was multiplied by 0.91032 to determine its weight in the 1997-based excluded hospital with capital market basket.

The aggregate capital component of the 1997-based excluded hospital market basket (8.968 percent) was determined from the same set of Medicare cost reports used to derive the operating component. The detailed capital cost categories of depreciation, interest, and other capital expenses were also determined using the Medicare cost reports. Two sets of weights for the capital portion of the revised and rebased market basket needed to be determined. The first set of weights identifies the proportion of capital expenditures attributable to each capital cost category, while the second set represents relative vintage weights for depreciation and interest. The vintage weights identify the proportion of capital expenditures that is attributable to each year over the useful life of capital assets within a cost category (see the hospital inpatient prospective payment final rule published in the **Federal Register** on August 1, 2002 (67 FR 50045 through 50047), for a discussion of how vintage weights are determined).

The cost categories, price proxies, and base-year FY 1992 and proposed FY 1997 weights for the excluded hospital with capital market basket are presented in Table 2 below. The vintage weights for the proposed 1997-based excluded hospital with capital market basket is presented in Table 2(A) below.

TABLE 2.—PROPOSED EXCLUDED HOSPITAL WITH CAPITAL INPUT PRICE INDEX (FY 1992 AND PROPOSED FY 1997) STRUCTURE AND WEIGHTS

Cost category	Price wage variable	Weights (%) base-year 1992	Proposed weights (%) base-year 1997
TOTAL		100.000	100.000
Compensation		57.935	57.579
Wages and Salaries	ECI—Wages and Salaries, Civilian Hospital Workers	47.417	47.355
Employee Benefits	ECI—Benefits, Civilian Hospital Workers to capture total costs (operating and capital), In order to capture total costs (operating and capital), HCFA Occupational Benefit Proxy.	10.519	10.244
Professional fees: Non-Medical	ECI—Compensation: Prof. & Technical	1.908	4.423
Utilities		1.524	1.180
Electricity	WPI—Commercial Electric Power	0.916	0.726
Fuel Oil, Coal, etc.	WPI—Commercial Natural Gas	0.365	0.248
Water and Sewerage	CPI–U—Water & Sewage	0.243	0.206
Professional Liability Insurance	HCFA—Professional Liability Premiums	0.983	0.733
All Other Products and Services		28.571	27.117
All Other Products		22.027	17.914
Pharmaceuticals	WPI—Prescription Drugs	2.791	6.318
Food: Direct Purchase	WPI—Processed Foods	2.155	1.122
Food: Contract Service	CPI–U—Food Away from Home	0.998	1.043
Chemicals	WPI—Industrial Chemicals	3.413	2.133
Blood and Blood Products	WPI—Blood and Derivatives		0.748
Medical Instruments	WPI—Med. Inst. & Equipment	2.868	1.795
Photographic Supplies	WPI—Photo Supplies	0.364	0.167
Rubber and Plastics	WPI—Rubber & Plastic Products	4.423	1.366
Paper Products	WPI—Convert. Paper and Paperboard	1.984	1.110
Apparel	WPI—Apparel	0.809	0.478
Machinery and Equipment	WPI—Machinery & Equipment	0.193	0.852
Miscellaneous Products	WPI—Finished Goods excluding Food and Energy	2.029	0.783
All Other Services		6.544	9.203
Telephone	CPI–U—Telephone Services	0.574	0.348
Postage	CPI–U—Postage .	0.268	0.702
All Other: Labor	ECI—Compensation: Service Workers	4.945	4.453
All Other: Non-Labor Intensive	CPI–U—All Items (Urban)	0.757	3.700
Capital-Related Costs		9.080	8.968
Depreciation		5.611	5.586
Fixed Assets	Boeckh-Institutional Construction: 23 Year Useful Life Life Y_y_YYF e.	3.570	3.503
Movable Equipment	WPI—Machinery & Equipment: 11 Year Useful life	2.041	2.083
Interest Costs		3.212	2.682
Non-profit	Avg. Yield Municipal Bonds: 23 Year Useful Life	2.730	2.280
For-profit	Avg. Yield AAA Bonds: 23 Year Useful Life	0.482	0.402
Other Capital Related Costs	CPI–U—Residential Rent	0.257	0.699

Note: The operating cost category weights in the proposed excluded hospital market basket add to 100.0. When we add an additional set of cost category weights (total capital weight = 8.968 percent) to this original group, the sum of the weights in the new index must still add to 100.0. Because capital costs account for 8.968 percent of the market basket, then operating costs account for 91.032 percent. Each weight in the proposed 1997-based excluded hospital market basket was multiplied by 0.91032 to determine its weight in the proposed 1997-based excluded hospital with capital market basket.

Note: Weights may not sum to 100.0 due to rounding.

TABLE 2(A).—PROPOSED EXCLUDED HOSPITAL WITH CAPITAL INPUT PRICE INDEX (FY 1997) VINTAGE WEIGHTS

Year from farthest to most recent	Fixed assets (23-year weights)	Movable assets (11-year weights)	Interest: capital-related (23-year weights)
1	0.018	0.063	0.007
2	0.021	0.068	0.009
3	0.023	0.074	0.011
4	0.025	0.080	0.012
5	0.026	0.085	0.014
6	0.028	0.091	0.016
7	0.030	0.096	0.019
8	0.032	0.101	0.022
9	0.035	0.108	0.026
10	0.039	0.114	0.030
11	0.042	0.119	0.035
12	0.044		0.039
13	0.047		0.045
14	0.049		0.049
15	0.051		0.053
16	0.053		0.059
17	0.057		0.065
18	0.060		0.072
19	0.062		0.077
20	0.063		0.081
21	0.065		0.085
22	0.064		0.087
23	0.065		0.090
Total	1.0000	1.0000	1.0000

NOTE: Weights may not sum to 1.000 due to rounding.

Table 2(B) below compares the 1992-based excluded hospital with capital market basket to the proposed 1997-based excluded hospital with capital market basket. As shown below, the rebased and revised market basket grows slightly faster over the 1999 through 2001 period than the 1992-based market basket. The main reason for this growth is the switching of the wage and benefit proxy to the ECI for hospital workers from the previous occupational blend. This revision had a similar impact on the hospital inpatient prospective payment system and excluded hospital market baskets, as described in the final rule published in the **Federal Register** on August 1, 2002 (67 FR 50032 through 50041).

TABLE 2(B).—PERCENT CHANGES IN THE 1992-BASED AND PROPOSED 1997-BASED EXCLUDED HOSPITAL WITH CAPITAL MARKET BASKETS, FYS 1999 THROUGH 2004

Fiscal year	Percent change, 1992-based market basket	Percent change, proposed 1997-based market basket
1999	2.3	2.7
2000	3.4	3.1
2001	3.9	4.0
Average historical:	3.2	3.3
2002	2.7	3.6
2003	3.0	3.5
2004	3.0	3.3
Average forecast:	2.9	3.5

Source: Global Insights, Inc, 4th Qtr 2002,*@USMARCO.MODTREND@CISSIM/TL1102.SIM. Historical data through 3rd Qtr 2002.*

Based upon the analysis mentioned below, we believe the excluded hospital with capital market basket provides a reasonable measure of the price changes facing IPFs. However, we have also been researching the feasibility of developing a market basket specific to IPF services. This research includes 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 IPFs.

Our analysis of the Medicare cost reports indicates that the distribution of costs among major cost report categories (wages, pharmaceuticals, and capital) for IPFs is not substantially different from the 1997-based excluded hospital with capital market basket we propose to use. In addition, the only data available to us for these cost categories (wages, pharmaceuticals, and capital) presented a potential problem since no other major cost category weights would be based on IPF data. Based on the research discussed below, at this time, we are not proposing to develop a market basket specific to IPF services.

We conducted an analysis of annual percent changes in the market basket when the weights for wages, pharmaceuticals, and capital in IPFs were substituted into the excluded hospital with capital market basket. Other cost categories were recalibrated using ratios available from the hospital inpatient prospective payment system hospital market basket. On average, between 1995 and 2002, the excluded hospital with capital market basket increased at nearly the same average annual rate (3.4 percent) as the market basket with IPF weights for wages, pharmaceuticals, and capital (3.5 percent). This difference is less than the 0.25 percentage point criterion that determines whether a forecast error adjustment is warranted under the hospital inpatient prospective payment system update framework.

Based upon this analysis, we believe that the excluded hospital with capital market basket is doing an adequate job of reflecting the price changes facing IPFs. We will continue to solicit comments about issues particular to IPFs that should be considered in our development of the proposed 1997-based excluded hospital with capital market basket, as well as encourage suggestions for additional data sources that may be available. Our hope is that the additional cost data being collected under the proposed IPF prospective payment system will eventually allow for the development of a market basket based primarily on IPF data. We welcome comments on issues particular to IPFs that should be considered in our use of the proposed 1997-based excluded hospital with capital market basket, as well as on suggestions for additional data sources that may be readily available on the cost structure of IPFs.

As discussed more fully in section IV of this proposed rule, we are proposing to implement the proposed IPF prospective payment system for IPF cost reporting periods that begin on or after April 1, 2004. The first update, however, would not be until July 1, 2005. This extends the first year for 3 additional months in order to adjust the update cycle for this proposed payment system. As a result, the effective period for this proposed rule is April 1, 2004 through June 30, 2005. To update payments between FY 2003 and the effective period, the update must reflect the market basket increase over this period, which is currently estimated at 5.3 percent. This would represent the proposed increase in the excluded hospital with capital market basket for FY 2004 and the first 9 months of FY 2005.

B. Development of the Proposed Case-Mix Adjustment Regression

In order to ensure that the proposed IPF prospective payment system would be able to account adequately for each IPF's case-mix, we performed an extensive regression analysis of the relationship between the per diem costs and both patient and facility characteristics to determine those characteristics associated with statistically significant cost differences. For characteristics with statistically

significant cost differences, we used the regression coefficients of those variables to determine the size of the corresponding payment adjustments. Based on the regression analysis, we are proposing to adjust the per diem payment for differences in the patient's DRG, age, comorbidities, and the day of the stay. Also, we are proposing adjustments for area wage levels, rural IPFs, and teaching IPFs.

We computed a per diem cost for each Medicare inpatient psychiatric stay, including routine operating, ancillary, and capital components using information from the 1999 MedPAR file and data from the 1999 Medicare cost reports. The method described below that was used to construct the proposed per diem cost for IPFs is a standard method that has been used to construct a Medicare cost per discharge for inpatient acute care (Newhouse, J.P., S. Cretin, and C. Witsberger. Predicting Hospital Accounting Costs, *Health Care Financing Review,* V.11, No. 1. FalI 1989). We believe that this method provides a full account of IPF's per diem costs.

To calculate the cost per day for each inpatient psychiatric stay, routine costs were estimated by multiplying the routine cost per day from the IPF's 1999 Medicare cost report by the number of Medicare covered days on the 1999 MedPAR stay record. Ancillary costs were estimated by multiplying each departmental cost-to-charge ratio by the corresponding ancillary charges on the MedPAR stay record. The total cost per day was calculated by summing routine and ancillary costs for the stay and dividing it by the number of Medicare covered days for each day of the stay. We used the best available data and methods for this proposed IPF prospective payment system. However, the data are potentially limited for the purpose of determining the extent to which differences in patient characteristics influence the per diem cost of inpatient psychiatric care.

This potential limitation results from Medicare cost accounting practices in which routine per diem costs are calculated as an average and, therefore, do not vary among patients within a facility (that is, a patient requiring intensive staff attention is assigned the same routine cost as a patient requiring little staff attention). This potential limitation assumes heightened importance for IPFs because routine costs represent about 88 percent of total costs. As a result, our cost measure may not capture the degree of variation in routine cost attributable to differences in patient characteristics. Patient differences are reflected in our measure of routine cost only to the extent that facilities tend on average to treat different proportions of patients with differing routine resource needs. For example, one IPF may have higher routine per diem costs because it treats a higher proportion of older patients (or patients who require continuous monitoring) than another IPF. However, our cost variable will not measure the extent to which older patients within the same IPF are more costly than younger patients. We are currently conducting a research study with the RTI International® (trade name of Research Triangle Institute) that will provide information as to the effects of this data limitation. As a result, we expect to have more information about the extent to which routine costs vary by certain patient characteristics. We solicit suggestions on other data sets or studies that could provide additional information on the relationship between individual patients and average facility routine costs.

This routine cost limitation does not apply to ancillary costs because they can be measured at the patient level using Medicare claims as reported in the MedPAR file. However, there are differences in charging practices between psychiatric hospitals and psychiatric units that affect our measurement of ancillary costs. For example, there are approximately 100 hospitals in our MedPAR data file that do not bill ancillary charges; the majority of these providers are State psychiatric hospitals who bill a single average per diem rate that includes routine, ancillary, and other costs.

The proposed payment adjustors were derived from regression analysis of 100 percent of the 1999 MedPAR data file. The MedPAR data file used for the final regression contains 467,372 cases although the complete file contains 476,541 cases. We deleted 5,822 cases (1.24 percent) from this file because routine cost data for certain IPFs was not available. In order to include as many IPFs as possible in the regression, we substituted the 1998 Medicare cost report data for routine cost and ancillary cost to charge ratios (using the 1998 Medicare cost report data).

For the remaining 470,719 cases, we used the following method to trim extraordinarily high or low cost values that most likely contained data errors, in order to improve the accuracy of our results. The means and standard deviations of the logged per diem total cost were computed separately for cases from psychiatric hospitals and psychiatric units. Separate statistics were computed for the groups of IPFs, because we did not want to systematically exclude a larger proportion of cases from the higher cost psychiatric units. Before calculating the means of the logged per diem total cost, we trimmed cases from the file when covered days were zero, or routine costs were less than $100 or greater than $3,000, (because we believe this range captured the grossly aberrant cases), so that the means would not be distorted. We trimmed cases when the logged per diem cost was outside the standard and generally used statistical trim points of plus or minus 3 standard deviations from the respective means for hospitals and psychiatric units. These criteria eliminated another 3,347 cases, leaving 467,372 cases that were used in the final regression.

The log of per diem cost, like most health care cost measures, appears to be normally distributed. Therefore, the natural logarithm of the per diem cost was the dependent variable in the regression analysis. To control for psychiatric hospitals that do not bill ancillary costs, we included a categorical variable that identified them.

The proposed per diem cost was adjusted for differences in labor cost across geographic areas using the FY 1999 hospital wage index unadjusted for geographic reclassifications, in order to be consistent with our use of the market basket labor share in applying the wage index adjustment.

We computed a proposed wage adjustment factor for each case by multiplying the Medicare hospital wage index for each facility by the proposed labor-related share (.72828) and adding the proposed non-labor share (.27172). We used the proposed excluded hospital with capital market basket to determine the labor-related share (see section III.A. of this proposed rule). The per diem cost for each case was divided by this factor before taking the natural logarithm (that is, a standard mathematical practice accepted by the scientific community). The payment adjustment for the wage index was computed consistently with the wage adjustment factor, which is equivalent to separating the per diem cost into a labor portion and a non-labor portion and adjusting the labor portion by the wage index.

With the exception of the proposed payment adjustment for teaching facilities, the independent variables were specified as one or more categorical variables. Once the regression model was finalized based on the log normal variables, the regression coefficients for these variables were converted to payment adjustment factors by treating each coefficient as an exponent of the base e for natural

logarithms, which is approximately equal to 2.718. The proposed payment adjustment factors represent the proportional effect of each variable relative to a reference variable.

1. Proposed Patient-Level Characteristics

Subject to the limitations of the proposed cost variable described above and the availability of patient characteristic information contained in the administrative data, we attempted to use patient characteristics to explain the cost variation amongst IPFs. By adjusting for DRGs, comorbidities, age, and day of the stay, we were able to explain approximately 19 percent of the variation in the per diem cost. This result is comparable to that obtained by THEORI in the analysis they conducted for the APA. The study is described in section II.B. of this proposed rule.

a. DRGs

The principal diagnosis ICD code listed on the claim is used to assign each case to one of the 15 DRGs that we are proposing to recognize in this IPF prospective payment system (see section II.C of this proposed rule). The coefficients of these DRGs from the cost regression analysis were used to determine the magnitude of the payment adjustment for each of the proposed 15 DRGs. The payment adjustments are expressed relative to the most frequently assigned DRG (DRG 430, Psychoses). That is, the proposed adjustment factor for DRG 430 would be 1.00, and the proposed adjustment factors for the other 14 DRGs would vary above and below 1.00. For 8 DRGs, the proposed adjustments would be relatively small (between .96 and 1.04, that is, between 4 percent lower to 4 percent higher). The following 4 DRGs would receive relatively large payment adjustments:

- DRG 424 (Surgical procedure with Principal Diagnosis of Mental Illness) would have the largest payment adjustment of approximately 1.22.
- DRG 023 (Non-traumatic stupor and coma) would receive an adjustment of approximately 1.10.
- DRG 425 (Acute Adjustment Reaction and Psychosocial Dysfunction) would receive an adjustment of approximately 1.08.
- DRG 12 (Degenerative Nervous System Disorders) would receive an adjustment of approximately 1.07.

Both of the following two DRGs would be paid substantially less than DRG 430 with payment adjustments of approximately 0.88:

- DRG 433 (Alcohol/Drug Abuse or Dependence, left against medical advice).
- DRG 523 (Alcohol/Drug Abuse or Dependence, without Complications and/or Comorbidity and without Rehabilitation Therapy).

Cases in our MedPAR data file whose principal diagnosis classified them in DRGs other than one of the 15 DRGs that we are proposing to recognize in this proposed IPF prospective payment system were grouped into a single "other" category.

b. Comorbidities

Our analysis of the data indicates that patients who have certain comorbid conditions in addition to their psychiatric condition generally require more expensive care while they are hospitalized. After a thorough review of the ICD–9–CM codes, some comorbid conditions were identified as being more costly on a per diem basis. Groups of similar diagnosis codes were created to describe these conditions, which tend to be chronic illnesses that require additional medications, supplies, laboratory, or diagnostic testing in addition to the care provided for their psychiatric condition. Conditions in which the patient is acutely ill requiring care in a general hospital, for example, myocardial infarction, were not included in our analysis.

Based upon this analysis, we are proposing payment adjustments for 17 comorbidity categories that we would recognize for payment adjustments under the proposed IPF prospective payment system. Table 3 below provides a listing of the proposed comorbidity categories, the ICD–9–CM diagnostic codes comprising each category, and the payment adjustment factors. The adjustment factors are also in Addendum A.

As in the case of the DRGs, the cost regression analysis was used to determine the magnitude of the proposed payment adjustments for the comorbidity groups. Of the 17 comorbidity categories, the following 4 groups would have proposed payment adjustment factors ranging from 1.11 to 1.17 more than a case that did not have any of the 17 comorbid conditions: (1) Coagulation factor deficits; (2) renal failure, chronic; (3) chronic cardiac conditions; and (4) atherosclerosis of extremity with gangrene. Seven categories would be paid payment adjustments from 1.08 to 1.14: (1) Tracheotomy; (2) renal failure, acute; (3) malignant neoplasms; (4) severe protein calorie malnutrition; (5) chronic obstructive pulmonary disease; (6) poisoning; and (7) severe musculoskeletal and connective tissue diseases. The remaining 6 comorbidity categories would receive payment adjustments ranging from 1.03 to 1.10: (1) HIV; (2) infectious diseases; (3) uncontrolled type I diabetes mellitus; (4) artificial openings digestive and urinary; (5) drug and/or alcohol induced mental disorders; and (6) eating and conduct disorders.

Other potential conditions were considered as potentially more expensive, but the small number of cases in the MedPAR data file made it impossible to propose an appropriate adjustment for those conditions. We solicit comments suggesting other conditions that may be expected to increase the per diem cost of care in IPFs. In addition, we expect that as facilities become aware of the importance of providing accurate information on the diagnoses of patients, we will have more data to use as a basis for refinements to the list of proposed comorbid conditions affecting the per diem cost of care.

TABLE 3.—DIAGNOSIS CODES FOR PROPOSED COMORBIDITY CATEGORIES

Description of proposed comorbidity	ICD–9–CM code	Proposed adjustment factor
HIV	042	1.06
Coagulation Factor Deficits	2860 through 2864	1.11
Tracheotomy	51900 and V440	1.14
Renal Failure, Acute	5846 through 5849; 7885; 9585; V451; V560, V561; and V562	1.08
Renal Failure, Chronic	40301; 40311; 40391; 40402; 40412; 40492, 585; and 586	1.14
Malignant Neoplasms	1400 through 1720; 1740 through 1840; and 1850 through 2080.	1.10

TABLE 3.—DIAGNOSIS CODES FOR PROPOSED COMORBIDITY CATEGORIES—Continued

Description of proposed comorbidity	ICD–9–CM code	Proposed adjustment factor
Uncontrolled Type I Diabetes-Mellitus, with or without complications.	25003; 25083; 25013; 25023; 25033; 25093; 25043; 25053; 25063; and 25073.	1.10
Severe Protein Calorie Malnutrition	260 through 262	1.12
Eating and Conduct Disorders	3071; 30750; 31203; 31233; and 31234	1.03
Infectious Diseases	01000 through 04110; 04500 through 05319, 05440 through 05449; 0550 through 0770; 0782 through 0789; and 07950 through 07595.	1.08
Drug and/or Alcohol Induced Mental Disorders	2920; 2922; 2910; 29212; 30300; and 30400	1.03
Cardiac Conditions	3910; 3911; 3912; 40201; 41403; 4160; and 4210	1.13
Atherosclerosis of Extremity with Gangrene	44024	1.17
Chronic Obstructive Pulmonary Disease	5100; 51883; 51884; 4920; 494; 49120 through 49122, and V461.	1.12
Artificial Openings-Digestive and Urinary	56960; V441 through V443; and V4450	1.09
Severe Musculoskeletal and Connective Tissue Diseases	6960; 7100; 73000 through73009; 73010 through 73019; 73020 through 73029; and 7854.	1.12
Poisoning	96500 through 96509; and 9654; 9670 through 9700; 9800 through 9809; 9830 through 9839; 986; 9890 through 9897.	1.14

c. Patient Age and Gender

The cost regressions explored several alternative configurations of age and gender variables. The results indicate that the per diem cost rises as a patient's age increases, and the per diem cost are higher for female patients.

We examined the variation in the per diem cost for 5-year age intervals ranging from age 40 to 80 with open-ended categories ranging above age 80 and below 40 and determined that the effect of age was statistically significant. We initially ran the regression for three age groups consistent with the natural breaks in the distribution of age (under 55, 55 to 64, and 65 and over). The distribution showed that most Medicare psychiatric patients are under age 55 and over age 65. In addition, the distribution showed that the age group between 55 and 65 years of age increased the predictive power of the model only by a factor of .002 percent because there were few patients in that age category. For this reason, we are not proposing adjustments reflecting the three age groups. Rather, we are proposing to make a single adjustment of 13 percent for patients 65 years and over. We are proposing two age groups (under 65 and over 65) to correspond with the major populations within Medicare: the disabled and the elderly, which we believe are largely responsible for the age-related cost differences that we observed. In addition, preliminary results from the RTI International® research that used estimates of patient-specific routine cost per day (from a sample of 40 IPFs) found that splitting age into two groups (under 65 and over 65) has greater explanatory power than alternative age group configurations. The research study is described in more detail in section V.C.1. of this proposed rule.

The cost regression implies that female patients are approximately 3 percent more costly than male patients. However, the explanatory power of the equation increases by less than .002 percentage points. There is also a small reduction in the age effect for the 65 and over age group (less than one percentage point). We also examined the alternative of including gender along with the three age groups (under 55, 55 to 64, and 65 and over) and compared the results to the regression without gender and with two age groups (under 65 and 65 and over). The fuller specification of age and gender only increased the explanatory power by .003 points and had little effect on the size of the age effects.

We know that the elderly and women are more frequently treated in psychiatric units than in freestanding psychiatric hospitals. When an indicator variable for psychiatric units is included in the cost regression, the age and gender effects decrease (the 65 and over age effect declines from approximately 13 percent to approximately 9 percent, and the gender effect decreases from approximately 3 percent to 2 percent). We are unable to determine the extent to which this interaction of psychiatric unit status with age and gender indicates higher direct costs of treating the elderly and women, as opposed to other reasons for the higher costs of psychiatric units. However, RTI International's® preliminary results, which used a better patient-specific cost variable for a sample of 40 hospitals found a much stronger effect for age than for gender. This is because the evidence currently available to us is limited and we believe we cannot identify a direct link between the costs of psychiatric care in psychiatric units and treatment of female IPF patients. We are not proposing to adjust the per diem payment rate to account for gender. We invite comments on the appropriateness of including a gender variable as a payment adjustment as well as comments on the age categories used to identify variations in costs. We will continue to assess the effects of gender and age as we analyze more current data in the development of the final rule.

d. Length of Stay

Cost regressions indicate that the per diem cost declines as the length of stay increases. We are proposing adjustments to account for ancillary and certain administrative costs that occur disproportionately in the first days after being admitted to an IPF (the variable per diem adjustments). We examined the per diem cost over a range of 1 to 14 days. According to the 1999 MedPAR data file, the per diem costs were highest on day 1 and declined for days 2 through 8 as indicated below. Per diem costs for days 9 and thereafter remained relatively consistent with the median length of stay in an IPF for Medicare beneficiaries. The cost regression analysis was used to determine the following proposed payment adjustments. Relative to a stay of 9 or more days, the resulting adjustments for the first 8 days of a stay that we are proposing to use in this IPF prospective payment system are as follows:

- The variable per diem adjustment for day 1 would be an increase of approximately 26 percent.

- The variable per diem adjustment for days 2 to 4 would be an increase of approximately 12 percent.
- The variable per diem adjustment for days 5 to 8 would be an increase of approximately 5 percent.
- No variable per diem adjustment would be paid after the 8th day.

The higher payments for earlier days are offset through the budget neutrality adjustment, which has the effect of lowering the average payment to account for the increased payments.

2. Proposed Facility-Level Characteristics

As noted earlier, we were able to explain 19 percent of the variation in wage-adjusted per diem cost using patient characteristics. We explored a variety of ways to incorporate facility characteristics into the cost regressions in order to raise the explanatory power and refine the proposed payment system to better align payments with cost differences across facility types.

Per diem costs are strongly related to facility occupancy, because occupancy (as measured by the ratio of actual days to available days) measures the extent to which the facility is efficiently utilizing its capacity. When occupancy is low, fixed costs must be spread across relatively few days of care and the per diem costs are high. Because we do not want to pay for inefficiency, we are not proposing that occupancy be used as a payment adjuster. However, this variable is included in the cost regression to improve the estimates of the effects of other factors that may more appropriately be used to adjust payments.

An analysis of the facility-level characteristics we considered follows. To summarize the analysis, we are proposing that payments be adjusted based on the IPF's wage index, rural location, and teaching status. We considered, and explain below, the reasons why we are proposing not to provide adjustments for psychiatric units, disproportionate share intensity, or IPFs in Alaska or Hawaii.

a. Rural Location

We found that, controlling for the patient characteristics and other facility variables included in our cost regression, facilities located in non-metropolitan area counties had per diem costs about 16 percent higher than facilities located in metropolitan area counties. Most of the higher cost of rural IPFs is related to the fact that the vast majority are psychiatric units within small general acute care hospitals. Small-scale facilities are more costly on a per diem basis because there are minimum levels of fixed costs that cannot be avoided. Based on this analysis, we are proposing to make an adjustment of 16 percent for IPFs located in rural areas.

b. Teaching Status

One option for paying psychiatric teaching facilities for their higher costs relies on past experience with the teaching adjustment for other Medicare prospective payment systems. As in other inpatient prospective payment systems, we measured teaching status as one plus the ratio of the number of interns and residents assigned to the facility divided by the IPF's average daily census (ADC). Similarly for psychiatric units, we used the number of interns and residents assigned to the psychiatric unit.

The advantages of using the ADC rather than the number of beds for the denominator of the ratio noted above was discussed in the final rule we published in the **Federal Register** on August 30, 1991 (56 FR 43380) for putting inpatient hospital capital payments under a prospective payment. As described in that rule, the two key advantages of the ADC are that it is—(1) easier to define more precisely than number of beds; and (2) less subject to understatement in an effort to increase the size of the teaching variable. We believe that these advantages apply equally to IPFs.

The teaching variable in our cost regressions, that is, the logarithm of one plus the ratio of interns and residents to ADC, has a coefficient value of .5215. This cost effect is converted to a payment adjustment by treating the regression coefficient as an exponent and raising the teaching variable to the .5215 power. Applying this method for a facility with a teaching variable of 1.10 would yield a 5.1 percent increase in the per diem payment; for a facility with a teaching variable of 1.25, there would be a 12.3 percent higher payment.

Our impact tables are based on the assumption that we would pay a proposed IPF teaching adjustment in this manner and our proposed regulatory text is also based on this approach. However, we are considering alternatives because we are concerned that this method creates incentives for teaching hospitals to add residents and to increase their payments under an open-ended formula that pays higher teaching payments as teaching intensity, as measured by resident to ADC ratios, increases.

The BBA, sections 4621 and 4623, limited the incentives to add residents in hospitals paid under the hospital inpatient prospective payment system by adopting caps for both direct and indirect teaching payments. The number of residents was capped for the purpose of computing both the direct and indirect teaching adjustments and the resident to ADC was capped for purposes of computing the indirect teaching adjustment. Because IPFs would now be paid on a prospective basis similar to acute care hospitals, we are considering extending the indirect teaching caps to IPF teaching hospitals. Regulations, as specified at § 413.86, already apply the BBA caps to direct medical education payments for all teaching hospitals.

We are also exploring whether there are other alternatives for paying IPF teaching hospitals their higher teaching costs. We are interested in developing methodologies for estimating these higher costs and then, based on the newly available estimates and current data, distributing those costs fairly to individual teaching hospitals. We invite comments on obtaining the estimates and current data and on other approaches to paying psychiatric teaching hospitals for their higher medical-education costs based on that data.

c. Disproportionate Share Hospital Status

We measured the extent to which a facility provides care to low income patients using the disproportionate share hospital (DSH) variable used in other Medicare prospective payment systems (that is, the sum of the proportion of Medicare days of care provided to recipients of Supplemental Security Income and the proportion of the total days of care provided to Medicaid beneficiaries). For psychiatric units, both proportions are specific to the unit and not the entire hospital. A limitation of the Medicaid proportion as applied to psychiatric hospitals is that Medicaid does not pay for services provided to individuals under the age of 65 in an institution for mental diseases (IMD), as specified in section 1905(h) of the Act. As a result, low-income beneficiaries in IMDs cannot be identified as Medicaid beneficiaries, and the Medicaid proportion will be biased downwards.

The DSH variable was highly significant in our cost regressions; however, we found that facilities with higher DSH had lower per diem costs. We note that the previously cited study for the APA also found the same results. The relationship of high DSH with lower costs cannot be attributed to downward bias in the Medicaid proportion due to the IMD exclusion. This is because public psychiatric

hospitals already have lower costs on average than other types of IPFs. Therefore, if we propose a DSH adjustment based on the regression analysis, IPFs with high DSH shares would be paid lower per diem rates.

We tried a variety of supplemental analyses in an attempt to better understand the observed relationship, but did not find a positive relationship between the per diem cost and the DSH ratio. Therefore, we are not proposing a payment adjustment for DSH intensity but will monitor the effect of DSH for possible future adjustments.

d. Psychiatric Units in General Acute Care Hospitals

On average, psychiatric units have higher per diem costs than psychiatric hospitals. According to the 1999 MedPAR file, the average per diem cost for psychiatric units was $615, compared to $444 for psychiatric hospitals.

Some of the patient characteristics and facility variables that we included in our cost regressions explain part, but not all, of the cost difference between hospitals and psychiatric units. Controlling for facility size, occupancy, and selected comorbidities reduces the magnitude of the estimated cost difference from approximately 37 percent to 19 percent. Several factors may account for the remaining 19 percent difference: (1) A large proportion of psychiatric admissions to these units enter the hospital through the emergency room (ER), and ER charges are included on the inpatient claims used in our analysis (this issue will not be relevant to IPF payment in the future because ER services have been paid under the outpatient hospital prospective payment system since August 2000); (2) some of these admissions have medical conditions in addition to psychiatric symptoms and require more treatments resulting in higher costs due to more services and equipment; (3) psychiatric hospitals and psychiatric units may utilize different patterns of care and staffing; and (4) accounting differences may account for some of the cost difference.

We have decided not to propose a specific adjustment for psychiatric units. We are concerned about applying such an adjustment to all psychiatric units regardless of an individual unit's costs, efficiency, or case mix.

We hope that with further research, we will be able to gain a better understanding of the cost differences that would enable us to propose even more refined payment adjustments to directly measure the differences in patient care needs in psychiatric units.

e. Adjustment for Alaska and Hawaii IPFs

Some of the prospective payment systems that have been developed include a cost-of-living adjustment for the unique circumstances of Medicare providers located in Alaska and Hawaii. Therefore, we analyzed our data to determine the existence of IPFs located in Alaska and Hawaii. Currently, in Alaska, there are only two psychiatric hospitals and no psychiatric units. In Hawaii, there is one psychiatric hospital and one psychiatric unit. In the absence of a cost-of-living adjustment, our analyses indicates that some facilities in Alaska and Hawaii would "profit" and other facilities would experience a "loss." Due to the limited number of cases, the results of our analysis are inconclusive regarding whether a cost-of-living adjustment would improve payment equity for these facilities. Therefore, we are not proposing an adjustment for IPFs located in Alaska and Hawaii. We will continue to assess the impact of the proposed IPF prospective payment system on IPFs located in Alaska and Hawaii as we obtain more current data.

3. Proposed Payment Adjustments

a. Proposed Outlier Adjustment

While we are not statutorily required to provide outlier payments, we believe that it is appropriate to propose an outlier payment policy in connection with this prospective payment system in order to both ensure that IPFs treating unusually costly cases do not incur substantial "losses" and promote access to IPFs for patients requiring expensive care. Providing additional payments for costs that are beyond the IPF's control can strongly improve the accuracy of the proposed IPF prospective payment system in determining resource costs at the patient and facility level.

Notwithstanding the factors that we are proposing to recognize in the IPF prospective payment system as proposed adjustments to the per diem payment rate, the cost of care for some psychiatric patients may still substantially exceed the otherwise applicable payments during the course of a stay. This may occur because of multiple comorbid conditions and complications that require a high utilization of ancillary services. Since this is a per diem payment system, the extent to which length of stay is a factor would be mitigated because payment is made for each day of the stay.

We have determined that it is important to provide some protection from financial risk caused by treating patients who require more costly care and to reduce the incentives to under serve these patients.

Therefore, in order to protect IPFs from significant "losses" on very costly cases, we are proposing to provide outlier payments and set outlier numerical criteria prospectively so that outlier payments are projected to equal 2 percent of total payments under the proposed IPF prospective payment system. Based on the regression analysis and payment simulations, we believe that using a 2 percent threshold optimizes our ability to protect vulnerable IPFs while providing adequate payment for all other cases that are not outlier cases.

We are proposing, in § 412.424(c), to make an outlier payment for any case in which the estimated total cost exceeds an outlier threshold amount equal to the total IPF prospective payment system payment amount plus a fixed dollar loss amount. The fixed dollar loss amount is the amount used to limit the loss that an IPF would incur under the proposed outlier policy (see section III.C.3. of this proposed rule for an explanation of how the fixed dollar loss amount is calculated). Once the cost of a case exceeds the outlier threshold amount, an outlier payment would be made. A basic principle of an outlier policy is that outlier payments should cover less than the full amount of the additional costs above the outlier threshold in order to preserve the incentive to contain costs once a case qualifies for outlier payments (see Emmett B. Keeler, Grace M. Carter, and Sally Trude, "Insurance Aspects of DRG Outlier Payments," The Rand Corporation, N–2762–HHS, October 1988). This results in Medicare and the IPF sharing financial risk in the treatment of extraordinarily costly cases.

b. Methodology for Proposed Outlier Payments

We are proposing to make outlier payments on a per case basis rather than on a per diem basis. Outlier payments would be made for IPF cases when the estimated cost of the entire stay exceeds the outlier threshold amount. We believe it is appropriate to determine outlier status on a per case basis in order to accurately assess the "losses" associated with the care of a patient for the entire stay. If we propose to establish a per diem fixed dollar loss threshold, outlier payments could occur for part of an inpatient stay when no "losses" actually occur. If we review the stay in terms of the resources expended each day, the facility may incur a "loss" on some days of the stay and may experience "gains" on other days of the stay. Thus, assessing the resources

expanded over the course of the entire stay provides a fuller picture of the actual resources needed to provide care for the complete episode of care. After assessing the entire stay, one can determine if a "loss" was actually incurred by the IPF.

Therefore, we are proposing to define the outlier threshold amount as the total IPF prospective payment for an IPF stay, plus a fixed dollar loss amount. As explained below, the fixed dollar amount is determined to be the dollar amount per stay that achieves a total outlier percentage of 2 percent of the proposed prospective payments. The proposed outlier payment would be defined as a proportion of the estimated cost beyond the outlier threshold. The proportion of additional costs paid as outlier payments is referred to as the loss-sharing ratio. We chose to propose the fixed dollar loss amount and the loss-sharing ratios to allow the estimated total outlier payments to be 2 percent of the total estimated proposed IPF prospective payments.

In order to determine the most appropriate outlier policy, our goal was to analyze the extent to which the various outlier percentages reduce financial risk, reduce incentives to under serve costly beneficiaries, and improve the overall fairness of the payment system. Our analysis showed that the higher the outlier percentage, the more cases qualified for outlier payments, and the less payment was made per case. Conversely, a low outlier percentage resulted in a higher fixed dollar loss threshold and although fewer cases exceeded the threshold, the amount paid was more substantial.

We began our analysis by determining that if approximately 10 percent of IPF cases received an outlier payment, we would be maintaining the basic premise behind establishing an outlier policy, that is, to compensate IPFs for their truly high cost cases. Also, this percentage of cases, that is 10 percent, is not inconsistent with the percentage of total outlier cases paid in other prospective payment systems.

Initially, we believed that a 5 percent outlier policy would result in outlier payments for approximately 10 percent of total IPF cases. However, our analysis showed that a 5 percent outlier policy resulted in outlier payments for approximately 20 percent of IPF cases, paying an average of $1,975 per case. Since 20 percent of IPF cases would receive an outlier payment, we do not believe that a 5 percent outlier policy limits outlier payments to only the truly high cost cases. We then reduced the outlier policy to 3 percent and found that 12 percent of IPF cases received outlier payments, with an average payment of $2,125 per case. Although a 3 percent outlier policy reduced the number of cases that would qualify for outlier payments, 12 percent of cases still exceeded our target of 10 percent of total IPF cases.

However, we have determined that an outlier policy of 2 percent of the total proposed IPF payments would allow us to achieve a balance of the above stated goals. A 2 percent outlier policy would appropriately compensate for the truly high cost cases with a much more appropriate level of payment and reduced financial risk without causing a significant reduction in the per diem base rate. Under a 2 percent outlier policy, approximately 7 percent of IPF cases qualify for outlier payments with an average payment of $2,350 per case. Providing outlier payments to 7 percent of cases meets the 10 percent target and would provide outlier payment for only the high cost IPF cases. Accordingly, we are proposing the outlier policy to be 2 percent of the total proposed IPF payments. The amount of outlier payments would be funded by prospectively reducing the non-outlier payment rates in a budget-neutral manner.

Under our proposed outlier policy, we would make outlier payments for discharges in which estimated costs exceed an adjusted threshold amount ($4,200 multiplied by the IPF's facility adjustments, that is wages, rural location, and teaching status) plus the total IPF prospective payment system adjusted payment amount for the discharge. The estimated cost for a case would be calculated by multiplying the overall facility-specific cost-to-charge ratio by the total charges for the inpatient stay.

In establishing the loss-sharing ratio, we considered establishing a single ratio consistent with the hospital inpatient prospective payment system, which is set at a marginal cost of 80 percent of the difference between the cost for the discharge and the adjusted threshold amount. However, the proposed IPF prospective payment system unlike the hospital inpatient prospective payment system is a per diem payment system, we are concerned that a single loss-sharing ratio at 80 percent might provide an incentive to increase length of stay in order to receive additional outlier payments. Therefore, we are proposing to reduce the loss-sharing ratio when the length of the stay increases beyond the median length of stay. We believe that a reduction to the outlier loss-sharing ratio should occur in a similar manner to the declining per diem payment. The per diem payment amount under the proposed IPF prospective payment system is highest on days 1 through 4, declines on days 5 through 8, and declines further for all days beyond 8. Similarly, we are proposing to establish an 80-percent loss-sharing ratio for days 1 through 8 in order to reflect higher costs early in an IPF stay and reduce the ratio by 20 percent for days 9 and thereafter. This is consistent with the median length of stay for IPFs. Reducing the amount Medicare would share in the loss of high cost cases would provide an incentive for an IPF to contain costs once a case qualifies for outlier payments. We solicit comments on this approach.

c. Proposed Implementation of the Outlier Policy

The intent of proposing an outlier policy is to adequately pay for truly high-cost cases. However, we have become aware that under the hospital inpatient prospective payment system, some hospitals have taken advantage of two system features in the outlier policy to maximize their outlier payments. The first is the time lag between the current charges on a submitted claim and the cost-to-charge ratio taken from the most recent settled cost report. Second, statewide average cost-to-charge ratios are used in those instances in which an acute care hospital's operating or capital cost-to-charge ratios fall outside reasonable parameters. We set forth these parameters and the statewide cost-to-charge ratios for acute care hospitals in the annual publication of prospective payment rates that are published by August 1 of each year in accordance with § 412.8(b)(2). Currently, these parameters represent 3.0 standard deviations (plus or minus) from the geometric mean of cost-to-charge ratios for all hospitals. Hospitals could arbitrarily increase their charges so far above costs that their cost-to-charge ratios would fall below 3 standard deviations from the geometric mean of the cost-to-charge ratio. Thus, a higher statewide average cost-to-charge ratio would be applied to determine if the hospital should receive an outlier payment. This disparity results in their cost-to-charge ratios being set too high, which in turn results in an overestimation of their current costs per case.

The intention of the outlier policy under both the hospital inpatient prospective payment system and the proposed IPF prospective payment system is to make payments only when the cost of care is extraordinarily high in relation to the average cost of treating comparable conditions or illnesses. We

believe that if hospitals' charges are not sufficiently comparable in magnitude to their costs, the legislative purpose underlying payment for outliers is thwarted. Thus, on June 9, 2003, we published a final rule in the **Federal Register** (68 FR 34494) to ensure that outlier payments are paid for truly high-cost cases under the hospital inpatient prospective payment system.

We believe the use of parameters is appropriate for determining cost-to-charge ratios to ensure these values are reasonable and that outlier payments can be made in the most equitable manner possible. Further, we believe the proposed methodology of computing IPF outlier payments is susceptible to the same payment enhancement practices identified under the hospital inpatient prospective payment system because it depends on the cost-to-charge ratio to determine the IPF's cost. Accordingly, as discussed below, we are proposing provisions for implementing the outlier policy to ensure the statistical accuracy of cost-to-charge ratios and appropriate adjustment of IPF outlier payments.

1. Statistical Accuracy of Cost-to-Charge Ratios

We believe that there is a need to ensure that the cost-to-charge ratio used to compute an IPF's estimated costs should be subject to a statistical measure of accuracy. Removing aberrant data from the calculation of outlier payments will allow us to enhance the extent to which outlier payments are equitably distributed and continue to reduce incentives for IPFs to under serve patients who require more costly care. Further, using a statistical measure of accuracy to address aberrant cost-to-charge ratios would also allow us to be consistent with the outlier policy under the hospital inpatient prospective payment system. Therefore, we are making the following two proposals:

- We will calculate two national ceilings, one for IPFs located in rural areas and one for facilities located in urban areas. We propose to compute this ceiling by first calculating the national average and the standard deviation of the cost-to-charge ratios for both urban and rural IPFs.

To determine the rural and urban ceilings, we propose to multiply each of the standard deviations by 3 and add the result to the appropriate national cost-to-charge ratio average (either rural or urban). We believe that the method explained above results in statistically valid ceilings. If an IPF's cost-to-charge ratio is above the applicable ceiling, the ratio is considered to be statistically inaccurate. Therefore, we are proposing to assign the national (either rural or urban) median cost-to-charge ratio to the IPF. Due to the small number of IPFs compared to the number of acute care hospitals, we believe that statewide averages used in the hospital inpatient prospective payment system, would not be statistically valid in the IPF context.

In addition, the distribution of cost-to-charge ratios for IPFs is not normally distributed and there is no limit to the upper ceiling of the ratio. For these reasons, the average value tends to be overstated due to the higher values on the upper tail of the distribution of cost-to-charge ratios. Therefore, we are proposing to use the national median by urban and rural type as the substitution value when the facility's actual cost-to-charge ratio is outside the trim values. Cost-to-charge ratios above this ceiling are probably due to faulty data reporting or entry, and, therefore, should not be used to identify and make payments for outlier cases because these data are clearly erroneous and should not be relied upon. In addition, we propose to update and announce the ceiling and averages using this methodology every year.

- We will not apply the applicable national median cost-to-charge ratio when an IPF's cost-to-charge ratio falls below a floor. We are proposing this policy because we believe IPFs could arbitrarily increase their charges in order to maximize outlier payments.

Even though this arbitrary increase in charges should result in a lower cost-to-charge ratio in the future (due to the lag time in cost report settlement), if we propose a floor on cost-to-charge ratios, we would apply the applicable national median for the IPFs actual cost-to-charge ratio. Using the national median cost-to-charge ratio in place of the provider's actual cost-to-charge ratio would estimate the IPF's costs higher than they actually are and may allow the IPF to inappropriately qualify for outlier payments.

Accordingly, we are proposing to apply the IPF's actual cost-to-charge ratio to determine the cost of the case rather than creating and applying a floor. In such cases as described above, applying an IPF's actual cost-to-charge ratio to charges in the future to determine the cost of the case will result in more appropriate outlier payments.

Consistent with the policy change under the hospital inpatient prospective payment system, we are proposing that IPFs would receive their actual cost-to-charge ratios no matter how low their ratios fall. We are still assessing the procedural changes that would be necessary to implement this change.

2. Adjustment of IPF Outlier Payments

As discussed in the hospital inpatient prospective payment system final rule for outliers, we have implemented changes to the outlier policy used to determine cost-to-charge ratios for acute care hospitals, because we became aware that payment vulnerabilities exist in the current outlier policy. Because we believe the IPF outlier payment methodology is likewise susceptible to the same payment vulnerabilities, we are proposing the following:

- Include in proposed § 412.424(c)(2)(v) a cross-reference to § 412.84(i) that was included in the final rule published in the **Federal Register** on June 9, 2003 (68 FR 34515). Through this cross-reference, we are proposing that fiscal intermediaries would use more recent data when determining an IPF's cost-to-charge ratio. Specifically, as provided in § 412.84(i), we are proposing that fiscal intermediaries would use either the most recent settled IPF cost report or the most recent tentatively settled IPF cost report, whichever is later to obtain the applicable IPF cost-to-charge ratio. In addition, as provided under § 412.84(i), any reconciliation of outlier payments will be based on a ratio of costs to charges computed from the relevant cost report and charge data determined at the time the cost report coinciding with the discharge is settled.

- Include in proposed § 412.424(c)(2)(v) a cross reference to § 412.84(m) (that was included in the final rule published in the **Federal Register** on June 9, 2003 (68 FR 34415) to revise the outlier policy under the hospital inpatient prospective payment system). Through this cross-reference, we are proposing that IPF outlier payments may be adjusted to account for the time value of money during the time period it was inappropriately held by the IPF as an "overpayment." We also may adjust outlier payments for the time value of money for cases that are "underpaid" to the IPF. In these cases, the adjustment will result in additional payments to the IPF. We are proposing that any adjustment will be based upon a widely available index to be established in advance by the Secretary, and will be applied from the midpoint of the cost reporting period to the date of reconciliation. We are still assessing the procedural changes that would be necessary to implement this change.

d. Computation of Proposed Outlier Payments

In order to illustrate the proposed outlier payment mechanism, we present

the following example of how we would calculate the outlier payment.

Example: John Smith was hospitalized at a non-teaching IPF facility in Richmond, Virginia for 14 days. His total allowable billed charges for the 14 days was $20,000. The prospective payment amount (per diem payments plus adjustments) was $8,000.

To determine whether this case qualifies for outlier payments, it would be necessary to compute the cost of the case by multiplying the facility's overall cost-to-charge ratio of .72 by the allowable charge of $20,000. In this case, the total allowable costs for Mr. Smith's case is $14,400 ($20,000 × .72). Because the IPF is a non-teaching urban facility, the fixed dollar threshold is adjusted by the wage index 0.9477.

TABLE 4.—COMPUTATION EXAMPLE OF THE PROPOSED OUTLIER PAYMENT

Steps to Calculate the Proposed Outlier Payment		
Calculate the Fixed Dollar Loss Threshold:		
Fixed Dollar Threshold		$4,200
Wage adjusted labor share (.72828×4,200)*0.9477	$2,899	
Non Labor Share (0.27172 × $4.200)	1,141	
Adjusted Fixed Dollar Threshold ($2,899+$1,141)	4.040	
Calculate Eligible Outlier Costs:		
Hospital Costs	14,400	
Adjusted Fixed Dollar Threshold	4,040	
Prospective Payment System Adjusted Payment	8,000	
Eligible for Outlier Costs ($14,400 – $4,040 – $8,000)	2,360	
Calculate the Loss Sharing Ratio Amount:		
Per Diem Outlier Costs ($2,360/14 days)		169
Loss-sharing Ratio Days 1 through 8 ($169×.80×8 days)	1,079	
Loss-sharing Ratio Days 9 through 14 $169×.60 ×6 days)	607	
The Total Outlier Payment Amount $1,079+$607)	1,686	

e. Interrupted Stays

Since per diem payments under the proposed IPF prospective payment system would be higher for the first 8 days of a stay (the variable per diem adjustment discussed earlier in this section), we are proposing to adopt an interrupted stay policy. The policy is intended to reduce incentives to move patients among Medicare-covered sites of care in order to maximize Medicare payment. We are concerned that IPFs could maximize payment by prematurely discharging patients after the 8 days during which they receive higher payments (the variable per diem adjustments), and then readmitting the same patient. In some cases a discharge and subsequent readmission within a short period of time may be appropriate. For example, we are concerned, in particular, that when there is a psychiatric unit within an acute care hospital, a patient could be transferred from the unit after only a few days of care to another part of the hospital and then be readmitted to the psychiatric unit. In this scenario, the hospital could receive the per diem adjustments for both stays in the psychiatric unit as well as receive the DRG payment associated with the acute hospital stay.

In proposed § 412.402, we define an interrupted stay as one in which the patient is discharged from an IPF and returns to the same IPF within 5 consecutive calendar days. Specifically, we are proposing in § 412.424(d) that if a patient is discharged from an IPF and returns to the same IPF within 5 consecutive calendar days, we would treat both stays as a single stay. Therefore, we would not apply the variable per diem adjustment for the second admission and would combine the costs of both stays for the purpose of determining whether the case qualifies for outlier payments.

We considered defining an interrupted stay as a readmission within 8 days of discharge since the variable per diem adjustments are not applied after the 8th day of the stay. We are not proposing this definition for an interrupted stay because we believe that after an 8-day absence from the IPF, many of the services that account for increased costs early in an inpatient psychiatric stay would need to be repeated, for example, assessments and laboratory testing. After a shorter absence from the IPF of 1 through 4 days, however, many of those admission-related services such as psychiatric evaluations and the patient's medical history would not need to be repeated. Therefore, we believe the lower end of the last range of payment adjustment, that is, 5 days, would provide for appropriate per diem payment adjustment as well as provide a disincentive to inappropriately shift patients between Medicare-covered sites of care. In addition, we intend to monitor the extent and timing of readmissions to IPFs and plan to account for changes in practice patterns as we refine the proposed IPF prospective payment system. Public comments are welcome on the proposed definition of an interrupted stay.

For the purposes of counting the 5-calendar day time period to determine the length of the interrupted stay, the day of discharge would be counted as "day 1", with midnight of that day serving as the end of that calendar day. The 4 calendar days that immediately follow day 1 would be days 2 through 5.

C. Development of the Proposed Budget-Neutral Federal Per Diem Base Rate

1. Data Used To Develop the Proposed Federal Per Diem Base Rate

Based on the regression analysis, we are proposing a prospective payment system for IPFs based on a per diem payment amount calculated from average costs adjusted for budget neutrality. The per diem amount would be adjusted by a budget-neutrality factor to arrive at the Federal per diem base rate used as the standard payment per day for the proposed IPF prospective payment system. The proposed Federal per diem base payment would be adjusted by the proposed wage index and the proposed patient-level and facility-level characteristics identified in the regression analysis. To calculate the proposed per diem amount, we would estimate the average cost per day for—(1) routine services from the most recent available cost report data (cost reports beginning in FY 1999 supplemented with 1998 cost reports if the 1999 cost report is missing); and (2) ancillary costs per day using data from the 1999 Medicare bills and corresponding data from facility cost reports.

2. Calculation of the Proposed Per Diem Amount

For routine services, the proposed per diem operating and capital costs would be used to develop the base for the psychiatric per diem amount. The per diem routine costs were obtained from each facility's Medicare cost report. To estimate the costs for routine services included in developing the proposed per diem amount, we summed the total routine costs (including costs for capital) submitted on the cost report for each provider and divided it by the total Medicare days. Some average routine costs per day were determined to be aberrant, that is, the costs were extraordinarily high or low and most likely contained data errors. The following method was used to trim extraordinarily high or low cost values in order to improve accuracy of our results. First, the average and standard deviations of the total per diem cost (routine and ancillary costs) were computed separately for cases from psychiatric hospitals and psychiatric units (separate statistics were computed for the groups of IPFs, because we did not want to systematically exclude a larger proportion of cases from the higher cost psychiatric units). Before calculating the means, we trimmed cases from the file when covered days were zero or routine costs were less than $100 or greater than $3,000. We selected these amounts because we believe this range captured the grossly aberrant cases. Elimination of the grossly aberrant cases would prevent the means from being distorted. Second, we trimmed cases when the provider's total cost per day was outside the standard and generally used statistical trim points of plus or minus 3 standard deviations from the respective means for each facility type (psychiatric hospitals and psychiatric units). If the total cost per day was outside the trim value, we would delete the data for that provider from the per diem rate development file. This method of trimming is consistent with the method used for the regression analysis. After trimming the data, the average routine cost per day would be $495.

For the ancillary services, we would calculate the costs by converting charges from the 1999 Medicare claims into costs using facility-specific, cost-center specific cost-to-charge ratios obtained from each provider's applicable cost reports. We matched each provider's departmental cost-to-charge ratios from their Medicare cost report to each charge on their claims reported in the MedPAR file. Multiplying the total charges for each type of ancillary service by the corresponding cost-to-charge ratio provided an estimate of the costs for all ancillary services received by the patient during the stay. For those departmental cost-to-charge ratios that we considered to be aberrant because they were outside the statistically valued trim points of plus or minus 3.00 standard deviations from the facility-type mean, we replaced the individual cost-to-charge ratios for each department with the median department cost-to-charge ratio by facility type (psychiatric hospital or psychiatric unit). Because the distribution of ratios of cost-to-charges is not normally distributed and because there is no limit to the upper ceiling of the ratio, the mean value tends to be overstated due to the higher values on the upper tail of the bell curve. Therefore, we chose the median by facility type as a better measure for the substitution value when the facility's actual cost-to-charge ratio was outside the trim values.

After computing the estimated costs by applying the cost-to-charge ratios to the total ancillary charges for each patient stay, we would determine the average ancillary amount per day by dividing the total ancillary costs for all stays by the total covered Medicare days. Using this methodology, the average ancillary cost per day would be $67.

Adding the average ancillary costs per day ($67) and the facility's average routine costs per day including capital costs ($495) provides the base payment amount ($562) for the estimated average per diem amount for each patient day of inpatient psychiatric care.

3. Determining the Update Factors for the Budget-Neutrality Calculation

Section 124(a)(1) of Pub. L. 106–113 requires that the proposed IPF prospective payment system be budget neutral. In other words, the amount of total payments under the proposed IPF prospective payment system, including any payment adjustments, must be projected to be equal to the amount of total payments that would have been made if the proposed prospective payment system were not implemented. Therefore, we are proposing to calculate the budget-neutrality factor for the implementation period by setting the total estimated prospective payment system payments equal to the total estimated payments that would have been made under the TEFRA methodology had the proposed prospective payment system not been implemented.

As discussed in section IV of this proposed rule, the implementation date of the proposed IPF prospective payment system is cost reporting periods beginning on or after April 1, 2004. In order to create a more even and efficient process of updates for the various Medicare payment systems, we are recommending that the first Federal base rate update occur on July 1, 2005. Therefore, we calculated the proposed Federal base rate to be budget neutral for the 15-month period April 1, 2004 through June 30, 2005.

The data sources we used to calculate the budget-neutrality factor were the most complete data available for IPFs and included cost report data from FY 1999 and the 1999 Medicare claims data from the June 2001 update of the MedPAR files. We updated the cost report data for each IPF to the midpoint of that 15-month period (April 1, 2004 through June 30, 2005) and used the projected market basket update factors for each applicable year.

We note that the FY 1999 cost report file is not complete because of the lag in the filing of cost reports for some providers, therefore, a small number of IPFs do not have cost report data for the 1999 cost report period. To include as many IPFs in the payment calculation as possible, we filled in the missing data using data from the previous year for those IPFs. The prospective payment projections were based on case level data from the 1999 MedPAR files and the facility level characteristics from the 1999 cost reports. These data provide the input for the development of the appropriate update factors to be applied to the proposed prospective payment model.

a. Cost Report Data for April 1, 2004 Through June 30, 2005

In order to determine each provider's projected costs for the proposed implementation period, we are proposing to update each IPF's cost to the midpoint of the period April 1, 2004 through June 30, 2005. To calculate operating costs, we would use the applicable percentage increases to the TEFRA target amounts for FYs 1999 through 2002 (in accordance with § 413.40(c)(3)(vii)) and the full excluded hospital market-basket percentage increase for FY 2003 and later. For FYs 1999 through 2002, we would determine the appropriate update factor for each year by using the methodology described below:

- For IPFs with costs that equal or exceed their target amounts by 10 percent or more for the most recent cost reporting period for which information is available, the update factor would be the market-basket percentage increase.
- For IPFs that exceed their target amounts by less than 10 percent, the

update factor would be equal to the market basket minus 0.25 percentage points for each percentage point in which operating costs are less than 10 percent over the target (but in no case less than 0 percent).

- For IPFs that are at or below their target amounts but exceed 66.7 percent of the target amounts, the update factor would be the market basket minus 2.5 percentage points (but in no case less than 0 percent).
- For IPFs that do not exceed 66.7 percent of their target amounts, the update factor would be 0 percent.
- For FYs 2003 and later, we use the most recent estimate of the percentage increase projected by the excluded hospital market-basket index.

In addition, since the proposed prospective payment system would include both the operating and capital-related costs, we needed to project the capital-related cost under the TEFRA system as well. We used the excluded capital market basket to project the capital-related costs under the TEFRA system. Table 5 below, summarizes the excluded hospital market basket and the excluded capital market basket indexes.

TABLE 5.—PROPOSED EXCLUDED HOSPITAL MARKET BASKET AND EXCLUDED CAPITAL MARKET BASKET

Fiscal year	Excluded hospital market basket percent	Excluded capital market basket percent
FY 1999	2.9	0.9
FY 2000	3.3	1.2
FY 2001	4.3	1.0
FY 2002	3.9	0.9
FY 2003* ...	3.7	0.8
FY 2004* ...	3.5	1.1
FY 2005* ...	3.2	1.1

*NOTE: Projected Percentage.

b. Estimate of Total Payments Under the TEFRA Payment System

We estimated payments for inpatient operating and capital services under the current TEFRA system using the following methodology:

Step 1: IPF's Facility-Specific Target Amount.

The facility-specific target amount for an IPF would be calculated based on the IPF's allowable inpatient operating cost per discharge for the base period, excluding capital-related, nonphysician anesthetist, and medical education costs. We would update this target amount using a rate-of-increase percentage as specified in § 413.40(c)(3)(viii).

From FYs 1998 through 2002, there were two national caps on the payment amounts for IPFs. As specified in § 413.40(c)(4)(iii), an IPF's facility-specific target is the lower of its net allowable base-year costs per discharge increased by the applicable update factors or the cap for the applicable cost reporting period. In determining each IPF's facility-specific target amount, we would use the labor-related and non-labor related shares of the national cap amounts for FY 2002 that appeared in the hospital inpatient prospective payment system final rule published in the **Federal Register** on August 1, 2001 (66 FR 39916). For existing IPFs (that is, IPFs paid under TEFRA before October 1, 1997), we adjusted the labor-related share ($8,429) by the applicable geographic wage index and added that amount to the non-labor related share ($3,351). For new IPFs (that is, IPFs first paid under TEFRA after October 1, 1997), we adjusted the labor-related share ($6,815) and added that amount to the non-labor related share ($2,709).

Step 2: IPF's Payment Amount for Inpatient Operating Services

Under the TEFRA system, an IPF's payment amount for inpatient operating services is the lower of—

- The hospital-specific target amount (subject to application of the cap as determined in Step (1) multiplied by the number of Medicare discharges (the ceiling); or
- The hospital's average inpatient operating cost per case multiplied by the number of Medicare discharges.

In addition, under the TEFRA system, payments may include a bonus or relief payment, as follows:

- IPFs whose net inpatient operating costs are lower than or equal to the ceiling, would receive the lower payment of either the net inpatient operating costs plus 15 percent of the difference between the inpatient operating costs and the ceiling; or the net inpatient operating costs plus 2 percent of the ceiling.
- IPFs whose net inpatient operating costs are greater than the ceiling, but less than 110 percent of the ceiling, would receive the ceiling payment.
- IPFs whose net inpatient operating costs are greater than 110 percent of the ceiling would receive the ceiling payment plus the lower of 50 percent of the difference between the 110 percent of the ceiling and the net inpatient operating costs or 10 percent of the ceiling payment.

Step 3: IPF's Payment for Capital-Related Costs

Under the TEFRA system, in accordance with section 1886(g) of the Act, Medicare allowable capital-related costs are paid on a reasonable cost basis. Each IPF's payment for capital-related costs would be taken directly from the cost report and updated for inflation using the excluded capital market basket.

Step 4: IPF's Total (Operating and Capital-Related Costs) Payment Under the TEFRA Payment System

Once estimated payments for inpatient operating costs are determined (including bonus and relief payments, as appropriate), we would add the TEFRA adjusted operating payments and capital-related cost payments together to determine each IPF's total payments under the TEFRA payment system.

c. Payments Under the Proposed Prospective Payment System Without a Budget-Neutrality Adjustment

Payments under the proposed prospective payment system would be estimated without a budget-neutrality adjustment. We used $562 (the average cost per day consistent with the average cost per day used in the regression model) as the starting point for the Federal per diem base rate. By applying the aggregate cost increase factor using the applicable market basket increase factors, we updated the base rate to the April 1, 2004 through June 30, 2005 period. The updated cost per day of $671 was then used in the payment model to project future payments under the proposed IPF prospective payment system. The next step was to apply the associated proposed wage index and all applicable proposed patient-level and facility-level adjustments to determine the appropriate proposed prospective payment amount for each stay in the final payment model file.

We note that no separate wage or standardization factors were applied to the per diem amount used to derive the total proposed prospective payment system payments as these factors would be accounted for through the budget-neutrality computation described below. Thus, when the total proposed prospective payment system payments are compared to projected TEFRA payments, the resulting factor applied to the per diem amount would implicitly account for the effects of wage and standardization adjustments to the per diem costs.

d. Calculation of the Proposed Budget-Neutral Adjustment

In determining the proposed budget-neutrality factor, we compared the proposed prospective payment system amounts calculated from the psychiatric stays in the 1999 MedPAR file to the projected TEFRA payments from the

1999 cost report file (as explained in greater detail in section b. above). The proposed budget-neutrality adjustment was calculated by dividing total estimated payments under the TEFRA payment system by estimated payments under the proposed IPF prospective payment system without a budget-neutrality adjustment.

Since the proposed IPF prospective payment system amount for each provider would include applicable outlier amounts, we reduced the proposed budget neutral per diem base rate by 2 percent to account for the 2 percent of aggregate proposed prospective payments to be made for outlier payments. The appropriate proposed outlier amount was determined by comparing the adjusted prospective payment amount for the entire stay to the computed cost per case. If costs were above the prospective payment amount plus the adjusted fixed dollar loss threshold, an outlier payment was computed using the applicable risk-sharing percentages as explained in greater detail in section III.B.3 of this proposed rule. The outlier amount was computed for all stays and the total outlier amount was added to the final proposed prospective payment amount. If the total outlier amount for all providers was determined to be higher or lower than 2 percent of the total payments under the proposed prospective payment system, then the fixed dollar loss threshold was adjusted accordingly. The proposed fixed dollar loss threshold was determined to be $4,200.

4. Proposed Behavioral Offset

We would calculate the proposed budget-neutral Federal per diem base rate by applying the budget-neutrality factor calculated above and the 2 percent adjustment for outlier payments to $671 (the average cost per day for the 15-month period, April 1, 2004 through June 30, 2005). However, if the proposed IPF prospective payment system is implemented as proposed, we would expect that IPFs may experience usage patterns that are significantly different from their current usage patterns. Two examples are—(1) the proposed IPF prospective payment system is a per-diem system, therefore, IPFs might have an incentive to keep patients in the facility longer to maximize use of their beds or to receive the proposed outlier payments; and (2) the current TEFRA payment system does not rely on ICD–9–CM coding. Proper comorbidity coding, however, will have an impact on the proposed prospective payments under this proposed rule. Therefore, we expect that IPFs will have an incentive to comprehensively code for the presence of comorbidities, thus, ultimately, the coding practice of IPFs should improve once the proposed IPF prospective payment system is implemented.

As a result, Medicare may incur higher payments than assumed in our calculation. These effects were taken into account when we calculated the proposed budget-neutral Federal per diem base rate. Accounting for these effects through an adjustment is commonly known as a behavioral offset. Based on accepted actuarial practices and consistent with the assumptions made under the inpatient rehabilitation facilities (IRF) prospective payment system, in determining this proposed behavioral offset, we assumed that the IPFs would regain 15 percent of potential "losses" and augment payment increases by 5 percent. We applied this actuarial assumption, which was based on consideration of our historical experience with new payment systems, to the estimated "losses" and "gains" among the IPFs. We intend to monitor the extent to which current practice in IPFs such as the average length of stay is affected by implementation of a per diem payment system and may propose adjustments to the behavioral assumptions accordingly. The above methodology made no behavioral assumptions for changes in the number of total psychiatric beds or the shift of utilization among types of psychiatric hospitals.

5. Proposed Federal Per Diem Base Rate

The proposed Federal per diem base rate with an outlier adjustment and budget neutrality with a behavioral offset would be $530. This proposed dollar amount would include a 2-percent reduction to account for outlier payments, and a 19-percent reduction to account for budget neutrality and the behavioral offset to the proposed Federal per diem base rate otherwise calculated under the proposed methodology as described above.

6. Proposed Changes to Physician Recertification Requirements

In addition to the monitoring efforts mentioned above, we are proposing changes in the physician recertification requirements for inpatient psychiatric care as specified in § 424.14. This section states that Medicare Part A pays for inpatient psychiatric care only if a physician certifies and recertifies the need for services. Therefore, we are proposing to revise § 424.14(c), regarding the content of the physician recertification and § 424.14(d), regarding the timing of physician recertification to ensure that a patient's continued stay in an IPF is medically necessary.

As specified in existing § 424.14(c), a physician must recertify that inpatient psychiatric services furnished since the previous certification were, and continue to be required: (1) For treatment that could reasonably be expected to improve the patient's condition or for diagnostic study; and (2) the hospital's records show that the services furnished were intensive treatment services, admission and related services necessary for diagnostic study, or equivalent services. We are proposing to add a requirement that the physician recertify that the patient continues to need, on a daily basis, inpatient psychiatric care (furnished directly by or requiring the supervision of inpatient psychiatric facility personnel) or other professional services that, as a practical matter can only be provided on an inpatient basis.

Section 424.14(d)(2) requires the first recertification after admission to occur as of the 18th day of hospitalization. We are proposing to revise the timing of the first recertification to the 10th day of hospitalization in order to align the physician recertification of the need for continuation of the inpatient stay with the median length of stay. As noted previously, according to the 1999 MedPAR data, the median length of stay for Medicare beneficiaries was 9 days. These proposed changes are intended to ensure that a patient's continued stay in an IPF is medically necessary and more closely tied to the median length of stay.

We acknowledge that the additional protections afforded by the unique psychiatric hospital conditions of participation (COPs) in subpart E of part 482, which create administrative criteria and documentation requirements for psychiatric patients, are an additional protection in this regard. We believe these requirements provide adequate protection against the shift of lower cost nursing home patients with similar but less severe diagnoses into psychiatric hospitals. However, if we observe a shift of less severe cases into psychiatric hospitals, we may perform targeted reviews of admissions to assure that the COPs and physician certification requirements are being appropriately followed.

E. Proposed Area Wage Adjustment

Due to the variation in costs, because of the differences in geographic wage levels, we are proposing that payment rates under the proposed IPF prospective payment system be adjusted by a geographic index. In addition, we are proposing to use the inpatient acute care hospital wage data to compute the

IPF wage indices, because there is not an IPF-specific wage index available. We believe that the inpatient acute care hospital wage data reflects wage levels similar to psychiatric units as well as free-standing psychiatric hospitals. We also believe that IPFs generally compete in the same labor market as inpatient acute care hospitals.

Furthermore, we are proposing to adjust the labor-related portion of the proposed prospective payment rates for area differences in wage levels by a factor reflecting the relative facility wage level in the geographic area of the IPF compared to the national average wage level for these hospitals. We believe that the actual location of the IPF as opposed to the location of affiliated providers is most appropriate for determining the wage adjustment because the data support the premise that the prevailing wages in the area in which the IPF is located influence the cost of a case. Thus, we are using the inpatient acute care hospital wage data without regard to any approved geographic reclassification as specified in section 1886(d)(8) or 1886(d)(10) of the Act. We note this policy is consistent with the area wage adjustments used in other non-acute care facility prospective payment systems.

To account for wage differences, we first identified the proportion of labor and non-labor components of costs. We used our proposed 1997-based excluded hospital market basket with capital to determine the labor-related share. We calculated the proposed labor-related share as the sum of the weights for those cost categories contained in the proposed 1997-based excluded hospital with capital market basket that are influenced by local labor markets. These cost categories include wages and salaries, employee benefits, professional fees, labor-intensive services, and a 46 percent share of capital-related expenses. The labor-related share for the base period of the proposed prospective payment system (April 1, 2004 through June 30, 2005) is the sum of the relative importance of each labor-related cost category for this period, and reflects the different rates of price change for these cost categories between the base year (FY 1997) and this period. The sum of the relative importance for operating costs (wages and salaries, employee benefits, professional fees, and labor-intensive services) is 69.348 percent, as shown below in Table 6. The portion of capital that is influenced by local labor markets is estimated to be 46 percent. Because the relative importance of capital is 7.566 percent of the proposed 1997-based excluded hospital with capital market basket for the period April 1, 2004 through June 30, 2005, we would take 46 percent of 7.566 percent to determine the proposed labor-related share of capital. The result, 3.48 percent, is then added to the proposed 69.348 percent calculated for operating costs to determine the total proposed labor-related relative importance. The resulting labor-related share that we propose to use for the proposed IPF prospective payment system is 72.828 percent. The table below shows that the proposed labor-related share would have been 73.570 percent if we had not rebased the excluded hospital with capital market basket using more recent 1997 data rather than using 1992 data. As shown in Table 6, rebasing results in a lowering of the labor-related share by .742 percent.

TABLE 6.—PROPOSED LABOR-RELATED SHARE RELATIVE IMPORTANCE

Cost Category	Relative Importance 1992-based Market Basket (April 2004 to June 2005)	Relative Importance 1997-based Market Basket (April 2004 to June 2005)
Wages and salaries	50.714	49.158
Employee benefits	11.930	11.077
Professional fees	2.060	4.540
Postage	0.252	.....
All other labor intensive services	5.252	4.572
Subtotal	70.209	69.348
Labor-related share of capital costs	3.360	3.480
Total	73.570	72.828

A precedent exists for using this method to determine the proportion of payments adjusted for geographic differences in labor costs. Specifically, the labor-related share for acute care hospitals is determined from the prospective payment system hospital operating market basket using a similar method.

We believe that a wage index based on acute care hospital wage data is the best and most appropriate wage index to use in adjusting payments for IPFs, since both the acute care hospitals and IPFs compete in the same labor markets. This wage data includes the following categories of data: (1) Salaries and hours from short-term acute care hospitals; (2) home office costs and hours; (3) certain contract labor costs and hours; and (4) wage-related costs. The wage data excludes wages for services provided by teaching physicians, interns and residents, and nonphysician anesthetists under Medicare Part B, because we would not cover these services under the proposed IPF prospective payment system.

Consistent with the wage index methodologies in other prospective payment systems, we are proposing to divide IPFs into labor market areas. For the purpose of defining labor market areas, we are proposing to define an urban area as a Metropolitan Statistical Area (MSA) or New England County Metropolitan Area (NECMA), as defined by the Office of Management and Budget (OMB). In addition, we are proposing to define a rural area as any area outside an urban area. The proposed IPFs wage indices would be computed as follows:

- Compute an average hourly wage for each urban and rural area.
- Compute a national average hourly wage.
- Divide the average hourly wage for each urban and rural area by the national average hourly wage.

The result is a proposed wage index for each urban and rural area (see Addendum B1 for the proposed wage index for urban areas and Addendum B2 for the proposed wage index for rural areas).

To calculate the wage-adjusted facility payments, we are proposing the following method: (1) Multiply the prospectively determined Federal base rate by the labor-related percentage to determine the labor-related portion; (2) multiply this labor-related portion by the applicable IPF wage index; and (3) add the resulting wage-adjusted labor-related portion to the nonlabor-related portion, resulting in a wage-adjusted base rate.

F. Effect of the Proposed Transition on Budget Neutrality

Section 124(a)(1) of Pub. L. 106–113 requires that the proposed IPF prospective payment system maintain budget neutrality. As discussed in further detail in section IV of this proposed rule, we are proposing a 3-year transition period from the cost-based TEFRA reimbursement to payment based on 100-percent prospective payment. During the transition period, we are proposing that an IPF would be paid a blend of an increasing percentage of the IPF Federal per diem payment amount and a decreasing percentage of its TEFRA rate for each discharge. Since the estimated prospective payments were calculated in a budget-neutral manner, this proposed transition methodology would result in the same total estimated payments that are expected under the current rules.

G. Calculation of the Proposed Payment

Payments under the proposed IPF prospective payment system would be determined by adjusting the per diem base amount by the appropriate wage index and applicable IPF prospective payment system payment adjustments and adding any applicable outlier amounts. An example of how to calculate payment under the proposed IPF prospective payment system follows.

Example: Jane Doe, a 78-year-old female, is admitted to a psychiatric unit within the Get Well General Hospital located in Richmond, Virginia. Ms. Doe presents with signs and symptoms indicating a primary diagnosis of Major Depressive Disorder (ICD–296.33, DRG–430). Her medical history includes Uncontrolled Type 1 Diabetes with Ophthalmic manifestations (ICD–250.53) and Chronic Renal Failure (ICD–585). Ms. Doe remains in the hospital for 5 days.

TABLE 7.—EXAMPLE OF PROPOSED PAYMENT

Steps To Determine the Proposed Per Diem Payment		
Federal Base Prospective Payment Rate:		
Calculate Wage Adjusted Federal Base Rate		$530
Calculate the labor portion of the Federal base rate (.72828 × $530)		386
Apply wage index factor from Addendum B1 for Richmond Virginia (0.9477 × $386)	$366	
Calculate the non-labor of the Federal base rate: (0.27172 × $530)	$144	
Calculate total wage-adjusted Federal base rate: ($366 + $144)	$510	
Apply Facility Level Adjusters:		
Teaching adjustment (not applicable)		
Rural adjustment (not applicable)		
Apply Patient Level Adjusters:		
DRG adjustment for DRG 430	1.00	
Age adjustment (over 65)	1.13	
Comorbidity adjusters:		
Diabetes	1.11	
Chronic renal failure	1.12	
Total prospective payment adjustment factor: (1.00 × 1.13 × 1.11 × 1.12):	1.405	
Calculate Wage Adjustment and Prospective Payment System Adjusted Federal Per Diem: ($510 × 1.405)		716
Apply Variable Per Diem Adjustments:		
Day 1: (1.26 × $716)	$902	
Days 2 to 4: (1.12 × $716 x 3)	$2,406	
Day 5: (1.05 × $716)	$752	
The Total Proposed Prospective Payment System Payment for Jane Doe's IPF Stay	$4,060	

IV. Implementation of the Proposed IPF Prospective Payment System

We are proposing that payment to an IPF would convert to the IPF prospective payment system at the beginning of its first cost reporting period beginning on or after April 1, 2004.

A. Proposed Transition

We are proposing a 3-year transition to fully implement the IPF prospective payment system. During that time, we propose to use two payment percentages to determine an IPF's total payment under the proposed IPF prospective payment system. In addition, during the proposed transition, IPFs would receive a blended payment of the Federal per diem payment amount and a hospital-specific amount based on the IPF's TEFRA payment. As noted above, we are proposing that the system would become effective for cost reporting periods beginning on or after April 1, 2004.

As discussed in section V. of this proposed rule, we are proposing that the first year of the transition would continue for 15 months, thereby, moving the IPF prospective payment system to a July 1 update cycle. As a result, the first year of the transition period would be for cost reporting periods beginning on or after April 1, 2004 and before July 1, 2005. The total payment for this period would consist of 75 percent based on the TEFRA payment system and 25 percent based on the proposed IPF prospective payment amount. We are also proposing that for cost reporting periods beginning on or after July 1, 2005 and before July 1, 2006, the total payment would consist of 50 percent based on the TEFRA payment system, and 50 percent based on the proposed IPF prospective payment amount. In addition, we are also proposing that for cost reporting periods beginning on or after July 1, 2006 and before July 1, 2007, the total payment would consist of 25 percent based on the TEFRA payment system and 75 percent based on the proposed IPF prospective payment amount. Thus, we are proposing that payments to IPFs would be at 100 percent of the proposed IPF prospective payment amount for cost reporting periods beginning on or after July 1, 2007. Given the complex and redistributive nature of the

proposed prospective payment system and in order to thoroughly review the anticipated volume of comments we expect to receive on this proposed rule, it may ultimately be necessary to delay implementation beyond April 2004. In addition, it may be helpful to increase the transition period because a longer transition period would allow us to adjust the payment system if necessary before the full implementation of the IPF prospective payment system. Also, a longer transition period may be appropriate if the research designed to refine the payment system takes longer than we currently anticipate. We specifically request public comments on these implementation issues.

In order to mitigate the impacts of the prospective payment system, we are not proposing to allow an IPF to elect to be paid based on 100 percent of the Federal per diem payment amount in lieu of the blended methodology. In this way, the transition will allow IPFs time to become familiar with the prospective payment system and gradually move to the full Federal per diem amount over a 3-year period.

B. New Providers

We believe that we need to propose a definition of a new IPF because new IPFs will not participate in the 3-year transition from cost-based reimbursement to a prospective payment system (section IV.A. of this proposed rule). The transition period described is intended to provide currently existing IPFs time to adjust to payment under the new system. A new IPF would not have received payment under TEFRA for the delivery of IPF services before the effective date of the IPF prospective payment system. We do not believe that new IPFs require a transition period in order to make adjustments to their operating and capital financing, as will IPFs that have been paid under TEFRA, or need to otherwise integrate the effects of changing from one payment system to another payment system.

For purposes of Medicare payment under the proposed IPF prospective payment system, we are defining a new IPF as a provider of inpatient psychiatric hospital services that otherwise meets the qualifying criteria for IPFs, set forth in § 412.22, § 412.23, § 412.25, and § 412.27 under present or previous ownership (or both), and its first cost reporting period as an IPF begins on or after April 1, 2004, the proposed implementation date of the IPF prospective payment system.

C. Claims Processing

With respect to the proposed IPF prospective payment system, we are proposing to continue processing claims in a manner similar to the current claims processing system. Hospitals would continue to report diagnostic information on the claim form and the Medicare fiscal intermediaries would continue to enter clinical and demographic information in their claims processing systems for review by the Medicare Code Editor (MCE). The MCE reviews claims to determine if they are improperly coded (for example, diagnosis inappropriate to sex of the patient) or require more information (imprecise coding) in order to be processed. After screening, each claim would be classified into the appropriate DRG by a software program called the "GROUPER." If the "GROUPER" assigns a DRG that is not recognized under the proposed IPF prospective payment system, the claim would be returned to the IPF. If the "GROUPER" assigns a DRG recognized by the system, a "PRICER" program would calculate the Federal per diem payment amount, including the DRG adjustment and other patient-level and facility-level adjustments appropriate to the claim.

D. Periodic Interim Payments (PIP)

Under the TEFRA payment system—(1) a psychiatric hospital may be paid using the PIP method as specified in § 413.64(h); (2) psychiatric units are paid under the PIP method if the hospital of which they are a part is paid as specified in § 412.116(b); and (3) an IPF may be eligible to receive accelerated payments as specified in § 413.64(g) or for psychiatric units specified in § 412.116(f). We are proposing in § 412.432 to continue to allow for PIP and accelerated payment methods under the proposed IPF prospective payment system.

In addition, we are proposing that an IPF receiving prospective payments, whether or not it received a PIP under cost reimbursement, may receive a PIP if it meets the requirements specified in proposed § 412.432(b)(1) and receives approval by its intermediary. If an intermediary determines that an IPF, which received a PIP under cost reimbursement, is no longer entitled to receive a PIP, it will remove the IPF from the PIP method. As specified in proposed § 412.432(b)(1), intermediary approval of a PIP is conditioned upon the intermediary's best judgment as to whether payment can be made under the PIP method without undue risk of its resulting in an overpayment to the provider.

Excluded from PIP amounts are outlier payments that are paid upon the submission of a discharge bill. Also, Part A costs that are not paid under the proposed IPF prospective payment system, including Medicare bad debts and costs of an approved education program, and other costs paid outside the IPF prospective payment system, will be subject to the interim payment provisions as specified in § 413.64.

Under the proposed prospective payment system, if an IPF is not paid under the PIP method it may qualify to receive an accelerated payment. As specified in proposed § 412.432(e), the IPF must be experiencing financial difficulties due to a delay by the intermediary in making payment to the IPF, or there is a temporary delay in the IPFs preparation and submittal of bills to the intermediary beyond its normal billing cycle, because of an exceptional situation. A request for an accelerated payment must be made by the IPF and approved by the intermediary and us. The amount of an accelerated payment would be computed as a percentage of the net payment for unbilled or unpaid covered services. Recoupment of an accelerated payment would be made as bills are processed or by direct payment by the IPF.

E. Limitation on Beneficiaries Charges

In accordance with § 409.82 and § 409.83 and consistent with other established prospective payment systems policies, we are proposing in § 412.404(c) that an IPF may not charge a beneficiary for any service for which payment is made by Medicare. This policy will apply, even if the IPF's costs of furnishing services to that beneficiary are greater than the amount the IPF would be paid under the proposed IPF prospective payment system. In addition, we are proposing that an IPF receiving a prospective payment for a covered hospital stay (that is, a stay that includes at least one covered day) may charge the Medicare beneficiary or other person only for the applicable deductible and coinsurance amounts as specified in § 409.82, § 409.83, § 409.87, and § 489.20.

V. Future Updates

A. Proposed Annual Update Strategy

Section 124 of Pub. L. 106–113 does not specify an update strategy for the proposed IPF prospective payment system and is broadly written to give the Secretary a tremendous amount of discretion in proposing an update methodology. Therefore, we reviewed the update approach used in other hospital prospective payment systems

(specifically, the IRF and LTCH prospective payment system methodologies). As a result of this analysis, we are proposing the following strategy for updating the IPF prospective payment system: (1) Use the FY 2000 bills and cost report data, and the most current ICD–9–CM codes and DRGs, when we issue the IPF prospective payment system final rule; (2) implement the system effective for cost reporting periods beginning on or after April 1, 2004; and (3) update the Federal per diem base rate on July 1, 2005, since a July 1 update coincides with more hospital cost reporting cycles and would be administratively easier to manage. This means that the first year of the proposed Federal per diem base rate would be the 15-month period April 1, 2004 to June 30, 2005.

We believe it is important to delay updating the adjustment factors until the IPF data includes as much information as possible regarding the patient-level characteristics of the population that each IPF serves. For this reason, we do not intend to update the regression and recalculate the proposed Federal per diem base rate until we have analyzed 1 complete year of data under the IPF prospective payment system, that is, no earlier than July 1, 2007. We note that the ability of a regression analysis to appropriately identify variation in costs is dependent upon continued submission of claims and cost reports that are as accurate and complete as possible. Until that analysis is complete, we are proposing to publish a notice each spring that would do the following:

- Update the Federal per diem base rate using the excluded hospital with capital market basket increase in order to reflect the price of goods and services used by IPFs.
- Apply the most current hospital wage index with an adjustment factor to the Federal per diem base rate to ensure that aggregate payments to IPFs are not affected by an updated wage index.
- Update the fixed dollar loss threshold to maintain an outlier percentage that is 2 percent of total estimated IPF payments.
- Describe the impact of the ICD–9–CM coding changes discussed in the hospital inpatient prospective payment system proposed rule that would effect the proposed IPF prospective payment system.

In the future, we may propose an update methodology for the IPF prospective payment system that would be based on the excluded hospital with capital market basket index along with other appropriate adjustment factors relevant to psychiatric service delivery such as productivity, intensity, new technology, and changes in practice patterns.

B. Update of the ICD Codes and DRGs

In the health care industry, annual changes to the ICD–9–CM codes and the DRGs used in the hospital inpatient prospective payment system are effective for discharges occurring on or after October 1 of each year. Changes in ICD–9–CM codes and composition of the DRGs are presented in the hospital inpatient prospective payment system proposed rule published in the **Federal Register** in the spring of each year. We are proposing that through the hospital inpatient prospective payment system proposed rule, we would notify IPFs of any revised ICD–9–CM codes or proposed DRG modifications that would become effective on October 1 of that year if finalized. As noted earlier, all health care providers are required to used the updated ICD–9–CM codes on or after October 1 of each year.

Under the IPF prospective payment system, we are proposing to establish a base rate and provide for adjustments to the rate, including adjustments to reflect the DRG assigned to the patient's principal diagnosis and the comorbidity category for certain secondary or tertiary diagnoses. These adjustments would be driven by the ICD–9–CM codes provided on the IPF's claims.

For this reason, we urge IPFs to review the hospital inpatient prospective payment proposed rule to determine if any changes have been made to the ICD–9–CM codes or are being proposed in the composition of the 15 DRGs we are proposing to recognize under the IPF prospective payment system. In the event that occurs, we would explain in the hospital inpatient prospective payment system rules how the change would be handled under the IPF prospective payment system for claims on or after October 1 of each year.

C. Future Refinements

1. RTI International®

We have contracted with RTI International® to examine the extent to which modes of practice and staffing patterns explain the per diem cost differences among the various types of IPF facilities (private psychiatric hospitals, psychiatric units, and government hospitals). In addition, RTI International® will analyze the extent to which the different types of facilities treat different types of patients. We anticipate that this study may assist us in proposing refinements to the prospective payment system in the future.

Approximately two-thirds of the direct expense for providing inpatient psychiatric services is captured in the routine cost category of the Medicare cost report. After the allocation of overhead, this category represents 88 percent of the cost presently being reimbursed. The RTI International® project will collect patient-level and facility-level data from a small sample of psychiatric hospitals and psychiatric units nationwide. These data will provide information on the extent to which variation in the per diem cost across facilities can be explained by the differences in the mix of services and staffing that characterize their modes of practice. RTI International® will also analyze the links among costs, practice mode, and patient characteristics.

a. Mode of Practice

The mode of practice can be defined by treatment modality (services delivered) and by staffing levels. To analyze the mode of practice, RTI International® first developed a typology of therapeutic services (activities) provided in inpatient settings. The services range from labor-intensive activities (one-on-one intake assessments and evaluations), to less labor-intensive activities (therapies). In addition, RTI International® developed a classification of psychiatric labor resources that could be used to depict different staffing models. The RTI International® used these typologies to organize the collection of service and staffing data within the sampled psychiatric facilities. The RTI International® study hypothesized that lower cost facilities use lower cost practice modalities that can result from either the use of lower cost labor or lower cost treatment methods.

b. Patient Characteristics

To link the mode of practice with patient characteristics, modality must be collected at the patient level. Resource usage can be defined by estimating the type and cost of staff involved with providing patient care. This can be accomplished by linking each patient's activity with the time spent by each staffing type for an activity with the average wage rate for that staff. Adding the cost of each activity over a 24-hour period determines the per diem resource cost for a patient. These per diem costs can then be compared and linked with patient characteristics in order to explain resource use.

The RTI International® used patient characteristics that were available from claims data (age and diagnoses).

However, other variables are not collected on claims (Global Assessment of Functioning scores and functional deficits, such as, activities of daily living). This limited set of candidate variables was selected with input from RTI International's® technical evaluation panel. We will continue to investigate the functional status, and we are soliciting comments specifically on this issue.

c. Analysis

Using a cluster analysis technique, RTI International® will attempt to develop an index that could be highly predictive of resource use among the resulting psychiatric patient classification categories.

The RTI International® is also investigating whether a more refined payment model is possible. Such a model might reduce the need for a sophisticated psychiatric patient classification system. Currently, data are being collected for a 7-day period to analyze the change in resources over time. This study will allow a test of a hypothesis advocated by Frank, R.G., and Lave, HR. (1986). Journal of Human Resources, 21(3): (321–337). They suggested that when using a per diem rate that declines with the length of stay, the rate would be higher at the beginning of the stay to cover the higher costs associated with admission, and decline over time as treatment achieved stabilization of the patient's condition.

2. University of Michigan Research

We are also currently contracting with the University of Michigan's Public Health Institute to conduct research to assist us in developing a patient classification system based on a standard assessment tool. We believe that additional patient level information such as patient functioning and patient resource use is necessary to augment our administrative data and would result in a more equitable and accurate payment system. We are in the early stages of developing a preliminary tool, the Case Mix Assessment Tool (CMAT) instrument. We have attached a draft copy to this proposed rule for review and comment (*see* Addendum C.).

We believe that this assessment tool would collect minimal but necessary information. The draft instrument contains 36 questions. Each item in the draft assessment tool resulted from the University of Michigan's evaluation of existing instruments and clinical scales. It reflects the input and feedback to the contractor of both the technical evaluation panel and mental health associations as well as related psychological and psychiatric industry groups. This input included mental health professionals with experience in both payment methodology and assessment instruments. The tool would collect information on the patient characteristics, clinical characteristics, functional status, services, and treatments.

The information that would be collected in the CMAT is available in the patient's medical record and treatment plans. We do not believe that completing the assessment tool would require additional data collection on the part of the clinical staff. We have assumed that in addition to the medical record, a team of clinical staff provides services and treatment to these patients, including but not limited to nurses, psychiatric nurses, physicians, clinical psychologists, social workers, psychiatrists, and rehabilitation, physical, and speech therapists. To reduce both the complexity of the information collection process and the burden, the instrument would be completed at discharge. We are requesting comments on the availability of the information to complete this instrument.

In order to collect information in the most efficient manner possible, the CMAT would be automated. This approach would shorten the time to complete the instrument and simplify the input process. Upon completion, the instrument would be transmitted to us. We would develop and provide the software to perform the transmission to IPFs at no cost. In addition, we would provide training and manuals to facilitate both the transmission process and the completion of the assessment tool.

Finally, once the instrument has been pilot-tested and the instrument reflects changes resulting from this testing, we would pursue clearance by the Office of Management and Budget (OMB). A detailed OMB information collection package will be prepared and available for public comment. The package will include delineation of the technical evaluation panel membership, comments on specific items in the instrument, justifications for including selected questions (for example, activities of daily living), and the scaling for individual items. In addition, the OMB package will contain manuals and training material that support the instrument. Any comments on this preliminary draft instrument will assist us in developing a potential instrument.

3. Case-Mix Tool

The Ashcraft study used a patient assessment instrument to develop additional variables beyond psychiatric diagnosis to predict differences in the length of stay. The study led to a further effort (Fries, *et al.*, 1990), which resulted in the development of a classification system for long stay Veterans Administration's psychiatric patients (length of stay greater than 100 days). This research was the first to consider which characteristics could explain measured resource use for chronic psychiatric residents. Those characteristics included a broad assessment of patients' medical conditions, functional status, mental deficits, treatments, as well as the direct measurement of daily staff time spent with each patient. Using only six patient categories developed from these variables, the resulting long-stay classification system (PPCs) explained 11.4 percent of the variability in per diem resource use. While this number seems low, the Ashcraft and Fries Veterans Administration's studies were the first to offer a patient assessment instrument approach for the construction of case mix measures potentially useful in an IPF prospective payment system.

VI. Provisions of the Proposed Rule

We are proposing to make a number of revisions to the regulations in order to implement the proposed prospective payment system for IPFs. Specifically, we are proposing to make conforming changes in 42 CFR parts 412 and 413. We would establish a new subpart N in part 412, "Prospective Payment System for Hospital Inpatient Services of Psychiatric Facilities." This subpart would implement section 124 of the BBRA, which requires the implementation of a per diem prospective payment system for IPFs. This subpart would set forth the framework for the proposed IPF prospective payment system, including the methodology used for the development of the payment rates and related rules. These proposed revisions and others are discussed in detail below.

Section 412.1 Scope of Part

We propose to revise § 412.1 by redesignating paragraphs (a)(2) and (a)(3) as paragraphs (a)(3) and (a)(4).

We propose to add a new paragraph (a)(2) that would specify that this part implements section 124 of Pub. L. 106–113 by establishing a per diem based prospective payment system for inpatient operating and capital costs of hospital inpatient services furnished to Medicare beneficiaries by a psychiatric facility that meets the conditions of subpart N.

We propose to revise § 412.1 by redesignating paragraphs (b)(12) and (b)(13) as paragraphs (b)(13) and (b)(14).

We propose to add a new paragraph (b)(12) that would summarize the content of the new subpart N which sets forth the general methodology for paying operating and capital costs for inpatient psychiatric facilities effective with cost reporting periods beginning on or after April 1, 2004.

Section 412.20 Hospital Services Subject to the Prospective Payment Systems

We propose to amend § 412.20(a) by adding a reference to IPFs.

We propose to revise § 412.20 by redesignating paragraphs (b), (c), and (d), as paragraphs (c), (d), and (e).

We propose to add a new paragraph (b) that would indicate that effective for cost reporting periods beginning on or after April 1, 2004, covered hospital inpatient services furnished by a psychiatric facility as specified in § 412.404 of subpart N are paid under the prospective payment system.

Section 412.22 Excluded Hospitals and Hospital Units: General Rules

We propose to amend § 412.22(b) by revising paragraph (b) to state that except for those hospitals specified in paragraph (c) of this section, and § 412.20(b), (c), and (d), all excluded hospitals (and excluded hospital units, as described in § 412.23 through § 412.29) are reimbursed under the cost reimbursement rules set forth in part 413 of this chapter, and are subject to the ceiling on the rate of hospital cost increases as specified in § 413.40.

Section 412.23 Excluded Hospitals: Classifications

We propose to revise § 412.23 by redesignating paragraphs (a)(1) and (a)(2) as paragraphs (a)(2) and (a)(3).

We propose to add a new paragraph (a)(1) that would specify the requirements a psychiatric hospital must meet in order to be excluded from reimbursement under the prospective payment system as specified in § 412.1(a)(1) and to be paid under the IPF prospective payment system as specified in § 412.1(a)(2).

Section 412.25 Excluded Hospital Units: Common Requirements

We propose to amend § 412.25(a) by adding a reference to § 412.1(a)(2).

Section 412.27 Excluded Psychiatric Units: Additional Requirements

We propose to amend the introductory text of § 412.27 by adding the reference to § 412.1(a)(1) and (a)(2).

We propose to amend § 412.27(a) by removing the words the "Third Edition," and adding in its place, "Fourth Edition, Text Revision."

Section 412.116 Method of Payment

We propose to revise § 412.116 by redesignating paragraphs (a)(3) and (a)(4) as paragraphs (a)(4) and (a)(5).

We propose to add a new paragraph (a)(3) that would specify the cost reporting period to which the proposed IPF prospective payment system applies and how payments for inpatient psychiatric services are made to a qualified IPF.

Subpart N—Prospective Payment System for Hospital Inpatient Services of Psychiatric Facilities

We propose to add a new subpart N as follows:

Section 412.400 Basis and Scope of Subpart

We are proposing to add a new section § 412.400. In § 412.400(a), we would provide the requirements for the implementation of a prospective payment system for IPFs.

In proposed § 412.400(b), we would specify that this subpart sets forth the framework for the prospective payment system, including the methodology used for the development of payment rates and associated adjustments, the application of a transition period, and the related rules for IPFs for cost reporting periods beginning on or after April 1, 2004.

Section 412.402 Definitions

In § 412.402, we are proposing to define the following terms for purposes of this new subpart:

- *Comorbidity.*
- *Fixed dollar loss threshold.*
- *Inpatient psychiatric facilities.*
- *Interrupted stay.*
- *Outlier payment.*
- *Per diem payment amount.*
- *Principal diagnosis.*
- *Rural area.*
- *Urban area.*

Section 412.404 Conditions for Payment Under the Prospective Payment System for Hospital Inpatient Services of Psychiatric Facilities

In proposed § 412.404(a), we would specify that IPFs must meet the following general requirements to receive payment under the IPF prospective payment system:

- The IPF must meet the conditions as specified in this subpart.
- If the IPF fails to comply fully with the provisions of this part then the following are applicable—

++ Withhold (in full or in part) or reduce payment to the IPF until the facility provides adequate assurances of compliance; or

++ Classify the IPF as an hospital subject to the hospital inpatient prospective payment system.

In proposed paragraph (b), we would specify that, subject to the special payment provisions of § 412.22(c), an inpatient psychiatric facility must meet the general criteria set forth in § 412.22. For exclusion from the hospital inpatient prospective payment system as specified in § 412.1(a)(1), a psychiatric hospital must meet the criteria set forth in § 412.23(a) and psychiatric units must meet the criteria set forth in § 412.25 and § 412.27.

In proposed paragraph (c), we would specify the prohibited and permitted charges that may be imposed on Medicare beneficiaries.

In proposed paragraph (c)(1), we would specify that an IPF may not charge the beneficiary for any services which payment is made by Medicare, even if the IPFs costs are greater than the amount the facility is paid under the IPF prospective payment system.

In proposed paragraph (c)(2), we would specify that an IPF receiving payment for a covered stay may charge the Medicare beneficiary or other person for only the applicable deductible and coinsurance amounts under § 409.82, § 409.83, and § 409.87.

In proposed paragraph (d), we would specify the following provisions for furnishing IPF services directly or under arrangement:

- Applicable payments made under the IPF prospective payment system are considered payment in full for all hospital inpatient services (as defined in § 409.10) other than physicians' services to individual patients (as specified in § 415.102(a)) that are reimbursed on a fee schedule basis.
- Hospital inpatient services do not include physician, physician assistant, nurse practitioner, clinical nurse specialist, certified nurse midwives, qualified psychologist, and certified registered nurse anesthetist services.
- Payment is not made to a provider or supplier other than the IPF, except for services provided by a physician, physician assistant, nurse practitioner, clinical nurse specialist, certified nurse midwives, qualified psychologist, and certified registered nurse anesthetist.
- The IPF must furnish all necessary covered services to the Medicare beneficiary directly or under arrangement (as defined in § 409.3).

In proposed paragraph (e), we would specify that IPFs must meet the recordkeeping and cost reporting

requirements of § 412.27(c), § 413.20, and § 413.24.

Section 412.422 Basis of Payment

In proposed § 412.422(a), we would specify that under the prospective payment system, IPFs would receive a predetermined per diem amount, adjusted for patient characteristics and facility characteristics, for inpatient services furnished to Medicare beneficiaries. In addition, we would specify that during the transition period, payment would be based on a blend of the Federal per diem payment amount and the facility-specific payment rate.

In proposed § 412.422(b), we would specify that payments made under the prospective payment system represent payment in full for inpatient operating and capital-related costs associated with services furnished in an IPF but not for the cost of an approved medical education program described in § 413.85 and § 413.86 and for bad debts of Medicare beneficiaries as specified in § 413.80.

Section 412.424 Methodology for Calculating the Federal Per Diem Payment Rate

In proposed § 412.424, we would specify the methodology for calculating the Federal per diem payment rate for IPFs.

In proposed paragraph (a), we would specify the data sources used to calculate the prospective payment rate.

In proposed paragraph (b), we would specify that the methodology used for determining the Federal per diem base rate would include the following:

- The updated average per diem amount.
- The budget-neutrality adjustment factor.

In proposed paragraph (c), we would specify that the Federal per diem payment amount for IPFs would be the product of the Federal per diem base rate, the facility-level adjustments, and the patient-level adjustments applicable to the case as described below:

- Facility-level adjustments include:
- Adjustment for wages
- Location in rural areas
- Teaching status
- Patient-level adjustments include:
- Age
- Principal diagnosis
- Comorbodities
- Variable per diem adjustments
- Adjustment for high-cost outlier cases

In proposed paragraph (d), we would specify the special payment provisions for interrupted stays.

Section 412.426 Transition Period

In proposed § 412.426(a), we would specify the duration of the transition period to the IPF prospective payment system. In addition, we would specify that IPFs would receive a payment that is a blend of the Federal per diem payment amount and the facility-specific payment amount the IPF would receive under the TEFRA payment methodology.

In proposed paragraph (b), we would specify how the facility-specific payment amount is calculated.

In proposed paragraph (c), we would specify that new IPFs, that is, facilities that under present or previous ownership, or both, have its first cost reporting period as an IPF beginning on or after April 1, 2004, are paid the full Federal per diem rate.

Section 412.428 Publication of the Federal Per Diem Payment Rates

In proposed § 412.428, we would specify how we plan to publish information each year in the **Federal Register** to update the IPF prospective payment system.

Section 412.432 Method of Payment Under the Inpatient Psychiatric Facility Prospective Payment System

In proposed § 412.432, we would specify the following method of payment used under the IPF prospective payment system:

- General rules for receiving payment.
- Periodic interim payments including—
  - Criteria for receiving periodic interim payments
  - Frequency of payments
  - Termination of periodic interim payments
- Interim payment for Medicare bad debts and for costs not paid under the prospective payment system and other costs paid outside the prospective payment system.
- Outlier payments.
- Accelerated payments including—
  - General rule for requesting accelerated payments
  - Approval of accelerated payments
  - Amount of the accelerated payment
  - Recovery of the accelerated payment

Section 413.1 Introduction

We propose to amend § 413.1(d)(2)(ii) by removing the words "psychiatric hospitals (as well as separate psychiatric units (distinct parts) of short-term general hospitals)."

We propose to revise § 413.1 by redesignating paragraphs (d)(2)(iv), (d)(2)(v), (d)(2)(vi), and (d)(2)(vii) as paragraphs (d)(2)(vi), (d)(2)(vii), (d)(2)(viii), and (d)(2)(ix).

We propose to add a new paragraph (iv) that would specify that for cost reporting periods beginning before April 1, 2004, payment to psychiatric hospitals (as well as separate psychiatric units of short-term general hospitals) that are excluded under subpart B of part 412 of this chapter from the prospective payment system is on a reasonable cost basis, subject to the provisions of § 413.40.

We propose to add a new paragraph (v) that would specify that for cost reporting periods beginning on or after April 1, 2004, payment to psychiatric hospitals (as well as separate psychiatric units of short-term general hospitals) that meet the conditions of § 412.404 of this chapter is based on prospectively determined rates under subpart N of part 412.

Section 413.40 Ceiling on the Rate of Increase in Hospital Costs

Section 413.40(a)(2)(i) specifies the types of facilities to which the ceiling on the rate of increase in hospital inpatient costs is not applicable.

We propose to revise § 413.40(a)(2)(i) by redesignating paragraphs (a)(2)(i)(C) and (a)(2)(i)(D) as paragraphs (a)(2)(i)(D) and (a)(2)(i)(E).

We propose to add a new paragraph (C) to § 413.40 to clarify that § 413.40 is not applicable to psychiatric hospitals and psychiatric units under subpart N of part 412 of this chapter for cost reporting periods beginning on or after April 1, 2004.

We propose to revise paragraph (a)(2)(ii)(B) to specify the facilities to which the ceiling applies for cost reporting periods beginning on or after October 1, 1983 through March 31, 2004.

We propose to revise paragraph (a)(2)(iii) by redesignating paragraphs (a)(2)(iii) and (a)(2)(iv) as paragraphs (a)(2)(iv) and (a)(2)(v).

We propose to add a new paragraph (a)(2)(iii) that would specify psychiatric facilities are excluded from the prospective payment system as specified in § 412.1(a)(1) and paid under § 412.1(a)(2) for cost reporting periods beginning on or after April 1, 2004.

Section 413.64 Payment to Providers: Special Rules

We propose to amend § 413.64(h)(2)(i) by adding a reference to hospitals paid under the IPF prospective payment system.

Section 424.14 Requirements for Inpatient Services of Psychiatric Hospitals

We propose to amend § 424.14 by adding a new paragraph (c)(3) to state that for recertification a physician must indicate that the patient continues to need, on a daily basis, inpatient psychiatric care (furnished directly by or requiring the supervision of inpatient psychiatric facility personnel) or other professional services that, as a practical matter, can be provided only on a inpatient basis.

We propose to amend § 424.14(d)(2) by removing the word "18th day of hospitalization" and replacing it with "10th day of hospitalization."

VII. Collection of Information Requirements

These regulations do not impose any new information collection requirements. The burden of the requirements in § 412.404(e), reporting and recordkeeping requirements, are captured in the burden for the cross-referenced § 412.27(c), § 413.20, and § 413.24 under OMB approval numbers 0938–0301, 0938–0500, 0938–0358, and 0938–0600.

VIII. Response to Comments

Because of the large number of items of correspondence we normally receive on **Federal Register** documents published for comment, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this proposed rule, and, if we proceed with a subsequent document, we will respond to the major comments in the preamble to that document.

IX. Regulatory Impact Statement

A. Overall Impact

We have examined the impact of this proposed rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 16, 1980, Pub. L. 96–354), section 1102(b) of the Act, the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4), and Executive Order 13132).

Executive Order 12866 (as amended by Executive Order 13258, which merely 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). Based on analysis of the aggregate dollar impacts for each of the different facility types, we have determined that the re-distributive impact among facility types is $78 million. In addition, our analysis showed that a payment reduction of $40 million would occur for psychiatric units and a payment increase of $10 million would occur for-profit hospitals, $26 million for government hospitals, and $2 million for non-profit hospitals. Therefore, we have determined that this proposed rule would not be a major rule within the meaning of Executive Order 12866 because the redistributive effects do not constitute a shift of $100 million in any 1 year. In addition, because the proposed IPF prospective payment system must be budget neutral in accordance with section 124(a)(1) of Pub. L. 106–113, we estimate that there will be no budgetary impact for the Medicare program (section IX.B.6. of this proposed rule).

The RFA requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and government agencies. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $29 million or less in any 1 year. Medicare fiscal intermediaries are not considered to be small entities. Individuals and States are not included in the definition of a small entity.

HHS considers that a substantial number of entities are affected if the rule impacts more than 5 percent of the total number of small entities as it does in this rule. We included all freestanding psychiatric hospitals (88 are nonprofit hospitals) in the analysis since their total revenues do not exceed the $29 million threshold. We also included small psychiatric units as well as psychiatric units of small hospitals, that is, fewer than 100 beds. We did not include psychiatric units within larger hospitals in the analysis because we believe this proposed rule would not significantly impact total revenues of the entire hospital that supports the unit. We have provided the following RFA analysis in section B, to emphasize that although the proposed rule would impact a substantial number of IPFs that were identified as small entities, we do not believe it would have a significant economic impact. Based on the analysis of the 917 psychiatric facilities that were classified as small entities by the definitions described above, we estimate the combined impact of the proposed rule would be a 1-percent increase in payments relative to their payments under TEFRA. This estimated impact does not meet the threshold established by HHS to be considered a significant impact. Nonetheless, we have prepared the following analysis to describe the impact of the proposed rule.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 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 an MSA and has fewer than 100 beds. We have determined that this proposed rule would have a substantial impact on hospitals classified as located in rural areas. As discussed earlier in this preamble, we are proposing to adjust payments by 16 percent for IPFs located in rural areas. In addition, we are proposing a 3-year transition to the new system to allow IPFs an opportunity to adjust to the new system. Therefore, the impacts shown in Table 8 below reflect the adjustments that are designed to minimize or eliminate the negative impact that the proposed IPF prospective payment may otherwise have on small rural IPFs.

Section 202 of the UMRA also requires that agencies assess anticipated costs and benefits before issuing any proposed rule that may result in expenditures in any 1 year by State, local, or tribal governments, in the aggregate, or by the private sector, of $110 million or more. This proposed rule does 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 1 year.

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 proposed rule under the criteria set forth in Executive Order 13132 and have determined that this proposed rule will not have any negative impact on the rights, roles, and responsibilities of State, local, or tribal governments or preempt State law.

B. Anticipated Effects

Below, we discuss the impact of this proposed rule on the Federal Medicare budget and on IPFs.

1. Budgetary Impact

Section 124(a)(1) of Pub. L. 106–113 requires us to set the payment rates contained in this proposed rule to ensure that total payments under the IPF prospective payment system are projected to equal the amount that would have been paid if this proposed prospective payment system had not been implemented. As a result of this analysis, which is discussed in section III of this proposed rule, we are proposing a budget-neutrality adjustment to the Federal per diem base rate. Thus, there will be no budgetary impact to the Medicare program by implementation of the proposed IPF prospective payment system.

2. Impacts on Providers

To understand the impact of the proposed IPF prospective payment system on providers, it is necessary to estimate payments that would be made under the current TEFRA payment methodology (current payments) and payments under the proposed IPF prospective payment system. The IPFs were grouped into the categories listed below based on characteristics provided in the Online Survey and Certification and Reporting (OSCAR) file and the 1999 cost report data from HCRIS:

- Facility Type
- Location
- Teaching Status
- Census Region
- Size

To estimate the impacts among the various categories of IPFs, we had to compare estimated future payments that would have been made under the TEFRA payment methodology to estimated payments under the proposed IPF prospective payment system. We estimated the impacts using the same set of providers (1,975 IPFs) that was used for the regression analysis to calculate the budget-neutral Federal per diem base rate, and to determine the appropriateness of various adjustments to the Federal per diem base rate. A detailed explanation of the methods we used to simulate TEFRA payments and estimated payments under the proposed IPF prospective payment system is provided in section III.C. of this proposed rule.

The impacts reflect the estimated "losses" or "gains" among the various classifications of IPF providers for the first year of the proposed IPF prospective payment system. Proposed prospective payments were based on the proposed budget-neutral Federal per diem base rate of $530 adjusted by the IPFs' estimated patient-level, facility-level adjustments, and simulated outlier amounts. This payment was compared to the IPF's payments based on its cost from the cost report inflated to the midpoint of the effective period (April 1, 2004 through June 30, 2005) and subject to the updated per discharge target amount.

Table 8 below illustrates the aggregate impact of the proposed IPF prospective payment system on various classifications of IPFs. The first column identifies the type of IPF, the second column indicates the number of IPFs for each type of IPF, and the third column indicates the ratio of the proposed IPF prospective payment system payments to the current TEFRA payments in the first year of the transition.

TABLE 8.—AGGREGATE IMPACT

Facility by type	Number of facilities	Ratio of proposed prospective payment amount to TEFRA payment with transition
All Facilities	1975	1.00
By Type of Ownership:		
Psychiatric Hospitals		
Government	181	1.14
Non-profit	88	1.01
For-profit	236	1.02
Psychiatric Units	1470	0.99
All Facilities	1975	1.00
Rural	445	0.99
Urban	1530	1.00
By Urban or Rural Classification:		
Urban by Facility Type		
Psychiatric Hospitals:		
Government	138	1.14
Non-profit	80	1.01
For-profit	221	1.02
Psychiatric Units	1091	0.99
Rural by Facility Type:		
Psychiatric Hospitals:		
Government	43	1.14
Non-profit	8	0.99
For-profit	15	1.02
Psychiatric Units	379	0.98
By Teaching Status:		
Non-teaching	1676	0.99
Less than 10% interns and residents to beds	163	1.02
10% to 30% interns and residents to beds	80	1.02
More than 30% interns and residents to beds	56	1.03
By Region:		
New England	128	0.99
Mid-Atlantic	316	1.04

TABLE 8.—AGGREGATE IMPACT—Continued

Facility by type	Number of facilities	Ratio of proposed prospective payment amount to TEFRA payment with transition
South Atlantic	283	1.00
East North Central	369	0.98
East South Central	161	0.99
West North Central	174	0.99
West South Central	270	0.97
Mountain	88	1.00
Pacific	181	1.00
By Bed Size:		
Psychiatric Hospitals:		
Under 10 beds	2	0.99
10 to 25 beds	36	0.99
25 to 50 beds	71	1.01
50 to 100 beds	199	1.02
100 to 200 beds	127	1.05
200 to 400 beds	49	1.10
Over 400 beds	21	1.19
Psychiatric Units		
Under 10 beds	55	0.96
10 to 25 beds	749	0.97
25 to 50 beds	443	0.98
50 to 100 beds	184	1.00
100 to 200 beds	32	1.02
200 to beds 400	6	1.07
Over 400 beds	1	1.12

3. Results

We measured the impact of the proposed IPF prospective payment system by comparing proposed payments under the IPF prospective payment system relative to current TEFRA payments. This was computed as a ratio of the proposed prospective payment to the current TEFRA payment for each classification of IPF. We have prepared the following summary of the impact of the proposed IPF prospective payment system set forth in this proposed rule.

a. Facility type

We grouped the IPFs into the following four categories: (1) Psychiatric units; (2) government hospitals; (3) for-profit hospitals; and (4) non-profit hospitals. Roughly 75 percent of all IPFs are psychiatric units. The impact analysis in Table 8 indicates that under the proposed IPF prospective payment system, freestanding psychiatric hospitals would receive an increase relative to the current payment. The psychiatric units would have a proposed prospective payment to the current TEFRA payment ratio of 0.99, the government hospitals would have a proposed prospective payment to the current TEFRA payment ratio of 1.14, and the non-profit and for-profit hospitals would have a proposed prospective payment to the current TEFRA payment ratio of 1.01 and 1.02, respectively.

b. Location

Approximately 23 percent of all IPFs are located in rural areas. The impact analysis in Table 8 indicates that under the proposed IPF prospective payment system, the proposed prospective payment to the current TEFRA payment ratio would be approximately 0.99 for rural IPFs and 1.00 for urban IPFs. If we grouped all of the IPFs by facility type within urban and rural locations, the impact analysis would indicate that the estimated proposed prospective payment to current TEFRA payment ratios would be between approximately 0.98 and 1.02 for all IPFs except government hospitals. Under the proposed IPF prospective payment system, the payment ratios for rural and urban government hospitals are both estimated to be approximately 1.14.

c. Teaching Status

Using the ratio of interns and residents to the average daily census for each facility as a measure of the magnitude of the teaching status, we grouped facilities into the following four major categories: (1) non teaching; (2) less than 10 percent ratio of interns and residents to average daily census; (3) 10 to 30 percent ratio of interns and residents to average daily census; and (4) more than 30 percent of interns and residents to average daily census. Facilities that are classified with a teaching ratio greater than 0 percent would benefit under the proposed IPF prospective payment system.

d. Census Region

Under the proposed IPF prospective payment system, IPFs in the Mid-Atlantic region would receive a higher payment ratio of approximately 1.04. IPFs in other regions would receive payment ratios between approximately 0.97 and 1.00. Specifically, the South Atlantic States, the Mountain States, and the Pacific States would receive payment ratios of 1.00. The New England States, East South Central States, and the West North Central States, would receive payment ratios of approximately 0.99. The proposed IPF prospective payments would be slightly lower than 0.99 for IPFs in the West South Central and East North Central States.

e. Size

We grouped the IPFs into 7 categories for each group of psychiatric facilities based on bed size: (1) Under 10 beds; (2) 10 to 25 beds; (3) 25 to 50 beds; (4) 50 to 100 beds; (5) 100 to 200 beds; (6) 200 to 400 beds; and (7) over 400 beds. Under the proposed IPF prospective

payment system, the payment ratios for all bed size categories would be greater than 0.96. The majority of IPFs' bed sizes were categories in which the payment ratio would be greater than 0.98. Under the proposed IPF prospective payment system, large IPFs with over 400 beds would receive the highest payment ratio (1.19 percent for psychiatric hospitals and 1.12 for psychiatric units), while psychiatric units with less than 10 beds would receive the lowest payment ratio of 0.96.

4. Effect on the Medicare Program

Based on actuarial projections resulting from our experience with other prospective payment systems, we estimate that Medicare spending (total Medicare program payments) for IPF services over the next 5 years would be as follows:

TABLE 9.—ESTIMATED PAYMENTS

Fiscal time periods	Dollars in millions
April 1, 2004 to June 30, 2005	5,311
July 1, 2005 to June 30, 2006	4,531
July 1, 2006 to June 30, 2007	4,788
July 1, 2007 to June 30, 2008	5,053
July 1, 2008 to June 30, 2009	5,328

These estimates are based on the current estimate of increases in the proposed excluded hospitals with capital market basket as follows:

- 3.3 percent for FY 2004;
- 3.1 percent for FY 2005;
- 3.0 percent for FY 2006;
- 2.9 percent for FY 2007;
- 3.0 percent for FY 2008; and
- 3.0 percent for FY 2009.

We estimate that there would be an increase in fee-for-service Medicare beneficiary enrollment as follows:

- 1.8 percent in FY 2004;
- 1.5 percent in FY 2005;
- 1.5 percent in FY 2006;
- 1.9 percent in FY 2007;
- 2.0 percent in FY 2008; and
- 1.9 percent in FY 2009.

Consistent with the statutory requirement for budget neutrality in the initial year of implementation, we intend for estimated aggregate payments under the proposed IPF prospective payment system to equal the estimated aggregate payments that would be made if the IPF prospective payment system were not implemented. Our methodology for estimating payments for purposes of the budget-neutrality calculations uses the best available data. After the proposed IPF prospective payment system is implemented, we will evaluate the accuracy of the assumptions used to compute the budget-neutrality calculation. We intend to analyze claims and cost report data from the first year of the prospective payment system to determine whether the factors used to develop the Federal per diem base rate are not significantly different from the actual results experienced in that year. We are planning to compare payments under the final Federal per diem rate (which relies on an estimate of cost-base TEFRA payments using historical data from a base year and assumptions that trend the data to the initial year of implementation) to estimated cost-based TEFRA payments based on actual data from the first year of the IPF prospective payment system. The percent difference (either positive or negative) would be applied prospectively to the established prospective payment rates to ensure the rates accurately reflect the payment levels intended by the statute. We intend to perform this analysis within the first 5 years of the implementation of the prospective payment system.

Section 124 of Pub. L. 106–113 provides the Secretary broad authority in developing the proposed IPF prospective payment system, including the authority for appropriate adjustments. In accordance with this authority, we may make a one-time prospective adjustment to the Federal per diem base rate in an effort to ensure that the best historical data available forms the foundation of the prospective payment rates in future years.

5. Effect on Beneficiaries

Under the proposed IPF prospective payment system, IPFs would receive payment based on the average resources consumed by patients for each day. We do not expect changes in the quality of care or access to services for Medicare beneficiaries under the proposed IPF prospective payment system. In fact, we believe that access to IPF services would be enhanced due to the proposed adjustment factors for comorbid conditions and the proposed outlier policy, which are intended to adequately reimburse IPFs for expensive cases. In addition, we expect that paying prospectively for IPF services will enhance the efficiency of the Medicare program.

6. Computer Hardware and Software

We do not anticipate that IPFs will incur additional systems operating costs in order to effectively participate in the proposed IPF prospective payment system. We believe that IPFs possess the computer hardware capability to handle the billing requirements under the proposed IPF prospective payment system. Our belief is based on indications that approximately 99 percent of hospital inpatient claims are submitted electronically. In addition, we are not proposing any significant changes in claims processing (*see* section IVC. of this proposed rule).

C. Alternatives Considered

We considered the following alternatives in developing the proposed IPF prospective payment system:

- One option we considered incorporated not only the patient-level and facility-level variables described previously, but also a site-of-service distinction. Under this approach, psychiatric units would have received a higher per diem payment, all other factors being equal, based on the assumption that psychiatric units on average treat a more complex and costly case-mix. A psychiatric unit adjustment to the otherwise applicable per diem payment rate would reflect the absence of a more sophisticated patient classification system specifically linked to resource use. Our analysis of the 1999 cost report and billing data used to develop this proposed rule reveals that an adjustment would have increased the otherwise applicable per diem payment to psychiatric units by approximately 33 percent.

The average 1999 inpatient psychiatric per diem cost were $615 for psychiatric units, $534 for non-profit hospitals, $448 for proprietary providers, and $378 for governmental facilities. While some of the higher than average per diem cost in psychiatric units may be due to a greater medical and surgical acuity among patients treated in psychiatric units, part of the difference is undoubtedly attributable to economy of scale inefficiencies associated with operating small units, including higher overhead expenses, and generally lower occupancy rates. A psychiatric unit site-of-service distinction in payment rates would represent a proxy adjuster in lieu of a more refined classification system. Therefore, we are concerned about applying such an adjustment to all psychiatric units regardless of cost, efficiency, or case-mix. In addition, no other Medicare prospective payment system has a distinction in payments solely based on the site of service.

We strongly believe that payments on behalf of Medicare beneficiaries should reflect the resource needs of patients, not simply where patients are treated. A higher per diem payment to psychiatric units compared to psychiatric hospitals may create powerful incentives to increase the number of psychiatric units without regard to patient need or acuity. Pending the development of a more refined facility-specific case-mix

system, we believe that the proposed payment system appropriately accommodates the higher costs of those psychiatric units with a more complex case-mix. The proposed DRG and comorbidity payment adjustments, the proposed 3-year transition period that would allow a gradual phase-in of the proposed IPF prospective payment system, and the proposed outlier payment policy would ensure that those psychiatric units with more costly, resource-intensive cases are not unfairly disadvantaged.

Although the use of a psychiatric unit adjustment in connection with the proposed IPF prospective payment system was described in our August 21, 2002 Report to the Congress as a potential payment option, as discussed in section III.B.2. of this proposed rule, we have not adopted this approach.

• Another option we considered was a facility model based on the IPF's historical payment and patient mix.

In order to address the limitation of routine cost data that is discussed in section III.B. of this proposed rule, we considered a model based on facility-level routine costs and patient-level ancillary costs separately. Under this model, the variables in the facility routine cost regression are defined differently than in the ancillary cost and proposed rule regressions. For example, in the ancillary cost regression, length of stay is each patient's length of stay, but in the routine cost regression it is the facility's average length of stay. Similarly, in the ancillary cost regression, the age variable indicates whether an individual patient is over 65 years of age, but in the routine cost regression it indicates the percentage of the facility's patients who are over 65 years of age. This difference in the routine and ancillary cost regressions also applies to the comorbidity and DRG variables. These differences in measurement mean that the coefficient values of these variables are not directly comparable between the facility-level routine cost regression and the patient-level regression for ancillary cost or total cost. In addition, operationalizing this model would present claims processing and systems issues to keep the facility-level data up to date. Therefore, we rejected this approach.

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

List of Subjects

42 CFR Part 412

Administrative practice and procedure, Health facilities, Medicare, Puerto Rico, Reporting and recordkeeping requirements.

42 CFR Part 413

Health facilities, Kidney diseases, Medicare, Puerto Rico, Reporting and recordkeeping requirements.

42 CFR Part 424

Emergency medical services, Health facilities, Health professions, Medicare, Reporting and recordkeeping.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services proposes to amend 42 CFR chapter IV as follows:

PART 412—PROSPECTIVE PAYMENT SYSTEMS FOR INPATIENT PSYCHIATRIC 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 A—General Provisions

2. Section 412.1 is amended as follows:

a. Redesignating paragraphs (a)(2) and (a)(3) as paragraphs (a)(3) and (a)(4).

b. Adding a new paragraph (a)(2).

c. Redesignating paragraphs (b)(12) and (b)(13) as paragraphs (b)(13) and (b)(14).

d. Adding a new paragraph (b)(12).

The additions read as follows:

§ 412.1 Scope of part.

(a) * * *

(2) This part implements section 124 of Public Law 106–113 by establishing a per diem prospective payment system for the inpatient operating and capital costs of hospital inpatient services furnished to Medicare beneficiaries by a psychiatric facility that meets the conditions of subpart N of this part.

* * * * *

(b) * * *

(12) Subpart N describes the prospective payment system specified in paragraph (a)(2) of this section for inpatient psychiatric facilities and sets forth the general methodology for paying the operating and capital-related costs of hospital inpatient services furnished by inpatient psychiatric facilities effective with cost reporting periods beginning on or after April 1, 2004.

* * * * *

Subpart B—Hospital Services Subject to and Excluded From the Prospective Payment Systems for Inpatient Operating Costs and Inpatient Capital Related Costs

3. Section 412.20 is amended as follows:

a. Revising paragraph (a).

b. Redesignating paragraphs (b), (c), and (d) as paragraphs (c), (d), and (e).

c. Adding a new paragraph (b).

The revision and addition read as follows:

§ 412.20 Hospital services subject to the prospective payment systems.

(a) Except for services described in paragraphs (b), (c), (d), and (e) of this section, all covered hospital inpatient services furnished to beneficiaries during the subject cost reporting periods are paid under the prospective payment system as specified in § 412.1(a)(1).

(b) Effective for cost reporting periods beginning on or after April 1, 2004, covered hospital inpatient services furnished to Medicare beneficiaries by an inpatient psychiatric facility that meets the conditions of § 412.404 are paid under the prospective payment system described in subpart N of this part.

* * * * *

4. Section 412.22 is amended by revising paragraph (b).

§ 412.22 Excluded hospitals and hospital units: General rules.

* * * * *

(b) *Cost reimbursement.* Except for those hospitals specified in paragraph (c) of this section, and § 412.20(b), (c), and (d), all excluded hospitals (and excluded hospital units, as described in § 412.23 through § 412.29) are reimbursed under the cost reimbursement rules set forth in part 413 of this chapter, and are subject to the ceiling on the rate of hospital cost increases as specified in § 413.40 of this chapter.

* * * * *

5. Section 412.23 is amended as follows:

a. Republishing paragraph (a) introductory text.

b. Redesignating paragraphs (a)(1) and (a)(2) as paragraphs (a)(2) and (a)(3).

c. Adding a new paragraph (a)(1).

The republication and addition read as follows:

§ 412.23 Excluded hospitals: Classifications.

* * * * *

(a) *Psychiatric hospitals.* A psychiatric hospital must—

(1) Meet the following requirements to be excluded from the prospective

payment system as specified in § 412.1(a)(1) and to be paid under the prospective payment system as specified in § 412.1(a)(2) and in subpart N of this part;

* * * * *

6. Section 412.25 is amended by revising the paragraph (a) introductory text to read as follows:

§ 412.25 Excluded hospital units: Common requirements.

(a) *Basis for exclusion.* In order to be excluded from the prospective payment systems as specified in § 412.1(a)(1) and to be paid under the inpatient prospective payment system as specified in 412.1(a)(2), a psychiatric unit must meet the following requirements.

* * * * *

§ 412.27 [Amended]

7. Section 412.27 is amended as follows:

a. Revising the introductory text.

b. Amending paragraph (a) by removing the words "Third Edition", and adding in its place, "Fourth Edition, Text Revision".

The revision reads as follows:

§ 412.27 Excluded psychiatric units: Additional requirements.

In order to be excluded from the prospective payment system as specified in § 412.1(a)(1), and paid under the inpatient psychiatric prospective payment system as specified in § 412.1(a)(2), a psychiatric unit must meet the following requirements:

* * * * *

8. Section 412.116 is amended as follows:

a. Redesignating paragraphs (a)(3) and (a)(4) as paragraphs (a)(4) and (a)(5).

b. Adding a new paragraph (a)(3).

The addition reads as follows:

§ 412.116 Method of payment.

(a) * * *

(3) For cost reporting periods beginning on or after April 1, 2004, payments for hospital inpatient services furnished by a psychiatric hospital and psychiatric unit that meet the conditions of § 412.404 are made as described in § 412.432.

* * * * *

9. A new subpart N is added to read as follows:

Subpart N—Prospective Payment System for Hospital Inpatient Services of Psychiatric Facilities.

Sec.

Subpart N—Prospective Payment System for Hospital Inpatient Services of Psychiatric Facilities.

§ 412.400 Basis and scope of subpart.

(a) *Basis.* This subpart implements section 124 of Public Law 106–113, which provides for the implementation of a per diem based prospective payment system for inpatient psychiatric hospitals and psychiatric units (inpatient psychiatric facilities).

(b) *Scope.* This subpart sets forth the framework for the prospective payment system for inpatient psychiatric facilities, including the methodology used for the development of the per diem rate and associated adjustments, the application of a transition period, and the related rules. Under this system, for cost reporting periods beginning on or after April 1, 2004, payment for the operating and capital-related costs of hospital inpatient services furnished by inpatient psychiatric facilities is made on the basis of prospectively determined rates and applied on a per diem basis.

§ 412.402 Definitions.

As used in this subpart—

Comorbidity means all specific patient conditions that are secondary to the patient's primary diagnosis and that coexists at the time of admission, 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.

Fixed dollar loss threshold means a dollar amount by which the costs of a case exceed payment in order to qualify for an outlier payment.

Inpatient psychiatric facilities means hospitals that meet the requirements as specified in § 412.22, § 412.23(a) and units that meet the requirements as specified in § 412.22, § 412.25, and § 412.27.

Interrupted stay means a Medicare inpatient is discharged from the inpatient psychiatric facility and returns to the same inpatient psychiatric facility within 5 consecutive calendar days. The 5 consecutive calendar days begin with the day of discharge.

Outlier payment means an additional payment beyond the Federal prospective payment amount for cases with unusually high costs.

Per diem payment amount means payment based on the average cost of 1 day of inpatient psychiatric services.

Principal diagnosis means the condition established after study to be chiefly responsible for occasioning the admission of the patient to the inpatient psychiatric facility.

Rural area means an area as defined in § 412.62(f)(1)(iii).

Urban area means an area as defined in § 412.62(f)(1)(ii).

§ 412.404 Conditions for payment under the prospective payment system for hospital inpatient services of psychiatric facilities.

(a) *General requirements.* (1) Effective for cost reporting periods beginning on or after April 1, 2004, an inpatient psychiatric facility must meet the conditions of this section to receive payment under the prospective payment system described in this subpart for hospital inpatient services furnished in psychiatric facilities to Medicare beneficiaries.

(2) If an inpatient psychiatric facility fails to comply fully with these conditions, CMS may, as appropriate—

(i) Withhold (in full or in part) or reduce Medicare payment to the inpatient psychiatric facility until the facility provides adequate assurances of compliance; or

(ii) Classify the inpatient psychiatric facility as a hospital that is subject to the conditions of subpart C of this part and is paid under the prospective payment system as specified in § 412.1(a)(1).

(b) *Inpatient psychiatric facilities subject to the prospective payment system.* Subject to the special payment provisions of § 412.22(c), an inpatient psychiatric facility must meet the general criteria set forth in § 412.22. For exclusion from the hospital inpatient prospective payment system as specified in § 412.1(a)(1), a psychiatric hospital must meet the criteria set forth in § 412.23(a) and psychiatric units must meet the criteria set forth in § 412.25 and § 412.27.

(c) *Limitations on charges to beneficiaries*—(1) *Prohibited charges.* Except as permitted in paragraph (c)(2) of this section, an inpatient psychiatric facility may not charge a beneficiary for any services for which payment is made by Medicare, even if the facility's cost of furnishing services to that beneficiary are greater than the amount the facility is paid under the prospective payment system.

(2) *Permitted charges.* An inpatient psychiatric facility receiving payment

under this subpart for a covered hospital stay (that is, a stay that included at least one covered day) may charge the Medicare beneficiary or other person only the applicable deductible and coinsurance amounts under § 409.82, § 409.83, and § 409.87 of this chapter and for items or services as specified under § 489.20(a) of this chapter.

(d) *Furnishing of hospital inpatient services directly or under arrangement.* (1) Subject to the provisions of § 412.422, the applicable payments made under this subpart are payment in full for all hospital inpatient services, as specified in § 409.10 of this chapter. Hospital inpatient services do not include the following:

(i) Physicians' services that meet the requirements of § 415.102(a) of this chapter for payment on a fee schedule basis.

(ii) Physician assistant services, as specified in section 1861(s)(2)(K)(i) of the Act.

(iii) Nurse practitioners and clinical nurse specialist services, as specified in section 1861(s)(2)(K)(ii) of the Act.

(iv) Certified nurse midwife services, as specified in section 1861(gg) of the Act.

(v) Qualified psychologist services, as specified in section 1861(ii) of the Act.

(vi) Services of a certified registered nurse anesthetist, as specified in section 1861(bb) of the Act.

(2) CMS does not pay providers or suppliers other than inpatient psychiatric facilities for services furnished to a Medicare beneficiary who is an inpatient of the inpatient psychiatric facility, except for services described in paragraphs (d)(1)(i) through (d)(1)(vi) of this section.

(3) The inpatient psychiatric facility must furnish all necessary covered services to the Medicare beneficiary who is an inpatient of the inpatient psychiatric facility, either directly or under arrangements (as specified in § 409.3 of this chapter).

(e) *Reporting and recordkeeping requirements.* All inpatient psychiatric facilities participating in the prospective payment system under this subpart must meet the recordkeeping and cost reporting requirements as specified in § 412.27(c), § 413.20, and § 413.24 of this chapter.

§ 412.422 Basis of payment.

(a) *Method of Payment.* (1) Under the prospective payment system, inpatient psychiatric facilities receive a predetermined per diem payment amount for inpatient services furnished to Medicare Part A fee-for-service beneficiaries.

(2) Payment under the prospective payment system is based on the Federal per diem payment rate that includes adjustments as specified in § 412.424.

(3) During the transition period, payment is based on a blend of the Federal per diem payment amount and the facility-specific payment rate as specified in § 412.426.

(b) *Payment in full.* (1) The payment made under this subpart represents payment in full (subject to applicable deductibles and coinsurance as specified in subpart G of part 409 of this chapter) for inpatient operating and capital-related costs associated with furnishing Medicare covered services in an inpatient psychiatric facility, but not the cost of an approved medical education program as specified in § 413.85 and § 413.86 of this chapter.

(2) In addition to the payments based on the prospective payment rates, inpatient psychiatric facilities receive payment for bad debts of Medicare beneficiaries, as specified in § 413.80 of this chapter.

§ 412.424 Methodology for calculating the Federal per diem payment rates.

(a) *Data sources.* To calculate the Federal per diem payment rate for inpatient psychiatric facilities, CMS uses the following data sources:

(1) The best Medicare data available to estimate the average per diem payment amount for inpatient operating and capital-related costs made as specified in part 413 of this chapter.

(2) Patient and facility cost report data capturing routine and ancillary costs.

(3) An appropriate wage index to adjust for wage differences.

(4) An increase factor to adjust for the most recent estimate of increases in the prices of an appropriate market basket of goods and services provided by inpatient psychiatric facilities.

(b) *Determining the Federal per diem base amount.* The Federal per diem base rate is the product of the updated average per diem rate and the budget-neutrality adjustment factor as described in paragraphs (b)(1) and (b)(2) of this section.

(1) *Determining the average per diem rate.* CMS determines the average inpatient operating and capital per diem cost for inpatient psychiatric facilities by using the best available data as specified in paragraph (a) of this section. CMS applies the increase factor described in paragraph (a)(4) of this section to update the rate to the midpoint of the first 15 months under the system.

(2) *Budget-neutrality factor.* (i) CMS adjusts the average per diem amount to ensure that the aggregate payments under the prospective payment system are estimated to equal the amount that would have been made to inpatient psychiatric facilities if the prospective payment system described in this subpart was not implemented.

(ii) CMS evaluates the accuracy of the budget-neutrality adjustment within the first 5 years after implementation of the inpatient prospective payment system. CMS may make a one-time prospective adjustment to the Federal per diem base rate to account for significant differences between the historical data on cost-based TEFRA payments (the basis of the budget-neutrality adjustment at the time of implementation) and estimates of TEFRA payments based on actual data from the first year of the prospective payment system.

(c) *Determining the Federal per diem amount.* The Federal per diem payment amount is the product of the Federal per diem base rate, the facility-level adjustments applicable to the inpatient psychiatric facility, and the patient-level characteristics applicable to the case as described in paragraphs (c)(1) and (c)(2) of this section.

(1) *Facility-level adjustments.* (i) *Adjustment for wages.* The labor portion of the Federal per diem base rate is adjusted to account for geographic differences in the area wage levels using an appropriate wage index. The application of the wage index is made on the basis of the location of the inpatient psychiatric facility in an urban or rural area as specified in § 412.402.

(ii) *Location in rural areas.* CMS adjusts the Federal per diem base rate by a factor for facilities located in rural areas as specified in § 412.62(f)(1)(iii).

(iii) *Teaching status.* CMS adjusts the Federal per diem base rate by a factor to account for a facility's teaching status based on the ratio of the number of interns and residents assigned to the facility divided by the facility's average daily census.

(2) *Patient-level adjustments.* (i) *Age.* CMS adjusts the Federal per diem base rate by a factor for patients age 65 and older.

(ii) *Principal diagnosis.* The inpatient psychiatric facility must identify a psychiatric diagnosis for each patient. CMS adjusts the wage-adjusted Federal per diem base rate by a factor to account for the diagnosis-related group assignment associated with the principal diagnosis, as specified by CMS.

(iii) *Comorbidities.* CMS adjusts the Federal per diem base rate by a factor to account for certain comorbidities as specified by CMS.

(iv) *Variable per diem adjustments.* CMS adjusts the Federal per diem base rate by declining factors for day 1, days 2 through 4, and days 5 through 8 of the inpatient stay. The variable per diem adjustment does not apply after day 8.

(v) *Adjustment for high-cost cases.* CMS provides for an additional payment if the estimated total cost for a case exceeds a fixed dollar loss threshold plus the total per diem payment amount for the case.

(A) The fixed dollar loss threshold is adjusted for area wage levels, teaching status, and rural location.

(B) The additional payment equals 80 percent of the difference between the estimated cost of the case and the per diem payment amount for days 1 through 8, 60 percent for days 9 and beyond.

(C) Additional payments made under this section would be subject to the adjustments at § 412.84(i), except that the national urban and rural medians would be used instead of statewide averages, and at § 412.84(m) of this part.

(d) *Special payment provision for interrupted stays.* If a patient is discharged from an inpatient psychiatric facility and returns to the same facility before midnight of the 5th consecutive day, the case is considered to be continuous for purposes:

(1) Determining the appropriate variable per diem adjustment, as specified in paragraph (c)(2)(iv) of this section, applicable to the case.

(2) Determining whether the total cost for a case exceeds the fixed dollar loss threshold and qualifies for outlier payments as specified in paragraph (c)(2)(v) of this section.

§ 412.426 Transition period.

(a) *Duration of transition period and proportion of the blended transition rate.* Except as provided in paragraph (c) of this section, for cost reporting periods beginning on or after April 1, 2004 through June 30, 2007, an inpatient psychiatric facility receives a payment comprised of a blend of the Federal per diem payment amount, as specified in § 412.424(c) and a facility-specific payment as specified under paragraph (b) of this section.

(1) For cost reporting periods beginning on or after April 1, 2004 and before June 30, 2005, payment is based on 75 percent of the facility-specific payment and 25 percent of the Federal per diem payment amount.

(2) For cost reporting periods beginning on or after July 1, 2005 and before June 30, 2006, payment is based on 50 percent of the facility-specific payment and 50 percent of the Federal per diem payment amount.

(3) For cost reporting periods beginning on or after July 1, 2006 and before June 30, 2007, payment is based on 25 percent of the facility-specific payment and 75 percent of the Federal per diem payment amount.

(4) For cost reporting periods beginning on or after July 1, 2007, payment is based entirely on the Federal per diem payment amount.

(b) *Calculation of the facility-specific payment.* The facility-specific payment is equal to the payment for each cost reporting period in the transition period that would have been made without regard to this subpart. The facility's Medicare fiscal intermediary calculates the facility-specific payment for inpatient operating costs and capital costs in accordance with part 413 of this chapter.

(c) *Treatment of new inpatient psychiatric facilities.*

New inpatient psychiatric facilities, that is, facilities that under present or previous ownership or both have their first cost reporting period as an IPF beginning on or after April 1, 2004, are paid based entirely on the Federal per diem payment system.

§ 412.428 Publication of the Federal per diem payment rates.

CMS will publish annually in the **Federal Register** information pertaining to the inpatient psychiatric facility prospective payment system. This information includes the Federal per diem payment rates, the area wage index, and a description of the methodology and data used to calculate the payment rates.

§ 412.432 Method of payment under the inpatient psychiatric facility prospective payment system.

(a) *General rule.* Subject to the exceptions in paragraphs (b) and (c) of this section, an inpatient psychiatric facility receives payment under this subpart for inpatient operating cost and capital-related costs for each inpatient stay following submission of a bill.

(b) *Periodic interim payments (PIP).* (1) Criteria for receiving PIP.

(i) An inpatient psychiatric facility receiving payment under this subpart may receive PIP for Part A services under the PIP method subject to the provisions of § 413.64(h) of this chapter.

(ii) To be approved for PIP, the inpatient psychiatric facility must meet the qualifying requirements in § 413.64(h)(3) of this chapter.

(iii) Payments to a psychiatric unit are made under the same method of payment as the hospital of which it is a part as specified in § 412.116.

(iv) As provided in § 413.64(h)(5) of this chapter, intermediary approval is conditioned upon the intermediary's best judgment as to whether payment can be made under the PIP method without undue risk of resulting in an overpayment to the provider.

(2) *Frequency of payment.* For facilities approved for PIP, the intermediary estimates the annual inpatient psychiatric facility's Federal per diem prospective payments, net of estimated beneficiary deductibles and coinsurance, and makes biweekly payments equal to 1/26 of the total estimated amount of payment for the year. If the inpatient psychiatric facility has payment experience under the prospective payment system, the intermediary estimates PIP based on that payment experience, adjusted for projected changes supported by substantiated information for the current year. Each payment is made 2 weeks after the end of a biweekly period of service as specified in § 413.64(h)(6) of this chapter. The interim payments are reviewed at least twice during the reporting period and adjusted if necessary. Fewer reviews may be necessary if an inpatient psychiatric facility receives interim payments for less than a full reporting period. These payments are subject to final settlement.

(3) *Termination of PIP.* (i) *Request by the inpatient psychiatric facility.* Subject to the provisions of paragraph (b)(1)(iii) of this section, an inpatient psychiatric facility receiving PIP may convert to receiving prospective payments on a non-PIP basis at any time.

(ii) *Removal by the intermediary.* An intermediary terminates PIP if the inpatient psychiatric facility no longer meets the requirements of § 413.64(h) of this chapter.

(c) *Interim payments for Medicare bad debts and for costs of an approved education program and other costs paid outside the prospective payment system.* The intermediary determines the interim payments by estimating the reimbursable amount for the year based on the previous year's experience, adjusted for projected changes supported by substantiated information for the current year, and makes biweekly payments equal to 1/26 of the total estimated amount. Each payment is made 2 weeks after the end of the biweekly period of service as specified in § 413.64(h)(6) of this chapter. The interim payments are reviewed at least twice during the reporting period and adjusted if necessary. Fewer reviews may be necessary if an inpatient psychiatric facility receives interim payments for less than a full reporting period. These payments are subject to final cost settlement.

(d) *Outlier payments.* Additional payments for outliers are not made on an interim basis. The outlier payments are made based on the submission of a discharge bill and represent final payment.

(e) *Accelerated payments.* (1) *General rule.* Upon request, an accelerated payment may be made to an inpatient psychiatric facility that is receiving payment under this subpart and is not receiving PIP under paragraph (b) of this section if the inpatient psychiatric facility is experiencing financial difficulties because of the following:

(i) There is a delay by the intermediary in making payment to the inpatient psychiatric facility.

(ii) Due to an exceptional situation, there is a temporary delay in the inpatient psychiatric facility's preparation and submittal of bills to the intermediary beyond the normal billing cycle.

(2) *Approval of payment.* An inpatient psychiatric facility's request for an accelerated payment must be approved by the intermediary and CMS.

(3) *Amount of payment.* The amount of the accelerated payment is computed as a percent of the net payment for unbilled or unpaid covered services.

(4) *Recovery of payment.* Recovery of the accelerated payment is made by recoupment as inpatient psychiatric facility bills are processed or by direct payment by the inpatient psychiatric facility.

PART 413—PRINCIPLES OF REASONABLE COST REIMBURSEMENT; PAYMENT FOR END-STAGE RENAL DISEASE SERICES; PROSPECTIVELY DETERMINED PAYMENT FOR SKILLED NURSING FACILITIES

1. The authority citation for part 413 is revised to read as follows:

Authority: Secs. 1102, 1812(d), 1814(b), 1815, 1833(a), (i), and (n), 1861 (v), 1871, 1881, 1883, and 1886 of the Social Security Act (42 U.S.C. 1302, 1395d(d), 1395f(b), 1395g, 1395l(a), (i), and (n), 1395x(v), 1395hh, 1395rr, 1395tt, and 1395ww).

2. Section 413.1 is amended as follows:

a. Revising paragraph (d)(2)(ii).

b. Redesignating paragraphs (d)(2)(iv),(d)(2)(v), (d)(2)(vi), and (d)(2)(vii) as paragraphs (d)(2)(vi), (d)(2)(vii), (d)(2)(viii), and (d)(2)(ix).

(c) Adding new paragraphs (d)(2)(iv) and (d)(2)(v).

The revision and additions read as follows:

§ 413.1 Introduction.

* * * * *

(d) * * *

(2) * * *

(ii) Payment to children's hospitals that are excluded from the prospective payment systems under subpart B of part 412 of this chapter, and hospitals outside the 50 States and the District of Columbia is on a reasonable cost basis, subject to the provisions of § 413.40.

* * * * *

(iv) For cost reporting periods beginning before April 1, 2004, payment to psychiatric hospitals (as well as separate psychiatric units (distinct parts) of short-term general hospitals) that are excluded under subpart B of part 412 of this chapter from the prospective payment system is on a reasonable cost basis, subject to the provisions of § 413.40.

(v) For cost reporting periods beginning on or after April 1, 2004, payment to psychiatric hospitals (as well as separate psychiatric units (distinct parts) of short-term general hospitals) that meet the conditions of § 412.404 of this chapter is based on prospectively determined rates under subpart N of part 412 of this chapter.

* * * * *

3. Section 413.40 is amended as follows:

a. Redesignating paragraphs (a)(2)(i)(C) and (a)(2)(i)(D) as paragraphs (a)(2)(i)(D) and (a)(2)(i)(E).

b. Adding a new paragraph (a)(2)(i)(C).

c. Republishing paragraphs (a)(2)(ii) introductory text.

d. Revising paragraph (a)(2)(ii)(B).

e. Redesignating paragraphs (a)(2)(iii) and (a)(2)(iv) as paragraphs (a)(2)(iv) and (a)(2)(v).

f. Adding a new paragraph (a)(2)(iii).

The revision and additions read as follows:

§ 413.40 Ceiling on the rate of increase in hospital inpatient costs.

(a) * * *

(2) * * *

(i) * * *

(C) Psychiatric hospitals and psychiatric units that are paid under the prospective payment system for hospital inpatient services under subpart N of part 412 of this chapter for cost reporting periods beginning on or after April 1, 2004.

* * * * *

(ii) For cost reporting periods beginning on or after October 1, 1983 through March 31, 2004, this section applies to—

* * * * *

(B) Psychiatric and rehabilitation units excluded from the prospective payment systems, as specified in § 412.1(a)(1) of this chapter and in accordance with § 412.25 through § 412.30 of this chapter, except as limited by paragraphs (a)(2)(iii) and (a)(2)(iv) of this section with respect to psychiatric and rehabilitation hospitals and psychiatric and rehabilitation units as specified in § 412.22, § 412.23, § 412.25, § 412.27, § 412.29 and § 412.30 of this chapter.

* * * * *

(iii) For cost reporting periods beginning on or after April 1, 2004 this section applies to psychiatric hospitals and psychiatric units that are excluded from the prospective payment systems as specified in § 412.1(a)(1) of this chapter and paid under the prospective payment system as specified in § 412.1(a)(2) of this chapter.

* * * * *

4. Section 413.64 is amended by revising paragraph (h)(2)(i) to read as follows:

§ 413.64 Payment to providers: Specific rules.

* * * * *

(h) * * *

(2) * * *

(i) Part A inpatient services furnished in hospitals that are excluded from the prospective payment systems, as specified in § 412.1(a)(1) of this chapter, and are paid under the prospective payment system as specified in subpart N of part 412 of this chapter.

* * * * *

PART 424—CONDITIONS OF MEDICARE PAYMENT

1. The authority citation for part 424 continues to read as follows:

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

2. Section 424.14 is amended as follows:

a. Adding paragraph (c)(3).

b. Revising paragraph (d)(2).

The addition and revision read as follows:

§ 424.14 Requirements for inpatient services of psychiatric hospitals.

* * * * *

(c) * * *

(3) The patient continues to need, on a daily basis, inpatient psychiatric care (furnished directly by or requiring the supervision of inpatient psychiatric facility personnel) or other professional services that, as a practical matter can only be provided on an inpatient basis.

(d) * * *

(2) The first recertification is required as of the 10th day of hospitalization. Subsequent recertifications are required

at intervals established by the UR committee (on a case-by-case basis if it so chooses), but no less frequently than every 30 days.

* * * * *

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: April 17, 2003.

Thomas A. Scully,

Administrator, Centers for Medicare & Medicaid Services.

Approved: April 29, 2003.

Tommy G. Thompson,

Secretary.

Editorial Note: This document was received at the Office of the Federal Register on November 18, 2003.

[The following addenda will not appear in the Code of Federal Regulations.]

Addendum A—Proposed Psychiatric Prospective Payment Adjustment

Rate and Adjustment Factors

Proposed Rate and Adjustment Factors

Proposed Per Diem Rate	
Proposed Per Diem Rate	$530

Proposed Rate and Adjustment Factors—Continued

Labor-Share	$386
Non-Labor-Share	$144
Proposed Facility Adjustments	
Rural Location	1.16
Wage Area Adjustment	(1)
Teaching Adjustment	(2)
Proposed Variable Per Diem Adjustments	
Day 1	1.26
Days 2 through 4	1.12
Days 5 through 8	1.05
Proposed Age Adjustments	
65 Years of Age and Over	1.13
Proposed DRG Adjustments	
DRG 12	1.07
DRG 23	1.10
DRG 424	1.22
DRG 425	1.08
DRG 426	1.00
DRG 427	1.01
DRG 428	1.03
DRG 429	1.02
DRG 430	1.00
DRG 431	1.02
DRG 432	0.96
DRG 433	0.88
DRG 521	1.02
DRG 522	0.97

Proposed Rate and Adjustment Factors—Continued

DRG 523	0.88
Proposed Comorbidity Adjustments	
HIV	1.06
Coagulation Factor Deficits	1.11
Tracheotomy	1.14
Eating and Conduct Disorders	1.03
Infectious Diseases	1.08
Renal Failure, Acute	1.08
Rental Failure, Chronic	1.14
Malignant Neoplasm's	1.10
Uncontrolled Diabetes Mellitus with or without complications	1.10
Sever Protein Calorie Malnutrition	1.12
Drug and Alcohol Induce Mental Disorders	1.03
Cardiac Conditions	1.13
Arteriosclerosis of the Extremity with Gangrene	1.17
Chronic Obstructed Pulmonary Disease	1.12
Artificial Openings-Digestive and Urinary	1.09
Severe Musculoskeletal and Connective Tissue Diseases	1.12
Poisoning	1.14

[1] See Addendum B.
[2] See section III.B.2.b.

Addendum B1.—Proposed Pre-Reclassified Wage Index for Urban Areas

MSA	Urban area (constituent counties or county equivalents)	Wage index
0040	Abilene, TX	0.7792
	Taylor, TX	
0060	Aguadilla, PR	0.4587
	Aguada, PR	
	Aguadilla, PR	
	Moca, PR	
0080	Akron, OH	0.9600
	Portage, OH	
	Summit, OH	
0120	Albany, GA	1.0594
	Dougherty, GA	
	Lee, GA	
0160	Albany-Schenectady-Troy, NY	0.8384
	Albany, NY	
	Montgomery, NY	
	Rensselaer, NY	
	Saratoga, NY	
	Schenectady, NY	
	Schoharie, NY	
0200	Albuquerque, NM	0.9315
	Bernalillo, NM	
	Sandoval, NM	
	Valencia, NM	
0220	Alexandria, LA	0.7859
	Rapides, LA	
0240	Allentown-Bethlehem-Easton, PA	0.9735
	Carbon, PA	
	Lehigh, PA	
	Northampton, PA	
0280	Altoona, PA	0.9225
	Blair, PA	
0320	Amarillo, TX	0.9034
	Potter, TX	

ADDENDUM B1.—PROPOSED PRE-RECLASSIFIED WAGE INDEX FOR URBAN AREAS—Continued

MSA	Urban area (constituent counties or county equivalents)	Wage index
	Randall, TX	
0380	Anchorage, AK	1.2358
	Anchorage, AK	
0440	Ann Arbor, MI	1.1103
	Lenawee, MI	
	Livingston, MI	
	Washtenaw, MI	
0450	Anniston,AL	0.8044
	Calhoun, AL	
0460	Appleton-Oshkosh-Neenah, WI	0.8997
	Calumet, WI	
	Outagamie, WI	
	Winnebago, WI	
0470	Arecibo, PR	0.4337
	Arecibo, PR	
	Camuy, PR	
	Hatillo, PR	
0480	Asheville, NC	0.9876
	Buncombe, NC	
	Madison, NC	
0500	Athens, GA	1.0211
	Clarke, GA	
	Madison, GA	
	Oconee, GA	
0520	Atlanta, GA	0.9991
	Barrow, GA	
	Bartow, GA	
	Carroll, GA	
	Cherokee, GA	
	Clayton, GA	
	Cobb, GA	
	Coweta, GA	
	De Kalb, GA	
	Douglas, GA	
	Fayette, GA	
	Forsyth, GA	
	Fulton, GA	
	Gwinnett, GA	
	Henry, GA	
	Newton, GA	
	Paulding, GA	
	Pickens, GA	
	Rockdale, GA	
	Spalding, GA	
	Walton, GA	
0560	Atlantic City-Cape May, NJ	1.1017
	Atlantic City, NJ	
	Cape May, NJ	
0580	Auburn-Opelika, AL	0.8325
	Lee, AL	
0600	Augusta-Aiken, GA–SC	1.0264
	Columbia, GA	
	McDuffie, GA	
	Richmond, GA	
	Aiken, SC	
	Edgefield, SC	
0640	Austin-San Marcos, TX	0.9637
	Bastrop, TX	
	Caldwell, TX	
	Hays, TX	
	Travis, TX	
	Williamson, TX	
0680	Bakersfield, CA	0.9899
	Kern, CA	
0720	Baltimore, MD	0.9929
	Anne Arundel, MD	
	Baltimore, MD	
	Baltimore City, MD	
	Carroll, MD	
	Harford, MD	
	Howard, MD	
	Queen Annes, MD	

ADDENDUM B1.—PROPOSED PRE-RECLASSIFIED WAGE INDEX FOR URBAN AREAS—Continued

MSA	Urban area (constituent counties or county equivalents)	Wage index
0733	Bangor, ME	0.9664
	Penobscot, ME	
0743	Barnstable-Yarmouth, MA	1.3202
	Barnstable, MA	
0760	Baton Rouge, LA	0.8294
	Ascension, LA	
	East Baton Rouge	
	Livingston, LA	
	West Baton Rouge, LA	
0840	Beaumont-Port Arthur, TX	0.8324
	Hardin, TX	
	Jefferson, TX	
	Orange, TX	
0860	Bellingham, WA	1.2282
	Whatcom, WA	
0870	Benton Harbor, MI	0.9042
	Berrien, MI	
0875	Bergen-Passaic, NJ	1.2150
	Bergen, NJ	
	Passaic, NJ	
0880	Billings, MT	0.9022
	Yellowstone, MT	
0920	Biloxi-Gulfport-Pascagoula, MS	0.8757
	Hancock, MS	
	Harrison, MS	
	Jackson, MS	
0960	Binghamton, NY	0.8341
	Broome, NY	
	Tioga, NY	
1000	Birmingham, AL	0.9222
	Blount, AL	
	Jefferson, AL	
	St. Clair, AL	
	Shelby, AL	
1010	Bismarck, ND	0.7972
	Burleigh, ND	
	Morton, ND	
1020	Bloomington, IN	0.8907
	Monroe, IN	
1040	Bloomington-Normal, IL	0.9109
	McLean, IL	
1080	Boise City, ID	0.9310
	Ada, ID	
	Canyon, ID	
1123	Boston-Worcester-Lawrence-Lowell-Brockton, MA–NH	1.1235
	Bristol, MA	
	Essex, MA	
	Middlesex, MA	
	Norfolk, MA	
	Plymouth, MA	
	Suffolk, MA	
	Worcester, MA	
	Hillsborough, NH	
	Merrimack, NH	
	Rockingham, NH	
	Strafford, NH	
1125	Boulder-Longmont, CO	0.9689
	Boulder, CO	
1145	Brazoria, TX	0.8535
	Brazoria, TX	
1150	Bremerton, WA	1.0944
	Kitsap, WA	
1240	Brownsville-Harlingen-San Benito, TX	0.8880
	Cameron, TX	
1260	Bryan-College Station, TX	0.8821
	Brazos, TX	
1280	Buffalo-Niagara Falls, NY	0.9365
	Erie, NY	
	Niagara, NY	
1303	Burlington, VT	1.0052
	Chittenden, VT	
	Franklin, VT	

ADDENDUM B1.—PROPOSED PRE-RECLASSIFIED WAGE INDEX FOR URBAN AREAS—Continued

MSA	Urban area (constituent counties or county equivalents)	Wage index
	Grand Isle, VT	
1310	Caguas, PR	0.4371
	Caguas, PR	
	Cayey, PR	
	Cidra, PR	
	Gurabo, PR	
	San Lorenzo, PR	
1320	Canton-Massillon, OH	0.8932
	Carroll, OH	
	Stark, OH	
1350	Casper, WY	0.9690
	Natrona, WY	
1360	Cedar Rapids, IA	0.9056
	Linn, IA	
1400	Champaign-Urbana, IL	1.0635
	Champaign, IL	
1440	Charleston-North Charleston, SC	0.9235
	Berkeley, SC	
	Charleston, SC	
	Dorchester, SC	
1480	Charleston, WV	0.8898
	Kanawha, WV	
	Putnam, WV	
1520	Charlotte-Gastonia-Rock Hill, NC–SC	0.9850
	Cabarrus, NC	
	Gaston, NC	
	Lincoln, NC	
	Mecklenburg, NC	
	Rowan, NC	
	Stanly, NC	
	Union, NC	
	York, SC	
1540	Charlottesville, VA	1.0438
	Albemarle, VA	
	Charlottesville City, VA	
	Fluvanna, VA	
	Greene, VA	
1560	Chattanooga, TN–GA	0.8976
	Catoosa, GA	
	Dade, GA	
	Walker, GA	
	Hamilton, TN	
	Marion, TN	
1580	Cheyenne, WY	0.8628
	Laramie, WY	
1600	Chicago, IL	1.1044
	Cook, IL	
	De Kalb, IL	
	Du Page, IL	
	Grundy, IL	
	Kane, IL	
	Kendall, IL	
	Lake, IL	
	McHenry, IL	
	Will, IL	
1620	Chico-Paradise, CA	0.9745
	Butte, CA	
1640	Cincinnati, OH–KY–IN	0.9381
	Dearborn, IN	
	Ohio, IN	
	Boone, KY	
	Campbell, KY	
	Gallatin, KY	
	Grant, KY	
	Kenton, KY	
	Pendleton, KY	
	Brown, OH	
	Clermont, OH	
	Hamilton, OH	
	Warren, OH	
1660	Clarksville-Hopkinsville, TN–KY	0.8406
	Christian, KY	

ADDENDUM B1.—PROPOSED PRE-RECLASSIFIED WAGE INDEX FOR URBAN AREAS—Continued

MSA	Urban area (constituent counties or county equivalents)	Wage index
	Montgomery, TN	
1680	Cleveland-Lorain-Elyria, OH	0.9670
	Ashtabula, OH	
	Geauga, OH	
	Cuyahoga, OH	
	Lake, OH	
	Lorain, OH	
	Medina, OH	
1720	Colorado Springs, CO	0.9916
	El Paso, CO	
1740	Columbia MO	0.8496
	Boone, MO	
1760	Columbia, SC	0.9307
	Lexington, SC	
	Richland, SC	
1800	Columbus, GA–AL	0.8374
	Russell, AL	
	Chattahoochee, GA	
	Harris, GA	
	Muscogee, GA	
1840	Columbus, OH	0.9751
	Delaware, OH	
	Fairfield, OH	
	Franklin, OH	
	Licking, OH	
	Madison, OH	
	Pickaway, OH	
1880	Corpus Christi, TX	0.8729
	Nueces, TX	
	San Patricio, TX	
1890	Corvallis, OR	1.1453
	Benton, OR	
1900	Cumberland, MD–WV	0.7847
	Allegany, MD	
	Mineral, WV	
1920	Dallas, TX	0.9998
	Collin, TX	
	Dallas, TX	
	Denton, TX	
	Ellis, TX	
	Henderson, TX	
	Hunt, TX	
	Kaufman, TX	
	Rockwall, TX	
1950	Danville, VA	0.8859
	Danville City, VA	
	Pittsylvania, VA	
1960	Davenport-Moline-Rock Island, IA–IL	0.8835
	Scott, IA	
	Henry, IL	
	Rock Island, IL	
2000	Dayton-Springfield, OH	0.9282
	Clark, OH	
	Greene, OH	
	Miami, OH	
	Montgomery, OH	
2020	Daytona Beach, FL	0.9062
	Flagler, FL	
	Volusia, FL	
2030	Decatur, AL	0.8973
	Lawrence, AL	
	Morgan, AL	
2040	Decatur, IL	0.8055
	Macon, IL	
2080	Denver, CO	1.0601
	Adams, CO	
	Arapahoe, CO	
	Broomfield, CO	
	Denver, CO	
	Douglas, CO	
	Jefferson, CO	
2120	Des Moines, IA	0.8791

ADDENDUM B1.—PROPOSED PRE-RECLASSIFIED WAGE INDEX FOR URBAN AREAS—Continued

MSA	Urban area (constituent counties or county equivalents)	Wage index
	Dallas, IA	
	Polk, IA	
	Warren, IA	
2160	Detroit, MI	1.0448
	Lapeer, MI	
	Macomb, MI	
	Monroe, MI	
	Oakland, MI	
	St. Clair, MI	
	Wayne, MI	
2180	Dothan, AL	0.8137
	Dale, AL	
	Houston, AL	
2190	Dover, DE	0.9356
	Kent, DE	
2200	Dubuque, IA	0.8795
	Dubuque, IA	
2240	Duluth-Superior, MN–WI	1.0368
	St. Louis, MN	
	Douglas, WI	
2281	Dutchess County, NY	1.0684
	Dutchess, NY	
2290	Eau Claire, WI	0.8952
	Chippewa, WI	
	Eau Clair, WI	
2320	El Paso, TX	0.9265
	El Paso, TX	
2330	Elkhart-Goshen, IN	0.9722
	Elkhart, IN	
2335	Elmira, NY	0.8416
	Chemung, NY	
2340	Enid, OK	0.8376
	Garfield, OK	
2360	Erie, PA	0.8925
	Erie, PA	
2400	Eugene-Springfield, OR	1.0944
	Lane, OR	
2440	Evansville-Henderson, IN–KY	0.8177
	Posey, IN	
	Vanderburgh, IN	
	Warrick, IN	
	Henderson, KY	
2520	Fargo-Moorhead, ND–MN	0.9684
	Clay, MN	
	Cass, ND	
2560	Fayetteville, NC	0.8889
	Cumberland, NC	
2580	Fayettevile-Springdale-Rogers, AR	0.8100
	Benton, AR	
	Washington, AR	
2620	Flagstaff, AZ–UT	1.0682
	Coconino, AZ	
	Kane, UT	
2640	Flint, MI	1.1135
	Genesee, MI	
2650	Florence, AL	0.7792
	Colbert, AL	
	Lauderdale, AL	
2655	Florence, SC	0.8780
	Florence, SC	
2670	Fort Collins-Loveland, CO	1.0066
	Larimer, CO	
2680	Ft. Lauderdale, FL	1.0297
	Broward, FL	
2700	Fort Myers-Cape Coral, FL	0.9680
	Lee, FL	
2710	Fort Pierce-Port St. Lucie, FL	0.9823
	Martin, FL	
	St. Lucie, FL	
2720	Fort Smith, AR–OK	0.7895
	Crawford, AR	
	Sebastian, AR	

ADDENDUM B1.—PROPOSED PRE-RECLASSIFIED WAGE INDEX FOR URBAN AREAS—Continued

MSA	Urban area (constituent counties or county equivalents)	Wage index
	Sequoyah, OK	
2750	Fort Walton Beach, FL	0.9693
	Okaloosa, FL	
2760	Fort Wayne, IN	0.9457
	Adams, IN	
	Allen, IN	
	De Kalb, IN	
	Huntington, IN	
	Wells, IN	
	Whitley, IN	
2800	Fort Worth-Arlington, TX	0.9446
	Hood, TX	
	Johnson, TX	
	Parker, TX	
	Tarrant, TX	
2840	Fresno, CA	1.0216
	Fresno, CA	
	Madera, CA	
2880	Gadsden AL	0.8505
	Etowah, AL	
2900	Gainesville, FL	0.9871
	Alachua, FL	
2920	Galveston-Texas City, TX	0.9465
	Galveston, TX	
2960	Gary, IN	0.9584
	Lake, IN	
	Porter, IN	
2975	Glens Falls, NY	0.8281
	Warren, NY	
	Washington, NY	
2980	Goldsboro, NC	0.8892
	Wayne, NC	
2985	Grand Forks, ND–MN	0.8897
	Polk, MN	
	Grand Forks, ND	
2995	Grand Junction, CO	0.9456
	Mesa, CO	
3000	Grand Rapids-Muskegon-Holland, MI	0.9525
	Allegan, MI	
	Kent, MI	
	Muskegon, MI	
	Ottawa, MI	
3040	Great Falls, MT	0.8950
	Cascade, MT	
3060	Greeley, CO	0.9237
	Weld, CO	
3080	Green Bay, WI	0.9502
	Brown, WI	
3120	Greensboro-Winston-Salem-High Point, NC	0.9282
	Alamance, NC	
	Davidson, NC	
	Davie, NC	
	Forsyth, NC	
	Guilford, NC	
	Randolph, NC	
	Stokes, NC	
	Yadkin, NC	
3150	Greenville, NC	0.9100
	Pitt, NC	
3160	Greenville-Spartanburg-Anderson, SC	0.9122
	Anderson, SC	
	Cherokee, SC	
	Greenville, SC	
	Pickens, SC	
	Spartanburg, SC	
3180	Hagerstown, MD	0.9268
	Washington, MD	
3200	Hamilton-Middletown, OH	0.9418
	Butler, OH	
3240	Harrisburg-Lebanon-Carlisle, PA	0.9223
	Cumberland, PA	
	Dauphin, PA	

ADDENDUM B1.—PROPOSED PRE-RECLASSIFIED WAGE INDEX FOR URBAN AREAS—Continued

MSA	Urban area (constituent counties or county equivalents)	Wage index
	Lebanon, PA	
	Perry, PA	
3283	Hartford, CT	1.1549
	Hartford, CT	
	Litchfield, CT	
	Middlesex, CT	
	Tolland, CT	
3285	Hattiesburg, MS	0.7659
	Forrest, MS	
	Lamar, MS	
3290	Hickory-Morganton-Lenoir, NC	0.9028
	Alexander, NC	
	Burke, NC	
	Caldwell, NC	
	Catawba, NC	
3320	Honolulu, HI	1.1457
	Honolulu, HI	
3350	Houma, LA	0.8385
	Lafourche, LA	
	Terrebonne, LA	
3360	Houston, TX	0.9892
	Chambers, TX	
	Fort Bend, TX	
	Harris, TX	
	Liberty, TX	
	Montgomery, TX	
	Waller, TX	
3400	Huntington-Ashland, WV–KY–OH	0.9636
	Boyd, KY	
	Carter, KY	
	Greenup, KY	
	Lawrence, OH	
	Cabell, WV	
	Wayne, WV	
3440	Huntsville, AL	0.8903
	Limestone, AL	
	Madison, AL	
3480	Indianapolis, IN	0.9717
	Boone, IN	
	Hamilton, IN	
	Hancock, IN	
	Hendricks, IN	
	Johnson, IN	
	Madison, IN	
	Marion, IN	
	Morgan, IN	
	Shelby, IN	
3500	Iowa City, IA	0.9587
	Johnson, IA	
3520	Jackson, MI	0.9532
	Jackson, MI	
3560	Jackson, MS	0.8607
	Hinds, MS	
	Madison, MS	
	Rankin, MS	
3580	Jackson, TN	0.9275
	Chester, TN	
	Madison, TN	
3600	Jacksonville, FL	0.9281
	Clay, FL	
	Duval, FL	
	Nassau, FL	
	St. Johns, FL	
3605	Jacksonville, NC	0.8239
	Onslow, NC	
3610	Jamestown, NY	0.7976
	Chautaqua, NY	
3620	Janesville-Beloit, WI	0.9849
	Rock, WI	
3640	Jersey City, NJ	1.1190
	Hudson, NJ	
3660	Johnson City-Kingsport-Bristol, TN–VA	0.8268

ADDENDUM B1.—PROPOSED PRE-RECLASSIFIED WAGE INDEX FOR URBAN AREAS—Continued

MSA	Urban area (constituent counties or county equivalents)	Wage index
	Carter, TN	
	Hawkins, TN	
	Sullivan, TN	
	Unicoi, TN	
	Washington, TN	
	Bristol City, VA	
	Scott, VA	
	Washington, VA	
3680	Johnstown, PA	0.8329
	Cambria, PA	
	Somerset, PA	
3700	Jonesboro, AR	0.7749
	Craighead, AR	
3710	Joplin, MO	0.8613
	Jasper, MO	
	Newton, MO	
3720	Kalamazoo-Battlecreek, MI	1.0595
	Calhoun, MI	
	Kalamazoo, MI	
	Van Buren, MI	
3740	Kankakee, IL	1.0790
	Kankakee, IL	
3760	Kansas City, KS–MO	0.9736
	Johnson, KS	
	Leavenworth, KS	
	Miami, KS	
	Wyandotte, KS	
	Cass, MO	
	Clay, MO	
	Clinton, MO	
	Jackson, MO	
	Lafayette, MO	
	Platte, MO	
	Ray, MO	
3800	Kenosha, WI	0.9686
	Kenosha, WI	
3810	Killeen-Temple, TX	1.0399
	Bell, TX	
	Coryell, TX	
3840	Knoxville, TN	0.8970
	Anderson, TN	
	Blount, TN	
	Knox, TN	
	Loudon, TN	
	Sevier, TN	
	Union, TN	
3850	Kokomo, IN	0.8971
	Howard, IN	
	Tipton, IN	
3870	La Crosse, WI–MN	0.9400
	Houston, MN	
	La Crosse, WI	
3880	Lafayette, LA	0.8475
	Acadia, LA	
	Lafayette, LA	
	St. Landry, LA	
	St. Martin, LA	
3920	Lafayette, IN	0.9278
	Clinton, IN	
	Tippecanoe, IN	
3960	Lake Charles, LA	0.7965
	Calcasieu, LA	
3980	Lakeland-Winter Haven, FL	0.9357
	Polk, FL	
4000	Lancaster, PA	0.9078
	Lancaster, PA	
4040	Lansing-East Lansing, MI	0.9726
	Clinton, MI	
	Eaton, MI	
	Ingham, MI	
4080	Laredo, TX	0.8472
	Webb, TX	

ADDENDUM B1.—PROPOSED PRE-RECLASSIFIED WAGE INDEX FOR URBAN AREAS—Continued

MSA	Urban area (constituent counties or county equivalents)	Wage index
4100	Las Cruces, NM	0.8745
	Dona Ana, NM	
4120	Las Vegas, NV–AZ	1.1521
	Mohave, AZ	
	Clark, NV	
	Nye, NV	
4150	Lawrence, KS	0.7923
	Douglas, KS	
4200	Lawton, OK	0.8315
	Comanche, OK	
4243	Lewiston-Auburn, ME	0.9179
	Androscoggin, ME	
4280	Lexington, KY	0.8581
	Bourbon, KY	
	Clark, KY	
	Fayette, KY	
	Jessamine, KY	
	Madison, KY	
	Scott, KY	
	Woodford, KY	
4320	Lima, OH	0.9483
	Allen, OH	
	Auglaize, OH	
4360	Lincoln, NE	0.9892
	Lancaster, NE	
4400	Little Rock-North Little, AR	0.9097
	Faulkner, AR	
	Lonoke, AR	
	Pulaski, AR	
	Saline, AR	
4420	Longview-Marshall, TX	0.8629
	Gregg, TX	
	Harrison, TX	
	Upshur, TX	
4480	Los Angeles-Long Beach, CA	1.2001
	Los Angeles, CA	
4520	Louisville, KY–IN	0.9276
	Clark, IN	
	Floyd, IN	
	Harrison, IN	
	Scott, IN	
	Bullitt, KY	
	Jefferson, KY	
	Oldham, KY	
4600	Lubbock, TX	0.9646
	Lubbock, TX	
4640	Lynchburg, VA	0.9219
	Amherst, VA	
	Bedford City, VA	
	Bedford, VA	
	Campbell, VA	
	Lynchburg City, VA	
4680	Macon, GA	0.9204
	Bibb, GA	
	Houston, GA	
	Jones, GA	
	Peach, GA	
	Twiggs, GA	
4720	Madison, WI	1.0467
	Dane, WI	
4800	Mansfield, OH	0.8900
	Crawford, OH	
	Richland, OH	
4840	Mayaguez, PR	0.4914
	Anasco, PR	
	Cabo Rojo, PR	
	Hormigueros, PR	
	Mayaguez, PR	
	Sabana Grande, PR	
	San German, PR	
4880	McAllen-Edinburg-Mission, TX	0.8428
	Hidalgo, TX	

ADDENDUM B1.—PROPOSED PRE-RECLASSIFIED WAGE INDEX FOR URBAN AREAS—Continued

MSA	Urban area (constituent counties or county equivalents)	Wage index
4890	Medford-Ashland, OR	1.0498
	Jackson, OR	
4900	Melbourne-Titusville-Palm Bay, FL	1.0253
	Brevard, FL	
4920	Memphis, TN–AR–MS	0.8920
	Crittenden, AR	
	De Soto, MS	
	Fayette, TN	
	Shelby, TN	
	Tipton, TN	
4940	Merced, CA	0.9837
	Merced, CA	
5000	Miami, FL	0.9802
	Dade, FL	
5015	Middlesex-Somerset-Hunterdon, NJ	1.2313
	Hunterdon, NJ	
	Middlesex, NJ	
	Somerset, NJ	
5080	Milwaukee-Waukesha, WI	0.9893
	Milwaukee, WI	
	Ozaukee, WI	
	Washington, WI	
	Waukesha, WI	
5120	Minneapolis-St. Paul, MN-WI	1.0903
	Anoka, MN	
	Carver, MN	
	Chisago, MN	
	Dakota, MN	
	Hennepin, MN	
	Isanti, MN	
	Ramsey, MN	
	Scott, MN	
	Sherburne, MN	
	Washington, MN	
	Wright, MN	
	Pierce, WI	
	St. Croix, WI	
5140	Missoula, MT	0.9157
	Missoula, MT	
5160	Mobile, AL	0.8108
	Baldwin, AL	
	Mobile, AL	
5170	Modesto, CA	1.0498
	Stanislaus, CA	
5190	Monmouth-Ocean, NJ	1.0674
	Monmouth, NJ	
	Ocean, NJ	
5200	Monroe, LA	0.8137
	Ouachita, LA	
5240	Montgomery, AL	0.7734
	Autauga, AL	
	Elmore, AL	
	Montgomery, AL	
5280	Muncie, IN	0.9284
	Delaware, IN	
5330	Myrtle Beach, SC	0.8976
	Horry, SC	
5345	Naples, FL	0.9754
	Collier, FL	
5360	Nashville, TN	0.9578
	Cheatham, TN	
	Davidson, TN	
	Dickson, TN	
	Robertson, TN	
	Rutherford, TN	
	Sumner, TN	
	Williamson, TN	
	Wilson, TN	
5380	Nassau-Suffolk, NY	1.3357
	Nassau, NY	
	Suffolk, NY	
5483	New Haven-Bridgeport-Stamford-Waterbury-Danbury, CT	1.2408

ADDENDUM B1.—PROPOSED PRE-RECLASSIFIED WAGE INDEX FOR URBAN AREAS—Continued

MSA	Urban area (constituent counties or county equivalents)	Wage index
	Fairfield, CT	
	New Haven, CT	
5523	New London-Norwich, CT	1.1767
	New London, CT	
5560	New Orleans, LA	0.9046
	Jefferson, LA	
	Orleans, LA	
	Plaquemines, LA	
	St. Bernard, LA	
	St. Charles, LA	
	St. James, LA	
	St. John The Baptist, LA	
	St. Tammany, LA	
5600	New York, NY	1.4414
	Bronx, NY	
	Kings, NY	
	New York, NY	
	Putnam, NY	
	Queens, NY	
	Richmond, NY	
	Rockland, NY	
	Westchester, NY	
5640	Newark, NJ	1.1381
	Essex, NJ	
	Morris, NJ	
	Sussex, NJ	
	Union, NJ	
	Warren, NJ	
5660	Newburgh, NY–PA	1.1387
	Orange, NY	
	Pike, PA	
5720	Norfolk-Virginia Beach-Newport News, VA–NC	0.8574
	Currituck, NC	
	Chesapeake City, VA	
	Gloucester, VA	
	Hampton City, VA	
	Isle of Wight, VA	
	James City, VA	
	Mathews, VA	
	Newport News City, VA	
	Norfolk City, VA	
	Poquoson City, VA	
	Portsmouth City, VA	
	Suffolk City, VA	
	Virginia Beach City, VA	
	Williamsburg City, VA	
	York, VA	
5775	Oakland, CA	1.5072
	Alameda, CA	
	Contra Costa, CA	
5790	Ocala, FL	0.9402
	Marion, FL	
5800	Odessa-Midland, TX	0.9397
	Ector, TX	
	Midland, TX	
5800	Oklahoma City, OK	0.8900
	Canadian, OK	
	Cleveland, OK	
	Logan, OK	
	McClain, OK	
	Oklahoma, OK	
	Pottawatomie, OK	
5910	Olympia, WA	1.0960
	Thurston, WA	
5920	Omaha, NE–IA	0.9978
	Pottawattamie, IA	
	Cass, NE	
	Douglas, NE	
	Sarpy, NE	
	Washington, NE	
5945	Orange County, CA	1.1474
	Orange, CA	

ADDENDUM B1.—PROPOSED PRE-RECLASSIFIED WAGE INDEX FOR URBAN AREAS—Continued

MSA	Urban area (constituent counties or county equivalents)	Wage index
5960	Orlando, FL	0.9640
	Lake, FL	
	Orange, FL	
	Osceola, FL	
	Seminole, FL	
5990	Owensboro, KY	0.8344
	Daviess, KY	
6015	Panama City, FL	0.8865
	Bay, FL	
6020	Parkersburg-Marietta, WV–OH	0.8127
	Washington, OH	
	Wood, WV	
6080	Pensacola, FL	0.8645
	Escambia, FL	
	Santa Rosa, FL	
6120	Peoria-Pekin, IL	0.8739
	Peoria, IL	
	Tazewell, IL	
	Woodford, IL	
6160	Philadelphia, PA–NJ	1.0713
	Burlington, NJ	
	Camden, NJ	
	Gloucester, NJ	
	Salem, NJ	
	Bucks, PA	
	Chester, PA	
	Delaware, PA	
	Montgomery, PA	
	Philadelphia, PA	
6200	Phoenix-Mesa, AZ	0.9820
	Maricopa, AZ	
	Pinal, AZ	
6240	Pine Bluff, AR	0.7962
	Jefferson, AR	
6280	Pittsburgh, PA	0.9365
	Allegheny, PA	
	Beaver, PA	
	Butler, PA	
	Fayette, PA	
	Washington, PA	
	Westmoreland, PA	
6323	Pittsfield, MA	1.0235
	Berkshire, MA	
6340	Pocatello, ID	0.9372
	Bannock, ID	
6360	Ponce, PR	0.5169
	Guayanilla, PR	
	Juana Diaz, PR	
	Penuelas, PR	
	Ponce, PR	
	Villalba, PR	
	Yauco, PR	
6403	Portland, ME	0.9794
	Cumberland, ME	
	Sagadahoc, ME	
	York, ME	
6440	Portland-Vancouver, OR–WA	1.0667
	Clackamas, OR	
	Columbia, OR	
	Multnomah, OR	
	Washington, OR	
	Yamhill, OR	
	Clark, WA	
6483	Providence-Warwick-Pawtucket, RI	1.0854
	Bristol, RI	
	Kent, RI	
	Newport, RI	
	Providence, RI	
	Washington, RI	
6520	Provo-Orem, UT	0.9984
	Utah, UT	
6560	Pueblo, CO	0.8820

ADDENDUM B1.—PROPOSED PRE-RECLASSIFIED WAGE INDEX FOR URBAN AREAS—Continued

MSA	Urban area (constituent counties or county equivalents)	Wage index
	Pueblo, CO	
6580	Punta Gorda, FL	0.9218
	Charlotte, FL	
6600	Racine, WI	0.9334
	Racine, WI	
6640	Raleigh-Durham-Chapel Hill, NC	0.9990
	Chatham, NC	
	Durham, NC	
	Franklin, NC	
	Johnston, NC	
	Orange, NC	
	Wake, NC	
6660	Rapid City, SD	0.8846
	Pennington, SD	
6680	Reading, PA	0.9295
	Berks, PA	
6690	Redding, CA	1.1135
	Shasta, CA	
6720	Reno, NV	1.0648
	Washoe. NV	
6740	Richland-Kennewick-Pasco, WA	1.1491
	Benton, WA	
	Franklin, WA	
6760	Richmond-Petersburg, VA	0.9477
	Charles City County, VA	
	Chesterfield, VA	
	Colonial Heights City, VA	
	Dinwiddie, VA	
	Goochland, VA	
	Hanover, VA	
	Henrico, VA	
	Hopewell City, VA	
	New Kent, VA	
	Petersburg City, VA	
	Powhatan, VA	
	Prince George, VA	
	Richmond City, VA	
6780	Riverside-San Bernardino, CA	1.1365
	Riverside, CA	
	San Bernardino, CA	
6800	Roanoke, VA	0.8614
	Botetourt, VA	
	Roanoke, VA	
	Roanoke City, VA	
	Salem City, VA	
6820	Rochester, MN	1.2139
	Olmsted, MN	
6840	Rochester, NY	0.9194
	Genesee, NY	
	Livingston, NY	
	Monroe, NY	
	Ontario, NY	
	Orleans, NY	
	Wayne, NY	
6880	Rockford, IL	0.9625
	Boone, IL	
	Ogle, IL	
	Winnebago, IL	
6895	Rocky Mount, NC	0.9228
	Edgecombe, NC	
	Nash, NC	
6920	Sacramento, CA	1.1500
	El Dorado, CA	
	Placer, CA	
	Sacramento, CA	
6960	Saginaw-Bay City-Midland, MI	0.9650
	Bay, MI	
	Midland, MI	
	Saginaw, MI	
6980	St. Cloud, MN	0.9700
	Benton, MN	
	Stearns, MN	

ADDENDUM B1.—PROPOSED PRE-RECLASSIFIED WAGE INDEX FOR URBAN AREAS—Continued

MSA	Urban area (constituent counties or county equivalents)	Wage index
7000	St. Joseph, MO	0.8021
	Andrews, MO	
	Buchanan, MO	
7040	St. Louis, MO–IL	0.8855
	Clinton, IL	
	Jersey, IL	
	Madison, IL	
	Monroe, IL	
	St. Clair, IL	
	Franklin, MO	
	Jefferson, MO	
	Lincoln, MO	
	St. Charles, MO	
	St. Louis, MO	
	St. Louis City, MO	
	Warren, MO	
	Sullivan City, MO	
7080	Salem, OR	1.0367
	Marion, OR	
	Polk, OR	
7120	Salinas, CA	1.4623
	Monterey, CA	
7160	Salt Lake City-Ogden, UT	0.9945
	Davis, UT	
	Salt Lake, UT	
	Weber, UT	
7200	San Angelo, TX	0.8374
	Tom Green, TX	
7240	San Antonio, TX	0.8753
	Bexar, TX	
	Comal, TX	
	Guadalupe, TX	
	Wilson, TX	
7320	San Diego, CA	1.1131
	San Diego, CA	
7360	San Francisco, CA	1.4142
	Marin, CA	
	San Francisco, CA	
	San Mateo, CA	
7400	San Jose, CA	1.4145
	Santa Clara, CA	
7440	San Juan-Bayamon, PR	0.4741
	Aguas Buenas, PR	
	Barceloneta, PR	
	Bayamon, PR	
	Canovanas, PR	
	Carolina, PR	
	Catano, PR	
	Ceiba, PR	
	Comerio, PR	
	Corozal, PR	
	Dorado, PR	
	Fajardo, PR	
	Florida, PR	
	Guaynabo, PR	
	Humacao, PR	
	Juncos, PR	
	Los Piedras, PR	
	Loiza, PR	
	Luguillo, PR	
	Manati, PR	
	Morovis, PR	
	Naguabo, PR	
	Naranjito, PR	
	Rio Grande, PR	
	San Juan, PR	
	Toa Alta, PR	
	Toa Baja, PR	
	Trujillo Alto, PR	
	Vega Alta, PR	
	Vega Baja, PR	
	Yabucoa, PR	

ADDENDUM B1.—PROPOSED PRE-RECLASSIFIED WAGE INDEX FOR URBAN AREAS—Continued

MSA	Urban area (constituent counties or county equivalents)	Wage index
7460	San Luis Obispo-Atascadero-Paso Robles, CA	1.1271
	San Luis Obispo, CA	
7480	Santa Barbara-Santa Maria-Lompoc, CA	1.0481
	Santa Barbara, CA	
7485	Santa Cruz-Watsonville, CA	1.3646
	Santa Cruz, CA	
7490	Santa Fe, NM	1.0712
	Los Alamos, NM	
	Santa Fe, NM	
7500	Santa Rosa, CA	1.3046
	Sonoma, CA	
7510	Sarasota-Bradenton, FL	0.9425
	Manatee, FL	
	Sarasota, FL	
7520	Savannah, GA	0.9376
	Bryan, GA	
	Chatham, GA	
	Effingham, GA	
7560	Scranton-Wilkes-Barre-Hazleton, PA	0.8599
	Columbia, PA	
	Lackawanna, PA	
	Luzerne, PA	
	Wyoming, PA	
7600	Seattle-Bellevue-Everett, WA	1.1474
	Island, WA	
	King, WA	
	Snohomish, WA	
7610	Sharon, PA	0.7869
	Mercer, PA	
7620	Sheboygan, WI	0.8697
	Sheboygan, WI	
7640	Sherman-Denison, TX	0.9255
	Grayson, TX	
7680	Shreveport-Bossier City, LA	0.8987
	Bossier, LA	
	Caddo, LA	
	Webster, LA	
7720	Sioux City, IA-NE	0.9046
	Woodbury, IA	
	Dakota, NE	
7760	Sioux Falls, SD	0.9257
	Lincoln, SD	
	Minnehaha, SD	
7800	South Bend, IN	0.9802
	St. Joseph, IN	
7840	Spokane, WA	1.0852
	Spokane, WA	
7880	Springfield, IL	0.8659
	Menard, IL	
	Sangamon, IL	
7920	Springfield, MO	0.8424
	Christian, MO	
	Greene, MO	
	Webster, MO	
8003	Springfield, MA	1.0927
	Hampden, MA	
	Hampshire, MA	
8050	State College, PA	0.8941
	Centre, PA	
8080	Steubenville-Weirton, OH-WV	0.8804
	Jefferson, OH	
	Brooke, WV	
	Hancock, WV	
8120	Stockton-Lodi, CA	1.0506
	San Joaquin, CA	
8140	Sumter, SC	0.8273
	Sumter, SC	
8160	Syracuse, NY	0.9714
	Cayuga, NY	
	Madison, NY	
	Onondaga, NY	
	Oswego, NY	

ADDENDUM B1.—PROPOSED PRE-RECLASSIFIED WAGE INDEX FOR URBAN AREAS—Continued

MSA	Urban area (constituent counties or county equivalents)	Wage index
8200	Tacoma, WA	1.0940
	Pierce, WA	
8240	Tallahassee, FL	0.8504
	Gadsden, FL	
	Leon, FL	
8280	Tampa-St. Petersburg-Clearwater, FL	0.9065
	Hernando, FL	
	Hillsborough, FL	
	Pasco, FL	
	Pinellas, FL	
8320	Terre Haute, IN	0.8599
	Clay, IN	
	Vermillion, IN	
	Vigo, IN	
8360	Texarkana, AR-Texarkana, TX	0.8088
	Miller, AR	
	Bowie, TX	
8400	Toledo, OH	0.9810
	Fulton, OH	
	Lucas, OH	
	Wood, OH	
8440	Topeka, KS	0.9199
	Shawnee, KS	
8480	Trenton, NJ	1.0432
	Mercer, NJ	
8520	Tucson, AZ	.8911
	Pima, AZ	
8560	Tulsa, OK	0.8332
	Creek, OK	
	Osage, OK	
	Rogers, OK	
	Tulsa, OK	
	Wagoner, OK	
8600	Tuscaloosa, AL	0.8130
	Tuscaloosa, AL	
8640	Tyler, TX	0.9521
	Smith, TX	
8680	Utica-Rome, NY	0.8465
	Herkimer, NY	
	Oneida, NY	
8720	Vallejo-Fairfield-Napa, CA	1.3354
	Napa, CA	
	Solano, CA	
8735	Ventura, CA	1.1096
	Ventura, CA	
8750	Victoria, TX	0.8756
	Victoria, TX	
8760	Vineland-Millville-Bridgeton, NJ	1.0031
	Cumberland, NJ	
8780	Visalia-Tulare-Porterville, CA	0.9429
	Tulare, CA	
8800	Waco, TX	0.8073
	McLennan, TX	
8840	Washington, DC–MD–VA–WV	1.0851
	District of Columbia, DC	
	Calvert, MD	
	Charles, MD	
	Frederick, MD	
	Montgomery, MD	
	Prince Georges, MD	
	Alexandria City, VA	
	Arlington, VA	
	Clarke, VA	
	Culpepper, VA	
	Fairfax, VA	
	Fairfax City, VA	
	Falls Church City, VA	
	Fauquier, VA	
	Fredericksburg City, VA	
	King George, VA	
	Loudoun, VA	
	Manassas City, VA	

ADDENDUM B1.—PROPOSED PRE-RECLASSIFIED WAGE INDEX FOR URBAN AREAS—Continued

MSA	Urban area (constituent counties or county equivalents)	Wage index
	Manassas Park City, VA	
	Prince William, VA	
	Spotsylvania, VA	
	Stafford, VA	
	Warren, VA	
	Berkeley, WV	
	Jefferson, WV	
8920	Waterloo-Cedar Falls, IA	0.8069
	Black Hawk, IA	
8940	Wausau, WI	0.9782
	Marathon, WI	
8960	West Palm Beach-Boca Raton, FL	0.9939
	Palm Beach, FL	
9000	Wheeling, OH–WV	0.7670
	Belmont, OH	
	Marshall, WV	
	Ohio, WV	
9040	Wichita, KS	0.9520
	Butler, KS	
	Harvey, KS	
	Sedgwick, KS	
9080	Wichita Falls, TX	0.8498
	Archer, TX	
	Wichita, TX	
9140	Williamsport, PA	0.8544
	Lycoming, PA	
9160	Wilmington-Newark, DE–MD	1.1173
	New Castle, DE	
	Cecil, MD	
9200	Wilmington, NC	0.9640
	New Hanover, NC	
	Brunswick, NC	
9260	Yakima, WA	1.0569
	Yakima, WA	
9270	Yolo, CA	0.9434
	Yolo, CA	
9280	York, PA	0.9026
	York, PA	
9320	Youngstown-Warren, OH	0.9358
	Columbiana, OH	
	Mahoning, OH	
	Trumbull, OH	
9340	Yuba City, CA	1.0276
	Sutter, CA	
	Yuba, CA	
9360	Yuma, AZ	0.8589
	Yuma, AZ	

ADDENDUM B2.—WAGE INDEX FOR RURAL AREAS

Nonurban area	Wage index
Alabama	0.7660
Alaska	1.2293
Arizona	0.8493
Arkansas	0.7666
California	0.9840
Colorado	0.9015
Connecticut	1.2394
Delaware	0.9128
Florida	0.8814
Georgia	0.8230
Guam	0.9611
Hawaii	1.0255
Idaho	0.8747
Illinois	0.8204
Indiana	0.8755
Iowa	0.8315
Kansas	0.7923
Kentucky	0.8079

ADDENDUM B2.—WAGE INDEX FOR RURAL AREAS—Continued

Nonurban area	Wage index
Louisiana	0.7567
Maine	0.8874
Maryland	0.8946
Massachusetts	1.1288
Michigan	0.9000
Minnesota	0.9151
Mississippi	0.7680
Missouri	0.8021
Montana	0.8481
Nebraska	0.8204
Nevada	0.9577
New Hampshire	0.9796
New Jersey [1]	.....
New Mexico	0.8872
New York	0.8542
North Carolina	0.8666
North Dakota	0.7788

ADDENDUM B2.—WAGE INDEX FOR RURAL AREAS—Continued

Nonurban area	Wage index
Ohio	0.8613
Oklahoma	0.7590
Oregon	1.0303
Pennsylvania	0.8462
Puerto Rico	0.4356
Rhode Island [1]	.....
South Carolina	0.8607
South Dakota	0.7815
Tennessee	0.7877
Texas	0.7821
Utah	0.9312
Vermont	0.9345
Virginia	0.8504
Virgin Islands	0.7845
Washington	1.0179
West Virginia	0.7975
Wisconsin	0.9162

ADDENDUM B2.—WAGE INDEX FOR RURAL AREAS—Continued

Nonurban area	Wage index
Wyoming	0.9007

[1] All counties within the State are classified urban.

BILLING CODE 4120–01–P

ADDENDUM C-- **CASE MIX ASSESSMENT TOOL (CMAT) DRAFT 7.0 version 1.0**

For research purposes only - Final operational instrument will retain only items useful for case mix. Paper version of automated CMAT.

DEMOGRAPHICS

1. Name of Patient (last, first, MI, suffix)

2. Medicare Number

3. Medical Record Number

4. Medicare Facility Identification Number

5. Gender 1. Male 2. Female

6. Date of Birth (MM-DD-YYYY)

7. Education (Highest Level Completed)
1. No schooling
2. 8th grade/less
3. 9-11 grades
4. High school
5. Technical or trade school
6. Some college
7. Bachelor's Degree
8. Graduate Degree

SERVICE HISTORY

8. Number of Psychiatric Admissions Record the number of lifetime psychiatric admissions, not including this one.
0. None 1. 1-3
2. 4-10 3. 11 or more

9. Number of Medications Record the number of different medications administered in last 7 days, including OTCs

STAY PARAMETERS

10. Legal Status
1. Voluntary
2. Involuntary (e.g., civil court hold, admitted by guardian)
3. Criminal court hold (e.g., forensic)

11. Admission Date (MM-DD-YYYY)

12. Assessment Date (MM-DD-YYYY)

13. Type of Hospital
1. Freestanding psychiatric hospital
2. Exempt unit in a general hospital
3. State psychiatric hospital
4. Federal psychiatric hospital
5. Other _____

14. Housing Status: Availability of housing at discharge
0. No 1. Yes 2. Discharge not expected

PSYCHIATRIC and COMORBID CONDITIONS

15. Psychiatric Diagnoses During Stay
ICD-9 codes at **admission** ICD-9 codes **current**

16. Medical Diagnoses/ Complexities During Stay
ICD-9 codes | Condition is unstable or out of control 0.No 1.Yes

17. Depressed (Code for indicators observed in the last 3 days)
0. Not exhibited
1. Not exhibited in last three days but is reported to be present
2. Exhibited 1-2 of last 3 days
3. Exhibited daily, not persistent
4. Exhibited daily, persistent

a. **Facial Expression:** sad, pained, worried facial expression (e.g., furrowed brow)
b. **Tearfulness:** crying, tearfulness
c. **Negative or Depressive Statements**: patient made negative statements (e.g., "Nothing matters; I would rather be dead; What's the use; Let me die"; regrets having lived so long)
d. **Anxious Complaints**: repetitive anxious complaints (non-health related) (e.g., persistently seeks attention/reassurance)
e. **Fears/Phobias**: expression (including non-verbal) of what appear to be unrealistic fears (e.g., fear of being abandoned, of being left alone, of being with others) or intense fear of specific objects or situations
f. **Health Complaints**: repetitive health complaints (e.g., persistently seeks medical attention; excessive concerns with bodily functions)
g. **Anger**: persistent anger with self or others (e.g., easily annoyed; anger at care received)

CASE MIX ASSESSMENT TOOL (CMAT) DRAFT 7.0 version 1.0

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PSYCHIATRIC and COMORBID CONDITIONS (cont)

18. Psychotic Symptoms (Code for indicators observed in the last 3 days)
0. Not exhibited
1. Not exhibited in last three days but is reported to be present
2. Exhibited 1-2 of last 3 days
3. Exhibited daily, not persistent
4. Exhibited daily, persistent

a. **Hallucinations:** Erroneous/false perception involving any of the senses (hearing, vision, smell, taste, touch) ☐
b. **Delusions:** Fixed false beliefs or thoughts ☐
c. **Disorganized Thinking/Speech:** Loosening of associations, blocking, flight of ideas, tangentiality, circumstantiality, etc. ☐

19. Mania - grandiosity, talkativeness, racing thoughts/flight of ideas, distractibility, agitation, irritability. Indicate if exhibited in last 3 days. ☐
0. Not exhibited 1. Exhibited 1-2 of last 3 days 2. Exhibited daily

20. Danger to Others (Code for most recent incidence)
0. Never exhibited
1. Instance prior to the last year
2. Instance in the last year
3. Instance in the last 30 days
4. Instance in the last 3 days

a. **Violence toward Others** ☐
b. **Violent Ideation** ☐

21. Aggression (Code for frequency within the last 3 days)
0. Not exhibited
1. Not exhibited in last three days but is reported to be present
2. Exhibited 1-2 of last 3 days
3. Exhibited daily, not persistent
4. Exhibited daily, persistent

a. **Verbal Aggression** ☐
b. **Physical Aggression** (e.g., attack or assault) ☐

22. Self-injury and Suicidality
a. **Considered performing a self-injurious act in the last 30 days** ☐
0. No 1. Yes
b. **Self-Injurious attempt** (Code for most recent instance) ☐
0. Never
1. Attempt more than 1 year ago
2. Attempt in the last year
3. Attempt in the last 30 days
4. Attempt in the last 3 days
c. **Intent of any self-injurious attempt was to kill him/herself** ☐
0. No/No attempt 1. Yes
d. **Suicide plan** - Patient has a current suicide plan ☐
0. No 1. Yes

23. Cognitive Function / Communication
a. **Short-term memory OK** - seems/appears to recall after 5 minutes ☐
0. Memory OK 1. Memory Problem
b. **Long-term memory OK** - seems/appears to recall distant past ☐
0. Memory OK 1. Memory Problem
c. **Procedural memory OK** - Can perform all or almost all steps in a multi-task sequence without cues for initiation ☐
0. Memory OK 1. Memory Problem
d. **Situational memory OK - Both** recognizes staff names/faces frequently encountered **AND** knows location of places regularly visited (bedroom, dining room, activity room, therapy room) ☐
0. Memory OK 1. Memory Problem
e. **Daily decision making:** How well patient makes decisions about organizing the day (e.g., when to get up or have meals, which clothes to wear or activities to do) ☐
0. Independent - decisions consistent/reasonable
1. Modified Independence - some difficulty in new situations only
2. Minimally Impaired - in specific situations, decisions become poor and cues/supervision necessary at those times
3. Moderately Impaired - decision is consistantly poor, cues/supervision required at all times
4. Severely Impaired - never/rarely makes decisions
f. **Insight into mental health problems** - Degree of patient insight ☐
0. Full 1. Limited 2. None
g. **Making self understood (Expression)** - Expressing information content -- however able ☐
0. Understood -- Expresses ideas without difficulty
1. Usually understood -- Difficulty finding words or finishing thoughts BUT if given time, little or no prompting required
2. Often understood -- Difficulty finding words or finishing thoughts, prompting usually required
3. Sometimes understood -- Ability is limited to concrete requests
4. Rarely/never understood

CASE MIX ASSESSMENT TOOL (CMAT) DRAFT 7.0 version 1.0

For research purposes only - Final operational instrument will retain only items useful for case mix. Paper version of automated CMAT.

PSYCHIATRIC and COMORBID CONDITIONS (cont)

24. Signs and Symptoms (Code for indicators observed in last 3 days)
0. No 1. Yes

- **a. Dry mouth** ☐
- **b. Nausea** ☐
- **c. Constipation** ☐
- **d. Impaired Balance/ataxia** ☐
- **e. Edema** ☐

25. Health Problems:

a. Pain - Frequently complains or shows evidence of pain in last 3 days ☐
0. None 1. Less than daily 2. Daily

b. Sleep Problems - Any sleep problems present on 2 or more of the last 3 days, including awakening earlier than desired, difficulty falling asleep, restless or nonrestful sleep, too much sleep, interrupted sleep. ☐
0. No 1. Yes

26. Substance Abuse/Dependence

a. An increase in either amount or frequency of substance use within the past 30 days ☐
0. No 1. Yes

b. Unable to control substance use within the past 30 days ☐
0. No 1. Yes

c. Substance Abuse Withdrawal: Severity of signs or symptoms possibly indicative of withdrawal from alcohol or drugs. Code for most severe level in last 3 days. ☐
0. None
1. Mild - symptoms typical of early stages of withdrawal (e.g., agitation, "jitters", craving, hostility, gastrointestinal upset, anxiety, vivid dreaming)
2. Moderate - increased severity of early indicators, weakness, sweating, hot flashes, fainting, muscle twitching
3. Severe - symptoms typical of late stages of withdrawal (e.g., exhaustion, seizures, tremors, tachycardia, disorientation, hyperventilation)

d. Intentional Misuse of Medication - Misuse of prescription or over-the-counter medications in the **past 30 days** (e.g., uses medication for purpose other than intended) ☐
0 No 1. Yes

27. History of Abuse Towards Patient
0. No 1. Yes

- **a. Any history of physical abuse or assault** ☐
- **b. Any history of sexual abuse or assault** ☐
- **c. Any history of emotional abuse** ☐

FUNCTIONING

28. Activities of Daily Living: Code for self-performance, last 3 days

0. Independent - no help, setup, or supervision - or help, setup or supervision provided only 1 or 2 times
1. Setup help only - article or device provided or placed within reach of patient 3 or more times
2. Supervision - oversight, encouragement or cueing provided 3 or more times OR supervision (1 or more times) plus physical assistance provided only 1 or 2 times (for a total of 3 or more episodes of help or supervision)
3. Limited Assistance patient highly involved in activity; received physical help in guided maneuvering of limbs or other non-weight bearing assistance 3 or more times OR combination of non-weight bearing help with more help provided only 1 or 2 times (for a total of 3 or more episodes of physical help)
4. Extensive Assistance patient performed part of activity on own (50% or more of subtasks) BUT help of the following type(s) was provided 3 or more times:
Weight-bearing support (e.g., holding weight of limb, trunk)
– Full performance by another of a task (some of the time) or discrete subtask
5. Maximal Assistance patient was involved and completed less than 50% of subtasks on own, received weight bearing help or full performance of certain subtasks 3 or more times. Includes two person assists where the patient completes less than 50% of subtasks on own
6. Total Dependence full performance of activity by other(s)
8. Activity did not occur

- **a. Personal Hygiene:** how patient maintains personal hygiene. Includes combing hair, brushing teeth, shaving, applying makeup, controlling body odor, washing/drying face, hands, and perineum (exclude baths & showers) ☐
- **b. Locomotion:** how patient moves between locations in his or her room and adjacent corridor on same floor. If in wheelchair, self sufficiency once in wheelchair ☐
- **c. Toilet Use:** How patient uses the toilet room (or commode, bedpan, urinal) ☐
- **d. Eating:** How patient eats and drinks (regardless of skill). Includes intake of nourishment by other means (e.g., tube feeding, total parenteral nutrition) ☐

CASE MIX ASSESSMENT TOOL (CMAT) DRAFT 7.0 version 1.0

For research purposes only - Final operational instrument will retain only items useful for case mix. Paper version of automated CMAT.

FUNCTIONING (cont)

29. Capacity to Perform Instrumental Activities of Daily Living

If patient *had been required* to carry out the activity over the **last 24 hours**, *speculate* and code for what you consider the patient's capacity (ability) would have been to perform the activity at that time

0. **Independent** would have required no help, setup, or supervision
1. **Setup Help Only** – would have required help that would have been limited to providing or placing article/device within reach of patient; could have performed all other tasks on own
2. **Supervision** - would have required oversight, encouragement, or cueing
3. **Limited Assistance** - on some occasion(s) could have done on own, other times would have required help
4. **Moderate Assistance** - while patient could have been involved, would have required presence of helper at all times, and would have performed 50% or more of subtasks on own
5. **Maximal Assistance** - while patient could have been involved, would have required presence of helper at all times, and would have performed less than 50% of subtasks on own
6. **Total Dependence** - full performance by other(s) of activity would have been required at all times (no residual capacity exists)

a. **Meal Preparation:** How meals are prepared (e.g., planning meals, cooking, assembling ingredients, setting out food and utensils) ☐

b. **Managing Medications:** How medications are managed (e.g., remembering to take medicines, opening bottles, taking correct drug dosages, giving injections, applying ointments) ☐

c. **Transportation:** How patient travels by vehicle (e.g., gets to places beyond walking distance) ☐

30. Bladder Continence: In the last 3 days, control of urinary bladder function (includes dribbling) ☐

0. **Continent** - Complete control - DOES NOT USE any type of catheter or other urinary collection device
1. **Continent With Catheter** - Complete control with use of catheter or urinary collection device that doesn't leak urine
2. **Infrequent Incontinence** - Not incontinent over last 3 days, but patient does have incontinent episodes
3. **Episode of Incontinence** - On one day
4. **Occasionally Incontinent** - On two days
5. **Frequently Incontinent** - Tended to be incontinent daily, but some control present (e.g., during day)
6. **Incontinent** - Inadequate control of bladder
8. **Did Not Occur** - No urine output from bladder.

31. Number of Falls in last 30 days ☐

0. None 1. One 2. Two or more

SERVICE / TREATMENTS

32. Past ECT: Time since last ECT ☐

0. Never received
1. Instance prior to the last year
2. Instance in the last year
3. Instance in the last 30 days
4. Instance in the last 3 days

33. Control Interventions (Code for use of each device in the **last 3 days**)

0. Not used
1. Less than daily use
2. Daily use - night only
3. Daily use - day only
4. Night and day, but not constant
5. Constant use for full 24 hours (with periodic release)

a. **Mechanical restraint, no ambulation** ☐
b. **Mechanical restraint, ambulation possible** ☐
c. **Chair prevents rising** ☐
d. **Physical/manual restraint by staff** ☐
e. **Seclusion room** ☐

DIAGNOSTIC STUDIES/LAB RESULTS

In the last 3 days, or since admission, code for the most recent test. For each test use the following codes:

0. Not evaluated
1. Evaluated, met criteria
2. Evaluated, did not meet criteria

34. White Blood Count, WBC: criteria - range 3.8 - 10.8 ☐

35. Head CT or MRI: criteria - No hemorrhages, infarcts, masses, or white matter hyperdensity. ☐

36. Lithium Toxicity: criteria - 1.2 or lower ☐

37. Completed by:

_____

(last, first, MI, suffix, degree)

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Federal Register

Friday,
November 28, 2003

Part III

Department of Housing and Urban Development

24 CFR Parts 1006 and 1007

Housing Assistance for Native Hawaiians: Native Hawaiian Housing Block Grant Program and Loan Guarantees for Native Hawaiian Housing Program; Direct Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 1006 and 1007

[Docket No. FR–4668–F–03]

RIN 2577–AC27

Housing Assistance for Native Hawaiians: Native Hawaiian Housing Block Grant Program and Loan Guarantees for Native Hawaiian Housing Program; Final Rule

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Final rule.

SUMMARY: This rule issues as final, and responds to public comments on, an interim rule published on June 13, 2002, to implement procedures and requirements for two new programs to address the housing needs of Native Hawaiians. The Native Hawaiian Housing Block Grant program will provide housing block grants to fund affordable housing activities. The Section 184A Loan Guarantees for Native Hawaiian Housing program will provide Native Hawaiian families with greater access to private mortgage resources by guaranteeing loans for one-to four-family housing located on Hawaiian Home Lands.

DATES: *Effective Date:* December 29, 2003.

FOR FURTHER INFORMATION CONTACT: Edward Fagan, Office of Native American Programs, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–5000, telephone (202) 401–7914. (This is not a toll-free number.) Individuals with speech-or hearing-impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

Section 513 of the Hawaiian Homelands Homeownership Act of 2000, Subtitle B of Title V of the American Homeownership and Economic Opportunity Act of 2000 (Pub. L. 106–569, approved December 27, 2000) (HHH Act) amends the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4101 *et seq.*) (NAHASDA) by adding a new "Title VIII—Housing Assistance for Native Hawaiians." Title VIII (the Act) establishes a program of block grant assistance to provide affordable housing for Native Hawaiians that is closely modeled on the Indian Housing Block Grant (IHBG) program under NAHASDA. Section 514 of the HHH Act adds a new Section 184A to the Housing and Community Development Act of 1992 to authorize a new program of housing loan guarantees for Native Hawaiians based upon the Section 184 Loan Guarantee for Indian Housing program.

HUD published an interim rule on June 13, 2002 (67 FR 40774), to implement the Act at 24 CFR part 1006 as the Native Hawaiian Housing Block Grant (NHHBG) program, and to implement the Section 184A Native Hawaiian Housing Loan Guarantee program (Section 184A program) at 24 CFR part 1007. Public comment was also invited on the two new programs of housing assistance for Native Hawaiians. This rule issues as final, and responds to public comments received on, the June 13, 2002, interim rule.

II. Response to Public Comment on the Interim Rule

The public comment period on the June 13, 2002, interim rule closed on August 12, 2002. HUD received four comments on the interim rule. Comments were received from a nonprofit organization, a county agency, and two agencies of the state of Hawaii. The comments received are organized below in this section of the preamble to correspond to the rule section that is addressed by the comment. The HUD response follows each comment.

Section 1006.10 Definitions

Comment: The definition of "housing area" should be expanded to include lands outside the jurisdiction of the Department of Hawaiian Home Lands (DHHL), and lands other than the Hawaiian home lands (Hawaiian Home Lands) because there are many native Hawaiians who should qualify for assistance on the basis of income, but have not received a DHHL lease.

HUD response: The language of the definition of "housing area" in the rule is the same language that appears as the definition of "housing area" in section 801(5) of the Act, and HUD may not, by regulation, substantively change this statutory definition.

Comment: In the definition of "Native Hawaiian," DHHL's certification that an individual is a bona fide lessee should be included as acceptable evidence that an individual is a Native Hawaiian, along with genealogical records, verification by elders, and birth records.

HUD response: Section 1006.301 sets forth the statutory requirement that eligibility is limited to Native Hawaiian families who are eligible to reside on the Hawaiian Home Lands. HUD agrees that an individual who is a bona fide homestead leaseholder satisfies the NHHBG program requirement that the family is eligible to reside on the Hawaiian Home Lands. The lease is sufficient to document the requirement.

Section 1006.101 Housing Plan Requirements

Comment: Since no federal funds were used in constructing past units on the Hawaiian Home Lands, DHHL should not be required to report on the condition or disposition of those dwellings.

HUD response: The housing plan requirements of §§ 1006.101(b)(vii) and (viii), which this comment addresses, are taken directly from the authorizing statute (see 25 U.S.C. 4223(c)(2)(D)(vii) and (viii)). In general, the statutory provisions for a housing plan require a more comprehensive approach that looks at the use of NHHBG funding not in isolation, but within the context of the overall housing needs of Native Hawaiians and the total resources available to address those needs. Therefore, even though no federal funds were used in the construction of past units, it is necessary to consider these existing resources to better utilize the new assistance. In addition, NHHBG funding may be used for the demolition or disposition of existing units, if the DHHL provides for this activity in its housing plan, even though the units were not constructed with federal funds.

Section 1006.201 Eligible Affordable Housing Activities

Comment: Because there are currently no NAHASDA (more specifically, NHHBG) assisted units on the Hawaiian Home Lands), NHHBG funds cannot be used in existing communities. DHHL would like to enable existing communities to use NAHASDA funds for model activities, resident management and crime and safety activities.

HUD response: The eligible activities in section 810 of the Act are "affordable housing" activities. Subsection (b)(1) covers development of affordable housing, subsection (b)(2) covers housing-related services for affordable housing, subsection (b)(3) covers management services for affordable housing, subsection (b)(4) covers crime prevention and safety measures to protect residents of affordable housing, and subsection (b)(5) covers model housing activities. Subpart C of the regulations reflects the statutory language. "Affordable housing" is housing that complies with the requirements for affordable housing in

the statute and regulations. Notwithstanding the fact that the housing in existing communities was not developed with NHHGB funds, NHHBG funds may be used to assist existing communities if the existing housing complies with the requirements for affordable housing. HUD notes that under both section 813(b) of the Act (25 U.S.C. 4232(b)) and, § 1006.305(d) of the regulations, housing assisted with NHHBG funds pursuant to the exception to low-income requirement at section 809(a)(2)(B) of the Act (25 U.S.C. 4228(a)(2)(B)), and § 1006.301(b) of the regulations, shall be considered affordable housing for purposes of the Act.

Section 1006.220 Crime Prevention and Safety Activities

Comment: DHHL would like to provide services within existing communities, even if there are no NAHASDA-assisted units within the communities at the present time.

HUD response: HUD's response to the comment on § 1006.201 addresses this issue.

Section 1006.225 Model Activities

Comment: DHHL would like to provide services within existing communities, even if there are no NAHASDA-assisted units within the communities at the present time.

HUD response: HUD's response to the comment on § 1006.201 addresses this issue.

Eligible Activities (Subpart C Generally)

Comment: In the case of activities such as site improvements or development of utilities that benefit the whole community, "all units in a project should be considered as Eligible Low-Income Families" if the families in the project are existing residents and any of the following:

(a) The median income of the Hawaiian Home Lands area in which the project is located is less than 80 percent of the median income of the state of Hawaii (based on the most recent U.S. Census data available); or

(b) The project has a poverty rate of at least 20 percent; or

(c) The project is located in a low-income area of the U.S. Treasury Department's Community Development Financial Institutions (CDFI) Fund On-line Help Desk Maps.

There should be criteria to qualify whole communities as low-income because where there are existing residents, the effort to certify individual families as low-income becomes an imposition on the residents and burdensome to the DHHL. The rule should not serve as a disincentive to provide affordable housing activities in existing communities.

HUD response: The authorizing statute permits exceptions to the low-income requirement and allows NHHBG funds to be used for housing activities under model programs that are designed to carry out the purposes of title VIII of the Act. The use of NHHBG funds under the low-income exception and for model activities both require HUD approval. HUD encourages the submission of specific planned model activities and requests for exemptions for review with conformity to the Act's requirements.

Comment: The rule restricts the use of funds to communities in which there are existing NAHASDA-assisted units, and prevents DHHL from strengthening or enabling existing communities with NAHASDA funds. [Note: Although the comment spoke of "NAHASDA-assisted units" and "NAHASDA funds" it is clear that NHHBG assistance is the intended subject.]

HUD response: HUD's response to the comment on § 1006.201 addresses this issue.

Comment: There may be a need to improve off-site infrastructure to access DHHL property through non-DHHL properties. The current rule appears to preclude such projects. Expanding the definition of "housing area" would allow funding of off-site infrastructure improvements.

HUD response: Under section 810(b)(1) of the Act, the development of affordable housing may include both site improvements and the development of utilities and utility services. Site improvements must be on the site of the affordable housing. The affordable housing must be located on a "housing area" which is defined by section 801(5) of the Act to mean an area of the Hawaiian Home Lands with respect to which the DHHL is authorized to provide assistance for affordable housing under the Act. Although the affordable housing must be located on the Hawaiian Home Lands, the utilities need not necessarily be located there. However, the utilities must be for the affordable housing.

Section 1006.310 Rent and Lease-Purchase Limitations

Comment: For rental and rent-to-own units, each entering family must qualify as low-income. For homeownership, only the initial family must qualify as low-income.

HUD response: The regulatory requirements reflect the statutory requirements at section 813(a) of the Act (25 U.S.C. 4232(a)).

Comment: Because the monthly maximum rent or lease-purchase payment may not exceed 30 percent of a low-income family's income, this cap may preclude the establishment of flat rents or lease-purchase payments based on operational costs or market factors.

HUD response: The 30 percent of income requirement is statutory (25 U.S.C. 4230(a)(2), section 811(a) of the Act) and applies "in the case of any low-income family." Where a family that is not low-income is assisted, if permitted under the exception discussed earlier in this preamble, the 30 percent of income requirement does not apply. (*See* § 1006.310(c).)

Section 1006.315 Lease Requirements

Comment: Currently DHHL will take action against the lessee only if the illegal activity is conducted on the leased premises.

HUD response: The regulation allows this flexibility, and provides, at § 1006.315(f), that "the DHHL, owner, or manager may terminate the tenancy." (Emphasis added.) Termination is discretionary, not mandatory.

Section 1006.320 Tenant or Homebuyer Selection

Comment: DHHL plans to use current state administrative rules, which govern the awarding of leases to applicants on the waiting lists for Hawaiian Home Lands with the addition of the NAHASDA income requirement for this purpose.

HUD response: The policies and criteria adopted by the DHHL as required by the Act, must be available for review by HUD, and the housing plan submitted annually by the DHHL must contain a certification that the DHHL has such policies in effect. HUD will bring any concerns it may have with respect to such policies to the DHHL's attention upon conducting such reviews.

Section 1006.330 Insurance Coverage

Comment: Would HUD be required to be named as an additional insured on homeowner units funded by the Act or does the insurance requirement apply only on rental units purchased or constructed by DHHL with NAHASDA funds and owned and managed by DHHL?

HUD response: The insurance requirement is intended to preserve the NHHBG investment in affordable housing and not to provide any compensation to HUD. HUD is not named as an additional insured on any units, but the DHHL must require the owner of any rental or homeownership unit assisted with more than $5,000 of

NHHBG funds to obtain insurance sufficient to cover the replacement cost of the unit.

Section 1006.335 Use of Nonprofit Organizations and Public-Private Partnerships

Comment: Because of the limited number of experienced nonprofit developers in Hawaii, the requirement to work with nonprofits to the extent practicable may serve as an obstacle to the development of affordable housing.

HUD response: The DHHL is in the best position to determine the extent to which it is practicable to work with nonprofits. This requirement is not intended to hinder the DHHL's affordable housing efforts.

Section 1006.340 Treatment of Program Income

Comment: New grant funds should be accessible even if there is available program income remaining, because it may be impracticable to exhaust all program income first.

HUD response: The requirement to disburse program income first in § 1006.340(b)(3) merely repeats the governmentwide requirements of Office of Management and Budget (OMB) Circular A–102, "Administrative Requirements for Grants and Cooperative Agreements to State, Local and Federally Recognized Indian Tribal Governments," which has been adopted by HUD at 24 CFR part 85. It is not necessary to exhaust all program income first as the comment states. Under 24 CFR 1006.340(c), if the total amount of program income received in a single year does not exceed $25,000, then the amount is not considered program income and is not subject to the requirement that it be disbursed before disbursing additional NHHBG funds. Program income would not have to be disbursed unless and until it is determined that the $25,000 threshold has been crossed. The requirement is intended to avoid the stockpiling and non-use of program income.

Section 1006.345 Labor Standards

Comment: DHHL partners with nonprofits that use self-help and volunteer labor to bring down housing costs for low-income families. These efforts would be hampered by a wage requirement.

HUD response: Volunteer labor is specifically exempted, under the conditions specified in section 805(b)(2) of the Act (25 U.S.C. 4225(b)(2)), and § 1006.345(d) of the regulations, from the wage requirement.

Section 1007.1 Purpose

Comment: The purpose section of the regulations states that HUD understands homestead leases have unique legal status; therefore, HUD is aware that homestead leases are not alienable.

HUD response: Section 208(6) of the Hawaiian Homes Commission Act (HHCA) provides that:

> The lessee, with the consent and approval of the commission, may mortgage or pledge the lessee's interest in the tract or improvements thereon to a recognized lending institution authorized to do business as a lending institution in either the state or elsewhere in the United States; provided the loan secured by a mortgage on the lessee's leasehold interest is insured or guaranteed by the Federal Housing Administration, Department of Veterans Affairs, or any other federal agency and their respective successors and assigns, which are authorized to insure or guarantee such loans, or any acceptable private mortgage insurance as approved by the commission. The mortgagee's interest in any such mortgage shall be freely assignable. Such mortgages, to be effective, must be consented to and approved by the commission and recorded with the department.

The HHCA specifically permits the lessee of a homestead lease to pledge the lessee's interest in the tract or improvements, which provides a sufficient basis for mortgage lending to proceed in the unique circumstances of the Hawaiian Home Lands. As a practical matter, the federal government's insurance or guarantee of the loan, rather than the value of the property, provides the actual financial security for a lender to an individual Native Hawaiian borrower in these transactions. Under the HHCA, general leases are clearly alienable.

HUD notes that nearly all of the comments submitted on the Section 184A program address issues of loans to individual, Native Hawaiian borrowers who hold homestead leases, the same group of borrowers directly served by the existing Federal Housing Administration (FHA) Section 247 mortgage insurance program. Because of the unique status of Hawaiian Home Lands, the Section 247 program focuses on loans to individual, Native Hawaiian borrowers. This focus is exemplified by one of the principal purposes of the HHCA, "Preventing alienation of the fee title to the lands set aside under this Act so that these lands will always be held in trust for continued use by native Hawaiians in perpetuity," HHCA § 101(b)(3)). This focus raises a number of difficulties in implementation, among them, issues concerning the security offered for a loan, and valuation of, foreclosure on, and sale after foreclosure of the security. However, the use of Section 184A loan guarantees is not limited to individual homebuyers, and HUD wishes to emphasize the significant difference between the new Section 184A program and the Section 247 program.

The Section 184A program does not merely duplicate the Section 247 program, which focuses exclusively on loans to individual native Hawaiian families holding homestead leases. For reasons of efficiency and ease of administration, and to capitalize on familiarity in order to promote acceptance by the lending industry, HUD intends to administer both the Section 184A and Section 247 programs in a consistent manner with respect to individual, Native Hawaiian borrowers, who are eligible under either program. But to fully implement, and derive the maximum benefit from, the Section 184A program, HUD has concluded that it will emphasize and strongly encourage the use of the Section 184A program in ways that do not duplicate the Section 247 program.

The conclusion for not having the Section 184A program duplicate the Section 247 program comes from HUD's consideration of the broader range of eligible borrowers under the Section 184A program statute, the flexibility permitted for eligible collateral, and the larger scale of the activities that may be undertaken with the greater amount of guaranteed funds available to a borrower. HUD, therefore, strongly encourages the use of Section 184A loan guarantees by the institutional borrowers (DHHL, Office of Hawaiian Affairs, experienced nonprofits) specifically made eligible under the statute. These institutional borrowers may negotiate with lenders for larger loans, up to the limits HUD is authorized to guarantee, to obtain financing for large-scale, integrated infrastructure, homeownership development projects on the Hawaiian Home Lands. Section 184A allows this type of community-wide, rather than single home, development and, to the fullest extent possible, HUD encourages the use of the program for such projects.

Under such a project, for example, the DHHL could develop and pay for the cost of a number of homes and supporting infrastructure, using a combination of NHHBG funds and Section 184A guaranteed loan proceeds. The loan collateral could be any bonds or notes the DHHL is authorized to issue. The grant funds could cover the infrastructure costs, and the loan proceeds could cover the cost of the homes. If the DHHL chooses to provide direct financing to a Native Hawaiian leaseholder for one of these homes, the

transaction would require no additional source of funding; the DHHL could offer a loan at the minimum rate necessary to cover its repayment of the Section 184A loan; and any payments made by the leaseholder would be a direct offset of the cost of developing the home. HUD would not have to guarantee or insure these loans. Because the infrastructure was paid for by grant funds, the leaseholder/borrower is not paying back these costs, only the loan guarantee costs of the home. Even if there were a number of successive defaults on a home, the home could be offered at a discounted price or shorter term to each successive leaseholder, since the DHHL is seeking only to recover its costs and repay its loans, not to make a profit. Any gap in cash flow while a defaulting leaseholder is evicted and a new leaseholder takes over would be limited to the monthly payments as they come due and not to the entire cost of the home.

The use of Section 184A loan guarantees as described above may proceed under the rule at 24 CFR part 1007 as currently written. HUD is planning in a separate rule to propose minimum financial viability and development capacity and experience requirements to determine what nonprofits are eligible for guarantees, but this should not prevent planning of Section 184A development projects from proceeding. HUD welcomes the opportunity to work with the eligible institutional borrowers to develop viable projects on a case-by-case basis. The result of using the Section 184A program for this larger-scale development is anticipated to be an increase in the production of affordable housing units on a more financially sound basis, while avoiding many of the difficulties pointed out in the public comments, which focus on issues related to individual borrowers. To the extent Section 184A loan guarantees are sought for individual borrowers, the existing FHA Section 247 program model will be followed.

Section 1007.20 Eligible Housing

Comment: The FHA Section 247 program accepts the building codes of the various counties, and the Section 184A program should accept the same requirements.

HUD response: A new paragraph (d) is being added to § 1007.20 to provide that housing that meets the minimum property standards for Section 247 mortgage insurance is deemed to meet the required housing safety and quality standards.

Section 1007.30 Security for Loan

Comment: Under § 1007.30(a), only the dwelling for which the loan is used is collateral for the loan.

HUD response: Where the borrower is an individual, Native Hawaiian holder of a homestead lease, the lessee's interest must always be included as collateral for the loan. This is consistent with Section 208(6) of the HHCA, and with the FHA Section 247 mortgage insurance program. Where the borrower is an entity other than an eligible Native Hawaiian family, "any collateral authorized under and not prohibited by federal or state law," as provided by § 1007.30(a), may be used.

Comment: Under § 1007.30(b), which addresses Hawaiian Home Lands property interest as collateral, all homestead leases are inalienable.

HUD response: As noted earlier, HUD is aware of the restrictions preventing alienation of the fee title to the lands set aside as Hawaiian Home Lands and recognizes the limitations on disposition of a homestead lease that has been mortgaged pursuant to section 208(6) of the HHCA. However, HUD also notes the specific authority to "mortgage or pledge the lessee's interest in the tract or improvements thereon."

Comment: Under § 1007.30(b)(1), which addresses approved leases, leases have evolved over the years, and DHHL would not want to be required to amend older leases.

HUD response: HUD is uncertain of the circumstances under which an older lease would be at issue in a Section 184A loan guarantee transaction, since refinancing is not an eligible activity. The statute for the Section 184 loan guarantee program was amended to specifically authorize refinancing, and such specific authorization is not present in Section 184A. Nevertheless, should a request for a Section 184A loan guarantee present itself in the context of an older lease, HUD must reserve the right to approve the lease in order to protect its, and the public's, financial interest, as it is obliged to do in all of its programs.

Comment: Under § 1007.30(b)(2), which addresses assumption or sale of leasehold, title can only be transferred to another native Hawaiian; neither HUD nor the mortgagee can hold title.

HUD response: HUD agrees with this comment, and plans to amend this section in a separate proposed rule. As a practical matter, the provisions of this paragraph with respect to obtaining title to the leasehold interest cannot be executed, although the provisions requiring the DHHL's consent before any assumption of a lease, and HUD's approval before the lessor may terminate the lease while the mortgage is guaranteed or held by HUD, remain valid.

Comment: Under § 1007.30(b)(3), which addresses liquidation, only DHHL can cancel or award a lease.

HUD response: The HUD response to the comment under § 1007.30(b)(2) addresses this issue.

Comment: Under § 1007.30(b)(4), which addresses eviction procedures, the DHHL's Administrative Rules and Hawaii Revised Statutes provide procedures for "contested case hearings" to allow lessees due process before a lease can be cancelled, which lengthens the process time. A more realistic time requirement than 60 days is 180 days to a year.

HUD response: HUD does not intend to impose unrealistic requirements. In response to this comment, the last sentence of § 1007.30(b)(4), which contains this requirement, is removed.

Comment: Under § 1007.30(b)(4)(i), which addresses enforcement, reconsideration of lease cancellations, and court stays prolong the process.

HUD response: The HUD response to the comment under § 1007.30(b)(4) addresses this issue.

Section 1007.35 Loan Terms

Comment: Because DHHL provides land at no cost to native Hawaiians, only the cost of the dwelling is assumed by the lessee; therefore, loan limits should mirror the FHA Section 247 program. Setting a high loan maximum will limit DHHL's ability to reaward existing homes, which have high values, to waiting low-income families.

HUD response: HUD agrees with the comment. As noted earlier in this preamble, HUD intends to administer both the Section 184A and Section 247 programs in a consistent manner, with respect to individual, Native Hawaiian borrowers holding homestead leases.

Section 1007.40 Environmental Requirements

Comment: A Finding of No Significant Impact (FONSI) should not be required to be published for each new construction loan made by individual lessees to construct a house on their homestead lot. The lessee should not be burdened with the cost to publish a FONSI.

HUD response: FONSIs result from environmental assessments under the National Environmental Policy Act (NEPA). Under the environmental reviews conducted by HUD under 24 CFR part 50, referenced in § 1007.40, activities under the Section 184A program may or may not require

preparation of environmental assessments and FONSIs under NEPA, depending upon whether or not the activities are categorically excluded from environmental assessment in accordance with 24 CFR 50.20. Categorically excluded activities require only review and compliance with the other applicable environmental laws and authorities, and do not involve a FONSI. If a FONSI or other findings are required, HUD will prepare them. As noted in § 1007.40, HUD will also require documents similar to the builder's certification required under 24 CFR 203.12(b)(2). The lessee is not responsible for preparing the FONSI, the other findings, or the builder's certification.

Section 1007.50 Certificate of Guarantee

Comment: After a lender has established credibility in packaging Section 184A loans, HUD should consider a direct guarantee process for local lenders.

HUD response: HUD will consider such an approach, although as discussed earlier, HUD intends to encourage the use of the Section 184A program by institutional borrowers to conduct larger-scale development.

Section 1007.65 Transfer and Assumption

Comment: DHHL should be notified of any assignment of loan to another servicer; assignment should be recorded in DHHL's recordation system.

HUD response: HUD agrees with the suggested change in this comment, which will assist DHHL in monitoring the status of outstanding loans in the Section 184A program and taking an active approach to prevent defaults. Because this change would affect the responsibilities of servicers and has not been subject to notice and comment, it would be included in a proposed rule HUD is planning to publish separately from today's rule.

Section 1007.75 Payment under Guarantee

Comment: Under § 1007.75(a)(1), which addresses notification, the lender should also provide written notice to DHHL if the borrower defaults.

HUD response: The HUD response to the comment under § 1007.65 addresses this issue.

Comment: Under § 1007.75(a)(2)(i), which addresses foreclosure, the holder of guarantee cannot foreclose on a DHHL lease.

HUD response: Although § 1007.75(a)(2)(i) basically tracks the statutory language of Section 184A(i)(1)(A)(ii)(I) (12 U.S.C. 1715z–13b(i)(1)(A)(ii)(I)), HUD agrees that this comment identifies the difficulties of proceeding in accordance with the statute where the borrower is an individual, Native Hawaiian leaseholder, and the security for the loan is the lessee's interest in a homestead lease. The foreclosure process in these cases would have to follow the procedure used for defaults under the Section 247 program. HUD notes that these difficulties would not be present in the case of any of the eligible institutional borrowers, where the security for the loan would not be an interest of any kind in Hawaiian Home Lands property or where the borrower holds a general lease. This is among the reasons that HUD is encouraging the use of the Section 184A program by the eligible institutional borrowers.

Comment: Under § 1007.75(a)(2)(ii), a loan could be assigned to HUD, HUD pays the claim, DHHL cancels the lease, reawards the lease and repays HUD the amount recovered through sale.

HUD response: Again, HUD notes that the situation contemplated by the comment almost certainly involves an individual, leaseholder borrower, with the lessee's interest as collateral, a situation that HUD intends to address in a manner consistent with the Section 247 program, to the extent such transactions take place under Section 184A.

III. Changes to the Interim Rule in This Final Rule

The following changes to the June 13, 2002, interim rule are made by this final rule, consistent with the discussion of public comments in this preamble, and as further explained below:

1. A new paragraph (d) is added to § 1007.20 to provide that housing that meets the minimum property standards for Section 247 mortgage insurance is deemed to meet the required housing safety and quality standards.

2. The last sentence of § 1007.30(b)(4)(i), which uses 60 days to completion of eviction as a requirement for adequate enforcement, is removed.

3. HUD is removing the initial field office review in the appeal process under § 1007.30(b)(4)(ii) to streamline the procedure from a three-step to a two-step process. The initial request for a review is to be submitted directly to the Deputy Assistant Secretary, Office of Native American Programs.

IV. Findings and Certifications

Paperwork Reduction Act Statement

The information collection requirements contained in this rule have been submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) and have been assigned OMB control number 2577–0200. In accordance with the Paperwork Reduction Act, HUD may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a currently valid OMB control number.

Environmental Impact

A Finding of No Significant Impact with respect to the environment was made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332) at the interim rule stage of this rulemaking, and continues to apply at this final rule stage. The Finding of No Significant Impact is available for public inspection between the hours of 7:30 a.m. and 5:30 p.m. weekdays in the Office of General Counsel, Regulations Division, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–0500.

Executive Order 12866, Regulatory Planning and Review

OMB reviewed this rule under Executive Order 12866 (entitled "Regulatory Planning and Review"). OMB determined that this rule is a "significant regulatory action" as defined in section 3(f) of the Order (although not economically significant, as provided in section 3(f)(1) of the Order). Any changes made to the rule as a result of that review are identified in the docket file, which is available for public inspection in the Regulations Division, Room 10276, Office of the General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–0500.

Regulatory Flexibility Act

The Secretary has reviewed this rule before publication and by approving it certifies, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), that this rule would not have a significant economic impact on a substantial number of small entities. This rule provides requirements for administering a program of assistance to provide affordable housing for a specific population, Native Hawaiians, through a single state agency, the Department of Hawaiian Home Lands.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) requires federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and on the private sector. This rule does not impose, within the meaning of the UMRA, any federal mandates on any state, local, or tribal governments or on the private sector.

Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any rule that has federalism implications if the rule either (1) imposes substantial direct compliance costs on state and local governments and is not required by statute, or (2) the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Order. This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Order.

List of Subjects

24 CFR Part 1006

Community development block grants, Grant programs—housing and community development, Grant programs—Native Hawaiians, Low and moderate income housing, Native Hawaiians, Reporting and recordkeeping requirements.

24 CFR Part 1007

Loan programs—Native Hawaiians, Native Hawaiians, Reporting and recordkeeping requirements.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance number for the Native Hawaiian Housing Block Grant program is 14.873, and for the Section 184A Loan Guarantees for Native Hawaiian Housing program is 14.874.

■ Accordingly, for the reasons stated in the preamble, the interim rule for parts 1006 and 1007 of chapter IX of title 24 of the Code of Federal Regulations, published on June 13, 2002, 67 FR 40774, is promulgated as final; with the following amendments, to read as follows:

PART 1007—SECTION 184A LOAN GUARANTEES FOR NATIVE HAWAIIAN HOUSING

■ 1. The authority citation for 24 CFR part 1007 continues to read as follows:

Authority: 12 U.S.C. 1715z-13b; 42 U.S.C. 3535(d).

■ 2. In § 1007.20, add a new paragraph (d) to read as follows:

§ 1007.20 Eligible housing.

* * * * *

(d) Housing that meets the minimum property standards for Section 247 mortgage insurance (12 U.S.C. 1715z-12) is deemed to meet the required housing safety and quality standards.

■ 3. In § 1007.30, revise paragraphs (b)(4)(i) and (b)(4)(ii) and add the undesignated paragraph at the end of the section to the end of newly revised (b)(4)(ii) to read as follows:

§ 1007.30 Security for loan.

* * * * *

(b) * * *

(4) * * *

(i) *Enforcement.* If HUD determines that the DHHL has failed to enforce adequately its eviction procedures, HUD will cease issuing guarantees for loans under this part except pursuant to existing commitments.

(ii) *Review.* If HUD ceases issuing guarantees for the DHHL's failure to enforce its eviction procedures, HUD shall notify the DHHL of such action and that the DHHL may, within 30 days after notification of HUD's action, file a written appeal with the Deputy Assistant Secretary, Office of Native American Programs (ONAP). Upon notification of an adverse decision by the Deputy Assistant Secretary, the DHHL has 30 additional days to file an appeal with the Assistant Secretary for Public and Indian Housing. The determination of the Assistant Secretary shall be final, but the DHHL may resubmit the issue to the Assistant Secretary for review at any subsequent time if new evidence or changed circumstances warrant reconsideration. * * *

Dated: September 9, 2003.

Michael Liu,

Assistant Secretary for Public and Indian Housing.

[FR Doc. 03–29472 Filed 11–26–03; 8:45 am]

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Federal Register

Friday,
November 28, 2003

Part IV

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Parts 15, 31, and 42
Federal Acquisition Regulation; Applicability of the Cost Principles and Penalties for Unallowable Costs; Proposed Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 15, 31, and 42

[FAR Case 2001–018]

RIN: 9000–AJ77

Federal Acquisition Regulation; Applicability of the Cost Principles and Penalties for Unallowable Costs

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to remove the requirement to apply cost principles and procedures when pricing a contract if cost or pricing data are not obtained, and to increase the contract dollar threshold for assessing a penalty if the contractor includes expressly unallowable costs in its claim for reimbursement.

DATES: Interested parties should submit comments in writing on or before January 27, 2004 to be considered in the formulation of a final rule.

ADDRESSES: Submit written comments to—General Services Administration, FAR Secretariat (MVA), 1800 F Street, NW., Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Submit electronic comments via the Internet to—*farcase.2001–018@gsa.gov*. Please submit comments only and cite FAR case 2001–018 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Edward Loeb, Policy Adviser, at (202) 501–0650. Please cite FAR case 2001–018.

SUPPLEMENTARY INFORMATION:

A. Background

The proposed rule—

• Narrows the scope of FAR part 31. The rule would amend the FAR to indicate that the cost principles and procedures of FAR part 31 do not apply to the pricing of fixed-price contracts if cost or pricing data are not obtained. Currently, the cost principles and procedures of FAR part 31 apply whenever cost analysis is performed, regardless of whether cost or pricing data are obtained.

• This change is consistent with statute. 10 U.S.C. 2324 lists a number of costs that are unallowable on "covered contracts," and 41 U.S.C. 256 extends the statutory unallowable costs to civilian agencies. 10 U.S.C. 2324(1)(1)(A) defines a "covered contract" as "a contract for an amount in excess of $500,000 that is entered into by the head of an agency, except that such term does not include a fixed-price contract without cost incentives or any firm fixed-price contract for the purchase of commercial items." part 31 cost principles continue to apply to covered contracts.

• This change is consistent with a goal of the Councils to reduce government-unique regulations when the risk to the Government is low.

• Adds a definition to FAR 31.001 for fixed-price contracts, subcontracts and modifications. The Councils are particularly interested in obtaining comments regarding this proposed definition. We are also asking for public input regarding the following alternative definition, which has been considered by the Councils, and which was published on July 3, 2003 (68 FR 40104) as part of a proposed rule for FAR case 1999–025, Cost Accounting Standards Administration: The public comment period on that case is closed.

Fixed-price contracts and subcontracts means—

(1) Fixed-price contracts and subcontracts described at 16.202, 16.203, and 16.207;

(2) Fixed-price incentive contracts and subcontracts where the price is not adjusted based on actual costs incurred (Subpart 16.4);

(3) Orders issued under indefinite-delivery contracts and subcontracts where final payment is not based on actual costs incurred (Subpart 16.5); and

(4) The fixed hourly rate portion of the time-and-materials and labor-hours contracts and subcontracts (Subpart 16.6).

• Raises the dollar threshold for including the contract clause at FAR 52.242–3, Penalties for Unallowable Costs, in solicitations and contracts. The clause covers the assessment of penalties against a contractor that includes unallowable indirect costs in its final indirect cost rate proposal or in its final statement of costs incurred or estimated to be incurred under a fixed-price incentive contract. Currently, the contracting officer must include the contract clause in certain solicitations and contracts over $500,000. The rule would increase the dollar threshold from $500,000 to $550,000.

• 10 U.S.C. 2324(b) requires the head of the agency to assess a penalty against the contractor if the contractor submits a cost in its proposal for settlement that is expressly unallowable under a "covered contract." As indicated above, a "covered contract" is a contract that is greater than $500,000. FAR 42.709 uses this threshold to implement the statutory penalty provisions for claiming expressly unallowable costs.

• 10 U.S.C. 2324(1)(1)(B) provides for adjusting the dollar threshold of a "covered contract" to account for inflation. This adjustment from $500,000 to $550,000 is consistent with the adjustment of the Truth in Negotiations Act threshold recently implemented in Item II of Federal Acquisition Circular 97–20; and

• Makes several editorial changes, including deleting the phrase "or any firm-fixed-price contract for the purchase of commercial items" at FAR 42.709(b) and FAR 42.709–6, since this type of contract is included in the class of contracts (fixed-price contracts without cost incentives) already addressed at these FAR sites.

B. Regulatory Planning and Review

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

C. Regulatory Flexibility Act

The Councils do not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive, fixed-price basis, and do not require application of the cost principles and procedures discussed in this rule. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. We invite comments from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR Parts 15, 31, and 42 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 2001–018), in correspondence.

D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose information collection requirements that require the

approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 15, 31, and 42

Government procurement.

Dated: November 21, 2003.

Laura Auletta,

Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 15, 31, and 42 as set forth below:

1. The authority citation for 48 CFR parts 15, 31, and 42 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 15—CONTRACTING BY NEGOTIATION

2. Amend section 15.404–1 by revising paragraph (c)(2)(iv) to read as follows:

15.404–1 Proposal analysis techniques.

* * * * *

(c) * * *

(2) * * *

(iv) When applicable, verification that the offeror's cost submissions are in accordance with the contract cost principles and procedures in part 31 and the requirements and procedures in 48 CFR Chapter 99 (Appendix to the FAR looseleaf edition), Cost Accounting Standards.

* * * * *

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

3. Amend section 31.000 by revising paragraph (a) to read as follows:

31.000 Scope of part.

* * * * *

(a) The pricing of contracts, subcontracts, and modifications to contracts and subcontracts whenever cost analysis is performed (*see* 15.404–1(c)), except contracts, subcontracts, and modifications issued on a fixed-price basis where cost or pricing data is not obtained; and

* * * * *

4. Amend section 31.001 by adding, in alphabetical order, the definition "Fixed-price contracts, subcontracts, and modifications" to read as follows:

31.001 Definitions.

* * * * *

Fixed-price contracts, subcontracts, and modifications means—

(1) Fixed-price contracts, subcontracts, and modifications described at 16.202, 16.203 (except 16.203–1(b)) and 16.207;

(2) Fixed-price incentive contracts, subcontracts, and modifications where the price is not adjusted based on actual costs incurred (Subpart 16.4);

(3) The fixed hourly rate portion of time-and-materials and labor-hour contracts, subcontracts, and modifications where the rate is not adjusted based on actual costs incurred (Subpart 16.6); and

(4) Orders issued under indefinite-delivery contracts (Subpart 16.5) using one of the contract types in paragraphs (1) through (3) of this definition.

* * * * *

5. Revise section 31.102 to read as follows:

31.102 Fixed-price contracts.

(a) The applicable subparts of part 31 shall be used in the pricing of fixed-price contracts, subcontracts, and modifications to contracts and subcontracts when—

(1) Cost analysis is performed, except contracts, subcontracts, and modifications issued on a fixed-price basis where cost or pricing data is not obtained; or

(2) A fixed-price contract clause requires the determination or negotiation of costs.

(b) Application of cost principles to fixed-price contracts and subcontracts must not be construed as a requirement to negotiate agreements on individual elements of cost in arriving at agreement on the total price. The final price accepted by the parties reflects agreement only on the total price.

(c) Further, notwithstanding the mandatory use of cost principles, the objective will continue to be to negotiate prices that are fair and reasonable, cost and other factors considered.

6. Amend section 31.103 by revising paragraph (a) to read as follows:

31.103 Contracts with commercial organizations.

* * * * *

(a) The cost principles and procedures in Subpart 31.2 and agency supplements shall be used in pricing negotiated supply, service, experimental, developmental, and research contracts, subcontracts, and contract modifications with commercial organizations whenever cost analysis is performed (*see* 15.404–1(c)), except contracts, subcontracts, and modifications issued on a fixed-price basis where cost or pricing data is not obtained.

* * * * *

7. Amend section 31.105 by revising paragraph (b) to read as follows:

31.105 Construction and architect-engineer contracts.

* * * * *

(b) Except as otherwise provided in paragraph (d) of this section, the cost principles and procedures in Subpart 31.2 shall be used in the pricing of contracts, subcontracts, and contract modifications in this category if cost analysis is performed (*see* 15.404–1(c)), except contracts, subcontracts, and modifications issued on a fixed-price basis where cost or pricing data is not obtained.

* * * * *

8. Amend section 31.106–1 by revising the third sentence of the introductory paragraph to read as follows:

31.106–1 Applicable cost principles.

* * * Whichever cost principles are appropriate will be used in the pricing of facilities contracts, subcontracts, and contract modifications in this category if cost analysis is performed (*see* 15.404–1(c)), except contracts, subcontracts, and modifications issued on a fixed-price basis where cost or pricing data is not obtained. * * *

* * * * *

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

9. Amend section 42.709 by revising paragraph (b) to read as follows:

42.709 Scope.

* * * * *

(b) This section applies to contracts in excess of $550,000, except fixed-price contracts without cost incentives.

10. Amend section 42.709–6 by revising the first sentence to read as follows:

42.709–6 Contract clause.

Insert the clause at 52.242–3, Penalties for Unallowable Costs, in solicitations and contracts over $550,000, except fixed-price contracts without cost incentives. * * *

[FR Doc. 03–29640 Filed 11–26–03; 8:45 am]

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Federal Register

Friday,
November 28, 2003

Part V

Securities and Exchange Commission

17 CFR Parts 228, 229, 240 et al.
Disclosure Regarding Nominating Committee Functions and Communications Between Security Holders and Boards of Directors; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 228, 229, 240, 249, 270 and 274

[Release Nos. 33–8340; 34–48825; IC–26262; File No. S7–14–03]

RIN 3235–AI90

Disclosure Regarding Nominating Committee Functions and Communications Between Security Holders and Boards of Directors

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: We are adopting new disclosure requirements and amendments to existing disclosure requirements to enhance the transparency of the operations of boards of directors. Specifically, we are adopting enhancements to existing disclosure requirements regarding the operations of board nominating committees and a new disclosure requirement concerning the means, if any, by which security holders may communicate with directors. These rules require disclosure but do not mandate any particular action by a company or its board of directors; rather, the new disclosure requirements are intended to make more transparent to security holders the operation of the boards of directors of the companies in which they invest.

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

Compliance Dates: Registrants must comply with these disclosure requirements in proxy or information statements that are first sent or given to security holders on or after January 1, 2004, and in Forms 10–Q, 10–QSB, 10–K, 10–KSB, and N–CSR for the first reporting period ending after January 1, 2004. Registrants may comply voluntarily with these disclosure requirements before the compliance date.

Comments: Comments regarding the "collection of information" requirements, within the meaning of the Paperwork Reduction Act of 1995, of Regulations S–B and S–K, and Forms 10–Q, 10–QSB, 10–K, 10–KSB, and N–CSR should be received by January 1, 2004.

ADDRESSES: To help us process and review your comments more efficiently, comments should be sent by one method—U.S. mail or electronic mail—only. Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments also may be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. S7–14–03. This number should be included in the subject line if sent via electronic mail. Electronically submitted comment letters will be posted on the Commission's Internet Web site *(http://www.sec.gov)*. We do not edit personal information, such as names or electronic mail addresses, from electronic submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Lillian C. Brown, at (202) 942–2920, Andrew Thorpe, at (202) 942–2910, or Andrew Brady, at (202) 942–2900, in the Division of Corporation Finance, or with respect to investment companies, Christian L. Broadbent, at (202) 942–0721, in the Division of Investment Management, U.S. Securities and Exchange Commission, 450 Fifth Street, NW., Washington DC 20549.

SUPPLEMENTARY INFORMATION: We are adopting amendments to Item 401[1] of Regulation S–B[2] and Item 401[3] of Regulation S–K[4] under the Securities Act of 1933,[5] Items 7 and 22 of Schedule 14A[6] under the Securities Exchange Act of 1934,[7] Rule 30a–2[8] under the Investment Company Act of 1940,[9] Forms 10–Q[10] and 10–QSB[11] under the Exchange Act, and Form N–CSR[12] under the Exchange Act and the Investment Company Act. Although we are not adopting amendments to Schedule 14C[13] under the Exchange Act, the amendments will affect the disclosure provided in Schedule 14C, as Schedule 14C requires disclosure of some items of Schedule 14A. Similarly, although we are not adopting amendments to Forms 10–K[14] and 10–KSB[15] under the Exchange Act, the amendments to Item 401 of Regulations S–B and S–K will affect the disclosure under Forms 10–K and 10–KSB, as those forms require disclosure of the information required by Item 401 of Regulations S–K and S–B.

[1] 17 CFR 228.401.
[2] 17 CFR 228.10 *et seq.*
[3] 17 CFR 229.401.
[4] 17 CFR 229.10 *et seq.*
[5] 15 U.S.C. 77a *et seq.*
[6] 17 CFR 240.14a–101.
[7] 15 U.S.C. 78a *et seq.*
[8] 17 CFR 270.30a–2.
[9] 15 U.S.C. 80a–1 *et seq.*
[10] 17 CFR 249.308a.
[11] 17 CFR 249.308b.
[12] 17 CFR 249.331 and 17 CFR 274.128.
[13] 17 CFR 240.14c–101.
[14] 17 CFR 249.310.
[15] 17 CFR 249.310b.

I. Background

On August 8, 2003, we proposed new disclosure standards intended to increase the transparency of nominating committee functions and the processes by which security holders may communicate with boards of directors of the companies in which they invest.[16] The disclosure standards that we adopt today are, in most respects, those proposed on August 8, 2003. Overall, most commenters supported new disclosure standards relating to nominating committee functions and security holder communications with directors;[17] however, as noted below, we received a number of comments and suggestions with regard to specific components of the proposed disclosure standards.[18] We have revised some elements of the proposed disclosure standards in response to these comments and suggestions.

The requirements we proposed on August 8, 2003,[19] and are adopting today, follow in many respects the recommendations made by the Division of Corporation Finance in a report provided to the Commission on July 15, 2003.[20] This report resulted from our April 14, 2003 directive to the Division to review the proxy rules relating to the election of corporate directors.[21] In preparing the report and developing its recommendations, the Division considered the input of members of the investing, business, legal, and academic communities.[22] The majority of these

[16] *See* Release No. 34–48301 (August 8, 2003) [68 FR 48724]. Comments received in response to the proposals, as well as a summary of these comments ("Summary of Comments") may be found in File No. S7–14–03 and on our Web site at *http://www.sec.gov*.

[17] *See* Summary of Comments—File No. S7–14–03.

[18] *See id.*

[19] *See* Release No. 34–48301 (August 8, 2003).

[20] The Division also recommended that we propose amendments to the proxy rules regarding the inclusion in company proxy materials of security holder nominees for election as directors. Our proposals regarding this issue were included in a separate release. *See* Release No. 34–48626 (October 14, 2003) [68 FR 60784]. As such, this adopting release does not address that issue directly. The Division's Staff Report to the Commission, detailing the results of its review of the proxy process related to the nomination and election of directors, can be found on our Web site at *http://www.sec.gov*. Staff Report: Review of the Proxy Process Regarding the Nomination and Election of Directors, Division of Corporation Finance (July 15, 2003).

[21] *See* Press Release No. 2003–46 (April 14, 2003).

[22] On May 1, 2003, we solicited public views on the Division's review of the proxy rules relating to the nomination and election of directors. *See* Release No. 34–47778 (May 1, 2003) [68 FR 24530]. In addition to receiving written comments, the

commenters supported our decision to direct the review and, reflecting concern over corporate director accountability and recent corporate scandals, generally urged us to adopt rules that would grant security holders greater access to the nomination process and greater ability to exercise their rights and responsibilities as owners of their companies.[23] Many of the comments received in connection with the Division's review evidenced a growing concern among security holders that they lack sufficient input into decisions made by the boards of directors of the companies in which they invest.[24] Two particular areas of concern related to the nomination of candidates for election as director and the ability of security holders to communicate effectively with members of boards of directors.[25] We seek to address these concerns with the new disclosure standards we are adopting today.

II. New Disclosure Requirements

A. Disclosure Regarding Nominating Committee Processes

1. Discussion

We are adopting new proxy statement disclosure requirements that will provide greater transparency regarding the nominating committee and the nomination process.[26] This enhanced disclosure is intended to provide security holders with additional, specific information upon which to evaluate the boards of directors and nominating committees of the companies in which they invest. Further, we intend that increased transparency of the nomination process will make that process more understandable to security holders. In particular, we are adopting a number of specific and detailed disclosure requirements because we believe that disclosure in response to each of these requirements will assist security holders in understanding each of the processes and policies of nominating committees and boards of directors regarding the nomination of candidates for director.

Detailed disclosure regarding nomination processes will provide security holders with important information regarding the management and oversight of the companies in which they invest. The specific disclosure requirements we are adopting today will cause companies to provide security holders with that information. We believe that specific, detailed disclosure requirements are necessary and appropriate to assure that investors are provided with disclosure that presents the desired degree of clarity and transparency. In the absence of these specific disclosure requirements, we believe that disclosure could be at a level of generality that would not be sufficiently useful to security holders.

Each of the requirements we are adopting today furthers the goal of providing the transparency that is necessary for security holders to understand the nomination process. For example, the rules we are adopting requiring disclosure of the following matters are necessary to give security holders a more complete overview of the nomination process for directors of the companies in which they invest:

- A company's determination whether to have a nominating committee;
- The nominating committee's charter, if any;
- The nominating committee's processes for identifying and evaluating candidates; and
- The minimum qualifications for a nominating committee-recommended nominee and any qualities and skills that the nominating committee believes are necessary or desirable for board members to possess.

In addition, as noted in the proposing release,[27] we believe that information as to whether nominating committee members are independent within the requirements of listing standards applicable to a company is meaningful to security holders in evaluating the nomination process of a company, how that process works, and the seriousness with which the nomination process is considered by a company. Further, information regarding the persons who recommended each nominee and disclosure as to whether there are third parties that receive compensation related to identifying and evaluating candidates will provide important information as to the process followed by a company.

The ability to participate in the nomination process is an important matter for security holders.[28] Accordingly, we believe that it is important for security holders to understand the specific application of the nomination processes to candidates put forward by security holders. Disclosure as to whether and how they may participate in a company's nomination process, and the manner in which their candidates are evaluated, including differences between how their candidates and how other candidates are evaluated, therefore, represents important information for security holders. Finally, an additional, specific disclosure requirement regarding the treatment of candidates put forward by large security holders or groups of security holders that have a long-term investment interest is appropriate, as it will provide investors with information that is useful in assessing the actions of the nominating committee.

2. Disclosure Requirements

The amendments we are adopting today will expand the current proxy statement disclosure regarding a company's nominating or similar committee to include:

- A statement as to whether the company has a standing nominating committee or a committee performing similar functions[29] and, if the company does not have a standing nominating committee or committee performing similar functions, a statement of the basis for the view of the board of directors that it is appropriate for the company not to have such a committee and identification of each director who

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Division spoke with a number of interested parties representing security holders, the business community, and the legal community. Each of the comment letters received, memoranda documenting the Division's meetings, and a summary of the comments ("Summary of Comments") may be found in File No. S7–10–03 and on our Web site, *http://www.sec.gov*. Summary of Comments in Response to the Commission's Solicitation of Public Views Regarding Possible Changes to the Proxy Rules (July 15, 2003).

[23] *See* Summary of Comments—File No. S7–10–03.

[24] *See id.*

[25] *See id.*

[26] Prior to the effectiveness of these amendments, companies must disclose whether they have a nominating committee and, if so, whether that committee considers nominees recommended by security holders and how any such recommendations may be submitted. *See* Paragraphs (d)(1) and (d)(2) of Item 7 of Exchange Act Schedule 14A. *See also* Release No. 34–15384 (December 6, 1978) [43 FR 58522], in which the Commission adopted these disclosure standards. In the 1978 release proposing these disclosure requirements, the Commission stated generally its belief that the new disclosure requirements would facilitate improved accountability and, more specifically, that:

> [I]nformation relating to nominating committees would be important to security holders because a nominating committee can, over time, have a significant impact on the composition of the board and also can improve the director selection process by increasing the range of candidates under consideration and intensifying the scrutiny given to their qualifications. Additionally, the Commission believes that the institution of nominating committees can represent a significant step in increasing security holder participation in the corporate electoral process, a subject which the Commission will consider further in connection with its continuing proxy rule re-examination.

Release No. 34–14970 (July 18, 1978) [43 FR 31945].

[27] *See* Release No. 34–48301 (August 8, 2003).

[28] *See* Release No. 34–14970 (July 18, 1978). *See also* Summary of Comments "File No. S7–10–03 and Summary of Comments "File No. S7–14–03.

[29] As noted earlier in this release, this disclosure currently is required under Paragraph (d)(1) of Item 7 of Exchange Act Schedule 14A.

participates in the consideration of director nominees;[30]

• The following information regarding the company's director nomination process:[31]

• If the nominating committee has a charter, disclosure of whether a current copy of the charter is available to security holders on the company's Web site. If the nominating committee has a charter and a current copy of the charter is available to security holders on the company's Web site, disclosure of the company's Web site address. If the nominating committee has a charter and a current copy of the charter is not available to security holders on the company's Web site, inclusion of a copy of the charter as an appendix to the company's proxy statement at least once every three fiscal years. If a current copy of the charter is not available to security holders on the company's Web site, and is not included as an appendix to the company's proxy statement, identification of the prior fiscal year in which the charter was so included in satisfaction of the requirement;[32]

• If the nominating committee does not have a charter, a statement of that fact;[33]

• If the company is a listed issuer[34] whose securities are listed on a national securities exchange registered pursuant to section 6(a) of the Exchange Act[35] or in an automated inter-dealer quotation system of a national securities association registered pursuant to section 15A(a) of the Exchange Act[36] that has independence requirements for nominating committee members, disclosure as to whether the members of the nominating committee are independent, as independence for nominating committee members is defined in the listing standards applicable to the listed issuer;[37]

• If the company is not a listed issuer,[38] disclosure as to whether each of the members of the nominating committee is independent. In determining whether a member is independent, the company must use a definition of independence of a national securities exchange registered pursuant to section 6(a) of the Exchange Act or a national securities association registered pursuant to section 15A(a) of the Exchange Act that has been approved by the Commission (as that definition may be modified or supplemented), and state which definition it used. Whatever definition the company chooses, it must apply that definition consistently to all members of the nominating committee and use the independence standards of the same national securities exchange or national securities association for purposes of nominating committee disclosure under this requirement and audit committee disclosure required under Item 7(d)(3)(iv) of Exchange Act Schedule 14A;[39]

• If the nominating committee has a policy with regard to the consideration of any director candidates recommended by security holders, a description of the material elements of that policy, which shall include, but need not be limited to, a statement as to whether the committee will consider director candidates recommended by security holders;[40]

• If the nominating committee does not have a policy with regard to the consideration of any director candidates recommended by security holders, a statement of that fact and a statement of the basis for the view of the board of directors that it is appropriate for the company not to have such a policy;[41]

• If the nominating committee will consider candidates recommended by security holders, a description of the procedures to be followed by security holders in submitting such recommendations;[42]

• A description of any specific, minimum qualifications that the nominating committee believes must be met by a nominating committee-recommended nominee for a position on the company's board of directors, and a description of any specific qualities or skills that the nominating committee believes are necessary for one or more of the company's directors to possess;[43]

• A description of the nominating committee's process for identifying and evaluating nominees for director, including nominees recommended by security holders, and any differences in the manner in which the nominating committee evaluates nominees for director based on whether the nominee is recommended by a security holder;[44]

• With regard to each nominee approved by the nominating committee for inclusion on the company's proxy card (other than nominees who are executive officers or who are directors standing for re-election), a statement as to which one or more of the following categories of persons or entities recommended that nominee: security holder, non-management director, chief executive officer, other executive officer, third-party search firm, or other, specified source;[45]

• If the company pays a fee to any third party or parties to identify or evaluate or assist in identifying or

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[30] *See* new Paragraph (d)(2)(i) of Item 7 of Exchange Act Schedule 14A.

[31] For the remainder of our discussion of this disclosure requirement, the term "nominating committee" refers to a nominating committee or similar committee or group of directors fulfilling the role of a nominating committee. That group may comprise the full board. *See* the Instruction to new Paragraph (d)(2)(ii) of Item 7 of Exchange Act Schedule 14A. If the company has a standing nominating committee or a committee fulfilling the role of a nominating committee, Item 7(d)(1) of Exchange Act Schedule 14A requires identification of the members of that committee. If the company does not have such a standing committee, new Paragraph (d)(2)(i) of Item 7 of Exchange Act Schedule 14A will require identification of each director who participates in the consideration of director nominees.

[32] See new Paragraph (d)(2)(ii)(A) of Item 7 of Exchange Act Schedule 14A.

[33] See new Paragraph (d)(2)(ii)(B) of Item 7 of Exchange Act Schedule 14A.

[34] As defined in Exchange Act Rule 10A–3 [17 CFR 240.10A–3].

[35] 15 U.S.C. 78f(a).

[36] 15 U.S.C. 78o–3(a).

[37] *See* new Paragraph (d)(2)(ii)(C) of Item 7 of Exchange Act Schedule 14A.

[38] As defined in Exchange Act Rule 10A–3.

[39] *See* new Paragraph (d)(2)(ii)(D) of Item 7 of Exchange Act Schedule 14A.

[40] *See* new Paragraph (d)(2)(ii)(E) of Item 7 of Exchange Act Schedule 14A. As adopted, this disclosure requirement specifies that the company's description of the material elements of its policy with regard to consideration of security holder candidates "need not" be limited to a statement as to whether the nominating committee will consider security holder-recommended candidates. This revision was made in response to a commenter's concern that the proposed requirement (that the disclosure "shall not" be limited to a statement as to whether the committee will consider security holder recommended candidates) implied that a company could not merely have a policy of considering security holder recommended candidates, but instead was required to put in place a more detailed policy with respect to consideration of such candidates. *See* Committee on Federal Regulation of Securities of the American Bar Association's section of Business Law ("ABA").

[41] *See* new Paragraph (d)(2)(ii)(F) of Item 7 of Exchange Act Schedule 14A.

[42] Prior to the effectiveness of these amendments, this disclosure is required under Paragraph (d)(2) of Item 7 of Exchange Act Schedule 14A. As a result of the amendments to Item 7 of Exchange Act Schedule 14A that we are adopting today, this requirement will be moved to new Paragraph (d)(2)(ii)(G) of Item 7 of Exchange Act Schedule 14A. In addition, we are adopting a new requirement in Regulations S–B and S–K, and a new reference to that requirement in Exchange Act Forms 10–Q and 10–QSB, that will require companies to disclose any material changes to the procedures that were previously disclosed pursuant to this item. *See* new Paragraph (b) of Item 5 of Part II to Exchange Act Forms 10–Q and 10–QSB, new Paragraph (g) of Item 401 of Exchange Act Regulation S–B, and new Paragraph (j) of Item 401 of Exchange Act Regulation S–K. In those instances where a material change is implemented during the last quarter of a company's fiscal year, companies will be required to include disclosure of such change in their Exchange Act Form 10–K or 10–KSB. *See* Item 10 of Part III of Exchange Act Form 10–K, Item 9 of Part III of Exchange Act Form 10–KSB, new Paragraph (g) of Item 401 of Exchange Act Regulation S–B, and new Paragraph (j) of Item 401 of Exchange Act Regulation S–K.

[43] *See* new Paragraph (d)(2)(ii)(H) of Item 7 of Exchange Act Schedule 14A.

[44] *See* new Paragraph (d)(2)(ii)(I) of Item 7 of Exchange Act Schedule 14A.

[45] *See* new Paragraph (d)(2)(ii)(J) of Item 7 of Exchange Act Schedule 14A.

evaluating potential nominees, disclosure of the function performed by each such third party;[46] and

• If the company's nominating committee received, by a date not later than the 120th calendar day before the date of the company's proxy statement released to security holders in connection with the previous year's annual meeting, a recommended nominee from a security holder that beneficially owned more than 5% of the company's voting common stock for at least one year as of the date the recommendation was made, or from a group of security holders that beneficially owned, in the aggregate, more than 5% of the company's voting common stock,[47] with each of the securities used to calculate that ownership held for at least one year as of the date the recommendation was made,[48] identification of the candidate and the security holder or security holder group that recommended the candidate and disclosure as to whether the nominating committee chose to nominate the candidate, provided, however, that no such identification or disclosure is required without the written consent of both the security holder or security holder group and the candidate to be so identified.[49]

3. Comments Regarding, and Revisions to, the Proposed Disclosure Requirements

In response to our request for comment on the proposed nominating committee disclosure requirements, a majority of commenters who supported the proposed rules believed that increased disclosure about nominating committee processes would be effective in increasing security holder understanding of the nomination process,[50] board accountability,[51] board responsiveness,[52] and a company's corporate governance policies.[53] With regard to the particular components of the proposed disclosure standards, commenters provided more specific input, which we considered carefully in revising certain of the disclosure standards that we are adopting today.

a. Nominating Committee Charter

Commenters generally were of the view that summary disclosure of the material terms of the nominating committee's charter within a company's proxy statement was unnecessary and would lead to excessively lengthy proxy statements.[54] These commenters suggested that it would be adequate to identify where the charter could be found, provide the charter to security holders upon request, and/or attach the charter to the proxy statement once every three years (as is the case for audit committee charters).[55]

The disclosure standard that we are adopting today does not include the proposed requirement that companies describe the material terms of the nominating committee charter. Companies will, instead, be required to disclose whether a current copy of the charter is available to security holders on the company's Web site. Where a company does not make the charter available on its Web site, the company would be required to include a copy of the charter as an appendix to its proxy statement at least once every three fiscal years and, in those proxy statements that do not include the charter as an appendix, the company would be required to identify in which of the prior years the charter was so included. We believe that this disclosure standard will provide security holders with the information regarding a company's nominating committee that was sought in the proposal, without unduly burdening companies.

b. Independence of Nominating Committee Members

In response to the proposed disclosure requirement that listed issuers disclose any instance during the prior fiscal year in which any member of the nominating committee did not satisfy the definition of independence included in the listing standards to which the company is subject, a number of commenters suggested that we revise or delete this requirement.[56] At least one of these commenters believed that independence determinations are interpretive matters and that board members could be unaware of developments that would impact independence.[57] Another commenter suggested that we revise the disclosure requirement to conform to the recently adopted provision that requires companies to state whether members of their audit committees are independent, as defined in applicable listing standards.[58] We believe that it is appropriate to use an approach consistent with the audit committee disclosure standards. Accordingly, the disclosure standard we are adopting will require companies to disclose whether each member of the nominating committee is independent, as independence for nominating committee members is defined in the

[46] *See* new Paragraph (d)(2)(ii)(K) of Item 7 of Exchange Act Schedule 14A.

[47] Our use of a more than 5% beneficial ownership threshold to trigger this additional disclosure obligation means that recommendations generally will be made by security holders or groups that have a reporting obligation under Exchange Act Regulation 13D [17 CFR 240.13d–240.13d–102]. Recommending security holders, like other beneficial owners, will continue to report on Exchange Act Schedule 13G (17 CFR 240.13d–102] or Exchange Act Schedule 13D [17 CFR 240.13d–101] based on their purpose or effect in acquiring or holding the company's securities. That determination is not intended to be affected by our adoption of this new disclosure obligation. In addition, we anticipate that security holders may communicate with each other in an effort to aggregate more than 5% of a company's securities before submitting a recommended candidate to a company's nominating committee. The determination as to what communications may be deemed solicitations, either subject to or exempt from the proxy rules, is based on facts and circumstances and is not intended to be affected by our adoption of this new disclosure obligation.

[48] Similar to the method used in Exchange Act Rule 14a–8 [17 CFR 240.14a–8] with regard to security holder proponents, the percentage of securities held by a recommending security holder, as well as the holding period of those securities may be determined by the company, on its own, if the security holder is the registered holder of the securities. If not, the security holder can submit one of the following to the company to evidence the required ownership and holding period:

(1) a written statement from the "record" holder of the securities (usually a broker or bank) verifying that, at the time the security holder made the recommendation, he or she had held the required securities for at least one year; or

(2) if the security holder has filed a Schedule 13D, Schedule 13G, Form 3 (17 CFR 249.103], Form 4 (17 CFR 249.104], and/or Form 5 [17 CFR 249.105], or amendments to those documents or updated forms, reflecting ownership of the securities as of or before the date of the recommendation, a copy of the schedule and/or form, and any subsequent amendments reporting a change in ownership level, as well as a written statement that the security holder continuously held the required securities for the one-year period as of the date of the recommendation.

See Instruction 3 to new Paragraph (d)(2)(ii)(L) of Item 7 of Exchange Act Schedule 14A.

[49] *See* new Paragraph (d)(2)(ii)(L) of Item 7 of Exchange Act Schedule 14A.

[50] *See, e.g.*, American Federation of State, County, and Municipal Employees ("AFSCME"); Council of Institutional Investors ("CII"); Creative Investment Research, Inc. ("CIR"); Andrew Randall; Pennsylvania State Employees' Retirement System ("SERS").

[51] *See*, e.g., J.A. Glynn & Co. ("J.A. Glynn"); Robert Schneeweiss.

[52] *See*, e.g., CII; CIR.

[53] See, e.g., American Community Bankers ("ACB"); California Public Employees' Retirement System ("CalPERS"); CIR; United Brotherhood of Carpenters and Joiners of America ("UBC").

[54] *See, e.g.*, The Business Roundtable ("BRT"); Foley & Lardner ("Foley"); Independent Community Bankers Association ("ICBA"); International Paper Company ("Int'l Paper"); Jenkens & Gilchrist ("Jenkens"); McGuireWoods LLP ("McGuireWoods"); Committee on Securities Regulation of the Business Section of the New York State Bar Association ("NYSBAR"); Sullivan & Cromwell, LLP ("Sullivan"); Wells Fargo & Company ("Wells Fargo").

[55] *See*, e.g., ICBA; Int'l Paper; McGuireWoods; NYSBAR.

[56] *See, e.g.*, ABA; Sullivan.

[57] *See* ABA.

[58] *See* Sullivan. This disclosure requirement is set forth in Paragraph (d)(3)(iv) of Item 7 of Exchange Act Schedule 14A.

listing standards applicable to the listed issuer.

c. Qualifications and Skills of Candidates and Overall Board Composition

Commenters provided input with regard to the proposed requirement that companies describe the qualifications, qualities, skills, and overall composition that companies are seeking with regard to board membership. In this regard, some commenters noted that nominating committees' selection processes do not tend to be precise, and that the characteristics a nominating committee looks for may change as the composition of the board changes.[59] In consideration of these comments, the disclosure requirements we are adopting today do not include the proposed requirement that companies describe "any specific standards for the overall structure and composition of the company's board of directors."[60] We are adopting the remaining disclosure items substantially as proposed, as we believe that they will provide valuable information to security holders regarding the nomination process, without resulting in boilerplate disclosures.

Many commenters that supported the disclosure requirements suggested that we expand the requirements to require companies to disclose the extent to which they take into consideration diversity, in particular race and gender, in nominating candidates.[61] We have not included such a requirement in the standards we are adopting today, as we believe this particular consideration, as well as other considerations made by a company, will likely be addressed adequately by the new disclosure item requiring companies to disclose their criteria for considering board candidates. Further, we do not view it as appropriate to identify any specific criteria that a company must address in describing the qualities it looks for in board candidates.

d. Sources of nominees

Some of the most extensive comment, particularly from the business and legal communities, arose from the proposal to require companies to identify the source of all director nominees, other than incumbent directors and executive officers.[62] Generally speaking, these commenters were of the view that, as proposed, the required disclosure would be difficult to make in a clear and accurate manner because there are multiple "sources" for most nominees.[63] In addition, these commenters objected to naming the specific source on the basis that this disclosure could have a "chilling effect on the search process,"[64] would be immaterial,[65] and could imply that a nominee was unqualified to serve on the board based solely on the position held by the individual (*e.g.*, the chief executive officer) who originally recommended the nominee.[66] While some commenters recommended that we delete this provision, others recommended that we instead require disclosure of the general category of persons who recommended the nominee (*e.g.*, management or security holders).[67] Another commenter recommended that we, instead, require companies to disclose whether nominees are independent from the company and, in the case of nominees proposed by security holders, from the recommending security holders.[68]

We continue to believe that information regarding the sources of company nominees is important for security holders; however, we have revised the disclosure standard to require companies to identify the category or categories of persons or entities that recommended each nominee. In this regard, we have retained the requirement that companies specifically note those instances where a nominee was recommended by the chief executive officer of the company. In providing the required disclosure, companies should consider what category of person initially recommended, or otherwise brought to the attention of the nominating committee, each candidate. In disclosing the category of persons or entities that initially recommended a candidate to the nominating committee, companies should ensure that they identify also any person or entity that caused a particular candidate to be recommended. For example, if the chief executive officer asks a third party to evaluate a potential candidate, and that third party ultimately recommends the candidate to the nominating committee, both the chief executive officer and the third party should be identified as recommending parties in the company's disclosure. We have provided for disclosure of more than one type of source for a nominee to address the possibility of multiple sources.

e. Additional Disclosure Regarding Nominees of Large, Long-Term Security Holders

The additional disclosure requirement with regard to nominees recommended by large, long-term security holders elicited a great deal of comment from most categories of commenters. Generally, commenters from the business and legal communities recommended either deleting the disclosure requirement related to security holder recommendations altogether or increasing the beneficial ownership requirement to 5% or 10% and/or increasing the holding period to two or more years.[69] With regard to the 5% and 10% recommendations, at least one commenter noted that those recommending security holders would be required to report their beneficial ownership under Exchange Act Regulation 13D.[70]

Some of the reasons given by commenters for deleting the requirement were:

- The requirement would give special status to larger security holders;[71]
- 3% security holders could use the disclosure requirement for their own "special interests";[72]
- There could be more than one triggering nomination, thus resulting in complex and confusing disclosure;[73]
- The requirement would create a bias to accept marginal director candidates;[74]

[59] *See, e.g.*, Foley; Jenkens; McGuireWoods; NYSBAR; Wells Fargo.

[60] Release No. 34–48301 (August 8, 2003).

[61] *See, e.g.*, Boston Common Asset Management ("Boston"); Calvert Group Ltd. ("Calvert"); Christian Brothers Investment Services ("CBIS"); Nathan Cummings Foundation ("Cummings"); Domini Social Investments LLC ("Domini"); ISIS Asset Management ("ISIS"); J.A. Glynn; James McRitchie, Editor, CorpGov.net and PERSWatch.net, Letter dated September 13, 2003 ("McRitchie2"); Mehri & Skalet PLLC ("Mehri &Skalet"); Denise L. Nappier, Connecticut State Treasurer ("Nappier"); Social Investment Forum Ltd. ("SIF"); Socially Responsible Investment Coalition ("SRIC"); William C. Thompson, Jr., Controller of the City of New York ("Thompson"); The General Board of Pension and Health Benefits of the United Methodist Church ("UMC"); Walden Asset Management ("Walden"). *See also* Jesse Smith Noyes Foundation ("Noyes"). We also received a number of letters that are substantially similar in content that supported additional disclosure describing board consideration of diversity. *See* Letter Type A ("Letter A"); Letter Type B ("Letter B").

[62] *See, e.g.*, ABA; BRT; Intel Corporation ("Intel"); Leggett & Platt Inc. ("Leggett"); NYSBAR; Valero Energy Corporation ("Valero"); Wells Fargo.

[63] *See id.*

[64] American Society of Corporate Secretaries. *See also*, American Corporate Counsel Association ("ACCA"); Valero.

[65] *See, e.g.*, BRT.

[66] *See* Sullivan.

[67] *See* Boston; Intel; Walden.

[68] *See* ABA.

[69] *See, e.g.*, ACB; ACCA; Compass Bancshares, Inc. ("Compass"); Foley; ICBA; Intel; Int'l Paper; Jenkens; Leggett; NYSBAR; Sullivan; Wells Fargo.

[70] *See* Sullivan.

[71] *See id.*

[72] *Id. See also* ABA.

[73] *See* ABA.

[74] *See* Sullivan.

• The requirements, specifically those regarding giving the reasons for rejecting nominees, would "chill" nominating committee discussions;[75]

• The disclosure would not be material to security holders;[76] and

• The disclosure would raise privacy issues for the nominating security holder and candidate.[77]

Conversely, this disclosure item also received strong support from security holders, many of whom recommended that we use a lower ownership percentage trigger or a trigger no more stringent than that proposed.[78]

With regard to the requirement that the reasons for not nominating a candidate be given, many commenters believed that this requirement would be difficult to satisfy, as:

• Nominating committee determinations are not always precise in nature;

• The disclosure would expose candidates to ridicule; and/or

• The disclosure would be an invasion of privacy for all parties involved in the process, including the nominating committee members, whose deliberations would be made public as a result of the disclosure requirement.[79]

Some commenters also expressed the view that this requirement would expose the company and nominating committee members to risk of litigation and would allow security holders to "second guess" the nominating committee's determinations.[80] On the other hand, some commenters were of the view that we should retain the proposed disclosure standard and expand it to require companies to disclose the identity of rejected candidates, provided that the candidates consent to be so identified.[81]

After considering the comments, we continue to believe that disclosure of director recommendations made by large, long-term security holders would provide valuable information that would enable security holders to better understand the nomination process. We have re-evaluated the 3% threshold to trigger the additional disclosure requirement, however, and have determined that ownership of more than 5% is a more appropriate threshold at which to require companies to provide additional disclosure.[82] In this regard, we agree with commenters that a more than 5% ownership threshold has a significant advantage over a lesser ownership threshold, in that recommending security holders would be subject to the beneficial ownership reporting requirements of Exchange Act Regulation 13D. We anticipate that a more than 5% ownership threshold will, in many cases, simplify the process by which a company and the recommending security holder determine that the recommending security holder satisfies the ownership threshold to trigger the additional disclosure requirement and, where a security holder or group has reported its beneficial ownership prior to making a recommendation, will help to ensure that the company and its security holders have basic information about the recommending security holder. This will benefit the company by providing the nominating committee with additional information regarding the recommending security holder and, possibly, the recommended candidate. Further, security holders will benefit through having additional information upon which they can evaluate the nominating committee's response to the security holder recommendation.[83]

In addition, the new disclosure standard will require that companies make the specified disclosures, including identifying both the nominating security holder or security holder group and candidate, only in those instances where both parties have provided to the company their consent to be identified and, where the security holder or group members are not registered holders, the security holder or group members have provided proof of the required ownership and holding period to the company. A security holder or group that seeks to require a company to provide disclosure related to a recommendation would provide their written consent and proof of ownership to the company at the time of the recommendation. The company would not be obligated to request such materials where a security holder or group does not otherwise provide their consent and proof of ownership.[84]

In consideration of the concerns expressed by commenters, including those with regard to boilerplate disclosure and privacy issues, the disclosure standard that we are adopting today does not include the proposed requirement that companies disclose the specific reasons for not nominating a candidate. The requirement will, however, require that companies identify the candidate in addition to the recommending security holder or group. While not required, a company could, of course, choose to explain why it did not nominate one or all of the security holder-recommended candidates.

We also have added language to the disclosure requirement to clarify the date by which a security holder must submit a recommended nominee in order to trigger the additional disclosure requirement by the company—a security holder's recommendation would have to be received by a company's nominating committee by a date not later than the 120th calendar day before the date the company's proxy statement was released to security holders in connection with the previous year's annual meeting.[85] We have added a new instruction clarifying that, where a company has changed its meeting date by more than 30 days, a security holder must make its recommendation by a date that is a reasonable time before the company begins to print and mail its proxy statement in order to trigger the additional disclosures.[86]

In addition, we have added a new instruction that responds to commenters' suggestion that we address how the percentage of securities owned by a nominating security holder would be calculated.[87] In this regard we have clarified that the percentage of securities held by a recommending security holder may be determined by reference to the

[75] *See, e.g., id.*

[76] *See id.*

[77] *See id.*

[78] *See, e.g.*, American Federation of Labor and Congress of Industrial Organizations ("AFL–CIO"); CII; International Brotherhood of Teamsters ("IBT"); ISIS; McRitchie2; Nappier; SERS; Trillium Asset Management ("Trillium"); UBC. *See also* AFSCME; Association of the Bar of the City of New York's Special Committee on Mergers, Acquisitions and Corporate Control Contests ("NYCBAR").

[79] *See, e.g.*, ABA; BRT; Foley; Jenkens; NYSBAR; Sullivan; Valero.

[80] *See, e.g.*, Compass; Foley; Jenkens.

[81] *See* CII; CIR; Cummings; SERS.

[82] On October 14, 2003, we proposed new rules regarding the inclusion of security holder nominees for director in company proxy materials. *See* Release No. 34–48626 (October 14, 2003). The issue of the appropriate ownership threshold, if any, for any such inclusion of security holder nominees for director is a separate issue from the appropriate ownership threshold for the disclosure we are adopting today and is not addressed in this release.

[83] In this regard, information available to our Office of Economic Analysis indicates that, of the companies listed on the New York Stock Exchange, Nasdaq Stock Market and American Stock Exchange as of December 31, 2002, 57% had at least one institutional security holder that beneficially owned 5% of the common equity or similar securities and 1.4% had five or more such security holders. This information was derived from filings on Exchange Act Form 13-F [17 CFR 249.325] that indicated that the filing security holder had held its securities for at least one year.

[84] *See* Instruction 4 to new Paragraph (d)(2)(ii)(L) of Item 7 of Exchange Act Schedule 14A.

[85] As is currently required in Exchange Act Rule 14a–8, this date would be calculated by determining the release date disclosed in the previous year's proxy statement, increasing the year by one, and counting back 120 calendar days.

[86] *See* Instruction 2 to new Paragraph (d)(2)(ii)(L) of Item 7 of Exchange Act Schedule 14A. The new instruction is modeled after the approach used with regard to Exchange Act Rule 14a–8 security holder proposals, as set forth in Exchange Act Rule 14a–8(e)(2) [17 CFR 240.14a–8(e)(2)].

[87] *See, e.g.*, ABA.

company's most recently filed quarterly or annual report (or any subsequent current report), unless the party relying on such report knows or has reason to believe that the information included in the report is inaccurate.[88]

4. Interaction of the Disclosure Requirements With Recently Revised Market Listing Standards

The New York Stock Exchange and the Nasdaq Stock Market have adopted revised listing standards that, among other requirements, require listed companies to have independent nominating committees.[89] While these listing standard changes demonstrate the importance of the nomination process and the nominating committee, and represent a strengthening of the role and independence of the nominating committee, they do not require nominating committees to consider security holder nominees or companies to make the disclosures described in this release. The disclosure requirements we are adopting today will provide useful information to security holders regarding the nomination process, the manner of evaluating nominees, and the extent to which the boards of directors of the companies in which they invest have a process for considering, and do in fact consider, security holder recommendations. Accordingly, the disclosure requirements we are adopting today will operate in conjunction with the revised listing standards regarding nominating committees.

A number of commenters from the business and legal communities recommended that we delay adoption of the proposed disclosure standards in order to allow the new listing standards regarding nominating committees to take effect.[90] We agree with these commenters that the new listing standards represent a significant strengthening of the nomination process; however, we believe that the disclosure standards that we adopt today are a necessary complement to those listing standards and, accordingly, do not believe such a delay is necessary or appropriate.

B. Disclosure Regarding the Ability of Security Holders To Communicate With Boards of Directors

1. Discussion

We are adopting new disclosure standards with regard to security holder communications with board members. These disclosure standards are intended to improve the transparency of board operations, as well as security holder understanding of the companies in which they invest.[91]

In response to our May 1, 2003 solicitation of input into the proxy process review by the Division of Corporation Finance, representatives of the business community commented that disclosure regarding the means by which security holders may communicate directly with the board of directors would address issues of accountability and responsiveness without extensive disruption or costs.[92] Comments from investors and investor advocacy groups also indicated the view that this disclosure would be helpful;[93] however, these commenters also noted that disclosure alone would not address all issues related to accountability and responsiveness.[94]

We received similar comment with regard to the proposed disclosure requirements, with no clear consensus as to whether the proposed rules would be an effective means to improve board accountability, board responsiveness, and corporate governance policies.[95] Some commenters believed the disclosure would be useful to security holders, including one commenter who expressed the view that the proposed disclosure would provide security holders with important information that provides an understanding of a company's process for communications with the board.[96] Conversely, other commenters did not believe that the proposed rules would be an effective means to improve board accountability, board responsiveness, and corporate governance policies and expressed the view that the disclosure would not be useful to security holders.[97] Overall, we continue to believe that the disclosure will provide security holders with useful information about their ability to communicate with board members. Accordingly, we are adopting, substantially as proposed, the disclosure standards related to security holder communications with board members.

2. Disclosure Requirements

We are adopting a number of specific and detailed disclosure requirements regarding communications by security holders with boards of directors because we believe that these requirements will provide security holders with a better understanding of the manner in which security holders can engage in these communications. In particular, we believe that the disclosure requirements, including whether a board has a process by which security holders can communicate with it, are necessary to give security holders a better picture of a critical component of the board's interaction with security holders. Detailed disclosure regarding that process at a company, if it exists, will be important to security holders in evaluating the nature and quality of the communications process. Further, we believe that the level of specificity in the new disclosure standards will discourage boilerplate disclosure.

Companies will be required to provide the following disclosure with regard to their processes for security holder communications with board members:

- A statement as to whether or not the company's board of directors provides a process for security holders to send communications to the board of directors and, if the company does not have such a process for security holders to send communications to the board of

[88] *See* Instruction 1 to new Paragraph (d)(2)(ii)(L) of Item 7 of Exchange Act Schedule 14A. The new instruction is modeled after Exchange Act Rule 13d–1(j) [17 CFR 240.13d–1(j)], which specifies on what basis beneficial holders may calculate the percentage of subject securities they hold for purposes of Exchange Act Regulation 13D.

[89] *See* Release No. 34–48745 (November 4, 2003) [68 FR 64154]. While the NYSE standards include a requirement that listed companies have an independent nominating committee (NYSE section 303A(4)(a)), the Nasdaq standards provide that the nomination of directors may, alternatively, be determined by a majority of the independent directors (NASD Rule 4350(c)). In discussing the NYSE and Nasdaq standards, our references to independent nominating committees encompass this alternative under the Nasdaq standards.

[90] *See, e.g.*, ABA; ACB; ACCA; BRT; CSX Corporation; Foley; ICBA; Jenkens; Valero.

[91] In Exchange Act Release No. 34–48745 (November 4, 2003), the Commission approved a new NYSE listing standard that addresses security holder communications with board members. This standard provides that: "In order that interested parties may be able to make their concerns known to non-management directors, a company must disclose a method for such parties to communicate directly and confidentially with the presiding director [of the non-management directors] or with non-management directors as a group." *See* NYSE Section 303A(3). This method could be analogous to the method in the NYSE listing standards required by Exchange Act Rule 10A–3 regarding audit committees. *See* Commentary to NYSE Section 303A(3). Exchange Act Rule 10A–3(b)(2) requires listing standards relating to audit committees to require that "[e]ach audit committee * * * establish procedures for the receipt, retention and treatment of complaints regarding accounting, internal accounting controls or auditing matters, including procedures for the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters."

[92] *See* Summary of Comments—File No. S7–10–03.

[93] *See* id.

[94] *See* id.

[95] *See* Summary of Comments—File No. S7–14–03.

[96] *See* CIR.

[97] *See, e.g.*, ABA; BRT; Les Greenberg, Chairman, Committee of Concerned Shareholders, Letter dated August 9, 2003 ("CCS1"); Valero.

directors, a statement of the basis for the view of the board of directors that it is appropriate for the company not to have such a process; [98]

- If the company has a process for security holders to send communications to the board of directors:
- a description of the manner in which security holders can send communications to the board and, if applicable, to specified individual directors; [99] and
- If all security holder communications are not sent directly to board members, a description of the company's process for determining which communications will be relayed to board members; [100] and
- A description of the company's policy, if any, with regard to board members' attendance at annual meetings and a statement of the number of board members who attended the prior year's annual meeting.[101]

3. Comments Regarding, and Revisions to, the Proposed Disclosure Requirements

a. Scope of the Disclosure Requirement

We received a number of comments suggesting that we clarify the application of the disclosure requirements to communications with the board by officers, directors, employees, and agents of the company who also own company securities.[102] We do not believe that all communications from officers, directors, employees, and agents of the company are the types of communications that the disclosure standards should capture. We have, therefore, added a general instruction to the new disclosure requirements clarifying that:

- Communications from an officer or director of the company will not be viewed as security holder communications for purposes of the disclosure requirement; [103] and
- Communications from an employee or agent of the company will be viewed as security holder communications for purposes of the disclosure requirement only if those communications are made solely in such employee's or agent's capacity as a security holder.[104]

In response to our request for comment as to whether the new disclosure standard should apply to communications made in connection with security holder proposals submitted pursuant to Exchange Act Rule 14a–8, one commenter suggested that it would be "inappropriate" to exclude Exchange Act Rule 14a–8 proposals from the new disclosure standard; [105] however, other commenters suggested that Exchange Act Rule 14a–8 communications should be expressly excluded.[106] In particular, one commenter noted that, "[b]oth the security holder proponent and the company are subject to specific, detailed requirements, conditions and deadlines, including regulation of the content of statements about the proposal * * * There is no need to impose another disclosure requirement on this process." [107] We agree that the current disclosure requirements with regard to security holder proposals are adequate to inform security holders of how they may communicate with boards via that mechanism. Accordingly, we have expressly excluded security holder proposals submitted pursuant to Exchange Act Rule 14a–8, and communications made in connection with such proposals, from the definition of "security holder communications" for purposes of the new disclosure standard.[108]

b. Process for Communicating With Board Members

We proposed a standard that would have required companies to identify those directors to whom security holders could send communications. Commenters noted that they did not believe that it would be appropriate to include such a requirement on the basis that named directors could then be targeted for inappropriate correspondence and that some companies may not include specified recipients of security holder communications in their communications procedures.[109]

In consideration of these concerns, we have revised the disclosure requirement to specify that companies should describe how security holders can send communications to the board and, if applicable, to specified individual directors.[110] We also have added a new instruction providing that, in lieu of describing in the proxy statement the manner in which security holders may communicate with board members, the manner in which the company determines those communications that will be forwarded to board members, the company's policy regarding director attendance at annual meetings, and the number of directors who attended the prior year's annual meeting, such information may instead be placed on the company's Web site, provided that the company discloses in its proxy statement the Web site address where such information may be found.[111]

Commenters also expressed concern about the proposed disclosure item related to companies' policies with regard to "filtering" communications.[112] Some commenters suggested that extensive disclosure of a company's process for determining which communications are forwarded to board members would imply that a company was improperly blocking communications from security holders.[113] Such a filtering process is necessary, in the opinion of these commenters, because many security holder communications are related to company products and services, are solicitations, or otherwise relate to improper or irrelevant topics.[114] At least one commenter posited that the proposed disclosure item does not relate directly to company processes to facilitate communications with directors and should be deleted as unnecessary.[115] Another commenter suggested that we revise the disclosure requirement to clarify that purely ministerial activities, such as organizing and collating security holder communications, need not be disclosed.[116] Other commenters noted that, should we retain the disclosure requirement, we should not expand it to include the identity of the party that is responsible for filtering communications.[117]

In consideration of these comments, the disclosure item we are adopting today does not include the requirement that companies identify the department or other group within the company that is responsible for determining which communications are forwarded to directors. We also have added an instruction to clarify that a company's process for collecting and organizing security holder communications, as well

[98] *See* new Paragraph (h)(1) of Item 7 of Exchange Act Schedule 14A.

[99] *See* new Paragraph (h)(2)(i) of Item 7 of Exchange Act Schedule 14A.

[100] *See* new Paragraph (h)(2)(ii) of Item 7 of Exchange Act Schedule 14A.

[101] *See* new Paragraph (h)(3) of Item 7 of Exchange Act Schedule 14A.

[102] *See, e.g.*, Wells Fargo.

[103] *See* Instruction 1 to new Paragraph (h) of Item 7 of Exchange Act Schedule 14A.

[104] *See* id.

[105] AFSCME.

[106] *See* NYSBAR; Valero.

[107] NYSBAR.

[108] *See* Instruction 2 to new Paragraph (h) of Item 7 of Exchange Act Schedule 14A.

[109] *See* NYSBAR.

[110] *See* new Paragraph (h)(2)(i) of Item 7 of Exchange Act Schedule 14A.

[111] *See* the Instruction to new Paragraphs (h)(2) and (h)(3) of Item 7 of Exchange Act Schedule 14A.

[112] *See, e.g.*, ABA; BRT; Intel; NYSBAR; Sullivan.

[113] *See* Sullivan. *See also* ABA.

[114] *See, e.g.*, Wells Fargo.

[115] *See* ABA.

[116] *See* Sullivan.

[117] *See, e.g.*, NYSBAR; Wells Fargo.

as similar or related activities, need not be disclosed, provided that the company's process is approved by a majority of the independent directors.[118]

c. Material Actions Taken by the Board of Directors as a Result of Security Holder Communications

Many commenters expressed concern with regard to the proposal that would have required companies to describe any material action taken by the board of directors during the preceding fiscal year as a result of security holder communications.[119] Most of these commenters suggested deleting this disclosure requirement on the basis that it would be too difficult to tie board actions to specific security holder recommendations.[120] One commenter suggested that the disclosure requirement was too vague and companies would be unsure as to what actions must be disclosed.[121] In consideration of these concerns, the disclosure requirements we are adopting today do not include the proposed requirement related to material actions taken in response to security holder communications.

d. Director Attendance at Annual Meetings

In the proposing release, we asked whether there were alternative ways to achieve our objectives. We further solicited comment on whether we should provide guidance to companies or otherwise address appropriate procedures for companies to implement with regard to security holder communications with board members. We also noted that the term "communications" was meant to be broadly construed. Several commenters suggested that we require companies to disclose whether they have a policy regarding attendance by directors at annual meetings and provide information about annual meeting attendance by directors.[122] We believe that such a disclosure requirement would further our broad objective to provide investors with information about a company's communications policies and general responsiveness to investors' concerns.

Directors' attendance at annual meetings can provide investors with an opportunity to communicate with directors about issues affecting the company. We are adopting a requirement that companies disclose their policy with regard to director attendance at annual meetings and the number of directors who attend the annual meetings, as that disclosure will give security holders a more complete picture of a company's policies related to opportunities for communicating with directors.

C. Related Disclosure in Quarterly and Annual Reports

In response to our request for comment regarding whether material changes to a company's process for security holders to submit nominees for election as director to the company should be disclosed in periodic or current reports, a number of commenters indicated the need to provide security holders with more current information regarding that process.[123] These commenters expressed the concern that the procedures described in a company's proxy statement could change during the course of a fiscal year, and the absence of information regarding those changes could impair significantly security holders' opportunities to submit recommended nominees.[124] In response to these comments, we are adopting new disclosure standards that will require companies to report any material changes to the procedures for security holder nominations in the Exchange Act Form 10–Q, 10–QSB, 10–K, or 10–KSB filed for the period in which the material change occurs.[125] We also are including an instruction clarifying that, for purposes of this disclosure obligation, adoption of procedures by which security holders may recommend nominees to a company's board of directors, where the company previously disclosed that it did not have in place such procedures, will constitute a material change.[126]

D. Investment Companies

The new disclosure requirements regarding board nominating committees and security holders' communications with members of boards will apply to proxy statements of investment companies.[127] Investment companies currently are required to comply with Exchange Act Schedule 14A when soliciting proxies, including proxies relating to the election of directors.[128] Item 22(b)(14)(iv) of Exchange Act Schedule 14A requires investment companies to disclose the same information about nominating committees that currently is required for operating companies by Item 7(d)(2).[129] As with operating companies, the enhanced transparency provided by the amendments is intended to provide security holders with additional, specific information upon which to evaluate the boards of directors and nominating committees of the investment companies in which they invest. Commenters generally supported the application of the proposed disclosure requirements to investment companies.[130]

The rules that we are adopting will require disclosure as to whether or not

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[118] *See* the Instruction to new Paragraph (h)(2)(ii) of Item 7 of Exchange Act Schedule 14A.

[119] *See, e.g.*, ABA; ACB; ACCA; Warren J. Archer ("Archer"); BRT; DKW Law Group; Domini; Foley; Intel; Int'l Paper; Jenkens; NYCBAR; NYSBAR.

[120] *See, e.g.*, ABA; BRT; Domini; Foley; Intel; Int'l Paper; Jenkens; NYCBAR; NYSBAR.

[121] *See* NYSBAR.

[122] *See* Amalgamated Bank and its Long View Funds ("Amalgamated"); Boston; CBIS; CII; Granary Foundation ("Granary"); Letter B; Maine Retirement System; McRitchie2; SERS; SIF; Walden. *See also* Connie Hansen.

[123] *See, e.g.*, AFL–CIO; AFSCME; Amalgamated; CalPERS; CII; CIR; Cummings; IBT; Int'l Paper; McRitchie2; SERS; SIF; Smith; Trillium; UBC.

[124] *See* id.

[125] *See* new Paragraph (b) of Item 5 of Part II to Exchange Act Forms 10–Q and 10–QSB, new Paragraph (g) of Item 401 of Exchange Act Regulation S–B, and new Paragraph (j) of Exchange Act Regulation S–K. In those instances where a material change is implemented during the last quarter of a company's fiscal year, companies will be required to include disclosure of the change in their Exchange Act Form 10–K or 10–KSB. *See* Item 10 of Part III of Exchange Act Form 10–K, Item 9 of Part III of Exchange Act Form 10–KSB, new Paragraph (g) of Item 401 of Exchange Act Regulation S–B, and new Paragraph (j) of Item 401 of Exchange Act Regulation S–K.

[126] *See* Instruction 2 to new Paragraph (g) of Item 401 of Exchange Act Regulation S–B and new Paragraph (j) of Item 401 of Exchange Act Regulation S–K.

[127] *See* Paragraphs (e) of Item 7 and (b) of Item 22 of Exchange Act Schedule 14A. The disclosure requirements will apply to business development companies as well as investment companies registered under the Investment Company Act of 1940 ("Investment Company Act)," except where otherwise noted. Business development companies are a category of closed-end investment company that are not registered under the Investment Company Act, but are subject to certain provisions of that Act. *See* sections 2(a)(48) and 54–65 of the Investment Company Act [15 U.S.C. 80a–2(a)(48) and 80a–53 – 64].

[128] *See* Investment Company Act Rule 20a–1 [17 CFR 270.20a–1] (requiring investment companies to comply with Regulation 14A [17 CFR 240.14a–1—240.14a–101]), Schedule 14A, and all other rules and regulations adopted pursuant to section 14(a) of the Exchange Act [15 U.S.C. 78n] that would be applicable to a proxy solicitation if it were made in respect of a security registered pursuant to section 12 of the Exchange Act [15 U.S.C. 78l]).

[129] Investment companies are subject to Items 7 and 22(b) of Exchange Act Schedule 14A when soliciting proxies regarding the election of directors. Currently, in lieu of the disclosure required by Paragraphs (a)–(d)(2) of Item 7, investment companies must provide the information required by Paragraph (b) of Item 22. *See* Paragraph (e) of Item 7. We are amending Paragraph (e) of Item 7 to apply the disclosure requirements regarding nominating committees in Paragraph (d)(2) of Item 7 to investment companies, and deleting the current disclosure requirement regarding nominating committees in Paragraph (b)(14)(iv) of Item 22 as duplicative.

[130] *See, e.g.*, ABA; AFL–CIO; Investment Company Institute ("ICI").

the members of an investment company's nominating committee are "interested persons" of the company as defined in section 2(a)(19) of the Investment Company Act,[131] rather than independent under the listing standards of a national securities exchange or national securities association, as in the case of operating companies.[132] We are requiring disclosure with respect to the section 2(a)(19) test for investment companies because that test is tailored to capture the broad range of affiliations with investment advisers, principal underwriters, and others that are relevant to "independence" in the case of investment companies. Commenters generally supported the use of this test for independence in the case of investment companies.[133] Similarly, with respect to the instruction that states that in describing a company's process for determining which communications will be relayed to board members, collecting and organizing security holder communications need not be disclosed provided that the company's process is approved by a majority of the independent directors, we are specifying in the case of investment companies that the approval required is of a majority of the directors who are not "interested persons" under section 2(a)(19).[134]

As with operating companies, investment companies will be required to state which one or more of certain categories of persons or entities recommended each nominee who is approved by the nominating committee for inclusion on the company's proxy card.[135] However, in recognition of the fact that investment companies are generally externally managed by an investment adviser, the categories will include the following: security holder, director, chief executive officer, other executive officer, or employee of the investment company's investment adviser, principal underwriter, or any affiliated person of the investment adviser or principal underwriter. With respect to the disclosure requirement regarding nominees recommended by large, long-term security holders, we are adopting an instruction clarifying that, for a registered investment company, the percentage of securities held by a recommending security holder may be determined by reference to the company's most recent report on Form N–CSR.[136]

Finally, as with operating companies, we are requiring a registered investment company to provide disclosure regarding material changes to the procedures for security holder nominations of directors. This information will be provided in Form N–CSR.[137]

III. Paperwork Reduction Act

A. Background

The amendments to Exchange Act Schedule 14A contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995.[138] We published a notice requesting comment on the collection of information requirements in the proposing release, and we submitted these requirements to the Office of Management and Budget for review in accordance with the PRA.[139] The titles for the collections of information are:

(1) "Proxy Statements—Regulation 14A (Commission Rules 14a–1 through 14a–15 and Schedule 14A)" (OMB Control No. 3235–0059);

(2) "Information Statements—Regulation 14C (Commission Rules 14c–1 through 14c–7 and Schedule 14C)" [140] (OMB Control No. 3235–0057);

(3) "Rule 20a–1 under the Investment Company Act of 1940, Solicitations of Proxies, Consents and Authorizations" (OMB Control No. 3235–0158); [141]

(4) "Form 10–K" (OMB Control No. 3235–0063);

(5) "Form 10–KSB" (OMB Control No. 3235–0420);

(6) "Form 10–Q" (OMB Control No. 3235–0070);

(7) "Form 10–QSB" (OMB Control No. 3235–0416);

(8) "Regulation S–K" (OMB Control No. 3235–0071);

(9) "Regulation S–B" (OMB Control No. 3235–0417); and

(10) "Form N–CSR" (OMB Control No. 3235–0570).[142]

These regulations, forms and schedules were adopted pursuant to the Securities Act, Exchange Act and Investment Company Act and set forth the disclosure requirements for annual and quarterly reports and proxy and information statements filed by companies to ensure that investors are informed.[143] The hours and costs associated with preparing, filing, and sending these forms and schedules constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

B. Summary of Amendments

Under the amendments, we are expanding the disclosure that currently is required in company proxy or information statements regarding the activities of a company's nominating committee. The new disclosure requirements also will require disclosure in proxy or information statements regarding the policies and procedures regarding security holder communications with boards of directors. We are adopting new requirements for disclosure of company policies with regard to board members' attendance at annual meetings and the number of board members who attended the prior year's annual meeting, as well as disclosure in periodic reports of any material changes to company procedures for security holder nominations. Compliance with the disclosure requirements will be mandatory. There will be no mandatory

[131] 15 U.S.C 80a–2(a)(19).

[132] New Paragraph (b)(14)(ii) of Item 22 of Exchange Act Schedule 14A.

[133] *See, e.g.*, ABA; ICI.

[134] *See* the Instruction to new Paragraph (h)(2)(ii) of Item 7 of Exchange Act Schedule 14A.

[135] *See* new Paragraph (d)(2)(ii)(J) of Item 7 of Exchange Act Schedule 14A.

[136] *See* Instruction 1 to new Paragraph (d)(2)(ii)(L) of Item 7 of Exchange Act Schedule 14A. In the case of business development companies, which are not required to file reports on Form N–CSR, the percentage of securities would be determined by reference to the company's reports on Exchange Act Forms 10–K and 10–Q.

[137] *See* new Item 9 of Form N–CSR. We are renumbering current Items 9 and 10 as Items 10 and 11, and are adopting a conforming change to Rule 30a–2 under the Investment Company Act to reflect the renumbering of Item 10. Because business development companies file reports on Forms 10–K and 10–Q rather than Form N–CSR, they would provide the required disclosure on these forms.

[138] 44 U.S.C. 3501 *et seq.*

[139] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[140] Exchange Act Schedule 14C requires disclosure of some items of Exchange Act Schedule 14A. Therefore, while we are not amending the text of Exchange Act Schedule 14C, the amendments to Exchange Act Schedule 14A must also be reflected in the PRA burdens for Exchange Act Schedule 14C.

[141] Investment Company Act Rule 20a–1 requires registered investment companies to comply with Exchange Act Regulation 14A or 14C, as applicable. Therefore, the annual responses to Investment Company Act Rule 20a–1 reflect the number of proxy and information statements that are filed by registered investment companies.

[142] The changes to the collections of information entitled "Regulation S–B" and "Regulation S–K" are reflected in our estimates for Forms 10–Q, 10–QSB, 10–K and 10–KSB. Therefore, we are not changing the burden estimates for those titles.

[143] The proxy rules apply to domestic companies with equity securities registered under section 12 of the Exchange Act and to investment companies registered under the Investment Company Act. There is a discrepancy between the number of annual reports by reporting companies and the number of proxy and information statements filed with the Commission in any given year. This is because some companies are subject to reporting requirements by virtue of section 15(d) of the Exchange Act [15 U.S.C. 78o], and therefore are not covered by the proxy rules. In addition, companies that are not listed on a national securities exchange or the Nasdaq Stock Market may not hold annual meetings and therefore would not be required to file a proxy or information statement.

retention period for the information disclosed, and responses to the disclosure requirements will not be kept confidential.

C. Responses to Request for Comments

We requested comment on the PRA analysis contained in the proposing release. While we received only two comment letters specifically addressing our PRA analysis, we received several comment letters responding to the proposals in general.[144] Although we are adopting the disclosure amendments substantially as proposed, we have made some additions and subtractions to the disclosure requirements in the final rules that will have the net effect of reducing the amount of required disclosures. In response to comments, we are adding a requirement for companies to provide updates in periodic reports regarding material changes to the procedures for security holder nominations. We also are adding a requirement for companies to describe in proxy and information statements their policies regarding director attendance at annual meetings and the number of directors who attended the prior year's annual meeting. After considering the comments, we are not adopting certain of the proposed disclosure requirements. For example, the amendments will not require companies to describe:

- The material terms of their nominating committee charters;
- Any specific standards for the overall structure and composition of the board of directors;
- The specific reasons for the nominating committee's determination not to include a security holder candidate as a nominee; and
- Any material action taken by the board of directors as a result of communications from security holders.

The majority of commenters did not comment on the hours and cost burdens for companies that will result from the amendments; however, we received two comment letters that specifically addressed the paperwork burdens in the proposing release.[145] One commenter noted that given the number of unlisted companies, it is difficult to estimate the compliance burden.[146] One commenter believed that the proposing release underestimated the disclosure burden for the proposed rules, and that the burden could be as high as 12 hours for the first year and 4 hours for following years.[147]

The actual paperwork burden for some companies could be 5 hours per schedule; however, in devising the estimates we considered a number of factors. For example, large companies may incur a greater paperwork burden than small companies, the pre-existing disclosure requirements may enable companies to streamline the collection of information necessary for the new disclosure, and the amendments contain more simplified disclosure requirements from the proposals, which will lower the paperwork burden. After considering these factors, we do not believe that 5 hours per schedule is an accurate burden estimate. However, after considering the comments indicating that we may have underestimated slightly the burden, we are not reducing our burden estimates for proxy and information statements, even though the amendments will reduce the amount of disclosure from that which would have been required by the proposals.

D. Paperwork Burden Estimates

As a result of the changes described above, the reporting and cost burden estimates for the collections of information have changed. While we are not changing the paperwork burden estimates for proxy and information statements, we are adding collection of information requirements in periodic reports under the Exchange Act.

1. Proxy and Information Statements

For purposes of the PRA, we estimated the annual incremental paperwork burden for proxy and information statements under the new disclosure requirements to be approximately 19,557 hours of company personnel time and a cost of approximately $1,955,700 for the services of outside professionals.[148] That estimate included the time and the cost of preparing disclosure that has been appropriately reviewed by executive officers, the disclosure committee, in-house counsel, outside counsel, and members of the board of directors.[149] Because the current rules already require a company to collect and disclose information about the composition, functions, policies and procedures of its nominating committee, we factored the pre-existing burdens into our estimates for the new disclosure requirements.

We derived the paperwork burden estimates by estimating the total amount of time it will take a company to prepare and review the disclosure. We estimated that, over a three-year time period, the annual incremental disclosure burden will be an average of 3 hours per schedule. This estimate was based on two assumptions:

- Companies spend a greater amount of time preparing the disclosure in year one and will become more efficient in preparing the disclosure over the following two years; [150] and
- Not all proxy and information statements involve action to be taken with respect to the election of directors, and therefore will not require companies to provide the disclosure.[151]

This estimate represents the average burden for all companies, both large and small, that are subject to the proxy rules. We expect that the disclosure burden could be greater for larger companies and lower for smaller companies. Table 1, below, illustrates the incremental annual compliance burden of the collection of information in hours and in cost for proxy and information statements under the Exchange Act and Investment Company Act.

[144] *See* discussion of comments in Part II of this release and Summary of Comments—S7–14–03.

[145] *See* ABA; Stoecklein Law Group ("Stoecklein").

[146] *See* ABA.

[147] *See* Stoecklein. Using those numbers as inputs into our model, the annual incremental disclosure burden over a three-year time period would be an average of 5 hours per schedule. Accordingly, using the commenter's assumptions, the annual incremental paperwork burden for all companies to prepare the disclosure would be approximately 32,595 hours of company personnel time and a cost of approximately $3,259,500 for the services of outside professionals.

[148] For convenience, the estimated PRA hour burdens have been rounded to the nearest whole number.

[149] In connection with other recent rulemakings, we have had discussions with several private law firms to estimate an hourly rate of $300 as the cost of outside professionals that assist companies in preparing these disclosures.

[150] We estimated that it will take 6 hours to prepare the disclosure in year one, 3.13 hours in year two, and 2.03 hours in year three.

[151] We estimate that 20% of all proxy and information statements do not include disclosure about directors, and therefore would not include the disclosure required by the amendments. This estimate is based on the proportion of preliminary proxy statements to definitive proxy statements filed in our 2002 fiscal year (2,555/8,692=29%), which has been adjusted downward by 9% to reflect the fact that some preliminary proxy statements contain disclosure about directors. This estimate is based on the rationale that preliminary proxy statements are less likely to contain disclosure about directors because registrants do not file preliminary proxy statements for security holder meetings where the matters to be acted upon involve only the election of directors or other specified matters. *See* Exchange Act Rule 14a–6 [17 CFR 240.14a–6].

TABLE 1: CALCULATION OF INCREMENTAL PRA BURDEN ESTIMATES

	Annual responses	Incremental hours/form	Incremental burden	75% company	25% professional	$300 prof. cost
	(A)	(B)	(C)=(A) × (B)	(D)=(C) × 0.75	(E)=(C) × 0.25	(F)=(E) × $300
SCH 14A	7,188	3.00	21,564.00	16,173	5,391.00	$1,617,300.00
SCH 14C	446	3.00	1,338.00	1,004	334.50	100,350.00
Rule 20a–1	1,058	3.00	3,174.00	2,381	793.50	238,050.00
Total	8,692			19,557		1,955,700.00

2. Periodic Reports

For purposes of the PRA, we estimate the annual incremental paperwork burden for Exchange Act periodic reports under the new disclosure requirements to be approximately 1,311 hours of company personnel time and a cost of approximately $131,100 for the services of outside professionals. We estimate that, over a three-year time period, the annual incremental disclosure burden would be an average of 0.01 hours per Form 10–K and Form 10–KSB, 0.04 hours per Form 10–Q and Form 10–QSB, and 0.03 hours per Form N–CSR.[152] This estimate was based on the following two assumptions:

- Each year, 20% of reporting companies will change materially the procedures by which security holders may recommend nominees to the board of directors; [153] and
- It will take .25 hours to prepare the disclosure regarding material changes to security holder nomination procedures.

Table 2, below, illustrates the incremental annual compliance burden of the collection of information in hours and in cost for periodic reports under the Exchange Act and Investment Company Act.

TABLE 2: CALCULATION OF INCREMENTAL PRA BURDEN ESTIMATES

	Annual responses	Incremental hours/form	Incremental burden	75% company	25% professional	$300 prof. cost
	(A)	(B)	(C)=(A) × (B)	(D)=(C) × 0.75	(E)=(C) × 0.25	(F)=(E) × $300
10–K	8,484	0.01	84.84	64	21.21	$6,000.00
10–KSB	3,820	0.01	38.20	29	9.55	3,000.00
10–Q	23,743	0.04	949.72	712	237.43	71,000.00
10–QSB	11,299	0.04	451.96	339	112.99	34,000.00
N–CSR	7,400	0.03	222.00	167	55.50	17,000.00
Total				1,311		$131,000.00

E. Request for Comment

We request comment in order to (a) evaluate whether the collections of information are necessary for the proper performance of our functions, including whether the information will have practical utility, (b) evaluate the accuracy of our estimate of the burden of the collections of information, (c) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected, and (d) evaluate whether there are ways to minimize the burden of the collections of information on those who respond, including through the use of automated collection techniques or other forms of information technology.[154]

Any member of the public may direct to us any comments concerning the accuracy of this burden estimate and any suggestions for reducing this burden. Persons who desire to submit comments on the collection of information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and send a copy of the comments to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549, with reference to File No. S7–14–03. Requests for materials submitted to the OMB by us with regard to this collection of information should be in writing, refer to File No. S7–14–03, and be submitted to the Securities and Exchange Commission, Office of Filings and Information Services, Branch of Records Management, 450 Fifth Street, NW., Washington, DC 20549. Because the OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, your comments are best assured of having their full effect if the OMB receives them within 30 days of publication.

IV. Cost-Benefit Analysis

A. Background

On August 8, 2003 we proposed new disclosure requirements intended to increase the transparency of nominating committee functions and the processes by which security holders may communicate with boards of directors of the companies in which they invest.[155] These proposals followed substantially the recommendations made by the Division of Corporation Finance in a staff report dated July 15, 2003.[156] In

[152] For example, the average burden per form for Form 10–K is calculated as follows: [(8,484 Form 10–Ks × 5% frequency of disclosure × 0.25 hours)/ 8,484 Form 10–Ks] = .01. The calculation for Form 10–Q is as follows: [(23,743 Form 10–Qs × 15% frequency of disclosure × 0.25 hours)/23,743 Form 10–Qs] = .04. The calculation for Form N–CSR is as follows: [(7,400 Form N–CSRs × 10% frequency of disclosure × 0.25 hours)/7,400 Form N–CSRs] = .03. The discrepancy in quotients is due to the fact that operating companies report on a quarterly basis, while registered management investment companies report on a semi-annual basis.

[153] Under our assumptions, 5% of operating companies will provide the disclosure each quarter (for a total of 20%), while 10% of registered management investment companies will provide the information semi-annually (for a total of 20%).

[154] Comments are requested pursuant to 44 U.S.C. 3506(c)(2)(B).

[155] *See* Release No. 34–48301 (August 8, 2003).

[156] *See* Staff Report: Review of the Proxy Process Regarding the Nomination and Election of Directors, Division of Corporation Finance (July 15, 2003). The Division's Staff Report, detailing the results of its review of the proxy process related to

Continued

committee functions and the processes by which security holders may communicate with boards of directors of the companies in which they invest.[155]

These proposals followed substantially the recommendations made by the Division of Corporation Finance in a staff report dated July 15, 2003.[156] In

[155] preparing this report and developing its recommendations, the Division considered the input of members of the investing, business, legal, and academic communities.[157]

The Commission is adopting the

[156] *See* Staff Report: Review of the Proxy Process Regarding the Nomination and Election of Directors, Division of Corporation Finance (July 15, 2003). The Division's Staff Report, detailing the results of its review of the proxy process related to

On balance, we believe these estimates are reasonable.

To the extent that the new disclosures influence corporate behavior, however, the costs would extend beyond a disclosure burden. For example, companies may incur additional costs in instituting more responsive policies and procedures regarding director nominations and security holder communications. We have not included these costs in our analysis of the additional disclosure requirement, but have sought comment regarding such costs and related matters. After considering the comments, which are summarized below, we continue to believe that the amendments provide useful information to investors. The amendments do not require a company to adopt any particular policies and procedures. To the extent that a company voluntarily incurs the expense of adopting more responsive board policies, we believe that those costs are justified by the benefits of such policies.

In response to our request for comment, one commenter noted that the initial cost of implementing and maintaining procedures would be high.[173] This commenter identified the indirect cost of the increase in the amount of time that must be spent monitoring corporate activities, which may detract from effective management of the company.[174] The commenter identified costs such as legal fees associated with structuring and reviewing policies, the cost of management time related to structuring policies, fees paid to accountants for managerial and financial statement creation and review, opportunity costs related to missed business opportunities, and other costs.[175]

One commenter believed that the rules could be "extremely costly, time-consuming and potentially disruptive."[176] This commenter explained that the rules could increase significantly the number of communications that are sent to board members and the more corporate directors must divide their time, the less effectively they will discharge their competing functions.[177] Two commenters believed that the disclosure requirements would increase the burden on boards and discourage service.[178]

[173] *See* CIR.
[174] *See id.*
[175] *See id.*
[176] *See* Foley.
[177] *See id.*
[178] *See* CIR; Foley.

D. Small Business Issuers

Although the new rules apply to small business issuers, we do not anticipate any disproportionate impact on small business issuers. Like other issuers, small business issuers should incur relatively minor compliance costs to fulfill their disclosure obligations, and should find it unnecessary to hire extra personnel. Several commenters supported requiring small companies to provide the disclosure.[179]

Other commenters recommended granting outright relief to small businesses or deferring application of the rules to small businesses until the Commission evaluates the impact of the rules.[180] One commenter suggested that small companies that have established procedures could comply voluntarily.[181] These commenters sought relief for small businesses for several reasons. One commenter recommended that we not apply the rules to small businesses because it will "waste the money of small publicly held companies, create confusion * * * and provide no useful service to security holders."[182] This commenter noted that there does not appear to be a significant number of instances where major security holders of small publicly held companies were unable to communicate with boards of directors, particularly because major security holders are in management and/or on the board.[183] Further, this commenter was of the view that, because major unaffiliated security holders potentially can impact the trading price of small business securities, management and the board "take the views of major unaffiliated security holders very seriously."[184] This commenter also noted that the board and security holders will not agree on every aspect of running the company and it is not clear why small businesses need to set up a procedure for every communication with security holders.[185]

One commenter noted that increasing the incremental cost to small businesses by a certain number of hours and assuming that the staff is available already is flawed.[186] One commenter believed that the benefits of increased disclosure would not outweigh a small business issuer's need to reduce expenses.[187] This commenter noted that, as regulatory requirements increase, small businesses will have to hire additional staff or reduce the number of hours spent managing the company.[188]

After reviewing these comments, we are convinced that issues relating to corporate accountability and security holder rights affect small companies as much as they affect large companies. The concerns raised by the commenters addressed primarily the cost of establishing and maintaining new board policies and procedures—not the cost of the disclosure required by the amendments. A small business issuer is not required to adopt new policies and procedures under the amendments. Thus, we do not believe that applying the rules to small business issuers would be inconsistent with the policies underlying the small business issuer disclosure system.

[179] *See* CalPERS; CII; Granary; Letter B; McRitchie2; SERS; SIF; Trillium.
[180] *See* ABA; Archer; Foley; Stoecklein.
[181] *See* ABA.
[182] *See* Archer.
[183] *See id.*
[184] *See id.*
[185] *See id.*
[186] *See id.*
[187] *See* Stoecklein.
[188] *See id.*

V. Consideration of Burden on Competition and Promotion of Efficiency, Competition, and Capital Formation

Section 23(a)(2) of the Exchange Act[189] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. The amendments are intended to make information about the functions of a company's nominating committee of the board of directors, as well as the ability of security holders to communicate with the board of directors, more transparent to investors. We anticipate that the new rules will provide increased information upon which to evaluate the functioning of boards of directors and make investment decisions. The rules may affect competition because they will allow companies to consider their existing policies in relation to policies adopted by other companies. As a result, companies may compete to adopt policies that effectively balance security holder and director interests and, therefore, attract investors.

We have identified one possible area where the rules could potentially place a burden on competition. The new disclosure will enable investors to compare companies' policies and procedures for director nominations and communications with directors. To the

[189] 15 U.S.C. 78w(a)(2).

extent that investors may place a premium on a company that provides security holders with favorable director nomination and communication procedures, a company will be at a disadvantage to other companies that maintain more favorable procedures.

Section 2(b) of the Securities Act,[190] section 3(f) of the Exchange Act [191] and section 2(c) of the Investment Company Act [192] require us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. We believe the disclosure will make information about the operation of a company's director nomination process more transparent. In addition, disclosure regarding the means by which security holders may communicate directly with a company's board of directors may increase security holder involvement in the companies in which they invest. As a result, we believe that investors may be able to evaluate a company's board of directors more effectively and make more informed investment decisions. We believe that, as a consequence of these developments, there may be some positive impact on the efficiency of markets and capital formation. The possibility of these effects, their magnitude if they were to occur, and the extent to which they will be offset by the costs of the new rules, are difficult to quantify.

We requested comment on these matters in the proposing release. We received no comments in response to these requests.

VI. Final Regulatory Flexibility Analysis

This Final Regulatory Flexibility Analysis has been prepared in accordance with the Regulatory Flexibility Act.[193] This FRFA involves amendments to Items 7 and 22 of Exchange Act Schedule 14A, Item 5 of Exchange Act Forms 10–Q and 10–QSB, Form N–CSR, and Item 401 of Regulations S–B and S–K. The amendments will expand the disclosure that currently is required in company filings regarding the functions of a company's nominating committee. In addition, the amendments will require disclosure regarding the policies and procedures regarding security holder communications with boards of directors. An Initial Regulatory Flexibility Analysis was prepared in accordance with the Regulatory Flexibility Act [194] in conjunction with the proposing release. The proposing release included the IRFA and solicited comments on it.

A. Need for the Amendments

The amendments are designed to address the growing concern among security holders over the accountability of corporate directors and the lack of sufficient security holder input into decisions made by the boards of directors of the companies in which they invest. Currently, companies must state whether they have a nominating committee and, if so, must identify the members of the nominating committee, state the number of committee meetings held, and briefly describe the functions performed by such committees.[195] In addition, if a company has a nominating or similar committee, it must state whether the committee considers nominees recommended by security holders and, if so, must describe how security holders may submit recommended nominees.[196] The amendments are designed to build upon existing disclosure requirements to elicit a more detailed discussion of the policies and procedures of nominating committees as well as the means by which security holders can communicate with boards of directors.

The amended disclosure requirements are designed to enhance transparency of the policies of boards of directors, with the goal of providing security holders a better understanding of the functions and activities of the boards of the companies in which they invest. For example, the amendments relating to nominating committees will require disclosure about the source of director candidates and the level of scrutiny accorded to each candidate. The amendments relating to security holder communications with directors may strengthen the association among security holders and directors by providing security holders with a better understanding of the means by which they may communicate with board members. For example, the amended disclosure will inform security holders of the manner in which to send communications to the board. Moreover, the amendments aim to enable investors to better evaluate a company's responsiveness to security holder issues and inquiries by illuminating the degree of director involvement with security holder concerns.

B. Significant Issues Raised by Public Comment

The Initial Regulatory Flexibility Analysis appeared in the proposing release. We requested comment on any aspect of the IRFA, including the number of small entities that would be affected by the proposals, the nature of the impact, how to quantify the number of small entities that would be affected, and how to quantify the impact of the proposals. While we did not receive any comments that responded directly to the IRFA, we did receive comments addressing the impact on small business issuers. Several commenters supported requiring small companies to provide the disclosure.[197] In that regard, commenters stated, "enhanced disclosure would be of great value to all types of investors."[198] Other commenters recommended granting outright relief to small businesses or deferring application of the rules to small businesses until the Commission evaluates the impact of the rules.[199] One commenter suggested that small companies that have established procedures could comply voluntarily.[200]

Those commenters who sought relief for small businesses did so for several reasons. One commenter recommended that we not apply the rules to small businesses because it will "waste the money of small publicly held companies, create confusion * * * and provide no useful service to security holders."[201] This commenter noted that there does not appear to be a significant number of instances where major security holders of small publicly held companies were unable to communicate with boards of directors, particularly because major security holders are in management and/or on the board.[202] Further, this commenter was of the view that, because major unaffiliated security holders potentially can impact the trading price of small business securities, management and the board "take the views of major unaffiliated security holders very seriously."[203] This commenter also noted that the board and security holders will not agree on every aspect of running the company and it is not clear why small businesses

[190] 15 U.S.C. 77b(b).
[191] 15 U.S.C. 78c(f).
[192] 15 U.S.C. 80a–2(c).
[193] 5 U.S.C. 601.
[194] 5 U.S.C. 603.
[195] *See* Paragraph (d)(1) of Item 7 of Exchange Act Schedule 14A.
[196] *See* Paragraph (d)(2) of Item 7 of Exchange Act Schedule 14A, prior to adoption of these amendments.
[197] *See* CalPERS; CII; Granary; Letter B; McRitchie2; SERS; SIF; Trillium.
[198] *See* Letter B; McRitchie2.
[199] *See* ABA; Archer; Foley; Stoecklein.
[200] *See* ABA.
[201] *See* Archer.
[202] *See id.*
[203] *See id.*

need to set up a procedure for every communication with security holders.[204]

One commenter noted that increasing the incremental cost to small businesses by a certain number of hours and assuming that the staff is available already is flawed.[205] One commenter believed that the benefits of increased disclosure would not outweigh a small business issuer's need to reduce expenses.[206] This commenter noted that, as regulatory requirements increase, small businesses will have to hire additional staff or reduce the number of hours spent managing the company.[207]

After reviewing these comments, we are convinced that issues relating to corporate accountability and security holder rights affect small companies as much as they affect large companies. The concerns raised by the commenters addressed primarily the cost of establishing and maintaining new board policies and procedures "not the cost of the disclosure required by the amendments. A small business issuer is not required to adopt new policies and procedures under the amendments. Thus, we do not believe that applying the rules to small business issuers would be inconsistent with the policies underlying the small business issuer disclosure system. Like other issuers, small business issuers should incur relatively minor compliance costs to fulfill their disclosure obligations, and should find it unnecessary to hire extra personnel. To the extent small businesses decide to adopt such policies, they are likely to do so because they believe the benefits justify the costs.

C. Small Entities Subject to the Amendments

The amendments will affect companies that are small entities. Exchange Act Rule 0–10(a)[208] defines a company, other than an investment company, to be a "small business" or "small organization" for purposes of the Regulatory Flexibility Act if it had total assets of $5 million or less on the last day of its most recent fiscal year. An investment company is considered to be a "small business" if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[209] As discussed below, we believe that the amendments will affect approximately 805, or 32%, of the small entities that are operating companies. We believe that the amendments also will affect approximately 50 of the small entities that are investment companies.

The Commission received 8,692 separate proxy and information statements in its 2002 fiscal year. We estimate that 6,954, or 80%, of those filings involved the election of directors, and therefore will be affected by the new disclosure requirements.[210] Furthermore, we estimate that 5,257 companies are "listed issuers" (as defined in Exchange Act Rule 10A–3) that are subject to the proxy rules.[211] Because the relevant listing standards of national securities exchanges and Nasdaq require that listed issuers hold annual meetings, and state law provides for the election of directors at annual meetings, we estimate that at least 5,257 proxy and information statements involve elections of directors.[212] Of these proxy and information statements, less than 225 relate to operating companies and less than 25 relate to investment companies that constitute "small entities."[213] Therefore, we deduced that 1,697 proxy and information statements relate to the election of directors for companies that are not "listed issuers."[214] We estimate that approximately 580 of the proxy and information statements for operating companies that are not "listed issuers" will be filed by small entities affected by the new rules.[215] We also estimate that approximately 25 of the proxy and information statements for investment companies that are not "listed issuers" will be filed by small entities affected by the new disclosure requirements. Therefore, we estimate that the amendments will, in total, affect approximately 855 small entities.[216]

We requested comment on the number of small entities that would be impacted by our proposals, including any available empirical data. We received no responses to this request.

D. Reporting, Recordkeeping, and Other Compliance Requirements

The amendments are expected to result in some additional costs to comply with the disclosure requirements. Because the current rules already require a company to collect and disclose information about the composition, functions, policies and procedures of its nominating committee, the disclosure should not impose significant new costs for the collection of information. Thus, the task of complying with the nominating committee disclosure could be performed by the same person or group of persons responsible for compliance under the current rules at a minimal incremental cost. Moreover, if a small entity were to maintain a process for security holders to send communications to its board of directors, company personnel would be aware of such procedures and the disclosure burden also would be minimal. If a small entity does not maintain such a process, then the disclosure will consist of a statement that the board does not have a communications process and a statement of the specific basis for the view of the board of directors that it is appropriate for the company not to have such a communications process.

To the extent that the new rules influence corporate behavior, however, the costs will extend beyond a disclosure burden. For example, companies may incur additional costs in instituting more responsive policies and procedures regarding director nominations and security holder communications. The new disclosure

[204] *See id.*

[205] *See id.*

[206] *See* Stoecklein.

[207] *See id.*

[208] 17 CFR 240.0–10(a).

[209] *Id.*

[210] We estimate that 20% of all proxy and information statements do not include disclosure about directors, and therefore would not include the disclosure required by the amendments. This estimate is based on the proportion of preliminary proxy statements to definitive proxy statements filed in our 2002 fiscal year (2,555/8,692=29%), which has been adjusted downward by 9% to reflect the fact that some preliminary proxy statements contain disclosure about directors. This estimate is based on the rationale that preliminary proxy statements are less likely to contain disclosure about directors because registrants do not file preliminary proxy statements for security holder meetings where the matters to be acted upon involve only the election of directors or other specified matters. *See* Exchange Act Rule 14a-6.

[211] We derived this estimate from the database provided by the Center for Research in Securities Prices at the University of Chicago, the Standard & Poors Research Insight Compustat Database ("Compustat"), and SEC Form 1392.

[212] *See, e.g.*, Rule 302.00 of NYSE listing standards and Rule 4350(e) of Nasdaq listing standards.

[213] Data obtained from Compustat indicates that there are less than 225 listed operating companies that are small entities. Information compiled by the Commission staff indicates that there are less than 25 listed investment companies that are small entities.

[214] 6,536–5,257=1,697.

[215] This estimate is based on the proportion of small entities that are reporting companies (2,500) to the total domestic companies quoted on the OTCBB or the Pink Sheets (7,317). We derived the latter figure from individuals within the organization called *http://www.pinksheets.com* and from the OTCBB Web site at *http://www.otcbb.com*.

[216] The calculation for the total number of small entities is as follows: 225 listed operating companies + 25 listed investment companies + 580 non-listed operating companies + 25 non-listed investment companies = 855.

requirements, however, do not mandate any specific procedures.

For purposes of the PRA, we estimated that it will take an average of approximately 3 hours per year for companies, large and small, to comply with the new disclosure requirements. We estimated that 75% of the compliance burden will be carried by the company internally and that 25% of the compliance burden will be carried by outside professionals retained by the company. Thus, we estimate the annual incremental paperwork burden for a company subject to the proxy rules will be 2.4 hours per company, which translates into an estimated cost of $204 per company,[217] and a cost of approximately $240 per company for the services of outside professionals.[218] A cost of $444 per small entity may not, however, constitute a significant economic impact. That conclusion is based on our analysis of 1,245 small entities available on the Compustat database. We found that the average revenue of those small entities is $2.07 million per company. Therefore, on average, the estimated $444 compliance expense will constitute approximately .02% of a small entity's revenues, based on the Compustat data.

E. Agency Action To Minimize Effect on Small Entities

The Regulatory Flexibility Act directs the Commission to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the proposals, we considered the following alternatives:

(a) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

(b) The clarification, consolidation, or simplification of disclosure for small entities;

(c) The use of performance rather than design standards; and

(d) An exemption for small entities from coverage under the proposals.

The Commission has considered a variety of reforms to achieve its regulatory objectives. As one possible approach, we considered requiring companies to include the security holder's proxy card and materials in the company mailing. Alternatively, we considered amending or reinterpreting Exchange Act Rule 14a–8(i)(8)[219] to allow security holder proposals requesting access to the company's proxy card for the purpose of making nominations. We believe that the current disclosure requirements are the most cost-effective approach to address specific concerns related to small entities because the proposals build on existing disclosure requirements.

We have drafted the new disclosure rules to require clear and straightforward disclosure of a company's policies and procedures regarding the nomination of directors and security holder communications. Separate disclosure requirements for small entities would not yield the disclosure that we believe to be necessary to achieve our objectives. In addition, the informational needs of investors in small entities are typically as great as the needs of investors in larger companies. Therefore, it did not seem appropriate to develop separate requirements for small entities involving clarification, consolidation, or simplification of the disclosure.

We have used design rather than performance standards in connection with the new requirements for two reasons. First, based on our past experience, we believe the disclosure will be more useful to investors if there are enumerated informational requirements. The mandated disclosures may be likely to result in a more focused and comprehensive discussion. Second, more precise disclosure requirements will promote more consistent disclosure among a cross-section of public companies because they will have greater certainty as to the required disclosure. In addition, more precise disclosure requirements will improve our ability to enforce the rules. Therefore, adding to the disclosure requirements in existing proxy and information statements appears to be the most effective method of eliciting the disclosure.

VII. Statutory Basis and Text of Amendments

The amendments are being adopted pursuant to sections 2,[220] 6,[221] 7,[222] 10,[223] and 19[224] of the Securities Act, sections 3(b),[225] 12, 13,[226] 14, 15, 23(a)[227] and 36[228] of the Exchange Act, as amended, and sections 8,[229] 20(a),[230] 30,[231] 31,[232] and 38[233] of the Investment Company Act, as amended.

List of Subjects

17 CFR Parts 228, 229, 240 and 249

Reporting and recordkeeping requirements, Securities.

17 CFR Parts 270 and 274

Investment companies, Reporting and recordkeeping requirements, Securities.

Text of the Amendments

■ In accordance with the foregoing, the Securities and Exchange Commission amends Title 17, chapter II of the Code of Federal Regulations as follows:

PART 228—INTEGRATED DISCLOSURE SYSTEM FOR SMALL BUSINESS ISSUERS

■ 1. The general authority citation for Part 228 is revised to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77jjj, 77nnn, 77sss, 78l, 78m, 78n, 78o, 78u–5, 78w, 78*ll*, 78mm, 80a–8, 80a–29, 80a–30, 80a–37, 80b–11, and 7201 *et seq.*; and 18 U.S.C. 1350.

* * * * *

■ 2. Amend § 228.401 by adding paragraph (g) to read as follows:

§ 228.401 (Item 401) Directors, Executive Officers, Promoters and Control Persons.

* * * * *

(g) Describe any material changes to the procedures by which security holders may recommend nominees to the registrant's board of directors, where those changes were implemented after the registrant last provided disclosure in response to the requirements of Item 7(d)(2)(ii)(G) of Schedule 14A (§ 240.14a–101), or this Item.

Instructions to paragraph (g) of Item 401:

1. The disclosure required in paragraph (g) need only be provided in a registrant's quarterly or annual reports.

2. For purposes of paragraph (g), adoption of procedures by which security holders may recommend nominees to the registrant's board of directors, where the registrant's most recent disclosure in response to the requirements of Item 7(d)(2)(ii)(G) of Schedule 14A (§ 240.14a–101), or this Item, indicated that the registrant did not have in place such procedures, will constitute a material change.

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[217] We estimate the average hourly cost of in-house personnel to be $85. This cost estimate is based on data obtained from *The SIA Report on Management and Professional Earnings in the Securities Industry* (October 2001).

[218] In connection with other recent rulemakings, we have had discussions with several private law firms to estimate an hourly rate of $300 as the cost of outside professionals that assist companies in preparing these disclosures.

[219] 17 CFR 240.14a–8(i)(8).

[220] 15 U.S.C. 77b.

[221] 15 U.S.C. 77f.

[222] 15 U.S.C. 77g.

[223] 15 U.S.C. 77j.

[224] 15 U.S.C. 77s.

[225] 15 U.S.C. 78c(b).

[226] 15 U.S.C. 78m.

[227] 15 U.S.C. 78w(a).

[228] 15 U.S.C. 78mm.

[229] 15 U.S.C. 80a–8.

[230] 15 U.S.C. 80a–20(a).

[231] 15 U.S.C. 80a–29.

[232] 15 U.S.C. 80a–30.

[233] 15 U.S.C. 80a–37.

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONVERVATIONS ACT OF 1975—REGULATION S–K

■ 3. The general authority citation for Part 229 is revised to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78o, 78u–5, 78w, 78*ll*, 78mm, 79e, 79j, 79n, 79t. 80a–8, 80a–9, 80a–20, 80a–29, 80a–30, 80a–31(c), 80a–37, 80a–38(a), 80a–39, 80b–11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 4. Amend § 229.401 by adding paragraph (j) to read as follows:

§ 229.401 (Item 401) Directors, executive officers, promoters and control persons.

* * * * *

(j) Describe any material changes to the procedures by which security holders may recommend nominees to the registrant's board of directors, where those changes were implemented after the registrant last provided disclosure in response to the requirements of Item 7(d)(2)(ii)(G) of Schedule 14A (§ 240.14a–101), or this Item.

Instructions to paragraph (j) of Item 401:

1. The disclosure required in paragraph (j) need only be provided in a registrant's quarterly or annual reports.

2. For purposes of paragraph (j), adoption of procedures by which security holders may recommend nominees to the registrant's board of directors, where the registrant's most recent disclosure in response to the requirements of Item 7(d)(2)(ii)(G) of Schedule 14A (§ 240.14a–101), or this Item, indicated that the registrant did not have in place such procedures, will constitute a material change.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 5. The general authority citation for part 240 is revised 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, 78l, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 6. Amend § 240.14a–101 by:

■ a. Revising paragraph (d)(2) of Item 7;

■ b. Revising the reference "paragraphs (a) through (d)(2)" in paragraph (e) of Item 7 to read "paragraphs (a) through (d)(1) and (d)(2)(ii)(D)";

■ c. Adding paragraph (h) to Item 7;

■ d. Revising the reference "paragraphs (d)(3), (f) and (g)" in the introductory text of paragraph (b) of Item 22 to read "paragraphs (d)(2) (other than (d)(2)(ii)(D)), (d)(3), (f), (g), and (h)";

■ e. Revising the last sentence of the introductory text of paragraph (b)(14) of Item 22;

■ f. Revising paragraph (b)(14)(ii) of Item 22;

■ g. Removing the semi-colon and "and" from the end of paragraph (b)(14)(iii) of Item 22 and in their place adding a period;

■ h. Removing paragraph (b)(14)(iv) of Item 22; and

■ i. Adding an Instruction directly after paragraph (b)(14)(iii) of Item 22.

The additions and revisions read as follows:

§ 240.14a–101 Schedule 14A. Information required in proxy statement.

Schedule 14A Information

* * * * *

Item 7. Directors and executive officers.

* * * * *

(d)(1) * * *

(2)(i) If the registrant does not have a standing nominating committee or committee performing similar functions, state the basis for the view of the board of directors that it is appropriate for the registrant not to have such a committee and identify each director who participates in the consideration of director nominees;

(ii) Provide the following information regarding the registrant's director nomination process:

(A) If the nominating committee has a charter, disclose whether a current copy of the charter is available to security holders on the registrant's Web site. If the nominating committee has a charter and a current copy of the charter is available to security holders on the registrant's Web site, provide the registrant's Web site address. If the nominating committee has a charter and a current copy of the charter is not available to security holders on the registrant's Web site, include a copy of the charter as an appendix to the registrant's proxy statement at least once every three fiscal years. If a current copy of the charter is not available to security holders on the registrant's Web site, and is not included as an appendix to the registrant's proxy statement, identify in which of the prior fiscal years the charter was so included in satisfaction of this requirement;

(B) If the nominating committee does not have a charter, state that fact;

(C) If the registrant is a listed issuer (as defined in § 240.10A–3) whose securities are listed on a national securities exchange registered pursuant to section 6(a) of the Act (15 U.S.C. 78f(a)) or in an automated inter-dealer quotation system of a national securities association registered pursuant to section 15A(a) of the Act (15 U.S.C. 78o–3(a)) that has independence requirements for nominating committee members, disclose whether the members of the nominating committee are independent, as independence for nominating committee members is defined in the listing standards applicable to the listed issuer;

(D) If the registrant is not a listed issuer (as defined in § 240.10A–3), disclose whether each of the members of the nominating committee is independent. In determining whether a member is independent, the registrant must use a definition of independence of a national securities exchange registered pursuant to section 6(a) of the Act (15 U.S.C. 78f(a)) or a national securities association registered pursuant to section 15A(a) of the Act (15 U.S.C. 78o–3(a)) that has been approved by the Commission (as that definition may be modified or supplemented), and state which definition it used. Whatever definition the registrant chooses, it must apply that definition consistently to all members of the nominating committee and use the independence standards of the same national securities exchange or national securities association for purposes of nominating committee disclosure under this requirement and audit committee disclosure required under paragraph (d)(3)(iv) of Item 7 of Schedule 14A (§ 240.14a–101);

(E) If the nominating committee has a policy with regard to the consideration of any director candidates recommended by security holders, provide a description of the material elements of that policy, which shall include, but need not be limited to, a statement as to whether the committee will consider director candidates recommended by security holders;

(F) If the nominating committee does not have a policy with regard to the consideration of any director candidates recommended by security holders, state that fact and state the basis for the view of the board of directors that it is appropriate for the registrant not to have such a policy;

(G) If the nominating committee will consider candidates recommended by security holders, describe the procedures to be followed by security holders in submitting such recommendations;

(H) Describe any specific, minimum qualifications that the nominating committee believes must be met by a nominating committee-recommended nominee for a position on the registrant's board of directors, and describe any specific qualities or skills that the nominating committee believes are necessary for one or more of the registrant's directors to possess;

(I) Describe the nominating committee's process for identifying and evaluating nominees for director, including nominees recommended by security holders, and any differences in the manner in which the nominating committee evaluates nominees for director based on whether the nominee is recommended by a security holder;

(J) With regard to each nominee approved by the nominating committee for inclusion on the registrant's proxy card (other than nominees who are executive officers or who are directors standing for re-election), state which one or more of the following categories of persons or entities recommended that nominee: security holder,

non-management director, chief executive officer, other executive officer, third-party search firm, or other, specified source. With regard to each such nominee approved by a nominating committee of an investment company, state which one or more of the following additional categories of persons or entities recommended that nominee: security holder, director, chief executive officer, other executive officer, or employee of the investment company's investment adviser, principal underwriter, or any affiliated person of the investment adviser or principal underwriter;

(K) If the registrant pays a fee to any third party or parties to identify or evaluate or assist in identifying or evaluating potential nominees, disclose the function performed by each such third party; and

(L) If the registrant's nominating committee received, by a date not later than the 120th calendar day before the date of the registrant's proxy statement released to security holders in connection with the previous year's annual meeting, a recommended nominee from a security holder that beneficially owned more than 5% of the registrant's voting common stock for at least one year as of the date the recommendation was made, or from a group of security holders that beneficially owned, in the aggregate, more than 5% of the registrant's voting common stock, with each of the securities used to calculate that ownership held for at least one year as of the date the recommendation was made, identify the candidate and the security holder or security holder group that recommended the candidate and disclose whether the nominating committee chose to nominate the candidate, provided, however, that no such identification or disclosure is required without the written consent of both the security holder or security holder group and the candidate to be so identified.

Instructions to paragraph (d)(2)(ii)(L):

1. For purposes of Item 7(d)(2)(ii)(L), the percentage of securities held by a nominating security holder may be determined using information set forth in the registrant's most recent quarterly or annual report, and any current report subsequent thereto, filed with the Commission pursuant to this Act (or, in the case of a registrant that is an investment company registered under the Investment Company Act of 1940, the registrant's most recent report on Form N–CSR (§§ 249.331 and 274.128)), unless the party relying on such report knows or has reason to believe that the information contained therein is inaccurate.

2. For purposes of the registrant's obligation to provide the disclosure specified in Item 7(d)(2)(ii)(L), where the date of the annual meeting has been changed by more than 30 days from the date of the previous year's meeting, the obligation under that Item will arise where the registrant receives the security holder recommendation a reasonable time before the registrant begins to print and mail its proxy materials.

3. For purposes of Item 7(d)(2)(ii)(L), the percentage of securities held by a recommending security holder, as well as the holding period of those securities, may be determined by the registrant if the security holder is the registered holder of the securities. If the security holder is not the registered owner of the securities, he or she can submit one of the following to the registrant to evidence the required ownership percentage and holding period:

A. A written statement from the "record" holder of the securities (usually a broker or bank) verifying that, at the time the security holder made the recommendation, he or she had held the required securities for at least one year; or

B. If the security holder has filed a Schedule 13D (§ 240.13d–101), Schedule 13G (§ 240.13d–102), Form 3 (§ 249.103), Form 4 (§ 249.104), and/or Form 5 (§ 249.105), or amendments to those documents or updated forms, reflecting ownership of the securities as of or before the date of the recommendation, a copy of the schedule and/or form, and any subsequent amendments reporting a change in ownership level, as well as a written statement that the security holder continuously held the securities for the one-year period as of the date of the recommendation.

4. For purposes of the registrant's obligation to provide the disclosure specified in Item 7(d)(2)(ii)(L), the security holder or group must have provided to the registrant, at the time of the recommendation, the written consent of all parties to be identified and, where the security holder or group members are not registered holders, proof that the security holder or group satisfied the required ownership percentage and holding period as of the date of the recommendation.

Instruction to paragraph (d)(2)(ii): For purposes of Item 7(d)(2)(ii), the term "nominating committee" refers not only to nominating committees and committees performing similar functions, but also to groups of directors fulfilling the role of a nominating committee, including the entire board of directors.

* * * * *

(h)(1) State whether or not the registrant's board of directors provides a process for security holders to send communications to the board of directors and, if the registrant does not have such a process for security holders to send communications to the board of directors, state the basis for the view of the board of directors that it is appropriate for the registrant not to have such a process;

(2) If the registrant has a process for security holders to send communications to the board of directors:

(i) Describe the manner in which security holders can send communications to the board and, if applicable, to specified individual directors; and

(ii) If all security holder communications are not sent directly to board members, describe the registrant's process for determining which communications will be relayed to board members; and

Instruction to paragraph (h)(2)(ii): For purposes of the disclosure required by this paragraph, a registrant's process for collecting and organizing security holder communications, as well as similar or related activities, need not be disclosed provided that the registrant's process is approved by a majority of the independent directors or, in the case of a registrant that is an investment company, a majority of the directors who are not "interested persons" of the investment company as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(19)).

(3) Describe the registrant's policy, if any, with regard to board members' attendance at annual meetings and state the number of board members who attended the prior year's annual meeting.

Instruction to paragraphs (h)(2) and (h)(3): In lieu of providing the information required by paragraphs (h)(2) and (h)(3) in the proxy statement, the registrant may instead provide the registrant's Website address where such information appears.

Instructions to paragraph (h):

1. For purposes of this paragraph, communications from an officer or director of the registrant will not be viewed as "security holder communications." Communications from an employee or agent of the registrant will be viewed as "security holder communications" for purposes of this paragraph only if those communications are made solely in such employee's or agent's capacity as a security holder.

2. For purposes of this paragraph, security holder proposals submitted pursuant to § 240.14a–8, and communications made in connection with such proposals, will not be viewed as "security holder communications."

* * * * *

Item 22. Information required in investment company proxy statement.

* * * * *

(b) * * *

(14) * * * Identify the other standing committees of the Fund's board of directors, and provide the following information about each committee, including any separately designated audit committee and any nominating committee:

* * * * *

(ii) The members of the committee and, in the case of a nominating committee, whether or not the members of the committee are "interested persons" of the Fund as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(19)); and

* * * * *

Instruction to paragraph (b)(14): For purposes of Item 22(b)(14), the term "nominating committee" refers not only to nominating committees and committees performing similar functions, but also to groups of directors fulfilling the role of a nominating committee, including the entire board of directors.

* * * * *

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

■ 7. The general authority citation for Part 249 is revised to read as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 8. Amend Form 10–Q (referenced in § 249.308a), Item 5 of Part II—Other Information by:
■ a. Designating the existing text in Item 5 as paragraph (a);
■ b. Removing the period at the end of newly designated paragraph (a) and in its place adding "; and"; and
■ c. Adding paragraph (b).
The addition reads as follows:

Note: The text of Form 10–Q does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 10–Q
* * * * *

Part II—Other Information
* * * * *

Item 5. Other Information.
* * * * *

(b) Furnish the information required by Item 401(j) of Regulation S–K (§ 229.401).
* * * * *

■ 9. Amend Form 10–QSB (referenced in § 249.308b), Item 5 to Part II—Other Information by:
■ a. Designating the existing text in Item 5 as paragraph (a);
■ b. Removing the period at the end of newly designated paragraph (a) and in its place adding "; and"; and
■ c. Adding paragraph (b).
The addition reads as follows:

Note: The text of Form 10–QSB does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 10–QSB
* * * * *

Part II—Other Information
* * * * *

Item 5. Other Information.
* * * * *

(b) Furnish the information required by Item 401(g) of Regulation S–B (§ 228.401).
* * * * *

PART 270—RULES AND REGULATIONS, INVESTMENT COMPANY ACT OF 1940

■ 10. The authority citation for part 270 continues to read in part as follows:

Authority: 15 U.S.C. 80a–1 *et seq.*, 80a–34(d), 80a–37, and 80a–39, unless otherwise noted.
* * * * *

■ 11. Amend § 270.30a–2 by:
■ a. Revising the reference "Item 10(a)(2)" in paragraph (a) to read "Item 11(a)(2)"; and
■ b. Revising the reference "Item 10(b)" in paragraph (b) to read "Item 11(b)."

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

■ 12. The authority citation for Part 274 continues to read, in part, as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78*l*, 78m, 78n, 78o(d), 80a–8, 80a–24, 80a–26, and 80a–29, unless otherwise noted.
* * * * *

■ 13. Amend Form N–CSR (referenced in §§ 249.331 and 274.128) by:
■ a. Revising the reference "10(a)(1)" in General Instruction D and paragraphs (c) and (f)(1) of Item 2 to read "11(a)(1)";
■ b. Redesignating Items 9 and 10 as Items 10 and 11;
■ c. Adding new Item 9; and
■ d. Revising the reference "Item 10" in the heading of the Instruction to newly redesignated Item 11 to read "Item 11."

The addition reads as follows:

Note: The text of Form N–CSR does not, and these amendments will not, appear in the Code of Federal Regulations.

Form N–CSR
* * * * *

Item 9. Submission of Matters to a Vote of Security Holders.

Describe any material changes to the procedures by which shareholders may recommend nominees to the registrant's board of directors, where those changes were implemented after the registrant last provided disclosure in response to the requirements of Item 7(d)(2)(ii)(G) of Schedule 14A (17 CFR 240.14a–101), or this Item.

Instruction: For purposes of this Item, adoption of procedures by which shareholders may recommend nominees to the registrant's board of directors, where the registrant's most recent disclosure in response to the requirements of Item 7(d)(2)(ii)(G) of Schedule 14A (17 CFR 240.14a–101), or this Item, indicated that the registrant did not have in place such procedures, will constitute a material change.
* * * * *

By the Commission.

Dated: November 24, 2003.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 03–29723 Filed 11–26–03; 8:45 am]
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H.J. Res. 79/P.L. 108–135

Making further continuing appropriations for the fiscal year 2004, and for other purposes. (Nov. 22, 2003; 117 Stat. 1391)

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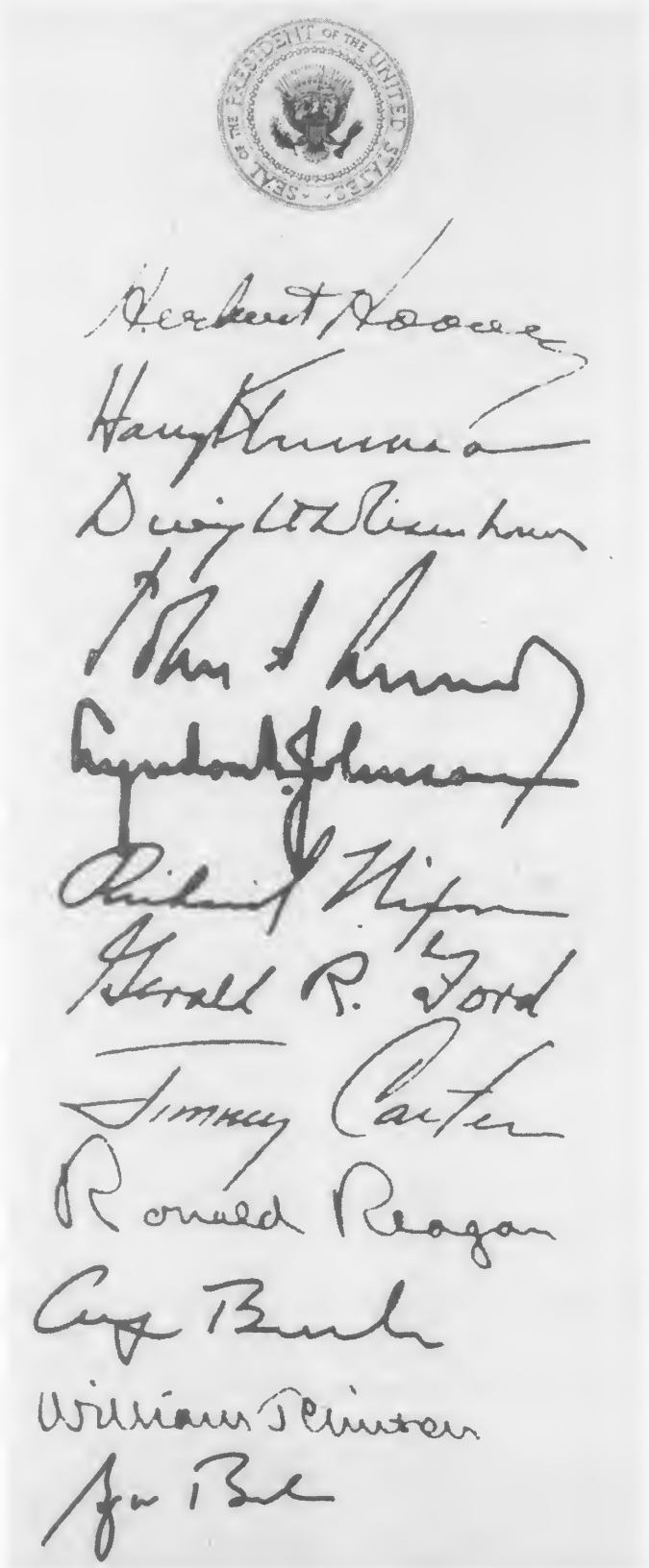

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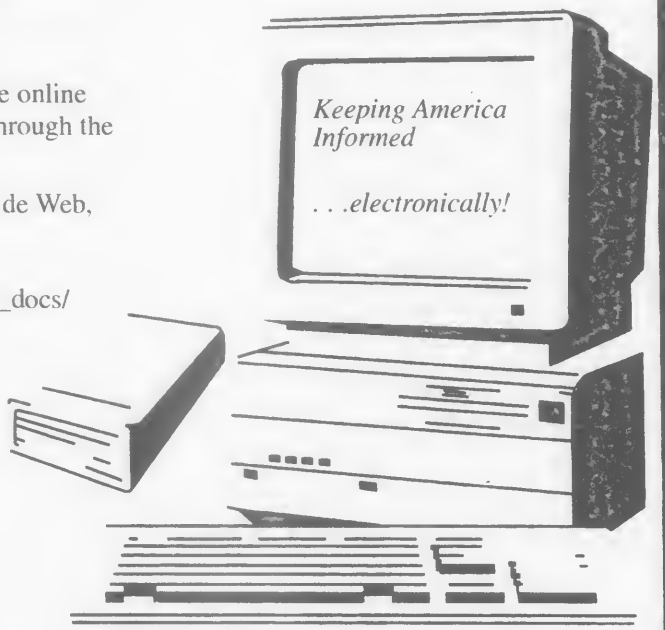

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