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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 23

[Docket No. CE203, Special Condition 23–143A–SC]

Special Conditions; Avidyne Corporation, Inc.; Various Airplane Models; Protection of Systems for High Intensity Radiated Fields (HIRF)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Amended final special conditions; request for comments.

SUMMARY: These amended special conditions are issued to Avidyne Corporation, 55 Old Bedford Road, Lincoln, MA 01773, for a Supplemental Type Certificate for the models listed under the heading "Type Certification Basis." This special condition amends special condition 23–143, which was published on February 25, 2004 (69 FR 8551), to add two more airplane models and to change the Avidyne part number from Model 700–00006–1XX to 700–00006–XXX. This amendment also removes three aircraft models that do not require these special conditions. AC 23–143 includes various airplane models to streamline the certification process needed to improve the safety of the airplane fleet by fostering the incorporation of new technologies that can be certificated affordably under 14 CFR part 23.

The airplanes will have novel and unusual design features when compared to the state of technology envisaged in the applicable airworthiness standards. These novel and unusual design features include the installation of an electronic flight instrument system (EFIS) display, Model 700–00006–XXX(), manufactured by Avidyne Corporation, Inc., for which the applicable regulations do not contain adequate or appropriate airworthiness standards for the protection of these systems from the effects of high intensity radiated fields (HIRF). These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to the airworthiness standards applicable to these airplanes.

DATES: The effective date of these special conditions is March 17, 2004. Comments must be received on or before April 26, 2004.

ADDRESSES: Comments may be mailed in duplicate to: Federal Aviation Administration, Regional Counsel, ACE–7, Attention: Rules Docket Clerk, Docket No. CE203, Room 506, 901 Locust, Kansas City, Missouri 64106. All comments must be marked: Docket No. CE203. Comments may be inspected in the Rules Docket weekdays, except Federal holidays, between 7:30 a.m. and 4 p.m.

FOR FURTHER INFORMATION CONTACT: Wes Ryan, Aerospace Engineer, Standards Office (ACE–110), Small Airplane Directorate, Aircraft Certification Service, Federal Aviation Administration, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone (816) 329–4127.

SUPPLEMENTARY INFORMATION: The FAA has determined that notice and opportunity for prior public comment hereon are impracticable because these procedures would significantly delay issuance of the approval design and delivery of the affected aircraft. In addition, the substance of these special conditions has been subject to the public comment process in several prior instances with no substantive comments received. The FAA, therefore, finds that good cause exists for making these special conditions effective upon issuance.

Comments Invited

Interested persons are invited to submit such written data, views, or arguments as they may desire. Communications should identify the regulatory docket or notice number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments will be considered by the Administrator. The special conditions may be changed in light of the comments received. All comments received will be available in the Rules Docket for examination by interested persons, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerning this rulemaking will be filed in the docket. Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must include a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. CE203." The postcard will be date stamped and returned to the commenter.

Background

On July 3, 2003, Avidyne Corporation, 55 Old Bedford Road, Lincoln, MA 01773, made an application to the FAA for a new Supplemental Type Certificate for airplane models listed under the type certification basis. The models are currently approved under the type certification basis listed in the paragraph headed "Type Certification Basis." The proposed modification incorporates a novel or unusual design feature, such as digital avionics consisting of an EFIS that is vulnerable to HIRF external to the airplane.

Type Certification Basis

Under the provisions of 14 CFR part 21, § 21.101, Avidyne Corporation must show that affected airplane models, as changed, continue to meet the applicable provisions of the regulations incorporated by reference in Type Certificate Numbers listed below or the applicable regulations in effect on the date of application for the change. The regulations incorporated by reference in the type certificate are commonly referred to as the original "type certification basis" and can be found in the Type Certificate Numbers listed below. In addition, the type certification basis of airplane models that embody this modification will include § 23.1301 of Amendment 23–20; §§ 23.1309, 23.1311, and 23.1321 of Amendment 23–49; and § 23.1322 of Amendment 23–43; exemptions, if any; and the special conditions adopted by this rulemaking action.

Aircraft make	Aircraft model(s)	Type certification No.	Certificate basis
Aerostar Aircraft Corporation	PA–60–600, PA–60–601, PA–60–601P, PA–60–602P, PA–60–700P	A17WE	FAR 23.
	360, 400	A11WE	FAR 23.
American Champion	7AC, 7ACA, S7AC, 7BCM, 7CCM, S7CCM, 7DC, S7DC, 7EC, S7EC, 7ECA, 7FC, 7GC, 7GCA, 7GCB, 7GCBA, 7GCBC, 7GCAA, 7HC, 7JC, 7KC, 7KCAB.	A–759	CAR 3.
	8GCBC, 8KCAB	A21CE	FAR 23.
Cessna Aircraft Company	140A	5A2	CAR 3.
	150, 150A, 150B, 150C, 150D, 150E, 150F, 150G, 150H, 150J, 150K, A150K, 150L, A150L, 150M, A150M, 152, A152.	3A19	CAR 3.
	170, 170A, 170B	A–799	CAR 3.
	172, 172A, 172B, 172C, 172D, 172E, 172F, 172G, 172H, 172I, 172K, 172L, 172M, 172N, 172P, 172Q, 172R, 172S.	3A12	CAR 3, 14 CFR 23.
	172RG, P172D, R172E, R172F, R172G, R172H, R172J, R172K, 175, 175A, 175B, 175C.	3A17	CAR 3.
	177, 177A, 177B, 177RG	A13CE	14 CFR 23.
	180, 180A, 180B, 180C, 180D, 180E, 180F, 180G, 180H, 180J, 180K	5A6	CAR 3.
	182, 182A, 182B, 182C, 182D, 182E, 182F, 182G, 182H, 182J, 182K, 182L, 182M, 182N, 182P, 182Q, 182R, 182S, R182, T182, TR182.	3A13	CAR 3, 14 CFR 23.
	185, 185A, 185B, 185C, 185D, 185E, A185E, A185F	3A24	CAR 3.
	190, 195, 195A, 195B	A–790	CAR 3.
	210, 210A, 210B, 210C, 210D, 210E, 210F, T210F, 210G, T210G, 210H, T210H, 210J, T210J, 210K, T210K, 210L, T210L, 210M, T210M, 210N, P210N, T210N, 210R, P210R, T210–R, 210–5, 210–5A.	3A21	CAR 3.
	205, 206, P206, P206–A, P206–B, P206–C, P206–D, P206–E, TP206–A, TP206– B, TP206–C, TP206–D, TP206–E, U206, U206–A, U206–B, U206–C, U206–D, U206–E, U206–F, U206–G, TU206A, TU206–B, TU206– C, TU206–D, TU206–E, TU206–F, TU206–G, 206H, T206H.	A4CE	CAR 3, 14 CFR 23.
	207, 207A, T207, T207A	A16CE	14 CFR 23.
	208, 208A, 208B	A37CE	14 CFR 23.
	310, 310A (USAF U–3A), 310B, 310C, 310D, 310E (USAF U–3B), 310F, 310G, 310H, E310H, 310I, 310J, 310J–1, E310J, 310K, 310L, 310N, 310P, T310P, 310Q, T310Q, 310R, T310R.	3A10	CAR 3.
	320, 320–1, 320A, 320B, 320C, 320D, 320E, 320F, 340, 340A, 335, 340, 340A.	3A25	CAR 3.
	336	A2CE	CAR 3.
	337 and 337A (USAF O2B), 337B, T337B, 337C, T337C, 337D, T337D, M337B (USAF O2A), 337E, T337E and T337F, 337F, T337G, 337G, 337H, T337H, P337H, T337H–SP.	A6CE	CAR 3, 14 CFR 23.
	401, 401A, 401B, 402, 402A, 402B, 402C, 411, 411A, 414, 414A, 421, 421A, 421B, 421C, 425.	A7CE	CAR 3.
	441	A28CE	FAR 23.
	404, 406	A25CE	FAR 23.
Cirrus Design Corp	SR20, SR22	A00009CH	FAR 23.
Commander Aircraft	112, 114, 112TC, 112B, 112TCA, 114A, 114B, 114TC	A12SO	CAR 3.
De Havilland Inc	DHC–2 Mk. I, DHC–2 Mk. II, DHC–2 Mk. III	A–806	CAR 3.
	(Twin Otter) DHC–6–1, DHC–6–100, DHC–6–200, DHC–6–300	A9EA	CAR 3.
Diamond Aircraft Industries	DA 20–A1, DA20–C1	TA4CH	14 CFR 23.
	DA40	A47CE	14 CFR 23.
Fairchild	SA26–T, SA26–AT, SA226–T, SA226–AT, SA226–T(B), SA227–AT, SA227–TT.	A5SW	CAR 3.
	SA–226–TC, SA227–AC (C–26A), SA227–BC (C–26A), SA227–PC	A8SW	14 CFR 23.
Lancair	Columbia 300, LC40–550FG	A00003SE	14 CFR 23.
Learjet	23	A5CE	CAR 3.
Maule Aerospace Technology, Inc	BEE DEE M–4, M–4, M–4C, M–4S, and M–4T, M–4–210, M–4–210C, M–4–210S, and M–4–210T, M–4–220, M–4–220C, M–4–220S, and M–4– 220T, M–4–180C, M–4–180S, and M–4–180T, M–5–210C, M–5–220C, M–5–235C, M–5–180C, M–5–210TC, M–6–235, M–6–180, M–5–200, M–7–235, MX–7–235, MX–7–180, MX–7–420, MXT–7–180, MT–7–235, M–8–235, MX–7–160, MXT–7–160, MX–7–180A, MXT–7–80A, MX–7–180B, MXT–7–420, M–7–235B, M–7–235A, M–7–235C, MX–7–180C.	3A23	CAR 3.
	M–7–260, M–7–420, M7–7– 260, MT–7–420, M–7–260C	3A23	CAR 3.
Mitsubishi Heavy Industries, Ltd	MU–2B–25, MU–2B–35, MU–2B–26, MU–2B–36, MU–2B–26A, MU–2B–36A, MU–2B–40, MU–2B–60.	A10SW	CAR 3.
Mooney Aircraft Corp	M20, M20A, M20B, M20C, M20D, M20E, M20F, M20G, M20J, M20K, M20L, M20M, M20R, M20S.	2A3	CAR 3.
	M22	A6SW	CAR 3.
Partenavia Costruzioni Aeronauticas S.p.A.	P 68, P 68B, P 68C, P 68C–TC, P 68 "OBSERVER", AP68 TP series 300 "SPARTACUS", P68TC "OBSERVER", AP68TP 600 "VIATOR", P68 "OBSERVER 2".	A31EU	14 CFR 23.
	VA300.		

Aircraft make	Aircraft model(s)	Type certification No.	Certificate basis
The New Piper Aircraft, Inc	PA–23, PA–23–160, PA–23–235, PA–23–250, PA–E23–250	1A10	CAR 3.
	PA–28–140, PA–28–150, PA–28–151, PA–28–160, PA–28–180, PA–28S–160, PA–28S–180, PA–28–235, PA–28–236, PA–28R–180, PA–28R–200, PA–28–181, PA–28–161, PA–28R–201, PA–28R–201T, PA–28RT–201, PA–28RT–201T, PA–28–201T.	2A13	CAR 3.
	PA–30, PA–39, PA–40	A1EA	CAR 3.
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	PA–42–720R	A32SO	FAR 23.
	PA–44–180, PA–44–180T	A19SO	14 CFR 23.
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Raytheon Aircraft Company	H35, J35, K35, M35, 35–33, N35, 35–A355, 35–B33, P35, S35, 35–C33, E33, F33, V35, V35A, V35B, 35–C33A, E33A, E33C, 36, A36, F33A, F33C, G33, A36TC, B36TC.	3A15	CAR 3.
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	58P, 58PA, 58TC, 58TCA	A23CE	14 CFR 23.
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	200, A100–1 (U–21J), 200C, 200CT, 200T, A200C (C–12A) or (C–12C), A200C (UC–12B), A200CT (C–12D) or (FWC–12D) or (RC–12D) or (C–12F) or (RC–12G) or (RC–12H) or (RC–12K) or (RC–12P) or (RC–12Q), B200, B200C (C–12F) or (UC–12F) or (UC–12M), or (C–12R), B200CT, B200T, 300, B300, B300C, 300LW, 1900, 1900C (C–12J), 1900D.	A24CE	FAR 23.
	65–90, 65–A90, B90, C90, C90A	3A20	CAR 3. FAR 23.
Revo, Incorporated	Colonial C–1, Colonial C–2, Lake LA–4, LA–4A, LA–4P, Lake LA–4–200, Lake 250.	1A13	CAR 3, 14 CFR 23.
Sky International	Husky A–1, A–1A, A–1B	A22NM	FAR 23.
Socata Aerospatiale	TB 20, TB 10, TB 21, TB9, TB 200	A51EU	14 CFR 23.
	TBM 700	A60EU	14 CFR 23.
Twin Commander Aircraft Corp	500, 500–A, 500–B, 500–U, 500–S, 520, 560, 560–A, 560–E	6A1	CAR 23.
	560–F, 680, 680E, 680F, 720, 680FL, 680FL(P), 680T, 680V, 680W, 681, 685, 690, 690A, 690B, 690C, 690D, 695, 695A, 695B.	2A4	CAR 23.
	700	A12SW	FAR 23.

Discussion

If the Administrator finds that the applicable airworthiness standards do not contain adequate or appropriate safety standards because of novel or unusual design features of an airplane, special conditions are prescribed under the provisions of § 21.16.

Special conditions, as appropriate, as defined in § 11.19, are issued in accordance with § 11.38 after public notice and become part of the type certification basis in accordance with § 21.101(b)(2) of Amendment 21–69.

Special conditions are initially applicable to the model for which they are issued. Should the applicant apply for a supplemental type certificate to modify any other model already included on the same type certificate to incorporate the same novel or unusual design feature, the special conditions would also apply to the other model under the provisions of § 21.101.

Novel or Unusual Design Features

Avidyne Corporation plans to incorporate certain novel and unusual design features into an airplane for which the airworthiness standards do not contain adequate or appropriate safety standards for protection from the effects of HIRF. These features include EFIS, which are susceptible to the HIRF environment, that were not envisaged by the existing regulations for this type of airplane.

Protection of Systems From High Intensity Radiated Fields (HIRF)

Recent advances in technology have given rise to the application in aircraft designs of advanced electrical and electronic systems that perform functions required for continued safe flight and landing. Due to the use of sensitive solid-state advanced components in analog and digital electronics circuits, these advanced systems are readily responsive to the transient effects of induced electrical current and voltage caused by the HIRF. The HIRF can degrade electronic systems performance by damaging components or upsetting system functions.

Furthermore, the HIRF environment has undergone a transformation that was not foreseen when the current requirements were developed. Higher energy levels are radiated from transmitters that are used for radar, radio, and television. Also, the number of transmitters has increased significantly. There is also uncertainty concerning the effectiveness of airframe shielding for HIRF. Furthermore,

coupling to cockpit-installed equipment through the cockpit window apertures is undefined.

The combined effect of the technological advances in airplane design and the changing environment has resulted in an increased level of vulnerability of electrical and electronic systems required for the continued safe flight and landing of the airplane. Effective measures against the effects of exposure to HIRF must be provided by the design and installation of these systems. The accepted maximum energy levels in which civilian airplane system installations must be capable of operating safely are based on surveys and analysis of existing radio frequency emitters. These special conditions require that the airplane be evaluated under these energy levels for the protection of the electronic system and its associated wiring harness. These external threat levels, which are lower than previous required values, are believed to represent the worst case to which an airplane would be exposed in the operating environment.

These special conditions require qualification of systems that perform critical functions, as installed in aircraft, to the defined HIRF environment in paragraph 1 or, as an option to a fixed value using laboratory tests, in paragraph 2, as follows:

(1) The applicant may demonstrate that the operation and operational capability of the installed electrical and electronic systems that perform critical functions are not adversely affected when the aircraft is exposed to the HIRF environment defined below:

Frequency	Field strength (volts per meter)	
	Peak	Average
10 kHz–100 kHz ...	50	50
100 kHz–500 kHz	50	50
500 kHz–2 MHz	50	50
2 MHz–30 MHz	100	100
30 MHz–70 MHz ...	50	50
70 MHz–100 MHz	50	50
100 MHz–200 MHz	100	100
200 MHz–400 MHz	100	100
400 MHz–700 MHz	700	50
700 MHz–1 GHz ...	700	100
1 GHz–2 GHz	2000	200
2 GHz–4 GHz	3000	200
4 GHz–6 GHz	3000	200
6 GHz–8 GHz	1000	200
8 GHz–12 GHz	3000	300
12 GHz–18 GHz ...	2000	200
18 GHz–40 GHz ...	600	200

The field strengths are expressed in terms of peak root-mean-square (rms) values.

or,

(2) The applicant may demonstrate by a system test and analysis that the electrical and electronic systems that perform critical functions can withstand a minimum threat of 100 volts per meter, electrical field strength, from 10 kHz to 18 GHz. When using this test to show compliance with the HIRF requirements, no credit is given for signal attenuation due to installation.

A preliminary hazard analysis must be performed by the applicant, for approval by the FAA, to identify either electrical or electronic systems that perform critical functions. The term "critical" means those functions whose failure would contribute to, or cause, a failure condition that would prevent the continued safe flight and landing of the airplane. The systems identified by the hazard analysis that perform critical functions are candidates for the application of HIRF requirements. A system may perform both critical and non-critical functions. Primary electronic flight display systems, and their associated components, perform critical functions such as attitude, altitude, and airspeed indication. The HIRF requirements apply only to critical functions.

Compliance with HIRF requirements may be demonstrated by tests, analysis, models, similarity with existing systems, or any combination of these. Service experience alone is not acceptable since normal flight operations may not include an exposure to the HIRF environment. Reliance on a system with similar design features for redundancy as a means of protection against the effects of external HIRF is generally insufficient since all elements of a redundant system are likely to be exposed to the fields concurrently.

Applicability

As discussed above, these special conditions are applicable to one modification to the airplane models listed under the heading "Type Certification Basis." Should Avidyne Corporation apply at a later date for a supplemental type certificate to modify any other model on the same type certificate to incorporate the same novel or unusual design feature, the special conditions would apply to that model as well under the provisions of § 21.101.

Conclusion

This action affects only certain novel or unusual design features of one modification to several models of airplanes. It is not a rule of general applicability and affects only the applicant who applied to the FAA for approval of these features on the airplane.

The substance of these special conditions has been subjected to the notice and comment period in several prior instances and has been derived without substantive change from those previously issued. It is unlikely that prior public comment would result in a significant change from the substance contained herein. For this reason, and because a delay would significantly affect the certification of some airplane models, the FAA has determined that prior public notice and comment are unnecessary and impracticable, and good cause exists for adopting these special conditions upon issuance. The FAA is requesting comments to allow interested persons to submit views that may not have been submitted in response to the prior opportunities for comment described above.

List of Subjects in 14 CFR Part 23

Aircraft, Aviation safety, Signs and symbols.

Citation

■ The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113 and 44701; 14 CFR 21.16 and 21.101; and 14 CFR 11.38 and 11.19.

The Special Conditions

■ Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for airplane models listed under the "Type Certification Basis" heading modified by Avidyne Corporation, to add an EFIS.

1. Protection of Electrical and Electronic Systems from High Intensity Radiated Fields (HIRF). Each system that performs critical functions must be designed and installed to ensure that the operations, and operational capabilities of these systems to perform critical functions, are not adversely affected when the airplane is exposed to high intensity radiated electromagnetic fields external to the airplane.

2. For the purpose of these special conditions, the following definition applies: Critical Functions: Functions whose failure would contribute to, or cause, a failure condition that would prevent the continued safe flight and landing of the airplane.

Issued in Kansas City, Missouri, on March 17, 2004.

James E. Jackson,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–6748 Filed 3–25–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2004–CE–07–AD; Amendment 39–13535; AD 2004–06–09]

RIN 2120–AA64

Airworthiness Directives; The Lancair Company Models LC40–550FG and LC42–550FG Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain The Lancair Company (Lancair) Models LC40–550FG and LC42–550FG airplanes. This AD requires you to repetitively inspect the fuel pressure transducer for evidence of chafing and measure the cross section diameter (as necessary). The AD also requires you to install a compliance kit at a time dependent on the outcomes of the inspections and measurement. Installation of the kit is terminating action for the repetitive inspection requirements. This AD is the result of several reports of the fuel pressure transducer wearing through at the threads where it attached to the fuel line. We are issuing this AD to detect and correct chafing and wear of the fuel pressure transducer, which could result in failure of the transducer threaded fitting with a resulting fuel leak. These fuel leaks could lead to engine power loss or fire.

DATES: This AD becomes effective on May 3, 2004.

As of May 3, 2004, the Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulation.

We must receive any comments on this AD by June 1, 2004.

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

- *By mail:* FAA, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 2004–CE–07–AD, 901 Locust, Room 506, Kansas City, Missouri 64106.
- *By fax:* (816) 329–3771.
- *By e-mail: 9-ACE-7-Docket@faa.gov.* Comments sent electronically must contain "Docket No. 2004–CE–07–AD" in the subject line. If you send comments electronically as attached electronic files, the files must be formatted in Microsoft Word 97 for Windows or ASCII.

You may get the service information identified in this AD from The Lancair Company, 22550 Nelson Rd., Bend, Oregon 97701; telephone: (541) 318–1144; facsimile: (541) 318–1177.

You may view the AD docket at FAA, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 2004–CE–07–AD, 901 Locust, Room 506, Kansas City, Missouri 64106. Office hours are 8 a.m. to 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Jeff Morfitt, Aerospace Engineer, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington 98055; telephone: 425–917–6405; facsimile: 425–917–6590.

SUPPLEMENTARY INFORMATION:

What Events Have Caused This AD?

The FAA has received several reports of wear of the fuel pressure transducer at the threads due to vibration and the consequent abrasion in the mount. There was one report of a failure of the mount with a resulting fuel leak in a Lancair Model LC40–550FG with about 370 hours time-in-service.

What Is the Potential Impact if FAA Took No Action?

This fuel leak could lead to engine power loss or fire.

Is There Service Information That Applies to This Subject?

Lancair has issued:

—Service Bulletin No. SB–04–002B, dated March 10, 2004; and

—Compliance Kit Instruction No. CK–002, dated March 10, 2004.

What Are the Provisions of This Service Information?

The service information includes procedures for:

—Repetitively inspecting the fuel pressure transducer and related parts for evidence of chafing;

—measuring the diameter of the transducer if chafing is found; and

—installing Compliance Kit Instruction No. CK–002.

FAA's Determination and Requirements of the AD

What Has FAA Decided?

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

Since the unsafe condition described previously is likely to exist or develop on other Lancair Models LC40–550FG and LC42–550FG airplanes of the same type design, we are issuing this AD to detect and correct chafing and wear of the fuel pressure transducer, which could result in failure of the transducer threaded fitting with a resulting fuel leak. These fuel leaks could lead to engine power loss or fire.

What Does This AD Require?

This AD requires you to incorporate the actions in the previously-referenced service bulletin.

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

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

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

Comments Invited

Will I Have the Opportunity to Comment Before You Issue the Rule?

This AD is a final rule that involves requirements affecting flight safety and was not preceded by notice and an opportunity for public comment; however, we invite you to submit any written relevant data, views, or arguments regarding this AD. Send your comments to an address listed under **ADDRESSES.** Include "AD Docket No. 2004–CE–07–AD" in the subject line of your comments. If you want us to acknowledge receipt of your mailed comments, send us a self-addressed, stamped postcard with the docket number written on it; we will date-stamp your postcard and mail it back to you. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify it. If a person contacts us through a nonwritten communication, and that contact relates to a substantive part of this AD, we will summarize the contact and place the summary in the docket. We will consider all comments received by the closing date and may amend the AD in light of those comments.

Regulatory Findings

Will This AD Impact Various Entities?

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

Will This AD Involve a Significant Rule or Regulatory Action?

For the reasons discussed above, I certify that this AD:

1. Is not a "significant regulatory action" under Executive Order 12866;
2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and
3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a summary of the costs to comply with this AD and placed it in the AD Docket. You may get a copy of this summary by sending a request to us at the address listed under **ADDRESSES.** Include "AD Docket No. 2004–CE–07–AD" in your request.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2004–06–09 The Lancair Company: Amendment 39–13535; Docket No. 2004–CE–07–AD.

When Does This AD Become Effective?

(a) This AD becomes effective on May 3, 2004.

Are Any Other ADs Affected by This Action?

(b) None.

What Airplanes Are Affected by This AD?

(c) This AD affects the following airplane models and serial numbers that are certificated in any category:

Model	Serial numbers
LC40–550FG	40004 through 40079
LC42–550FG	42002 through 42045

What Is the Unsafe Condition Presented in This AD?

(d) This AD is the result of several reports of that the fuel pressure transducer had worn through at the threads where it attached to the fuel line. We are issuing this AD to detect and correct chafing and wear of the fuel pressure transducer, which could result in failure of the transducer threaded fitting with a resulting fuel leak. These fuel leaks could lead to engine power loss or fire.

What Must I Do to Address This Problem?

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

Actions	Compliance	Procedures
(1) Inspect the fuel pressure transducer, as follows: (i) Visually inspect the fuel inlet of the transducer for chafing (surface discontinuity or discoloration). (ii) If chafing is found, use a caliper and measure the outside diameter of the fuel inlet fitting (rotating the transducer while noting the minimum cross sectional measurement). If the measurement is 0.370 inches or more and there is no evidence of fuel leakage, then repetitively inspect until you do the modification in paragraph (e)(3) of this AD.	Initially, unless already done within the last 25 hours time-in-service (TIS), inspect upon accumulating 100 hours TIS or within 5 hours TIS after May 3, 2004 (the effective date of this AD), whichever occurs later. Repetitively inspect thereafter at intervals not to exceed 25 hours TIS until the modification in paragraph (e)(3) of this AD is done. The modification in paragraph (e)(3) of this AD is terminating action for the repetitive inspection requirements in this AD.	Follow The Lancair Company Model 300/350 Mandatory Service Bulletin No. SB–04–002B, dated March 10, 2004, and the applicable airplane maintenance manual.
(2) If the measurement of the outside diameter of the fuel inlet fitting is 0.369 inches or less, do the modification in paragraph (3)(3) of this AD.	Before further flight after the inspection required in paragraph (e)(1) of this AD in which the measurement of 0.369 inches or less is found.	Follow The Lancair Company Model 300/350 Mandatory Service Bulletin No. SB–04–002B, dated March 5, 2004, The Lancair Company Model 300/350 Compliance Kit Instruction No. CK–002, dated March 10, 2004, and the applicable airplane maintenance manual.
(3) Install Compliance Kit CK–002	Within 100 hours TIS after May 3, 2004 (the effective date of this AD) or before further flight if the criteria in paragraph (e)(2) of this AD exists. You may do this installation before this time as terminating action for the repetitive inspection requirements.	Follow The Lancair Company Model 300/350 Compliance Kit Instruction No. CK–002, dated March 10, 2004, and the applicable airplane maintenance manual.

May I Request an Alternative Method of Compliance?

(f) You may request a different method of compliance or a different compliance time for this AD by following the procedures in 14 CFR 39.19. Unless FAA authorizes otherwise, send your request to your principal inspector. The principal inspector may add comments and will send your request to the Manager, Seattle Aircraft Certification Office (ACO), FAA. For information on any already approved alternative methods of compliance, contact Jeff Morfitt, Aerospace Engineer, Seattle ACO, 1601 Lind Avenue SW., Renton, Washington 98055; telephone: 425–917–6405; facsimile: 425–917–6590.

May I Obtain a Special Flight Permit for the Initial Inspection Requirement of This AD?

(g) No. Special flight permits are not allowed for this AD. Part 39 of the Federal Aviation Regulations (14 CFR part 39) provides blanket approval of special flight permits for ADs, unless otherwise specified in the individual AD. The FAA has

determined that the safety issue is severe enough that the chafing in the fuel pressure transducer or fuel leaks must be corrected before further operation.

Does This AD Incorporate Any Material by Reference?

(h) You must do the actions required by this AD following the instructions in The Lancair Company Model 300/350 Mandatory Service Bulletin No. SB–04–002B, dated March 10, 2004, and The Lancair Company Model 300/350 Compliance Kit Instruction No. CK–002, dated March 10, 2004. The Director of the Federal Register approved the incorporation by reference of this service information in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may get a copy from The Lancair Company, 22550 Nelson Rd., Bend, Oregon 97701; telephone: (541) 318–1144; facsimile: (541) 318–1177. You may review copies at FAA, Central Region, Office of the Regional Counsel, 901 Locust, Room 506, Kansas City, Missouri 64106; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Issued in Kansas City, Missouri, on March 16, 2004.

James E. Jackson,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–6498 Filed 3–25–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NM–317–AD; Amendment 39–13541; AD 2004–06–15]

RIN 2120–AA64

Airworthiness Directives; BAE Systems (Operations) Limited Model Avro 146-RJ Series Airplanes; and BAE Systems (Operations) Limited Model BAe 146 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain BAE Systems (Operations) Limited Model Avro 146-RJ and Model BAe 146 series airplanes, that requires a test to determine the torque setting for the collar cap screw of the differential box for the nose landing gear, and follow-on actions. This action is necessary to prevent uncommanded inputs to the nosewheel steering, which could result in reduced controllability of the airplane during takeoff and landing. This action is intended to address the identified unsafe condition.

DATES: Effective April 30, 2004.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of April 30, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from British Aerospace Regional Aircraft American Support, 13850 Mclearen Road, Herndon, Virginia 20171. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

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

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain BAE Systems (Operations) Limited Model Avro 146–RJ and Model BAe 146 series airplanes was published in the **Federal Register** on January 5, 2004 (69 FR 289). That action proposed to require a test to determine the torque setting for the collar cap screw of the differential box for the nose landing gear, and follow-on actions.

Comments

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

Explanation of Editorial Change

Note 1 of the proposed AD referred to a "detailed inspection and follow-on actions." This was an inadvertent error in the proposed AD. Note 1 of the final rule has been changed to refer to a "torque test and follow-on actions."

Conclusion

The FAA has determined that air safety and the public interest require the adoption of the rule as proposed, with the editorial change mentioned previously.

Cost Impact

The FAA estimates that 55 airplanes of U.S. registry will be affected by this AD, that it will take approximately 2 work hours per airplane to accomplish the required actions, and that the average labor rate is $65 per work hour. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be $7,150, or $130 per airplane.

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

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2004–06–15 Bae Systems (Operations) Limited (Formerly British Aerospace Regional Aircraft): Amendment 39–13541. Docket 2001–NM–317–AD.

Applicability: Model Avro 146–RJ series airplanes; and Model BAe 146 series airplanes; equipped with a nose landing gear having a part number listed under paragraph 1.A.(1) of BAE Systems (Operations) Limited Inspection Service Bulletin ISB.32–168, dated August 6, 2001; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent uncommanded inputs to the nosewheel steering, which could result in reduced controllability of the airplane during takeoff and landing, accomplish the following:

Note 1: BAE Systems (Operations) Limited Inspection Service Bulletin ISB.32–168, dated August 6, 2001, references Messier-Dowty Service Bulletin 146–32–154, dated August 3, 2001, as an additional source of service information for accomplishment of the torque test and follow-on actions. Although the Messier-Dowty service bulletin specifies to submit certain information to the manufacturer, this AD does not include such a requirement.

Torque Test and Follow-On Actions

(a) Within 6 months after the effective date of this AD: Perform a torque test of the collar cap screw of the differential box for the nose landing gear, and do all applicable follow-on actions before further flight in accordance with the Accomplishment Instructions of BAE Systems (Operations) Limited Inspection Service Bulletin ISB.32–168, dated August 6, 2001.

(b) If the steering mechanism will not return to the neutral position following the functional test in paragraph 2.C. of the Accomplishment Instructions of BAE Systems (Operations) Limited Inspection Service Bulletin ISB.32–168, dated August 6, 2001, before further flight: Repair per a method approved by either the Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate; or the CAA (or its delegated agent).

Parts Installation

(c) As of the effective date of this AD, no person may install on any airplane a nose landing gear assembly unless the torque test and follow-on actions have been accomplished in accordance with paragraph 2.B. of BAE Systems (Operations) Limited Inspection Service Bulletin ISB.32–168, dated August 6, 2001.

Alternative Methods of Compliance

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

Incorporation by Reference

(e) Unless otherwise specified in this AD, the actions shall be done in accordance with BAE Systems (Operations) Limited Inspection Service Bulletin ISB.32–168, dated August 6, 2001. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from British Aerospace Regional Aircraft American Support, 13850 Mclearen Road, Herndon, Virginia 20171. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Note 2: The subject of this AD is addressed in British airworthiness directive 004–08–2001.

Effective Date

(f) This amendment becomes effective on April 30, 2004.

Issued in Renton, Washington, on March 17, 2004.

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–6582 Filed 3–25–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–NM–115–AD; Amendment 39–13540; AD 2004–06–14]

RIN 2120–AA64

Airworthiness Directives; Saab Model SAAB 2000 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Saab Model SAAB 2000 series airplanes, that requires measuring the torque of the adjustable pin in the rear attachment of the intermediate strut for both engines, and retorquing the adjustable pins to the correct torque value. This action is necessary to prevent long-term damage to the engine mounting structure (EMS), and loss of redundancy on the EMS, which could result in possible separation of an engine from the airplane, reduced controllability of the airplane, and injury to persons or property on the ground. This action is intended to address the identified unsafe condition.

DATES: Effective April 30, 2004.

The incorporation by reference of a certain publication listed in the regulations is approved by the Director of the Federal Register as of April 30, 2004.

ADDRESSES: The service information referenced in this AD may be obtained from Saab Aircraft AB, SAAB Aircraft Product Support, S–581.88, Linköping, Sweden. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Rosanne Ryburn, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4057; telephone (425) 227–2139; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain Saab Model SAAB 2000 series airplanes was published in the **Federal Register** on January 5, 2004 (69 FR 293). That action proposed to require measuring the torque of the adjustable pin in the rear attachment of the intermediate strut for both engines, and retorquing the adjustable pins to the correct torque value.

Comments

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

Conclusion

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

Cost Impact

The FAA estimates that 3 airplanes of U.S. registry will be affected by this AD, that it will take approximately 2 work hours per airplane to accomplish the required actions, and that the average labor rate is $65 per work hour. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be $390, or $130 per airplane.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD

were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2004–06–14 Saab Aircraft AB: Amendment 39–13540. Docket 2003–NM–115–AD.

Applicability: Model SAAB 2000 series airplanes, serial numbers –004 through –063 inclusive; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent long-term damage to the engine mounting structure (EMS), and loss of redundancy on the EMS, which could result in possible separation of an engine from the airplane, reduced controllability of the airplane, and injury to persons or property on the ground, accomplish the following:

Service Bulletin References

(a) The following information pertains to the service bulletin referenced in this AD:

(1) The term "service bulletin," as used in this AD, means the Accomplishment Instructions of Saab Service Bulletin 2000–71–014, dated January 23, 2003.

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

Torque Check

(b) Within 3 months after the effective date of this AD: Measure the torque of the adjustable pin in the rear attachment of the intermediate strut for both engines, in accordance with the inspection requirements and torque values in the service bulletin.

Retorque

(c) Retorque the adjustable pin in the intermediate strut rear attachment of the EMS to the correct torque value, in accordance with the service bulletin.

Alternative Methods of Compliance

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

Incorporation by Reference

(e) The actions shall be done in accordance with Saab Service Bulletin 2000–71–014, dated January 23, 2003. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Saab Aircraft AB, SAAB Aircraft Product Support, S–581.88, Linköping, Sweden. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Note 1: The subject of this AD is addressed in Swedish airworthiness directive 1–183, dated January 23, 2003.

Effective Date

(f) This amendment becomes effective on April 30, 2004.

Issued in Renton, Washington, on March 16, 2004.

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–6581 Filed 3–25–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NM–339–AD; Amendment 39–13539; AD 2004–06–13]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A319 and A320 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD), applicable to certain Airbus Model A319 and A320 series airplanes, that currently requires repetitive inspections to detect cracking and delamination of the containers in which the off-wing emergency evacuation slides are stored, and corrective actions if necessary. That AD also requires eventual modifications of the slides, which terminates the requirement for repetitive inspections. This action removes the currently required repetitive inspections, and requires an additional modification of the off-wing emergency evacuation slides. The actions specified by this AD are intended to prevent the loss of the emergency evacuation slides during flight, which could result in damage to the fuselage, and to prevent incorrect inflation of the emergency evacuation slides, which could result in the emergency exits being unusable during an emergency evacuation. This action is intended to address the identified unsafe condition.

DATES: Effective April 30, 2004.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of April 30, 2004.

The incorporation by reference of a certain other publication was approved previously by the Director of the Federal Register as of February 1, 2000 (64 FR 72533, December 28, 1999).

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

FOR FURTHER INFORMATION CONTACT: Tom Groves, Aerospace Engineer, International Branch, ANM–116, FAA,

Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1503; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) by superseding AD 99–26–22, amendment 39–11481 (64 FR 72533, December 28,1999), which is applicable to certain Airbus Model A319 and A320 series airplanes, was published in the **Federal Register** on January 5, 2004 (69 FR 291). The action proposed to require removing the currently required repetitive inspections, and would require an additional modification of the off-wing emergency evacuation slides.

Comment

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

The commenter supports the proposed rule.

Conclusion

After careful review of the available data, including the comment noted above, we have determined that air safety and the public interest require the adoption of the rule as proposed.

Cost Impact

The modification per Airbus Service Bulletin A320–25–1156, Revision 02, is currently required by AD 99–26–22, which is applicable to approximately 121 airplanes of U.S. registry. This modification takes approximately 3 work hours per airplane to accomplish (not including time for gaining access and closing up), at an average labor rate of $65 per work hour. The cost of required parts is now approximately $679 per airplane. Based on these figures, the cost impact of this current requirement is estimated to be $105,754, or $874 per airplane.

The new requirements of this AD would affect approximately 435 airplanes of U.S. registry.

The new actions that are required in this AD action will take approximately 3 work hours per airplane to accomplish, at an average labor rate of $65 per work hour. Required parts will cost approximately $80 per airplane. Based on these figures, the cost impact of the new actions is estimated to be $119,625, or $275 per airplane.

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

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. Section 39.13 is amended by removing amendment 39–11481 (64 FR 72533, December 28, 1999), and by adding a new airworthiness directive (AD), amendment 39–13539, to read as follows:

2004–06–13 Airbus: Amendment 39–13539. Docket 2001–NM–339–AD. Supersedes AD 99–26–22, Amendment 39–11481.

Applicability: Model A319 and A320 series airplanes, certificated in any category; except airplanes that have Airbus Modifications 24850 and 25844 and 27275 installed in production; or that have Airbus Service Bulletin A320–25–1156, Revision 01, dated February 2, 1999; or Revision 02, dated October 26, 1999; and Airbus Service Bulletin A320–25–1265, dated June 6, 2001; accomplished.

Compliance: Required as indicated, unless accomplished previously.

To prevent the loss of the emergency evacuation slides during flight, which could result in damage to the fuselage, and to prevent incorrect inflation of the emergency evacuation slides, which could result in the emergency exits being unusable during an emergency evacuation, accomplish the following:

Restatement of Requirements of AD 99–26–22

Terminating Modification

(a) For airplanes on which Airbus Modifications 24850 and 25844; or Airbus Service Bulletin A320–25–1156, Revision 01, dated February 2, 1999; or Revision 02, dated October 26, 1999; have not been accomplished: Within 5 years after February 1, 2000 (the effective date of AD 99–26–22, amendment 39–11481), modify the off-wing emergency evacuation slides (*i.e.*, modifications, inspection, repair, and repacking) in accordance with Airbus Service Bulletin A320–25–1156, Revision 01, dated February 2, 1999; or Revision 02, dated October 26, 1999. After the effective date of this AD, only Revision 02 may be used.

Note 1: Airbus Service Bulletin A320–25–1156, Revision 01, dated February 2, 1999, and Revision 02, dated October 26, 1999; refer to Air Cruisers Service Bulletins 004–25–37, Revision 2, dated May 29, 1996, and 004–25–42, dated September 16, 1996; as additional sources of service information for accomplishment of the modification of the off-wing escape slides.

New Requirements of this AD

(b) For airplanes listed in Airbus Service Bulletin A320–25–1265, dated June 6, 2001: Within 3 years after the effective date of this AD, modify the left and right off-wing emergency evacuation slides in accordance with the Accomplishment Instructions of that service bulletin.

Note 2: Airbus Service Bulletin A320–25–1265, dated June 6, 2001, refers to Air Cruisers Service Bulletin 004–25–48, Revision 3, dated August 3, 2001, as an additional source of service information for accomplishment of the modification of the off-wing emergency evacuation slides.

Parts Installation

(c) As of the effective date of this AD, no person may install, on any airplane, an off-wing emergency evacuation slide having part number D31865–101, –102, –103, –104, –105, –106, –107, or –108.

Alternative Methods of Compliance

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

Incorporation by Reference

(e) Unless otherwise specified in this AD, the actions shall be done in accordance with Airbus Service Bulletin A320–25–1156, Revision 01, dated February 2, 1999; Airbus Service Bulletin A320–25–1156, Revision 02, dated October 26, 1999; and Airbus Service Bulletin A320–25–1265, dated June 6, 2001; as applicable.

(1) The incorporation by reference of Airbus Service Bulletin A320–25–1156, Revision 02, dated October 26, 1999; and Airbus Service Bulletin A320–25–1265, dated June 6, 2001; is approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

(2) The incorporation by reference of Airbus Service Bulletin A320–25–1156, Revision 01, dated February 2, 1999, was approved previously by the Director of the Federal Register as of February 1, 2000 (64 FR 72533, December 28, 1999).

(3) Copies may be obtained from Airbus, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Note 3: The subject of this AD is addressed in French airworthiness directive 2001–380(B), dated September 5, 2001.

Effective Date

(f) This amendment becomes effective on April 30, 2004.

Issued in Renton, Washington, on March 16, 2004.

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–6580 Filed 3–25–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–288–AD; Amendment 39–13538; AD 2004–06–12]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747–400F Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Boeing Model 747–400F series airplanes, that requires repetitive detailed and general visual inspections of the external fuselage skin for cracks; various inspections of the affected area where cracks are found to determine the extent of the damage; and repair of cracks. This action is necessary to detect and correct fatigue cracks in the fuselage skin and frame shear tie assemblies, which could propagate and result in possible in-flight decompression of the airplane. This action is intended to address the identified unsafe condition.

DATES: Effective April 30, 2004.

The incorporation by reference of a certain publication listed in the regulations is approved by the Director of the Federal Register as of April 30, 2004.

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

FOR FURTHER INFORMATION CONTACT: Candice Gerretsen, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 917–6428; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain Boeing Model 747–400F series airplanes was published in the **Federal Register** on November 26, 2003 (68 FR 66384). That action proposed to require repetitive detailed and general visual inspections of the external fuselage skin for cracks; various inspections of the affected area where cracks are found to determine the extent of the damage; and repair of cracks.

Comments

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

Conclusion

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

Cost Impact

There are approximately 72 airplanes of the affected design in the worldwide fleet. The FAA estimates that 12 airplanes of U.S. registry will be affected by this AD, that it will take approximately 1 work hour per airplane to accomplish the required inspections, and that the average labor rate is $65 per work hour. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be $780, or $65 per airplane, per inspection cycle.

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

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2004–06–12 Boeing: Amendment 39–13538. Docket 2002–NM–288–AD.

Applicability: Model 747–400F series airplanes, having line numbers 968 through 1286 inclusive, certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To detect and correct fatigue cracks in the fuselage skin and frame shear tie assemblies, which could propagate and result in possible in-flight decompression of the airplane, accomplish the following:

Service Bulletin Reference

(a) The term "service bulletin," as used in this AD, means the Accomplishment Instructions of Boeing Special Attention Service Bulletin 747–53–2480, dated March 28, 2002.

Compliance Time

(b) At the later compliance time specified in paragraphs (b)(1) and (b)(2) of this AD, do the inspections specified in paragraph (c) of this AD.

(1) Within 6,000 flight cycles after the date of issuance of the original Airworthiness Certificate or date of issuance of the Export Certificate of Airworthiness, whichever comes first.

(2) Within 3,000 flight cycles after the effective date of this AD.

Repetitive Inspections

(c) Perform both inspections of the external fuselage skin as shown in Table 1 of this AD, per the service bulletin. Repeat the inspections thereafter at intervals not to exceed 3,000 flight cycles.

TABLE 1.—INSPECTION REQUIREMENTS

Type of inspection	Area to inspect
(1) Detailed	Inspect the skin surface for cracks initiating from the shear tie fasteners (14 locations on each side) common to the body station 800 frame between stringers S–13 and S–15 on both the left and right sides of the airplane.
(2) General visual	Inspect the skin surface at all fastener locations for cracks between body stations 780 to 800 and stringers S–13 through S–15 on both the left and right sides of the airplane.

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

Note 2: 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."

Crack Findings: Inspections and Repair

(d) If any crack is found during any inspection required by paragraph (c) of this AD, before further flight, do the actions specified in paragraphs (d)(1) and (d)(2) of this AD.

(1) Perform inspections of the affected area to determine the extent of the crack using the following applicable inspection methods, per the service bulletin: detailed inspection; open-hole high frequency eddy current (HFEC) inspection; surface HFEC inspection; and dye penetrant inspection.

(2) Repair any crack per the service bulletin. Where the service bulletin specifies contacting Boeing for an alternate repair method: Before further flight, repair per a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA, or per data meeting the type certification basis of the airplane approved by a Boeing Company DER who has been authorized by the Manager, Seattle ACO, to make such findings.

Terminating Action for Repaired Area

(e) Accomplishment of the repair per paragraph (d)(2) of this AD ends the repetitive inspection requirements of paragraph (c) of this AD for that repaired area only.

Alternative Methods of Compliance

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

Incorporation by Reference

(g) Unless otherwise specified in this AD, the actions shall be done in accordance with Boeing Special Attention Service Bulletin 747–53–2480, dated March 28, 2002. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Effective Date

(h) This amendment becomes effective on April 30, 2004.

Issued in Renton, Washington, on March 16, 2004.

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–6579 Filed 3–25–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NM–380–AD; Amendment 39–13537; AD 2004–06–11]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A330–301, –321, –322, –341, and –342 Series Airplanes; and Model A340–211, –212, 213, –311, –312, and –313 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Airbus Model A330–301, –321, –322, –341, and –342 series airplanes; and certain Model A340 series airplanes, that requires inspecting for and repairing cracking 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: Effective April 30, 2004.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of April 30, 2004.

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

FOR FURTHER INFORMATION CONTACT: 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: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain Airbus Model A330–301, –321, –322, –341, and –342 series airplanes; and certain Model A340 series airplanes was published in the **Federal Register** on November 28, 2003 (68 FR 66762). That action proposed to 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.

Comments

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

Request To Revise Applicability

The commenter requests that the applicability of the proposed AD be revised to match the applicability of the French airworthiness directive, which limits Model A340 series airplanes to A340–211, –212, 213, –311, –312, and –313. The commenter states that the proposed (FAA) AD, as written, would include Model A340–500 and –600 series airplanes, which do not need the compliance check.

We agree, for the reasons provided by the commenter. We have revised the applicability accordingly in this final rule.

Conclusion

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

Cost Impact

This AD will affect about 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 actions will take about 30 work hours per airplane, at an average labor rate of $65 per work hour. Required parts will cost about $1,075 per airplane. Based on these figures, the cost impact of this AD 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 requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2004–06–11 Airbus: Amendment 39–13537. 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.
A340–211, –212, 213, –311, –312, and –313 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.

Incorporation by Reference

(e) Unless otherwise specified in this AD, the actions must be done in accordance with Airbus Service Bulletin A330–57–3055, Revision 01, dated May 2, 2002; or Airbus Service Bulletin A340–57–4062, Revision 01, dated May 2, 2002; as applicable. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Airbus, 1 Rond Point Maurice Bellonte, 31701 Blagnac Cedex, France. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Note 1: The subject of this AD is addressed in French airworthiness directives 2001–578(B) and 2001–579(B), both dated November 28, 2001.

Effective Date

(f) This amendment becomes effective on April 30, 2004.

Issued in Renton, Washington, on March 17, 2004.

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–6578 Filed 3–25–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2003–15398; Airspace Docket No. 03–AGL–091]

Revocation of Class D Airspace Area; Chicago, IL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action revokes the Class D airspace area for the Merrill C. Meigs Airport, Chicago, IL. The FAA is taking this action due to the closure of the airport.

EFFECTIVE DATE: 0901 UTC, June 10, 2004.

FOR FURTHER INFORMATION CONTACT: Patricia A. Graham, Air Traffic Division, Airspace Branch, AGL–520, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois 60018, telephone (847) 294–7568.

SUPPLEMENTARY INFORMATION:

Background

On July 28, 2003, the FAA issued a notice proposing to revoke the Class D airspace area for the Merrill C. Meigs Airport. Specifically, that action prposed to revoke the existing Class D airspace area extending from the surface up to and including 3,100 feet above mean sea level (MSL) within a 3.8 nautical mile radius of the now closed Meigs Airport reference point. Class D airspace areas are intended to provide controlled airspace for visual or instrument flight rules operations at airports having an operating Airport Traffic Control Tower (ATCT).

Discussion of Comment

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal. All comments received were reviewed prior to taking any final action on this matter. In response to the notice, we received thirty-three comments. Two of the comments received were in support of the proposed airspace action and the others stated objection or provided other comments on the proposal. Those objecting to the proposal expressed concern that the revocation of the Class D Airspace Area would take away the ability of pilots to use the Chicago Meigs Airport in case they had to make an emergency landing, or require some other sort of assistance.

Other commenters expressed concern that revoking the Class D airspace area and closing the Chicago Meigs Airport would result in an increase in the congestion at the Chicago O'Hare International Airport (O'Hare Airport) and the Chicago Midway International Airport (Midway Airport).

Several other commenters stated that it was less convenient to fly into the O'Hare Airport and Midway Airport rather than the former Chicago Meigs Airport. One commenter stated that the lack of controlled airspace around downtown Chicago could have serious potential security risks. Additionally, several commenters expressed a concern that a Class D airspace area is needed to keep a corridor along the shore of Lake Michigan safer; and that the FAA should continue to provide some sort of advisory service to pilots utilizing something similar to an ATCT.

Many of those commenting also expressed a concern that by revoking the Class D airspace area the FAA was supporting the alleged illegal closing of Chicago Meigs Airport, and that the airport should not be closed.

Many of the concerns expressed by those commenting on the notice are beyond the control of the FAA. Specifically, many commenters took issue with the actual closing of the Meigs Airport, the destruction of its runway as well as the lack of availability of the airport in case of an emergency landing, and the impact the closure would have on the Chicago O'Hare and Chicago Midway International Airports. Also, they expressed a belief that there was increased security risk resulting from a reduction in controlled airspace.

While the FAA respects the opinions of those expressing comments regarding the Meigs Airport closure, those comments are outside of the scope of the notice. The purpose of the proposed action was to address the classification of the airspace over the closed Meigs Airport. The FAA proposed this action

after and in response to the closure of the Chicago Meigs Airport.

In response to those commenters expressing concern regarding the lack of controlled airspace after the revocation of the existing Class D airspace area, it should be noted that there will be Class E airspace area (which is controlled airspace) extending from 700 feet above the ground to the base of the overlying Chicago, IL Class B Airspace Area in the same area. Air traffic control services will remain available to aircraft operating in this area. These services include safety alerts, traffic advisories, and limited radar vectoring when requested by the pilot. This is the same level of service that has been available on a daily basis since the airport and ATCT closure and is similar to the service available prior to the airport closure during the hours when the Meigs ATCT was closed.

The Rule

This amendment to 14 CFR part 71 revokes the Class D airspace area at Chicago, IL, for the former Merrill C. Meigs Airport. As a result, the existing Class E airspace area will be in effect on a continuous basis. A Class D airspace area extending upward from the surface of the earth is no longer needed because the airport and ATCT have been closed.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore this, proposed regulation—(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 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).

The Amendment

■ In consideration of the foregoing, 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

§ 71.1 Amended

■ 2. The incorporation by reference in 14 CFR 71.1 of the 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

* * * * *

AGL IL D Chicago, IL [Removed]

* * * * *

Issued in Des Plaines, Illinois on March 04, 2004.

Nancy B. Shelton,

Manager, Air Traffic Division, Great Lakes Region.

[FR Doc. 04–6861 Filed 3–25–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2004–16989; Airspace Docket No. 04–ACE–7]

Modification of Class E Airspace; Hays, KS

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Direct final rule; request for comments; correction.

SUMMARY: This action corrects a direct final rule; request for comments that was published in the **Federal Register** on Friday, March 5, 2004, (69 FR 10330) [FR Doc. 04–5026]. It corrects an erroneously cited reference.

DATES: This direct final rule is effective on 0901 UTC, June 10, 2004.

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:

History

Federal Register document 04–5026, published on Friday, March 5, 2004, (69 FR 10330) modified Class E2 and Class E5 airspace areas at Hays, KS. The modification corrected discrepancies in the Hays Regional Airport airport reference point, expanded the areas by .1 mile, redefined the extensions to the airspace areas and brought the legal descriptions of Hays, KS Class E airspace areas into compliance with FAA Order 7400.2E, Procedures for Handling Airspace Matters. However, the date and effective date of cited FAA Order 7400.9L, Airspace Designations and Reporting Points, was published incorrectly.

■ Accordingly, pursuant to the authority delegated to me, the date and effective date of cited FAA Order 7400.9L, as published in the **Federal Register** on Friday, March 5, 2004, (69 FR 10330) [FR Doc. 04–5026] is corrected as follows:

§ 71.1 [Corrected]

■ On page 10331, Column 1, paragraph headed "§ 71.1 [Amended]," fourth line and fifth line, change "August 30, 2002, and effective September 16, 2002, is amended as" to read "September 2, 2003, and effective September 16, 2003, is amended as."

Issued in Kansas City, MO, on March 9, 2004.

Paul J. Sheridan,

Acting Manager, Air Traffic Division, Central Region.

[FR Doc. 04–6751 Filed 3–25–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 177

[Docket No. 1996F–0176]

Indirect Food Additives: Polymers; Technical Amendment

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; technical amendment.

SUMMARY: The Food and Drug Administration (FDA) is amending its food additive regulations to correctly reflect all materials that are permitted for use as films/layers of laminated articles intended for use with food. The current requirements for polymer films/layers are incomplete due to an inadvertent error. This document is

editorial in nature and amends the regulations to correct this error.

DATES: This rule is effective March 26, 2004. Submit written or electronic comments by April 26, 2004.

ADDRESSES: Submit written comments to the Division of Dockets Management (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments.*

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

SUPPLEMENTARY INFORMATION:

I. Background

FDA has discovered that an error has become incorporated into the agency's regulations in part 177 (21 CFR part 177). In the **Federal Register** of August 25, 1999 (64 FR 46271), FDA published a final rule with an inadvertent error. In this final rule, § 177.1390 was amended, and existing paragraph (c)(1)(i)(*f*) was not redesignated as paragraph (c)(1)(i)(*g*). Because § 177.1390(c)(1)(i)(*g*) was not added to the agency's regulations, the regulations are incorrect. Accordingly, § 177.1390 is being amended to correct this error.

To the extent that 5 U.S.C. 553 applies to this action, the agency's implementation of this action without opportunity for public comment comes within the good cause exception in 5 U.S.C. 553(b)(3)(B) in that obtaining public comment is impracticable, unnecessary, and contrary to public interest. This amendment to the food additive regulations corrects an inadvertent omission in the Code of Federal Regulations (CFR). The purpose of this final rule is to update the regulations in part 177 to correctly reflect all materials that are permitted for use as films/layers of laminated articles intended for use with food. In accordance with 21 CFR 10.40(e)(1), FDA is providing an opportunity for comment on whether the regulation should be subsequently modified or revoked.

II. Analysis of Impacts

FDA has examined the impacts of the final rule under Executive Order 12866 and the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). Under the Regulatory Flexibility Act, if a rule has a significant economic impact on a substantial number of small entities, an agency must analyze regulatory options that would minimize any significant impact of the rule on small entities. Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement of anticipated costs and benefits before proposing any rule that may result in an expenditure in any one year by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million(adjusted annually for inflation).

The agency concludes that this final rule is consistent with the principles set out in Executive Order 12866 and in these two statutes. FDA has determined that the final rule is not a significant regulatory action as defined by the Executive order and so is not subject to review under the Executive order.

The Unfunded Mandates Reform Act of 1995 does not require FDA to prepare a statement of costs and benefits for this final rule, because the final rule is not expected to result in any 1-year expenditure that would exceed $100 million adjusted for inflation. The current inflation adjusted statutory threshold is $112.3 million.

The purpose of this final rule is to update the regulations in part 177 to correctly reflect all materials that are permitted for use as films/layers of laminated articles intended for use with food. Because this rule simply adds an additional permitted use that was inadvertently omitted from § 177.1390, this rule does not impose any additional costs on industry. Consequently, the agency certifies that this final rule will not have a significant economic impact on a substantial number of small entities. Therefore, under the Regulatory Flexibility Act, no further analysis is required.

III. Paperwork Reduction Act of 1995

The final rule contains no collection of information. Therefore, clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 is not required.

IV. Environmental Impact

The agency has determined under 21 CFR 25.30(i) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

V. Federalism

FDA has analyzed this final rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the rule does not contain policies that have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, the agency has concluded that the rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required.

VI. Opportunity for Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments to *http://www.fda.gov/dockets/ecomments* or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 177

Food additives, Food packaging.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 177 is amended as follows:

PART 177—INDIRECT FOOD ADDITIVES: POLYMERS

■ 1. The authority citation for 21 CFR part 177 continues to read as follows:

Authority: 21 U.S.C. 321, 342, 348, 379e.

■ 2. Section 177.1390 is amended by adding paragraph (c)(1)(i)(g) to read as follows:

§ 177.1390 Laminate structures for use at temperatures of 250 °F and above.

* * * * *

(c) * * *

(1) * * *

(i) * * *

(*g*) Polymeric resins that comply with an applicable regulation in this chapter which permits food type and time/temperature conditions to which the

container will be exposed, including sterilization processing.

* * * * *

Dated: March 18, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–6738 Filed 3–25–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF STATE

22 CFR Part 51

[Public Notice 4619]

RIN 1400–ZA05

Passport Procedures—Amendment to Passport Regulations

AGENCY: State Department.

ACTION: Interim final rule.

SUMMARY: The interim final rule clarifies that passports that are revoked, or reported lost or stolen, are invalid. The interim final rule also requires the personal appearance of all passport applicants who are not eligible to apply by mail. It also requires that minors under 14 years of age appear in person unless such appearance has been specifically waived. Finally, the interim final rule requires that applicants for United States passports provide photographs in accordance with the instructions printed on the passport application.

DATES: This interim final rule is effective on the date of publication. Written comments must be received no later than April 26, 2004.

ADDRESSES: Written comments should be addressed to: Chief, Legal Division, Office of Passport Policy, Planning and Advisory Services, 2100 Pennsylvania Ave., NW., 3rd Floor, Washington, DC 20037. E-mail for comments: *PassportRules@state.gov* or submit your comments through the Web site at *http://www.regulations.gov/*.

FOR FURTHER INFORMATION CONTACT: Sharon Palmer-Royston, Office of Passport Policy, Planning and Advisory Services, Bureau of Consular Affairs, Department of State (202) 663–2662; Fax (202) 663–2654.

SUPPLEMENTARY INFORMATION: Section 1101(a)(30) of Title 8, United States Code (U.S.C.), defines a passport as any travel document issued by a competent authority showing the bearer's origin, identity and nationality, which is valid for the admission of the bearer into a foreign country. Section 1185(b) of Title 8, U.S.C., requires U.S. citizens to bear a valid U.S. passport to enter or depart the United States unless specifically exempted—exemptions are provided in 22 CFR 53.2. The Secretary of State has sole authority to grant and issue passports, pursuant to 22 U.S.C. 211a. Before a passport is issued to any person by or under authority of the United States, such person shall subscribe to and submit a written application, as required by 22 U.S.C. 213. During its period of validity, a passport (when issued for the maximum period authorized by law) is a document establishing proof of United States citizenship, pursuant to 22 U.S.C. 2705; and, 22 CFR 51.2(b) provides that unless authorized by the Department no person shall bear more than one valid or potentially valid U.S. passport at any one time; and, 8 U.S.C. 1504 authorizes the Secretary of State to cancel a passport if it was obtained illegally, fraudulently or erroneously.

Reporting Lost or Stolen Passports

Section 51.4 of Title 22, Code of Federal Regulations (CFR), governs the validity of passports. The interim final rule amends § 51.4 by adding a new paragraph (h) providing that a passport is invalid if formally revoked by the Department; or registered by the Department as lost or stolen when reported in writing or by telephone to the Department of State, or in writing as part of the passport application process at a passport agency, or a diplomatic or consular post abroad.

The effect of this change is to forestall the use of passports that have been revoked or reported as lost or stolen for illegal entry into the United States or at international ports of entry in other countries. This means that whenever a person has reported to the Department that his or her passport is lost or stolen, and the Department has registered the passport as invalid, the passport will not be usable for travel purposes if it is later recovered. The Department considers the promulgation of this regulatory provision as a matter of urgency to bolster border security by preventing the misuse of a lost or stolen United States passport.

Photographs

Section 51.25(a) of Title 22, Code of Federal Regulations (CFR), requires the applicant for a United States passport to submit with his or her application duplicate photographs of the size specified in the application. Section 51.25(a) further requires that the photographs should be sufficiently recent to be a good likeness of and satisfactorily identify the applicant. The interim final rule provides flexibility to determine what specifications of the photographs may be defined in the future, if determined to be necessary for proper facial identification and technological compatibility. The interim final rule amends the first sentence in § 51.25(a) simply to require submission of photographs as specified in the passport application.

Since 1914, passport applicants have been required to provide photographs to be included in their passports. As an identity document, a passport is intended to provide proof that the person named therein is the very same as the bearer alleges himself or herself to be. A passport without a photograph cannot adequately prove the bearer's identity. Any future changes in the photograph requirement would conform to agreed international practice to improve the accuracy of automated face recognition.

Personal Appearance of Minors

Section 51.21 of Title 22, Code of Federal Regulations (CFR), governs the execution of passport applications in general, and § 51.27 governs the execution of passport applications for minors. The interim final rule amends §§ 51.21 and 51.27 to require the personal appearance when applying for a passport of all persons, including minors under 14 years of age, ineligible to apply for a passport by mail under 51.21(c) and (d), except as waived under 51.27(b)(2)(i). Section 51.27(b)(2) is amended by inserting a new paragraph (i) that requires all minors under 14 years of age applying for passports to appear in person, with limited provisions for waiver. This new requirement will enhance accurate identification of all applicants and is an important step to prevent the possible misuse of a passport in facilitating international child abduction.

The Department considers the enactment of this rule as a matter of urgency to strengthen fraud prevention with respect to individuals, especially minors whose personal appearance during the passport application process has been generally waived in the past. In this regard, this new requirement reflects the findings and recommendation of the Department's Office of the Inspector General: Review of the Domestic Passport Operations, Phase II Fraud Prevention Programs Report number ISP–CA–03–25, December 2002, recommendation 4.

Further, members of Congress had expressed strong interest in providing a statutory and regulatory provision for this purpose, and the Department informed Congress that this rule would be established to protect minors under 14 years of age on an urgent basis.

In compelling cases, personal appearance may be waived by a senior passport specialist at the issuing passport agency in the United States, or by a senior consular officer at the issuing overseas consular office; a non-Department of State acceptance agent would not have the authority to waive personal appearance. When a minor's personal appearance is waived, the person executing the passport application on behalf of the minor must appear in person and verify the application by oath or affirmation unless, in the case of applications received overseas, these requirements are also waived by a senior consular officer.

The Department of State will issue guidance regarding the use of such waivers.

Regulatory Findings

Administrative Procedure Act

The Department is publishing this rule as an interim final rule, with a 30-day provision for post-promulgation public comments, based on the "good cause" exceptions set forth at 5 U.S.C. 553(b)(3)(B) and 553(d)(3). It is dictated by the necessity of additional controls over the documentation of U.S. citizens who are ages 14 and under, to help prevent the possible misuse of a passport in facilitating international child abduction.

Regulatory Flexibility Act/Executive Order 13272: Small Business

These changes to the regulations are hereby certified as not expected to have a significant impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act, 5 U.S.C. 601–612.

The Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by 5 U.S.C. 804, for purposes of congressional review of agency rulemaking under the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104–121. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign based companies in domestic and import markets.

The Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 (UFMA), Pub. L. 104–4; 109 Stat. 48; 2 U.S.C. 1532, generally requires agencies to prepare a statement before proposing any rule that may result in an annual expenditure of $100 million or more by State, local, or tribal governments, or by the private sector. This rule does not result in any such expenditure nor will it significantly or uniquely affect small governments.

Executive Order 13132: Federalism

The Department finds that this regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. Nor does the rule have federalism implications warranting the application of Executive Orders No. 12372 and No. 13132.

Executive Order 12866: Regulatory Review

The Department of State considers this rule to be a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review. Therefore, the Department has submitted the rule to the Office of Management and Budget for its review.

Executive Order 12988: Civil Justice Reform

The Department has reviewed the regulations in light of sections 3(a) and 3(b)(2) of Executive Order No. 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

The Paperwork Reduction Act of 1995

This rule does not impose information collection requirements under the provisions of the Paperwork Reduction Act, 44 U.S.C., Chapter 35.

The Treasury and General Government Appropriations Act of 1999—Assessment of Federal Regulations and Policies on Families

In light of the nature of these regulations and section 654 of the Treasury and General Government Appropriations Act of 1999, Pub. L. 105–277, 112 Stat. 2681 (1998), the Department has assessed the impact of these regulations on family well being in accordance with section 654(c) of that Act. This rule is intended to promote child and family safety by helping prevent child abduction and trafficking.

List of Subjects in 22 CFR Part 51

Administrative practice and procedure, Drug traffic control, Passports and visas.

■ Accordingly, the Department amends 22 CFR Chapter I as follows:

PART 51—[AMENDED]

■ 1. The authority citation for Part 51 continues to read as follows:

Authority: 22 U.S.C. 211a, 213, 2651a, 2671(d)(3), 2714 and 3926; 31 U.S.C. 9701; E.O. 11295, 3 CFR, 1966–1970 Comp., p 570; sec. 236, Pub. L. 106–113, 113 Stat. 1501A–430; 18 U.S.C. 1621(a)(2).

■ 2. Section 51.4 is amended to add a new paragraph (h) before the section authority citation that reads as follows:

§ 51.4 Validity of passports.

* * * * *

(h) Invalidity. A United States passport is invalid whenever:

(1) The passport has been formally revoked by the Department; or

(2) The Department has registered a passport reported either in writing or by telephone to the Department of State, or in writing to a U.S. passport agency or to a diplomatic or consular post abroad as lost or stolen.

■ 3. Section 51.21 is amended as follows:

■ a. Paragraph (a) is revised to read as set forth below.

■ b. Paragraphs (c) introductory text and (d) introductory text are amended by removing the word "photographs" and adding "photographs as specified in the application" in its place each time it appears.

■ c. Paragraph (d) is further amended by replacing the period at the end of paragraph (d)(1) with a semicolon; adding "and" directly following the end of paragraph (d)(2); and removing paragraph (d)(4).

§ 51.21 Execution of passport application.

(a) First time applicants, or persons who have not been issued a passport within the past fifteen years, and persons who are not eligible to apply for a passport under paragraphs (c) and (d) of this section. Except as provided in § 51.27(b)(2)(i), a person who has never been issued a passport in his or her own name, or who has not been issued a passport for the full validity period of 10 years in his or her own name within 15 years of the date of a new application, or who is otherwise not eligible to apply for a passport under paragraphs (c) and (d) of this section, shall apply for a passport by appearing in person before a person authorized by the Secretary to give oaths, verify the application by oath or affirmation before that authorized person, provide two recent photographs as specified in the application, and pay the established fees.

* * * * *

■ 4. Section 51.25 is amended by removing the phrase "photographs of the size" and adding in its place "photographs as" in paragraph (a).

■ 5. Section 51.27 is amended by redesignating paragraphs (b)(2)(i), (ii), (iii), (iv), (v), (vi), and (vii), as paragraphs (b)(2)(ii), (iii), (iv), (v), (vi), (vii), and (viii), and adding a new paragraph (b)(2)(i) to read as follows:

§ 51.27 Minors.

* * * * *

(b) * * *

(2) *Minors under the age of 14.* (i) Minors under 14 years of age applying for a passport shall appear in person, unless the personal appearance of the minor is specifically waived by a senior passport specialist at the issuing passport agency in the United States, or by a senior consular officer at the issuing overseas consular office, pursuant to guidance issued by the Department of State. In cases where such a waiver is granted, the person executing the passport application on behalf of the minor shall appear in person and verify the application by oath or affirmation before a person authorized by the Secretary to give oaths unless, in the case of applications received overseas, these requirements are also waived by a senior consular officer, pursuant to guidance issued by the Department of State.

* * * * *

Dated: March 16, 2004.

Maura Harty,

Assistant Secretary for Consular Affairs, Department of State.

[FR Doc. 04–6576 Filed 3–25–04; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 5

[Docket No. FR–4876–I–01]

RIN 2501–AD01

Implementation of Requirement in HUD Programs for Use of Data Universal Numbering System (DUNS) Identifier

AGENCY: Office of the Secretary, HUD.

ACTION: Interim rule.

SUMMARY: This interim rule implements an Office of Management and Budget (OMB) policy directive that requires grant applicants, other than individuals, to provide a Data Universal Numbering System (DUNS) number when applying for federal grants or other assistance agreements on or after October 1, 2003. HUD is applying this policy widely to its assistance programs in order to have a single identifier for applicants and facilitate the transition to electronic application submission.

DATES: *Comment Due Date:* May 25, 2004.

Effective Date: April 26, 2004.

ADDRESSES: Interested persons are invited to submit comments regarding this rule to the Regulations Division, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–5000. Communications should refer to the above docket number and title. A copy of each communication submitted will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Facsimile (FAX) comments are not acceptable.

FOR FURTHER INFORMATION CONTACT: Barbara Dorf, Director, Office of Departmental Grants Management and Oversight, Room 3156, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–3000, telephone (202) 708–0667 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this number through TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

In a notice published on October 30, 2002 (67 FR 66177), OMB proposed to establish the Dun and Bradstreet (D&B) Data Universal Numbering System (DUNS) number as the universal identifier for federal grant and cooperative agreement applicants. The OMB notice solicited public comments and included a proposal to establish this policy as a governmentwide requirement.

On June 27, 2003 (68 FR 38402), OMB published a final policy directive that implemented a governmentwide requirement for applicants to provide a DUNS number when applying for federal grants or cooperative agreements on or after October 1, 2003.

OMB has determined that there is a governmentwide need for improved statistical reporting of federal grants and cooperative agreements. Governmentwide use of the DUNS number will provide a means to identify entities receiving those awards, as well as their business relationships. The identifier will be used for tracking purposes and to validate address and point-of-contact information. The DUNS number already is in use by the federal government generally to identify entities receiving federal contracts and by some federal agencies in their grant and cooperative agreement processes. Among existing numbering systems, DUNS is the only one that provides the federal government the ability to determine hierarchical and family-tree data for related organizations.

Based on the OMB directive, HUD is extending this policy to all assistance awards unless the recipient is specifically exempted under this policy or the program is granted an exemption by OMB. For purposes of the DUNS requirement, assistance awards subject to this policy include, but are not limited to, such financial assistance awards as Section 8 contract administration and Section 108 loan guarantees. At this time, the DUNS requirement does not extend to FHA insurance or loan guarantee transactions that are not associated with a grant program or grant award.

The objective of this DUNS policy is to help ensure that HUD is able to identify funding received by the various entities that receive HUD program awards. Recipients affected include but are not limited to: state, local, and tribal governments, public housing agencies (PHAs), tribally designated housing entities (TDHEs), universities and colleges, nonprofit organizations, for-profit organizations, owners of assisted housing and resident management organizations, and resident councils. It is HUD's intent to make all funding opportunities and applications for assistance available online at *http://www.grants.gov* and this requirement is consistent with the intent and direction of the OMB Policy Directive issued on June 27, 2003. Use of the DUNS number will be required for all submissions through *http://www.grants.gov*.

II. This Interim Rule

HUD is implementing OMB's DUNS policy and making it widely applicable to HUD funding programs by amending 24 CFR part 5 to add a new subpart K that requires organizations that apply for HUD grants or financial assistance to provide a DUNS number with the application. This policy covers funds awarded as a grant, cooperative agreement, capital fund or operating fund subsidy, capital advance, or other assistance. Every application for a new grant or assistance award or renewal of an award or plan (including PHA plans) under all discretionary and formula grant programs, must include a DUNS number for the applicant.

The DUNS requirement will also apply to groups of organizations applying for HUD grants or financial

assistance as consortia. Applicants or groups of applicants under consortia arrangements must have a DUNS number for the organization that submits an application for federal assistance on behalf of the other applicants and manages the funds. If each organization is submitting a separate application for federal assistance, then each organization must have a separate DUNS submitted with its application for assistance. If an organization is managing funds for a group of organizations (as may be the case with several small PHAs utilizing a single management organization to apply for and manage funds on their behalf), a DUNS number must be submitted for the managing organization if it is drawing down HUD funds directly. If an organization, such as a PHA, draws down funds directly from HUD and subsequently turns the funds over to a management organization, then the management organization must obtain a DUNS number and provide the number to HUD.

Unless an exemption is granted by OMB, an application will not be considered complete until a valid DUNS number is provided by the applicant.

Individuals who would personally receive an assistance award from HUD, apart from any business or nonprofit organization with which they may operate or participate, are exempt from this requirement. Specifically, individuals may continue to apply under programs for which they are eligible without providing a DUNS number. In addition, an applicant is not required to submit DUNS numbers for entities with which it may enter into subawards.

The DUNS number does not replace existing identifiers, such as the Employer Identification Number (EIN), the Tax Identification Number (TIN), and State Application Identifier (SAI) numbers that are required by statute, Executive Order, or regulation.

Obtaining a DUNS number is free for all entities doing business with the federal government. This includes grant and cooperative agreement applicants and prospective applicants. Applicants should identify their organizations as a federal grant applicant or prospective applicant when they contact D&B, as explained below.

The DUNS Number is site-specific, therefore each distinct physical location of an entity (such as branches, divisions, and headquarters) may be assigned a DUNS number. If an organization already has a DUNS number in connection with the federal acquisition process, or requested or had one assigned for another purpose, the applicant may use that number for its application. When possible, organizations should avoid establishing new numbers. Organizations should take responsibility for updating and validating the DUNS information associated with the existing numbers. To help organizations manage multiple DUNS, an entity may request D&B to supply a family-tree report of the DUNS numbers associated with the organization. Organizations should work with D&B to ensure the correct information is on the report. If an organization wishes to determine if it has an existing DUNS number or to request a family tree report, it can contact D&B using the toll-free number, (866) 705–5711.

Organizations can receive a DUNS number by calling the dedicated toll-free DUNS Number request line at (866) 705–5711 between 8 a.m. and 6 p.m. (local time of the caller when calling from within the United States). Speech- or hearing-impaired individuals may access the toll-free DUNS Number request line through TTY by calling (866) 814–7818. Organizations may also apply online at *http://www.dunandbradstreet.com*. For faster service, HUD recommends using the telephone request line to obtain the DUNS number. The telephone call to receive the DUNS number takes approximately five to ten minutes and the number will be assigned at the conclusion of the call. Applicants can expect that the following information will be requested: legal name; name and address for the organization's headquarters; "doing business as" (DBA) or other name by which the organization is commonly known or recognized; physical address, city, state and ZIP Code; mailing address (if separate from headquarters or physical address); telephone number; contact name and title; and number of employees.

III. Findings and Certifications

Justification for Interim Rulemaking

In general, HUD publishes a rule for public comment before issuing a rule for effect, in accordance with its own regulations on rulemaking, 24 CFR part 10. Part 10, however, provides for exceptions from that general rule where the Department finds good cause to omit advance notice and public participation. The good cause requirement is satisfied when the prior public procedure is "impracticable, unnecessary, or contrary to the public interest."

The Department finds that good cause exists to publish this interim rule for effect without first soliciting public comment. This rule will require organizations that apply for HUD assistance to obtain and provide a DUNS number in their applications. Organizations that call the DUNS dedicated, toll-free telephone number can immediately obtain a DUNS number. Therefore, the burden placed on organizations is a minimal amount of time, and there are no additional costs associated with acquiring the DUNS. In addition, OMB, by its October 30, 2002, notice, already has solicited and received comments from the public concerning this governmentwide requirement.

The Department, however, is soliciting additional public comment on this rule. All comments received on this rule will be considered in adopting the final rule.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This interim rule does not impose any federal mandates on any state, local, or tribal government or the private sector within the meaning of the Unfunded Mandates Reform Act of 1995.

Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Order. This interim 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.

Impact on Small Entities

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed and approved this interim rule and in so doing has certified that this rule will not have a significant economic impact on a substantial number of small entities. DUNS numbers are immediately obtained at no cost with mininal time and effort. Although HUD has determined that this interim rule does not have a significant economic impact on a substantial number of small entities, HUD invites comments

regarding less burdensome alternatives to this rule that will meet HUD's objectives as described in this preamble.

Environmental Impact

In accordance with 24 CFR 50.19(c)(1) of the Department's regulations, this interim rule does not direct, provide for assistance or loan and mortgage insurance for, or otherwise govern or regulate, real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction, or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. Therefore, this proposed rule is categorically excluded from the requirements of the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*).

List of Subjects in 24 CFR Part 5

Administrative practice and procedure, Aged, Claims, Drug abuse, Drug traffic control, Grant programs—housing and community development, Grant programs—Indians, Individuals with disabilities, Information and statistics, Loan programs—housing and community development, Low and moderate income housing, Mortgage insurance, Pets, Public housing, Rent subsidies, Reporting and recordkeeping requirements.

■ For the reasons described in the preamble, 24 CFR part 5 is amended as follows:

PART 5—GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

■ 1. The authority citation for 24 CFR part 5 continues to read as follows:

Authority: 42 U.S.C. 3535(d).

■ 2. A new subpart K is added to part 5 to read as follows:

Subpart K—Application submission requirements

Subpart K—Application Submission Requirements

§ 5.1001 Applicability.

This subpart applies to all applicants for HUD grants, cooperative agreements, capital fund or operating fund subsidy, capital advance, or other assistance under HUD programs, including grant programs that are classified by OMB as including formula grant programs or activities, but excluding FHA insurance and loan guarantees that are not associated with a grant program or grant award.

§ 5.1003 Use of a universal identifier for organizations applying for HUD grants.

(a) Every application for a new or renewal of a grant, cooperative agreement, capital fund or operating fund subsidy, capital advance, or other assistance, including an application or plan under a grant program that is classified by OMB as including formula grant programs, must include a Data Universal Numbering System (DUNS) number for the applicant.

(b) (1) Applicants or groups of applicants under a consortium arrangement must have a DUNS number for the organization that is submitting the application for federal assistance as the lead applicant on behalf of the other applicants. If each organization is submitting a separate application as part of a group of applications, then each organization must include its DUNS number with its application submission.

(2) If an organization is submitting an application as a sponsor or on behalf of other applicants, and the other entities will be receiving funds directly from HUD, then the applicant or sponsor must submit an application for funding that includes the DUNS number of each applicant that would receive funds directly from HUD.

(3) If an organization is managing funds for a group of organizations, a DUNS number must be submitted for the managing organization, if it is drawing down funds directly from HUD.

(4) If an organization is drawing down funds directly from HUD and subsequently turning the funds over to a management organization, then the management organization must obtain a DUNS number and submit the number to HUD.

(c) Individuals who would personally receive a grant or other assistance from HUD, independent from any business or nonprofit organization with which they may operate or participate, are exempt from this requirement.

(d) In cases where individuals apply for funding, but the funding will be awarded to an institution or other entity on the individual's behalf, the institution or entity must obtain a DUNS number and the individual must submit the institution's DUNS number with the application.

(e) Unless an exemption is granted by OMB, HUD will not consider an application as complete until a valid DUNS number is provided by the applicant. For classes of grants and grantees subject to this part, exceptions to this rule must be submitted to OMB for approval in accordance with procedures prescribed by the Department.

Dated: March 3, 2004.

Alphonso Jackson,

Secretary (Acting).

[FR Doc. 04–6759 Filed 3–25–04; 8:45 am]

BILLING CODE 4210–32–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9120]

RIN 1545–BA92

Allocation and Apportionment of Expenses; Alternative Method for Determining Tax Book Value of Assets

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulation.

SUMMARY: This document contains temporary regulations providing an alternative method of valuing assets for purposes of apportioning expenses under the tax book value method of § 1.861–9T. The alternative tax book value method, which is elective, allows taxpayers to determine, for purposes of apportioning expenses, the tax book value of all tangible property that is subject to a depreciation deduction under section 168 by using the straight line method, conventions, and recovery periods of the alternative depreciation system under section 168(g)(2). The alternative method provided in the temporary regulations is intended to minimize basis disparities between foreign and domestic assets of taxpayers that may arise when taxpayers use adjusted tax basis to value assets under the tax book value method of expense apportionment. The text of these temporary regulations also serves as the text of the proposed regulations set forth in the Proposed Rules section of this issue of the **Federal Register.**

DATES: *Effective Date:* These regulations are effective March 26, 2004.

Applicability Date: For dates of applicability, *see* §§ 1.861–9(h)(5)(iii) and 1.861–9T(i)(3).

FOR FURTHER INFORMATION CONTACT: Margaret A. Hogan, (202) 622–3850 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to regulations under section 864(e) of the Internal Revenue Code (Code). Section 864(e) was enacted by the Tax Reform Act of 1986 (Pub. L. 99–514, 100 Stat. 2121) to address concerns

regarding the allocation and apportionment of interest expense. On September 14, 1988, the IRS published temporary regulations (T.D. 8228, 1988–2 C.B. 136 [53 FR 35467]) under § 1.861 implementing section 864(e) of the Code. The temporary regulations contained in this document amend § 1.861–9T and make conforming amendments to §§ 1.861–9 and 1.861–9T(g)(1)(ii).

Section 864(e)(2) of the Code provides that allocations and apportionments of interest expense shall be made on the basis of assets rather than gross income. For this purpose, the regulations permit a taxpayer to choose to compute the value of its assets under either the tax book value method or the fair market value method. Sections 1.861–8T(c)(2) and 1.861–9T(g)(1)(ii). Taxpayers using the tax book value method may elect to change to the fair market value method at any time. Rev. Proc. 2003–37, 2003–1 C.B. 950 (May 27, 2003). Taxpayers that elect to use the fair market value method must continue to use that method unless expressly authorized by the Commissioner to change methods. Section 1.861–8T(c)(2). Section 1.861–8T(c)(2) also permits taxpayers to apportion certain other expenses based on the comparative value of assets provided that such apportionment is made in accordance with the rules of § 1.861–9T(g).

The use of adjusted tax basis for purposes of apportioning expenses under the tax book value method may result in disparities between the bases of domestic and foreign assets of a taxpayer because of the differences in depreciation methods applicable to those assets. For example, the tax book value of tangible property used in the United States generally reflects depreciation of that property pursuant to the modified accelerated cost recovery system (MACRS) under section 168. MACRS generally permits a taxpayer to depreciate tangible property (other than real property) under the 200-percent declining balance method, or the 150-percent declining balance method in the case of certain property. Section 168(b). MACRS also permits taxpayers to depreciate property over shorter recovery periods than a property's class life.

In contrast, tangible property used predominantly outside the United States generally must be depreciated pursuant to the alternative depreciation system (ADS) under section 168(g). Section 168(g)(1)(A). ADS requires a taxpayer to depreciate tangible property using the straight line method of depreciation. Additionally, ADS generally requires taxpayers to use recovery periods equal to the property's class life and therefore longer periods than those used under MACRS.

As a result of accelerated depreciation under MACRS as compared to slower depreciation under ADS, an asset used in the United States generally will have a lower adjusted tax basis (*i.e.*, tax book value) than if the same asset were used predominantly outside of the United States. The relatively higher tax book value for assets used predominantly outside the United States results in an increased apportionment of interest expense to foreign source income and a corresponding reduction in the taxpayer's foreign tax credit limitation.

A disparity in the apportionment of expenses between domestic and foreign assets also may result when a U.S. corporation owns a 10-percent or greater interest in a foreign subsidiary that holds tangible property. Section 864(e)(4) provides that for purposes of allocating and apportioning expenses on the basis of assets, the tax basis of stock in a nonaffiliated 10-percent owned corporation will be adjusted to reflect the earnings and profits of the corporation that are attributable to the stock held by the taxpayer. See also § 1.861–12T(c)(2). Accordingly, the adjusted tax basis of stock in a foreign corporation for purposes of apportioning expenses generally will reflect the foreign corporation's earnings and profits, the computation of which reflects the depreciation of tangible property. Under section 312(k), tangible property generally is depreciated under ADS for purposes of determining earnings and profits. Accordingly, a taxpayer that owns a 10-percent or greater interest in a foreign corporation that holds tangible property may be subject to a disparity similar to the one that arises where the taxpayer holds foreign assets directly.

Explanation of Provisions

The temporary regulations provide an alternative method of determining the tax book value of assets (the "alternative tax book value method"). The alternative tax book value method allows a taxpayer to elect to determine the tax book value of its tangible property that is subject to depreciation under section 168 as though all such property had been depreciated using ADS under section 168(g)(2) during the entire period in which it has been in service. The temporary regulations further provide that tax book value will be determined without regard to the election to expense certain depreciable assets under section 179. Because tax book value will be computed under ADS, the rules permitting a special allowance for property acquired after September 10, 2001, and before January 1, 2005, will not apply. See section 168(k)(2)(C)(ii). Application of section 168(g)(2) as prescribed by these temporary regulations applies solely for determining an asset's tax book value for purposes of apportioning expenses (including the calculation of the alternative minimum tax foreign tax credit pursuant to section 59(a)) under the asset method described in § 1.861–9T(g). Application of section 168(g)(2) pursuant to these regulations does not otherwise affect the result under other provisions of the Code, including the amount of any deduction claimed under sections 167, 168, 169, 263(a), 617, or any other capital cost recovery provision.

The elective alternative to the existing tax book valuation method provides taxpayers with the option of determining the adjusted bases of both foreign and domestic assets under one consistent depreciation method for purposes of apportioning expenses under the asset method described in § 1.861–9T(g). A uniform depreciation methodology will help reduce the basis disparity between foreign and domestic assets that can occur under the existing tax book value method.

The temporary regulations generally provide that, for a taxpayer that elects the alternative tax book value method, the tax book value of tangible property that is depreciated under section 168 is determined as though such property were subject to the alternative depreciation system under section 168(g) for the entire period that such property has been in service. Thus, if a taxpayer elects the alternative tax book value method effective for the 2005 taxable year, the tax book value of tangible property placed in service in 2006 is determined each year using the rules of section 168(g) that apply to property placed in service in 2006. However, in the case of tangible property placed in service in a taxable year prior to the first taxable year to which the election to use the alternative method applies, the tax book value of such property is determined using the alternative depreciation system rules that apply to property placed in service in the taxable year to which the election first applies. Thus, if a taxpayer elects the alternative tax book value method effective for the 2005 taxable year, the tax book value of tangible property placed in service in 2004 and prior years is determined each year using the rules of section 168(g) that apply to property placed in service in 2005. A special rule also applies in determining tax book value in cases where a taxpayer

makes an election to use the alternative tax book value method after recently (within three years) revoking a prior election to use that method.

The temporary regulations do not modify the rules for determining when property is placed in service for purposes of section 168. If a taxpayer acquires property with a carryover or substituted basis, the determination of the tax book value of that property using the alternative tax book value method will reflect that carryover or substituted basis, determined using the general rule for property placed in service during or after the year of election and using the special rule for property placed in service before the year of election. The Treasury Department and the IRS recognize that acquisitions, mergers, and similar transactions involving taxpayers that use different methods of interest expense apportionment may raise particular issues in applying these rules. The Treasury Department and the IRS request comments regarding the use of the alternative tax book value method with respect to tangible property acquired pursuant to an acquisition, merger, or similar transaction and placed in service in a taxable year prior to such transaction.

The temporary regulations set forth rules for electing the alternative tax book value method. Generally, taxpayers may elect to value their assets using the alternative tax book value method with respect to any taxable year beginning on or after March 26, 2004. Once made, the election applies to all members of an affiliated group of corporations (as defined in §§ 1.861–11(d) and 1.861–11T(d)). Taxpayers electing the alternative tax book value method may change from that method to the fair market value method at any time for any open year. However, taxpayers using the fair market value method must obtain the consent of the Commissioner to change methods, including a change to the alternative tax book value method.

In conjunction with the issuance of these regulations, the Treasury Department and the IRS intend to issue a revenue procedure to provide temporary rules granting taxpayers automatic consent to change from the fair market value method to the alternative tax book value method. It is anticipated that the revenue procedure will apply to changes in method of apportionment made during a two-year period after March 26, 2004, with the automatic consent applying to taxable years that begin on or after March 26, 2004, and for which the taxpayer has not filed its income tax return. Comments are requested concerning such an automatic consent procedure, including the appropriateness of a two-year period of time for these purposes.

The Treasury Department and the IRS are aware that application of the existing tax book value method may result in other similar disparities between the valuation of domestic and foreign assets. Accordingly, comments are requested regarding whether additional modifications to the tax book value method may be appropriate to address potential disparities arising from other cost recovery provisions, such as the treatment of intangible drilling costs, that distinguish between assets based on place of use.

These temporary regulations are intended to improve the operation of the rules relating to the allocation and apportionment of interest expense. The Treasury Department and the IRS also are considering additional guidance with respect to interest expense allocation and apportionment for purposes of § 1.861–9T(h). In particular, to prevent overvaluation of tangible assets under the fair market value method, the Treasury Department and the IRS intend to address situations in which a taxpayer that uses the fair market value method of apportionment takes the position that the value of its tangible assets pursuant to § 1.861–9T(h)(1)(ii) exceeds the aggregate value of its assets pursuant to § 1.861–9T(h)(1)(i). Comments are requested regarding modifications to the current regulations to address this situation.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. For the applicability of the Regulatory Flexibility Act (5 U.S.C. chapter 6), refer to the Special Analyses section of the preamble to the cross-reference notice of proposed rulemaking published in the Proposed Rules section in this issue of the **Federal Register**. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations will be submitted to the Chief Counsel of Advocacy of the Small Business Administration for comment on its impact on small businesses.

Drafting Information

The principal author of these regulations is Margaret A. Hogan, Office of Associate Chief Counsel (International). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Amendments to the Regulations

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

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for § 1.861–9 is amended by adding entries in numerical order to read in part as follows:

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

Sections 1.861–9 and 1.861–9T also issued under 26 U.S.C. 863(a), 26 U.S.C. 864(e), 26 U.S.C. 865(i), and 26 U.S.C 7701(f). * * *

Par. 2. Section 1.861–9 is amended by:

■ 1. Revising paragraphs (a) through (g)(1)(i).

■ 2. Adding paragraphs (g)(1)(ii) through (h)(4), (h)(6), (i), and (j).

The revisions and additions read as follows:

§ 1.861–9 Allocation and apportionment of interest expense.

(a) through (g)(1)(i) [Reserved]. For further guidance, see § 1.861–9T(a) through (g)(1)(i).

(g)(1)(ii) [Reserved]. For further guidance, see the second sentence in § 1.861–9T(g)(1)(ii).

(g)(1)(iii) through (h)(4) [Reserved]. For further guidance, see § 1.861–9T(g)(1)(iii) through (h)(4).

(h)(5) * * *

(h)(6) through (j) [Reserved]. For further guidance, see § 1.861–9T(h)(6) through (j).

■ **Par. 3.** Section 1.861–9T is amended by:

■ 1. Revising the section heading.

■ 2. Adding a new sentence after the first sentence in paragraph (g)(1)(ii) introductory text.

■ 3. Adding paragraph (i).

The revisions and addition read as follows:

1.861–9T Allocation and apportionment of interest expense (temporary).

* * * * *

(g) * * * (1) * * * (i) * * *

(ii) * * * For rules concerning the application of an alternative method of valuing assets for purposes of the tax book value method, see paragraph (i) of this section. * * *

* * * * *

(i) *Alternative tax book value method—(1) Alternative value for*

certain tangible property. A taxpayer may elect to determine the tax book value of its tangible property that is depreciated under section 168 (section 168 property) using the rules provided in this paragraph (the alternative tax book value method). The alternative tax book value method applies solely for purposes of apportioning expenses (including the calculation of the alternative minimum tax foreign tax credit pursuant to section 59(a)) under the asset method described in paragraph (g) of this section.

(i) The tax book value of section 168 property placed in service during or after the first taxable year to which the election to use the alternative tax book value method applies shall be determined as though such property were subject to the alternative depreciation system under section 168(g) for the entire period that such property has been in service.

(ii) In the case of section 168 property placed in service prior to the first taxable year to which the election to use the alternative tax book value method applies, the tax book value of such property shall be determined under the depreciation method, convention, and recovery period provided for under section 168(g) for the first taxable year to which the election applies.

(iii) If a taxpayer revokes an election to use the alternative tax book value method ("the prior election") and later makes another election to use the alternative tax book value method (the "subsequent election") that is effective for a taxable year that begins within 3 years of the end of the last taxable year to which the prior election applied, the taxpayer shall determine the tax book value of its section 168 property as though the prior election has remained in effect.

(iv) The tax book value of section 168 property shall be determined without regard to the election to expense certain depreciable assets under section 179.

(v) *Examples.* The provisions of this paragraph (i)(1) are illustrated in the following examples:

Example 1. In 2000, a taxpayer purchases and places in service section 168 property used solely in the United States. In 2005, the taxpayer elects to use the alternative tax book value method, effective for the current taxable year. For purposes of determining the tax book value of its section 168 property, the taxpayer's depreciation deduction is determined by applying the method, convention, and recovery period rules of the alternative depreciation system under section 168(g)(2) as in effect in 2005 to the taxpayer's original cost basis in such property. In 2006, the taxpayer acquires and places in service in the United States new section 168 property. The tax book value of this section 168 property is determined under the rules of section 168(g)(2) applicable to property placed in service in 2006.

Example 2. Assume the same facts as in Example 1, except that the taxpayer revokes the alternative tax book value method election effective for taxable year 2010. Additionally, in 2011, the taxpayer acquires new section 168 property and places it in service in the United States. If the taxpayer elects to use the alternative tax book value method effective for taxable year 2012, the taxpayer must determine the tax book value of its section 168 property as though the prior election still applied. Thus, the tax book value of property placed in service prior to 2005 would be determined by applying the method, convention, and recovery period rules of the alternative depreciation system under section 168(g)(2) applicable to property placed in service in 2005. The tax book value of section 168 property placed in service during any taxable year after 2004 would be determined by applying the method, convention, and recovery period rules of the alternative depreciation system under section 168(g)(2) applicable to property placed in service in such taxable year.

(2) *Timing and scope of election.* (i) Except as provided in this paragraph (i)(2), a taxpayer may elect to use the alternative tax book value method with respect to any taxable year beginning on or after March 26, 2004. However, pursuant to § 1.861–8T(c)(2), a taxpayer that has elected the fair market value method must obtain the consent of the Commissioner prior to electing the alternative tax book value method. Any election made pursuant to this paragraph (i)(2) shall apply to all members of an affiliated group of corporations as defined in §§ 1.861–11(d) and 1.861–11T(d). Any election made pursuant to this paragraph (i)(2) shall apply to all subsequent taxable years of the taxpayer unless revoked by the taxpayer. Revocation of such an election, other than in conjunction with an election to use the fair market value method, for a taxable year prior to the sixth taxable year for which the election applies requires the consent of the Commissioner.

(ii) *Example.* The provisions of this paragraph (i)(2) are illustrated in the following example:

Example. Corporation X, a calendar year taxpayer, elects on its original, timely filed tax return for the taxable year ending December 31, 2007, to use the alternative tax book value method for its 2007 year. The alternative tax book value method applies to X's 2007 year and all subsequent taxable years. X may not, without the consent of the Commissioner, revoke its election and determine tax book value using a method other than the alternative tax book value method with respect to any taxable year beginning before January 1, 2012. However, X may automatically elect to change from the alternative tax book value method to the fair market value method for any open year.

(3) *Effective date.* (i) Paragraph (i) of this section applies to taxable years beginning on or after March 26, 2004.

(ii) The applicability of this paragraph (i) expires on or before March 26, 2007.

* * * * *

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

Approved: March 16, 2004.

Gregory Jenner,

Assistant Secretary of the Treasury.

[FR Doc. 04–6619 Filed 3–25–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 199

RIN 0720–AA75

TRICARE; Civilian Health and Medical Program of the Uniformed Services (CHAMPUS); Special Supplemental Food Program for Women, Infants, and Children Overseas

AGENCY: Office of the Secretary, Department of Defense.

ACTION: Final rule.

SUMMARY: This final rule implements section 674 of the National Defense Authorization Act for Fiscal Year 2000. Section 674 directed the Department of Defense to establish a program to provide supplemental food and nutrition education services to members of the armed forces on duty at stations outside the United States (and its territories and possessions) and to eligible civilians serving with, employed by, or accompanying the armed forces to these locations. Congress directed that the Department implement the special supplemental nutrition program for Women, Infants, and Children (WIC) in a manner that provides a benefit that is "similar" to the benefit provided to participants in the Special Supplemental Nutrition Program for Women, Infants and Children administered by the U.S. Department of Agriculture (USDA). Receipt of benefits under both the domestic WIC and the DoD programs is conditioned on applicants meeting specified eligibility criteria, *i.e.*, categorical (pregnant, postpartum, breastfeeding women, infants or children up to age 5), residency, income and nutritional risk. The Department was directed to use the USDA eligibility

criteria to the extent practicable. This final rule specifies eligibility requirements, describes the benefits available under the program, and provides administrative guidance on program operation. The Department is publishing this rule as a final rule in order to meet the statutory directive that the Secretary of Defense prescribes regulations to administer the program.

FOR FURTHER INFORMATION CONTACT: Danita F. Hunter, Operations Directorate, TRICARE Management Activity, 5111 Leesburg Pike, Suite 810, Falls Church, VA, 22041, telephone (703) 681–0039.

EFFECTIVE DATE: This rule is effective March 16, 2004.

SUPPLEMENTARY INFORMATION: *Public Comments:* We published the interim final rule on July 22, 2003 (68 FR 43299), and provided a 60 day comment period. We received no public comments.

A. Introduction

In the National Defense Authorization Act for Fiscal Year 2000, Congress mandated that the Department establish and fund a program to provide a special supplemental food and nutrition education program to eligible low-income families overseas whose members have been determined to be at nutritional risk. This program is known as the Women, Infants, and Children Overseas (WIC Overseas) program. This final rule implements section 674 of this Act.

B. Eligibility

To be eligible for the DoD special supplemental food program, a person must be a member of the armed forces on duty at stations outside the U.S. (and its territories and possessions) or an eligible civilian serving with, employed by, or accompanying the armed forces outside the U.S. (and its territories and possessions). Additionally, the person must be found to be at nutritional risk. Specifically, to be certified as eligible to receive benefits under the program, a person must:

- Meet specified program income guidelines published by the Secretary of Health and Human Services, and
- Meet one of the criteria listed in this regulation as indicative of nutritional risk. Determinations of income eligibility and nutritional risk will be made to the extent practicable using applicable standards used by the USDA in determining eligibility for the domestic Women, Infants, and Children (WIC) program. In determining income eligibility, the Department will use the Department of Health and Human Services income poverty table for the State of Alaska.

C. Scope of Benefit

The purpose of the program is to provide supplemental foods and nutrition education to serve as an adjunct to good health care during critical times of growth and development, in order to prevent the occurrence of health problems, including drug and other substance abuse, and to improve the health status of program participants. The benefit is similar to the benefit provided under the domestic WIC program.

Under the program, eligible participants are provided with drafts (paper food instruments, similar to vouchers) that may be redeemed at specified intervals for food packages. Participants access the food benefit by redeeming drafts at designated commissaries and NEXMARTS overseas. Food packages are prescribed by program staff who choose from a range of available food packages to tailor the benefit to the needs of program participants.

The program also provides nutrition education and counseling services to all participants at specified intervals. Nutrition education sessions are designed to stress the relationship between proper nutrition and good health with special emphasis on the nutritional needs of pregnant, postpartum, and breastfeeding women, infants, and children less than five years of age and to achieve a positive change in food habits, resulting in improved nutrition status and the prevention of nutrition-related health problems. Nutrition education promotes breastfeeding as the optimal method of infant nutrition. Nutritional education includes educating women participating in the program about the harmful effects of substance abuse. Nutrition education is an integral element of the WIC Overseas program; however, a participant may not be denied supplemental food benefits for failure to attend or participate in nutrition education activities. Nutrition education sessions are conducted in the context of the ethnic, cultural, and geographical preferences of participants.

D. Financial and Administrative Requirements

The Secretary of Defense will establish a system for verifying appropriate use of the WIC Overseas Program funds. This will include procedures to verify that draft redemption complies with applicable date-to-use, dollar amount, and other relevant criteria.

To leverage available funding to make the WIC Overseas program available to the maximum number of participants, the Secretary of Defense may enter into agreement up to three years in length to procure a particular brand of a food item to provide to Program participants. The agreement would specify the procurement of the competitively selected brand exclusive of other brands of the same or similar food. Competitive selection of the contract brand would conform to competitive contracting procedures specified in title 10, chapter 137, U.S. Code. The agreement would provide for the manufacturer of the contract brand to rebate to the Secretary an amount that is an agreed ratio of the amounts paid by the Secretary for the procurement of the contract brand. Rebates collected under the agreements will be credited to the appropriation available for carrying out the WIC Overseas program and will be available for the program in the same period as the other sums in the appropriation.

The Secretary will provide for an appeals process that will allow individuals who are denied certification or recertification to appeal those decisions. The process will include a requirement that individuals denied certification or recertification be advised of their right of appeal, the relevant time limits, and the procedures to effect an appeal and will further provide a second level of review to individuals adversely impacted by an appeals decision.

E. Regulatory Procedures

This rule will impose additional information collection requirements to the public under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3511). Individuals will be required to apply for certification and periodic recertification to receive benefits.

This rule is being issued as a final rule. The interim final rule was published July 22, 2003, there were no comments received from the public.

Executive Order 12866 requires certain regulatory assessments for any "significant regulatory action" which is defined in part as one that raises novel policy issues arising out of legal mandates. The Regulatory Flexibility Act (RFA) requires that each federal agency prepare, and make available for public comment, a regulatory flexibility analysis when the agency issues a regulation which would have a significant impact on a substantial number of small entities. This final rule is a significant regulatory action and has been reviewed by the Office of Management and Budget under Executive Order 12866. The annual cost

of this program is estimated to be about $24 million per year, beginning in Fiscal Year 2002. This rule is not economically significant and will not significantly affect a substantial number of small entities. The information collection notice was published on March 21, 2003 (68 FR 13906).

List of Subjects in 32 CFR Part 199

Department of Defense; Food assistance programs; Women, infants and children.

■ Accordingly, 32 CFR Part 199 is amended as follows:

PART 199—[AMENDED]

■ 1. The authority citation for Part 199 continues to read as follows:

Authority: 5 U.S.C. 301 and 10 U.S.C. Chapters 53 and 55.

■ 2. Title 32, CFR Part 199 is amended by revising § 199.23 to read as follows:

§ 199.23 Special Supplemental Food Program.

(a) *General provisions.* This section prescribes guidelines and policies for the delivery and administration of the Special Supplemental Food Program for Women, Infants, and Children Overseas (WIC Overseas Program). The purpose of the WIC Overseas Program is to provide supplemental foods and nutrition education, at no cost, to eligible persons and to serve as an adjunct to good health care during critical times of growth and development, in order to prevent the occurrence of health problems, including drug and other substance abuse, and to improve the health status of program participants. The benefit is similar to the benefit provided under the U.S. Department of Agriculture (USDA) administered Women, Infants, and Children (WIC) Program.

(b) *Definitions.* For most definitions applicable to the provisions of this section, refer to sec. 199.2. The following definitions apply only to this section:

(1) *Applicant.* Pregnant women, breastfeeding women, postpartum women, infants, and children who are applying to receive WIC Overseas benefits, and the breastfed infants of applicant breastfeeding women. This term also includes individuals who are currently participating in the Program but are re-applying because their certification is about to expire.

(2) *Breastfeeding women.* Women up to 1-year postpartum who are breastfeeding their infants. Their eligibility will end on the last day of the month of their infant's first birthday.

(3) *Certification.* The implementation of criteria and procedures to assess and document each applicant's eligibility for the Program.

(4) *Children.* Persons who have had their first birthday but have not yet attained their fifth birthday. Their eligibility will end on the last day of the month of their fifth birthday.

(5) *Competent Professional Authority (CPA).* An individual on the staff of the WIC Overseas office authorized to determine nutritional risk, prescribe supplemental foods, and design nutrition education programs. The following are authorized to serve as a competent professional authority: physicians, nutritionists, registered nurses, and dieticians may serve as a competent professional authority. Additionally, a CPA may be other persons designated by the regional program manager who meet the definition of CPA prescribed by the USDA as being professionally competent to evaluate nutritional risk. The definition also applies to an individual who is not on the staff of the WIC Overseas office but who is qualified to provide data upon which nutritional risk determinations are made by a competent professional authority on the staff of the local WIC Overseas office.

(6) *Contract brand.* The brand of a particular food item that has been competitively selected by the DoD to be the exclusive supplier of that type of food item to the program.

(7) *Date-to-use.* The date by which the drafts must be used to purchase food items.

(8) *Department.* The Department of Defense (DoD), unless otherwise noted.

(9) *Dependent.* (i) A spouse, or (ii) An unmarried child who is:

(A) Under 21 years of age; or

(B) Incapable of self-support because of mental or physical incapacity and is in fact dependent on the member for more than ½ of the child's support; or

(C) Is under 23 years of age, is enrolled in a full-time course of study in an institution of higher education and is in fact dependent on the member for more than one-half of the child's support.

(10) *Drafts.* Paper food instruments, similar to vouchers, issued in the WIC Overseas offices to program participants. Participants may redeem their drafts at participating commissaries and NEXMARTs for the types and quantities of foods specified on the face of the draft.

(11) *Economic unit.* All individuals contributing to or subsidizing the income of a household, whether they physically reside in that household or not.

(12) *Eligible civilian.* An eligible civilian is a person who is not a member of the armed forces and who is:

(i) A dependent of a member of the armed forces residing with the member outside the United States, whether or not that dependent is command sponsored, or

(ii) An employee of a military department who is a national of the United States and is residing outside the United States in connection with such individual's employment or a dependent of such individual residing with the employee outside the United States; or

(iii) An employee of a Department of Defense contractor who is a national of the United States and is residing outside the United States in connection with such individual's employment or a dependent of such individual residing with the employee outside the United States.

(13) *Family.* A group of related or non-related individuals who are one economic unit.

(14) *Hematological test.* A test of an applicant's or participant's blood as described in 7 CFR part 246.7(e).

(15) *Income guidelines.* Income poverty guidelines published by the U.S. DHHS. These guidelines are adjusted annually by the Department of Health and Human Services (DHHS), with each annual adjustment effective July 1 of each year. For purposes of WIC Overseas Program income eligibility determinations, income guidelines shall mean the income guidelines published by the DHHS pertaining to the State of Alaska.

(16) *Infants.* Persons under 1 year of age.

(17) *National of the U.S.* A person who:

(i) Is a citizen of the U.S.; or

(ii) Is not a citizen of the United States, but who owes permanent allegiance to the United States, as determined in accordance with the Immigration and Nationality Act.

(18) *NEXMART.* Navy Exchange Market.

(19) *Nutrition education.* Individual or group sessions and the provision of materials designed to improve health status, achieve positive change in dietary habits, and emphasize relationships between nutrition and health, all in keeping with the individual's personal, cultural, and socioeconomic preferences.

(20) *Nutritional risk.*

(i) The presence of detrimental or abnormal nutritional conditions detectable by biochemical, physical,

developmental or anthropometric data, or

(ii) Other documented nutritionally related medical conditions, or

(iii) Documented evidence of dietary deficiencies that impair or endanger health, or

(iv) Conditions that directly affect the nutritional health of a person, such as alcoholism or drug abuse, or

(v) Conditions that predispose persons to inadequate nutritional patterns, habits of poor nutritional choices or nutritionally related medical conditions.

(21) *Participants.* Pregnant women, breastfeeding women, postpartum women, infants, and children who are receiving supplemental foods or food instruments under the WIC Overseas Program, and the breastfed infants of participant breastfeeding women.

(22) *Postpartum Women.* Women up to 6 months after the end of their pregnancy. Their eligibility will end on the last day of the sixth month after their delivery.

(23) *Pregnant Women.* Women determined to have one or more embryos or fetuses in utero. Pregnant women are eligible to receive WIC benefits through 6 weeks postpartum, at which time they reapply for the program as postpartum or breastfeeding women.

(24) *Rebate.* The amount of money refunded under cost containment procedures to the Department from the manufacturer of a contract brand food item.

(25) *Regional Lead Agent.* The designated major military medical center that acts as the regional lead agent, having tri-service responsibility for the development and execution of a single, integrated health care network.

(26) *Supplemental foods.* Foods containing nutrients determined by nutritional research to be lacking in the diets of certain pregnant, breastfeeding, and postpartum women, infants, and children. WIC Overseas may substitute different foods providing the nutritional equivalent of foods prescribed by Domestic WIC programs, as required by 10 U.S.C. 1060a(c)(1)(B).

(27) *Verification.* Verification of drafts is a review before payment out of Defense Health Program funds to determine whether the commissary or NEXMART complied with applicable date-to-use, food specification, and other redemption criteria.

(c) *Certification of eligibility.* (1) to the extent practicable, participants shall be certified as eligible to receive Program benefits according to income and nutritional risk certification guidelines contained in regulations published by the USDA pertaining to the Women, Infants, and Children program required under 7 CFR 246.7(d)(2)(iv)(B). Applicants must meet the following eligibility criteria:

(i) Meet one of the participant type requirements: be a member of the armed forces on duty overseas; a family member/dependent of a member of the armed forces on duty overseas; a U.S. national employee of a military department serving overseas; a family member of a U.S. national employee of a DoD contractor serving overseas; a family member of a U.S. national employee of a DoD contractor serving overseas;

(ii) Reside in the geographic area served by the WIC Overseas office;

(iii) Meet the income criteria specified in this section; and

(iv) Meet the nutrition risk criteria specified in this section.

(2) In terms of income eligibility, the following apply:

(i) The Department of Defense shall use the Alaska income poverty guidelines published by the DHHS for making determinations regarding income eligibility for the Program.

(ii) Program income eligibility guidelines shall be adjusted annually to conform to annual adjustments made by the DHHS.

(iii) For income eligibility, the Program may consider the income of the family during the past 12 months and the family's current rate of income to determine which indicator accurately reflects the family's status.

(iv) A pregnant woman who is ineligible for participation in the Program because she does not meet income criteria shall be deemed eligible if the criteria would be met by increasing the number of individuals in her family (economic unit) by the number of children in utero.

(v) The Program shall define income according to USDA regulations with regard to the USDA-administered WIC Program. In particular—

(A) A basic allowance for housing is excluded from income as required by section 674 of the National Defense Authorization Act for Fiscal Year 2000.

(B) The value of in-kind housing benefits is excluded from income as required under USDA regulations.

(C) Cost of living allowances for duty outside the continental U.S. (OCONUS) is excluded from income as required under 7 CFR 246.7(d)(2)(iv)(A)(*2*).

(D) Public assistance and welfare payments are included in income.

(3) Participants must be found to be at nutritional risk to be eligible for program benefits.

(i) A Competent Professional Authority (CPA) shall determine if an applicant is at nutritional risk.

(ii) At the request of the program, applicants shall provide, according to schedules set by the USDA in 7 CFR 246.7(e) (unless deemed impracticable), nutritional risk data as a condition of certification in the Program. Such data includes:

(A) Anthropometric measurements,

(B) The results of hematological tests,

(C) Physical examination,

(D) Dietary information, or

(E) Developmental testing

(iii) A pregnant woman who meets all other eligibility criteria and for whom a nutritional risk assessment cannot immediately be completed will be considered presumptively eligible to participate in the Program for a period up to 60 days.

(iv) Infants under 6 months of age may be deemed to be at nutritional risk if the infant's mother was a Program participant during pregnancy or if medical records document that the mother was at nutritional risk during pregnancy.

(v) Unless otherwise specified herein or in 7 CFR 246.7(e), required nutritional risk data shall be provided to, or obtained by, the WIC Overseas Program office within 90 days of enrollment.

(4) In the event that it is impracticable for the WIC Overseas Program to adhere to the income and nutritional risk eligibility guidelines contained in USDA regulations, the Director, TRICARE Management Activity (TMA) may waive the Department's use of USDA WIC Program eligibility criteria by determining that it is impracticable to use these standards to certify participants in the WIC Overseas Program.

(i) Such determination shall consider relevant practical, administrative, national security, financial factors and existing Department policies and their application to the population served by the WIC Overseas Program.

(ii) Absent a written finding of impracticability described in section 199.23(c)(4), the eligibility criteria for the WIC program, contained in USDA regulations shall apply.

(5) An applicant for the WIC Overseas Program who presents a valid WIC Program Verification of Certification card, which is issued to participants in the domestic WIC Program when they intend to move, shall be considered eligible for participation in the WIC Overseas Program for the duration of the individual's current domestic WIC certification period, as long as he/she is an eligible service/family member or eligible civilian/family member.

(d) *Program benefits.* (1) Drafts. WIC participants shall be issued drafts that

may be redeemed for supplemental food prescribed under the program.

(i) Drafts shall at a minimum list the food items to be redeemed and the date-to-use.

(ii) Food items listed on the draft must be approved for use under the Program.

(iii) Drafts generally shall allow for a three-month supply of food items for each participant, unless the participant's nutritional status necessitates more frequent contacts with the WIC Overseas office.

(iv) Participating commissaries and NEXMARTS shall accept the drafts in exchange for approved food items.

(v) Commissary and NEXMART personnel shall be trained on verification and processing of drafts.

(vi) Program guidelines shall provide for training of new participants in how to redeem drafts.

(2) *Supplemental Food.* Participants shall redeem drafts for appropriate food packages at intervals determined in accordance with the USDA regulations.

(i) The Director, TMA shall identify to the Defense Commissary Agency (DeCA) and NEXCOM a list of food items approved for the WIC Overseas Program. This list shall be developed in consultation with the USDA and shall include information regarding the appropriate package and/or container sizes and quantities available for participants, as well as the frequency with which food items can be acquired. Additions and/or deletions of food items from this list shall be communicated to the commissaries and NEXMARTS on an ongoing basis.

(ii) A CPA shall prescribe appropriate foods from among the approved list to be included in food packages.

(iii) A CPA shall coordinate documentation of medical need when such documentation is a prerequisite for prescribing certain food items.

(iv) The Director, TMA may authorize changes regarding the supplemental foods to be made available in the WIC Overseas Program when local conditions preclude strict compliance or when such compliance is impracticable.

(3) *Nutrition Education.* Nutrition education shall be provided to all participants at intervals prescribed in USDA regulations at 7 CFR Part 246.11.

(i) The WIC Overseas nutrition education program shall be locally overseen by a CPA based on guidance and materials provided by TMA.

(ii) Nutrition education and its means of delivery be tailored to the greatest extent practicable to the specific nutritional, cultural, practical, and other needs of the participant. Participant profiles created during certification may be used in designing appropriate nutrition education. A CPA may develop individual care plans, as necessary, consistent with USDA regulations.

(iii) Nutrition education shall consist of sessions wherein individual participants or groups of participants meet with a CPA in an interactive setting such that participants can ask, and the CPA can answer, questions related to nutrition practices. In addition, nutrition education shall utilize prepared educational materials and/or Internet sites. Both the sessions and the information materials shall be designed to improve health status, achieve positive change in dietary habits, and emphasize relationships between nutrition and health. Individual and group sessions can be accomplished through, among other things, face-to-face meetings, remote tele-videoconferencing, real-time computer-based distance learning, or other means.

(iv) Nutrition education services shall generally be provided to participants twice during each 6-month certification period, unless a different schedule is specified in USDA regulations.

(v) The nutrition education program shall promote breastfeeding as the optimal method of infant nutrition, encourage pregnant participants to breastfeed unless contraindicated for health reasons, and educate all participating women about the harmful effects of substance abuse.

(vi) Individual participants shall not be denied supplemental food due to the failure to attend scheduled nutrition education sessions.

(e) *Financial management.* The Department shall establish procedures to provide for the verification of drafts prior to payment.

(i) Verification may utilize sampling techniques.

(ii) Payment of drafts shall be made out of Defense Health Program funds.

(f) *Rebate agreements.* (1) DoD is authorized to enter into an agreement with a manufacturer of a particular brand of a food item that provides for the exclusive supply to the program of the same or similar types of food items by that manufacturer.

(i) The agreement shall identify a contract brand of food item.

(ii) Under the agreement, the manufacturer shall rebate to the Department an agreed portion of the amounts paid by DoD for the procurement of the contract brand.

(2) The DoD shall use competitive procedures under title 10, chapter 137 to select the contract brand.

(3) Amounts rebated shall be credited to the appropriation available for carrying out the program and shall be applied against expenditures for the program in the same period as the other sums in the appropriation.

(g) *Administrative appeals and civil rights.* (1) Applicants who are denied certification or participants that are denied recertification shall be provided with a notice of ineligibility. The notice shall include information on the applicant's right to appeal the determination and instructions on doing so.

(2) Benefits shall not be provided while an appeal is pending when an applicant is denied benefits, a participant's certification has expired or a participant becomes categorically ineligible.

(3) A request for appeal shall be submitted in writing within five working days. If the decision is an adverse one it shall include notice to the applicant of his further appeal rights as reflected in (iii) below, and that he/she has five working days to effect any such appeal.

(4) Appeal reviews shall be conducted in the first instance by the CPA or team leader in charge of the local WIC Overseas office.

(i) Written notice of a decision shall be provided to the applicant within five working days.

(ii) If the appeal is upheld, retroactive benefits shall not be provided.

(iii) At an applicant's request a denied appeal may be forwarded to the regional program manager for review, who will provide a decision on the appeal within 5 working days.

(iv) If the regional program manager denies the appeal, there shall be no further right of appeal.

(5) Complaints about discriminatory treatment shall be handled in accordance with procedures established at each local WIC Overseas site.

(h) *Operations and Administration.* (1) Information collected about WIC Overseas applicants and participants shall be collected, maintained, and disclosed in accordance with applicable laws and regulations.

(2) Information and personnel security requirements shall be consistent with applicable laws and regulations.

Dated: March 17, 2004.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 04–6388 Filed 3–25–04; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[CGD13–04–007]

RIN 1625–AA00

Security Zone: Portland Rose Festival on Willamette River

AGENCY: Coast Guard, DHS.

ACTION: Implementation of regulation.

SUMMARY: The Captain of the Port Portland will enforce the Portland Rose Festival Security Zone from June 9, 2004, until June 13, 2004.

DATES: 33 CFR 165.1312 will be enforced commencing June 9, 2004, until June 13, 2004.

FOR FURTHER INFORMATION CONTACT: Captain of the Port Portland, 6767 N. Basin Ave, Portland, OR, 97217 at (503) 240–9370 to obtain information concerning enforcement of this rule.

SUPPLEMENTARY INFORMATION: On May 29, 2003, the Coast Guard published a final rule (68 FR 31979) establishing a security zone, in 33 CFR 165.1312, for the security of naval vessels on a portion of the Willamette River during the fleet week of the Rose Festival. This security zone provides for the regulation of vessel traffic in the vicinity of the moored naval vessels. Entry into this zone is prohibited unless authorized by the Captain of the Port or his designee. The Captain of the Port Portland will enforce the Rose Festival Security Zone established by 33 CFR 165.1312 from Wednesday, June 9, 2004, until Sunday, June 13, 2004. The Captain of the Port may be assisted by other Federal, state, or local agencies in enforcing this security zone.

Dated: March 1, 2004.

Paul D. Jewell,

Captain, U.S. Coast Guard, Captain of the Port, Portland.

[FR Doc. 04–6743 Filed 3–25–04; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[TX–164–1–7622; FRL–7638–5]

Approval and Promulgation of Implementation Plans; Texas; Control of Emission of Oxides of Nitrogen (NO_X) From Cement Kilns

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is approving revisions to the Texas State Implementation Plan (SIP). These revisions concern Control of Air Pollution from Nitrogen Compounds—Cement Kilns. The affected sources are major cement kilns that were in service before December 31, 1999. The EPA is approving these SIP revisions for cement kilns as they will contribute to attainment of the 1-hour ozone National Ambient Air quality Standards (NAAQS). Today's action does not intend to address any aspect(s) of the implementation of the 8-hour ozone NAAQS. The EPA is approving control of emissions of NO_X from cement kilns in accordance with the requirements of the Federal Clean Air Act (the Act).

DATES: This rule is effective on April 26, 2004.

ADDRESSES: Copies of the documents relevant to this action are available for public inspection during normal business hours at the following locations. Anyone wanting to examine these documents should make an appointment with the appropriate office at least two working days in advance.

Environmental Protection Agency, Region 6, Air Planning Section (6PD–L), 1445 Ross Avenue, Dallas, Texas 75202–2733.

Texas Commission on Environmental Quality (TCEQ), Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

FOR FURTHER INFORMATION CONTACT: Mr. Alan Shar, Air Planning Section (6PD–L), EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, telephone (214) 665–6691, and shar.alan@epa.gov.

SUPPLEMENTARY INFORMATION:

Table of Contents

Statutory and Executive Order Reviews

In this document "we," "us," and "our" refer to EPA.

1. What Actions Are We Taking in This Document?

On April 30, 2000, the Governor of Texas submitted to us rule revisions to 30 TAC, Chapter 117, Control of Air Pollution From Nitrogen Compounds concerning cement kilns operations (April 30, 2000 SIP submittal). The April 30, 2000 SIP submittal specifically addressed revisions to the following sections of Chapter 117.

TABLE I.—AFFECTED SECTIONS OF THE RULE UNDER APRIL 30, 2000 SIP SUBMITTAL

Section	Title
117.260	Cement Kiln Definitions.
117.261	Applicability.
117.265	Emissions Specifications.
117.273	Continuous Demonstration of Compliance.
117.279	Notification, Recordkeeping, and Reporting Requirements.
117.283	Source Cap.
117.524	Compliance Schedule for Cement Kilns.

In CEMEX USA (CEMEX) and TXI Operations, LP (TXI) v. TCEQ, Case No. GN001480 (Travis Co. Dist. Ct. April 30, 2003), CEMEX and TXI challenged the State for adopting the above revision to Chapter 117. As a part of a negotiated settlement of the case, TCEQ issued a re-proposal to revise 30 TAC, Chapter 117, on October 24, 2002.

On December 9, 2002, EPA submitted comments to TCEQ concerning re-proposed revisions to Chapter 117.

On April 2, 2003, TCEQ submitted a revised Chapter 117, Control of Air Pollution from Nitrogen Compounds rule concerning cement kilns operations as a revision to the SIP (April 2, 2003 SIP submittal). The April 2, 2003 SIP submittal specifically addressed revisions to the following sections of Chapter 117.

TABLE II.—AFFECTED SECTIONS OF THE RULE UNDER APRIL 2, 2003 SIP SUBMITTAL

Section	Title
117.260	Cement Kiln Definitions.
117.265	Emissions Specifications.
117.279	Notification, Recordkeeping, and Reporting Requirements.
117.283	Source Cap.
117.524	Compliance Schedule for Cement Kilns.
117.570	Use of Credits for Compliance.

On July 30, 2003 (68 FR 44631), we published a direct final rulemaking action on these two submittals. In 68 FR 44631 we stated that if EPA receives relevant adverse comments, EPA would publish a timely withdrawal in the **Federal Register** informing the public that this Texas SIP revision would not take effect. The EPA received relevant adverse comments on the July 30, 2003 (68 FR 44631), rulemaking action during the public comment period.

On September 15, 2003 (68 FR 53891), we published a withdrawal in the **Federal Register** stating that we will be summarizing and responding to comments received on this Texas SIP revision. Today, we are summarizing and responding to comments received on our July 30, 2003 (68 FR 44631), Texas SIP revision.

2. Who Submitted Comments to Us?

We received written comments on our July 30, 2003 (68 FR 44631), Texas SIP revision from a private citizen, Blue Skies Alliance, Downwinders At Risk, and Lone Star Chapter of Sierra Club (the Commenters).

3. How Do We Respond to the Submitted Written Comments?

Our responses to the written comments concerning July 30, 2003 (68 FR 44631), Texas SIP revision are as follows:

Comment #1: The Commenters state the proposed NO_X rules are insufficient to allow the Dallas/Fort Worth (D/FW) area to move effectively toward attainment.

Response to Comment #1: The primary purpose of the proposed rule was to reduce emissions of NO_X from this specific industrial sector. The State's development of this rule for cement industry was part of its air quality planning effort to not only achieve controls in the nonattainment area, but also to reduce ozone precursor emissions on a regional basis. Our proposed July 30, 2003 rulemaking (68 FR 44631), in and by itself, was not intended to serve as an attainment demonstration plan for the D/FW area. The controls for the cement kilns was one part of the larger attainment demonstration SIP which was adopted by the State of Texas and submitted to EPA in April 2000. Our action today will make the existing Texas rule for each cement kiln that was placed into service before December 31, 1999, in 5 Texas Counties of Bexar, Comal, Ellis, Hays, and McLennan, federally enforceable. We want to make it clear that our approval of this Texas SIP revision is independent of any future NO_X reduction measures that could be required of the cement industry, if such reduction measures are determined necessary for attainment of the 8-hour ozone NAAQS and are considered to be feasible and practicable.

Comment #2: The Commenters state that a local air committee recommended reductions of fifty percent as opposed to the proposed thirty percent for NO_X from cement kilns in Ellis County.

Response to Comment #2: The proposed rule was submitted to EPA in accordance with section 110(a)(2) of the Act. The proposed emissions reduction level of at least thirty percent from the 1996 baseline level is in agreement with those found in our reference document "Alternative Control Techniques Document—NO_X Emissions from Cement Manufacturing" EPA–453/R–94–004 (ACT Document). The TCEQ's emissions level of NO_X control (at minimum thirty percent reduction) is in agreement with the "Federal Implementation Plans to Reduce Regional Transport of Ozone" of October 21, 1998 (63 FR 56394). Also see our response to Comment #1 in this document.

Comment #3: The Commenters state that Selective Catalytic Reduction (SCR) and Selective Non-Catalytic Reduction (SNCR) have been found to make reductions up to eighty percent depending on the fuel source and type of kiln.

Response to Comment #3: The analysis for the approvability of this Texas SIP revision was evaluated against our ACT Document, and against the limitations and requirements of other federally approved SIPs for existing cement kilns. Our Technical Support Document (TSD) did not identify any EPA-approved SIP rules in other parts of the country that have mandated SCR or SNCR as a required control strategy for controlling NO_X from existing cement kilns. We provided a copy of our TSD to the Commenters at their request during the public comment period. Our rulemaking action today will make existing Texas rule federally enforceable, and is consistent with EPA's past approvals. Our approval today is not intended to preclude additional control requirements being applied to the cement industry, if such control requirements are determined necessary for attainment of the 8-hour ozone NAAQS and the application of such control requirements is determined feasible and practicable.

Comment #4: The Commenters state that SCR/SNCR should be included as acceptable means of control technology for NO_X reductions.

Response to Comment #4: The proposed rule offers several means of control to a source in order to comply with the emission limitations. Also see our response to Comment #3 in this document. Absent information on or examples of SCR or SNCR cases used as a required technique for controlling NO_X from existing cement kilns in any other federally approved-SIPs from the Commenters, we disagree with the Commenters at this time. However, should these or other similar technologies demonstrate success for cement manufacturing sector, EPA will then re-examine its RACT or ACT determinations.

Comment #5: The Commenters state that low-NO_X burner is an ambiguous term unless associated with a manufacturer of this type device or with accompanying specifications. Any facility proposing the use of this type device shall first provide the manufacturers statement describing the product, its capabilities and limitations. In cases where the facility proposes to build their own, that facility shall submit to the proper authority, their design along with evidence they are experienced in this field, sufficient to design and build a product that will achieve the required results, prior to its being approved as part of an emissions reduction plan.

Response to Comment #5: Section 5.1.3 of our ACT Document states that low-NO_X burners are designed to reduce flame turbulence, delay fuel/air mixing, and establish fuel-rich zones for initial combustion. The longer, less intense flames resulting from the staged combustion lower flame temperatures and consequently reduce thermal NO_X formation. Figure 5–1 on Page 5–7 of that document also illustrates the schematic of a typical low-NO_X burner. For information concerning low-NO_X burners we refer the Commenters to section 5.1.3 of our ACT Document. The proposed rulemaking departs from a command and control approach and offers a menu of options to an affected source to comply with the emission limitations. The EPA does not subscribe to advocating a prescribed design, make, model or manufacturer as the only means of controlling emissions. If a source has a different or innovative method of controlling emissions and can successfully demonstrate that its method is effective in both pilot plant and large scale operations, then EPA sees no reason to disapprove the implementation of the source's method of control. Furthermore, the effectiveness of the control technology will be determined by continuous monitoring and through compliance testing.

Comment #6: The Commenters propose to delete any reference to rolling average of NO_X emissions. They further state that rolling averages allow facilities to exceed emissions during periods of increased production, increasing the air pollution for those days. The Commenters contend that by shutting down one or two days within the month, the facility could avoid exceeding their allowable.

Response to Comment #6: We disagree. Rolling average is a commonly accepted averaging method in regulations governing emissions from cement manufacturing. The TSD for our proposal (68 FR 44631) refers to rules from various parts of the country that have adopted a similar averaging window (30-day) or language (rolling average) in their rules. While EPA is endorsing a 30-day rolling average as the basis for NO_X emission specifications in section 117.265 of the rule, we do not approve of a 365-day rolling average or an annual average for NO_X emission specifications in section 117.265. We consider annual averaging of emission specifications to be problematic for permitting and compliance determination purposes. Furthermore, the inherent continuous operational nature of a cement kiln could limit an operator's ability from shutting down one or two days within the month as suggested by the Commenters. The affected sources are required to emit at or below their permitted levels of emissions. Appropriate test methods, recordkeeping, reporting, compliance certification, and Continuous Emissions Monitor System (CEMS) data along with SIP rules constitute proper mechanisms to assure compliance with the terms and conditions of this regulation and air permits issued to an affected source. Contrary to the Commenters' contention, the rule of law does not allow EPA to arbitrarily shut down a business one or two days within the month.

Comment #7: The Commenters state that the rule should provide that allowable emissions shall be based upon the actual pounds/hour, pounds/day, tons/year and exceedances in any one-hour or day shall generate enforcement action.

Response to Comment #7: We believe that the actual production level in conjunction with the length of operation at an affected source is the proper method to set an emissions limitation for cement manufacturing. We believe that an emission limitation of "pound NO_X per ton of clincker produced" in conjunction with appropriate test methods, recordkeeping, reporting, compliance certification, and CEMS data built into air permits constitute a proper enforceable mechanism to assure compliance with the terms and conditions of this regulation and air permits issued to an affected source.

Comment #8: The Commenters propose to remove reference to percentages of reduction when establishing compliance. Existing permits include a Maximum Allowable Emission Rate (MAER) table. In complying with this new rule for cement kilns, each facility shall be required to amend or modify their existing permit to reflect the actual NO_X in pounds/day, tons/year revision in the MAER table which corresponds to the percent reduction required by this rule.

Response to Comment #8: Each affected source is required to operate at or below its permitted levels of emissions. The proposed rule requires at least thirty percent reduction in NO_X emissions when compared with the 1996 baseline inventory data. Section 117.205 lists emission limitations for each type of kiln in a designated County. These requirements combined with appropriate test methods, recordkeeping, reporting, compliance certification, and CEMS data which are built into air permits constitute a proper enforceable mechanism to assure compliance with the terms and conditions of air permits issued to an affected source. The rule is intended to complement, supplement, and strengthen the air contaminants data in the MAER table of air permits, not to replace those limits. Air permit modifications or amendments of affected facilities are handled according to the applicable State's title V or New Source Review program. For above reasons we disagree with the Commenters.

Comment #9: The Commenters state that all Ellis County cement kilns including both wet and dry process kilns should reduce their emissions by fifty percent, as recommended by a local committee, instead of the proposed thirty percent using the 1996 emissions as the baseline year. The Commenters state that the reduction in this rule, will not achieve the necessary ozone reduction required to meet the D/FW SIP deadline.

Response to Comment #9: The proposed rule was submitted to EPA in accordance to section 110(a)(2) of the Act. The emissions reduction level of at least thirty percent from the 1996 baseline levels is in agreement with those found in our ACT Document. The reductions are in agreement with EPA's October 21, 1998, Federal Implementation Plans to Reduce Regional Transport of Ozone. *See* 63 FR 56394. As an example, the NO_X emissions specifications of 4.0 lb NO_X/ton of clinker produced for a long wet kiln operating in Ellis County is comparable to or more stringent than the NO_X emissions specifications from similar cement kilns in many other parts of country. The proposed July 30, 2003 rulemaking (68 FR 44631), in and by itself, was not intended to serve as an attainment demonstration plan for the D/FW area. However, as noted previously, we want to make it clear that our approval of this Texas SIP revision is independent of any future NO_X reduction measures that could be required of the cement industry, if such reduction measures are determined necessary for attainment of the 8-hour ozone NAAQS and are considered to be feasible and practicable.

Comment #10: The Commenters state that in applying mid-kiln firing/secondary combustion as a method of NO_X reduction, no new types of chemical or chemical compounds, not previously emitted, should be resulted in the emission inventory.

Response to Comment #10: 40 CFR 63, Subpart LLL—National Emission Standards for Hazardous Air Pollutants (NESHAP) from the Portland Cement Manufacturing Industry (64 FR 31925, June 14, 1999) applies to each new and existing portland cement plant which is a major source or an area source. Subpart LLL regulates emissions of Dioxin, Furan, Particulate Matter, Opacity, and Total Hydrocarbon Carbon. The NO_X emissions are not regulated under Subpart LLL. Elsewhere the Commenters suggest imposition of post combustion control devices such as SCR on the affected sources. Use of SCR as a control device has the potential to cause emission of chemical reagents such as ammonia or urea in the form of particulate matter which were not previously emitted. All affected facilities are required to emit at or below their permitted levels. For these reasons we disagree with the Commenters.

Comment #11: The Commenters state that subsection 117.265(c) should be removed in its entirety. No cement facility shall be exempt from complying with required emission reductions as stipulated in this section.

Response to Comment #11: Subsection 117.265 (c) will allow a source to choose from a menu of options to achieve at least a thirty percent reduction in NO_X emissions. These options range from complying with the specified emissions limitations, installing and operating a low NO_X burner, mid-kiln firing, a secondary combustion control, or other changes to the kiln that would achieve at least thirty percent reduction in NO_X emissions. These options are consistent with the type of controls in NO_X rules for cement manufacturing in other parts of country. Our TSD for the 68 FR 44631 rulemaking detailed a number of federally-approved NO_X rules for cement manufacturing. We provided the Blue Skies Alliance with a copy of our TSD. The EPA considers subsection

117.265(c) as an appropriate means of extending operational flexibility to a source to achieve compliance. For these reasons we disagree with the Commenters.

Comment #12: The Commenters state that the rule shall remove any and all authority from the executive director and/or commissioners to exempt any kiln or facility from those required reductions regardless of the reason.

Response to Comment #12: A source will need to comply with all applicable provisions of the SIP. The notification, recordkeeping, and reporting requirements in section 117.279, and the compliance schedule for cement kilns in section 117.524 serve as mechanisms for achieving and maintaining compliance with the rule. Therefore, we do not interpret this SIP revision as authorizing the executive director and/or commissioners to exempt cement manufacturing sector from emissions reductions required under Chapter 117.

Comment #13: The Commenters state that subsection 117.265(e) (Use of Emissions Credits for Compliance) should be removed in its entirety. Using emission credits to achieve compliance with the control of NO_X requirements does not satisfy the overall purpose of this rule, that being to reduce the total NO_X emissions that prevent conformance with the SIP. This provision only serves to allow a facility to manipulate their operation to avoid the cost of proper control technology.

Response to Comment # 13: We disagree with the Commenters. Title IV—Acidic Deposition Control (Acid Rain Program) of the Act is a prime example of the regulatory use of emissions banking and trading for compliance purposes. Other federally-approved SIP revisions of Texas' Chapter 117 rule, affecting many other types of facilities, contain provisions allowing use of emissions credits for compliance. Singling out the cement manufacturing sector from use of emissions credits for compliance by deleting any provisions that would allow use of emissions credits for compliance would increase the bar of compliance and extend unfair advantage to other sectors.

Comment #14: The Commenters state that the rule should provide access by citizens to the actual CEMS data for review.

Response to Comment #14: The Act requires that emission data and information be open and available to the public. The State is also required to comply with the sections 110(a)(2)(F)(i) through (iii) of the Act. As applicable, the air permits issued to the affected sources contain special conditions for recording, reporting, and recordkeeping information concerning CEMS. Reports of inspection of these affected sources are also open and available to the public. For these reasons no further change to the text of proposed rule is warranted.

Comment #15: The Commenters state that any provisions for the use or application of Predictive Emissions Monitoring System (PEMS) should be deleted.

Response to Comment #15: A PEMS is the total equipment necessary for the determination of a gas concentration or emission rate using processor control device operating parameter measurements and a conversion equation, a graph, or computer program to produce results in units of the applicable emission limitation or standard. Historically, other federally-approved SIP revisions of Texas' Chapter 117 rule, affecting many other types of facilities, contain provisions allowing use of PEMS. Singling out the cement manufacturing sector from use of PEMS by deleting any provisions that would allow use of PEMS would increase the bar of compliance and extend unfair advantage to other sectors. Therefore, no further change to the text of proposed rule is warranted.

Comment #16: The Commenters state that subsection 117.273(b)(1)(C) should be deleted. Performance under 40 CFR 60, Appendix F, Sections 5.1 and 5.1.1 shall apply and deviations or exceptions shall not be allowed under this rule.

Response to Comment # 16: Section 117.273 requires installation, calibration, maintenance, and operation of CEMS. Subsection 117.273(b) requires use of 40 CFR 60.13 and Appendix B, Performance Specification 2 for NO_X. Subsection 117.273(b)(1)(C) requires use of 40 CFR 60 Appendix F Section 5.1 for quality assurance purposes. As applicable, the air permits issued to the affected sources contain special conditions for recording, reporting, and recordkeeping information concerning CEMS. Affected monitors will need to comply with all applicable monitoring requirements. Such provisions have been already incorporated in the proposed rule.

Comment #17: The Commenters state that section 117.283 in its entirety should be deleted. The purpose of this proposed rule is the reduction of NO_X. Manipulating numbers to achieve emission reductions does not satisfy such a requirement. Reductions can and should be achieved through adequate control technology.

Response to Comment #17: Section 117.283 concerns the source cap. The proposed rule will result in an annual overall reduction of 5,913.3 tons of NO_X from affected sources. The EPA considers this amount to be a significant reduction in NO_X emissions. We do not agree with the Commenters' characterization that requiring at least thirty percent reduction in NO_X emissions as manipulating numbers to achieve emission reductions. With regard to adequate control technology we refer the Commenters to our response to Comment #2 of this document.

Comment #18: The Commenters state that the rule should include an operation requirement that all cement kilns that exceed permitted NO_X emission rates in excess of 2.8 lbs NO_X/ton clinker shall cease operation between March 1st and September 30th, the ozone season, to ease the burden of harmful ozone levels on the D/FW area.

Response to Comment #18: Absent significant information substantiating the Commenters' position, EPA is unable to adopt a provision in its regulation which requires all cement kilns in Ellis County cease operations between March 1st and September 30th, if the 2.8 lbs NO_X/ton clinker emissions limitation has been exceeded. However, the State is in the process of developing a future revision to the D/FW ozone SIP. Consideration of impact of the cement plants and the potential for additional control measures will be a part of this regulatory process. Also see our response to Comment #1 in this document.

Comment #19: The Commenters state that this rule demonstrates a greater effort toward relieving facilities from emissions reduction than it does to actually reduce emissions required to satisfy compliance with the SIP and protect the health of citizens.

Response to Comment #19: As stated in section 5 of our proposal (68 FR 44631), "currently Texas SIP contains no federally-approved requirements for controlling NO_X emissions from cement kilns." The proposed rule will result in an annual overall reduction of 5,913.3 tons of NO_X from affected sources in these Counties. The EPA considers this amount to be a significant reduction in NO_X emissions. We do not agree with the Commenters' characterization that requiring at least thirty percent reduction in NO_X emissions as an effort toward relieving facilities from emissions reduction.

Comment #20: The Commenters state that the economics and financial condition of an industry is not the concern of the EPA or the TCEQ, that responsibility belongs to the Commerce Department.

Response to Comment #20: All EPA and TCEQ's revisions to the SIP will need to comply with and adhere to applicable provisions of the Act. We believe that our July 30, 2003 (68 FR 44631), rulemaking action is in accord with the requirements of the Act and EPA's policies.

Comment #21: A private citizen stated that in his opinion this rule ranks among the worst proposals offered by EPA since the exodus of Administrator Browner.

Response to Comment #21: The proposed rule was submitted to EPA in accordance to section 110(a)(2) of the Act. The proposed emissions reduction level of at least thirty percent from the 1996 baseline levels is in agreement with those found in our ACT Document. The proposed reductions are in agreement with the 63 FR 56394, October 21, 1998, the Federal Implementation Plans to Reduce Regional Transport of Ozone. For example, the NO_X emissions specifications of 4.0 lb NO_X/ton of clinker produced for a long wet kiln operating in Ellis County (designated as attainment for 1-hour ozone NAAQS), is comparable to or more stringent than the NO_X emissions specifications from similar cement kilns in many other parts of country. The proposed rule will result in an annual overall reduction of 5,913.3 tons of NO_X from affected sources in these Counties. For these reasons we disagree with the commenter's characterization of the proposed rule.

This concludes our responses to the written comments we received concerning the July 30, 2003 (68 FR 44631), Texas SIP revision.

4. What do these Rule Revisions for Cement Kilns that we are Approving Provide?

These rule revisions require at least thirty percent reductions of NO_X compared with the 1996 baseline emission inventory from each cement kiln that is major source in Bexar, Comal, Ellis, Hays, and McLennan Counties, and was placed into service before December 31, 1999. The following 2 tables contain a summary of these SIP revisions for cement kilns in these 5 Texas Counties.

TABLE III.—AFFECTED SOURCES, LOCATIONS, AND NO_X EMISSIONS SPECIFICATIONS FOR CEMENT KILNS

Source	County	NO_X emission specification
Long wet kiln	Bexar, Comal, Hays, McLennan	6.0 lb NO_X/ton of clinker produced.
Long wet kiln	Ellis	4.0 lb NO_X/ton of clinker produced.
Long dry kiln	Bexar, Comal, Hays, McLennan, Ellis	5.1 lb NO_X/ton of clinker produced.
Preheater kiln	Bexar, Comal, Hays, McLennan, Ellis	3.8 lb NO_X/ton of clinker produced.
Precalciner or preheater-precalciner kiln	Bexar, Comal, Hays, McLennan, Ellis	2.8 lb NO_X/ton of clinker produced.

TABLE IV.—AFFECTED SOURCES AND THEIR COMPLIANCE SCHEDULES

Source	Compliance schedule
Cement kilns in Ellis County	May 1, 2003.
Cement kilns in Bexar, Comal, Hays, and McLennan.	May 1, 2005.

These emissions specifications meet and are in agreement with those found in our ACT Document, and are comparable to or more stringent than emission specifications for cement kilns in a number of other federally approved State rules.

5. What Areas in Texas Will These Rule Revisions Affect?

The following table contains a list of Counties affected by today's rulemaking action.

TABLE V.—AFFECTED TEXAS COUNTIES BY THE CEMENT KILN PROVISIONS OF CHAPTER 117

Rule/source	Affected counties
Chapter 117/Cement Kilns.	Bexar, Comal, Ellis, Hays, and McLennan.

If you are in one of these Texas counties, you should refer to the Chapter 117 rules to determine if and how today's action will affect you.

Statutory and Executive Order Reviews

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

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

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the

National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by May 25, 2004. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Cement kiln, Intergovernmental relations, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: March 12, 2004.

Richard E. Greene,

Regional Administrator, Region 6.

PART 52—[AMENDED]

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

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

Subpart SS—Texas

■ 2. In § 52.2270 the table in paragraph (c) is amended under Chapter 117, Subchapter B, by adding a new entry heading as "Division 4—Cement Kilns", adding new individual entries for sections "117.260, 117.261, 117.265, 117.273, 117.279, and 117.283"; Subchapter E, by adding a new individual entry for section 117.524 and revising the entry for section 117.570.

§ 52.2270 Identification of plan.

* * * * *

(c) * * *

EPA APPROVED REGULATIONS IN THE TEXAS SIP

State citation	Title/subject	State approval/submittal date	EPA approval date	Explanation
*	*	*	*	*
Chapter 117 (Reg 7)—Control of Air Pollution From Nitrogen Compounds				
*	*	*	*	*
Subchapter B—Division 4—Cement Kilns				
Section 117.260	Cement Kiln Definitions	04/19/00, 03/05/03	*03/26/04 and [FR page number]*	
Section 117.261	Applicability	04/19/00	*03/26/04 and [FR page number]*	Also finalizes 65 FR 64914
Section 117.265	Emission Specifications	04/19/00, 03/05/03	*03/26/04 and [FR page number]*	
Section 117.273	Continuous Demonstration of Compliance.	04/19/00	*03/26/04 and [FR page number]*	Also finalizes 65 FR 64914
Section 117.279	Notification, Recordkeeping, and Reporting Requirements.	04/19/00, 03/05/03	*03/26/04 and [FR page number]*	
Section 117.283	Source Cap	04/19/00, 03/05/03	*03/26/04 and [FR page number]*	
*	*	*	*	*
Subchapter E—Administrative Provisions				
*	*	*	*	*
Section 117.524	Compliance Schedule for Cement Kilns.	04/19/00, 03/05/03	*03/26/04 and [FR page number]*	
117.570	Use of Emissions Credits for Compliance.	3/05/03	*03/26/04 and [FR page number]*	
*	*	*	*	*

[FR Doc. 04–6309 Filed 3–25–04; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 60, 61, and 63

[LA–69–2–7617a; FRL–7638–7]

New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants; Delegation of Authority to Louisiana

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule; delegation of authority.

SUMMARY: The Louisiana Department of Environmental Quality (LDEQ) has submitted updated regulations for receiving delegation of EPA authority for implementation and enforcement of New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAPs) for all sources (both part 70 and non-part 70 sources). These regulations apply to certain NSPS promulgated by EPA at 40 CFR part 60, as amended through July 1, 2002; and certain NESHAPs promulgated by EPA, as amended through July 1, 2002, for both 40 CFR part 61 and 63 standards. The delegation of authority under this notice does not apply to sources located in Indian Country. EPA is providing notice that it has approved delegation of certain NSPS to LDEQ, and taking direct final action to approve the delegation of certain NESHAPs to LDEQ.

DATES: This rule is effective on May 25, 2004, without further notice, unless EPA receives adverse comment by April 26, 2004. If EPA receives such comment, EPA will publish a timely withdrawal in the **Federal Register** informing the public that this rule will not take effect.

ADDRESSES: Comments may be submitted electronically, by mail, or through hand delivery/courier. Follow the detailed instructions as provided in the **SUPPLEMENTARY INFORMATION** section below.

FOR FURTHER INFORMATION CONTACT: Mr. Jeffery Robinson, U.S. EPA, Region 6, Multimedia Planning and Permitting Division (6PD), 1445 Ross Avenue, Dallas, TX 75202–2733, (214) 665–6435; or electronic mail at *robinson.jeffrey@epa.gov*.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. General Information

A. What Is the Public Rulemaking File?

EPA is committed to ensuring public access to the information that is used to inform the public of the Agency's decisions regarding the environment and human health and to ensuring that the public has an opportunity to participate in the Agency's decision process. The official public rulemaking file consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. The public rulemaking file does not include Confidential Business Information (CBI) or other information for which disclosure is restricted by statute, although such information is a part of the administrative record for this action. The public rulemaking file is the collection of materials that is available for public viewing at the Regional Office. The administrative record is the collection of material used to inform the public of the Agency's decision on this rulemaking action.

B. How Can I Get Copies of This Document and Other Related Information?

1. *An official public rulemaking file is available for inspection at the Regional Office.* The Regional Office has established an official public rulemaking file for this action under LA–69–2–7617a. The public rulemaking file is available for viewing at the Air Permits Section, U.S. Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. EPA requests that, if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section two working days in advance to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4 p.m. excluding Federal holidays.

2. *Copies of the State submittal.* Copies of the State submittal are also available for public inspection during official business hours, by appointment at the Louisiana Department of Environmental Quality, 602 N. Fifth Street, Baton Rouge, LA 70802.

3. *Electronic Access.* You may access this **Federal Register** document electronically through the Regulation.gov Web site located at *http://www.regulations.gov* where you can find, review, and submit comments on federal rules that are open for comment and have been published in the **Federal Register**.

The E Government Act of 2002 states that to "to the extent practicable" agencies shall accept electronic comments and establish electronic dockets. Also, President Bush's management plan for government includes a government-wide electronic rulemaking system. The first phase of the e-Rulemaking initiative was the development of a Federal portal that displays all **Federal Register** notices and proposed rules open for comment. The URL for this site is *http://www.regulations.gov*. The site also provides the public with the ability to submit electronic comments that can then be transferred to the Agency responsible for the rule.

EPA's policy is to make all comments it receives, whether submitted electronically or on paper, available for public viewing at the Regional Office as EPA receives them and without change. However, those portions of a comment that contain properly identified and claimed CBI or other information for which disclosure is restricted by statute will be excluded from the public rulemaking file. The entire comment, including publicly restricted information, will be included in the administrative record for this action.

C. How and To Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in Section I.D, below. Do not use e-mail

to submit CBI or information protected by statute.

1. *Electronically.* If you submit an electronic comment as prescribed below, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment, and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the public rulemaking file, and may be made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *E-mail.* Comments may be sent by electronic mail (e-mail) to *robinson.jeffrey@epa.gov,* Attention "Public comment on proposed rulemaking LA–69–2–7617a." In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the Docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

ii. *Regulations.gov.* As an alternative to e-mail, you may submit comments electronically to EPA by using the Federal web-based portal that displays all **Federal Register** notices and proposed rules open for comment. To use this method, access the Regulations.gov Web site at *http://www.regulations.gov,* then select "Environmental Protection Agency" at the top of the page and click on the "Go" button. The list of current EPA actions available for comment will be displayed. Select the appropriate action and please follow the online instructions for submitting comments. Unlike EPA's e-mail system, the Regulations.gov Web site is an "anonymous" system, which means EPA will not know your identity, e-mail address, or other contact information, unless you provide it in the text of your comments.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Section I.C.2, directly below. These electronic submissions will be accepted in WordPerfect, Word, or ASCII file format. You should avoid the use of special characters and any form of encryption.

2. *By Mail.* Send your comments to: Jeff Robinson, Air Permits Section (6PD–R), Multimedia Planning and Permitting Division, U.S. Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. Please include the text "Public comment on proposed rulemaking LA–69–2–7617a" in the subject line of the first page of your comments.

3. *By Hand Delivery or Courier.* Deliver your written comments or comments on a disk or CD ROM to: Jeff Robinson, Air Permits Section (6PD–R), Multimedia Planning and Permitting Division, U.S. Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, Attention "Public comment on proposed rulemaking LA–69–2–7617a." Such deliveries are only accepted during official hours of business, which are Monday through Friday, 8:30 a.m. to 4:00 p.m., excluding Federal holidays.

D. How Should I Submit CBI to the Agency?

For comments submitted to the Agency by mail or hand delivery, in either paper or electronic format, you may assert a business confidentiality claim covering confidential business information (CBI) included in your comment by clearly marking any part or all of the information as CBI at the time the comment is submitted to EPA. CBI should be submitted separately, if possible, to facilitate handling by EPA. Submit one complete version of the comment that includes the properly labeled CBI for EPA's official docket and one copy that does not contain the CBI to be included in the public docket. If you submit CBI on a disk or CD ROM, mark on the outside of the disk or the CD ROM that it contains CBI and then identify the CBI within the disk or CD ROM. Also submit a non-CBI version if possible. Information which is properly labeled as CBI and submitted by mail or hand delivery will be disclosed only in accordance with procedures set forth in 40 CFR part 2. For comments submitted by EPA's e-mail system or through Regulations.gov, no CBI claim may be asserted. Do not submit CBI to Regulations.gov or via EPA's e-mail system. Any claim of CBI will be waived for comments received through Regulations.gov or EPA's e-mail system. For further advice on submitting CBI to the Agency, contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

E. Privacy Notice

It is important to note that the comments you provide to EPA will be publicly disclosed in a rulemaking docket or on the Internet. The comments are made available for public viewing as EPA receives them and without change. Any personal information you choose to include in your comment will be included in the docket. However, EPA will exclude from the public docket any information labeled confidential business information (CBI), copyrighted material or other information restricted from disclosure by statute.

Comments submitted via Regulations.gov will not collect any personal information, e-mail addresses, or contact information unless they are included in the body of the comment. Comments submitted via Regulations.gov will be submitted anonymously unless you include personal information in the body of the comment. Please be advised that EPA cannot contact you for any necessary clarification if technical difficulties arise unless your contact information is included in the body of comments submitted through Regulations.gov. However, EPA's e-mail system is not an anonymous system. E-mail addresses are automatically captured by EPA's e-mail system and included as part of your comment that is placed in the public rulemaking docket.

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

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.

2. Describe any assumptions that you used.

3. Provide any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at your estimate.

5. Provide specific examples to illustrate your concerns.

6. Offer alternatives.

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

8. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line

on the first page of your response. It would also be helpful if you provided the name, date, and **Federal Register** citation related to your comments.

II. What Does This Action Do?

EPA is providing notice that it is delegating authority for implementation and enforcement of certain NSPS to LDEQ. EPA is also taking direct final action to approve the delegation of certain NESHAPs to LDEQ. With this delegation, LDEQ has the primary responsibility to implement and enforce the delegated standards.

III. What Is the Authority for Delegation?

Section 111(c)(1) of the Clean Air Act (CAA) authorizes EPA to delegate authority to any state agency which submits adequate regulatory procedures for implementation and enforcement of the NSPS program. The NSPS standards are codified at 40 CFR part 60.

Section 112(l) of the CAA and 40 CFR part 63, subpart E, authorizes EPA to delegate authority to any state or local agency which submits adequate regulatory procedures for implementation and enforcement of emission standards for hazardous air pollutants. The hazardous air pollutant standards are codified at 40 CFR parts 61 and 63, respectively.

IV. What Criteria Must Louisiana's Program Meet To Be Approved?

EPA previously approved LDEQ's program for the delegation of NSPS. 47 FR 07665 (February 22, 1982). This action notifies the public that EPA is updating LDEQ's delegation to implement and enforce certain NSPS. As to the NESHAP standards in 40 CFR parts 61 and 63, section 112(l) of the CAA enables EPA to approve State air toxics programs or rules to operate in place of the Federal air toxics program or rules. 40 CFR part 63, subpart E (subpart E) governs EPA's approval of State rules or programs under section 112(l).

EPA will approve an air toxics program if we find that:

(1) the State program is "no less stringent" than the corresponding Federal program or rule;

(2) the State has adequate authority and resources to implement the program;

(3) the schedule for implementation and compliance is sufficiently expeditious; and

(4) the program otherwise complies with Federal guidance.

In order to obtain approval of its program to implement and enforce Federal section 112 rules as promulgated without changes (straight delegation), only the criteria of 40 CFR 63.91(d) must be met. 40 CFR 63.91(d)(3) provides that interim or final Title V program approval will satisfy the criteria of 40 CFR 63.91(d) for part 70 sources.

V. How Did LDEQ Meet the Subpart E Approval Criteria?

As part of its Title V submission, LDEQ stated that it intended to use the mechanism of incorporation by reference to adopt unchanged Federal section 112 into its regulations. This applied to both existing and future standards as they applied to part 70 sources. 59 FR 43797 (August 25, 1994) and 60 FR 17750 (April 7, 1995). On September 12, 1995, EPA promulgated final full approval of the State's operating permits program effective October 12, 1995. 60 FR 42296. Under 40 CFR 63.91(d)(2), once a state has satisfied up-front approval criteria, it needs only to reference the previous demonstration and reaffirm that it still meets the criteria for any subsequent submittals. LDEQ has affirmed that it still meets the up-front approval criteria.

In addition, Louisiana has requested delegation of a State requirement to adjust a section 112 rule. The approval of this adjustment is regulated at 40 CFR 63.92. The LDEQ has adopted an earlier compliance date and is more stringent than the Federal requirement at 40 CFR 63.440(d)(1). The LDEQ has met the criteria of 40 CFR 63.91, and the State compliance date adjustment is not ambiguous with respect to stringency of applicability, level of control, compliance and enforcement measures, or the compliance date of any affected source or emission point, and satisfies the requirements at 40 CFR 63.92(b).

VI. What Is Being Delegated?

EPA received requests to update the NSPS and NESHAP delegations on November 21, 1997, and June 17, 2003. LDEQ requested the EPA to update the delegation of authority for the following:

A. NSPS (40 CFR part 60 standards) through July 1, 2002;

B. NESHAPs (40 CFR part 61 standards) through July 1, 2002; and

C. NESHAPs (40 CFR part 63 standards) through July 1, 2002.

LDEQ's request was for delegation of certain NSPS and NESHAP for all sources (both part 70 and non-part 70 sources). The request includes revisions of the NESHAP standards adopted unchanged into Louisiana Administrative Code (LAC) Title 33:III, Chapter 30, Subchapter A, section 3003—Incorporation by Reference 40 CFR part 60; Chapter 51, Subchapter B, section 5116—Incorporation by Reference of 40 CFR part 61; Chapter 51, Subchapter C, section 5122—Incorporation by Reference of 40 CFR part 63 as it Applies to Major Sources, except for the compliance date established in Subpart S—Pulp and Paper Industry at 40 CFR 63.440(d)(1); and Chapter 53, Subchapter B, section 5311—Incorporation by Reference of 40 CFR part 63 as it Applies to Area Sources. For NSPS, this revision incorporated all NSPS promulgated by EPA (except Subpart AAA—Standards of Performance for New Residential Wood Heaters) as amended in the **Federal Register** through July 1, 2002. For the part 61 NESHAPs, this revision included all NESHAPs promulgated by EPA as amended in the **Federal Register** through July 1, 2002, excluding subparts B, H, I, K, Q, R, T, and W. For the part 63 NESHAPs, this includes the NESHAPs set forth in Table 1 below. The effective date of the Federal delegation for parts 61 and 63 standards is the effective date of this rule.

TABLE 1

40 CFR Part 63 NESHAP for Source Categories

Subpart	Emission standard
A	General Provisions
D	Early Reductions
F	Hazardous Organic NESHAP (HON)—Synthetic Organic Chemical Manufacturing Industry (SOCMI)
G	HON—SOCMI Process Vents, Storage Vessels, Transfer Operations and Wastewater
H	HON—Equipment Leaks
I	HON—Certain Processes Negotiated Equipment Leak Regulation
J	Polyvinyl Chloride and Copolymers Production
L	Coke Oven Batteries
M	Perchloroethylene Dry Cleaning
N	Chromium Electroplating
O	Ethylene Oxide Sterilizers
Q	Industrial Process Cooling Towers
R	Gasoline Distribution
S	Pulp and Paper Industry
T	Halogenated Solvent Cleaning
U	Polymers and Resins I
W	Polymers and Resins II—Epoxy Resins and Non-Nylon Polyamides
X	Secondary Lead Smelting
Y	Marine Tank Vessel Loading
AA	Phosphoric Acid
BB	Phosphate Fertilizers
CC	Petroleum Refineries
DD	Off-Site Waste and Recovery
EE	Magnetic Tape Manufacturing

TABLE 1—Continued

40 CFR Part 63 NESHAP for Source Categories

Subpart	Emission standard
GG	Aerospace Manufacturing and Rework
HH	Oil and Natural Gas Production
II	Shipbuilding and Ship Repair
JJ	Wood Furniture Manufacturing
KK	Printing and Publishing Industry
LL	Primary Aluminum Reduction Plants
OO	Tanks—Level 1
PP	Containers
QQ	Surface Impoundments
RR	Individual Drain Systems
SS	Closed Vent Systems, Control Devices, Recovery Devices and Routing to a Fuel Gas System or a Process
TT	Equipment Leaks—Level 1
UU	Equipment Leaks—Level 2 Standards
VV	Oil-Water Separators and Organic-Water Separators
WW	Storage Vessels (Tanks)—Control Level 2
YY	Generic Maximum Achievable Control Technology Standards
CCC	Steel Pickling—HCl Process Facilities and Hydrochloric Acid Regeneration
DDD	Mineral Wool Production
EEE	Hazardous Waste Combustors
GGG	Pharmaceuticals Production
HHH	Natural Gas Transmission and Storage
III	Flexible Polyurethane Foam Production
JJJ	Polymers and Resins, Group IV
LLL	Portland Cement Manufacturing
MMM	Pesticide Active Ingredient Production
NNN	Wool Fiberglass Manufacturing
OOO	Polymer and Resins III—Amino Resins and Phenolic Resins
PPP	Polyether Polyols Production
QQQ	Primary Copper Smelting
RRR	Secondary Aluminum
TTT	Primary Lead Smelting
UUU	Petroleum Refineries—Catalytic Cracking, Catalytic Reforming and Sulfer Plants
VVV	Publicly Owned Treatment Works (POTW)
XXX	Ferroalloys Production
CCCC	Nutritional Yeast Mfg.
GGGG	Vegetable Oil Production—Solvent Extraction
HHHH	Wet Formed Fiberglass Mat Production
SSSS	Surface Coating for Metal Coil
TTTT	Leather Finishing Operations
UUUU	Cellulose Production Manufacture
VVVV	Boat Manufacturing
CCCCC	Coke Ovens: Pushing, Quenching and Battery Stacks

VII. What Is Not Being Delegated?

As mentioned above, LDEQ has not been delegated the authority for the following standards:

40 CFR Part 60, Subpart AAA (Standards of Performance for New Residential Wood Heaters);

40 CFR Part 61, Subpart B (National Emission Standards for Radon Emissions from Underground Uranium Mines);

40 CFR Part 61, Subpart H (National Emission Standards for Emissions of Radionuclides Other Than Radon From Department of Energy Facilities);

40 CFR Part 61, Subpart I (National Emission Standards for Radionuclide Emissions from Federal Facilities Other Than Nuclear Regulatory Commission Licensees and Not Covered by Subpart H);

40 CFR Part 61, Subpart K—(National Emission Standards for Radionuclide Emissions from Elemental Phosphorus Plants);

40 CFR Part 61, Subpart Q (National Emission Standards for Radon Emissions from Department of Energy facilities);

40 CFR Part 61, Subpart R (National Emission Standards for Radon Emissions from Phosphogypsum Stacks);

40 CFR Part 61, Subpart T (National Emission Standards for Radon Emissions from the Disposal of Uranium Mill Tailings); and

40 CFR Part 61, Subpart W (National Emission Standards for Radon Emissions from Operating Mill Tailings).

In addition, EPA cannot delegate to a State any of the Category II Subpart A authorities set forth in 40 CFR 63.91(g)(2). These include the following provisions: § 63.6(g), Approval of Alternative Non-Opacity Standards; § 63.6(h)(9), Approval of Alternative Opacity Standards; § 63.7(e)(2)(ii) and (f), Approval of Major Alternatives to Test Methods; § 63.8(f), Approval of Major Alternatives to Monitoring; and § 63.10(f), Approval of Major Alternatives to Recordkeeping and Reporting. In addition, some MACT standards have certain provisions that cannot be delegated to the States [*e.g.* 40 CFR 63.106(b)].[1] Therefore, any MACT standard that EPA is delegating to LDEQ that provides that certain authorities cannot be delegated are retained by EPA and not delegated. Furthermore, no authorities are delegated that require rulemaking in the **Federal Register** to implement, or where Federal overview is the only way to ensure national consistency in the application of the standards or requirements of CAA section 112. Finally, section 112(r), the accidental release program authority, is not being delegated by this approval.

All of the inquiries and requests concerning implementation and enforcement of the excluded standards in the State of Louisiana should be directed to the EPA Region 6 Office.

In addition, this delegation to LDEQ to implement and enforce certain NSPS and NESHAPs does not extend to sources or activities located in Indian country, as defined in 18 U.S.C. 1151. Under this definition, EPA treats as reservations, trust lands validly set aside for the use of a Tribe even if the trust lands have not been formally designated as a reservation. Consistent with previous federal program approvals or delegations, EPA will continue to implement the NSPS and NESHAPs in Indian country because LDEQ has not adequately demonstrated its authority over sources and activities located within the exterior boundaries of Indian reservations and other areas in Indian country.

VIII. How Will Applicability Determinations Under Section 112 Be Made?

In approving this delegation, LDEQ will obtain concurrence from EPA on any matter involving the interpretation of section 112 of the CAA or 40 CFR part 63 to the extent that implementation, administration, or enforcement of these sections have not been covered by EPA determinations or guidance.

IX. What Authority Does EPA Have?

We retain the right, as provided by CAA section 112(l)(7), to enforce any applicable emission standard or requirement under section 112. EPA also has the authority to make certain decisions under the General Provisions

[1] On June 23, 2003, EPA modified certain NESHAPs to clarify which authorities can be delegated to State, local, and tribal agencies. 68 FR 37334. However, this delegation is not directly affected by these changes, since LDEQ is receiving delegation of the part 63 standards that were promulgated by EPA, as amended thorugh July 1, 2002.

(subpart A) of part 63. We are granting LDEQ some of these authorities, and retaining others, as explained in sections VI and VII above. In addition, EPA may review and disapprove of State determinations and subsequently require corrections. (*See* 40 CFR 63.91(g) and 65 FR 55810, 55823, September 14, 2000.)

Furthermore, we retain any authority in an individual emission standard that may not be delegated according to provisions of the standard.[2] Also, listed in the footnotes of the part 63 delegation table at the end of this rule are the authorities that cannot be delegated to any State or local agency which we therefore retain.

X. What Information Must LDEQ Provide to EPA?

In delegating the authority to implement and enforce these rules and in granting a waiver of EPA notification requirements, we require LDEQ to input all source information into the Aerometric Information Retrieval System (AIRS) for both point and area sources. LDEQ must enter this information into the AIRS system and update the information by September 30 of every year. LDEQ must provide any additional compliance related information to EPA, Region 6, Office of Enforcement and Compliance Assurance within 45 days of a request under 40 CFR 63.96(a).

In receiving delegation for specific General Provisions authorities, LDEQ must submit to EPA Region 6 on a semi-annual basis, copies of determinations issued under these authorities. For part 63 standards, these determinations include: Applicability determinations (§ 63.1); approval/disapprovals of construction and reconstruction (§ 63.5(e) and (f)); notifications regarding the use of a continuous opacity monitoring system (§ 63.6(h)(7)(ii)); finding of compliance (§ 63.6(h)(8)); approval/disapprovals of compliance extensions (§ 63.6(i)); approvals/disapprovals of minor (§ 63.7(e)(2)(i)) or intermediate (§ 63.7(e)(2)(ii) and (f)) alternative test methods; approval of shorter sampling times and volumes (§ 63.7(e)(2)(iii)); waiver of performance testing (§ 63.7(e)(2)(iv) and (h)(2), (3)); approvals/disapprovals of minor or intermediate alternative monitoring methods (§ 63.8(f)); approval of adjustments to time periods for submitting reports (§ 63.9 and 63.10); and approvals/disapprovals of minor alternatives to recordkeeping and reporting (§ 63.10(f)).

Additionally, EPA's Emission Measurement Center of the Emissions Monitoring and Analysis Division must receive copies of any approved intermediate changes to test methods or monitoring. (Please note that intermediate changes to test methods must be demonstrated as equivalent through the procedures set out in EPA method 301.) This information on approved intermediate changes to test methods and monitoring will be used to compile a database of decisions that will be accessible to State and local agencies and EPA Regions for reference in making future decisions. (For definitions of *major, intermediate* and *minor* alternative test methods or monitoring methods, *see* 40 CFR 63.90). The LDEQ should forward these intermediate test methods or monitoring changes via mail or facsimile to: Chief, Source Categorization Group A, EPA (MD–19), Research Triangle Park, NC 27711, Facsimile telephone number: (919) 541–1039.

XI. What Is EPA's Oversight of This Delegation to LDEQ?

EPA must oversee LDEQ's decisions to ensure the delegated authorities are being adequately implemented and enforced. We will integrate oversight of the delegated authorities into the existing mechanisms and resources for oversight currently in place. If, during oversight, we determine that LDEQ made decisions that decreased the stringency of the delegated standards, then LDEQ shall be required to take corrective actions and the source(s) affected by the decisions will be notified, as required by 40 CFR 63.91(g)(1)(ii). We will initiate withdrawal of the program or rule if the corrective actions taken are insufficient.

XII. Should Sources Submit Notices to EPA or LDEQ?

All of the information required pursuant to the Federal NSPS and NESHAP (40 CFR parts 60, 61, and 63) should be submitted by sources located outside of Indian country, directly to the LDEQ at the following address: Office of Environmental Services, P. O. Box 4313, Baton Rouge, LA 70821–4313. The LDEQ is the primary point of contact with respect to delegated NSPS and NESHAPs. Sources do not need to send a copy to EPA. EPA Region 6 waives the requirement that notifications and reports for delegated standards be submitted to EPA in addition to LDEQ in accordance with 40 CFR 63.9(a)(4)(ii) and 63.10(a)(4)(ii).

XIII. How Will Unchanged Authorities Be Delegated to LDEQ in the Future?

In the future, LDEQ will only need to send a letter of request to EPA, Region 6, for those NSPS and NESHAP regulations that LDEQ has adopted by reference. The letter must reference the previous up-front approval demonstration and reaffirm that it still meets the up-front approval criteria. We will respond in writing to the request stating that the request for delegation is either granted or denied. If a request is approved, the effective date of the delegation will be the date of our response letter. A **Federal Register** will be published to inform the public and affected sources of the delegation, indicate where source notifications and reports should be sent, and to amend the relevant portions of the Code of Federal Regulations showing which NSPS and NESHAP standards have been delegated to LDEQ.

XIV. What Is the Relationship Between RCRA and the Hazardous Waste Combustor MACT?

As part of today's rule, we are delegating, under the CAA, implementation and enforcement authority for the Hazardous Waste Combustor (HWC) MACT (subpart EEE) to LDEQ. Many of the sources subject to the HWC MACT are also subject to the RCRA permitting requirements. We expect air emissions and related operating requirements found in the HWC MACT will be included in part 70 permits issued by LDEQ. However, RCRA permits will still be required for all other aspects of the combustion unit and the facility that are governed by RCRA (*e.g.*, corrective action, general facility standards, other combustor-specific concerns such as materials handling, risk-based emissions limits and operating requirements, as appropriate and other hazardous waste management units).[3] See the HWC

[2] EPA amended several NESHPs to clarify the implementation and enforcement authorities within the standards that we may delegate to each State, local or tribal agency such as LDEQ. 68 FR 37334 (June 23, 2003). A complete list of the standards is contained in a copy of the proposal available for review at the Dallas Regional Office. An electronic copy of the proposal may be obtained from EPA's Internet site, *http://www.epa.gov/ttn/oarpg/t3pfpr.html*. EPA believes the changes make all of the standards consistent in defining what may not be delegated in actions such as the one we are taking today.

[3] EPA promulgated the HWC MACT (40 CFR part 63, subpart EEE) under the joint authority of the CAA and RCRA. Before this rule went into effect, the air emissions from these sources were primarily regulated under the authority of RCRA. *See* 40 CFR parts 264, 265, 266, and 270. With the release of HWC MACT, the air emissions are now regulated under both CAA and RCRA. Even though both statutes give EPA the authority to regulate air emissions, we determined that having the emissions standards and permitting requirements in both sets

Continued

MACT rule preamble discussion (64 FR 52828, 52839–52843 (September 30, 1999)), and the RCRA Site-Specific Risk Assessment Policy for HWC Facilities dated June 2000 for more information on the interrelationship of the MACT rule with the RCRA Omnibus provision and site specific risk assessments.

XV. Final Action

The public was provided the opportunity to comment on the proposed approval of the program and mechanism for delegation of section 112 standards, as they apply to part 70 sources, on August 24, 1994, for the proposed interim approval of LDEQ's Title V operating permits program; and on April 7, 1995, for the proposed final approval of LDEQ's Title V operating permits program. In EPA's final full approval of Louisiana's Operating Permits Program (60 FR 47296), the EPA discussed the public comments on the proposed delegation of the Title V operating permits program. In this action, the public is given the opportunity to comment on the approval of LDEQ request for delegation of authority to implement and enforce certain section 112 standards for all sources (both part 70 and non-part 70 sources) which have been adopted by reference into Louisiana's state regulations. However, the Agency views the approval of these requests as a noncontroversial action and anticipates no adverse comments. Therefore, EPA is publishing this rule without prior proposal. However, in the "Proposed Rules" section of today's **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the program and delegation of authority described in this action if adverse comments are received. This action will be effective May 25, 2004, without further notice unless the Agency receives relevant adverse comments by April 26, 2004.

If EPA receives adverse comments, we will publish a timely withdrawal in the **Federal Register** informing the public the rule will not take effect. We will address all public comments in a subsequent final rule based on the proposed rule. The EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if we receive adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment.

XVI. Statutory and Executive Order Reviews

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

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

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

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by May 25, 2004. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

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of implementing regulations would be duplicative. For this reason, using the authority provided by section 1006(b) of RCRA, EPA deferred the RCRA requirements for the HWC emission controls to the CAA requirements of 40 CFR part 63, subpart EEE. After a facility has demonstrated compliance with the HWC MACT, the RCRA standards for air emissions from these units will no longer apply, with the exception of section 3005(c)(3) of RCRA, which requires that each RCRA permit contain the terms and conditions necessary to protect human health and the environment. Under this provision of RCRA, if a regulatory authority determines that more stringent conditions that the HWC MACT are necessary to protect human health and the environment for a particular facility, then that regulatory authority may impose those conditions in the facility's RCRA permit.

List of Subjects

40 CFR Part 60

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

40 CFR Part 61

Environmental protection, Air pollution control, Arsenic, Benzene, Beryllium, Hazardous substances, Mercury, Radon, Reporting, and recordkeeping requirements, Uranium, Vinyl chloride.

40 CFR Part 63

Environmental protection, Air pollution control, Hazardous substances, Intergovernmental relations, Reporting and recordkeeping requirements.

Authority: This action is issued under the authority of sections 111 and 112 of the Clean Air Act, as amended, 42 U.S.C. 7411 and 7412.

Dated: March 9, 2004.

Richard E. Greene,

Regional Administrator, Region 6.

40 CFR parts 60, 61, and 63 are amended as follows:

PART 60—[AMENDED]

■ 1. The authority citation for part 60 continues to read as follows:

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

■ 2. Section 60.4 is amended by revising paragraph (b)(T), and adding paragraph (e)(2) to read as follows:

§ 60.4 Address.

* * * * *

(b) * * *

(T) State of Louisiana: Louisiana Department of Environmental Quality, Office of Environmental Assessment, P.O. Box 4314, Baton Rouge, LA 70821–4314. For a list of delegated standards for Louisiana (excluding Indian country), see paragraph (e)(1) of this section.

* * * * *

(e) * * *

(2) Louisiana. The Louisiana Department of Environmental Quality has been delegated all part 60 standards promulgated by EPA, except subpart AAA—Standards of Performance for New Residential Wood Heaters, as amended in the **Federal Register** through July 1, 2002.

PART 61—[AMENDED]

■ 1. The authority citation for part 61 continues to read as follows:

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

■ 2. Section 61.04 is amended by revising paragraph (b)(T), and adding paragraph (c)(6)(ii) to read as follows:

§ 61.04 Addresses.

* * * * *

(b) * * *

(T) State of Louisiana: Louisiana Department of Environmental Quality, Office of Environmental Assessment, P.O. Box 4314, Baton Rouge, LA 70821–4314.

* * * * *

(c) * * *

(6) * * *

(ii) Louisiana. The Louisiana Department of Environmental Quality (LDEQ) has been delegated the following part 61 standards promulgated by EPA, as amended in the **Federal Register** through July 1, 2002. The (X) symbol is used to indicate each subpart that has been delegated.

DELEGATION STATUS FOR PART 61 STANDARDS—STATE OF LOUISIANA[1]

Subpart		LDEQ[2,3]
A	General Provisions	X
C	Beryllium	X
D	Beryllium Rocket Motor Firing	X
E	Mercury	X
F	Vinyl Chloride	X
J	Equipment Leaks of Benzene	X
L	Benzene Emissions from Coke By-Product Recovery Plants	X
N	Inorganic Arsenic Emissions from Glass Manufacturing Plants	X
O	Inorganic Arsenic Emissions from Primary Copper Smelters	X
P	Inorganic Arsenic Emissions from Arsenic Trioxide and Metallic Arsenic Production Facilities	X
V	Equipment Leaks	X
Y	Benzene Emissions from Benzene Storage Vessels	X
BB	Benzene Emissions from Benzene Transfer Operations	X
FF	Benzene Emissions from Benzene Waste Operations	X

[1] Program delegated to Louisiana Department of Environmental Quality (LDEQ).

[2] Authorities which may not be delegated include: § 61.04(b), Addresses of State and Local Implementing Agencies; § 61.12(d)(1), Compliance with Standards and Maintenance Requirements, Alternate Means of Emission Limitation; § 61.13(h), Major Change to an Emissions Test; § 61.14(g), Major Modifications to Monitoring Requirements; § 61.16, Availability of Information Procedures; § 61.53(c)(4), List of Approved Design, Maintenance, and Housekeeping Practices for Mercury Chlor-Alkali Plants; and all authorities identified within specific subparts (*e.g.*, under "Delegation of Authority") that cannot be delegated.

[3] Federal rules adopted unchanged as of July 1, 2002.

* * * * *

PART 63—[AMENDED]

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

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

■ 2. Section 63.99 is amended by adding paragraph (a)(18) to read as follows:

§ 63.99 Delegated Federal authorities.

(a) * * *

(18) Louisiana.

(i) The following table lists the specific part 63 standards that have been delegated unchanged to the Louisiana Department of Environmental Quality for all sources. The "X" symbol is used to indicate each subpart that has been delegated. The delegations are subject to all of the conditions and limitations set forth in Federal law, regulations, policy, guidance, and determinations. Some authorities cannot be delegated and are retained by EPA. These include certain General Provisions authorities and specific parts of some standards. Any amendments made to these rules after this effective date are not delegated.

DELEGATION STATUS FOR PART 63 STANDARDS—STATE OF LOUISIANA [1]

Subpart	Source category	LDEQ [2,3]
A	General Provisions [2]	X
D	Early Reductions	X
F	Hazardous Organic NESHAP (HON)—Synthetic Organic Chemical Manufacturing Industry (SOCMI)	X
G	HON—SOCMI Process Vents, Storage Vessels, Transfer Operations and Wastewater	X
H	HON—Equipment Leaks	X
I	HON—Certain Processes Negotiated Equipment Leak Regulation	X
J	Polyvinyl Chloride and Copolymers Production	X
K	(Reserved).	
L	Coke Oven Batteries	X
M	Perchloroethylene Dry Cleaning	X
N	Chromium Electroplating and Chromium Anodizing Tanks	X
O	Ethylene Oxide Sterilizers	X
P	(Reserved).	
Q	Industrial Process Cooling Towers	X
R	Gasoline Distribution	X
T	Halogenated Solvent Cleaning	X
U	Group I Polymers and Resins	X
V	(Reserved).	
W	Epoxy Resins Production and Non-Nylon Polyamides Production	X
X	Secondary Lead Smelting	X
Y	Marine Tank Vessel Loading	X
Z	(Reserved).	
AA	Phosphoric Acid Manufacturing Plants	X
BB	Phosphate Fertilizers Production Plants	X
CC	Petroleum Refineries	X
DD	Off-Site Waste and Recovery Operations	X
EE	Magnetic Tape Manufacturing	X
FF	(Reserved).	
GG	Aerospace Manufacturing and Rework Facilities	X
HH	Oil and Natural Gas Production Facilities	X
II	Shipbuilding and Ship Repair Facilities	X
JJ	Wood Furniture Manufacturing Operations	X
KK	Printing and Publishing Industry	X
LL	Primary Aluminum Reduction Plants	X
MM	Chemical Recovery Combustion Sources at Kraft, Soda, Sulfide, and Stand-Alone Semichemical Pulp Mills	X
NN	(Reserved).	
OO	Tanks—Level 1	X
PP	Containers	X
QQ	Surface Impoundments	X
RR	Individual Drain Systems	X
SS	Closed Vent Systems, Control Devices, Recovery Devices and Routing to a Fuel Gas System or a Process	X
TT	Equipment Leaks—Control Level 1	X
UU	Equipment Leaks—Control Level 2 Standards	X
VV	Oil-Water Separators and Organic-Water Separators	X
WW	Storage Vessels (Tanks)—Control Level 2	X
XX	(Reserved).	
YY	Generic Maximum Achievable Control Technology Standards	X
ZZ–BBB	(Reserved).	
CCC	Steel Pickling—HCl Process Facilities and Hydrochloric Acid Regeneration	X
DDD	Mineral Wool Production	X
EEE	Hazardous Waste Combustors	X
FFF	(Reserved).	
GGG	Pharmaceuticals Production	X
HHH	Natural Gas Transmission and Storage Facilities	X
III	Flexible Polyurethane Foam Production	X
JJJ	Group IV Polymers and Resins	X
KKK	(Reserved).	
LLL	Portland Cement Manufacturing	X
MMM	Pesticide Active Ingredient Production	X
NNN	Wool Fiberglass Manufacturing	X
OOO	Amino/Phenolic Resins	X
PPP	Polyether Polyols Production	X
QQQ	Primary Copper Smelting	X
RRR	Secondary Aluminum Production	X
SSS	(Reserved).	
TTT	Primary Lead Smelting	X
UUU	Petroleum Refineries—Catalytic Cracking Units, Catalytic Reforming Units and Sulfur Recovery Plants	X
VVV	Publicly Owned Treatment Works (POTW)	X
WWW	(Reserved).	
XXX	Ferroalloys Production: Ferromanganese and Silicomanganese	X
AAAA	Municipal Solid Waste Landfills.	
CCCC	Nutritional Yeast Manufacturing	X

DELEGATION STATUS FOR PART 63 STANDARDS—STATE OF LOUISIANA [1]—Continued

Subpart	Source category	LDEQ [2,3]
GGGG	Solvent Extraction for Vegetable Oil Production	X
HHHH	Wet Formed Fiberglass Mat Production	X
JJJJ	Paper and other Web (Surface Coating).	
NNNN	Surface Coating of Large Appliances.	
OOOO	Fabric Printing Coating and Dyeing.	
QQQQ	Surface Coating of Wood Building Products.	
RRRR	Surface Coating of Metal Furniture.	
SSSS	Surface Coating for Metal Coil	X
TTTT	Leather Finishing Operations	X
UUUU	Cellulose Production Manufacture	X
VVVV	Boat Manufacturing	X
WWWW	Reinforced Plastic Composites Production.	
XXXX	Tire Manufacturing.	
BBBBB	Semiconductor Manufacturing.	
CCCCC	Coke Ovens: Pushing, Quenching and Battery Stacks	X
FFFFF	Integrated Iron and Steel.	
JJJJJ	Brick and Structural Clay Products Manufacturing.	
KKKKK	Clay Ceramics Manufacturing.	
LLLLL	Asphalt Roofing and Processing.	
MMMMM	Flexible Polyurethane Foam Fabrication Operation.	
NNNNN	Hydrochloric Acid Production, Fumed Silica Production.	
PPPPP	Engine Test Facilities.	
QQQQQ	Friction Products Manufacturing.	
SSSSS	Refractory Products Manufacture.	

[1] Program delegated to Louisiana Department of Environmental Quality (LDEQ).
[2] Authorities which may not be delegated include: § 63.6(g), Approval of Alternative Non-Opacity Emission Standards; § 63.6(h)(9), Approval of Alternative Opacity Standards; § 63.7(e)(2)(ii) and (f), Approval of Major Alternatives to Test Methods; § 63.8(f), Approval of Major Alternatives to Monitoring; § 63.10(f), Approval of Major Alternatives to Recordkeeping and Reporting; and all authorities identified in the subparts (*e.g.*, under "Delegation of Authority") that cannot be delegated.
[3] Federal rules adopted unchanged as of July 1, 2002.

(ii) Affected sources within Louisiana shall comply with the Federal requirements of 40 CFR part 63—subpart S—Pulp and Paper Industry, adopted by reference by the Louisiana Department of Environmental Quality's (LDEQ), with the exception of the compliance date listed in § 63.440(d)(1). The LDEQ has adopted an earlier compliance date than the Federal requirement. The earlier compliance date is approved by EPA pursuant to § 63.92. Affected sources in Louisiana that are subject to the requirements of Subpart S shall meet the compliance date established at Louisiana Administrative Code, Title 33, part III, chapter 51, subchapter C., section 5122, C.2.

* * * * *

[FR Doc. 04–6299 Filed 3–25–04; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

45 CFR Part 148

[CMS–2179–F]

RIN 0938–AM42

Grants to States for Operation of Qualified High Risk Pools

AGENCY: Office of the Secretary, HHS.

ACTION: Final rule.

SUMMARY: This final rule implements a provision of the Trade Adjustment Assistance Reform Act of 2002 by providing $40 million in Federal fiscal year 2003 and $40 million in Federal fiscal year 2004 to States that have incurred losses in connection with the operation of qualified high risk pools that meet certain criteria. This final rule also addresses comments received in response to the interim final rule that was published on May 2, 2003. This grant program implements section 2745 of the Public Health Service Act, as added by the Trade Adjustment Assistance Reform Act of 2002.

DATES: Effective date. These regulations are effective on April 26, 2004

Deadline for States to submit an application for losses incurred in their fiscal year 2002: States had to submit an application to us by no later than September 30, 2003. *Deadline for States to submit an application for losses incurred in their fiscal year 2003:* States must submit an application to us by no later than June 30, 2004. *Deadline for States to submit an application for losses incurred in their fiscal year 2004:* States must submit an application to us by no later than June 30, 2005.

ADDRESSES: *Where To Submit an Application.* All initial applications and supplemental applications must be submitted to: Centers for Medicare & Medicaid Services, Acquisition and Grants Group, Mail Stop C2–21–15, 7500 Security Boulevard, Baltimore, MD 21244–1850, Attn: Nicole Nicholson.

FOR FURTHER INFORMATION CONTACT: James Mayhew, (410) 786–9244.

SUPPLEMENTARY INFORMATION:

I. Background

A. General

Section 2745(b) of the Public Health Service Act (PHS Act), as added by section 201(b) of the Trade Adjustment Assistance Reform Act of 2002, authorizes the Secretary to make grants to States for up to 50 percent of the losses they incur in the operation of qualified high risk pools, and appropriates the necessary funds. In order to qualify for a grant, a State's risk

pool must meet the definition of a qualified risk pool, as described in section II of this preamble, as well as other applicable eligibility requirements described in that section.

B. Availability and Use of Funds

The total amount appropriated for these grants is $80 million ($40 million each in Federal fiscal years (FYs) 2003 and 2004). We have 2 years to obligate funding for each fiscal year. As directed by the statute, we will allocate funds in accordance with a formula based upon the number of uninsured individuals in each eligible State. This formula, described in section II of this preamble and in 45 CFR 148.312(b) of this final rule, was developed using the most accurate and current statistics available on the uninsured in each State. Eligible States may apply for grants for amounts up to 50 percent of losses they incur in connection with the operation of a qualified high risk pool. A State must have a qualified high risk pool that has incurred a loss in order to be eligible for a grant.

C. The Final Rule With Comment Period

On May 2, 2003, we published a final rule with comment period (68 FR 23410) to benefit eligible States and uninsured populations. We made funds available as quickly as possible to eligible States to fund losses incurred in the operation of qualified high risk pools.

II. Provisions of the Final Rule with Comment Period Published on May 2, 2003 (63 FR 23410)

In the May 2, 2003 final rule with comment period, we added a new subpart E to 45 CFR part 148, to provide for grants to States that incur losses in connection with operating qualified high risk pools. This subpart implemented section 2745 of the PHS Act. Its purpose is to provide grants to States that have qualified high risk pools that meet the specific requirements described in § 148.310. It also provides specific instructions on how to apply for the grants and outlines the grant review and grant award processes.

In the May 2, 2003 final rule with comment period, we added § 148.306, which describes the statutory basis and scope of the regulation. We also added § 148.308, "Definitions." CMS stands for Centers for Medicare & Medicaid Services. For the purposes of subpart E, a "qualified high risk pool" is a high risk pool that meets the conditions described in § 148.128(a)(2)(ii): (1) It provides to all eligible individuals, as defined in § 148.103, health insurance coverage (or comparable coverage) that does not impose any preexisting condition exclusion or affiliation periods for coverage of an eligible individual; and (2) provides for premium rates and covered benefits for the coverage consistent with the standards included in the National Association of Insurance Commissioners (NAIC) Model Health Plan for Uninsurable Individuals Act (as in effect as of August 21, 1996) but only if the model has been revised in State regulations to meet all of the requirements of this part and title 27 of the PHS Act.

A "loss" means the difference between expenses incurred by a qualified high risk pool, including payment of claims and administrative expenses, and premiums collected by the pool. A "standard risk rate" means a rate developed by a State using reasonable actuarial techniques and taking into account the premium rates charged by the other insurers offering health insurance coverage to individuals in the same geographical service area to which the rate applies. The standard rate may be adjusted based upon age, sex, and geographical location.

In the May 2, 2003 final rule with comment period, we added § 148.310, which describes eligibility requirements for a grant. A State must meet all of the following requirements to be eligible for a grant:

(a) The State has a qualified high risk pool as defined in § 148.308.

(b) The pool restricts premiums charged under the pool to no more than 150 percent of the premium for applicable standard risk rates for the State.

(c) The pool offers a choice of two or more coverage options through the pool.

(d) The pool has in effect a mechanism reasonably designed to ensure continued funding of losses incurred by the State after the end of fiscal year 2004 in connection with the operation of the pool.

(e) The pool has incurred a loss in a period described in § 148.314.

In the May 2, 2003 final rule with comment period, we added § 148.312, which describes the amount of a grant payment. Paragraph (a) provides that an eligible State may receive a grant to fund up to 50 percent of the losses incurred in the operation of its qualified high risk pool during the period for which it is applying. Paragraph (b) provides that we will allocate funds to each eligible State in accordance with the following formula:

(1) The number of uninsured individuals is calculated for each eligible State by taking a 3-year average of the number of uninsured individuals in that State in the Current Population Survey (CPS) of the Census Bureau. For grants based upon State fiscal years 2002 and 2003, a 3-year average will be calculated using numbers available as of May 1, 2003. For grants based upon State fiscal year 2004, a 3-year average will be calculated using numbers available as of March 1, 2005. Calculation of the State 3-year average will be done by the Census Bureau and provided to CMS.

(2) Based upon the CPS numbers, the State's percentage of the total uninsured population of eligible States is calculated and then multiplied by $40 million to determine the State's maximum allotment for the fiscal year in question. For example, if the most current 3-year average of uninsured individuals in State A is 1 million, and the 3-year average of uninsured individuals for all eligible States was 10 million, State A would have 10 percent of the uninsured population of the eligible States. Accordingly, State A's allotment would be 10 percent of $40 million, or $4 million, for the fiscal year in question.

Paragraph (c) states that the amount awarded to each eligible State will be the lesser of the 50 percent of losses incurred by its qualified risk pool for the fiscal year in question or its allotment under the formula.

In the May 2, 2003 final rule with comment period, we added § 148.314, which describes the periods for which eligible States may apply for grants; application deadlines; and allocation methodology. Under paragraph (a), an eligible State may apply for a grant to fund losses incurred in the operation of its qualified risk pool during the State's fiscal year 2002, 2003, or 2004. A State may apply for losses incurred in a partial fiscal year if a partial year audit is done. Under paragraph (b), an eligible State may only be awarded a maximum of two grants, with one grant per fiscal year. A grant for a partial fiscal year counts as a full grant. We also explain how we determine which grants will be funded out of which Federal fiscal year funds. This will depend in part on when the State submits its initial application.

In paragraph (c), we indicate that the deadlines for submitting grant applications are stated in § 148.316(d).

In paragraph (d), we explain how Federal funds will be distributed to States that may qualify at different points in time. The first group of States are those that submit applications for their fiscal year 2002 losses. (We will refer to those States as "02 States.") These States, that meet all the eligibility requirements and incur losses in

connection with a qualified high risk pool in State fiscal year 2002, had to submit a grant request by September 30, 2003. The first year grant for these States was funded with Federal fiscal year 2003 funds. The 02 States may be eligible for a second grant to fund their fiscal year 2003 losses. The deadline for those grant requests will be June 30, 2004. As explained below, these grants will be funded with Federal fiscal year 2004 funds. (If a State does not receive a grant for State fiscal year 2003, however, it still might qualify for its fiscal year 2004, as discussed below.)

The second group of States are those that did not submit applications for their 2002 fiscal years (or submitted applications but did not qualify) and that first qualify with respect to losses incurred in their fiscal year 2003. (We will refer to these States as "03 States.") These States may submit a grant request, which must be received by June 30, 2004. The first year grant for these States will be funded with Federal fiscal year 2003 funds. The 03 States (or any 02 States that did not apply or receive approval for losses incurred during State fiscal year 2003) may be eligible for a second grant to fund their fiscal year 2004 losses. The deadline for those grant requests will be June 30, 2005. Those grants will be funded with Federal fiscal year 2004 funds.

The third group of States are those that first qualify with respect to losses incurred in their fiscal year 2004. (We will refer to these States as "04 States.") These States may submit a grant request, which must be received by June 30, 2005. The first year grant for these States will be funded with Federal fiscal year 2004 funds. The 04 States will not be eligible for a second grant because the availability of Federal funds will have expired.

In paragraph (e), we explain how excess funds will be redistributed. The initial grants to the 02 States and the 03 States will come from the Federal fiscal year 2003 funds. After the deadline for 02 grants, we will determine how many States have submitted applications for grants. We will estimate, based upon contacts with other States that have shown interest, how many requests are likely to be received from 03 States. We will make an initial allotment for 02 States based upon these estimates. In other words, we will reserve some of the Federal fiscal year 2003 funds after the 02 States grant requests have been received in anticipation of requests being made by 03 States. Based upon expressions of interest we have received from States, we believe we have a reasonable estimate of the States that are likely to first qualify in their fiscal year 2003. We will hold in reserve our best estimate of the maximum amount of funds needed to provide full allotments to these States. If there are excess reserves (that is, the Department withholds more money than was necessary to provide grants to the 03 States), the excess funds will be proportionally redistributed to the 02 States and the 03 States, not to exceed 50 percent of losses incurred by the States. In other words, the size of the first year grants will be increased retroactively for these States.

In the unlikely event that the Department should underestimate the reserve needed to fund grants to all eligible 03 States, money will be taken from the Federal fiscal year 2004 funds to ensure that all eligible 03 States receive grants on an equivalent basis. We do not expect it to have a major impact on funding of the additional grants from the Federal fiscal year 2004 funds. Similarly, the Department will reserve some of the Federal fiscal year 2004 money to fund the second year grants for 02 and 03 States and the first year grants for the 04 States.

We believe that this method of distribution of the Federal funds is the fairest because it allows for States that qualified for a grant in their fiscal year 2002 to immediately apply for funding and it also allows for the States that may not immediately qualify to enact the changes needed in order to qualify and apply for funding in either their fiscal year 2003 or fiscal year 2004. This method is set up to accommodate as many States as possible.

In the May 2, 2003 final rule with comment period, we added § 148.316; paragraph (a) describes the application package that the individual State must submit to document that it has met the requirements for a grant. At a minimum, the package must include a completed standard form application kit (see paragraph (b) of this section) along with the following information:

(1) *History and description of the qualified high risk pool.* Provide a detailed description of the qualified high risk pool that includes the following:

(i) Brief history, including date of inception.

(ii) Enrollment criteria (including provisions for the admission of eligible individuals, as defined in § 148.103) and number of enrollees.

(iii) Description of how coverage is provided administratively in the qualified high risk pool (that is, self-insured, through a private carrier, etc.).

(iv) Benefits options and packages offered in the qualified high risk pool to both HIPAA-eligible individuals (as defined in § 148.103) and non-HIPAA-eligible individuals.

(v) Outline of plan benefits and coverage offered in the pool and the plan benefits and coverage of the two most popular policies in the State's private individual market.

(vi) Premiums charged (in terms of dollars and in percentage of standard risk rate) and other cost-sharing mechanisms, such as co-pays and deductibles, imposed on enrollees (both eligible individuals (as defined in § 148.103) and non-eligible individuals if a distinction is made).

(vii) How the standard risk rate for the State is calculated and when it was last calculated.

(viii) Revenue sources for the qualified high risk pool, including current funding mechanisms and, if different, future funding mechanisms. Provide current projections of future income.

(ix) Copies of all governing authorities of the pool, including statutes, regulations, and plan of operation.

(2) *Accounting of risk pool losses.* Provide a detailed accounting of claims paid, administrative expenses, and premiums collected for the fiscal year for which the grant is being requested. Indicate the timing of the fiscal year upon which the accounting is based. Provide the methodology of projecting losses and expenses, and include current projections of future operating losses (this information is needed to judge compliance with the requirement in § 148.310(d) of this final rule).

(3) *Contact person.* Identify the name, position title, address, e-mail address, and telephone number of the person to contact for further information and questions.

In paragraph (b)(1) of § 148.316, the following standard forms must be completed with an original signature and enclosed as part of the proposal:

SF–424 Application for Federal Assistance
SF–424A Budget Information
SF–424B Assurances—Non-Construction Program
SF–LLL Disclosure of Lobbying Activities
Biographical Sketch
Additional Assurances

These forms can be downloaded from the following Web site: *http://www.cms.hhs.gov/researchers/priorities/grants.asp.*

Paragraph (b)(2) specifies that all other narrative in the application must be submitted on 8½ x 11″ white paper.

In paragraph (c), we describe what applicants are required to submit. Applicants are required to submit an original and two copies of the application. Submissions by facsimile (fax) transmission will not be accepted.

Applications mailed through the U.S. Postal Service or a commercial delivery service will be considered "on time" if received by the close of business on the closing date, or postmarked (first class mail) by the date specified in the **DATES** section of this final rule. If express, certified, or registered mail is used, the applicant should obtain a legible dated mailing receipt from the U.S. Postal Service. Private metered postmarks are not acceptable as proof of timely mailings.

In paragraph (d), we describe the deadlines States must meet for submitting an application for losses they incur in a specified fiscal year.

(1) *Deadline for States to submit an application for losses incurred in their fiscal year 2002.* States had to submit an application to us by no later than September 30, 2003.

(2) *Deadline for States to submit an application for losses incurred in their fiscal year 2003.* States must submit an application to us by no later than June 30, 2004.

(3) *Deadline for States to submit an application for losses incurred in their fiscal year 2004.* States must submit an application to us by no later than June 30, 2005.

In paragraph (e), we indicate where to submit an application. All initial applications and supplemental applications must be submitted to: Centers for Medicare & Medicaid Services, Acquisition and Grants Group, Mail Stop C2–21–15, 7500 Security Boulevard, Baltimore, MD 21244–1850, Attn: Nicole Nicholson.

In the May 2, 2003 final rule with comment period, we added § 148.318, which describes how we will review grant applications. Paragraph (a) indicates that this grant program is not listed by the Secretary under 45 CFR 100.3, and therefore the grant program is not subject to review by States under 45 CFR part 100, which implements Executive Order 12372, "Intergovernmental Review of Federal Programs."

Paragraph (b) states that a team consisting of staff from CMS and the Department of Health and Human Services will review all applications. The team will meet as necessary on an ongoing basis as applications are received.

Paragraph (c) describes the eligibility criteria. To be eligible for a grant, a State must submit sufficient documentation to demonstrate that its high risk pool meets the eligibility requirements described in § 148.310. A State must include sufficient documentation of the losses incurred in the operation of the qualified high risk pool in the period for which it is applying.

Paragraph (d) indicates that if the review team determines that a State meets the eligibility requirements described in § 148.310, the review team will use the following additional criteria in reviewing the applications:

(1) *Documentation of expenses incurred during operation of the qualified high risk pool.* The losses and expenses incurred in the operation of a State's pool are sufficiently documented.

(2) *Funding mechanism.* The State has outlined funding sources, such as assessments and State general revenues, which can cover the projected costs and are reasonably designed to ensure continued funding of losses a State incurs in connection with the operation of the qualified high risk pool after fiscal year 2004.

In the May 2, 2003 final rule with comment period, we added § 148.320, which describes our grant award process. Paragraph (a) provides that we will notify each State applicant in writing of CMS' decision on its application. If we award a grant to the State applicant, the award letter will contain the following terms and conditions:

(i) All funds awarded to the grantee under this program must be used exclusively for the operation of a qualified high risk pool that meets the eligibility requirements for this program.

(ii) The grantee must keep sufficient records of the grant expenditures for audit purposes (see 45 CFR part 92).

(iii) The grantee may be required to submit quarterly progress and financial reports under 45 CFR part 92.

Paragraph (b) specifies that an applicant that receives a grant award must submit a letter of acceptance to CMS' Acquisition and Grants Group within 30 days of the date of the award agreeing to the terms and conditions of the award letter.

III. Analysis of and Responses to Public Comments

We received five timely public comments in response to the May 2, 2003 final rule with comment period. The comments and our responses are summarized below.

Comment: One commenter was concerned with the requirement in § 148.316(a)(1)(v) that a State applicant provide the plan benefits and coverage of the two most popular policies in the State's private individual market.

The commenter indicated that eligibility for a grant under the Trade Adjustment Assistance Reform Act of 2002 (Trade Act) does not require that the benefits and coverage of the high risk pool relate to the benefits and coverage of the State's most popular plans.

Response: The Trade Act requires that, in order to be eligible for a grant, a State's high risk pool must be a "qualified high risk pool" as defined in section 2744(c)(2) of the Public Health Service Act (PHS Act). A high risk pool, in accordance with section 2744(c)(2), must provide covered benefits consistent with the NAIC Model Health Plan for Uninsurable Individuals Act (NAIC Model) that was in effect at the time of passage of the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

Section 8 of the NAIC Model provides two alternatives for a high risk pool to use in designing a benefit package. Alternative One requires that a benefit plan be designed to be "consistent with major medical expense coverage to every eligible person who is not eligible for Medicare." Alternative Two provides a specific menu of benefits and exclusions that can be adopted by the risk pool. In establishing the coverage under alternative two, however, the risk pool board shall promulgate a benefit level "commensurate with health insurance provided through a representative number of large employers in the State." Both of these alternatives clearly indicate that a risk pool should provide a level of coverage that is consistent with what is being provided by other carriers throughout the State. An example of a way to establish that a risk pool is providing coverage that is consistent with what is being provided in the State is to provide both the coverage of the risk pool and that of the two most popular policies in the private individual market. In response to this comment, § 148.316(a)(1)(v) is being amended to specify that a State applicant must demonstrate that its high risk pool is providing coverage consistent with either Alternative One or Alternative Two in section 8 of the NAIC Model. This provides an applicant more flexibility in demonstrating that its risk pool is providing a level of benefits consistent with the NAIC Model.

Comment: One commenter was concerned with our interpretation of "qualified high risk pool" as defined in the Trade Act and section 2744(c)(2) of the PHS Act. The commenter indicated that the intent of the legislation was to provide assistance to all State high risk pools, regardless of whether the pools met the requirements of the PHS Act. The commenter stated that the definition of a "qualified high risk pool"

was inserted in the Trade Act to encourage States to use their high risk pools as their HIPAA mechanism, but not to rule out State high risk pools that did not meet the technical requirements of section 2744(c)(2).

The commenter also expressed concern for the States that have bifurcated pools, one for HIPAA eligibles and one for non-HIPAA eligibles, stating that losses from both pools should be counted for the grant, not just the pool for HIPAA eligibles.

Response: We do not believe there is any ambiguity in the statute. The language of the Trade Act expressly provides that a State must have established a "qualified high risk pool" as defined in section 2744(c)(2) of the PHS Act in order to qualify for a grant. Similarly, with respect to States with bifurcated high risk pools, the risk pools that do not include HIPAA eligibles do not meet the statutory definition of a qualified high risk pool. However, as a practical matter, it is our understanding that the losses from the pools that serve HIPAA eligibles are likely to be high enough to enable those States to obtain their full grant allotment under the allocation formula.

Comment: One commenter requested that the definition of "State" be expanded to include entities that may have been formed by State legislatures to conduct risk pool operations. This would allow the risk pool entity to submit a grant application on behalf of the State. The commenter also requested that "fiscal year" be defined to allow use of either the fiscal year of the State or, if different, the fiscal year of the risk pool entity. This would allow the risk pool entity to submit records based upon its own accounting system, if different from the State's.

Response: We agree with this comment and for purposes of this rule we have added to § 148.308 a definition of "State" that includes a risk pool entity of a State. We also added a definition of "State fiscal year" to include the fiscal year of the risk pool entity of the State.

Comment: One commenter was concerned with the 150 percent of the standard risk rate premium cap requirement. Since each State may calculate its standard risk rate differently, one State's risk pool premium, although set higher than 150 percent of its standard risk rate, may be lower in dollar value than another State's risk pool premium, even though the second State's premium is set lower than 150 percent of its standard risk rate. The commenter also stated that the NAIC Model recommends a premium cap of 200 percent, which, in the commenter's opinion, was more reasonable.

Response: The statute expressly requires the premium cap to be 150 percent of the standard risk rate. We have no authority to change the premium cap amount.

Comment: One commenter requested that we revise the language in § 148.314 (d) and (e), which explains how we plan to allocate the grant funds, to make it more technically correct in terms of fiscal year appropriations.

Response: We agree with this comment and have revised § 148.314(d) and (e) with the language that was suggested by the commenter.

IV. Provisions of the Final Regulations

For the most part, this final rule adopts the provisions of the May 2, 2003 final rule with comment period. Those provisions of this final rule that differ from the May 2003 final rule with comment period follow.

In response to comments, we revised § 148.308 by adding the definition of "State" to include in the definition an entity that operates the risk pools on behalf of the State. We also added the definition of "State fiscal year" to include fiscal years by which the risk pool entity bases its accounting. We revised § 148.316(a) introductory text to indicate that if a risk pool entity of a State applies for the grant (instead of the State itself), then it must demonstrate the nexus between it and the State. We revised § 148.316(a)(1)(v) to require State applicants to demonstrate that their risk pool is providing benefits coverage that is consistent with either Alternative One or Alternative Two of the NAIC Model.

We also revised § 148.312(b)(1) to indicate that, for grants based upon State fiscal years 2002 and 2003, the 3-year average of the number of uninsured in each State was calculated using CPS statistics available as of September 30, 2003 and for grants based upon State fiscal year 2004, the average number of uninsured will be calculated using CPS statistics available as of September 30, 2004. This change was made to reflect when the Census Bureau releases its annual statistics on the uninsured.

We revised § 148.314(a) to clarify that, when a State becomes eligible for a grant in the middle of its fiscal year, it can apply for a grant based only upon losses its risk pool incurs for the portion of the fiscal year after eligibility is established. We also revised § 148.314(d)(1), (d)(2), (d)(4), and (e) to use technically correct language for Federal fiscal year appropriations.

V. Collection of Information Requirements

Under the Paperwork Reduction Act (PRA) of 1995, we are required to provide 30-day notice in the **Federal Register** and solicit public comment when a collection of information 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 these issues for the section that contains information collection requirements.

Sections 148.316 Grant Application Instructions

This section requires an applicant to submit the application in writing and states what it must contain.

The burden for this information collection requirement has been approved by the Office of Management and Budget under approval number 0938–0887 through July 2006.

This section also requires documentation to be provided by a risk pool entity if it applies on behalf of a State. We estimate that it will take approximately 10 minutes per risk pool entity to provide documentation for a total of 3 hours per year, based on a maximum of 18 risk pool applicants. We will revise the information collection package, 0938–0887, to include this additional burden.

If you comment on these information collection and record keeping requirements, please mail copies directly to the following:

Centers for Medicare & Medicaid Services, Office of Strategic Operations and Regulatory Affairs, RDIG, DRD–B, Attn: Dawn Willinghan, CMS–2179–F, Room C5–16–03, 7500 Security Boulevard, Baltimore, MD 21244–1850; and

Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Attn: Brenda Aguilar, CMS Desk Officer.

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). Since the amount of appropriations under this rule will not total more than $40 million per fiscal year, it is not a major rule.

The RFA requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and government agencies. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $6 million to $29 million in any 1 year. Individuals and States are not included in the definition of a small entity. Since this rule is implementing a grant program for the States, this rule will not have a significant impact on small businesses.

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. Again, since this rule is implementing a grant program for the States, it will not have a significant impact on small hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule that may result in an expenditure in any 1 year by State, local, or tribal governments, in the aggregate, or by the private sector, of $110 million. Since this rule is strictly an appropriation, there are no unfunded mandates included in the rule.

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. Since this rule is strictly an appropriation of $80 million to the States to fund losses incurred in the operation of qualified high risk pools, it will have a beneficial impact on State governments since the funds will be used to provide health insurance coverage to uninsured individuals and will not impose any direct requirement costs on State and local governments.

B. Anticipated Effects

This rule will have a positive impact on approximately 22 States that currently operate qualified high risk pools in that it will make funds available to those States to fund losses incurred in the operation of their high risk pools. Additionally, in order to be eligible for funding, the high risk pools will have to lower or maintain their premium cap at no higher than 150 percent of the standard rate in the private market. These grants, therefore, will serve as an incentive for States to keep their risk pool premiums at a level that will be affordable and accessible to more uninsured individuals. It will not have a significant impact on other entities, including providers, nor will it have any significant impact on the Medicare and Medicaid programs.

C. Alternatives Considered

The Trade Adjustment Assistance Reform Act of 2002 was very prescriptive in its criteria for eligibility for operation grants to high risk pools. It also provided a specific definition of a high risk pool and outlined the allocation formula for the grants. In addition to following the statute, we had to comply with the Department grant award procedure requirements. Because of these requirements, and because we wanted to make the money available as quickly as possible, we did not consider other major alternatives on how to award the grants.

D. Conclusion

For the reasons indicated elsewhere in this section, we are not preparing analyses for either the RFA or section 1102(b) of the Act because 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, the Office of Management and Budget reviewed this regulation.

List of Subjects in 45 CFR Part 148

Administrative practice and procedure, Health care, Health insurance, Penalties, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, the Department of Health and Human Services amends 45 CFR subchapter B part 148 as set forth below:

PART 148—REQUIREMENTS FOR THE INDIVIDUAL HEALTH INSURANCE MARKET

■ 1. The authority citation for part 148 continues to read as follows:

Authority: Secs 2741 through 2763, 2791, and 2792 of the Public Health Service Act (42 U.S.C. 300gg–41 through 300gg–63, 300gg–91, and 300gg–92).

■ 2. In § 148.308, add the definitions of "State" and "State fiscal year" in alphabetical order to read as follows:

§ 148.308 Definitions.

* * * * *

State, for purposes of this subpart, means any of the 50 States and the District of Columbia or any entity to which a State has delegated the authority to conduct risk pool operations.

State fiscal year, for purposes of this subpart, means the fiscal year used for accounting purposes by either a State or a risk pool entity to which a State has delegated the authority to conduct risk pool operations.

■ 3. In § 148.312, republish the introductory text of paragraph (b) and revise paragraph (b)(1) to read as follows:

§ 148.312 Amount of grant payment.

* * * * *

(b) Funds will be allocated to each eligible State in accordance with the following formula:

(1) The number of uninsured individuals is calculated for each eligible State by taking a 3-year average of the number of uninsured individuals in that State in the Current Population Survey (CPS) of the Census Bureau. For grants based upon State fiscal years 2002 and 2003, a 3-year average was calculated using numbers available as of September 30, 2003. For grants based upon State fiscal year 2004, a 3-year average will be calculated using

numbers available as of September 30, 2004.

* * * * *

■ 4. Amend § 148.314 as follows:
■ A. Revise paragraph (a).
■ B. Revise paragraph (d)(1).
■ C. Revise paragraph (d)(2).
■ D. Revise paragraph (d)(4).
■ E. Revise paragraph (e).

The revisions read as follows:

§ 148.314 Periods during which eligible States may apply for a grant.

(a) *General rule.* A State that meets the eligibility requirements in § 148.310 may apply for a grant to fund losses that were incurred during the State's fiscal year 2002, 2003, or 2004 in connection with the operation of its qualified high risk pool. If a State becomes eligible for a grant in the middle of its fiscal year, a State may apply for losses incurred in a partial fiscal year if a partial year audit is done. Only losses that are incurred after eligibility is established will qualify for a grant.

* * * * *

(d) * * *

(1) *Initial grant applications submitted for losses incurred in State fiscal year 2002 (hereafter referred to as 02 States).* Initial grants to States that submitted an application for losses incurred in State fiscal year 2002 were funded out of the $40 million appropriation for Federal fiscal year (FFY) 2003, which is available for obligation until the end of FFY 2004. (This is referred to as the "initial $40 million appropriation.")

(2) *Initial grant applications submitted for losses incurred in State fiscal year 2003 (hereafter referred to as 03 States).* Initial grants to States that did not submit an application for losses in State fiscal year 2002 (or submitted an application but did not qualify) and first qualified for a grant for losses incurred in State fiscal year 2003 will be funded out of the initial $40 million appropriation.

* * * * *

(4) *Other applications.* All other grants, including the initial grants for the 04 States (States that initially qualify based upon losses incurred in their fiscal year 2004), will be funded out of the $40 million appropriation for FFY 2004, which is available for obligation until the end of FFY 2005. (This is referred to as the "second $40 million appropriation.")

(e) *Allocation of funds.* Grants to States described in paragraphs (d)(1) and (d)(2) of this section will be allocated in accordance with paragraphs (e)(1) and (e)(2) of this section.

(1) *Initial allocation.* (i) *Reserves.* We will first determine the projected number of 03 States (those that are expected to submit their initial grant requests after the deadline for grants relating to a State's 2002 losses). We will reserve the portion of the initial $40 million appropriation that we estimate will be needed to fund grants for 03 States.

(ii) *Initial allocation to 02 States.* The remainder of the initial $40 million appropriation will be allotted to the 02 States.

(iii) *Excess reserves.* If the initial allotments for any of the 02 or 03 States are less than 50 percent of the losses incurred by those States, any reserved funds that remain after allotments have been made to all 02 and 03 States will be proportionally redistributed to the 02 and 03 States, but not to exceed 50 percent of losses incurred by the States. The size of the initial grants will be increased retroactively for those States.

(2) *Second allocation.* The procedure described in paragraph (e)(1) of this section will also be applied to allocate the second $40 million appropriation. A reserve will be established based on the amounts expected to be needed to fund grants to 04 States before funds are allocated for second year grants for 02 and 03 States. If any excess funds remain after States receive their full allotments, the funds will be proportionally distributed to States whose allotments were less than 50 percent of their losses.

■ 5. Amend § 148.316 as follows:
■ A. Revise paragraph (a) introductory text.
■ B. Republish the introductory text of paragraph (a)(1).
■ C. Revise paragraph (a)(1)(v).

The revisions read as follows:

§ 148.316 Grant application instructions.

(a) *Application package.* Each State must compile an application package that documents that it has met the requirements for a grant. If a risk pool entity applies on behalf of a State, it must provide documentation that it has been delegated appropriate authority by the State. At a minimum, the application package must include a completed standard form application kit (see paragraph (b) of this section) along with the following information:

(1) *History and description of the qualified high risk pool.* Provide a detailed description of the qualified high risk pool that includes the following:

* * * * *

(v) Outline of plan benefits and coverage offered in the pool. Provide evidence that the level of plan benefits is consistent with either Alternative One or Alternative Two in Section 8 of the NAIC Model Health Plan for Uninsurable Individuals Act. See Appendix for the text of Section 8 of the NAIC Model.

* * * * *

(Catalogue of Federal Domestic Assistance Program No. 93.780, Grants to States for Operation of Qualified High-Risk Pools)

Dated: October 30, 2003.

Thomas A. Scully,

Administrator, Centers for Medicare & Medicaid Services.

Approved: December 22, 2003.

Tommy G. Thompson,

Secretary.

Note: This appendix will not appear in the Code of Federal Regulations.

Appendix

NAIC Model Health Plan for Uninsurable Individuals Act—July 1997 (This version is identical to the version that was in effect as of August 21, 1996)

Section 8. Benefits

Drafting Note: Two alternatives for Subsection A are offered for establishing covered services for the plan. Alternative One provides for the plan board to establish the covered services and exclusions, subject to the approval of the Commissioner. The advantages of this alternative are that legislators can leave the benefit determinations to experts in plan design and that benefits can be easily modified from time to time to recognize changes in marketplace standards and medical technology.

Alternative Two contains a list of covered services and exclusions for states that wish to include the benefits and exclusions in the statute. The advantage of Alternative Two is that the list contains the benefits and exclusions found in some high risk plans in operation at the time the model was adopted. The list is intended to be inclusive and states may wish to add or delete benefits or exclusions to reflect the state's policy preferences. The list is an outline of the benefits and exclusions; it is not policy language.

Consideration should be given prior to enactment to the cost effectiveness of inclusion or deletion of benefit mandates or other minimum benefit standards. Consideration also should be given to providing sufficient flexibility in the plan to allow for the delivery of services through health maintenance organizations, preferred provider organizations and other managed care arrangements.

Alternative One

A. The plan shall offer health care coverage consistent with major medical expense coverage to every eligible person who is not eligible for Medicare. The coverage to be issued by the plan, its schedule of benefits, exclusions and other limitations shall be established by the board and subject to the approval of the Commissioner.

Alternative Two

A. (1) Outline of Benefits. Covered expenses shall be the usual, customary and reasonable charge in the locality for the following services and articles when prescribed by a physician and determined by the plan to be medically necessary for the following areas of services, subject to provisions of Subsection B:

(a) Hospital services;

(b) Professional services for the diagnosis or treatment of injuries, illnesses or conditions, other than mental or dental, which are rendered by a physician, or by other licensed professionals at his direction;

(c) Drugs requiring a physician's prescription;

(d) Skilled nursing services of a licensed skilled nursing facility for not more than 120 days during a policy year;

(e) Services of a home health agency up to a maximum of 270 services per year;

(f) Use of radium or other radioactive materials;

(g) Oxygen;

(h) Anesthetics;

(i) Prostheses other than dental;

(j) Rental of durable medical equipment, other than eyeglasses and hearing aids, for which there is no personal use in the absence of the conditions for which it is prescribed;

(k) Diagnostic X-rays and laboratory tests;

(l) Oral surgery for excision of partially or completely unerupted, impacted teeth or the gums and tissues of the mouth when not performed in connection with the extraction or repair of teeth;

(m) Services of a physical therapist;

(n) Emergency and other medically necessary transportation provided by a licensed ambulance service to the nearest facility qualified to treat a covered condition;

(o) Outpatient services for diagnosis and treatment of mental and nervous disorders provided that a covered person shall be required to make a fifty percent (50%) copayment, and that the plan's payment shall not exceed $[insert number].

(2) Exclusions. Covered expenses shall not include the following:

(a) Any charge for treatment for cosmetic purposes other than surgery for the repair or treatment of an injury or a congenital bodily defect to restore normal bodily functions;

(b) Care which is primarily for custodial or domiciliary purposes;

(c) Any charge for confinement in a private room to the extent it is in excess of the institution's charge for its most common semiprivate room, unless a private room is medically necessary;

(d) That part of any charge for services rendered or articles prescribed by a physician, dentist or other health care personnel which exceeds the prevailing charge in the locality or for any charge not medically necessary;

(e) Any charge for services or articles the provision of which is not within the scope of authorized practice of the institution or individual providing the services or articles;

(f) Any expense incurred prior to the effective date of coverage by the plan for the person on whose behalf the expense is incurred;

(g) Dental care except as provided in Subsection A(1)(l);

(h) Eyeglasses and hearing aids;

(i) Illness or injury due to acts of war;

(j) Services of blood donors and any fee for failure to replace the first three (3) pints of blood provided to an eligible person each policy year;

(k) Personal supplies or services provided by a hospital or nursing home, or any other nonmedical or nonprescribed supply or service;

(l) Routine maternity charges for a pregnancy, except where added as optional coverage with payment of additional premiums;

(m) Any expense or charge for services, drugs or supplies that are not provided in accord with generally accepted standards of current medical practice;

(n) Any expense or charge for routine physical examinations or tests;

(o) Any expense for which a charge is not made in the absence of insurance or for which there is no legal obligation on the part of the patient to pay;

(p) Any expense incurred for benefits provided under the laws of the United States and this state, including Medicare and Medicaid and other medical assistance, military service-connected disability payments, medical services provided for members of the armed forces and their dependents or employees of the armed forces of the United States, and medical services financed on behalf of all citizens by the United States;

(q) Any expense or charge for in vitro fertilization, artificial insemination, or any other artificial means used to cause pregnancy;

(r) Any expense or charge for oral contraceptives used for birth control or any other temporary birth control measures;

(s) Any expense or charge for sterilization or sterilization reversals;

(t) Any expense or charge for weight loss programs, exercise equipment or treatment of obesity, except when certified by a physician as morbid obesity (at least two (2) times normal body weight);

(u) Any expense or charge for acupuncture treatment unless used as an anesthetic agent for a covered surgery;

(v) Any expense or charge for organ or bone marrow transplants other than those performed at a hospital with a board approved organ transplant program that has been designated by the board as a preferred provider organization for that specific organ or bone marrow transplant;

(w) Any expense or charge for procedures, treatments, equipment, or, services that are provided in special settings for research purposes or in a controlled environment, are being studied for safety, efficiency, and effectiveness, and are awaiting endorsement by the appropriate national medical specialty college for general use within the medical community.

B. In establishing the plan coverage, the board shall take into consideration the levels of health insurance provided in the state and medical economic factors as may be deemed appropriate; and promulgate benefit levels, deductibles, coinsurance factors, exclusions and limitations determined to be generally reflective of and commensurate with health insurance provided through a representative number of large employers in the state.

C. The board may adjust any deductibles and coinsurance factors annually according to the Medical Component of the Consumer Price Index.

D. Preexisting Conditions.

(1) Plan coverage shall exclude charges or expenses incurred during the first six (6) months following the effective date of coverage as to any condition for which medical advice, care or treatment was recommended or received as to such conditions during the six-month period immediately preceding the effective date of coverage.

Drafting Note: In order to reduce the premiums and costs of the plan, states may wish to provide for a longer exclusion period for preexisting conditions. States will need to weigh the need to provide access to individuals with preexisting conditions with the increased costs associated with a shorter preexisting condition exclusion period.

(2) Such preexisting condition exclusions shall be waived to the extent that similar exclusions, if any, have been satisfied under any prior health insurance coverage which was involuntarily terminated; provided, that

(1) Application for pool coverage is made not later than sixty (60) days following such involuntary termination and, in such case, coverage in the plan shall be effective from the date on which such prior coverage was terminated; and

(b) The applicant is not eligible for continuation or conversion rights that would provide coverage substantially similar to plan coverage.

E. Nonduplication of Benefits.

(1) The plan shall be payer for last resort of benefits whenever any other benefit or source of third-party payment is available. Benefits otherwise payable under plan coverage shall be reduced by all amounts paid or payable through any other health insurance and by all hospital and medical expense benefits paid or payable under any workers' compensation coverage, automobile medical payment or liability insurance whether provided on the basis of fault or nonfault, and by any hospital or medical benefits paid or payable under or provided pursuant to any state or federal law or program.

(2) The plan shall have a cause of action against an eligible person for the recovery of the amount of benefits paid that are not for covered expenses. Benefits due from the plan may be reduced or refused as a set-off against any amount recoverable under this paragraph.

[FR Doc. 04–6852 Filed 3–25–04; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 405 and 414

[CMS–1372–CN]

RIN 0938–AM97

Medicare Program; Changes to the Medicare Payment for Drugs for Calendar Year 2004; Correction

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

ACTION: Correction of interim final rule.

SUMMARY: This document corrects errors in the interim final rule with comment period that appeared in the **Federal Register** on January 7, 2004, entitled "Medicare Program; Changes to Medicare Payment for Drugs and Physician Fee Schedule Payments for Calendar Year 2004; Interim Final Rule."

EFFECTIVE DATE: January 1, 2004.

FOR FURTHER INFORMATION CONTACT: Jennifer Fan, (410) 786–0548.

SUPPLEMENTARY INFORMATION:

I. Background

In FR Doc. 03–32323 of January 7, 2004 (69 FR 1084), there were a number of technical errors that are identified and corrected in the Correction of Errors section below. The provisions in this correction notice are effective as if they had been included in the document published January 7, 2004. Accordingly, the corrections are effective January 1, 2004.

In Addendum F, on page 1250, we provided payment limits for three categories of drugs: "2004 Limit for Drugs (other than ESRD drugs separately billed by independent ESRD facilities and drugs infused through DME)", "2004 Limit for ESRD drugs separately billed by independent ESRD facilities", and "2004 Limit for Drugs when infused through DME." We inadvertently omitted and miscalculated some payment limits in the three columns and have corrected these errors. We are republishing Addendum F with the corrected information.

II. Correction of Errors

In FR Doc. 03–32323 of January 7, 2004 (69 FR 1084), republish Addendum F.

BILLING CODE 4120–01–P

Addendum F[a, b]

2004 Payment Limits for Part B Drugs Not Paid on a Cost or Prospective Payment Basis

HCPCS Code	Short Description	AWP %	2004 Limit for Drugs (other than ESRD drugs separately billed by independent ESRD Facilities and drugs infused through DME)	ESRD %	2004 Payment Limit for ESRD Drugs Separately Billed by Independent ESRD Facilities[c]	DME Infusion %	2004 Payment Limit for Drugs when Infused through DME[d]
90371	Hep b ig, im	85	$581.40	95	$649.80		
90375	Rabies ig, im/sc	85	$65.18	95	$72.85		
90376	Rabies ig, heat treated	85	$69.89	95	$78.11		
90385	Rh ig, minidose, im	85	$32.13	95	$34.77		
90585	Bcg vaccine, percut	85	$143.28	95	$160.13		
90632	Hep a vaccine, adult im	85	$62.94	95	$74.54		
90633	Hep a vacc, ped/adol, 2 dose	85	$26.66	95	$29.80		
90634	Hep a vacc, ped/adol, 3 dose	85	$26.66	95	$29.80		
90645	Hib vaccine, hboc, im	85	$21.76	95	$24.32		
90658	Flu vaccine, 3 yrs, im	95	$9.95	95	$9.95		
90675	Rabies vaccine, im	85	$121.83	95	$136.16		
90691	Typhoid vaccine, im	85	$37.58	95	$42.00		
90700	Dtap vaccine, im	85	$20.05	95	$22.41		
90703	Tetanus vaccine, im	85	$12.86	95	$14.37		
90704	Mumps vaccine, sc	85	$17.38	95	$19.43		
90705	Measles vaccine, sc	85	$13.45	95	$15.03		
90706	Rubella vaccine, sc	85	$14.97	95	$16.74		
90707	Mmr vaccine, sc	85	$34.93	95	$39.04		

HCPCS Code	Short Description	AWP %	2004 Limit for Drugs (other than ESRD drugs separately billed by independent ESRD Facilities and drugs infused through DME)	ESRD %	2004 Payment Limit for ESRD Drugs Separately Billed by Independent ESRD Facilities[c]	DME Infusion %	2004 Payment Limit for Drugs when Infused through DME[d]
90713	Poliovirus, ipv, sc	85	$23.00	95	$25.71		
90716	Chicken pox vaccine, sc	85	$57.86	95	$68.83		
90717	Yellow fever vaccine, sc	85	$52.93	95	$59.17		
90718	Td vaccine > 7, im	85	$10.31	95	$11.52		
90720	Dtp/hib vaccine, im	85	$33.63	95	$37.59		
90721	Dtap/hib vaccine, im	85	$43.70	95	$48.84		
90732	Pneumococcal vaccine	95	$18.62	95	$18.62		
90733	Meningococcal vaccine, sc	85	$58.66	95	$69.45		
90735	Encephalitis vaccine, sc	85	$71.37	95	$79.76		
90740	Hepb vacc, ill pat 3 dose im	95	$110.92	95	$110.92		
90743	Hep b vacc, adol, 2 dose, im	95	$27.05	95	$27.05		
90744	Hepb vacc ped/adol 3 dose im	95	$27.05	95	$27.05		
90746	Hep b vaccine, adult, im	95	$55.46	95	$55.46		
90747	Hepb vacc, ill pat 4 dose im	95	$110.92	95	$110.92		
J0130	Abciximab injection	85	$459.02	95	$513.02		
J0150	Injection adenosine 6 MG	85	$34.80	95	$37.71		
J0152[f]	Adenosine injection	85	$66.56	95	$76.42		
J0170	Adrenalin epinephrin inject	85	$2.10	95	$2.34		
J0200	Alatrofloxacin mesylate	85	$17.03	95	$19.04		
J0205[e]	Alglucerase injection	94	$37.13	95	$37.53		
J0207	Amifostine	85	$405.29	95	$452.97		
J0210	Methyldopate hcl injection	85	$10.63	95	$11.88		

HCPCS Code	Short Description	AWP %	2004 Limit for Drugs (other than ESRD drugs separately billed by independent ESRD Facilities and drugs infused through DME)	ESRD %	2004 Payment Limit for ESRD Drugs Separately Billed by Independent ESRD Facilities[c]	DME Infusion %	2004 Payment Limit for Drugs when Infused through DME[d]
J0215	Alefacept	85	$28.19	95	$31.51		
J0256	Alpha 1 proteinase inhibitor	85	$2.38	95	$2.66		
J0270	Alprostadil for injection	85	$0.31	95	$0.34		
J0275	Alprostadil urethral suppos	85	$18.17				
J0280	Aminophyllin 250 MG inj	85	$0.94	95	$1.05		
J0282	Amiodarone HCl	85	$5.51	95	$16.05		
J0285	Amphotericin B	85	$9.30	95	$10.39	95	$10.28
J0287	Amphotericin b lipid complex	85	$19.55	95	$21.85	95	$21.85
J0288	Ampho b cholesteryl sulfate	85	$13.60	95	$15.20	95	$15.20
J0289	Amphotericin b liposome inj	85	$32.03	95	$35.80	95	$35.80
J0290	Ampicillin 500 MG inj	85	$1.48	95	$1.65		
J0295	Ampicillin sodium per 1.5 gm	85	$6.64	95	$7.42		
J0300	Amobarbital 125 MG inj	85	$2.38	95	$2.66		
J0330	Succinycholine chloride inj	85	$0.17	95	$0.20		
J0360	Hydralazine hcl injection	85	$14.34	95	$16.04		
J0380	Inj metaraminol bitartrate	85	$1.14	95	$1.27		
J0390	Chloroquine injection	85	$17.61	95	$19.68		
J0395	Arbutamine HCl injection	85	$163.20	95	$182.40		
J0456	Azithromycin	85	$22.72	95	$25.38		
J0460	Atropine sulfate injection	85	$0.74	95	$1.19		
J0470	Dimecaprol injection	85	$21.18	95	$23.67		
J0475	Baclofen 10 MG injection	85	$192.53	95	$215.18	95	$215.18

HCPCS Code	Short Description	AWP %	2004 Limit for Drugs (other than ESRD drugs separately billed by independent ESRD Facilities and drugs infused through DME)	ESRD %	2004 Payment Limit for ESRD Drugs Separately Billed by Independent ESRD Facilities[c]	DME Infusion %	2004 Payment Limit for Drugs when Infused through DME[d]
J0476	Baclofen intrathecal trial	85	$71.40	95	$79.80	95	$79.80
J0500	Dicyclomine injection	85	$15.27	95	$17.06		
J0515	Inj benztropine mesylate	85	$3.49	95	$3.90		
J0520	Bethanechol chloride inject	85	$4.78	95	$5.34		
J0530	Penicillin g benzathine inj	85	$10.67	95	$11.92		
J0540	Penicillin g benzathine inj	85	$20.94	95	$23.40		
J0550	Penicillin g benzathine inj	85	$44.84	95	$50.12		
J0560	Penicillin g benzathine inj	85	$8.85	95	$9.89		
J0570	Penicillin g benzathine inj	85	$17.70	95	$19.78		
J0580	Penicillin g benzathine inj	85	$35.39	95	$39.56		
J0583	Bivalirudin	85	$1.43	95	$1.74		
J0585	Botulinum toxin a per unit	85	$4.43	95	$4.95		
J0587	Botulinum toxin type B	85	$7.86	95	$8.79		
J0592	Buprenorphine hydrochloride	85	$0.92	95	$1.03		
J0595	Butorphanol tartrate 1 mg	85	$3.94	95	$4.40		
J0600	Edetate calcium disodium inj	85	$39.46	95	$44.10		
J0610	Calcium gluconate injection	85	$0.90	95	$1.44		
J0620	Calcium glycer & lact/10 ML	85	$5.55	95	$6.42		
J0630	Calcitonin salmon injection	85	$34.37	95	$38.41		
J0636	Inj calcitriol per 0.1 mcg	85	$1.24	95	$1.38		
J0637	Caspofungin acetate	85	$29.48	95	$32.95		
J0640	Leucovorin calcium injection	80	$3.00	95	$3.56		

HCPCS Code	Short Description	AWP %	2004 Limit for Drugs (other than ESRD drugs separately billed by independent ESRD Facilities and drugs infused through DME)	ESRD %	2004 Payment Limit for ESRD Drugs Separately Billed by Independent ESRD Facilities[c]	DME Infusion %	2004 Payment Limit for Drugs when Infused through DME[d]
J0670	Inj mepivacaine HCL/10 ml	85	$1.85	95	$2.07		
J0690	Cefazolin sodium injection	85	$2.01	95	$2.25		
J0692	Cefepime HCl for injection	85	$7.28	95	$8.13		
J0694	Cefoxitin sodium injection	85	$9.56	95	$10.69		
J0696	Ceftriaxone sodium injection	85	$13.35	95	$14.92		
J0697	Sterile cefuroxime injection	85	$5.75	95	$6.42		
J0698	Cefotaxime sodium injection	85	$8.51	95	$9.51		
J0702	Betamethasone acet&sod phosp	85	$4.45	95	$4.98		
J0704	Betamethasone sod phosp/4 MG	85	$0.96	95	$1.07		
J0706	Caffeine citrate injection	85	$3.07	95	$3.44		
J0713	Inj ceftazidime per 500 mg	85	$6.04	95	$6.75		
J0715	Ceftizoxime sodium / 500 MG	85	$4.44	95	$4.96		
J0720	Chloramphenicol sodium injec	85	$6.46	95	$7.22		
J0725	Chorionic gonadotropin/1000u	85	$2.39	95	$3.09		
J0735	Clonidine hydrochloride	85	$49.35	95	$55.16		
J0740	Cidofovir injection	85	$754.80	95	$843.60		
J0743	Cilastatin sodium injection	85	$14.20	95	$15.87		
J0744	Ciprofloxacin iv	85	$12.25	95	$13.69		
J0745	Inj codeine phosphate /30 MG	85	$0.41	95	$0.87		
J0760	Colchicine injection	85	$6.32	95	$7.07		
J0770	Colistimethate sodium inj	85	$48.45	95	$54.15		
J0780	Prochlorperazine injection	85	$3.74	95	$8.84		

HCPCS Code	Short Description	AWP %	2004 Limit for Drugs (other than ESRD drugs separately billed by independent ESRD Facilities and drugs Infused through DME)	ESRD %	2004 Payment Limit for ESRD Drugs Separately Billed by Independent ESRD Facilities[c]	DME Infusion %	2004 Payment Limit for Drugs when Infused through DME[d]
J0800	Corticotropin injection	85	$83.15	95	$92.94		
J0835	Inj cosyntropin per 0.25 MG	85	$75.06	95	$81.00		
J0850	Cytomegalovirus imm IV /vial	85	$637.12	95	$712.07		
J0880	Darbepoetin alfa injection	85	$21.20	95	$23.69		
J0895	Deferoxamine mesylate inj	85	$13.98	95	$15.63	95	$15.63
J0900	Testosterone enanthate inj	85	$1.46	95	$1.63		
J0945	Brompheniramine maleate inj	85	$0.85	95	$0.95		
J0970	Estradiol valerate injection	85	$1.44	95	$1.62		
J1000	Depo-estradiol cypionate inj	85	$1.70	95	$1.90		
J1020	Methylprednisolone 20 MG inj	85	$2.40	95	$2.68		
J1030	Methylprednisolone 40 MG inj	85	$3.70	95	$4.13		
J1040	Methylprednisolone 80 MG inj	85	$7.40	95	$8.27		
J1051	Medroxyprogesterone inj	85	$4.50	95	$5.04		
J1056	MA/EC contraceptiveinjection	85	$22.02	95	$24.61		
J1060	Testosterone cypionate 1 ML	85	$3.99	95	$4.46		
J1070	Testosterone cypionat 100 MG	85	$4.43	95	$4.95		
J1080	Testosterone cypionat 200 MG	85	$8.44	95	$9.43		
J1094	Inj dexamethasone acetate	85	$0.64	95	$0.71		
J1100	Dexamethasone sodium phos	86	$0.10	95	$0.10		
J1110	Inj dihydroergotamine mesylt	85	$36.04	95	$36.10		
J1120	Acetazolamid sodium injectio	85	$18.36	95	$20.52		
J1160	Digoxin injection	85	$1.59	95	$1.79		

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J1165	Phenytoin sodium injection	85	$0.77	95	$0.86		
J1170	Hydromorphone injection	85	$1.38	95	$1.55	95	$1.49
J1180	Dyphylline injection	85	$8.07	95	$9.02		
J1190	Dexrazoxane HCl injection	85	$209.34	95	$233.97		
J1200	Diphenhydramine hcl injectio	85	$1.43	95	$1.61		
J1205	Chlorothiazide sodium inj	85	$9.38	95	$10.49		
J1212	Dimethyl sulfoxide 50% 50 ML	85	$39.91	95	$44.60		
J1230	Methadone injection	85	$0.68	95	$0.75		
J1240	Dimenhydrinate injection	85	$0.34	95	$0.38		
J1245	Dipyridamole injection	85	$5.10	95	$5.70		
J1250	Inj dobutamine HCL/250 mg	85	$4.24	95	$4.74	95	$4.74
J1260	Dolasetron mesylate	80	$13.85	95	$16.45		
J1270	Injection, doxercalciferol	85	$4.92	95	$5.50		
J1320	Amitriptyline injection	85	$2.15	95	$2.40		
J1325	Epoprostenol injection	85	$16.16	95	$18.06	95	$12.64
J1327	Eptifibatide injection	85	$11.48	95	$12.83		
J1335	Ertapenem injection	85	$21.24	95	$23.74		
J1364	Erythro lactobionate /500 MG	85	$3.14	95	$3.59		
J1380	Estradiol valerate 10 MG inj	85	$0.48	95	$0.53		
J1390	Estradiol valerate 20 MG inj	85	$1.02	95	$1.07		
J1410	Inj estrogen conjugate 25 MG	85	$55.04	95	$61.51		
J1435	Injection estrone per 1 MG	85	$0.51	95	$0.57		

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J1436	Etidronate disodium inj	85	$68.85	95	$76.95		
J1438	Etanercept injection	85	$138.83	95	$156.25		
J1440	Filgrastim 300 mcg injection	81	$158.50	95	$185.90		
J1441	Filgrastim 480 mcg injection	81	$267.79	95	$314.07		
J1450	Fluconazole	85	$85.83	95	$97.61		
J1452	Intraocular Fomivirsen na	85	$850.00	95	$950.00		
J1455	Foscarnet sodium injection	85	$11.70	95	$13.07	95	$13.07
J1460	Gamma globulin 1 CC inj	85	$10.20	95	$12.17		
J1470	Gamma globulin 2 CC inj	85	$20.40	95	$24.35		
J1480	Gamma globulin 3 CC inj	85	$30.63	95	$36.56		
J1490	Gamma globulin 4 CC inj	85	$40.80	95	$48.69		
J1500	Gamma globulin 5 CC inj	85	$51.00	95	$60.87		
J1510	Gamma globulin 6 CC inj	85	$61.08	95	$72.88		
J1520	Gamma globulin 7 CC inj	85	$71.33	95	$85.12		
J1530	Gamma globulin 8 CC inj	85	$81.60	95	$97.38		
J1540	Gamma globulin 9 CC inj	85	$91.89	95	$109.66		
J1550	Gamma globulin 10 CC inj	85	$102.00	95	$121.72		
J1563	IV immune globulin	80	$66.00	95	$78.38		
J1564	Immune globulin 10 mg	80	$0.72	95	$0.86		
J1565	RSV-ivig	85	$14.81	95	$18.12		
J1570	Ganciclovir sodium injection	85	$31.53	95	$35.25	95	$35.25
J1580	Garamycin gentamicin inj	85	$1.70	95	$2.07		

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J1590	Gatifloxacin injection	85	$0.81	95	$0.90		
J1595[f]	Injection glatiramer acetate	85	$30.13	95	$33.67		
J1600	Gold sodium thiomaleate inj	85	$12.10	95	$13.52		
J1610	Glucagon hydrochloride/1 MG	85	$40.80	95	$45.60		
J1620	Gonadorelin hydroch/ 100 mcg	85	$180.72	95	$201.98		
J1626	Granisetron HCl injection	80	$15.62	95	$18.54		
J1630	Haloperidol injection	85	$6.11	95	$6.83		
J1631	Haloperidol decanoate inj	85	$8.16	95	$9.12		
J1642	Inj heparin sodium per 10 u	80	$0.05	95	$0.06		
J1644	Inj heparin sodium per 1000u	85	$0.35	95	$0.40		
J1645	Dalteparin sodium	85	$14.04	95	$15.69		
J1650	Inj enoxaparin sodium	85	$5.46	95	$6.47		
J1652	Fondaparinux sodium	85	$7.40	95	$8.27		
J1655	Tinzaparin sodium injection	85	$3.43	95	$3.83		
J1670	Tetanus immune globulin inj	85	$106.25	95	$119.70		
J1700	Hydrocortisone acetate inj	85	$0.30	95	$0.34		
J1710	Hydrocortisone sodium ph inj	85	$4.98	95	$5.57		
J1720	Hydrocortisone sodium succ i	85	$1.55	95	$2.07		
J1730	Diazoxide injection	85	$110.01	95	$122.95		
J1742	Ibutilide fumarate injection	85	$224.89	95	$251.35		
J1745	Infliximab injection	85	$58.79	95	$65.70		
J1750	Iron dextran	85	$16.03	95	$17.91		

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J1756	Iron sucrose injection	85	$0.58	95	$0.66		
J1785[e]	Injection imiglucerase /unit	94	$3.71	95	$3.75		
J1790	Droperidol injection	85	$2.50	95	$2.80		
J1800	Propranolol injection	85	$8.45	95	$11.63		
J1810	Droperidol/fentanyl inj	85	$8.45	95	$9.44		
J1815	Insulin injection	85	$0.09	95	$0.10		
J1817	Insulin for insulin pump use					95	$2.80
J1830	Interferon beta-1b / .25 MG	85	$60.14	95	$66.40		
J1835	Itraconazole injection	85	$32.97	95	$38.65		
J1840	Kanamycin sulfate 500 MG inj	85	$2.94	95	$3.30		
J1850	Kanamycin sulfate 75 MG inj	85	$0.44	95	$0.49		
J1885	Ketorolac tromethamine inj	85	$3.19	95	$3.56		
J1890	Cephalothin sodium injection	85	$9.18	95	$10.26		
J1940	Furosemide injection	85	$0.88	95	$0.93		
J1950	Leuprolide acetate /3.75 MG	85	$453.79	95	$517.32		
J1955	Inj levocarnitine per 1 gm	85	$30.60	95	$34.20		
J1956	Levofloxacin injection	85	$18.62	95	$20.81		
J1960	Levorphanol tartrate inj	85	$3.37	95	$3.76		
J1980	Hyoscyamine sulfate inj	85	$7.66	95	$8.90		
J1990	Chlordiazepoxide injection	85	$22.37	95	$24.99		
J2001[f]	Lidocaine injection	85	$0.88	95	$0.98		
J2010	Lincomycin injection	85	$2.84	95	$3.31		

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J2020	Linezolid injection	85	$32.93	95	$38.98		
J2060	Lorazepam injection	85	$2.81	95	$3.14		
J2150	Mannitol injection	85	$2.92	95	$3.27		
J2175	Meperidine hydrochl /100 MG	85	$0.48	95	$0.53	95	$0.56
J2180	Meperidine/promethazine inj	85	$4.02	95	$4.50		
J2185	Meropenem	85	$4.40	95	$4.92		
J2210	Methylergonovin maleate inj	85	$3.67	95	$4.10		
J2250	Inj midazolam hydrochloride	85	$1.14	95	$1.28		
J2260	Inj milrinone lactate / 5 MG	85	$46.15	95	$51.58	95	$51.58
J2270	Morphine sulfate injection	85	$0.60	95	$0.77	95	$0.71
J2271	Morphine so4 injection 100mg	85	$6.99	95	$11.07	95	$11.07
J2275	Morphine sulfate injection	85	$1.70	95	$2.38	95	$4.39
J2280	Inj, moxifloxacin 100 mg	85	$9.30	95	$10.39		
J2300	Inj nalbuphine hydrochloride	85	$1.35	95	$1.59		
J2310	Inj naloxone hydrochloride	85	$2.12	95	$2.49		
J2320	Nandrolone decanoate 50 MG	85	$3.43	95	$3.84		
J2321	Nandrolone decanoate 100 MG	85	$6.25	95	$7.67		
J2322	Nandrolone decanoate 200 MG	85	$14.08	95	$15.74		
J2324	Nesiritide	85	$135.66	95	$151.62		
J2353[f]	Octreotide injection, depot	85	$71.09	95	$92.68		
J2354[f]	Octreotide inj, non-depot	85	$3.81	95	$4.25		
J2355	Oprelvekin injection	85	$239.67	95	$267.86		

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J2360	Orphenadrine injection	85	$4.85	95	$5.42		
J2370	Phenylephrine hcl injection	85	$1.15	95	$1.28		
J2400	Chloroprocaine hcl injection	85	$5.72	95	$6.39		
J2405	Ondansetron hcl injection	87	$5.58	95	$6.09		
J2410	Oxymorphone hcl injection	85	$2.64	95	$3.09		
J2430	Pamidronate disodium /30 MG	85	$237.88	95	$265.87		
J2440	Papaverin hcl injection	85	$2.98	95	$3.33		
J2460	Oxytetracycline injection	85	$0.91	95	$1.01		
J2501	Paricalcitol	85	$4.49	95	$5.33		
J2505[f]	Injection, pegfilgrastim 6mg	85	$2,507.50	95	$2,802.50		
J2510	Penicillin g procaine inj	85	$8.59	95	$9.60		
J2515	Pentobarbital sodium inj	85	$1.18	95	$1.46		
J2540	Penicillin g potassium inj	85	$0.26	95	$0.29		
J2543	Piperacillin/tazobactam	85	$4.36	95	$4.90		
J2545	Pentamidine isethionte/300mg	85	$40.12	95	$44.84		
J2550	Promethazine hcl injection	85	$2.55	95	$2.85		
J2560	Phenobarbital sodium inj	85	$1.44	95	$1.62		
J2590	Oxytocin injection	85	$1.15	95	$1.28		
J2597	Inj desmopressin acetate	85	$3.09	95	$3.45		
J2650	Prednisolone acetate inj	85	$0.22	95	$0.31		
J2670	Totazoline hcl injection	85	$3.51	95	$3.92		
J2675	Inj progesterone per 50 MG	85	$3.18	95	$3.62		

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J2680	Fluphenazine decanoate 25 MG	85	$8.02	95	$8.96		
J2690	Procainamide hcl injection	85	$1.24	95	$1.43		
J2700	Oxacillin sodium injeciton	85	$0.71	95	$0.80		
J2710	Neostigmine methylslfte inj	85	$0.59	95	$0.67		
J2720	Inj protamine sulfate/10 MG	85	$0.68	95	$0.76		
J2725	Inj protirelin per 250 mcg	85	$21.83	95	$24.40		
J2730	Pralidoxime chloride inj	85	$92.12	95	$102.96		
J2760	Phentolaine mesylate inj	85	$28.56	95	$31.92		
J2765	Metoclopramide hcl injection	85	$1.67	95	$1.90		
J2770	Quinupristin/dalfopristin	85	$102.52	95	$114.58		
J2780	Ranitidine hydrochloride inj	85	$1.29	95	$1.43		
J2783	Rasburicase	85	$105.54	95	$117.96		
J2788	Rho d immune globulin 50 mcg	85	$45.82	95	$34.77		
J2790	Rho d immune globulin inj	85	$89.76	95	$100.32		
J2792	Rho(D) immune globulin h, sd	85	$18.39	95	$20.55		
J2795	Ropivacaine HCl injection	85	$0.06	95	$0.07		
J2800	Methocarbamol injection	85	$3.40	95	$3.80		
J2820	Sargramostim injection	80	$24.47	95	$29.06		
J2910	Aurothioglucose injeciton	85	$15.49	95	$17.31		
J2912	Sodium chloride injection	85	$0.44	95	$0.49		
J2916	Na ferric gluconate complex	85	$7.31	95	$8.17		
J2920	Methylprednisolone injection	85	$1.41	95	$2.11		

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J2930	Methylprednisolone injection	85	$1.72	95	$3.24		
J2940	Somatrem injection	85	$40.76	95	$45.56		
J2941	Somatropin injection	85	$41.09	95	$45.92		
J2950	Promazine hcl injection	85	$0.41	95	$0.46		
J2993	Reteplase injection	85	$1,168.75	95	$1,364.44		
J2995	Inj streptokinase /250000 IU	85	$79.69	95	$89.06		
J2997	Alteplase recombinant	85	$32.83	95	$36.70		
J3000	Streptomycin injection	85	$5.67	95	$6.35		
J3010	Fentanyl citrate injeciton	85	$0.83	95	$0.93	95	$0.70
J3030	Sumatriptan succinate / 6 MG	85	$23.76	95	$26.56		
J3070	Pentazocine injection	85	$4.67	95	$5.23		
J3100	Tenecteplase injection	85	$2,407.63	95	$2,690.88		
J3105	Terbutaline sulfate inj	85	$26.30	95	$29.39		
J3120	Testosterone enanthate inj	85	$8.03	95	$8.98		
J3130	Testosterone enanthate inj	85	$16.07	95	$17.96		
J3140	Testosterone suspension inj	85	$0.28	95	$0.40		
J3150	Testosteron propionate inj	85	$0.84	95	$0.94		
J3230	Chlorpromazine hcl injection	85	$3.93	95	$4.40		
J3240	Thyrotropin injection	85	$552.50	95	$617.50		
J3245	Tirofiban hydrochloride	85	$421.77	95	$471.39		
J3250	Trimethobenzamide hcl inj	85	$1.25	95	$1.55		
J3260	Tobramycin sulfate injection	85	$3.99	95	$4.46		

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J3265	Injection torsemide 10 mg/ml	85	$1.39	95	$1.56		
J3280	Thiethylperazine maleate inj	85	$5.06	95	$5.65		
J3301	Triamcinolone acetonide inj	85	$1.43	95	$1.60		
J3302	Triamcinolone diacetate inj	85	$0.31	95	$0.33		
J3303	Triamcinolone hexacetonl inj	85	$0.90	95	$1.01		
J3305	Inj trimetrexate glucoronate	85	$127.50	95	$142.50		
J3315	Triptorelin pamoate	85	$356.66	95	$398.62		
J3320	Spectinomycn di-hcl inj	85	$25.30	95	$28.27		
J3360	Diazepam injection	85	$0.77	95	$0.86		
J3364	Urokinase 5000 IU injection	85	$50.65	95	$10.23		
J3365	Urokinase 250,000 IU inj	85	$457.66	95	$511.50		
J3370	Vancomycin hcl injection	85	$2.58	95	$7.03		
J3395	Verteporfin injection	85	$1,304.75	95	$1,603.13		
J3410	Hydroxyzine hcl injection	85	$1.08	95	$1.21		
J3411	Thiamine hcl 100 mg	85	$0.81	95	$0.90		
J3415	Pyridoxine hcl 100 mg	85	$0.47	95	$0.52		
J3420	Vitamin b12 injection	85	$0.15	95	$0.17		
J3430	Vitamin k phytonadione inj	85	$1.98	95	$2.21		
J3465	Injection, voriconazole	85	$4.51	95	$4.99		
J3475	Inj magnesium sulfate	85	$0.20	95	$0.23		
J3480	Inj potassium chloride	85	$0.07	95	$0.08		
J3485	Zidovudine	85	$0.91	95	$1.02		

HCPCS Code	Short Description	AWP %	2004 Limit for Drugs (other than ESRD drugs separately billed by Independent ESRD Facilities and drugs Infused through DME)	ESRD %	2004 Payment Limit for ESRD Drugs Separately Billed by Independent ESRD Facilities[c]	DME Infusion %	2004 Payment Limit for Drugs when Infused through DME[d]
J3486	Ziprasidone mesylate	85	$18.60	95	$20.79		
J3487	Zoledronic acid	85	$194.54	95	$227.86		
J7030	Normal saline solution infus	85	$8.89	95	$11.31		
J7040	Normal saline solution infus	85	$5.64	95	$4.68		
J7042	5% dextrose/normal saline	85	$8.45	95	$9.44		
J7050	Normal saline solution infus	85	$2.22	95	$2.83		
J7051	Sterile saline/water	85	$0.68	95	$0.76		
J7060	5% dextrose/water	85	$8.09	95	$7.51		
J7070	D5w infusion	85	$9.78	95	$10.97		
J7100	Dextran 40 infusion	85	$22.47	95	$25.11		
J7110	Dextran 75 infusion	85	$12.72	95	$14.21		
J7120	Ringers lactate infusion	85	$11.13	95	$12.45		
J7130	Hypertonic saline solution	85	$0.44	95	$0.52		
J7190	Factor viii	95	$0.87	95	$0.87		
J7191	Factor VIII (porcine)	95	$2.04	95	$2.04		
J7192	Factor viii recombinant	95	$1.29	95	$1.29		
J7193	Factor IX non-recombinant	95	$1.12	95	$1.12		
J7194	Factor ix complex	95	$0.40	95	$0.40		
J7195	Factor IX recombinant	95	$0.95	95	$0.95		
J7197	Antithrombin iii injection	95	$1.50	95	$1.50		
J7198	Anti-inhibitor	95	$1.43	95	$1.43		
J7308	Aminolevulinic acid hcl top	85	$90.31	95	$100.94		

HCPCS Code	Short Description	AWP %	2004 Limit for Drugs (other than ESRD drugs separately billed by independent ESRD Facilities and drugs infused through DME)	ESRD %	2004 Payment Limit for ESRD Drugs Separately Billed by Independent ESRD Facilities[c]	DME Infusion %	2004 Payment Limit for Drugs when infused through DME[d]
J7310	Ganciclovir long act implant	85	$4,250.00	95	$4,750.00		
J7317	Sodium hyaluronate injection	85	$124.11	95	$138.71		
J7320	Hylan G-F 20 injection	82	$201.24	95	$233.14		
J7330	Cultured chondrocytes implnt	85	$13,566.00	95	$15,920.10		
J7340	Metabolic active D/E tissue	85	$26.21	95	$29.30		
J7342	Metabolically active tissue	85	$13.78	95	$16.16		
J7500	Azathioprine oral 50mg	85	$1.11				
J7501	Azathioprine parenteral	85	$53.54	95	$59.84		
J7502	Cyclosporine oral 100 mg	85	$4.68				
J7504	Lymphocyte immune globulin	85	$249.36	95	$289.85		
J7506	Prednisone oral	85	$0.03				
J7507	Tacrolimus oral per 1 MG	85	$3.13				
J7509	Methylprednisolone oral	85	$0.44				
J7510	Prednisolone oral per 5 mg	85	$0.03				
J7511	Antithymocyte globuln rabbit	85	$319.94	95	$357.58		
J7513	Daclizumab, parenteral	85	$380.36	95	$425.11		
J7515	Cyclosporine oral 25 mg	85	$1.17				
J7517	Mycophenolate mofetil oral	86	$2.55				
J7520	Sirolimus, oral	85	$6.38				
J7525	Tacrolimus injection	85	$106.29	95	$118.80		
J7608	Acetylcysteine inh sol u d	80	$5.33				
J7618	Albuterol inh sol con	80	$0.12				

HCPCS Code	Short Description	AWP %	2004 Limit for Drugs (other than ESRD drugs separately billed by independent ESRD Facilities and drugs infused through DME)	ESRD %	2004 Payment Limit for ESRD Drugs Separately Billed by Independent ESRD Facilities[c]	DME Infusion %	2004 Payment Limit for Drugs when Infused through DME[d]
J7619	Albuterol inh sol u d	80	$0.39	95	$0.41		
J7621[f]	(Levo)albuterol/Ipra-bromide	85	$3.40	95	$1.90		
J7622	Beclomethasone inhalatn sol	85	$0.58				
J7626	Budesonide inhalation sol	85	$4.04				
J7631	Cromolyn sodium inh sol u d	80	$0.31				
J7633	Budesonide concentrated sol	85	$0.05				
J7635	Atropine inhal sol con	85	$0.20				
J7636	Atropine inhal sol unit dose	85	$0.32				
J7637	Dexamethasone inhal sol con	85	$0.09				
J7638	Dexamethasone inhal sol u d	85	$0.16				
J7639	Dornase alpha inhal sol u d	85	$14.92				
J7641	Flunisolide, inhalation sol	85	$0.63				
J7642	Glycopyrrolate inhal sol con	85	$0.50				
J7643	Glycopyrrolate inhal sol u d	85	$0.83				
J7644	Ipratropium brom inh sol u d	80	$2.82				
J7658	Isoproterenolhcl inh sol con	85	$6.51				
J7659	Isoproterenol hcl inh sol ud	85	$6.56				
J7681	Terbutaline so4 inh sol u d	85	$25.71				
J7682	Tobramycin inhalation sol	85	$44.08				
J7683	Triamcinolone inh sol con	85	$0.10				
J7684	Triamcinolone inh sol u d	85	$0.17				
J8510	Oral busulfan	85	$1.86				

HCPCS Code	Short Description	AWP %	2004 Limit for Drugs (other than ESRD drugs separately billed by independent ESRD Facilities and drugs infused through DME)	ESRD %	2004 Payment Limit for ESRD Drugs Separately Billed by Independent ESRD Facilities[c]	DME Infusion %	2004 Payment Limit for Drugs when infused through DME[d]
J8520	Capecitabine, oral, 150 mg	90	$3.21				
J8521	Capecitabine, oral, 500 mg	90	$10.69				
J8530	Cyclophosphamide oral 25 MG	85	$1.75				
J8560	Etoposide oral 50 MG	85	$40.49				
J8600	Melphalan oral 2 MG	85	$2.24				
J8610	Methotrexate oral 2.5 MG	85	$2.61				
J8700	Temozolomide	85	$6.58				
J9000	Doxorubic hcl 10 MG vl chemo	80	$8.16	95	$12.54		
J9001	Doxorubicin hcl liposome inj	85	$352.06	95	$416.69	95	$393.48
J9010	Alemtuzumab injection	85	$523.00	95	$584.54		
J9015	Aldesleukin/single use vial	85	$657.15	95	$734.46		
J9017	Arsenic trioxide	85	$32.94	95	$36.81		
J9020	Asparaginase injection	85	$56.02	95	$62.61		
J9031	Bcg live intravesical vac	85	$143.28	95	$160.13		
J9040	Bleomycin sulfate injection	85	$150.61	95	$182.40	95	$289.37
J9045	Carboplatin injection	81	$126.83	95	$155.65		
J9050	Carmus bischl nitro inj	85	$121.84	95	$142.49		
J9060	Cisplatin 10 MG injection	85	$13.56	95	$15.15		
J9062	Cisplatin 50 MG injection	85	$67.79	95	$75.76		
J9065	Inj cladribine per 1 MG	85	$45.90	95	$51.30	95	$61.72
J9070	Cyclophosphamide 100 MG inj	85	$5.13	95	$5.73		
J9080	Cyclophosphamide 200 MG inj	85	$9.74	95	$10.89		

HCPCS Code	Short Description	AWP %	2004 Limit for Drugs (other than ESRD drugs separately billed by independent ESRD Facilities and drugs infused through DME)	ESRD %	2004 Payment Limit for ESRD Drugs Separately Billed by Independent ESRD Facilities[c]	DME Infusion %	2004 Payment Limit for Drugs when Infused through DME[d]
J9090	Cyclophosphamide 500 MG inj	85	$20.45	95	$22.86		
J9091	Cyclophosphamide 1.0 grm inj	85	$40.92	95	$45.73		
J9092	Cyclophosphamide 2.0 grm Inj	85	$81.82	95	$91.45		
J9093	Cyclophosphamide lyophilized	85	$5.21	95	$4.88		
J9094	Cyclophosphamide lyophilized	85	$10.41	95	$9.77		
J9095	Cyclophosphamide lyophilized	85	$20.45	95	$24.42		
J9096	Cyclophosphamide lyophilized	85	$40.92	95	$48.86		
J9097	Cyclophosphamide lyophilized	85	$83.95	95	$97.75		
J9098	Cytarabine liposome	85	$332.35	95	$371.45		
J9100	Cytarabine hcl 100 MG inj	85	$7.33	95	$8.19	95	$8.19
J9110	Cytarabine hcl 500 MG inj	85	$7.65	95	$8.55	95	$8.55
J9120	Dactinomycin actinomycin d	85	$12.41	95	$13.87		
J9130	Dacarbazine 100 mg inj	85	$10.04	95	$11.22		
J9140	Dacarbazine 200 MG inj	85	$19.47	95	$22.06		
J9150	Daunorubicin	85	$66.42	95	$74.23		
J9151	Daunorubicin citrate liposom	85	$57.80	95	$64.60		
J9160	Denileukin diftitox, 300 mcg	85	$1,190.85	95	$1,330.95		
J9165	Diethylstilbestrol injection	85	$12.89	95	$14.41		
J9170	Docetaxel	80	$301.40	95	$357.90		
J9178[f]	Inj, epirubicin hcl, 2 mg	85	$24.73	95	$27.64		
J9181	Etoposide 10 MG inj	85	$1.53	95	$1.71		
J9182	Etoposide 100 MG inj	85	$15.30	95	$17.10		

HCPCS Code	Short Description	AWP %	2004 Limit for Drugs (other than ESRD drugs separately billed by independent ESRD Facilities and drugs infused through DME)	ESRD %	2004 Payment Limit for ESRD Drugs Separately Billed by Independent ESRD Facilities[c]	DME Infusion %	2004 Payment Limit for Drugs when Infused through DME[d]
J9185	Fludarabine phosphate inj	85	$318.59	95	$348.67		
J9190	Fluorouracil injection	85	$1.85	95	$2.07	95	$2.07
J9200	Floxuridine injection	85	$122.40	95	$136.80	95	$136.80
J9201	Gemcitabine HCl	80	$101.90	95	$129.49		
J9202	Goserelin acetate implant	80	$375.99	95	$446.49		
J9206	Irinotecan injection	80	$122.73	95	$152.88		
J9208	Ifosfomide injection	85	$134.55	95	$150.38	95	$150.38
J9209	Mesna injection	85	$31.45	95	$35.15		
J9211	Idarubicin hcl injection	85	$375.73	95	$419.94		
J9212	Interferon alfacon-1	85	$3.67	95	$4.09		
J9213	Interferon alfa-2a inj	85	$31.21	95	$34.88		
J9214	Interferon alfa-2b inj	85	$13.31	95	$14.88		
J9215	Interferon alfa-n3 inj	85	$7.03	95	$7.86		
J9216	Interferon gamma 1-b inj	85	$187.19	95	$209.22		
J9217	Leuprolide acetate suspnsion	81	$500.58	95	$622.33		
J9218	Leuprolide acetate injeciton	85	$23.26	95	$25.10		
J9219	Leuprolide acetate implant	85	$4,831.40	95	$5,399.80		
J9230	Mechlorethamine hcl inj	85	$10.74	95	$12.01		
J9245	Inj melphalan hydrochl 50 MG	85	$375.88	95	$420.10		
J9250	Methotrexate sodium inj	85	$0.35	95	$0.39		
J9260	Methotrexate sodium inj	85	$4.25	95	$4.75		
J9263	Oxaliplatin	85	$8.45	95	$9.45		

HCPCS Code	Short Description	AWP %	2004 Limit for Drugs (other than ESRD drugs separately billed by independent ESRD Facilities and drugs Infused through DME)	ESRD %	2004 Payment Limit for ESRD Drugs Separately Billed by Independent ESRD Facilities[c]	DME Infusion %	2004 Payment Limit for Drugs when Infused through DME[d]
J9265	Paclitaxel injection	81	$138.28	95	$162.17		
J9266	Pegaspargase/singl dose vial	85	$1,277.13	95	$1,543.75		
J9268	Pentostatin injection	85	$1,644.27	95	$1,837.72		
J9270	Plicamycin (mithramycin) inj	85	$83.93	95	$93.80		
J9280	Mitomycin 5 MG inj	85	$57.12	95	$63.84	95	$127.40
J9290	Mitomycin 20 MG inj	85	$185.64	95	$207.48		
J9291	Mitomycin 40 MG inj	85	$255.00	95	$285.00		
J9293	Mitoxantrone hydrochl / 5 MG	85	$321.52	95	$359.35		
J9300	Gemtuzumab ozogamicin	85	$1,953.94	95	$2,183.81		
J9310	Rituximab cancer treatment	81	$427.28	95	$501.13		
J9320	Streptozocin injection	85	$126.58	95	$141.47		
J9340	Thiotepa injection	85	$83.73	95	$93.58		
J9350	Topotecan	84	$706.17	95	$798.65		
J9355	Trastuzumab	85	$52.01	95	$58.13	95	$58.13
J9357	Valrubicin, 200 mg	85	$471.24	95	$526.68		
J9360	Vinblastine sulfate inj	85	$2.81	95	$3.15	95	$4.10
J9370	Vincristine sulfate 1 MG inj	85	$30.40	95	$33.98	95	$33.98
J9375	Vincristine sulfate 2 MG inj	85	$60.81	95	$67.96	95	$67.96
J9380	Vincristine sulfate 5 MG inj	85	$152.02	95	$160.36	95	$169.91
J9390	Vinorelbine tartrate/10 mg	81	$76.19	95	$89.36		
J9395	Injection, Fulvestrant	85	$78.36	95	$87.58		
J9600	Porfimer sodium	85	$2,329.60	95	$2,603.67		

HCPCS Code	Short Description	AWP %	2004 Limit for Drugs (other than ESRD drugs separately billed by independent ESRD Facilities and drugs infused through DME)	ESRD %	2004 Payment Limit for ESRD Drugs Separately Billed by Independent ESRD Facilities[c]	DME Infusion %	2004 Payment Limit for Drugs when Infused through DME[d]
P9041	Albumin (human),5%, 50ml	85	$13.01	95	$14.54		
P9043	Plasma protein fract,5%,50ml	85	$13.01	95	$14.54		
P9045	Albumin (human), 5%, 250 ml	85	$49.30	95	$55.10		
P9046	Albumin (human), 25%, 20 ml	85	$13.01	95	$14.54		
P9047	Albumin (human), 25%, 50ml	85	$49.30	95	$55.10		
P9048	Plasmaprotein fract,5%,250ml	85	$26.04	95	$29.10		
Q0136	Non esrd epoetin alpha inj	87	$11.62	95	$12.69		
Q0137[f]	Darbepoetin alfa, non-esrd	85	$4.24	95	$4.74		
Q0163	Diphenhydramine HCl 50mg	85	$0.08				
Q0164	Prochlorperazine maleate 5mg	85	$0.51				
Q0165	Prochlorperazine maleate10mg	85	$0.77				
Q0166	Granisetron HCl 1 mg oral	85	$39.98				
Q0167	Dronabinol 2.5mg oral	85	$2.93				
Q0168	Dronabinol 5mg oral	85	$7.96				
Q0169	Promethazine HCl 12.5mg oral	85	$0.28				
Q0170	Promethazine HCl 25 mg oral	85	$0.02				
Q0171	Chlorpromazine HCl 10mg oral	85	$0.06				
Q0172	Chlorpromazine HCl 25mg oral	85	$0.08				
Q0173	Trimethobenzamide HCl 250mg	85	$0.40				
Q0174	Thiethylperazine maleate10mg	85	$0.67				
Q0175	Perphenazine 4mg oral	85	$0.51				
Q0176	Perphenazine 8mg oral	85	$0.83				

HCPCS Code	Short Description	AWP %	2004 Limit for Drugs (other than ESRD drugs separately billed by independent ESRD Facilities and drugs infused through DME)	ESRD %	2004 Payment Limit for ESRD Drugs Separately Billed by Independent ESRD Facilities[c]	DME Infusion %	2004 Payment Limit for Drugs when Infused through DME[d]
Q0177	Hydroxyzine pamoate 25mg	85	$0.38				
Q0178	Hydroxyzine pamoate 50mg	85	$0.27				
Q0179	Ondansetron HCl 8mg oral	85	$27.22				
Q0180	Dolasetron mesylate oral	85	$64.80				
Q0183	Nonmetabolic active tissue	85	$13.78	95	$16.16		
Q0187	Factor viia recombinant	95	$1,681.50	95	$1,681.50		
Q2009	Fosphenytoin, 50 mg	85	$5.44				
Q2011	Hemin, per 1 mg	85	$6.62				
Q2022	VonWillebrandFactrCmplxperIU	95	$0.95	95	$0.95		
Q3025	IM inj interferon beta 1-a	85	$76.23	95	$85.21		
Q4054[f]	Darbepoetin alfa, esrd use	85	$4.24	95	$4.74		
Q4055[f]	Epoetin alfa, esrd use	87	$11.62				
Q4075	Acyclovir, 5 mg	85	$0.42	95	$0.47	95	$0.47
Q4076	Dopamine hcl, 40 mg					95	$0.62
Q4077	Treprostinil, 1 mg					95	$61.75

BILLING CODE 4120-01-C

(a) The absence or presence of a HCPCS code and payment limit in this table does not indicate Medicare coverage of the drug. Similarly, the inclusion of a payment limit within a specific column does not indicate Medicare coverage of the drug in that specific category. These determinations shall be made by the local Medicare contractor processing the claim.

(b) The default payment limit for a drug listed in this table is based on 85 percent of the AWP determined as of April 1, 2003. Other percentages and/or dates may apply to certain drugs as described earlier in this regulation.

(c) This listing of drugs furnished in connection with renal dialysis services and separately billed by renal dialysis facilities is comprehensive but may not be exhaustive. The payment limit for a drug furnished in connection with a renal dialysis service and separately billed by a renal dialysis facility is based on 95 percent of the AWP reflected in the published compendium as of September 1, 2003, regardless of its possible absence from this list.

(d) The payment limit for a drug infused through DME is based on 95 percent of the AWP for the drug in effect on October 1, 2003.

(e) Based on our review of data and information submitted by the manufacturer, we will pay for these drugs when furnished in 2004 at 94 percent of the AWP determined as of April 1, 2003.

(f) While the following list of HCPCS drug codes is new for CY 2004, the drugs they represent were available for payment as of April 1, 2003 under existing HCPCS codes. Below is a listing of the replacement/reference HCPCS for the new HCPCS drug codes effective January 1, 2004.

New HCPCS Code (effective 1/1/04)	Replacement/Reference HCPCS Code
J0152	J0151
J1595	Q2010
J2001	J2000
J2353, J2354	J2352
J2505	Q4053
J7621	J7618-J7619; J7644
J9178	J9180
Q0137, Q4054	J0880
Q4055	Q9920-Q9940

III. Waiver of Proposed Rulemaking

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** to provide a period for public comment before the provisions of a notice take effect. We can waive this procedure, however, if we find good cause that notice and comment procedure is impracticable, unnecessary, or contrary to the public interest and incorporate a statement of the finding and the reasons for it into the notice issued.

In this case, we believe that it is unnecessary to subject the corrections identified above to public comment. These errors were the result of inadvertent omissions and pricing errors in Addendum F. Our corrections of the pricing errors and addition of pricing information in the addendum does not substantively change any policy nor affect the payment methodology established under the new legislation. For this reason, we find it unnecessary to provide the opportunity for comment on the technical corrections made in this notice. Therefore, we find good cause to waive notice and comment procedures.

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

Dated: March 4, 2004.

Ann C. Agnew,

Executive Secretary to the Department.

[FR Doc. 04–6338 Filed 3–19–04; 9:16 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 410 and 414

CMS–1476–CN2

RIN 0938–AL96

Medicare Program; Revisions to Payment Policies Under the Physician Fee Schedule for Calendar Year 2004: Correction

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

ACTION: Correction of final rule with comment period.

SUMMARY: This document corrects technical errors that appeared in the final rule with comment period published in the **Federal Register** on November 7, 2003 entitled "Revisions to Payment Policies Under the Physician Fee Schedule for Calendar Year 2004."

EFFECTIVE DATE: This rule is effective January 1, 2004.

FOR FURTHER INFORMATION CONTACT: Diane Milstead (410) 786–3355.

SUPPLEMENTARY INFORMATION:

I. Background

In FR Doc. 03–27639 of November 7, 2003 (68 FR 63196), there were a number of technical errors that we are identifying and correcting in the Correction of Errors section below. Additionally, there are various revisions to Addendum F. While there were other errors in the November 7, 2003 rule, they were corrected by the interim final rule with comment period published in the January 7, 2004 **Federal Register** (69 FR 1084). (The provisions in this correction notice are effective as if they were included in the document published November 7, 2003.)

Discussion of Addendum F

In Addendum F, concerning the physician self-referral prohibition, we failed to include the new HCPCS code G0328 for fecal blood screening. Therefore, we are adding in alphanumeric order "G0328 Fecal blood scrn immunoassay" on page 63393, in the first column, in the list of Clinical Laboratory Services and also on page 63395, in the third column, under the heading "Preventive Screening Tests, Immunizations and Vaccines," following the entry for HCPCS code G0202. Additionally, in Addendum F, we inadvertently included two HCPCS codes for prostate brachytherapy that were deleted from the HCPCS effective January 1, 2004. Consequently, we are removing HCPCS codes G0256 "Prostate brachy w palladium" and G0261 "Prostate brachytherapy w/rad" from the list of codes that appears on page 63395, in the second column, under the subheading that reads "INCLUDE the following CPT and HCPCS level 2 codes classified elsewhere".

II. Correction of Errors

■ In FR Doc. 03–27639 of November 7, 2003 (68 FR 63196), make the following corrections—

■ 1. On page 63204, column three, second full sentence revise as follows to reference two additional E/M codes that were inadvertently omitted. The sentence now reads, "This will allow time for the PEAC to reconsider these eight E/M codes, as well as the two nursing facility discharge management codes (CPT 99315 and 99316)."

■ 2. On page 63218, in Table 3, the age references for codes G0321, G0322, G0325 and G0326 were labeled incorrectly. The correct references are as follows:

2 to 11 G0321
12 to 19 G0322
2 to 11 G0325
12 to 19 G0326

■ 3. On page 63226, in the discussion contained in the last paragraph of the first column, which continues to the second column, we erroneously characterized the history and usage of CPT code 17310. Replace the first two sentences beginning with "Prior to 2003, this code . . . and ending with ". . . during a particular stage of Mohs surgery." with the following: "Prior to 2003, this code was reported as each additional specimen, after the first five specimens, per stage of Mohs surgery. The reason for the 2003 CPT clarification was due to confusion caused by an inaccurate description of the code published in 1992. The description led some carriers to erroneously deny payment for CPT code 17310."

■ 4. On page 63230, column two, last sentence of second paragraph, add "work RVUs" after 0.00 so sentence reads "We are also accepting the RUC recommendation of 0.00 work RVUs for CPT code 93788."

■ 5. On page 63231, second column, in the response to comments about inappropriate valuation of radiopharmaceutical G-codes, G0273 and G0274, revise the last sentence of the response to read as follows "CPT codes 79403, *Radiopharmaceutical therapy, radiolabeled monoclonal antibody by intravenous infusion,* and 78802, *Radiopharmaceutical localization of tumor or distribution of radiopharmaceutical agent(s); whole body single day imaging* or 78804, *Radiopharmaceutical localization of tumor or distribution of radiopharmaceutical agent(s); whole body, requiring two or more days imaging* will be used to report these services."

■ 6. On page 63234, in Table 6, we incorrectly state that we agreed with the RUC recommendation to carrier price CPT code 47133. This service is included in payment to the organ procurement facility and is not paid under the physician fee schedule. In addition, the table erroneously states that we disagree with the RUC recommendations for CPT codes 61863 and 61867. The table is corrected to read as follows:

[1]CPT code	Mod	Description	RUC recommendation	HCPAC recommendation	CMS decision	2004 work RVU
47133	.....	Removal of donor liver	([2])	.....	Disagree	([3])
61863	.....	Implant neuroelectrode	19.00	.....	Agree	19.00
61867	.....	Implant neuroelectrode	31.34	.....	Agree	31.34

[1] All CPT codes copyright 2003 American Medical Association.
[2] Carrier.
[3] "X" status.

■ 7. On page 63236, second column, the discussion concerning CPT codes 61863 and 61867 is deleted, since we agreed with the RUC recommendation for these services.

■ 8. On page 63238, column 1, in the first and second sentences of the first paragraph under the subheading entitled, "C. Revisions Effective for 2004," the references to "Tables 7 and 8" are corrected to read "Tables 8 and 9."

■ 9. On page 63238, column 2 is amended as follows:

■ a. In Table 8, under the heading "Preventive Screening Tests, Immunizations and Vaccines," the following phrase is added as the last entry: "G0328 Fecal blood scrn immunoassay".

■ b. In Table 9, immediately under the heading "Radiation Therapy Services and Supplies," the following phrases are added in alphanumeric order:

G0256 Prostate brachy w palladium
G0261 Prostate brachytherapy w/rad

■ 10. On page 63238, column 3, the third sentence of the third paragraph is revised to read as follows: "Table 8 also reflects the addition of a screening mammography code (CPT 76083), a flu vaccine code (CPT 90655), and a fecal blood screening code (HCPCS G0328) to the list that identifies preventive screening tests, immunizations and vaccines that may qualify for the exception described in § 411.355(h) for these items and services."

■ 11. On page 63238, column 3, in the first sentence of the fourth paragraph, the reference to "Table 8" is corrected to read "Table 9" and in the last line of the fifth paragraph, the reference to "VI.B" is corrected to read "V.B".

■ 12. On page 63261, third column, first sentence, first paragraph under "Addendum A—Explanation and Use of Addendum B," replace "2003" with "2004". The sentence now reads "The addenda on the following pages provide various data pertaining to the Medicare physician fee schedule for physicians' services furnished in 2004". In the heading of the next section, replace references to "2003" with "2004". The heading now reads "Addendum B—2004 Relative Value Units and Related Information Used in Determining Medicare payments for 2004".

■ 13. On page 63393, in Addendum F, in the first column, in the list of Clinical Laboratory Services, the following HCPCS code and its descriptor are added in alphanumeric order:

G0328 Fecal blood scrn immunoassay

■ 14. On page 63395, in addendum F, in the third column, under the heading "Preventive Screening Tests, Immunizations and Vaccines," the following HCPCS code and its descriptor are added in alphanumeric order:

G0328 Fecal blood scrn immunoassay

■ 15. On page 63395, in Addendum F, in the second column, under the subheading, "INCLUDE the following CPT and HCPCS level 2 codes classified elsewhere," the following CPT codes and their descriptors are removed:

G0256 Prostate brachy w palladium
G0261 Prostate brachytherapy w/rad

III. Waiver of Proposed Rulemaking

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** to provide a period for public comment before the provisions of a notice take effect. We can waive this procedure, however, if we find good cause that notice and comment procedure is impracticable, unnecessary, or contrary to the public interest and incorporate a statement of the finding and the reasons for it into the notice issued.

In this case, we believe that it is unnecessary to subject the corrections identified above to public comment. These errors were the result of inadvertent omissions and typographical errors in Addendum F. Our corrections of the pricing errors and addition of pricing information in the addendum does not substantively change any policy nor affect the payment methodology established under the new legislation. For this reason, we find it unnecessary to provide the opportunity for comment on the technical corrections made in this notice. Therefore, we find good cause to waive notice and comment procedures.

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

Dated: March 19, 2004.

Ann C. Agnew,

Executive Secretary to the Department.

[FR Doc. 04–6832 Filed 3–25–04; 8:45 am]

BILLING CODE 4120–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CC Docket No. 98–67, FCC 03–190; DA 04–741]

Telecommunications Relay Services and Speech-to-Speech Services for Individuals With Hearing and Speech Disabilities

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective date.

SUMMARY: In this document, the Commission announces that the Office of Management and Budget (OMB) approved for three years the information collection requirements contained in the *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Declaratory Ruling, (*Declaratory Ruling*).

DATES: 47 CFR 64.604(a)(1) and (a)(3) published at 68 FR 55898, September 29, 2003 are effective March 26, 2004.

FOR FURTHER INFORMATION CONTACT: Dana Jackson or Cheryl King of the Consumer & Governmental Affairs Bureau, Disability Rights Office at (202) 418–2517 (voice), (202) 418–7898 (TTY).

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document released March 19, 2004 in DA 04–741 announcing OMB approval for three years the information collection requirements contained in *Declaratory Ruling*. The information collections were approved by OMB on February 20, 2004. OMB Control Number 3060–1053.

The Commission publishes this notice of the effective date of the rules. If you have any comments on these burden estimates, or how we can improve the

collection(s) and reduce the burden(s) they cause you, please write to Les Smith, Federal Communications Commission, Room 1–A804, 445 12th Street, SW., Washington, DC 20554. Please include the OMB Control Number 3060–1053, in your correspondence. We will also accept your comments regarding the Paperwork Reduction Act aspects of the collection via the Internet, if you send them to *Leslie.Smith@fcc.gov* or call (202) 418–0217.

To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0531 (voice), (202) 418–7365 (TTY). This *Public Notice* can also be downloaded in Text and ASCII formats at: *http://www.fcc.gov/cgb/dro.*

Synopsis

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), the FCC is notifying the public that it received approval from OMB on February 20, 2004, for the collection(s) of information contained in the Commission's voluntary reporting requirements in 47 CFR 64.604(a)(1) and (a)(3). The OMB Control Number is 3060–1053. The annual reporting burden for the collection(s) of information, including the time for gathering and maintaining the collection of information, is estimated to be: 1 respondent, and average of 8 hours per response per annum, for a total hour burden of 8 hours, and no annual cost. Under 5 CFR 1320, an agency may not conduct or sponsor a collection of information unless it displays a current valid OMB 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 OMB Control Number.

The foregoing notice is required by the Paperwork Reduction Act of 1995, Pub. L. 104–13, October 1, 1995, 44 U.S.C. 3507.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–6821 Filed 3–25–04; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 031107275–4082–02; I.D. 102803A]

RIN 0648–AP03

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery off the Southern Atlantic States; Amendment 13A

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

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to implement Amendment 13A to the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP). This final rule extends the current prohibitions on fishing for South Atlantic snapper-grouper in the experimental closed area and on retaining such species in or from the area. The experimental closed area constitutes a portion of the Oculina Bank Habitat Area of Particular Concern (HAPC), which is in the exclusive economic zone (EEZ) in the Atlantic Ocean off Ft. Pierce, FL. The intended effect is to continue the benefits of the closed area, namely, enhanced stock stability and increased recruitment of South Atlantic snapper-grouper by providing an area where deepwater snapper-grouper species can grow and reproduce without being subjected to fishing mortality.

DATES: This final rule is effective April 26, 2004.

ADDRESSES: Copies of the final regulatory flexibility analysis (FRFA) are available from the Southeast Regional Office, NMFS, 9721 Executive Center Drive N., St. Petersburg, FL 33702.

FOR FURTHER INFORMATION CONTACT: Julie Weeder, telephone: 727–570–5753, fax: 727–570–5583, e-mail: *Julie.Weeder@noaa.gov.*

SUPPLEMENTARY INFORMATION: The snapper-grouper fishery off the southern Atlantic states is managed under the FMP. The FMP was prepared by the South Atlantic Fishery Management Council (Council) and is implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

In Amendment 6 to the FMP, the Council proposed prohibitions on fishing for South Atlantic snapper-grouper in what is currently known as the experimental closed area and on retaining such species in or from the area. NMFS approved these prohibitions, and they became effective June 27, 1994 (59 FR 27242, May 26, 1994). In addition, in the experimental closed area, any South Atlantic snapper-grouper taken incidentally by hook-and-line gear must be released immediately by cutting the line without removing the fish from the water.

The experimental closed area is slightly less than 92 square nautical miles in the EEZ offshore from Ft. Pierce to Sebastian Inlet, FL. The geographical coordinates are specified at 50 CFR 622.35(c)(2). The experimental closed area constitutes a portion of the southern part of the Oculina Bank HAPC. In the entire HAPC no person may: (1) use a bottom longline, bottom trawl, dredge, pot, or trap; (2) if aboard a fishing vessel, anchor, use an anchor and chain, or use a grapple and chain; or (3) fish for rock shrimp or possess rock shrimp in or from the area on board a fishing vessel.

The preambles for both the proposed and final rules for Amendment 6 stated that the measures applicable to the experimental closed area "* * * will 'sunset' after 10 years if not reauthorized by the Council." (59 FR 9721, March 1, 1994 and 59 FR 27242, May 26, 1994, respectively).

As stated above, measures applicable to the experimental closed area were intended to enhance stock stability and increase recruitment of South Atlantic snapper-grouper by providing an area where deepwater snapper-grouper species could grow and reproduce without being subjected to fishing mortality. They were based on the Council's concern that traditional fishery management measures, such as minimum size limits and quotas, might not be sufficient to protect fully the snapper-grouper resources. The Council believed the measures would provide protection for overfished species in the management unit while minimizing adverse impacts upon user groups.

Based on limited information, there appear to be some encouraging signs of positive biological impacts from the initial 9–year prohibition of fishing for snapper-grouper species within the experimental closed area since it was established in 1994. A study conducted in 2001 found that, in the few areas where habitat remained intact, there were more and larger groupers than observed in a 1995 study, and male gag and scamp were also common. The observation of male gag and scamp is particularly of interest because size, age,

and proportion of males of these species have declined both in the Gulf of Mexico and South Atlantic regions. Other encouraging signs include the observation of juvenile speckled hind, which is a candidate species for listing under the Endangered Species Act. However, some species in the management unit remain overfished and continued protection is required.

This final rule will continue the current measures applicable to the experimental closed area indefinitely; no changes to regulatory text are required. The current measures at 50 CFR 622.35(c)(2) read as follows:

"(2) *Experimental closed area.* Within the Oculina Bank HAPC, the experimental closed area is bounded on the north by 27°53′ N. lat., on the south by 27°30′ N. lat., on the east by 79°56′ W. long., and on the west by 80°00′ W. long. No person may fish for South Atlantic snapper-grouper in the experimental closed area, and no person may retain South Atlantic snapper-grouper in or from the area. In the experimental closed area, any South Atlantic snapper-grouper taken incidentally by hook-and-line gear must be released immediately by cutting the line without removing the fish from the water."

The Council will review the configuration and size of the experimental closed area within 3 years of the publication date of this final rule and will re-evaluate all measures applicable to the area after 10 years.

The Council believes these actions provide the most biological, social, and economic benefits while allowing for adaptive management. Extending the prohibition on fishing for snapper-grouper species in the experimental closed area for an indefinite period will continue to protect snapper-grouper populations and protect *Oculina* coral and associated habitat. Such extension will also provide a hedge against the scientific uncertainty associated with the status of snapper-grouper species and reduce the possibility that these populations may fall below sustainable levels. Economically it is expected that the long-term benefits, such as "insurance" against the uncertainty of stock assessments and the non-use benefits of extending the prohibitions on snapper-grouper fishing in the closed area, outweigh the short-term benefits of opening the area to harvest. These measures are also expected to provide the most long-term positive impacts because they allow for adaptive management which can be seen as an assurance to the public that the area will be monitored and reviewed. Should the Council find after the 3–year review on size and configuration that the boundaries of the area are not appropriate, they can be changed at that time. In addition, the 10–year re-evaluation period will assure the public that the area will not be closed and forgotten. Additional background and rationale for the measures discussed above are contained in Amendment 13A.

NMFS approved Amendment 13A on February 4, 2004. NMFS published a proposed rule to implement Amendment 13A and requested comments on the proposed rule through January 9, 2004 (68 FR 66069, November 25, 2003).

Comments and Responses

NMFS received eight letters from the public during the comment periods on Amendment 13A and the proposed rule. The comments are summarized below along with the responses from NMFS.

Comment 1: The Oculina Bank Experimental Closed Area (OECA) is a failed experiment in fisheries management because there was not adequate policing. The OECA should be opened immediately and indefinitely.

Response: Scientific studies suggest that there has been some success with the OECA, and that a continued closure is appropriate. Signs of recovery of snapper-grouper species in the OECA are encouraging. A recent study showed that there were more and larger groupers in the area compared to 1995, and male gag and scamp were also observed. Finally, researchers observed juvenile speckled hind, a candidate species for the endangered species list. Opening the area would result in the loss of any gains accrued in the last 10 years, and short-term gains from increased catches would be outweighed by negative impacts to snapper-grouper populations. Enforcement activity for the OECA has recently increased. In 2003, NOAA Enforcement assigned a NOAA Enforcement special agent whose responsibility was to monitor fishing activity in the Oculina Bank area and coordinate law enforcement efforts.

Comment 2: Two additional options should have been considered but were not: reducing the size of the area, and instituting a seasonal closure during spawning months for certain fish.

Response: The Council considered both of these options during the scoping process. Neither a reduction in size of the current closed area, nor a time-limited spawning closure, would be expected to provide the degree of protection required to buffer snapper-grouper stocks against the scientific uncertainty associated with management of these species. The current size of the OECA is based on the best available scientific information, which includes, but is not limited to, the distribution of the *Oculina* coral and the deepwater snapper-grouper species associated with it. If the size of the OECA were reduced, some corals now located inside the boundaries of the present closed area would be susceptible to damage from hook-and-line gear and/or anchoring of vessels. Seasonal closures would not protect the density, sex ratio, or age, size, and community structure of fishes found in the OECA, because of harvests made in the open season. Fishing effort applied outside the closed season could remove the largest, oldest individuals with the best genetic makeup and greatest reproductive potential.

Comment 3: While the closure of the OECA as described in the preferred alternative is a step in the right direction, the OECA should be permanently (not indefinitely) closed. Some writers said it should be closed until scientists show that it is no longer necessary. One writer suggested that 3 years was not long enough to evaluate success in the area, and the site should be given adequate time before evaluation. Others suggested that regular reviews should occur, but there should be no scheduled time limitations or deadlines for review.

Response: Indefinite closure allows for adaptive management, which ensures that the area will be actively managed. Using adaptive management and the 10–year re-evaluation period, the public is assured that the area will be evaluated within prescribed timeframes and will not be re-opened prematurely. The evaluation scheduled for 3 years from the publication date of the final rule is meant to determine whether the size and shape of the OECA are appropriate, *i.e.*, whether the configuration and location provide adequate protection for growth and reproduction of the target species, not whether fishes and corals in the area have recovered due to the closure. The deadlines set for reviews do not in themselves provide for action to change the FMP. Opening the OECA or changing the size or configuration of the area would require additional action by the Council and would necessitate analysis of the existing scientific data on the efficacy of the OECA. Any scientific reasoning for opening the OECA would be rigorously reviewed as part of that process.

Comment 4: (a) Quotas on all fish stocks in the OECA should be cut by 40 percent in 2004 and by 10 percent each successive year; (b) No fishing for snapper-grouper species should be

allowed in the area, even incidental catch; (c) The size of the OECA should be doubled; (d) More marine sanctuaries should be established under the direction of the Caribbean Fisheries Management Council; and (e) The ban on anchoring in the OECA should be extended to include non-fishing vessels.

Response: (a) The Council is currently developing Amendment 13B to the FMP. This amendment will include options to restrict harvests of overfished species of the snapper-grouper complex throughout the South Atlantic. If such restrictions are implemented, they will be based on the best available scientific information. Quotas, along with seasonal closures and size limits, are frequently used management tools that help to ensure sustainability of species in the snapper-grouper management unit. (b) Incidental bycatch is non-directed and cannot be completely avoided, unless fishing for all species (including non-snapper-grouper species) is prohibited. Current regulations require cutting the line on incidentally hooked snapper-grouper species caught in the OECA without removing them from the water. Such responsible and ethical fishing practices provide the best possible chance for survival of these fishes. (c) The size and configuration of the OECA will be re-evaluated 3 years after the publication date of this final rule. (d) Marine sanctuaries in the United States are established pursuant to the National Marine Sanctuary Act, and not pursuant to the Magnuson-Stevens Act. (e) This amendment was prepared and will be implemented under the authority of the Magnuson-Stevens Act, which regulates fishing.

Comment 5: Adequate enforcement is needed to ensure the security of the OECA, and more funding should be devoted to this end. Additional funding is needed to monitor the efficacy of the closure of the OECA.

Response: Since this amendment was developed, enforcement efforts in the OECA have been enhanced significantly. For example, the Council stressed the importance of enforcement of the OECA; NOAA General Counsel revised its penalty schedule and increased civil administrative penalties; and a NOAA Enforcement special agent was assigned to the area and is responsible for coordinating patrols of the OECA and cooperating with partners to charge violators. Furthermore, the Florida Fish and Wildlife Conservation Commission purchased a 65–ft (20–m) offshore patrol vessel through the Joint Enforcement Agreement Fund from NOAA Enforcement. One of the missions of this enforcement vessel is to patrol the Oculina Bank and OECA. An Evaluation Plan, with needed research and monitoring studies and an enforcement/outreach program, is to be developed within 1 year of implementation of this amendment, using the expertise of the Council's Law Enforcement, Habitat, Coral, and Snapper-Grouper Advisory Panels. NMFS and the Council agree that continued research and monitoring of the OECA is important for measuring progress.

Comment 6: The Oculina Habitat Area of Particular Concern (HAPC) should be extended to include recently discovered *Oculina* thickets that lie just outside the HAPC.

Response: Amendment 13A states that, in 3 years, the size and configuration of the OECA will be re-evaluated using the best available information.

Comment 7: An integrated management plan for the OECA and HAPC should be developed that incorporates regulatory actions, research and monitoring activities, enforcement needs, and outreach and education programs.

Response: An Evaluation Plan, with needed research and monitoring studies and an enforcement/outreach program, is to be developed within 1 year of implementation of this amendment, using the expertise of the Council's Law Enforcement, Habitat, Coral, and Snapper-Grouper Advisory Panels.

Classification

The Administrator, Southeast Region, NMFS, determined that Amendment 13A is necessary for the conservation and management of the South Atlantic snapper-grouper fishery and that it is consistent with the national standards of the Magnuson-Stevens Act and other applicable laws.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

NMFS prepared an FRFA, based on the Regulatory Impact Review, that describes the economic impacts that this final rule will have on small business entities. A summary of the FRFA follows:

Amendment 6 to the FMP, implemented in May 1994, established harvest and possession prohibitions for snapper-grouper species in the Oculina Experimental Closed Area. These prohibitions are scheduled to sunset in June 2004. This final rule will extend these prohibitions for an indefinite period of time for the purpose of continuing protection of snapper-grouper species, and reducing the possibility that these populations may fall below sustainable levels. Further, by restricting the ability to harvest fish from the area, the rule is also expected to provide protection to the Oculina coral in the area. The Magnuson-Stevens Act, as amended, provides the statutory basis for the rule.

No public comments were received concerning the IRFA. Therefore, no changes were made in the final rule as a result of public comments.

The final rule does not impose any reporting or recordkeeping requirements.

There are two general classes of small entities that will be directly affected by the rule, commercial fishing vessels and for-hire fishing vessels. The Small Business Administration defines a small business that engages in commercial fishing as a firm that is independently owned and operated, is not dominant in its field of operation, and has annual receipts up to $3.5 million per year. The revenue benchmark for a small business that engages in for-hire fishing is a firm that has annual receipts up to $6.0 million per year.

There were 1,174 commercial vessels that participated in the snapper-grouper fishery in the South Atlantic during 2002. Of these vessels, 120 were homeported in the area of interest, where the "area of interest" is defined as those home port locations on the Florida Atlantic coast from Cape Canaveral south to West Palm Beach and are in the closest geographic proximity to the area covered by the rule. Commercial vessels operating in the snapper-grouper fishery in this area are estimated to have average annual gross and net incomes of approximately $39,745 and $12,388, respectively. Based on this income profile, it is assumed that all commercial fishing entities that will be affected by the rule are small entities.

For the for-hire sector, 1,221 snapper-grouper for-hire permits were issued to vessels in the southern Atlantic states in 2002. Of this total, 94 permits were issued to for-hire vessels in the area of interest. These vessels comprise two types of business operations, charterboats, which are smaller vessels designed to carry six or fewer passengers that book trips on a vessel basis, and headboats, which are larger vessels that book passage on an individual angler basis. The average gross and net revenues in 1997 for charterboats operating off the Atlantic coast of Florida are estimated at $57,000 and $15,000, respectively (2001 dollars), while that of headboats are estimated at $155,000 and $69,000, respectively (2001 dollars). Based on these gross revenue profiles, all for-hire vessels that

will be affected by the rule are assumed to be small entities.

The number of commercial and for-hire vessels that would fish in the closed area should the area reopen is not known. During the public comment period on the proposed rule, no one expressed an intent or desire to fish in the area should it reopen. However, all entities in the area of interest have the potential to enter the area. All such entities will be covered by the final rule, and all said entities are small entities.

The final rule is not expected to alter present fishing practices. All entities can continue to fish in the location, manner and frequency that they currently operate. Therefore, the final rule should not affect the profitability of identified vessels.

Five alternatives to the final rule were considered. One alternative differs from the rule only in that it lacks a specific schedule for re-evaluation of the rule. Three alternatives also lack a re-evaluation schedule and differ from the rule in the duration of the prohibition. No impacts have been identified associated with the presence or absence of a prescribed re-evaluation schedule. These four alternatives, therefore, are expected to have the same effect on the affected entities as the final rule. None of these four alternatives would restrict current fishing practices in any way and, therefore, would not impose any new operational costs and would not adversely impact current harvests. Thus, current profits of participants in this fishery are not expected to be reduced. The only impact any of these four alternatives may induce would be the elimination of potential, but not certain, increased short-term profits that might be derived from fishing activity directed into the *Oculina* area, should sunset have been allowed to occur. The fifth alternative, the no-action alternative, would allow for sunset of the prohibition. This alternative, and the three alternatives that specify shorter prohibition duration than the final rule, would allow potential, but not certain, short-term increases in profits to occur if participants re-enter the area. However, if snapper-grouper populations become depleted as a result of directed effort inside the area, any short-term gains would dissipate. Further, these potential short-term profits are expected to be less than the benefits that will accrue to continued protection of the resource and area. The benefits of continued protection are expected to exceed any potential short-term profits that would materialize from fishing in the *Oculina* area no matter how long the prohibition continues. However, it is the Council's intent to achieve long term continued protection and those alternatives which limit the duration of the prohibition will not meet this intent. The final rule, therefore, is not expected to induce any significant economic impacts on small entities, best suits management needs, and meet the Council's intent.

Copies of the FRFA are available upon request (see **ADDRESSES**).

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

Dated: March 19, 2004.

Rebecca Lent,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 04–6723 Filed 3–25–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 031124287–4060–02; I.D. 032204H]

Fisheries of the Exclusive Economic Zone off Alaska; Pacific Cod by Catcher Vessels Using Trawl Gear in the Bering Sea and Aleutian Islands Management Area

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

ACTION: Closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific cod by catcher vessels using trawl gear in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the A season allocation of the 2004 total allowable catch (TAC) of Pacific cod specified for catcher vessels using trawl gear in this area.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), March 23, 2004, until 1200 hrs, A.l.t., April 1, 2004.

FOR FURTHER INFORMATION CONTACT: Josh Keaton, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI according to the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2004 Pacific cod TAC specified in the 2004 final harvest specification for groundfish of the BSAI (69 FR 9242, February 27, 2004) allocated 32,791 metric tons to catcher vessels using trawl gear in the BSAI for the period 1200 hrs, A.l.t., January 1, 2004, through 1200 hrs, A.l.t., April 1, 2004. See § 679.20(c)(3)(iii), § 679.20(c)(5), and § 679.20(a)(7)(i)(A) and (B).

In accordance with § 679.20(d)(1)(i), the Administrator, Alaska Region, NMFS, has determined that the A season allocation of the 2004 Pacific cod TAC specified for catcher vessels using trawl gear in the BSAI will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 32,391 mt, and is setting aside the remaining 400 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance will be reached. Consequently, NMFS is prohibiting directed fishing for Pacific cod by catcher vessels using trawl gear in the BSAI.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent the Agency from responding to the most recent fisheries data in a timely fashion and would delay the closure the A season allocation of Pacific cod specified for catcher vessels using trawl gear in the BSAI.

The AA also finds good cause to waive the 30–day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: March 23, 2004.

Alan D. Risenhoover,

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

[FR Doc. 04–6853 Filed 3–23–04; 2:34 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 69, No. 59
Friday, March 26, 2004

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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 993

[Docket No. FV04–993–1 PR]

Dried Prunes Produced in California; Undersized Regulation for the 2004–05 Crop Year

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule invites comments on changes to the undersized regulation for dried prunes received by handlers from producers and dehydrators under Marketing Order No. 993 for the 2004–05 crop year. The marketing order regulates the handling of dried prunes produced in California and is administered locally by the Prune Marketing Committee (Committee). This rule would remove the smallest, least desirable of the marketable size dried prunes produced in California from human consumption outlets and allow handlers to dispose of the undersized prunes in such outlets as livestock feed. The Committee estimated that this rule would reduce the excess of dried prunes by approximately 4,300 tons while leaving sufficient prunes to fulfill foreign and domestic trade demand.

DATES: Comments received by April 23, 2004, will be considered prior to issuance of a final rule.

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

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

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

SUPPLEMENTARY INFORMATION: This proposal is issued under Marketing Agreement and Order No. 993, both as amended (7 CFR part 993), regulating the handling of dried prunes produced in California, hereinafter referred to as the "order." The marketing agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the "Act."

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

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

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

Summary

This proposal invites comments on changes to the undersized regulation in § 993.49(c) of the prune marketing order for the 2004–05 crop year for volume control purposes. The regulation removes prunes passing through specified screen openings. For French prunes, the screen opening would be increased from 23/32 to 24/32 of an inch in diameter; and for non-French prunes, the opening would be increased from 28/32 to 30/32 of an inch in diameter. This rule would remove the smallest, least desirable of the marketable size dried prunes produced in California from human consumption outlets. This rule would be in effect from August 1, 2004, through July 31, 2005, and was unanimously recommended by the Committee at a December 11, 2003, meeting.

Authority for Undersized Regulations as a Volume Control

Section 993.19b of the prune marketing order defines undersized prunes as prunes, which pass freely through a round opening of a specified diameter.

Section 993.49(c) of the prune marketing order establishes an undersized regulation of 23/32 of an inch for French prunes and 28/32 of an inch for non-French prunes. These diameter openings have been in effect for quality control purposes. Section 993.49(c) also provides that the USDA upon a recommendation of the Committee may establish larger openings for undersized dried prunes whenever it is determined that supply conditions for a crop year warrant such regulation.

Section 993.50(g) states in part: "No handler shall ship or otherwise dispose of, for human consumption, the quantity of prunes determined by the inspection service pursuant to § 993.49(c) to be undersized prunes." * * * Pursuant to § 993.52 minimum standards, pack

specifications, including the openings prescribed in § 993.49(c), may be modified by the USDA on the basis of a recommendation of the Committee or other information.

Pursuant to the authority in § 993.52 of the order, § 993.400 modifies the undersized prune openings prescribed in § 993.49(c) to permit undersized regulations using openings of 23/32 or 24/32 of an inch for French prunes and 28/32 or 30/32 of an inch for non-French prunes.

History of Undersized Regulations Used as a Volume Control

During the 1974–75 and 1977–78 crop years, the undersized prune regulation was established by USDA at 23/32 of an inch in diameter for French prunes and 28/32 of an inch in diameter for non-French prunes. These diameter openings were established in §§ 993.401 and 993.404, respectively (39 FR 32733, September 11, 1974; and 42 FR 49802, September 28, 1977). In addition, the Committee recommended and USDA established volume regulation percentages during the 1974–75 crop year with an undersized regulation at the aforementioned 23/32 and 28/32 inch diameter screen sizes. During the 1975–76 and 1976–77 crop years, the undersized prune regulation was established at 24/32 of an inch for French prunes and 30/32 of an inch for non-French prunes. These diameter openings were established in §§ 993.402 and 993.403, respectively (40 FR 42530, September 15 1975; and 41 FR 37306, September 3, 1976). The prune industry had an excess supply of prunes—particularly small size prunes. Rather than recommending volume regulation percentages for the 1975–76, 1976–77, and 1977–78 crop years, the Committee recommended the establishment of an undersized prune regulation applicable to all prunes received by handlers from producers and dehydrators during each of those crop years.

The objective of the undersized prune regulations during each of those crop years was to preclude the use of small prunes in manufactured prune products such as juice and concentrate. Handlers could not market undersized prunes for human consumption, but could dispose of them in nonhuman outlets such as livestock feed.

With these experiences as a basis, the marketing order was amended on August 1, 1982, establishing the continuing quality-related regulation for undersized French and non-French prunes under § 993.49(c). That regulation has removed from the marketable supply those prunes which are not desirable for use in prune products.

As in the 1970's, the prune industry is currently experiencing an excess supply of prunes, including the smaller sizes. During the 1998–99 crop year, an undersized prune regulation was established at 24/32 of an inch for French prunes, and 30/32 of an inch for non-French prunes. These diameter openings were established in § 993.405 (63 FR 20058, April 23, 1998).

With larger than desired carryin inventories and a 1999–2000 prune crop of about 172,000 natural condition tons, the Committee unanimously recommended continuing with an undersized prune regulation at 24/32 of an inch in diameter for French prunes and 30/32 of an inch in diameter for non-French prunes. These diameter openings were established in § 993.406 (64 FR 23759, May 4, 1999) and made effective from August 1, 1999, through July 31, 2000, or until the undersized prunes from that crop year were disposed of as required.

Because carryin inventories were larger than desired and the 2000–01 prune crop was expected to be about 203,000 natural condition tons, the Committee unanimously recommended continuing with an undersized prune regulation at 24/32 of an inch in diameter for French prunes and 30/32 of an inch in diameter for non-French prunes. These diameter openings were established in § 993.407 (65 FR 29945, May 10, 2000) and made effective from August 1, 2000, through July 31, 2001, or until the undersized prunes from that crop were disposed of as required.

Because supplies were expected to remain excessive in 2001–02, the Committee again unanimously recommended continuing with an undersized prune regulation at 24/32 of an inch in diameter for French prunes and 30/32 of an inch in diameter for non-French prunes. These diameter openings were established in § 993.408 (66 FR 30642, June 7, 2001) and made effective from August 1, 2001, through July 31, 2002, or until the undersized prunes are disposed of under the marketing order.

With supplies expected to remain excessive in 2002–03, the Committee again unanimously recommended continuing with an undersized prune regulation at 24/32 of an inch in diameter for French prunes and 30/32 of an inch in diameter for non-French prunes. These diameter openings were established in § 993.409 (67 FR 31717, May 10, 2002) and made effective from August 1, 2002, through July 31, 2003, or until the undersized prunes are disposed of under the marketing order.

Because supplies were not expected to remain excessive in 2003–04, the Committee did not recommend continuing with the undersized regulation from August 1, 2003 through July 31, 2004.

For the 1998–99 crop year, the carryin inventory level reached a record high of 126,485 natural conditions tons. Excessive inventories tend to dampen producer returns, and cause weak marketing conditions. The carryin for the 1999–2000 crop year was reduced to 59,944 natural condition tons. This reduction was due to the low level of salable production in 1998–99 (about 102,521 natural condition tons and 50 percent of a normal size crop) and the undersized prune regulation. The carryin for the 2000–01 crop year increased to 65,131 natural condition tons. This increase was due to a larger 1999–2000 crop size of about 171,754 natural condition tons and reduced shipments during the 1999–2000 crop year. The carryin for the 2001–02 crop year increased to 100,829 natural condition tons. This increase was due to a larger 2000–01 crop size of about 214,803 natural condition tons and a modest increase in shipments from a severely reduced shipment base during the 1999–2000 crop year. The carryin for the 2002–03 crop year decreased to 63,536 natural condition tons. This decrease was due to a smaller 2001–02 crop size of about 142,151 natural condition tons and a modest decrease in shipments from the shipment base during the 2000–01 crop year.

According to the Committee, the desired inventory level to keep trade distribution channels full while awaiting the new crop has ranged between 35,353 and 42,071 natural condition tons since the 1996–97 crop year while the actual inventory has ranged between 59,944 and 126,485 natural condition tons since that year. The desired inventory level for early season shipments fluctuates from year-to-year depending on market conditions.

At its meeting on December 11, 2003, the Committee unanimously recommended continuing an undersized prune regulation at 24/32 of an inch in diameter for French prunes and 30/32 of an inch in diameter for non-French prunes during the 2004–05 crop year for supply management purposes. This regulation would be in effect from August 1, 2004, through July 31, 2005, or until the undersized prunes from 2004–05 are properly disposed of as required under the marketing order.

The Committee estimated that there would be an excess of about 25,925 natural condition tons of dried prunes as of July 31, 2004. This proposed rule

would remove primarily small-sized prunes from human consumption channels, consistent with the undersized prune regulation that was implemented for the 1998–99, 1999–2000, 2000–01, 2001–02, and 2002–03 crop years. As mentioned earlier, an undersized prune regulation was not implemented last crop year (2003–04). It is estimated that approximately 4,300 natural condition tons of small prunes would be removed from human consumption channels during the 2004–05 crop year as a result of this rule. This would leave sufficient prunes to fill domestic and foreign trade demand during the 2004–05 crop year, and provide an adequate carryout on July 31, 2005, for early season shipments until the new crop is available for shipment. According to the Committee, the desired inventory level to keep trade distribution channels full while awaiting the 2004–05 crop is about 39,000 natural condition tons.

In its deliberations, the Committee reviewed statistics reflecting: (1) A worldwide prune demand which has been relatively stable at about 260,000 tons; (2) a worldwide oversupply that is expected to continue growing this decade (estimated at 305,115 natural condition tons by the year 2007); (3) a continuing oversupply situation in California caused by decreased shipments and continued large production from the plantings during the 1990's with higher yields per acre (between the 1990–91 and 2000–01 crop years, the yields ranged from 1.2 to 2.6 versus a 10-year average of 2.1 tons per acre); (4) California's continued excess inventory situation; and (5) low producer prices.

The production of these small sizes ranged from 1,335 to 8,778 natural condition tons during the 1991–92 through the 2002–03 crop years. The Committee concluded that it has to resume utilizing the undersized prune volume regulation in order to accelerate the return to a more balanced supply/demand situation in the interest of the California dried prune industry. In addition, the Committee supported other efforts to reduce burdensome supplies through an industry-funded tree removal program that was initiated in the fall of 2001. Through this program, over 4,700 bearing acres of prune plum trees were removed. At the request of the Committee, the USDA implemented a USDA funded tree removal program, wherein growers would be encouraged to remove prune plum trees. Through the USDA tree removal program, 13,248 bearing acres of prune plums were removed. While the industry successfully removed over 18,000 bearing acres of prune plum trees through the USDA and industry tree removal programs, prune production still exceeds demand.

Adding to the U.S. oversupply of prunes are imports of prune juice, which increased by 45 percent last year. The proposed change to the undersized regulation for the 2004–05 crop year will help bring supplies more in line with market needs.

Despite these supply management efforts, the industry's oversupply plight may continue over the next few years due to new prune plantings in recent years with higher yields per acre. These plantings have a higher tree density per acre than the older prune plantings. During the 1990–91 crop year, the non-bearing acreage totaled 5,900 acres; but by 1998–99, the non-bearing acreage had quadrupled to more than 26,000 acres. The non-bearing acreage has subsequently been reduced to 9,000 acres during the 2002–03 crop year. The 1996–97 through 2003–04 yields have ranged from 1.3 to 2.6 tons per acre. Over the last 10-years, the average was 2.3 tons per acre.

The 2003–04 dried prune crop is reported at 176,000 natural condition tons by the National Agricultural Statistics Service (NASS). The Committee is expecting another large crop of prunes during the 2004–05 crop year because of new bearing acreage coming into production and higher average yields.

Since the late 1990's, producers have not been able to recover the costs of drying, hauling, and paying the State of California producer promotion expenses on every ton of size 24/32 diameter dried prunes they delivered. The 1997–98 crop year producer prices for 24/32 of an inch in diameter French prunes were about $40–$50 per ton. This is about $260–$270 per ton below the cost of drying a ton of 24/32 diameter French prunes at a 4 to 1 dry-away ratio, the cost of hauling the prune/plums from the orchard to the dehydrator, and the assessments paid by producers under the California marketing order for promotion. During the 2003–04 crop year, producer prices are expected to be about $40 per ton for the 24/32 of an inch diameter French prunes, which is about $249 per ton below the cost of drying, hauling, and State promotion expenses. Low producer prices for all sizes of dried prunes are expected to continue until the prune supply and demand come more closely into alignment.

The intent of this proposal is to eliminate small sizes which have limited economic value, help reduce excess prune inventories, and to improve producer returns. Average producer returns currently are below the cost of production and the proposal would assist in enhancing returns.

The 1998–99, 1999–2000, 2000–01, 2001–02 and 2002–03 undersized prune rules of 24/32 of an inch for French prunes and 30/32 of an inch for non-French prunes have expedited the reduction of small prune inventories, but more needs to be done to bring supplies into balance with market demand. The excess inventory on July 31, 2003, was 32,619 natural condition tons. As noted earlier, during the 2003–04 crop year, the Committee did not implement an undersized prune volume regulation. The Committee believes that the same undersized prune regulation that was implemented for the 1998–99, 1999–2000, 2000–01, 2001–02 and 2002–03 crop years should be implemented during the 2004–05 crop year to continue reducing the inventories of small prunes, to help reduce the expected large 2004–05 prune crop, and more quickly bring supplies in line with demand. Attainment of this goal would benefit all of the producers and handlers of California prunes.

The recommended decision of June 1, 1981 (46 FR 29271) regarding undersized prunes states that the undersized prune regulation at the 23/32 and 28/32 inch diameter size openings would be continuous for the purposes of quality control even in above parity situations. It further states that any change (*i.e.* increase) in the size of those openings would not be for the purpose of establishing a new quality-related minimum. Larger openings would only be applicable when supply conditions warranted the regulation of a larger quantity of prunes as undersized prunes. Thus, any regulation prescribing openings larger than those in § 993.49(c) should not be implemented when the grower average price is expected to be above parity. The season average price received by prune growers ranged from 32 percent to 54 percent of parity during the 1995 through 2002 seasons. As discussed later, the average grower price for prunes during the 2004–05 crop year is not expected to be above parity, and implementation of this more restrictive undersized regulation would be appropriate in reference to parity.

Initial Regulatory Flexibility Analysis

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

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

There are approximately 1,100 producers of dried prunes in the production area and approximately 22 handlers subject to regulation under the marketing order. Small agricultural producers are defined by the Small Business Administration (13 CFR 121.201) as those having annual receipts of less than $750,000, and small agricultural service firms are defined as those whose annual receipts are less than $5,000,000.

An updated industry profile shows that 8 out of 22 handlers (36.4 percent) shipped over $5,000,000 worth of dried prunes and could be considered large handlers by the Small Business Administration. Fourteen of the 22 handlers (63.6 percent) shipped under $5,000,000 worth of prunes and could be considered small handlers. An estimated 32 producers, or less than 3 percent of the 1,100 total producers, would be considered large growers with annual incomes over $750,000. The majority of handlers and producers of California dried prunes may be classified as small entities.

As recommended by the Committee, this proposed rule would establish an undersized prune regulation of 24/32 of an inch in diameter for French prunes and 30/32 of an inch in diameter for non-French prunes for the 2004–05 crop year for volume control purposes. This change in regulation would result in more of the smaller-sized prunes being classified as undersized prunes and is expected to benefit producers, handlers, and consumers. The larger screen openings that were in place for 2002–03 are the same as proposed for 2004–2005 and are expected to remove 4,300 tons of dried prunes from the excess marketable supply.

The Committee estimates carryout inventories on July 31, 2004, to be 64,626 tons. This is 25,925 tons greater than desirable carryout inventories. This amount of inventory reflects a serious supply-demand imbalance in the industry. In addition, average 2003–04 grower prices are reported at $730 per ton by NASS and are lower than for the 2002–03 year, when growers received an average of $810 per ton. The $730 average grower price is substantially below total cost of production of $1,141 per ton and the total variable cost of production of $838 per ton, based on a 2001 study by the University of California Cooperative Extension reflecting a 2.5 ton production per acre in Sacramento County.[1] This means that most producers may not be earning sufficient returns to cover fixed costs. Some producers will continue to operate in the short run as long as prices are above variable costs, but others will begin to cease production in the longer run if prices do not recover to levels above total variable costs.

Tree removal programs (industry and federal) have been implemented by the industry. These programs have been successful in removing over 18,000 bearing acres from production, thus reducing marketable production. Even with these tree removal programs, total available supply is estimated at 224,626 tons for the 2004–05 crop year (marketable production estimated at 160,000 tons and 64,626 tons of carryin inventories). Total demand is estimated to not exceed 167,769 tons, resulting in carryout inventories of 56,857 tons. This remains in excess of desirable inventories of 39,000 tons.

Inventories of this magnitude have a significant depressing impact on grower payments. Growers do not receive payments until inventories are completely sold. The costs of maintaining these inventories are deducted from grower payments.

An undersized prune regulation would remove about 4,300 tons from the total available supply. An econometric model shows that an undersized prune rule resulting in eliminating 4,300 tons from marketable production would strengthen growers' prices modestly by $7.59 per ton. This price is still expected to be less than the cost of production for 2004–2005 estimated at $1,141 per ton.

Because the benefits and costs of the proposed action would be directly proportional to the quantity of 24/32 screen French prunes and 30/32 screen non-French prunes produced or handled, small businesses should not be disproportionately affected by the proposal. While variation in sugar content, prune density, and dry-away ratio vary from county to county, they also vary from orchard to orchard and season to season. In the major producing areas of the Sacramento and San Joaquin Valleys (which account for over 99 percent of the State's production), the prunes produced are homogeneous enough that the proposal should not be viewed as inequitable by large and small producers in any area of the State.

The quantity of small prunes in a lot is not dependent on whether a producer or handler is small or large, but is primarily dependent on cultural practices, soil composition, and water costs. The cost to minimize the quantity of small prunes is similar for small and large entities. The anticipated benefits of this rule are not expected to disproportionately impact small handlers or producers. The only additional costs on producers and handlers expected from the increased openings would be the disposal of additional tonnage (now estimated to be about 4,300 tons) to nonhuman consumption outlets. These costs are expected to be minimal and would be offset by the benefits derived by the elimination of some of the excess supply of small-sized prunes.

At the December 11, 2003, meeting, the Committee discussed the financial impact of this change on handlers and producers. Handlers and producers receive higher returns for the larger size prunes. Prunes eliminated through the implementation of this rule have very little value. As mentioned earlier, the current situation for producers is quite bleak with producers expecting to lose $249 on every ton of small-sized prunes delivered to handlers during the 2004–05 crop year. Producer prices for 24/32 screen French prunes are expected to be $40 per ton for the 2003–04 crop year. The cost of drying a ton of such prunes is $260 per ton with a 4 to 1 dry-away ratio, transportation from the orchard to the dehydrator is at least $20 per ton, and the producer assessment paid to the California Prune Board (a body which administers the State marketing order for promotion) is $9.33 per ton for a total cost of about $289.33 per ton. Thus, a producer could save about $249 per ton by not drying prune plums and not delivering dried prunes 24/32 of an inch in diameter to handlers.

Utilizing data provided by the Committee, USDA has evaluated the impact of the proposed undersized regulation change upon producers and handlers in the industry. The analysis shows that a reduction in the marketable production and handler inventories could result in higher season-average prices, which would benefit all producers. The removal of the smallest, least desirable of the marketable dried prunes produced in California from human consumption outlets would eliminate an estimated 4,300 tons of small-sized dried prunes during the 2004–05 crop year from the

[1] The study was prepared by Richard P. Buchner, John P. Edstrom, William H. Krueger, William H. Olson, Wilbur O. Reil, Karen M. Klonsky, and Richard L. DeMoura.

marketplace. This would help lessen the negative marketing and pricing effects resulting from the excess inventory situation facing the industry. California prune handlers reported that they held 71,320 tons of natural condition prunes on July 31, 2003, the end of the 2002–03 crop year. The 71,320 ton year-end inventory is larger than what is desired for early season shipments by the prune industry. The desired inventory level is based on an average 12-week supply to keep trade distribution channels full while awaiting new crop dried prunes. Currently, it is about 39,000 natural condition tons. This leaves a 2003–04 inventory surplus of about 32,000 tons. The undersized regulation will help reduce the surplus, but the anticipated large 2004–05 prune crop is expected to continue the supply imbalance.

As the marketable dried prune production and surplus prune inventories are reduced through this proposal, and producers continue to implement improved cultural and thinning practices to produce larger-sized prunes, continued improvement in producer returns is expected.

For the 1994–95 through the 2002–2003 crop years, the season average price received by the producers ranged from a high of $1,040 per ton in the 1995–1996 crop year to a low of $726 per ton during the 2001–02 crop year. The season average price received by producers during that 7-year period ranged from 32 percent to 54 percent of parity. Based on the latest available data, the season average producer price for the 2004–05 season is expected to be near the 2003–04 season's price, which is projected to be $730 per ton.

The Committee discussed alternatives to this change, including making no changes to the undersized prune regulation and allowing market dynamics to foster prune inventory adjustments through lower prices on the smaller prunes. While reduced grower prices for small prunes are expected to contribute toward a slow reduction in dried prune inventories, the Committee believed that the undersized rule change is needed to accelerate that reduction. A second alternative discussed was to advance to a 25/32 screen undersized regulation for French prunes. However, handlers expressed concern that this would reduce the amount of manufacturing prunes (approximately 4,000 tons) available for the manufacture of prune juice and concentrate. This could increase the prices of these products. The first initiative was not supported because it would not specifically eliminate the smallest, least valuable prunes, which are in oversupply.

This action would not impose any additional reporting or recordkeeping requirements on either small or large California dried prune handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

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

In addition, the Committee's meeting was widely publicized throughout the prune industry and all interested persons were invited to attend the meeting and participate in Committee deliberations on all issues. Like all Committee meetings, the December 11, 2003, meeting was a public meeting and all entities, both large and small, were able to express views on this issue. The Committee itself is composed of twenty-two members. Seven are handlers, fourteen are producers, and one is a public member. Moreover, the Committee and its Supply Management Subcommittee are monitoring the supply situation, and this proposed rule reflects their deliberations. Finally, interested persons are invited to submit information on the regulatory and informational impacts of this action on small businesses.

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

The Committee requested a comment period through April 23, 2004, to allow interested persons to respond to this proposal. This comment period should give the Committee time to observe the bloom period during the spring and industry shipment trends during the year and allow sufficient time to comment to the Department concerning any changes that are deemed appropriate. All written comments timely received will be considered before a final determination is made on this matter.

List of Subjects in 7 CFR Part 993

Marketing agreements, Plums, Prunes, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 993 is proposed to be amended as follows:

PART 993—DRIED PRUNES PRODUCED IN CALIFORNIA

1. The authority citation for 7 CFR part 993 continues to read as follows:

Authority: 7 U.S.C. 601–674.

§ 993.409 [Removed]

2. Section 993.409 is removed.

3. A new § 993.410 is added to read as follows:

§ 993.410 Undersized prune regulation for the 2004–05 crop year.

Pursuant to §§ 993.49(c) and 993.52, an undersized prune regulation for the 2004–05 crop year is hereby established. Undersized prunes are prunes which pass through openings as follows: for French prunes, 24/32 of an inch in diameter; for non-French prunes, 30/32 of an inch in diameter.

Dated: March 19, 2004.

A. J. Yates,

Administrator, Agriculture Marketing Service.

[FR Doc. 04–6704 Filed 3–25–04; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NM–316–AD]

RIN 2120–AA64

Airworthiness Directives; Saab Model SAAB 2000 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 Saab Model SAAB 2000 series airplanes, that currently requires repetitive inspections for discrepancies of the upper and lower areas of the backup struts in the left and right nacelles; and corrective actions, if necessary. This action would require repetitive inspections for cracks in the lower areas of the backup struts, and corrective action if necessary. This action would also require the eventual replacement of the backup struts with new, improved struts, which would terminate the repetitive inspections. The actions specified by the proposed AD are intended to prevent failure of the backup struts in the left and right nacelles due to fatigue cracking, which could result in loss of fail-safe redundancy in the design of the nacelle

in terms of load capability, and consequent separation of the engine from the airplane and subsequent reduced controllability of the airplane. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by April 26, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2001–NM–316–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–316–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 Saab Aircraft AB, SAAB Aircraft Product Support, S–581.88, Linköping, Sweden. 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–316–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–316–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

On June 28, 2000, the FAA issued AD 2000–13–09, amendment 39–11808 (65 FR 41871, July 7, 2000), applicable to certain Saab Model SAAB 2000 series airplanes, to require repetitive detailed visual and dye penetrant inspections of certain areas of the backup struts in the left and right nacelles to detect discrepancies; 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 failure of the backup struts in the left and right nacelles due to fatigue cracking, which could result in loss of fail-safe redundancy in the design of the nacelle in terms of load capability, and consequent separation of the engine from the airplane and subsequent reduced controllability of the airplane.

Actions Since Issuance of Previous Rule

The preamble to AD 2000–13–09 explains that we were considering further rulemaking for the requirements, which constituted "interim action." We now have determined that further rulemaking is indeed necessary; this proposed AD follows from that determination. The manufacturer has improved the design and manufacturing of the backup struts, which will improve their fatigue strength.

Further, although previous investigation indicated the possibility of cracking in the upper area of the backup strut, no cracks were found in that area. The manufacturer consequently determined that inspection of the upper strut area is unnecessary.

Explanation of Relevant Service Information

The manufacturer has issued Saab Service Bulletins (SBs) 2000–54–024 and 2000–54–025, both dated September 7, 2001. SB 2000–54–025 describes procedures for repetitive fluorescent dye penetrant inspections for cracks of the lower areas of the backup struts of the left and right nacelles around the welding in the pipe and in the attachment fitting. Corrective actions include incorporating SB 2000–54–024, which describes procedures for replacing—with new, improved parts—the backup struts in the electrical and hydraulic bays in the nacelles. SB 2000–54–025 provides operators the option of contacting Saab for repair instructions. Replacement of all four backup struts eliminates the need for the repetitive inspections. The Luftfartsverket (LFV), which is the airworthiness authority for Sweden, classified these SBs as mandatory and issued Swedish airworthiness directive 1–165, dated September 10, 2001, to ensure the continued airworthiness of these airplanes in Sweden.

FAA's Conclusions

This airplane model is manufactured in Sweden 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 LFV has kept the FAA informed of the situation described above. We have examined the findings of the LFV, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would supersede AD 2000–13–09 to require repetitive fluorescent dye penetrant

inspections for cracks of the lower ends of the nacelle backup struts. The proposed AD would also require immediate corrective action if necessary and eventual replacement of the backup struts with new, improved struts, which would terminate the repetitive inspections. The actions would be required to be accomplished in accordance with the SBs described previously, except as discussed below.

Differences Between the Proposed AD and the SBs/Swedish Airworthiness Directive

SB 2000–54–025 and the Swedish airworthiness directive specify a compliance time for the inspection of 1,650 flight hours after the last inspection. We instead provide varying compliance times intended to ensure that all airplanes—regardless of inspection status or number of flight hours since the last inspection—would be inspected in a timely manner.

Although SB 2000–54–025 specifies that operators may contact the manufacturer for disposition of certain repair (cracking) conditions, this proposed AD would not allow this option but would require operators to replace cracked struts in accordance with SB 2000–54–024.

Although SB 2000–54–025 recommends that operators send Saab a report of the inspection results, this proposed AD would not require a report.

Additional Change to Existing AD

We have reviewed the figures we have used over the past several years to calculate AD costs to operators. To account for various inflationary costs in the airline industry, we find it necessary to increase the labor rate used in these calculations from $60 per work hour to $65 per work hour. The cost impact information, below, reflects this increase in the specified hourly labor rate.

Cost Impact

This proposed AD would affect about 3 airplanes of U.S. registry.

The proposed inspection of the lower ends of the backup struts would take about 4 work hours per airplane, at an average labor rate of $65 per work hour. Based on these figures, the cost impact of this proposed action on U.S. operators is estimated to be $780, or $260 per airplane, per inspection cycle.

Replacing all four backup struts would take about 80 work hours per airplane, at an average labor rate of $65 per work hour. Required parts would cost about $165,416 per airplane. Based on these figures, the cost impact of this proposed action on U.S. operators is estimated to be $511,848, or $170,616 per airplane.

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

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by removing amendment 39–11808 (65 FR 41871, July 7, 2000), and by adding a new airworthiness directive (AD), to read as follows:

SAAB Aircraft AB: Docket 2001–NM–316–AD. Supersedes AD 2000–13–09, Amendment 39–11808.

Applicability: Model SAAB 2000 series airplanes, certificated in any category, serial numbers –004 through –063 inclusive.

Compliance: Required as indicated, unless accomplished previously.

To prevent failure of the backup struts in the left and right nacelles due to fatigue cracking, which could result in loss of fail-safe redundancy in the design of the nacelle in terms of load capability, and consequent separation of the engine from the airplane and subsequent reduced controllability of the airplane, accomplish the following:

Inspection

(a) At the applicable time specified in Table 1 of this AD: Perform a fluorescent dye penetrant inspection for cracks of the lower ends of the backup struts in the left and right nacelles, in accordance with SAAB Service Bulletin 2000–54–025, dated September 7, 2001. Although the service bulletin specifies to submit certain information to the manufacturer, this AD does not require a report.

TABLE 1.—FLUORESCENT DYE PENETRANT INSPECTION COMPLIANCE TIMES

If, as of the effective date of this new AD, the inspection required by AD 2000–13–09, amendment 39–11808—	And if the airplane has, as of the effective date of this new AD—	Then do the inspection within—
Has been done	Fewer than 4,500 flight cycles	1,650 flight hours after accomplishment of the most recent inspection done per AD 2000–13–09.
Has been done	4,500 or more flight cycles	900 flight hours after the most recent inspection done per AD 2000–13–09.

TABLE 1.—FLUORESCENT DYE PENETRANT INSPECTION COMPLIANCE TIMES—Continued

If, as of the effective date of this new AD, the inspection required by AD 2000–13–09, amendment 39–11808—	And if the airplane has, as of the effective date of this new AD—	Then do the inspection within—
Has not been done	Any number of flight cycles	200 flight hours after the effective date of this new AD.

Follow-On/Corrective Actions

(b) If no crack is found during the inspection required by paragraph (a) of this AD: Repeat the inspection at intervals not to exceed 1,650 flight hours, until the actions required by paragraph (d) of this AD have been done.

(c) If any crack is found during any inspection required by paragraph (a) of this AD: Replace the cracked strut with a new, improved strut before further flight in accordance with SAAB Service Bulletin 2000–54–024, dated September 7, 2001. Although the service bulletin provides the option of contacting the manufacturer for repair instructions, this AD requires that any alternative repair be done in accordance with a method approved by either the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or the LFV (or its delegated agent). Replacement of a backup strut terminates the repetitive inspections required by this AD for that strut only.

Strut Replacement

(d) Except as required by paragraph (c) of this AD: Within 36 months after the effective date of this AD, replace all four backup struts in the electrical and hydraulic bays of the nacelles with new, improved struts, in accordance with the Accomplishment Instructions of SAAB Service Bulletin 2000–54–024, dated September 7, 2001. Replacement of all four backup struts terminates the requirements of this AD.

Alternative Methods of Compliance

(e) 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 Swedish airworthiness directive 1–165, dated September 10, 2001.

Issued in Renton, Washington, on March 19, 2004.

Kevin M. Mullin,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–6685 Filed 3–25–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 95–SW–30–AD]

RIN 2120–AA64

Airworthiness Directives; Robinson Helicopter Company Model R44 Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM); rescission.

SUMMARY: This amendment proposes rescinding an existing Airworthiness Directive (AD) for Robinson Helicopter Company (Robinson) Model R44 helicopters. That AD currently requires revisions to the R44 Rotorcraft Flight Manual (RFM). The revisions limit operations in high winds and turbulence; provide information about main rotor (M/R) stall and mast bumping, recommendations for avoiding these situations, and additional emergency procedures for use in certain conditions. This action would rescind all the requirements of AD 95–26–05, Amendment 39–9463, Docket 95–SW–30–AD. This proposal is prompted by the FAA's determination that the limitations and the procedures required by that AD are no longer necessary to correct an unsafe condition.

DATES: Comments must be received on or before May 25, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA) Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 95–SW–30–AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. You may also send comments electronically to the Rules Docket at the following address: *9-asw-adcomments@faa.gov.*

FOR FURTHER INFORMATION CONTACT: Gordon Acker, FAA, Los Angeles Aircraft Certification Office, Flight Test Branch, 3960 Paramount Blvd., Lakewood, California 90712–4137, telephone (562) 627–5374, 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 should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this document may be changed in light of the comments received.

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

Commenters wishing the FAA to acknowledge receipt of their mailed comments submitted in response to this proposal must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 95–SW–30–AD." The postcard will be date stamped and returned to the commenter.

Discussion

On December 11, 1995, the FAA issued AD 95–26–05, Amendment 39–9463, Docket No. 95–SW–30–AD (60 FR 66488, December 22, 1995), for Robinson Model R44 helicopters. AD 95–26–05 superseded AD 95–04–13, Amendment 39–9165, Docket No. 95–SW–12–AD, issued February 23, 1995 (60 FR 11611, March 2, 1995). AD 95–04–13 superseded Priority Letter AD 95–02–04, Docket No. 95–SW–08–AD, issued January 12, 1995. AD 95–26–05 requires revisions to the Limitations, the Normal Procedures, and the Emergency

Procedures sections of the R44 RFM. These revisions limit operations in certain winds and turbulence; provide information about M/R stall and mast bumping; and provide recommendations for avoiding these situations. Additionally, emergency procedures are provided for use should certain conditions be encountered. AD 95–26–05 reduces the limitations required by the superseded ADs for pilots who have the flight experience specified in AD 95–26–05 and who have completed the SFAR No. 73 training.

Actions Since Issuing Previous AD

Since issuing AD 95–26–05, an FAA Technical Panel (TP) met on April 30, 1996, and recommended that AD 95–26–05 be rescinded. Recommendation Number 1 in the TP Executive Summary states: "Rescind AD 95–26–05 (restricting operations of the R44 in high wind and turbulence) based upon the results of the R44 Rotor Decay and Blade Flapping Survey conducted in July and August 1995 and the pilot workload reduction afforded by mandatory in-flight use of the throttle governor in all R44 helicopters." AD 96–11–09, Amendment 39–9634, Docket No. 95–SW–32–AD issued May 15, 1996 (61 FR 26427, May 28, 1996), prohibits flight with the governor "off" except for in-flight system malfunctions or emergency procedures training. The TP recommended rescission has been pending for over 7 years. No additional incidents or accidents have occurred that are due to M/R stall or mast bumping at abnormally low M/R revolutions-per-minute, flight in high winds, or flight in turbulence that indicate that the limitations imposed by AD 95–26–05 are still needed.

FAA's Conclusions

After reviewing the available data, the FAA has determined that it is appropriate to rescind AD 95–26–05 to eliminate unnecessary limitations and procedures. The limitations and procedures imposed by that AD are no longer needed to correct an unsafe condition.

This proposed action would rescind AD 95–26–05. Rescission of AD 95–26–05 would constitute only such action and if followed by a final action would not preclude the agency from issuing another action in the future nor would it commit the agency to any course of action in the future.

Cost Impact

The FAA estimates that 515 helicopters of U.S. registry are affected by AD 95–26–05 and that it would take approximately ½ work hour per helicopter to accomplish the actions at an average labor rate of $65 per work hour. Based on these figures, the total cost impact of the AD on U.S. operators is estimated to be $16,738. However, adopting this proposed rescission would eliminate those costs.

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 economic 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 an AD removing Amendment 39–9463 to read as follows:

Robinson Helicopter Company: Docket No. 95–SW–30–AD. Rescinds AD 95–26–05, Amendment 39–9463.

Applicability: Model R44 helicopters, certificated in any category.

Issued in Fort Worth, Texas, on March 10, 2004.

Scott A. Horn,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 04–6779 Filed 3–25–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–SW–40–AD]

RIN 2120–AA64

Airworthiness Directives; Eurocopter France Model EC155B and B1 Helicopters

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes adopting a new airworthiness directive (AD) for the specified Eurocopter France (ECF) model helicopters. The AD would require cleaning the auxiliary system unit (ASU) board. Also, the AD would require modifying the wiring and wiring harness. If a temporary modification is done, the AD would require inserting a placard regarding on-ground operation of the emergency landing gear pump (pump). Also, the AD would revise the Limitations section of the Rotorcraft Flight Manual (RFM) to limit the operation of the pump. Permanently modifying the wiring and wiring harness and removing the placard and limitations from the RFM would be terminating action. This proposal is prompted by the report of an emergency landing with the landing gear retracted. The landing gear failed to extend in normal and emergency extension modes following failure of the ASU board 10 Alpha 2. The actions specified by the proposed AD are intended to prevent an electrical short circuit, failure of landing gear to extend, and a landing gear-up emergency landing.

DATES: Comments must be received on or before May 25, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Office of the Regional Counsel, Southwest Region, Attention: Rules Docket No. 2003–SW–40–AD, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137. You may also send comments electronically to the Rules Docket at the following address: *9-asw-adcomments@faa.gov.* Comments may be inspected at the

Office of the Regional Counsel between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Jorge Castillo, Aviation Safety Engineer, FAA, Rotorcraft Directorate, Regulations and Guidance Group, Fort Worth, Texas 76193–0111, telephone (817) 222–5127, fax (817) 222–5961.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications should identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments will be considered before taking action on the proposed rule. The proposals contained in this document may be changed in light of the comments received.

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

Commenters wishing the FAA to acknowledge receipt of their mailed comments submitted in response to this proposal must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 2003–SW–40–AD." The postcard will be date stamped and returned to the commenter.

Discussion

The Direction Generale De L'Aviation Civile (DGAC), the airworthiness authority for France, notified the FAA that an unsafe condition may exist on Model EC 155B and B1 helicopters equipped with ASU board 10 Alpha 2, part number (P/N) SE07451. The DGAC advises that a landing gear did not extend in "NORMAL" and "EMERGENCY" extension modes due to a short-circuit between two components of the ASU board 10 Alpha 2.

ECF has issued Alert Telex No. 31A005R1, dated September 19, 2002, and Alert Service Bulletin (ASB) Nos. 31A005 and 31A008, both dated August 20, 2003. The Alert Telex and ASB No. 31A005 describe procedures for modifying the electrical circuit to preclude the risk of the landing gear not extending in the normal and emergency extension modes following failure of the ASU board 10 Alpha 2. ASB No. 31A008 describes procedures to enhance the reliability of the normal and emergency landing gear extension functions by separating their power supplies. The DGAC classified these service bulletins as mandatory and issued AD Nos. 2002–515(A) R1 and 2003–323(A), both dated September 3, 2003, to ensure the continued airworthiness of these helicopters in France.

These helicopter models are manufactured in France and are type certificated for operation in the United States under the provisions of 14 CFR 21.29 and the applicable bilateral agreement. Pursuant to the applicable bilateral 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 these type designs that are certificated for operation in the United States.

This previously described unsafe condition is likely to exist or develop on other helicopters of these same type designs registered in the United States. Therefore, the proposed AD would require the following:

- Within 15 hours time-in-service (TIS), clean the ASU board 10 Alpha 2.
- Within 30 days, either modify the wiring and wiring harness permanently or temporarily. If you elect the temporary modification, install a self-adhesive placard with the following text in white letters on a red background:

"CAUTION: ON GROUND OPERATION OF EMERGENCY LANDING GEAR PUMP IS *TIME LIMITED*—SEE OPERATING LIMITATIONS."

Also, insert the following text into the Operating Limitations section of the RFM:

"Limit the emergency landing gear pump (pump) to 10 minutes of continuous operation.

When the pump is continuously operated from 1 to 5 minutes, allow it to cool for 15 minutes before further use.

When the pump is continuously operated from 5 to 10 minutes, allow it to cool for 30 minutes before further use."

- Within 10 months, modify the wiring and wiring harness.
- Remove the temporary placard, if installed, and the limitations from the RFM.

The actions would be required to be accomplished following the service bulletins described previously. Permanently modifying the wiring and wiring harness and removing the temporary placard and operating limitations would be terminating actions for the requirements of this AD.

The FAA estimates that this proposed AD would affect 5 helicopters of U.S. registry. The modifications of the electrical system would take approximately 11 work hours per helicopter to accomplish at an average labor rate of $65 per work hour. Required parts would cost approximately $400 per helicopter. Based on these figures, the total cost impact of the proposed AD on U.S. operators would be $5,575.

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 economic 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 a new airworthiness directive to read as follows:

Eurocopter France: Docket No. 2003–SW–40–AD.

Applicability: Model EC 155B and B1 helicopters with auxiliary system unit (ASU) board 10 Alpha 2, part number (P/N) SE07451, installed, certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent an electrical short circuit, failure of landing gear to extend, and an emergency landing, accomplish the following:

(a) Within 15 hours time-in-service (TIS), clean the auxiliary system unit (ASU) board 10 Alpha 2. Clean the ASU board by following the Accomplishment Instructions, paragraphs 2.B.1, and 2.B.2.a., of Eurocopter EC155 Alert Service Bulletin (ASB) No. 31A005, dated August 20, 2003 (ASB No. 31A005).

(b) Within 30 days, modify the wiring and wiring harness permanently by complying with paragraph (c) of this AD or temporarily by following the Accomplishment Instructions, paragraphs 2.B.1. and 2.B.2.a. through 2.B.2.d. of ASB No. 31A005. If temporarily modified:

(1) Install a self-adhesive placard of the size and in the location depicted in Figure 4 of ASB No. 31A005 with the following text in white letters on a red background: "CAUTION: ON GROUND OPERATION OF EMERGENCY LANDING GEAR PUMP IS *TIME LIMITED*—SEE OPERATING LIMITATIONS" and

(2) Revise the Operating Limitations by inserting the following text into the Rotorcraft Flight Manual (RFM):

"(i) Limit the emergency landing gear pump (pump) to 10 minutes of continuous operation.

(ii) When the pump is continuously operated from 1 to 5 minutes, allow it to cool for 15 minutes before further use.

(iii) When the pump is continuously operated from 5 to 10 minutes, allow it to cool for 30 minutes before further use."

Note 1: Modifying the electric wiring covered by Alert Telex No. 31A005R1, dated September 19, 2002, led to inhibiting the protective thermal switch of the electric pump. This resulted in the need for a limitation placard. The purpose of the limitation placard is to remind operators about the on-ground operating limitations that apply to the electric pump.

(c) Within 10 months, modify the wiring and wiring harness by following the Accomplishment Instructions, paragraphs 2.A. and 2.B., of Eurocopter EC155 ASB No. 31A008, dated August 20, 2003 (ASB No. 31A008). If you made the temporary modifications described in paragraph (b) of this AD, remove the placard from the helicopter and the limitations inserted in the RFM as a result of paragraphs (b)(1) and (b)(2) of this AD.

(d) Permanently modifying the wiring and wiring harness following ASB No. 31A008 is terminating action for the requirements of this AD.

(e) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Contact the Safety Management Group, Rotorcraft Directorate, FAA, for information about previously approved alternative methods of compliance.

(f) Special flight permits will not be issued.

Note 2: The subject of this AD is addressed in Direction Generale De L'Aviation Civile (France) AD Nos. 2002–515(A) R1 and 2003–323(A), both dated September 3, 2003.

Issued in Fort Worth, Texas, on March 10, 2004.

Scott A. Horn,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 04–6778 Filed 3–25–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 73

[Docket No. FAA–2003–16722; Airspace Docket No. 03–AWP–19]

RIN 2120–AA66

Establishment of Restricted Area 2503D, Camp Pendleton; CA

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish a restricted area (R–2503D) over Camp Pendleton, CA. Specifically, this action proposes to convert the current San Onofre High and Low Military Operations Areas (MOA) and the associated Controlled Firing Area (CFA) to R–2503D. The FAA is taking this action to assist the Camp Pendleton U.S. Marine Corps (USMC) Base, CA, mission of providing realistic fleet training requirements and to enhance safety.

DATES: Comments must be received on or before May 10, 2004.

ADDRESSES: Send comments on this proposal to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590–0001. You must identify FAA Docket No. FAA–2003–16722, and Airspace Docket No. 03–AWP–19, at the beginning of your comments. You may also submit comments on the Internet at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Ken McElroy, Airspace and Rules, Office of System Operations and Safety, ATOP–R, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed 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 (FAA Docket No. FAA–2003–16722, and Airspace Docket no. 03–AWP–19) and be submitted in triplicate to the Docket Management System (*see* **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://dms.dot.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to FAA Docket No. FAA–2003–16722, and Airspace Docket No. 03–AWP–19." The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

An electronic copy of this document may be downloaded through the Internet at *http://dms.dot.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov,* or the **Federal Register**'s Web page at *http://www.gpoaccess.gov/fr/index.html.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except

Federal holidays. An informal docket may also be examined during normal business hours at the office of the Regional Air Traffic Division, AWP–520, 15000 Aviation Boulevard, Lawndale, CA 90261.

Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 73 (part 73) to revise and expand the dimensions of the current San Onofre MOAs over the Camp Pendleton, CA, area. The USMC has requested these changes because the existing special use airspace does not permit essential large-scale amphibious assault activities (including artillery live-fire, fixed-wing close air support, and remotely operated aircraft operations).

The existing restricted areas over Camp Pendleton are R–2503A, extending from the surface up to 2000 feet mean sea level (MSL); R–2503B, extending from the surface up to 15,000 feet MSL; and R–2503C, extending from 15,000 feet MSL to FL 270. These areas will not be changed. The San Onofre High and Low MOAs lie adjacent to the restricted areas from 2,000 feet MSL up to, but not including 8,000 feet MSL. This proposed amendment would convert the San Onofre High and Low MOAs, and the associated CFA to R–2503D, which would extend from 2,000 feet MSL up to 11,000 feet MSL. The San Onofre MOA and CFA designations would be revoked.

The time of designation for R–2503D would be intermittent by NOTAM 24 hours in advance, and limited to a maximum use of 20 days per year from 0600 to 2400 hours local time, and no more than 90 days per year between 0001 and 0600 local time. The restricted area would be available for joint-use and scheduled for training operations on an as needed basis subject to the maximum use limits.

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. Therefore, this proposed regulation: (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.

Environmental Review

This proposal will be subject to the appropriate environmental analysis in accordance with FAA Order 1050.1D, Policies and Procedures for Considering Environmental Impacts, prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 73

Airspace, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 73 as follows:

PART 73—SPECIAL USE AIRSPACE

1. The authority citation for part 73 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.

§ 73.25 [Amended]

2. § 73.25 is amended as follows:

* * * * *

R–2503D Camp Pendleton, CA [Added]

Boundaries. Beginning at lat. 33°22′42″ N.; long. 117°36′45″ W.; to lat. 33°27′13″ N.; long. 117°34′17″ W.; to lat. 33°18′41″ N.; long. 117°23′58″ W.; to lat. 33°17′30″ N.; long. 117°16′43″ W.; to lat. 33°14′09″N.; long. 117°26′38″ W.; to the point of the beginning by following a line 1 NM from and parallel to the shoreline.

Designated altitudes. 2,000 feet MSL to 11,000 feet MSL.

Time of designation. Intermittent by NOTAM 24 hours in advance not to exceed 20 days per year from 0600 to 2400 local time and not more than 90 days per year between 0001 and 0600 local.

Controlling agency. FAA, Southern California TRACON.

Using agency. U.S. Marine Corps, Commanding General, MCB Camp Pendleton, CA.

* * * * *

Issued in Washington, DC, March 18, 2004.

Reginald C. Matthews,

Manager, Airspace and Rules.

[FR Doc. 04–6747 Filed 3–25–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–121475–03]

RIN 1545–BC61

Qualified Zone Academy Bonds; Obligations of States and Political Subdivisions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations that amend the final regulations on qualified zone academy bonds. These regulations provide guidance to State and local governments that issue qualified zone academy bonds and to banks, insurance companies, and other taxpayers that hold those bonds. These regulations provide guidance on the maximum term, permissible use of proceeds, and remedial actions for qualified zone academy bonds. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments on this rule must be received by June 24, 2004. Requests to speak and outlines of topics to be discussed at the public hearing scheduled for July 21, 2004, at 10 a.m., must be received by July 12, 2004. Comments on the collection of information should be received by May 25, 2004.

ADDRESSES: Send submissions to CC:PA:LPD:PR (REG–121475–03), room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–121475–03), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the IRS Internet site at: *http://www.irs.gov/regs*. The public hearing will be held in room 7218, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Timothy L. Jones or Zoran Stojanovic, (202) 622–3980; concerning submissions of comments, the hearing, and requests to be placed on the building access list to attend the meeting, Guy R. Traynor, (202) 622–3693 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP; Washington, DC 20224. Comments on the collection of information should be received by May 25, 2004. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information (*see* below);

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

The collection of information in this proposed regulation is in § 1.1397E–1(h). This collection of information is required by the IRS to verify compliance with section 1397E. This information will be used to identify issuers of qualified zone academy bonds that have established a defeasance escrow as a remedial action taken because of failure to satisfy certain requirements of section 1397E. The collection of information is required to obtain or retain a benefit. The likely respondents are states or local governments that issue qualified zone academy bonds.

Estimated total annual reporting burden: 3 hours.

Estimated average annual burden hours per respondent: 30 minutes.

Estimated number of respondents: 6.

Estimated annual frequency of responses: varies.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

Section 1397E(a) of the Internal Revenue Code (Code) provides that an eligible taxpayer (within the meaning of section 1397E(d)(6)) that holds a qualified zone academy bond on a credit allowance date is allowed a credit against Federal income tax for the taxable year that includes the credit allowance date. In general, a qualified zone academy bond is a bond issued by a State or local government to finance certain eligible public school purposes under section 1397E(d). Section 1397E(b) provides that the amount of the qualified zone academy bond credit equals the product of the credit rate and the face amount of the bond held by the taxpayer on the credit allowance date. Under section 1397E(b)(2), the credit rate is determined by the Treasury Department and equals the percentage that the Department estimates generally will permit the issuance of qualified zone academy bonds without discount and without interest cost to the issuer. Section 1397E(f)(1) defines *credit allowance date* as the last day of the one-year period beginning on the date of issuance of the issue and the last day of each successive one-year period thereafter. Under section 1397E(d)(3), the maximum term of a qualified zone academy bond is determined by the Treasury Department and equals the term that the Department estimates will result in the present value of the obligation to repay the principal on the bond being equal to 50 percent of the face amount of the bond.

Section 1397E(g) provides that the amount of the qualified zone academy bond credit allowed to the taxpayer is included in the taxpayer's gross income.

Section 1397E(e) imposes a national limitation on the amount of qualified zone academy bonds that may be issued for each calendar year. The limitation is allocated by the Treasury Department among the States on the basis of their respective populations of individuals below the poverty line.

Temporary regulations (TD 8755) interpreting section 1397E were published on January 7, 1998 (63 FR 671), and amended on July 1, 1999 (TD 8826; 64 FR 35573). Final regulations under section 1397E (TD 8903) (the final regulations) were published on September 26, 2000 (65 FR 57732). This document contains proposed regulations (the proposed regulations) that would amend the final regulations.

Explanation of Provisions

I. Maximum Term

Section 1397E(d)(3) provides that the Secretary of the Treasury Department shall determine, during each calendar month, the maximum term for qualified zone academy bonds issued during the following calendar month. Section 1397E(d)(3) states that the maximum term shall be the term that the Secretary estimates will result in the present value of the obligation to repay the principal on the bond being equal to 50 percent of the face amount of the bond. Section 1.1397E–1(d) of the final regulations provides that the maximum term for a qualified zone academy bond is determined under section 1397E(d)(3) by using a discount rate equal to 110 percent of the long-term adjusted applicable Federal rate (AFR), compounded semi-annually, for the month in which the bond is issued. The IRS publishes the long-term adjusted AFR each month in a revenue ruling.

Section 1397E(b)(2) provides that the Secretary shall determine, during each calendar month, a credit rate for qualified zone academy bonds issued during the following calendar month. Section 1.1397E–1(b) provides that the Secretary shall determine monthly (or more often as deemed necessary by the Secretary) the credit rate the Secretary estimates generally will permit the issuance of a qualified zone academy bond without discount and without interest cost to the issuer. Notice 99–35 (1999–2 C.B. 26) indicates that, until further notice, the credit rate for a qualified zone academy bond will be published daily by the Bureau of Public Debt on its Internet site for State and Local Government Series securities (*http://www.publicdebt.treas.gov*). Notice 99–35 also provides that the credit rate shall be applied to a qualified zone academy bond on the first day on which there is a binding contract in writing for the sale or exchange of the bond. Notice 99–35 states that the credit rate will be determined by the Treasury Department based on its estimate of the yield on outstanding AA rated corporate bonds of a similar maturity for the business day immediately prior to the date on which there is a binding contract in writing for the sale or exchange of the bond.

Questions have been raised regarding the maximum term of a qualified zone

academy bond that is sold in one month and issued in another month. Section 1.1397E–1(d) provides that the maximum term is determined based on the month in which the bond is issued. However, under Notice 99–35, the credit rate for a qualified zone academy bond is determined based on the first day on which there is a binding contract in writing for the sale or exchange of the bond. The credit rate and maximum term should be determined on the same day because the credit rate for a bond depends on its maximum term. Accordingly, the proposed regulations amend § 1.1397E–1(d) to provide that the maximum term for a qualified zone academy bond is determined based on the first day on which there is a binding contract in writing for the sale or exchange of the bond.

II. Use of Proceeds and Remedial Actions

A. In General

Section 1397E(d)(1)(A) provides that a bond issued as part of an issue is a qualified zone academy bond only if, among other requirements, at least 95 percent of the proceeds of the issue are to be used for a qualified purpose with respect to a qualified zone academy established by an eligible local education agency (as defined in section 1397E(d)(4)(B)). Section 1397E(d)(5) defines *qualified purpose*, with respect to any qualified zone academy, as (i) rehabilitating or repairing the public school facility in which such academy is established, (ii) providing equipment for use at such academy, (iii) developing course materials for education to be provided at such academy, and (iv) training teachers and other school personnel in such academy. Section 1397E(d)(4)(A) defines *qualified zone academy* as any public school (or academic program within a public school) that is established by and operated under the supervision of an eligible local education agency to provide education or training below the postsecondary level if: (1) The public school or program is designed in cooperation with business in accordance with section 1397E(d)(4)(A)(i); (2) students in the public school or program will be subject to the same academic standards and assessments as other students educated by the eligible local education agency; (3) the comprehensive education plan of the public school or program is approved by the eligible local education agency; and (4) the public school is located in an empowerment zone or enterprise community (as defined in section 1393), or there is a reasonable expectation (as of the date of issuance of the bonds) that at least 35 percent of the students attending the school or participating in the program will be eligible for free or reduced-cost lunches under the school lunch program established under the Richard B. Russell National School Lunch Act.

B. Compliance With 95-Percent Test

1. In General

Comments have been received requesting guidance on compliance with the 95-percent test in section 1397E(d)(1)(A). The proposed regulations provide that, in general, an issue must satisfy three requirements to comply with section 1397E(d)(1)(A). First, the issuer must reasonably expect, as of the date of issuance of the issue, that at least 95 percent of the proceeds of the issue will be expended with due diligence. Second, the issuer must reasonably expect, as of the date of issuance of the issue, that at least 95 percent of the proceeds of the issue will be used for a qualified purpose with respect to a qualified zone academy for the entire term of the issue (without regard to any redemption provision). Third, except as otherwise provided in the remedial action provisions of the proposed regulations, discussed below, at least 95 percent of the proceeds of the issue must actually be used for a qualified purpose with respect to a qualified zone academy for the entire term of the issue (without regard to any redemption provision). For these purposes, any unspent proceeds are treated as used for a qualified purpose with respect to a qualified zone academy during any period that the issuer reasonably expects that those proceeds will be expended with due diligence for a qualified purpose with respect to a qualified zone academy.

2. Proceeds Expended for Rehabilitation, Repair or Equipment

Section 1397E(d)(5)(A) and (B) provides that the term *qualified purpose* with respect to any qualified zone academy includes rehabilitating or repairing the public school facility in which such academy is established, and providing equipment for use at such academy. The proposed regulations specify that, if proceeds of an issue are expended for a purpose described in section 1397E(d)(5)(A) or (B) with respect to a qualified zone academy, then those proceeds are treated as used for a qualified purpose with respect to the academy during any period after such expenditure that (1) the property financed with those proceeds is used for the purposes of the academy and (2) the academy maintains its status as a qualified zone academy. For this purpose, the retirement from service of financed property due to normal wear or obsolescence does not cause the property not to be used for a qualified purpose with respect to a qualified zone academy.

3. Proceeds Expended To Develop Course Materials or Train Teachers

Section 1397E(d)(5)(C) and (D) provides that the term *qualified purpose* with respect to any qualified zone academy includes developing course materials for education to be provided at such academy, and training teachers and other school personnel in such academy. The proposed regulations provide that, if proceeds of an issue are expended for a purpose described in section 1397E(d)(5)(C) or (D) with respect to a qualified zone academy, then those proceeds are treated as used for a qualified purpose with respect to the academy during any period after such expenditure.

4. Special Rule for Determining Status as Qualified Zone Academy

Section 1397E(d)(4)(A)(iv) provides that a public school (or academic program within a public school) is a qualified zone academy only if, among other requirements, the public school is located in an empowerment zone or enterprise community, or there is a reasonable expectation (as of the date of issuance of the bonds) that at least 35 percent of the students attending the school or participating in the program (as the case may be) will be eligible for free or reduced-cost lunches under the school lunch program established under the Richard B. Russell National School Lunch Act. For purposes of determining whether an issue complies with section 1397E(d)(4)(A)(iv), the proposed regulations provide that a public school is treated as located in an empowerment zone or enterprise community for the entire term of the issue if the public school is located in an empowerment zone or enterprise community on the date of issuance of the issue.

C. Remedial actions

1. In General

Comments have been received requesting guidance specifying remedial actions that may be taken to cure a violation of the 95-percent test in section 1397E(d)(1)(A).

The proposed regulations specify two remedial actions that may be taken in certain circumstances if less than 95 percent of the proceeds of an issue is actually used for a qualified purpose

with respect to a qualified zone academy. These remedial actions are available only if the issuer reasonably expected on the date of issuance of the issue that: (1) at least 95 percent of the proceeds of the issue would be expended with due diligence; and (2) at least 95 percent of the proceeds of the issue would be used for a qualified purpose with respect to a qualified zone academy for the entire term of the issue (without regard to any redemption provision).

As discussed below, the two remedial actions specified in the proposed regulations are (1) redemption or defeasance of the nonqualified bonds and (2) alternative use of the disposition proceeds. If the applicable requirements are met, the *redemption or defeasance* remedial action is available to cure any failure to satisfy the 95-percent test that was not reasonably expected as of the date of issuance. The *alternative use of disposition proceeds* remedial action applies only to certain dispositions of financed property for cash.

2. Redemption or Defeasance of Nonqualified Bonds

A *redemption or defeasance* remedial action is taken if: (1) All of the nonqualified bonds of the issue (determined by applying the principles of § 1.142–2(e)) are redeemed within 90 days after the date on which the failure to properly use proceeds occurs; (2) if any nonqualified bonds of the issue are not redeemed within 90 days after the date on which the failure to properly use proceeds occurs (the unredeemed nonqualified bonds), a defeasance escrow is established for the unredeemed nonqualified bonds within 90 days after the date on which the failure to properly use proceeds occurs; or (3) if the failure to properly use proceeds is a disposition of financed property described in section 1397E(d)(5)(A) or (B) and the consideration for the disposition is exclusively cash, all of the disposition proceeds (as defined in § 1.141–12(c)(1)) are used within 90 days after the date of the disposition to redeem, or establish a defeasance escrow for, a pro rata portion of the nonqualified bonds of the issue.

For proceeds that are not spent, a failure to properly use proceeds occurs on the earlier of: (1) The first date on which the public school (or academic program within the public school) does not constitute a qualified zone academy; and (2) the first date on which the issuer reasonably expects that less than 95 percent of the proceeds of the issue will be expended with due diligence for a qualified purpose with respect to a qualified zone academy. For proceeds that have been spent for rehabilitation, repair or equipment described in section 1397E(d)(5)(A) or (B) with respect to a qualified zone academy, a failure to properly use proceeds occurs on the earlier of: (1) The first date on which the public school (or academic program within the public school) does not constitute a qualified zone academy; and (2) the first date on which an action is taken that causes less than 95 percent of the proceeds of the issue to be used for a qualified purpose with respect to a qualified zone academy. If proceeds have been spent for course materials or training described in section 1397E(d)(5)(C) or (D) with respect to a qualified zone academy, no event subsequent to such expenditure shall constitute a failure to properly use such proceeds.

A defeasance escrow is defined as an irrevocable escrow established to retire bonds on the earliest call date after the date on which the failure to properly use proceeds occurs in an amount that is sufficient to retire the bonds on that call date. At least 90 percent of the weighted average amount in a defeasance escrow must be invested in investments (as defined in § 1.148–1(b)), except that no amount in a defeasance escrow may be invested in any investment the obligor (or any person that is a related party with respect to the obligor within the meaning of § 1.150–1(b)) of which is a user of proceeds of the bonds. All purchases or sales of an investment in a defeasance escrow must be made at the fair market value of the investment within the meaning of § 1.148–5(d)(6).

In addition, the issuer must pay to the United States, at the same time and in the same manner as rebate amounts are required to be paid under § 1.148–3 (or at such other time or in such other manner as the Commissioner may prescribe), 100 percent of the investment earnings on amounts in the defeasance escrow. For this purpose, the first computation period begins on the date on which the failure to properly use proceeds occurs.

Proceeds of qualified zone academy bonds (other than unspent proceeds of the issue for which the failure to properly use proceeds occurs) are not permitted to be used to redeem or defease the nonqualified bonds. The issuer must provide written notice to the Commissioner of the establishment of the defeasance escrow within 90 days of the date the defeasance escrow is established.

3. Alternative Use of the Disposition Proceeds

The *alternative use of disposition proceeds* remedial action has four requirements. First, the failure to properly use proceeds must be a disposition of financed property described in section 1397E(d)(5)(A) or (B) and the consideration for the disposition must be exclusively cash. Second, the issuer must reasonably expect as of the date of the disposition that: (1) All of the disposition proceeds, plus any amounts received from investing the disposition proceeds, will be expended within two years after the date of the disposition for a qualified purpose with respect to a qualified zone academy; or (2) to the extent not expected to be so expended, used within 90 days after the date of the disposition to take a *redemption or defeasance* remedial action. Third, the disposition proceeds, plus any amounts received from investing the disposition proceeds, must be treated as proceeds for purposes of section 1397E. Fourth, if all of the disposition proceeds, plus any amounts received from investing the disposition proceeds, are not actually expended for a qualified purpose within the two-year period beginning on the date of the disposition (or used within 90 days after the date of the disposition to take a *redemption or defeasance* remedial action), the remainder of such amounts must be used within 90 days after the end of that two-year period for a *redemption or defeasance* remedial action.

D. Definition of Proceeds

In general, § 1.148–1(b) defines sale proceeds as any amounts actually or constructively received from the sale of an issue, including amounts used to pay underwriters' discount or compensation. The proposed regulations provide that, for purposes of the qualified zone academy bond provisions (other than the private business contribution requirement, discussed below), proceeds means sale proceeds as defined in § 1.148–1(b), plus any amounts received from investing sale proceeds. Thus, under the proposed regulations, the requirement in section 1397E(d)(1)(A) that at least 95 percent of the proceeds of an issue be used for a qualified purpose with respect to a qualified zone academy is applied by taking into account not only the sale proceeds of the issue, but also any amounts received from investing those sale proceeds.

Section 1397E(d)(1)(C)(ii) provides that a bond is a qualified zone academy bond only if, among other requirements,

the issuer certifies that it has written assurances that the private business contribution requirement of section 1397E(d)(2) will be met with respect to the qualified zone academy. Section 1397E(d)(2)(A) provides that the private business contribution requirement is met if the eligible local education agency that established the qualified zone academy has written commitments from private entities to make qualified contributions (as defined in section 1397E(d)(2)(B)) having a present value (as of the date of issuance of the issue) of not less than ten percent of the proceeds of the issue. The proposed regulations provide that, for purposes of the private business contribution requirement of section 1397E(d)(2), proceeds means sale proceeds as defined in § 1.148–1(b). Thus, the private business contribution requirement is applied by taking into account only the sale proceeds of the issue without regard to any amounts received or expected to be received from investing those sale proceeds.

E. Payment of Principal, Interest or Redemption Price

The proposed regulations provide that the use of proceeds of a bond to pay principal, interest or redemption price of the bond or another bond is not a qualified purpose within the meaning of section 1397E(d)(5). Thus, the use of proceeds of a bond to refund another bond is not a qualified purpose. In addition, the use of proceeds of a bond to fund a sinking fund to repay the bond is not a qualified purpose.

Proposed Effective Dates

The proposed regulations are proposed to apply to bonds sold on or after the date that is 60 days after publication of final regulations in the **Federal Register** (the effective date). Issuers may apply the proposed regulations in whole, but not in part, to bonds sold before the effective date, except that: (1) issuers may apply the proposed regulations without regard to § 1.1397E–1(h)(8) (relating to the definition of proceeds) to bonds sold before the effective date; and (2) § 1.1397E–1(d) (relating to the maximum term of a qualified zone academy bond) and § 1.1397E–1(h)(2) (relating to reimbursement of expenditures with proceeds of a qualified zone academy bond) may not be applied to bonds issued before July 1, 1999.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. As previously noted, it is estimated that each year only six issuers of qualified zone academy bonds will be required to report the establishment of a defeasance escrow, and the estimated burden of each such reporting is only 30 minutes. In addition, the establishment of a defeasance escrow need only be reported once. Therefore, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments that are submitted timely (preferably a signed original and eight copies) to the IRS. The IRS and Treasury Department request comments on the clarity of the proposed regulations and how they may be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for July 21, 2004, at 10 a.m. in room 7218, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Because of access restrictions, visitors will not be admitted beyond the lobby more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, *see* the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing.

Persons who wish to present oral comments at the hearing must submit written comments by June 24, 2004, and submit an outline of the topics to be discussed and the amount of time to be devoted to each topic by July 12, 2004.

A period of 10 minutes will be allotted to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Comments are requested on all aspects of the proposed regulations.

Drafting Information

The principal authors of these regulations are Timothy L. Jones and Zoran Stojanovic, Office of Associate Chief Counsel, IRS (Tax Exempt and Governmental Entities), and Stephen J. Watson, Office of Tax Policy, Treasury Department. However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR Part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

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

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

Par. 2. Section 1.1397E–1 is amended by:

1. Revising the last sentence in paragraph (a).
2. Revising paragraphs (d) and (h).
3. Redesignating the text of paragraph (k) as paragraph (k)(1) and adding a heading for newly designated paragraph (k)(1).
4. Adding paragraph (k)(2).

The revisions and additions read as follows:

§ 1.1397E–1 Qualified zone academy bonds.

(a) * * * This section also provides other rules for qualified zone academy bonds, including rules governing the credit rate, the private business contribution requirement, the maximum term, use of proceeds, remedial actions, and eligible issuers.

* * * * *

(d) *Maximum term.* The maximum term for a qualified zone academy bond is determined under section 1397E(d)(3) by using a discount rate equal to 110 percent of the long-term adjusted AFR, compounded semi-annually, for the month in which the bond is sold. The Internal Revenue Service publishes this figure each month in a revenue ruling that is published in the Internal Revenue Bulletin. *See* § 601.601(d)(2)(ii)(*b*) of this chapter. A bond is sold on the first day on which

there is a binding contract in writing for the sale or exchange of the bond.

* * * * *

(h) *Use of proceeds*—(1) *In general.* Section 1397E(d)(1)(A) provides that a bond issued as part of an issue is a qualified zone academy bond only if, among other requirements, at least 95 percent of the proceeds of the issue are to be used for a qualified purpose with respect to a qualified zone academy established by an eligible local education agency (as defined in section 1397E(d)(4)(B)). Section 1397E(d)(5) defines *qualified purpose,* with respect to any qualified zone academy, as rehabilitating or repairing the public school facility in which such academy is established, providing equipment for use at such academy, developing course materials for education to be provided at such academy, and training teachers and other school personnel in such academy. Section 1397E(d)(4)(A) defines *qualified zone academy* as any public school (or academic program within a public school) that is established by and operated under the supervision of an eligible local education agency to provide education or training below the postsecondary level and that meets the requirements of section 1397E(d)(4)(A)(i), (ii), (iii) and (iv).

(2) *Use of proceeds requirements.* An issue meets the requirements of section 1397E(d)(1)(A) only if—

(i) The issuer reasonably expects, as of the date of issuance of the issue, that—

(A) At least 95 percent of the proceeds of the issue will be expended with due diligence; and

(B) At least 95 percent of the proceeds of the issue will be used for a qualified purpose with respect to a qualified zone academy for the entire term of the issue (without regard to any redemption provision); and

(ii) Except as otherwise provided in paragraph (h)(7) of this section, at least 95 percent of the proceeds of the issue is actually used for a qualified purpose with respect to a qualified zone academy for the entire term of the issue (without regard to any redemption provision).

(3) *Unspent proceeds.* For purposes of paragraphs (h)(2)(i)(B) and (h)(2)(ii) of this section, unspent proceeds are treated as used for a qualified purpose with respect to a qualified zone academy during any period that the issuer reasonably expects that those proceeds will be expended with due diligence for a qualified purpose with respect to a qualified zone academy.

(4) *Proceeds expended for rehabilitation, repair or equipment*—(i) *In general.* Section 1397E(d)(5)(A) and (B) provides that the term *qualified purpose* with respect to any qualified zone academy includes rehabilitating or repairing the public school facility in which such academy is established, and providing equipment for use at such academy. If proceeds of an issue are expended for a purpose described in section 1397E(d)(5)(A) or (B) with respect to a qualified zone academy, then those proceeds are treated as used for a qualified purpose with respect to the academy during any period after such expenditure that—

(A) The property financed with those proceeds is used for the purposes of the academy; and

(B) The academy maintains its status as a qualified zone academy under section 1397E(d)(4).

(ii) *Retirement from service.* The retirement from service of financed property due to normal wear or obsolescence does not cause the property not to be used for a qualified purpose with respect to a qualified zone academy.

(5) *Proceeds expended to develop course materials or train teachers.* Section 1397E(d)(5)(C) and (D) provides that the term *qualified purpose* with respect to any qualified zone academy includes developing course materials for education to be provided at such academy, and training teachers and other school personnel in such academy. If proceeds of an issue are expended for a purpose described in section 1397E(d)(5)(C) or (D) with respect to a qualified zone academy, then those proceeds are treated as used for a qualified purpose with respect to the academy during any period after such expenditure.

(6) *Special rule for determining status as qualified zone academy.* Section 1397E(d)(4)(A)(iv) provides that a public school (or academic program within a public school) is a qualified zone academy only if, among other requirements, the public school is located in an empowerment zone or enterprise community (as defined in section 1393), or there is a reasonable expectation (as of the date of issuance of the bonds) that at least 35 percent of the students attending the school or participating in the program (as the case may be) will be eligible for free or reduced-cost lunches under the school lunch program established under the Richard B. Russell National School Lunch Act. For purposes of determining whether an issue complies with section 1397E(d)(4)(A)(iv), a public school is treated as located in an empowerment zone or enterprise community for the entire term of the issue if the public school is located in an empowerment zone or enterprise community on the date of issuance of the issue.

(7) *Remedial actions*—(i) *General rule.* If less than 95 percent of the proceeds of an issue is actually used for a qualified purpose with respect to a qualified zone academy, the issue will be treated as meeting the requirements of section 1397E(d)(1)(A) if the issue met the requirements of paragraph (h)(2)(i) of this section and a remedial action is taken under paragraph (h)(7)(ii) or (iii) of this section.

(ii) *Redemption or defeasance*—(A) *In general.* A remedial action is taken under this paragraph (h)(7)(ii) if the requirements of paragraphs (h)(7)(ii)(B) and (C) of this section are met.

(B) *Retirement of nonqualified bonds*—(*1*) *In general.* The requirements of this paragraph (h)(7)(ii)(B) are met if—

(*i*) All of the nonqualified bonds of the issue (determined by applying the principles of § 1.142–2(e)) are redeemed within 90 days after the date on which the failure to properly use proceeds occurs (as determined under paragraph (h)(7)(ii)(D) of this section); or

(*ii*) If any nonqualified bonds of the issue are not redeemed within 90 days after the date on which the failure to properly use proceeds occurs (the unredeemed nonqualified bonds), a defeasance escrow is established for the unredeemed nonqualified bonds within 90 days after the date on which the failure to properly use proceeds occurs.

(*2*) *Special rule for dispositions for cash.* If the failure to properly use proceeds is a disposition of financed property described in section 1397E(d)(5)(A) or (B) and the consideration for the disposition is exclusively cash, the requirements of this paragraph (h)(7)(ii)(B) are met if all of the disposition proceeds (as defined in § 1.141–12(c)(1)) are used within 90 days after the date of the disposition to redeem, or establish a defeasance escrow for, a pro rata portion of the nonqualified bonds of the issue.

(*3*) *Definition of defeasance escrow.* For purposes of this section, a defeasance escrow is an irrevocable escrow established to retire bonds on the earliest call date after the date on which the failure to properly use proceeds occurs in an amount that is sufficient to retire the bonds on that call date. At least 90 percent of the weighted average amount in a defeasance escrow must be invested in investments (as defined in § 1.148–1(b)), except that no amount in a defeasance escrow may be invested in any investment the obligor (or any person that is a related party with respect to the obligor within the

meaning of § 1.150–1(b)) of which is a user of proceeds of the bonds. All purchases or sales of an investment in a defeasance escrow must be made at the fair market value of the investment within the meaning of § 1.148–5(d)(6).

(C) *Additional rules*—(*1*) *Limitation on source of funding.* Proceeds of qualified zone academy bonds (other than unspent proceeds of the issue for which the failure to properly use proceeds occurs) must not be used to redeem or defease nonqualified bonds under paragraph (h)(7)(ii)(B) of this section.

(*2*) *Rebate requirement.* The issuer must pay to the United States, at the same time and in the same manner as rebate amounts are required to be paid under § 1.148–3 (or at such other time or in such other manner as the Commissioner may prescribe), 100 percent of the investment earnings on amounts in a defeasance escrow established under paragraph (h)(7)(ii)(B) of this section. For this purpose, the first computation period begins on the date on which the failure to properly use proceeds occurs under paragraph (h)(7)(ii)(D) of this section.

(*3*) *Notice of defeasance.* The issuer must provide written notice to the Commissioner, at the place designated in § 1.150–5(a), of the establishment of the defeasance escrow within 90 days of the date the defeasance escrow is established.

(D) *When a failure to properly use proceeds occurs*—(*1*) *Proceeds not spent.* For proceeds that are not spent, a failure to properly use proceeds occurs on the earlier of—

(*i*) The first date on which the public school (or academic program within the public school) does not constitute a qualified zone academy; and

(*ii*) The first date on which the issuer reasonably expects that less than 95 percent of the proceeds of the issue will be expended with due diligence for a qualified purpose with respect to a qualified zone academy.

(*2*) *Proceeds spent for rehabilitation, repair or equipment.* For proceeds that have been spent for a purpose described in section 1397E(d)(5)(A) or (B) with respect to a qualified zone academy, a failure to properly use proceeds occurs on the earlier of—

(*i*) The first date on which the public school (or academic program within the public school) does not constitute a qualified zone academy; and

(*ii*) The first date on which an action is taken that causes less than 95 percent of the proceeds of the issue to be used for a qualified purpose with respect to a qualified zone academy.

(*3*) *Proceeds spent for course materials or training.* If proceeds have been spent for a purpose described in section 1397E(d)(5)(C) or (D) with respect to a qualified zone academy, no event subsequent to such expenditure shall constitute a failure to properly use such proceeds.

(iii) *Alternative use of disposition proceeds.* A remedial action is taken under this paragraph (h)(7)(iii) if all of the requirements of paragraphs (h)(7)(iii)(A) through (D) are met—

(A) The failure to properly use proceeds (as determined under paragraph (h)(7)(ii)(D) of this section) is a disposition of financed property described in section 1397E(d)(5)(A) or (B) and the consideration for the disposition is exclusively cash;

(B) The issuer reasonably expects as of the date of the disposition that—

(*1*) All of the disposition proceeds (as defined in § 1.141–12(c)(1)), plus any amounts received from investing the disposition proceeds, will be expended within two years after the date of the disposition for a qualified purpose with respect to a qualified zone academy; or

(*2*) To the extent not expected to be so expended, used within 90 days after the date of the disposition to redeem or defease bonds in a manner that meets the requirements of paragraph (h)(7)(ii) of this section;

(C) The disposition proceeds, plus any amounts received from investing the disposition proceeds, are treated as proceeds for purposes of section 1397E; and

(D) If all of the disposition proceeds, plus any amounts received from investing the disposition proceeds, are not actually used in the manner described in paragraph (h)(7)(iii)(B) of this section, the remainder of such amounts are used within 90 days after the end of the two-year period described in paragraph (h)(7)(iii)(B)(*1*) of this section for a remedial action that meets the requirements of paragraph (h)(7)(ii) of this section.

(iv) *Allocating disposition proceeds among multiple funding sources.* For purposes of this paragraph (h)(7), if property has been financed with an issue of qualified zone academy bonds and one or more other funding sources, any disposition proceeds from that property are allocated to the issue under the principles of § 1.141–12(c)(3).

(8) *Definition of proceeds*—(i) *In general.* Except as provided in paragraph (h)(8)(ii) of this section, for purposes of section 1397E and this section, proceeds means sale proceeds as defined in § 1.148–1(b), plus any amounts received from investing sale proceeds.

(ii) *Private business contribution requirement.* For purposes of the private business contribution requirement of section 1397E(d)(2), proceeds means sale proceeds as defined in § 1.148–1(b).

(9) *Payment of principal, interest or redemption price.* The use of proceeds of a bond to pay principal, interest or redemption price of the bond or another bond is not a qualified purpose within the meaning of section 1397E(d)(5).

(10) *Reimbursement.* An expenditure for a qualified purpose may be reimbursed with proceeds of a qualified zone academy bond. For this purpose, rules similar to those in § 1.150–2 shall apply.

* * * * *

(k) *Effective dates*—(1) *In general.*

* * *

(2) *Special effective dates for paragraphs (d) and (h)*—(i) *In general.* Except as otherwise provided in this paragraph (k)(2), paragraphs (d) and (h) of this section apply to bonds sold on or after the date that is 60 days after publication of final regulations in the **Federal Register**.

(ii) *Permissive application*—(A) *In general.* Except as provided in paragraphs (k)(2)(ii)(B) and (C) of this section, issuers may apply paragraphs (d) and (h) of this section in whole, but not in part, to bonds sold before the date that is 60 days after publication of final regulations in the **Federal Register**.

(B) *Definition of proceeds.* Issuers may apply paragraphs (d) and (h) of this section, without regard to the definition of proceeds in paragraph (h)(8) of this section, to bonds sold before the date that is 60 days after publication of final regulations in the **Federal Register**.

(C) *Bonds issued before July 1, 1999.* Paragraphs (d) and (h)(10) of this section may not be applied to bonds issued before July 1, 1999.

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 04–6623 Filed 3–25–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–129447–01]

RIN 1545–BA02

Allocation and Apportionment of Expenses; Alternative Method for Determining Tax Book Value of Assets

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations and notice of public hearing.

SUMMARY: In the Rules and Regulations section of this issue of the **Federal Register**, the IRS is issuing temporary regulations providing an alternative method of valuing assets for purposes of apportioning expenses under the tax book value method of § 1.861–9T. The alternative tax book value method, which is elective, allows taxpayers to determine, for purposes of apportioning expenses, the tax book value of all tangible property that is subject to a depreciation deduction under section 168 by using the straight line method, conventions, and recovery periods of the alternative depreciation system under section 168(g)(2). The alternative method provided in the temporary regulations is intended to minimize basis disparities between foreign and domestic assets of taxpayers that may arise when taxpayers use adjusted tax basis to value assets under the tax book value method of expense apportionment. The text of those temporary regulations also serves as the text of these proposed regulations. This document also provides a notice of public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by June 24, 2004. Outlines of topics to be discussed at the public hearing scheduled for July 19, 2004, at 10 a.m. must be received by June 28, 2004.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–129447–01), Room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–129447–01), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC or sent electronically, via the IRS Internet site at *http://www.irs.gov/regs*. The public hearing will be held in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Margaret A. Hogan, (202) 622–3850; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Robin Jones, (202) 622–7180 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

The temporary regulations in the Rules and Regulations section of this issue of the **Federal Register** amend 26 CFR part 1. The temporary regulations provide an alternative method of valuing assets for purposes of apportioning expenses under the tax book value method of § 1.861–9T. The text of the temporary regulations also serves as the text of these regulations. The preamble of the temporary regulations explains the temporary regulations and these proposed regulations.

Special Analyses

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

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and the Treasury Department request comments on the clarity of the proposed rule and how it can be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for July 19, 2004, beginning at 10 a.m. in the IRS Auditorium of the Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For more information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit electronic or written comments by June 24, 2004, and an outline of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by June 28, 2004. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these proposed regulations is Margaret A. Hogan, Office of Associate Chief Counsel (International). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for § 1.861–9 is amended by adding entries in numerical order to read in part as follows:

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

Sections 1.861–9 and 1.861–9T also issued under 26 U.S.C. 863(a), 26 U.S.C. 864(e), 26 U.S.C. 865(i), and 26 U.S.C 7701(f). * * *

Par. 2. Section 1.861–9 is amended by revising paragraph (g)(1)(ii) introductory text, and adding paragraphs (h)(6), (i) and (j) to read as follows:

§ 1.861–9 Allocation and apportionment of interest expense.

* * * * *

(g) * * * (1) * * * (i) * * *

(ii) * * * [The text of the proposed revision of § 1.861–9(g)(1)(ii) is the same as the second sentence of § 1.861–9T(g)(1)(ii) published elsewhere in this issue of the **Federal Register**.] * * *

* * * * *

(h)(6) [Reserved]. For further guidance see, § 1.861–9T(h)(6).

(i) [The text of the proposed addition of § 1.861–9(i) is the same as § 1.861–9T(i)(1) through (i)(3)(i) published

elsewhere in this issue of the **Federal Register**.]

(j) [Reserved]. For further guidance, see § 1.861–9T(j).

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 04–6620 Filed 3–25–04; 8:45 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 61 and 63

[LA–69–2–7617b; FRL–7638–6]

Approval of the Clean Air Act Section 112(l) Program for Hazardous Air Pollutants and Delegation of Authority to the State of Louisiana

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Louisiana Department of Environmental Quality (LDEQ) has submitted updated regulations for receiving delegation of EPA authority for implementation and enforcement of National Emission Standards for Hazardous Air Pollutants NESHAPs) for all sources (both part 70 and non-part 70 sources). These regulations apply to certain NESHAPs promulgated by EPA, as amended through July 1, 2002. The delegation of authority under this notice does not apply to sources located in Indian Country. EPA is providing notice that proposes to approve the delegation of certain NESHAPs to LDEQ.

DATES: Written comments must be received by April 26, 2004.

ADDRESSES: Comments must be submitted to Mr. Jeffery Robinson, Air Permits Section, Multimedia Planning and Permitting Division (6PD–R), U.S. Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. Comments may also be submitted electronically or through hand delivery/courier by following the detailed instructions in section I.B. of the Supplementary Information section of the direct final rule located in the Rules section of this **Federal Register.**

FOR FURTHER INFORMATION CONTACT: Mr. Jeffery Robinson, Air Permit Section, Air Permits Section, Multimedia Planning and Permitting Division (6PD–R), U.S. Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, at (214) 665–6435, or at *robinson.jeffrey@epa.gov.*

SUPPLEMENTARY INFORMATION: In the final rules section of this **Federal Register**, EPA is approving LDEQ's request for delegation of authority to implement and enforce certain NESHAPs for all sources (both part 70 and non-part 70 sources). LDEQ has adopted certain NESHAPs by reference into Louisiana's state regulations. In addition, EPA is waiving its notification requirements so sources will only need to send notifications and reports to LDEQ.

The EPA is taking direct final action without prior proposal because EPA views this as a noncontroversial action and anticipates no adverse comments. A detailed rationale for this approval is set forth in the preamble to the direct final rule. If no adverse comments are received in response to this action rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn, and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment. For additional information, see the direct final rule which is published in the Rules section of this **Federal Register.**

Authority: 42 U.S.C. 7412.

Dated: March 9, 2004.

Richard E. Greene,

Regional Administrator, Region 6.

[FR Doc. 04–6300 Filed 3–25–04; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 421

[CMS–1219–P]

RIN 0938–AL76

Medicare Program; Durable Medical Equipment Regional Carrier (DMERC) Service Areas and Related Matters

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

ACTION: Proposed rule.

SUMMARY: This proposed rule would allow us to change the geographical boundaries served by the regional contractors that process durable medical equipment claims and to make other minor changes in the contract administration of the durable medical equipment regional carriers (DMERCs). It would allow us to increase or decrease the number of DMERCs, to change the boundaries of DMERCs based on criteria other than the boundaries of the Common Working File, and to name new contractors to perform statistical analysis or maintain the national supplier clearinghouse. We would publish the changes and their justifications in a **Federal Register** notice, rather than through notice and comment rulemaking.

Although we are proposing to allow changes to the number and configuration of regional carriers, we are not proposing to alter the criteria and factors that we use in awarding contracts.

The intent of this proposed rule would be to improve the contract process by swiftly meeting the challenges of the changing healthcare industry, addressing the changing needs of beneficiaries, suppliers, and the Medicare program, and facilitating our efforts to provide interested parties with the best value Medicare claims processing services. While we are not proposing to reconfigure the DMERC service boundaries at this time, the changes set forth in this proposed rule would provide a mechanism to swiftly make these kinds of changes without repeatedly invoking full rulemaking.

DATES: We will consider comments if we receive them at the appropriate address, as provided below, no later than 5 p.m. on May 25, 2004.

ADDRESSES: In commenting, please refer to file code CMS–1219–P. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit electronic comments to *http://www.cms.hhs.gov/regulations/ecomments* or to *http://www.regulations.gov;* or you may 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–1219–P, P.O. Box 8016, Baltimore, MD 21244–8016.

Please allow sufficient time for mailed comments to be timely received in the event of delivery delays.

If you prefer, you may deliver (by hand or courier) your written comments (one original and two copies) to one of

the following addresses: Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, or Room C4–26–05, 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.

All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. After the close of the comment period, CMS posts all electronic comments received before the close of the comment period on its public Web site.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Kimberly Nyland, (410) 786–2289.

SUPPLEMENTARY INFORMATION:

Submitting Comments: We welcome comments from the public on all issues set forth in this rule to assist us in fully considering issues and developing policies. You can assist us by referencing the file code CMS–1219–P and the specific "issue identifier" that precedes the section on which you choose to comment.

Inspection of Public Comments: Comments received timely will be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone (410) 786–7195.

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

A. Legislative Overview of Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) Claims Administration Covering 1966 Through 1992

[If you choose to comment on issues in this section, please include the caption "Background" at the beginning of your comments.]

Medicare has covered medically necessary items of durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS) under Part B since the inception of the program in 1966. In the original authorizing legislation for the Medicare program, coverage was provided under sections 1832 and 1861(s) of the Social Security Act (the Act) (Pub. L. 89–97). Since that time, the coverage and payment rules for DMEPOS, which may now be found in sections 1832, 1834, and 1861 of the Act and their implementing regulations have changed significantly.

From 1986 to 1992, the number of complaints about fraud and abuse in the DMEPOS benefit began to increase markedly, and a variety of government investigations identified specific weaknesses in the program. We sought solutions to known claims processing problems, including the increasing level of fraud and abuse in billing. Subsequently, the Omnibus Budget Reconciliation Act of 1987 (OBRA 1987) Pub. L. 100–203, enacted on December 22, 1987, authorized the Secretary to designate, by regulation, regional carriers to process DMEPOS claims. (See sections 1834(a)(12) and 1834(h)(3) of the Act.)

Before 1993, Medicare Part B claims for DMEPOS items and services were assigned to each of the more than 30 local Medicare carriers and represented, on average, only 5 percent of each carrier's overall workload. After much review, we concluded that this structure was not the most effective one for administering DMEPOS claims under Medicare. It was difficult for carriers to devote significant administrative review resources to this small percentage of claims.

In addition, DMEPOS claims were generally complex and time-consuming to process. The protocol for suppliers to obtain a Medicare billing number was ill-defined and required little identifying information or compliance with any particular business or operational standards.

Furthermore, carriers' medical review policies varied significantly and contributed to inconsistent claims processing decisions. Finally, certain DMEPOS suppliers who engaged in unethical practices were able to exploit our local Medicare carriers by electing to submit claims to carriers that provided more generous coverage, paid more than other carriers, or both. As documented in program audits and congressional hearings, fraudulent suppliers could do this easily by manipulating our then existing "point of sale" claims jurisdiction rule; these suppliers could simply locate their business offices where conditions were most favorable. The collective impact of these issues resulted in significant abuse of the Medicare program by a subset of the DMEPOS supplier community, without any measurable improvement in patient care and outcomes.

B. Agency and Congressional Efforts To Reform DMEPOS Claims Administration, 1987 Through 1994

To address the problem of fraud and abuse in the supplier community, we initiated an effort to reform the administration of the DMEPOS benefit category using several strategies. On November 6, 1991, we published a proposed rule (56 FR 56612) setting forth a new framework for DMEPOS claims processing. In that rule, we proposed to limit the number of carriers handling DMEPOS claims by establishing regional carriers who would be expert processors of DMEPOS claims. The rule also proposed to change the requirement for assigning DMEPOS claims to carriers (that is, the DMEPOS claim jurisdiction rule) from a "point of sale" framework to a framework based on "beneficiary residence." In addition, the rule proposed to establish supplier business standards and information disclosure requirements. We expected that these changes, taken together, would make Medicare's DMEPOS claim administration apparatus less susceptible to supplier manipulation.

On June 18, 1992, we published a final rule with comment period (57 FR 27307) to implement this revised statutory authority. The rule provided the following:

- Established four regional carriers (known as DME Regional Carriers or DMERCS) to standardize the coverage and payment of DMEPOS.
- Designated the States and territories to be served by each DMERC.
- Consolidated and focused efforts to curb fraud and abuse.
- Controlled the enrollment of all DMEPOS suppliers through a National Supplier Clearinghouse (NSC) (a contractor that reviews and approves supplier applications for Medicare program billing numbers).

• Introduced the concept of a Statistical Analysis DME Regional Carrier (SADMERC) to review supplier billing patterns.

• Established minimum business standards for all suppliers wishing to enroll in the Medicare Program.

• Required that regional carriers administer DMEPOS' claims based on the location (State) of the beneficiary's primary residence. The regulations for DMERC contracts, in accordance with these authorities are set forth at 42 CFR 405.874, 421.210, 421.212, and 424.57.

Finally, on October 31, 1994, the Congress enacted the Social Security Amendments of 1994, Public Law 103–432. Among other matters, this statute established section 1834(j)(1) of the Act, which incorporated and augmented the supplier business and operational standards established in the final rule of June 18, 1992. Paragraph (E) of this provision ratified the concept of using the NSC. However, this provision restricts the type of entity that may perform the NSC function exclusively to Medicare carriers holding contracts under section 1842 of the Act.

C. Provisions of the Existing DMERC Regulations (Especially § 421.210)

As noted above, there are several regulatory provisions pertaining to the operation of the DMERCs and related functions. Section 405.874 establishes a process by which the NSC makes determinations on whether to issue a Medicare billing number to a supplier applicant and specifies an administrative appeals process if we make an adverse determination. Section 421.212 specifies that the Railroad Retirement Board will use the CMS-contracted DMERCs to make DMEPOS claim determinations for Medicare-eligible railroad retirees. Section 424.57 provides special payment rules for DMEPOS suppliers and requirements for the issuance of DMEPOS supplier billing numbers, including a series of business and operational standards that DMEPOS suppliers must meet in order to qualify for Medicare billing privileges.

Section 421.210 could be viewed as the cornerstone regulation for the DMERC carrier structure. As we are proposing to amend this regulation, it is important to discuss its content in some detail.

We published and implemented the current regulations at § 421.210 under the authority of sections 1842, 1834(a), and 1834(h) of the Act. The current regulation, which augments and expands on the underlying statutory provisions, provides for the following:

Paragraph (a) identifies the statutory basis for the rule and indicates that the purpose of the rule is to designate one or more carriers "by specific regions" to process DMEPOS claims.

Paragraph (b) identifies the types of claims for DMEPOS items and services that are processed by the DMEPOS carrier.

Paragraph (c) defines four specific regions for the processing of DMEPOS claims by naming the States and territories to be included in each region. This section also states that the DMERC regions coincide with the "sector" boundaries of our Common Working File System.

Paragraph (d) specifies criteria that we use in designating entities to serve as regional carriers for DMEPOS claims.

Paragraph (e)(1) requires that the DMERCs process DMEPOS claims only for beneficiaries whose permanent residence falls within their designated regional areas (as established by paragraph (c)). Paragraph (e)(1) also specifies that in processing DMEPOS claims, the DMERCs will apply the payment rates applicable to the State of residence of the beneficiary. In addition, the rule makes clear that the "beneficiary residence" jurisdiction rule applies to qualified Railroad Retirement beneficiaries and defines "permanent residence" for the purpose of the rule.

Paragraph (e)(2) identifies by name the initial DMERCs; paragraph (e)(3) identifies by name the initial NSC and SADMERC; paragraph (e)(4) commits us to periodically re-compete the four DME regional carrier contracts.

Paragraph (f) requires the DMERCs to collect ownership and control information, as well as supplier standard certifications, from each DMEPOS supplier that they service.

In section II of the preamble, we will discuss several changes we propose to make to paragraphs (a), (c), (d), and (e) of § 421.210.

D. Establishment and Operation of the DMERCs, 1993 Through 2003

We issued a Request for Proposal in May 1992 for the four regional DMERC contracts. We also solicited offers for two DMEPOS-related national contracts, the above-mentioned NSC and the SADMERC. In December 1992, the contracts, designed around Common Working File sectors, were awarded as follows:

Region A: Travelers Insurance Company for 10 States in the Northeast. [1]

Region B: AdminaStar Federal for 9 States in the Midwest and the District of Columbia.

Region C: Palmetto Government Benefits Administrators (GBA) for 14 States and 2 territories in the South.

Region D: CIGNA for 17 States and 3 territories in the West.

NSC: Palmetto GBA.

SADMERC: Palmetto GBA.

Initially, the DMERC and SADMERC contracts were 2-year contracts with two 1-year renewal options. The NSC was given two 1-year contracts and two 1-year renewal options. The contracts were modeled, to a significant extent, after requirements in the Federal Acquisition Regulations (FAR).

One of the biggest challenges and accomplishments of the transition to the DMERC processing arrangement was the consolidation of diverse carrier medical policies for DMEPOS. The agency's initiative to configure geographical regions to process DMEPOS claims by consolidating DME workloads from the 34 carriers to 4 DMERCs greatly improved the rigor and consistency of medical review. Formerly, each carrier developed its own local medical review policies for DMEPOS claims under loose guidelines and oversight from us. During the transition period, our coverage and medical review staff worked closely with the DMERC medical directors to streamline and standardize medical policy within and across the DMERC regions. Regionalization allowed the DMERCs to have a consistent uniform interpretation of coverage policies, local medical review policies, and pricing for similar items and services. Today, the DMERCs share essentially one approach to coverage and medical review for all DMEPOS items.

II. Provisions of This Proposed Rule

[If you choose to comment on issues in this section, please include the caption "Provisions of This Proposed Rule" at the beginning of your comments.]

We are proposing to make a number of changes to § 421.210, which concern the designation of regional carriers to process claims for DMEPOS. Broadly speaking, we are seeking greater future flexibility to revise the number and boundaries of DMERC regional areas. We also desire greater flexibility in contracting for DMERC, NSC, and SADMERC functions. We have examined the statutory framework (section 1834(a)(12) of the Act, as set forth below at paragraph (a), "Basis") for

[1] The contract was initially awarded to Travelers Insurance Company and the regulations use this name. Through a series of corporate transactions, United Healthcare became the successor-in-interest to Travelers and served as the DMERC until September 2000, when HealthNow was awarded the DMERC contract for Region A.

the current regulation and have concluded that the current regulation is more restrictive on the Secretary's contracting discretion than required either by statute or the program's interest.

Specifically, we are proposing to make the following changes to § 421.210 "Designations of regional carriers to process claims for durable medical equipment, prosthetics, orthotics, and supplies":

• Paragraph (a), "Basis."

We are proposing to revise paragraph (a) to more closely follow the actual language of section 1834(a)(12) of the Act that authorizes the Secretary to "designate, by regulation under section 1842 of the Act, one carrier for one or more entire regions to process all claims within the region for covered items under this section." We are therefore revising paragraph (a) to state that the Secretary is authorized to designate carriers for "one or more entire regions" rather than to designate carriers by "specific" regions.

• Paragraph (c), "Region designation."

We are proposing to revise the language in paragraph (c), designate the current paragraph (c) as (c)(1), and add a new paragraph (c)(2).

In paragraph (c), we are proposing to clarify the Secretary's authority to revise the number or configuration of DMEPOS regional areas in the future, based on appropriate factors and criteria.

The current regulations in § 421.210(c) specify that there are four regional areas for DMEPOS claims and further specify that these areas be drawn to coincide with the Common Working File sectors. The regulations also specify, by name, which States and territories are assigned to each region for DMEPOS claims. To allow greater flexibility, in paragraph (c)(1), we are proposing to add the word "initial" in front of the listing of the current DMERC service areas, to make clear that this configuration could change in the future.

In addition, we would revise paragraph (c)(1) to remove a specific reference to the Common Working File sector framework as a determinant for the DMERC regions. Advances in technology have greatly diminished the importance of this consideration and, therefore, its inclusion in regulation is unnecessary.

The existing reference to Common Working File sectors in paragraph (c)(1), as a constraint for the DMERC region boundaries, illustrates the approach of the original rule. The June 18, 1992 rule acknowledged a technical Medicare claims processing system constraint that was significant at the time. Since that time, advances in our claims processing system have greatly reduced the impact of "out of the area" processing, and it is no longer necessary to structure the DMERCs around the Common Working File sectors.

New paragraph (c)(2) would allow us to revise the number and boundaries of DMERC regional service areas in the future based on appropriate factors and criteria. Our goal is to constantly strive to improve beneficiary and supplier satisfaction. Therefore, we would consider the effect of any service area changes on beneficiaries and suppliers in our decisions. Examples of factors and criteria include population shifts or natural disasters that require a reallocation of workload, and workforce conditions that may make it difficult for DMERCs in certain areas to recruit and retain qualified employees. We specify in paragraph (c)(2) that this change would allow us future discretion to identify which States and territories are assigned to various DMERC regions by publication of a **Federal Register** notice. The **Federal Register** notice would identify the nature of any changes in the DMERC service areas, as well as our rationale for the changes.

Absent the proposed changes to these regulations, we would have to maintain the current DMERC configuration even if our administrative and program needs change. Currently, the only existing mechanism for changing the structure of the DMERC regions is to undertake notice and comment rulemaking for each change. We believe that it is not the intent of the statute to constrain the Secretary's administrative discretion to this extent. Although we are not now proposing to alter the number or configuration of the four areas for DMEPOS claims, we anticipate that new program circumstances may arise that may require alterations in the number or configuration of DMERC service areas. We believe that we have a definite need for the capability to move swiftly and make DMERC service area changes without going through notice and comment rulemaking whenever administrative issues arise. Just as critical, we believe it is important to consider the effects of these kinds of changes on beneficiaries and suppliers and to provide the public with an explanation of changes when they are made.

Under our proposed rules, we would not be required to administer four DMEPOS areas, would not be required to determine these DMEPOS areas based on the sector areas of the Common Working File, and would not be required to go through rulemaking to modify the assignment of the States and territories to revised DMEPOS areas.

We are providing a fictitious (but plausible) example of a situation, which cannot be addressed very well under the current regulation. In this example, DMERC X, which has historically performed well, is having difficulty serving all beneficiaries and suppliers in all of its assigned States, due to difficulties in recruiting a sufficient number of qualified personnel. At present, the regulations would seem to limit our options to—(1) hoping that DMERC X improves its performance; or (2) terminating DMERC X's contract for the entire service area and procuring and installing a replacement. We do not have the third option of removing a limited number of States from DMERC X's contract and attaching these service areas to another DMERC's service area (or setting up a fifth DMERC jurisdiction). However, under the proposed regulation, this kind of contract management action could yield many benefits, in that DMERC X could focus its resources on its remaining workload. Under the current regulation, moving a State to another area, or setting up a fifth jurisdiction, would require an extended rulemaking process unless the rules take a more general approach, as we are proposing.

• Paragraph (d), "Criteria for designating regional carriers."

Paragraph (d) under this section currently discusses our "designation" of regional carriers in a manner that does not explicitly acknowledge the fact that these designations must be premised on the awarding of Medicare carrier contracts in accordance with applicable law.

We are proposing to revise paragraph (d) under this section to make clear that we will designate regional carriers to process DMEPOS claims by awarding DMERC contracts in accordance with applicable law. We are not proposing any changes to the current criteria under paragraphs (d)(1) through (d)(5) of this section, which we use in our procurement evaluation processes for this particular kind of contract.

• Paragraph (e), "Carrier designation."

In paragraph (e)(1), we are also proposing to make minor revisions to conform the language to the changes made in § 421.210(c).

We are also proposing to revise paragraph (e) to provide that we have flexibility and discretion with respect to contracting for DMERC and related functions. The current regulations in § 421.210(e) name the initial DMERC-contracting companies and also identify the particular region each company

serves. The current regulations could be interpreted as requiring that we constantly update our rules whenever our business partners change.

The proposed regulatory framework will clarify our discretion not to name a contracting company in future regulations if we re-compete a DMERC contract after its conclusion or termination. This proposed change would potentially reduce the agency's administrative burden when a DMERC contract is not renewed. We are proposing, however, to notify affected beneficiaries and suppliers when we change contractors.

Specifically in paragraph (e)(2), we are proposing to remove the names of the initial DMERCs from the regulation. This change would also clarify our future discretion to award a DMERC contract to process DMEPOS claims under the Medicare program (that is, designate a DMERC), without any obligation to name the new DMERC(s) in regulations or by **Federal Register** notice. We would, however, notify affected beneficiaries and suppliers to the change in contractors. Therefore, we are proposing to revise paragraph (e)(2) to add that we will notify affected Medicare beneficiaries when we designate a regional carrier.

We are proposing to revise paragraphs (e)(3) and (e)(4) to allow us discretion to contract for the performance of NSC functions through either an amendment to a DMERC contract or through a non-DMERC Medicare carrier contract. In paragraph (e)(4), the current regulations for NSC functions limit the agency's selection of NSC contractors to one of the DMERCs. However, section 1834(j)(1)(E) of the Act actually more broadly permits any carrier with a contract under section 1842 of the Act to perform NSC functions. We believe that our rules should reflect this broader discretion under the statute. Therefore, in paragraph (e)(4), we are proposing to remove the limitation that restricts our list of contractors to only four DME regional carriers. This proposed revision gives us greater flexibility when we re-compete a DMERC contract after its conclusion or termination.

In addition, we are proposing to delete the references to the SADMERC function in § 421.210(e)(3) and § 421.210(e)(4). SADMERCS are responsible for storing national DMEPOS claims history data, for distributing to the DMERCS national pricing files, and for conducting data analysis. Although we recognize the importance of the activities that the SADMERC provides to us and the DMERCS, these activities are not identified elsewhere in the regulations, and we believe that little purpose is served by naming an entity without any reference to its functions. Therefore, we do not believe it necessary to reference the SADMERC in our regulations.

By removing the current reference to the SADMERC, including the constraint that this activity be included in a DMERC's contract, we will have the flexibility to include this function in a DMERC contract or to contract for the SADMERC activity through some other vehicle.

In summary, this proposed rule would allow us to change the geographical boundaries served by the regional contractors that process DME claims and to make other minor changes in contract administration of the DMERCS. We would be able to increase or decrease the number of DMERCS or change the boundaries of the DMERCs through a **Federal Register** notice. Further, we would name new contractors to perform the functions of the DMERC and NSC without going through notice and comment rulemaking. Instead, we would notify affected beneficiaries and suppliers of contractor changes through our outreach and education initiative.

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 3506(c)(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.

This document does not impose any new information collection and recordkeeping requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995.

IV. Response to Comments

Because of the large number of items of correspondence we normally receive on **Federal Register** documents published for comment, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

V. Regulatory Impact

A. Overall Impact

[If you choose to comment on issues in this section, please include the caption "Regulatory Impact" at the beginning of your comments.]

We have examined the impacts of this rule as required by Executive Order (E.O.) 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 (Pub. L. 104–4), and E.O. 13132.

E.O. 12866 (as amended by E.O. 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 does not reach the economic threshold and thus is not considered a major rule. This rule only provides the Secretary with greater contracting flexibility consistent with the statute and would not have any direct economic impact. Because this proposed rule would only affect our administrative structures and does not change in any way the Medicare DMEPOS benefit (that is, neither coverage nor payment is changed), this rule would not affect the amount or distribution of the Medicare benefit payment for DMEPOS. Further, any possible restructuring of the DMERC regions in the future would not remotely approach a net economic impact of $100 million on either CMS's administrative costs or the administrative costs of DMEPOS suppliers. Therefore, we do not believe that a regulatory impact analysis is necessary under E.O. 12866.

The RFA requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and

government agencies. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $6 million to $29 million in any 1 year. Individuals and States are not included in the definition of a small entity. This proposed rule, as noted above, would not have any direct economic impact on DMEPOS suppliers, because it would not affect the scope of benefits, coverage, or payment rules for DMEPOS, nor would it affect the billing requirements for these services. This rule would not commit us to any particular reconfiguration of the DMERC areas. However, we agree to consider any effects on DMEPOS suppliers in any future reconfigurations of the DMERC regions. We are not preparing an analysis for the RFA because we have determined that this rule would not have a significant economic impact on a substantial number of small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds. The changes that this rule proposes pertain to our processes for configuring and designating contractors to process DMEPOS claims and would not have a significant impact on the operations of a substantial number of small rural hospitals. Therefore, we are not preparing an analysis for section 1102(b) of the Act.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule that may result in expenditure in any 1 year by State, local, or tribal governments, in the aggregate, or by the private sector, of $110 million. This rule would not have a consequential effect on the governments mentioned or on the private sector.

E.O. 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. Since this regulation would not impose any costs on local governments, the requirements of E.O. 13132 are not applicable.

B. Conclusion

For these reasons, we are not preparing analyses for either the RFA or section 1102(b) of the Act because we have determined that this rule would 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.

C. Alternatives Considered

We could have chosen to continue to operate under the constraints of our current regulations. This option would require that we periodically undertake notice and comment rulemaking to update the regulations with the names of new contractors. We have provided additional discussion in the preamble describing why we believe this is not the optimal solution. We believe our proposal to make modest changes to our regulations would offer us greater flexibility in contracting with DMERCs and allow us to be more responsive to the needs of all key stakeholders.

In accordance with the provisions of E.O. 12866, the Office of Management and Budget reviewed this regulation.

List of Subjects in 42 CFR Part 421

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

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services proposes to amend 42 CFR chapter IV, part 421 as set forth below:

PART 421—INTERMEDIARIES AND CARRIERS

1. The authority citation for part 421 continues to read as follows:

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

Subpart C—Carriers

2. Amend § 421.210 as follows:

A. Revise paragraph (a).

B. Revise paragraph (c).

C. Revise the introductory text of paragraph (d).

D. Revise paragraph (e).

The revisions read as follows:

§ 421.210 Designations of regional carriers to process claims for durable medical equipment, prosthetics, orthotics, and supplies.

(a) *Basis.* This section is based on sections 1834(a)(12) and 1834(h) of the Act, which authorize the Secretary to designate one carrier for one or more entire regions to process claims for durable medical equipment, prosthetic devices, prosthetics, orthotics, and other supplies (DMEPOS). This authority has been delegated to CMS.

* * * * *

(c) *Region designation.* (1) The boundaries of the initial four regions for processing claims described in paragraph (b) of this section contain the following States and territories:

(i) Region A: Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, and Delaware.

(ii) Region B: Maryland, the District of Columbia, Virginia, West Virginia, Ohio, Michigan, Indiana, Illinois, Wisconsin, and Minnesota.

(iii) Region C: North Carolina, South Carolina, Kentucky, Tennessee, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas, Oklahoma, New Mexico, Colorado, Puerto Rico, and the Virgin Islands.

(iv) Region D: Alaska, Hawaii, American Samoa, Guam, the Northern Mariana Islands, California, Nevada, Arizona, Washington, Oregon, Montana, Idaho, Utah, Wyoming, North Dakota, South Dakota, Nebraska, Kansas, Iowa, and Missouri.

(2) CMS may modify the number and boundaries of the regions established in paragraph (c)(1) of this section based on appropriate criteria and considerations including the effect of the change on beneficiaries and DMEPOS suppliers. To announce changes, CMS will publish a notice in the **Federal Register** that delineates the regional boundary or boundaries changed, the States and territories affected, and supporting criteria or considerations.

(d) *Criteria for designating regional carriers.* CMS designates regional carriers to achieve a greater degree of effectiveness and efficiency in the administration of the Medicare program. In making this designation, CMS will award regional carrier contracts in accordance with applicable law and will consider some or all of the following criteria—

* * * * *

(e) *Carrier designation.* (1) Each carrier designated a regional carrier must process claims for items listed in paragraph (b) of this section for beneficiaries whose permanent residence is within that carrier's area as designated under paragraph (c) of this section. When processing the claims, the carrier must use the payment rates applicable for the State of residence of the beneficiary, including a qualified Railroad Retirement beneficiary. A beneficiary's permanent residence is the address at which he or she intends to

spend 6 months or more of the calendar year.

(2) CMS will notify affected Medicare beneficiaries and suppliers when it designates a regional carrier (in accordance with paragraph (d) of this section) to process DMEPOS claims (as defined in paragraph (b) of this section) for all Medicare beneficiaries residing in their respective regions (as designated under paragraph (c) of this section).

(3) CMS may contract for the performance of National Supplier Clearinghouse functions through a contract amendment to one of the DME regional carrier contracts or through a contract amendment to any Medicare carrier contract under § 421.200.

(4) CMS will periodically recompete the contracts for the DME regional carriers. CMS will also periodically recompete the National Supplier Clearinghouse function.

* * * * *

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

Dated: September 29, 2003.

Thomas A Scully,

Administrator, Centers for Medicare & Medicaid Services.

Approved: December 31, 2003.

Tommy G. Thompson,

Secretary.

[FR Doc. 04–6833 Filed 3–25–04; 8:45 am]

BILLING CODE 4120–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 0, 4 and 63

[ET Docket No. 04–35; FCC 04–30]

Commission's Rules Concerning Disruptions to Communications

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document proposes to extend the Commission's disruption reporting requirements to communications providers who are not wireline carriers. The Commission also proposes to streamline compliance with the reporting requirements through electronic filing with a "fill in the blank" template and by simplifying the application of that rule. In addition, the Commission proposes to delegate authority to the Chief, Office of Engineering and Technology, to make the revisions to the filing system and template that are necessary to achieve the goals of this rulemaking proceeding. We believe that these proposals will allow the Commission to obtain the necessary information regarding service disruptions in an efficient and expeditious manner and to achieve significant concomitant public interest benefits.

DATES: Comments must be filed on or before May 25, 2004, and reply comments June 24, 2004. Written comments on the proposed and/or modified information collection(s) must be submitted by the public, Office of Management and Budget (OMB), and other interested parties on or before May 25, 2004.

FOR FURTHER INFORMATION CONTACT: Charles Iseman at (202) 418–2444, *charles.iseman@fcc.gov*, Office of Engineering and Technology, TTY (202) 418–2989.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Notice of Proposed Rule Making*, ET Docket No. 04–35, FCC 04–30, adopted February 12, 2004, and released February 23, 2004. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY–A257), 445 12th Street, SW., Washington, DC 20554. The complete text of this document also 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*. Alternate formats are available to persons with disabilities by contacting Brian Millin at (202) 418–7426 or TTY (202) 418–7365.

Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments on or before May 25, 2004, and reply comments on or before June 24, 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, May 1, 1998. 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 appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number.

All paper filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. 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.

Initial Paperwork Reduction Act of 1995 Analysis

This NPRM contains proposed 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 collection(s) contained in this NPRM, as required by the Paperwork Reduction Act (PRA) of 1995, Public Law 104–13. Public and agency comments are due May 25, 2004. PRA comments should address: (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 estimates; (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.

Written comments by the public on the new or modified information collections are due May 25, 2004. In addition to filing comments with the Secretary, a copy of any Paperwork Reduction Act (PRA) comments on the information collection(s) contained herein should be submitted to Les Smith, Federal Communications Commission, Room 1–CA804, 445 12th Street, SW., Washington, DC 20554, or via the Internet to *Leslie.Smith@fcc.gov*, and to Kristy L. LaLonde, OMB Desk Officer, Room 10234 NEOB, 725 17th Street, NW., Washington, DC 20503 via the Internet to *LaLonde@omb.eop.gov* or by fax to 202–395–5167.

OMB Control Number: 3060–0484.

Title: Part 4 of the Commission's Rules Concerning Disruptions to Communications.

Form No.: NA.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities; Not-for-profit institutions; and/or State, local or tribal governments.

Number of Respondents: 52.

Estimated Time per Response: 5 hours.

Frequency of Response: On occasion reporting requirements.

Total Annual Burden: 1,040 hours.

Total Annual Costs: $41,600.

Needs and Uses: In recognition of the critical need for rapid, full, and accurate information on service disruptions that could affect homeland security, public health and safety, as well as the economic well-being of our Nation, and in view of the increasing importance of non-wireline communications in the Nation's communications networks and critical infrastructure, we propose to extend our disruption reporting requirements to communications providers who are not wireline carriers. We also propose to move the outage-reporting requirements from part 63 of our rules to part 4.

Summary of Notice of Proposed Rulemaking

1. This Notice of Proposed Rulemaking (NPRM) proposes to extend the Commission's disruption reporting requirements to communications providers who are not wireline carriers and to move the outage-reporting requirements from rule part 63 to part 4. In making these proposals, the Commission recognizes that, although these requirements were originally established within the telecommunications common carrier context, it is now appropriate to adapt and apply them more broadly across all communications platforms to the extent discussed in the NPRM. In an effort to promote rapid reporting and minimal administrative burden on covered entities, the Commission also proposes to streamline compliance with the reporting requirements through electronic filing with a "fill in the blank" template and by simplifying the application of the existing rule (47 CFR 63.100). The Commission seeks comment on these proposals and notes, as an initial matter, that the actual text of the final rules and the final reporting template that will be adopted may differ from the text and template that are contained in Appendix A and Appendix B to the Notice of Proposed Rulemaking. Accordingly, the Commission invites interested parties to file comments and reply comments to address the issues that are discussed in this NPRM as well as the specific rules that are proposed in Appendix A and the reporting template that is proposed in Appendix B. The Commission also requests comment on any other changes to its communications outage reporting rules that would eliminate inadequacies in these reporting requirements. Based on the comments that the Commission receives in this proceeding and on its analysis of the information that is before it, the Commission may make such additional modifications to its existing and proposed communications outage-reporting requirements as may be necessary or desirable to fulfill, more fully, the objectives that are set forth in the Communications Act.

2. Communications disruptions can be characterized as consisting of: (i) A lack of "generally-useful availability" of communications, which means an inability to access a network (*e.g.*, an inability to acquire dial-tone); or (ii) a lack of "generally-useful connectivity" of communications, which means the inability to complete the communication effectively after a network has been successfully accessed. Section 63.100 applies to both types of communications disruptions which are further classified into, essentially, two types of reporting requirements: (i) The reporting of disruptions that could have a direct effect on the safety of life or property or on the National defense and security; and (ii) the reporting of outages that are otherwise sufficiently significant that they warrant reporting. The Commission proposes to retain this basic type of reporting framework with modifications to improve its usefulness, and seek comment on this proposal.

3. *General Outage-Reporting Criteria and Proposed Revisions to Them.* Currently, the general reporting criteria requires that an outage be reported whenever its duration is at least 30 minutes and the number of customers potentially affected by the outage is at least 30,000. By the term "customer" the Commission means the individual end user (*i.e.*, a person), but some carriers have counted each large corporate or organizational customer as a single "customer." The latter interpretation leads to underreporting of significant outages. Another anomaly in the current rule is that outages whose duration lasts many hours or days but that affect slightly less than 30,000 customers are not required to be reported.

4. The Commission proposes to correct these anomalies in its general reporting criteria by requiring that an outage report be filed whenever the duration of the outage is at least 30 minutes and the outage potentially affects at least 900,000 user-minutes. A user-minute would be defined as the mathematical product of the number of end users and the outage duration expressed in minutes. For telephony, an "end user" would be defined as an assigned telephone number, and the number of potentially-affected user minutes would be the mathematical result of multiplying the outage's duration (expressed in minutes) by the number of potentially-affected assigned telephone numbers. ("Assigned telephone numbers" would be defined as the sum of "assigned numbers" and "administrative numbers," where the latter terms are currently defined in 47 CFR 52.15(f)(i) and (iii).) We seek comment on this proposal.

5. *Wireline Communications Providers.* The outage reporting requirements (subject to the proposed revisions) would continue to apply to "wireline providers," which are entities that provide terrestrial communications through direct connectivity, predominantly by wire, coaxial cable, or optical fiber, between the serving central office (as defined in the Appendix-Glossary to 47 CFR part 36) and end user location(s). (For outage reporting purposes, wireline communications includes any augmentation through the use of microwave links and other links that use other radio frequencies.)

6. *LEC and IXC Tandem Outages.* For the tandem facilities of interexchange or local exchange carriers, the current rule requires that "carriers must, if technically possible, use real-time to determine whether the criteria for reporting an outage have been reached. Carriers must report IXC and LEC tandem outages * * * where more than 90,000 calls are blocked during a period

of 30 or more minutes for purposes of complying with the 30,000 potentially affected customers threshold," 47 CFR 63.100(g). The NPRM proposes to modify this rule to replace the reference to "customers" with a reference to "user-minutes," for consistency purposes. We also note that the term "blocked calls" is not clearly defined in § 63.100 and that some companies count only *originating* calls that are blocked, while other companies count both *originating* and *terminating* blocked calls. To eliminate this ambiguity and to gain an understanding of the full impact of each outage, as well as to promote consistent reporting by all carriers, the Commission proposes to require that all blocked calls, regardless of whether they are originating or terminating calls, be counted in determining compliance with the outage reporting threshold criteria. For those outages where the failure prevents the counting of blocked calls in either the originating or terminating direction, or in both directions, historical data may be used. Three times the actual number of carried calls for the same day of the week and the same time of day should be used as a surrogate for the number of blocked calls that could not be measured directly. "Blocked calls" are a "running measurement" made for the total duration of the outage. That is, an outage that blocks only 50,000 calls in the first 30 minutes may nevertheless reach the 90,000 blocked-call threshold criterion if the outage lasts, for example, for one hour. In relatively rare cases, it may be possible to obtain the number of originating blocked calls only, or the number of terminating blocked calls only, but not both. For these cases, the Commission proposes to require that the blocked-call count be doubled to compensate for the missing data, unless the carrier certifies that only one direction of the call set-up was affected by the outage. The Commission seeks comment on these proposals.

7. *Cable Communications Providers—Circuit Switched Telephony.* Circuit-switched telephony provided by cable operators has always been subject to the communications disruptions reporting requirements set forth in 47 CFR 63.100. The Commission proposes to clarify this point and to modify these requirements in a manner consistent with its proposed changes (*i.e.*, 30 minutes duration and 900,000 user-minutes criteria) to the outage-reporting requirements for wireline telephony and seek comment on this proposal.

8. *Satellite Communications Providers.* Given the increased role played by satellites in our Nation's communications infrastructure, and the likelihood that the importance of satellite communications will grow substantially in the future, the Commission proposes to eliminate the satellite exemption in its outage reporting rules and proposes to require that all major failures be reported by providers of satellite communications to the public. This would apply to satellites or transponders used to provide telephony and/or paging. The proposal does not include satellites or transponders used solely to provide intra-corporate or intra-organizational private telecommunications or solely for the one-way distribution of video or audio programming. The Commission seeks comment on this proposal.

9. Satellite communications have space components and terrestrial components. The proposed reporting requirements cover all satellite communications outages, regardless of whether they result from failures in the space or terrestrial components. The proposal would require the reporting of any loss of complete accessibility to a satellite or any of its transponders for 30 minutes or more. Such outages could result, for example, from an inability to control a satellite, a loss of uplink or downlink communications, Telemetry Tracking and Command failures, or the loss of a satellite telephony terrestrially-based control center, all of which the Commission deems to be major infrastructure failures. Analogous to the cases of wireline, wireless, and cable communications, the proposal would also require the reporting of the loss, for 30 minutes or more, of any satellite link or its associated terrestrial components that are used to provide telephony and/or paging, whenever at least 900,000 user-minutes are potentially affected. The Commission seeks comment on these proposals.

10. *Wireless Communications Providers.* Similar to the case of satellite communications, the Commission recognizes the increased and critical role of wireless communications in our Nation's communications infrastructure and proposes to eliminate the exemption for wireless communications in its outage reporting rules. The term "wireless service providers," refers to entities that provide communications by using cellular architecture in the Cellular Radio Telephone Service ("CRTS") (part 22 of the Commission's Rules); Personal Communications Service ("PCS") (part 24); and enhanced Special Mobile Radio Service ("SMRS") (part 90) (such as that provided by NEXTEL). It also includes Short Message Service ("SMS") communications, which consist of short text messages (typically 20 octets or less), as well as CMRS paging services (see 47 CFR 20.9(a)(1), (6), 22.99, 22.507(c), and 90.7) and narrowband PCS (part 24), as wireless services. Consistent with the 30 minutes/900,000 user-minutes criteria, the Commission proposes to require wireless service providers to report outages of at least 30 minutes duration that potentially affect 900,000 user-minutes. While the Commission believes in the importance of a common metric that is based on the outage impact on people irrespective of the communications system involved, it also seeks comment on possible alternative criteria that would yield outage data that would be useful in developing best practices. Paging remains an important technology for emergency responders and therefore the Commission is proposing to include paging service providers within the scope of the outage reporting requirements for wireless service providers. For those paging systems in which each individual user is assigned a telephone number, the Commission proposes to define an end user as an assigned telephone number, and the number of potentially-affected user minutes would be the mathematical result of multiplying the outage's duration (expressed in minutes) by the number of potentially-affected assigned telephone numbers. It is the Commission's understanding that for other paging systems in which a caller must first dial a central number (*e.g.*, an "800 number") and then dial a unique identifier for the called party, the paging provider maintains a database of identifiers for its end users and would therefore know how many of its end users are potentially affected by any particular outage. The number of potentially-affected end users for those paging systems would simply be the mathematical result of multiplying the outage's duration (expressed in minutes) by the number of end users potentially affected by the outage. The Commission seeks comment on this interpretation and proposed addition to our rules, and on whether there are alternative approaches for measuring the extent of the impact of the outage of CMRS paging systems. For other wireless services, the determination of the number of potentially affected users can be more complex.

11. To measure the extent of wireless services system degradation, the Commission proposes to require the use of blocked calls instead of using assigned telephone numbers as a proxy for the usefulness of the system to users. In the wireless telephony service, a call is deemed "blocked" whenever the

Mobile Switching Center (MSC, also referred to as a Mobile Telephone Switching Office, or MTSO) cannot process the call request of an authenticated, registered user. Call blocking can result from a malfunction or from an overloaded condition in the wireless service network. Usually when calls are blocked, users newly attempting to access the system cannot be registered on the system until the underlying problem is corrected. Because wireless service networks typically provide user access through several MSCs, an outage on a single MSC affects only those subscribers served by that MSC. Accordingly, call blocking on a single MSC would be reportable if it were to result in an outage of at least 30 minutes duration that meets or exceeds the proposed 900,000 user-minute criterion. The Commission seeks comment on this proposal.

12. To estimate the number of potential users affected by a significant system degradation of wireless service facilities, we propose to require providers to determine the total call capacity of the affected MSC switch (or, in the case of a MSC that has more than one switch, the total call capacity of all switches in the affected MSC) and multiply the call capacity by the concentration ratio. Although the concentration ratio may vary among MSCs, we believe that, on average, the concentration ratio used for determining the outage reporting threshold should be uniform to facilitate correlative analyses of outage reports from different wireless providers. Based upon discussions with telecommunications engineers and our understanding of typical traffic loading/switch design parameters, we propose that the concentration factor be ten. Thus, a MSC switch that is capable of handling 3,000 simultaneous calls would have 30,000 potentially affected users (*i.e.*, (3,000) × (10) = 30,000). The Commission believes that this proposed concentration factor should adequately account for those users that are in the service area of the MSC and are thus eligible for immediate service. This factor would also take into account users that are assigned to the local home location register database for the MSC as well as potential visitors. Thus, under the general outage-reporting criteria that we are proposing, wireless service providers would be required to report MSC outages of at least 30 minutes duration that potentially affect at least 900,000 user-minutes. The Commission seeks comment on this proposed addition to our rules and on whether there are specific types of wireless systems for which a concentration factor of other than ten should be applied. As with its proposals for CMRS paging providers, the Commission also seeks comment on possible alternative criteria for wireless service providers and approaches to measure the extent of the impact of system degradation that would yield useful outage data on which to base the development of best practices.

13. The Commission further proposes to require the filing of an outage report whenever an MSC is incapable of processing communications for at least 30 minutes, without regard to the number of user-minutes potentially affected by the outage. The Commission reason for this specific proposal on MSC-outage reporting is based on its continuing need to be aware of the underlying robustness, as well as the overall reliability, of wireless networks. The MSC, in this regard, is a critical architectural component in wireless systems that is designed to process significant levels of traffic aggregation and call routing that are dependent upon SS7 signaling. The Commission also seeks comment on these additional conclusions and further proposal.

14. *Outages That Potentially Affect Special Offices and Facilities, or 911 Services and Facilities.* The Commission also proposes to simplify the requirements for reporting communications outages that potentially affect special offices and facilities or potentially affect the ability to complete 911 calls. Section 63.100(e) of our rules presently requires the reporting of outages of at least 30 minutes duration that potentially affect special offices and facilities. The Commission proposes to keep this requirement substantively intact with a minor modification that will make it applicable to all airports, not just major airports. Section 63.100(e), however, only applies to local exchange carriers, interexchange carriers, and competitive access providers. In light of the rapid changes that have occurred since this rule was adopted, we anticipate that special offices and facilities will increasingly take advantage of new communications technologies and services as they become available, with decreasing regard for the particular technological platform over which they are provided. As a consequence, the Commission proposes to extend the requirement to report outages potentially affecting special offices and facilities to include all communications providers for which we are proposing general communications outage-reporting requirements. These include wireline, wireless, cable, and satellite communications providers. The Commission seeks comment on this proposal.

15. In addition, the current requirements for reporting outages that potentially affect 911 services are differentiated by the length of the outage, the number of lines potentially affected, and other factors. The Commission tentatively conclude that these requirements are overly complex. The Commission proposes to revise these rules and simply require the reporting of all communications outages of at least 30 minutes duration that potentially affect the ability to originate, complete, or terminate 911 calls successfully (including the delivery of all associated name, identification, and location data). Because the Commission anticipates that the public safety community and 911-type services will also evolve to utilize new technologies, services, and platforms, it proposes to apply this requirement to all communications providers for which it is proposing general outage-reporting requirements. The Commission has been aware for some time that the use of wireless telephony to place emergency 911 calls has been increasing. Accordingly, we adopted rules requiring wireless providers to facilitate the work of E911 service responders by providing to Public Safety Answering Points ("PSAPs") both the automatic name information (ANI) and automatic location information (ALI) associated with the handset. The reliability of E911 service continues to be of vital concern to this Commission and is an essential part of our responsibilities. The Commission therefore proposes to require wireless service providers to report any failure of a wireless network element that prevents a MSC from receiving, or responding to, 911 calls (including the delivery of all associated data) for at least 30 minutes. The Commission seeks comment on this proposed rule and whether local network element failures or degradations should also be reported to the affected PSAPs in real time. In addition, the Commission seeks comments as to whether the time metric that is most appropriate for determining that a failure of call completion to a PSAP is significant and should be reported in 30 minutes. Finally, if a commenting party were to conclude that metric of 30 minutes is not the most appropriate one, the Commission then requests such party include in its comments its reasoning for that conclusion and a recommendation for a more appropriate time interval for E911 emergency calls.

16. *E911 and the MSS.* In the "E911 Scope" proceeding the Commission decided to require Mobile-Satellite Service ("MSS") providers of voice service that is interconnected with the Public Switched Telephone Network ("PSTN") to establish E911 call centers. *In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems and Amendment of parts 2 and 25 to Implement the Global Mobile Personal Communications by Satellite (GMPCS) Memorandum of Understanding and Arrangements et al.*, CC Docket No. 94–102 and IB Docket No. 99–67, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 03–290, released December 1, 2003, at ¶¶ 20–48 and 111–112 (adopting 911 service call center requirements and seeking further comment on how to implement E911 requirements for the MSS), 69 FR 6578 (February 11, 2004; final rule) and 69 FR 6595 (February 11, 2004; proposed rules). In that proceeding, the Commission also directed the Network Reliability and Interoperability Council ("NRIC") to study several E911 implementation technical issues for satellite systems. Finally, the Commission sought comment on whether transition periods are necessary for MSS providers with an ancillary terrestrial component (ATC) to comply with the terrestrial wireless E911 requirements and on proposed reporting and record-keeping requirements in connection with implementation of the emergency call center rule. In the instant proceeding, the Commission now proposes to subject MSS providers of interconnected voice service to E911 outage-reporting requirements but to delay implementation of the proposed requirements for MSS providers until the MSS-implementation issues raised in the *Second Further Notice* in the E911 Scope proceeding are resolved. The Commission seeks comment on the instant proposal.

17. *Elimination of Separate Requirement to Report Outages Caused by Fires.* A separate reporting requirement, set forth in § 63.100(d), pertains to the reporting of outages caused by fires. Carriers are required to report fire-related incidents that affect 1,000 or more service lines for a period of 30 minutes or more. Only a few outages have been reported pursuant to this subsection and these have tended to be very minor outages. In general, major fire outages have met the more general reporting criteria because they exceed the current 30-minute, 30,000-customer threshold criteria. Such outages would also exceed the proposed 900,000 user-minute threshold criterion. Thus, retention of separate outage reporting criteria for fire-related incidents appears to be an unnecessary complication for reporting carriers that does not appear to provide any significant benefit to the Commission or to the public. The Commission therefore proposes to eliminate this requirement and seeks comment on its conclusion and its proposed elimination of this rule.

18. *Other Simplifications to the Existing Rule.* The rule requires the filing of an initial outage report that contains contact information so that additional information can be obtained if necessary. Initial reports are helpful in determining whether an immediate response is required (*e.g.*, terrorist attacks or systemic failures) and whether patterns of outages are emerging (*e.g.*, phased terrorist attacks) that warrant further coordination or other action. Section 63.100 of the Commission's rules currently distinguishes between how quickly outages, of at least 30 minutes duration, are required to be reported, based on whether the number of customers potentially affected meets or exceeds a threshold criterion of 50,000. If this secondary threshold is exceeded, the carrier's initial report must be made "by facsimile or other record means delivered within 120 minutes of the carrier's first knowledge. * * *" Otherwise, when such outages potentially affect less than 50,000 customers (but satisfy the primary threshold criterion of 30,000 customers), the initial notification must be delivered within "3 days of the carrier's first knowledge." The Commission believes that this distinction complicates the outage-reporting requirements without any offsetting benefit and should, therefore, be eliminated. The current rule also requires that the filing be made "by facsimile or other record means." In the future, the ability to file initial reports electronically (*e.g.*, over the Internet), coupled with the "fill in the blank" template that is proposed in this NPRM, should make it possible for communications providers to notify us more promptly, and more easily, when communications disruptions arise. The improvements in filing requirements, as well as the electronic filing process that we are proposing, should make it easy for communications providers to file all initial disruption reports within 120 minutes of discovering a reportable outage. This, in turn, will facilitate more rapid action in the event of a serious crisis, and will also facilitate more rapid, more coherent, and more accurate responses when multiple outages are occurring during simultaneous (or virtually coincident) crises. The Commission therefore proposes to require all initial outage reports to be filed electronically within 120 minutes of becoming reportable. All final outage reports would continue to be required to be filed within 30 days of the filing of the initial report. The Commission seeks comment on these conclusions and proposed requirements. It also seeks comment as to whether, given the rapid response time that the Internet and circuit-switched telephony (*e.g.*, dial-up modems) enable, the Commission should require the filing of initial outage reports over the Internet within a shorter period of time than the 120-minute period discussed.

19. The Commission's experience in administering § 63.100 has enabled it to understand more completely other aspects of its reporting requirements that should be revised. As a consequence, the Commission finds that existing requirements for final disruption reports should be modified to require inclusion of the following information:

- A statement as to whether the reported outage was at least partially caused because the network did not follow engineering standards for full diversity (redundancy); and
- A statement of all of the causes of the outage. Outages may result from the occurrence of several events. The current rule requires that the final report identify the root cause. Experience in administering this part of its rules has convinced the Commission that there may be more than one root cause and that, to facilitate analysis, all causes of each outage should be reported.

In addition, as the communications market evolves, the Commission anticipates that communications may increasingly be offered through complex arrangements among communications providers and other entities (which may or may not be affiliated with the provider) that maintain or provide communications systems or services for them. For example, local exchange carriers have long provided Signaling System 7 ("SS7") communications for their own use as well as for their customers, but some entities have more recently emerged to provide SS7 for such carriers. The Commission proposes to require these entities to comply with any disruption reporting requirements that it may adopt to the same extent as would be required of them if they were communications providers directly providing voice or data communications or maintaining the system. The

Commission seeks comment on these proposals.

20. *Major Infrastructure Failures.* The communications outage reports that the Commission has received over the past ten years have provided significant insight into some of the major problems affecting circuit-switched voice communications. The infrastructure used to provide these services, however, is also used to provide many other services that are essential to Homeland Security and our Nation's economy. A tiny glimpse into the other uses of our Nation's communications infrastructure was provided in Verizon's network outage report covering the World Trade Center disaster on September 11, 2001. That report states that "some 300,000 dial tone lines and some 3.6 million DS0 equivalent data circuits were out of service" as a result of the damage. The ratio of more than ten times as many DS0 equivalent services using the infrastructure as dial tone lines is not unusual in a major metropolitan area. Most of the DS0 equivalent circuits are used to carry what are frequently called "special services." While the Commission has not previously required the reporting of communications outages that affected large numbers of special services, it needs to recognize in its communications disruption reporting rules the continuously increasing importance of data communications throughout the United States. The Commission believes that its rules should be revised to account for important attributes of special services that have not been fully addressed in the earlier sections of this NPRM that focused on different communications platforms. Rather than collect information that is limited specifically to "special services," however, the Commission proposes to directly address the underlying issue and collect information on the potential impact on all communications services of major infrastructure failures.

21. *DS3 Minutes.* As a consequence, the Commission proposes to establish additional outage-reporting criteria that would apply to failures of communications infrastructure components having significant traffic-carrying capacity. This requirement would apply to those communications providers for which the Commission has already proposed outage-reporting requirements and would also apply to those affiliated and non-affiliated entities that maintain or provide communications systems on their behalf. The Commission believes that the threshold reporting criterion for such infrastructure outages should be based on the number of DS3 minutes affected by the outage because DS3s are the common denominator used throughout the communications industry as a measure of capacity. A DS3 can handle 28 DS1s (T1s) or 672 DS0 (64 kbps voice or data circuits). On the higher end of the multiplexing hierarchy, an OC3 includes 3 DS3s, an OC48 includes 48 DS3s, and an OC192 includes 192 DS3s. Specifically, the Commission proposes to require the reporting of all outages of at least 30 minutes duration that potentially affect at least 1,350 DS3 minutes. The Commission proposes to count only working DS3s in this measure, by which it means those actually carrying some traffic of any type at the time of a failure. The Commission requests comment on these conclusions and proposed rules.

22. *Signaling System 7 ("SS7").* SS7 systems provide information to process, and terminate, virtually all domestic and international telephone calls irrespective of whether the call is wireless, wireline, local, long distance, or dial-up telephone modem access to ISPs. SS7 is also used in providing SMS text messaging services, 8XX number (*i.e.,* toll free) services, local number portability, VoIP Signaling Gateway services, 555 type number services, and most paging services. Currently the Commission's rules do not require outage reporting by those companies that do not provide service directly to end users. In addition, even for companies currently subject to outage reporting requirements, no threshold reporting criteria are currently based on blocked or lost SS7 messages.

23. As a consequence of the Commission's recognition of the critical role that SS7 plays in the national communications infrastructure, it proposes the addition of SS7 communications disruption reporting requirements. To be more specific, all providers of Signaling System 7 service (or its equivalent) would be required to report those communications disruptions of at least 30 minutes duration for which the number of blocked or lost ISDN User Part (ISUP) messages (or its equivalent) was at least 90,000. This reporting threshold is similar to the blocked-call criterion that was previously addressed in connection with LEC and IXC Tandem outages. The Commission requests comment on these conclusions and proposed addition to its rules.

24. *Electronic Filing and New Reporting Process.* Consistent with authority granted by the Communications Act of 1934, as amended, and in furtherance of the objectives of the Government Paperwork Elimination Act, the Commission proposes to require that communications outage reports be filed electronically. Electronic filing would have several major advantages for the Commission, reporting communications providers, and the public. For example:

- Providers would be able to file reports more rapidly and more efficiently.
- Information would be updated immediately. The expenses and efforts that are associated with the outage reporting process should be reduced substantially which, in turn, should result in continuing productivity gains.
- Changes to outage report data should be more easily accessible by communications providers, the public, and the Commission. Thus, reporting entities should be able to file initial and final report information more easily, and interested parties should also be able to access this information more quickly.
- Changes to electronic input form(s) can be implemented more quickly. Two of the purposes of the reliability database are to help identify causes of outages and to refine best practices for averting failures in communications networks. As networks evolve and experience is gained, the data fields can be more easily revised to improve the quality of the information received to reflect changes in communications infrastructures and management procedures.
- In addition, security precautions can be implemented to authenticate access by authorized users.

25. The Commission's current outage reporting rules do not require, or even refer to, electronic filing (other than by facsimile). Although it is understandable, in retrospect, that those rules did not incorporate electronic filing because the Internet was just beginning to expand in 1992, the time has now arrived to implement electronic filing procedures. These procedures should not only facilitate compliance with the objectives that are expressed in the Government Paperwork Elimination Act but also should improve service to the public, enhance the efficiency of our internal operations, and virtually eliminate any burden that would be associated with complying with the proposed reporting requirements. It may, however, be desirable for other reasons to have alternative ways by which outage reports can be filed with this Commission. The Commission requests comment on whether there are any circumstances under which electronic filing would not be appropriate and, if so, on what alternative filing procedures should be

used in such circumstances. The Commission recognizes that as experience is gained with the electronic filing of outage reports, modifications to the filing template may be necessary to fully implement an automated outage reporting system that will maximize reporting efficiency and minimize the time for providers to prepare, and for the Commission staff to review, outage reports. The Commission also proposes to delegate authority to the Chief, Office of Engineering and Technology to make the revisions to the filing system and template that may become necessary to achieve these goals. The Commission seeks comment on these proposals.

26. Historically, outage reports from wireline carriers have been available to the public. The Commission seeks comment as to whether this policy should not be applied, in whole or in part, to outage reports that will be filed by wireless, wireline, satellite, or cable providers and, if so, why.

Initial Regulatory Flexibility Act Analysis

27. As required by the Regulatory Flexibility Act ("RFA"),[1] the Commission has prepared this Initial Regulatory Flexibility Act Analysis ("IRFA") of the possible significant economic impact on small entities by the policies and rules proposed in this *Notice of Proposed Rule Making* ("NPRM"). Written public comments are requested on this IRFA and must be filed by May 25, 2004. The Commission will send a copy of the *NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[2] In addition, the *NPRM* (or summaries thereof), including the IRFA, will be published in the **Federal Register**.[3]

A. *Need for and Objectives of the Proposed Rules.* We seek comment on whether communications providers, whose customers experience outages on any facilities that the providers own, operate, lease, or otherwise utilize, should be required to report those outages that meet the revised reporting criteria set forth in our proposed amendments to § 63.100 of the Commission's Rules, 47 CFR 63.100. The current rule applies outage-reporting requirements only to wireline common carriers and to circuit-switched telephony service, if any, that is offered by cable television service providers. Our proposal, however, would extend such requirements to those commercial mobile radio service (CMRS) providers that employ cellular architecture ("wireless service providers"), terrestrial or satellite paging providers, satellite communications providers, affiliated or non-affiliated entities that maintain or provide communications systems or services used by the provider in offering such communications, and Signaling System 7 (SS7) providers. We believe that this proposed extension of the outage reporting requirements will provide needed information for fulfilling our statutory responsibilities with respect to the reliability of communications and their underlying infrastructures, given the increasing substitutability of communications through different media and our Nation's increasing reliance on these substitutes for Homeland Defense and National Security. Similarly, the changes that we propose in the threshold reporting criteria are well tailored, we believe, to accomplish this objective. Our proposal to move the outage-reporting requirements out of part 63 and into part 4 of the Commission's rules reflects that the proposed rules would be adapted to and applied broadly across all communications platforms to the extent discussed in the *Notice of Proposed Rule Making*. Finally, the proposed rules would require electronic filing of outage reports, pursuant to the requirements of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1998, 44 U.S.C. 1704.

B. *Legal Basis.* The legal basis for the rule changes proposed in this *NPRM* are contained in sections 1, 4(i), 4(k), 4(o), 218, 219, 230, 256, 301, 302(a), 303(f), 303(g), 303(j), 303(r), 303(v), 403, 621(b)(3), and 621(d) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(k), 154(o), 218, 219, 230, 256, 301, 302(a), 303(f), 303(g), 303(j), 303(r), 303(v), 403, 621(b)(3), and 621(d), and in section 1704 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1998, 44 U.S.C. 1704.

C. *Description and Estimates of the Number of Small Entities to Which the Rules Adopted in This Notice May Apply.* The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules.[4] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[5] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[6] 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).[7]

We further describe and estimate the number of small entity licensees and regulates that may be affected by rules adopted pursuant to this NPRM. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the number of commercial wireless entities, appears to be the data that the Commission publishes in its *Trends in Telephone Service* report.[8] The SBA has developed small business size standards for wireline and wireless small businesses within the three commercial census categories of Wired Telecommunications Carriers,[9] Paging,[10] and Cellular and Other Wireless Telecommunications.[11] Under these categories, a business is small if it has 1,500 or fewer employees. Below, using the above size standards and others, we discuss the total estimated numbers of small businesses that might be affected by our actions.

We have included small incumbent LECs in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a wired telecommunications carrier having 1,500 or fewer employees), and "is not dominant in its field of operation."[12] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation

[1] *See* 5 U.S.C. 603. The RFA, *see* 5 U.S.C. 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1966 (SBREFA), Public Law 104–121, 110 Stat. 847 (1996).

[2] 5 U.S.C. 603(a).

[3] *Id.*

[4] 5 U.S.C. 603(b)(3), 604(a)(3).

[5] *Id.* 601(6).

[6] 5 U.S.C. 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such terms which are appropriate to the activities of the agency and publishes such definitions(s) in the Federal Register."

[7] 15 U.S.C. 632.

[8] FCC, Wire line Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service*, Table 5.3 (May 2002) (*Trends in Telephone Service*).

[9] 13 CFR 121.201, North American Industry Classification System (NAICS) code 517110.

[10] 13 CFR 121.201, NAICS code 517211.

[11] 13 CFR 121.201, NAICS code 517212.

[12] 5 U.S.C. 601(3).

because any such dominance is not "national" in scope.[13] We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

Wired Telecommunications Carriers. The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.[14] According to Census Bureau data for 1997, there were 2,225 firms in this category, total, that operated for the entire year.[15] Of this total, 2,201 firms had employment of 999 or fewer employees, and an additional 24 firms had employment of 1,000 employees or more.[16] Thus, under this size standard, the great majority of firms can be considered small.

Incumbent Local Exchange Carriers (LECs). Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[17] According to Commission data,[18] 1,337 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,337 carriers, an estimated 1,032 have 1,500 or fewer employees and 305 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our action.

Competitive Local Exchange Carriers (CLECs), Competitive Access Providers (CAPs), "Shared-Tenant Service Providers," and "Other Local Service Providers." Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[19] According to Commission data,[20] 609 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 609 carriers, an estimated 458 have 1,500 or fewer employees and 151 have more than 1,500 employees. In addition, 16 carriers have reported that they are "Shared-Tenant Service Providers," and all 16 are estimated to have 1,500 or fewer employees. In addition, 35 carriers have reported that they are "Other Local Service Providers." Of the 35, an estimated 34 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities that may be affected by our action.

Interexchange Carriers (IXCs). Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[21] According to Commission data,[22] 261 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 223 have 1,500 or fewer employees and 38 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our action.

Wireless Service Providers. The SBA has developed a small business size standard for wireless small businesses within the two separate categories of Paging[23] and Cellular and Other Wireless Telecommunications.[24] Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. According to the Commission's most recent data,[25] 1,387 companies reported that they were engaged in the provision of wireless service. Of these 1,387 companies, an estimated 945 have 1,500 or fewer employees and 442 have more than 1,500 employees.[26] Consequently, the Commission estimates that most wireless service providers are small entities that may be affected by the rules and policies adopted.

Broadband Personal Communications Service. The broadband Personal Communications Service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for Blocks C and F as an entity that has average gross revenues of $40 million or less in the three previous calendar years.[27] For Block F, 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 three calendar years."[28] These standards defining "small entity" in the context of broadband PCS auctions have been approved by the SBA.[29] No small businesses, within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.[30] On March 23, 1999, the Commission re-

[13] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. 632(a); 5 U.S.C. 601(3). SBAS regulations interpret "small business concern" to include the concept of dominance on a national basis, 13 CFR 121.102(b).

[14] 13 CFR 121.201 (1997), NAICS code 513310 (changed to 517110 in October 2002).

[15] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 513310 (issued October 2000).

[16] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1,000 employees or more."

[17] 13 CFR 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

[18] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, Page 5–5 (Aug. 2003) (hereinafter "Trends in Telephone Service"). This source uses data that are current as of December 31, 2001.

[19] 13 CFR 121.201, NAICS code 517110 (changed from 513310 in Oct. 2002).

[20] "Trends in Telephone Service" at Table 5.3.

[21] 13 CFR 121.201, NAICS code 51710 (chaged from 513310 in Oct. 2002).

[22] Trends in Telephone Service at Table 5.3.

[23] 13 CFR 121.201, North American Industry Classification System (NAICS) code 517211.

[24] 13 CFR 121.201, North American Industry Classification System (NAICS) code 517212.

[25] FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, Trends in Telephone Service, Table 5.3, (August 2002).

[26] *Id.*

[27] *See* Amendment of Parts 20 and 24 of the Committee's Rules—Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96–59, Report and Order, 61 FR 33859 (July 1, 1996); *see also* 47 CFR 24.720(b).

[28] *See* Amendment of Parts 20 and 24 of the Committee's Rules—Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96–59, Report and Order, 61 FR 33859 (July 1, 1996).

[29] *See. e.g.*, Implementation of Section 309(j) of the Communications Act—Competitive Bidding PP Docket No. 93–256, Fifth Report and Order, 59 FR 37566 (July 22, 1994).

[30] FCC News, Broadband PCS, D, E and F Block Auction Closes, No. 71744 (released January 14, 1997). *See also* Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses, WT Docket No. 97–82, Second Report and Order, 62 FR 55348 (Oct. 24, 1997).

auctioned 347 C, D, E, and F Block licenses. There were 48 small business winning bidders. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as "small" or "very small" businesses. Based on this information, the Commission concludes that the number of small broadband PCS licenses would have included the 90 winning C Block bidders, the 93 qualifying bidders in the D, E, and F Block auctions, the 48 winning bidders in the 1999 re-auction, and the 29 winning bidders in the 2001 re-auction, for a total of 260 small entity broadband PCS providers, as defined by the SBA small business size standards and the Commission's auction rules. Consequently, the Commission estimates that 260 broadband PCS providers would have been small entities that could be affected by the rules and policies adopted herein. The results of Auction No. 35, however, were set aside and the licenses previously awarded to NextWave, which had qualified as a small entity, were reinstated. Therefore, the Commission estimates that less than 260 broadband PCS providers will be small entities that may be affected by the rules and policies adopted herein.

Narrowband Personal Communications Services. To date, two auctions of narrowband personal communications services (PCS) licenses have been conducted. For purposes of the two auctions that have already been held, "small businesses" were entities with average gross revenues for the prior three calendar years of $40 million or less. Through these auctions, the Commission has awarded a total of 41 licenses, out of which 11 were obtained by small businesses. To ensure meaningful participation of small business entities in future auctions, the Commission has adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order*.[31] A "small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million. A "very small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million. The SBA has approved these small business size standards.[32] In the future, the Commission will auction 459 licenses to serve Metropolitan Trading Areas (MTAs) and 408 response channel licenses. There is also one megahertz of narrowband PCS spectrum that has been held in reserve and that the Commission has not yet decided to release for licensing. The Commission cannot predict accurately the number of licenses that will be awarded to small entities in future actions. However, four of the 16 winning bidders in the two previous narrowband PCS auctions were small businesses, as that term was defined under the Commission's Rules. The Commission assumes, for purposes of this analysis that a large portion of the remaining narrowband PCS licenses will be awarded to small entities. The Commission also assumes that at least some small businesses will acquire narrowband PCS licenses by means of the Commission's partitioning and disaggregation rules.

800 MHz and 900 MHz Specialized Mobile Radio Licenses. The Commission awards "small entity" and "very small entity" bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years, or that had revenues of no more than $3 million in each of the previous calendar years, respectively.[33] These bidding credits apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. The Commission assumes, for purposes here, that all of the remaining existing extended implementation authorizations are held by small entities, as that term is defined by the SBA. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz SMR bands. There were 60 winning bidders that qualified as small or very small entities in the 900 MHz SMR auctions. Of the 1,020 licenses won in the 900 MHz auction, bidders qualifying as small or very small entities won 263 licenses. In the 800 MHz auction, 38 of the 524 licenses won were won by small and very small entities. Consequently, the Commission estimates that there are 301 or fewer small entity SMR licensees in the 800 MHz and 900 MHz bands that may be affected by the rules and policies adopted herein.

Paging. The SBA has developed a small business size standard for Paging, which consists of all such firms having 1,500 or fewer employees.[34] According to Census Bureau data for 1997, in this category there was a total of 1,320 firms that operated for the entire year.[35] Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional seventeen firms had employment of 1,000 employees or more.[36] Thus, under this size standard, the majority of firms can be considered small.

Rural Radiotelephone Service. The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.[37] A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (BETRS).[38] The Commission uses the SBA's small business size standard applicable to "Cellular and Other Wireless Telecommunications," *i.e.*, an entity employing no more than 1,500 persons.[39] There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adopted.

Cable and Other Program Distribution.[40] This category includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems, and subscription television services. According to Census Bureau data for 1997, there were a total

[31] In the Matter of Amendment of the Commission's Rules to Estalish New Personal Communications Services, Narrowband PCS, Docket No. ET 92–100, Docket No. PP 93–253, *Second Report and Order and Second Further Notice of Proposed Rulemaking*, 65 FR 35875 (June 6, 2000).

[32] *See* Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Dec. 2, 1998).

[33] 47 CFR 90.814(b)(1).

[34] 13 CFR 121.201, NAICS code 517211 (changed from 513321 in October 2002).

[35] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 513321 (issued October 2000).

[36] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1,000 employees or more."

[37] The service is defined in 22.99 of the Commission's Rules, 47 CFR 22.99.

[38] BETRS is defined in 22.757 and 22.759 of the Commission's Rules, 47 CFR 22.757 and 22.759.

[39] 13 CFR 121.201, NAICS code 517212.

[40] 13 CFR 121.201, North American Industry Classification System (NAICS) code 513220 (changed to 517510 in October 2002).

of 1,311 firms in this category, total, that had operated for the entire year.[41] Of this total, 1,180 firms had annual receipts of under $10 million and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, the Commission estimates that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein.

Satellite Telecommunications Providers. The appropriate size standards under SBA rules are for the two broad categories of Satellite Telecommunications and Other Telecommunications. Under both categories, such a business is small if it has $12.5 or less in average annual receipts.[42] For the first category of Satellite Telecommunications, Census Bureau data for 1997 show that there were a total of 324 firms that operated for the entire year.[43] Of this total, 273 firms had annual receipts of under $10 million, and an additional twenty-four firms had receipts of $10 million to $24,999,999. Thus, the majority of Satellite Telecommunications firms can be considered small.

Signaling System 7 (SS7) Providers. The Commission has not developed a definition of small entities applicable to Signaling System 7 providers. We shall apply the SBA's small business size standard for Other Telecommunications, which identifies as small all such companies having $12.5 million or less in annual receipts.[44] We believe that there are no more than half-a-dozen SS7 providers and doubt that any of them have annual receipts less then $12.5 million. Nonetheless, we shall assume that there may be several SS7 providers that are small businesses which could be affected by the proposed rules. We request comment on how many SS7 providers exist and on how many of these are small businesses that may be affected by our proposed rules.

D. *Description of Projected Reporting, Recordkeeping and Other Compliance Requirements.* The rules proposed in this *NPRM* would require telecommunications providers to report those outages that meet specified threshold criteria. These criteria are largely determined by the number of end users potentially affected by the outage and the duration of the outage, which generally must be at least 30 minutes. Under the current rules, which apply only to wireline carriers and cable television service providers that also provide telecommunications service, only about 200 outage reports per year from all reporting sources combined are filed with the Commission. The proposed revisions to the threshold criteria are not expected to alter the number of outage reports filed annually to a significant degree. Nevertheless, the proposed rules would extend the outage reporting requirements to telecommunications providers that are not currently subject to these rules. Therefore, we anticipate that more than 200 outage reports will be filed annually, but estimate that the total number of reports from all reporting sources combined will be substantially less than 1,000 annually. We note that, occasionally, the proposed outage reporting requirements could require the use of professional skills, including legal and engineering expertise. Without more data, we cannot accurately estimate the cost of compliance by small telecommunications providers. But irrespective of any of the reporting requirements that we are proposing here, we expect that telecommunications providers will track, investigate, and correct all of their service disruptions as an ordinary part of conducting their business operations—and will do so for service disruptions that are considerably smaller than for disruptions that would trigger the reporting criteria that we propose here. As a consequence, we believe that in the usual case, the only burden associated with the reporting requirements contained in this Notice will be the time required to complete the initial and final reports. We anticipate that electronic filing, through the type of template that we have identified in Appendix B of the NPRM, should minimize the amount of time and effort that will be required to comply with the rules that we propose in this proceeding. In this IFRA, we therefore seek comment on the types of burdens telecommunications providers will face in complying with the proposed requirements. Entities, especially small businesses and small entities, more generally, are encouraged to quantify the costs and benefits of the proposed reporting requirements.

E. *Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered.* Since the inception of the outage-reporting requirements in 1992, the number of outages reported each year has remained relatively steady at about 200. Since 1992, the substitutability of telecommunications through different media has increased substantially, and our Nation increasingly relies on these substitutes for Homeland Defense and National Security. We believe that the proposed telecommunications outage reporting requirements are minimally necessary to assure that we receive adequate information to perform our statutory responsibilities with respect to the reliability of telecommunications and their infrastructures. Also, we believe that the magnitude of the outages needed to trigger the reporting requirements (*e.g.*, outages of at least 30 minutes duration that potentially affect at least 900,000 user minutes) are sufficiently high as to make it unlikely that small businesses would be impacted significantly by the proposed rules. Finally, we believe that the proposed requirement that outage reports be filed electronically would significantly reduce the burdens and costs currently associated with manual filing processes.

F. *Federal Rules That Might Duplicate, Overlap, or Conflict With the Proposed Rules.* None.

Ordering Clauses

26. Pursuant to the authority contained in sections 1, 4(i)–(j), 4(k), 4(o), 218, 219, 230, 256, 301, 302(a), 303(f), 303(g), 303(j), 303(r), 403, 621(b)(3), and 621(d) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i)–(j), 154(k), 154(o), 218, 219, 230, 256, 301, 302(a), 303(f), 303(g), 303(j), 303(r), 403, 621(b)(3), and 621(d), and in § 1704 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1998, 44 U.S.C. 3504, this Notice of Proposed Rulemaking IS ADOPTED.

27. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects

47 CFR Part 0

Organization and functions (Government agencies), Reporting and recordkeeping requirements.

47 CFR Part 4

Communications common carriers, Communications equipment, Reporting

[41] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)", Table 4, NAICS code 513220 (issued October 2000).

[42] 13 CFR 121.201, NAICS codes 517410 and 517910 (changed from 513340 and 513390 in Oct. 2002).

[43] U.S. Census Bureau, 1997 Economic Census, Subject Service: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 513340 (issued Oct. 2000).

[44] 13 CFR 121.201, NAICS code 517910.

and recordkeeping requirements, Telecommunications.

47 CFR Part 63

Communications common carriers, Reporting and recordkeeping requirements.

Federal Communications Commission.

William F. Caton,

Deputy Secretary.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend parts 0 and 63 and add a new part 4 of chapter I of title 47 of the CFR as follows:

PART 0—COMMISSION ORGANIZATION

1. The authority citation for part 0 continues to read as follows:

Authority: Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155.

2. Section 0.31 is amended by revising paragraph (i) to read as follows:

§ 0.31 Functions of the Office.

* * * * *

(i) To administer parts 2, 4, 5,,15, and 18 of this chapter, including licensing, recordkeeping, rule making, and revising the filing system and template used for compliance with the Commission's communications disruption reporting requirements.

* * * * *

3. Section 0.241 is amended by revising paragraph (a) introductory text, paragraphs (a)(1), and (b) through (g) and by adding paragraphs (h) and (i) to read as follows:

§ 0.241 Authority delegated.

(a) The performance of functions and activities described in § 0.31 is delegated to the Chief of the Office of Engineering and Technology: *Provided,* that the following matters shall be referred to the Commission en banc for disposition:

(1) Notices of proposed rulemaking and of inquiry and final orders in rulemaking proceedings, inquiry proceedings and non-editorial orders making changes, except that the Chief of the Office of Engineering and Technology is delegated authority to make the revisions to the filing system and template necessary to maximize the efficiency of reporting and responding to critical data and minimize the time for providers to prepare and for the Commission staff to review the communications disruption reports required to be filed pursuant to part 4 of this chapter.

* * * * *

(b) The Chief of the Office of Engineering and Technology is delegated authority to administer the Equipment Authorization program as described in part 2 of this chapter.

(c) The Chief of the Office of Engineering and Technology is delegated authority to administer the Experimental Radio licensing program pursuant to part 5 of this chapter.

(d) The Chief of the Office of Engineering and Technology is delegated authority to administer the communications disruption reporting requirements that are contained in part 4 of this chapter and to revise the filing system and template used for the submission of such reports.

(e) The Chief of the Office of Engineering and Technology is delegated authority to examine all applications for certification (approval) of subscription television technical systems as acceptable for use under a subscription television authorization as provided for in this chapter, to notify the applicant that an examination of the certified technical information and data submitted in accordance with the provisions of this chapter indicates that the system does or does not appear to be acceptable for authorization as a subscription television system. This delegation shall be exercised in consultation with the Chief, Media Bureau.

(f) The Chief of the Office of Engineering and Technology is authorized to dismiss or deny petitions for rulemaking which are repetitive or moot or which for other reasons plainly do not warrant consideration by the Commission.

(g) The Chief of the Office of Engineering and Technology is authorized to enter into agreements with the National Institute of Standards and Technology and other accreditation bodies to perform accreditation of test laboratories pursuant to § 2.948(d) of this chapter. In addition, the Chief is authorized to make determinations regarding the continued acceptability of individual accrediting organizations and accredited laboratories.

(h) The Chief of the Office Engineering and Technology is delegated authority to enter into agreements with the National Institute of Standards and Technology to perform accreditation of Telecommunication Certification Bodies (TCBs) pursuant to §§ 2.960 and 2.962 of this chapter. In addition, the Chief is delegated authority to develop specific methods that will be used to accredit TCBs, to designate TCBs, to make determinations regarding the continued acceptability of individual TCBs, and to develop procedures that TCBs will use for performing post-market surveillance.

(i) The Chief of the Office of Engineering and Technology is delegated authority to make nonsubstantive, editorial revisions to the Commission's rules and regulations contained in parts 2, 4, 5, 15, and 18 of this chapter.

4. Part 4 is added to read as follows:

PART 4—DISRUPTIONS TO COMMUNICATIONS

Sec.

General

Reporting Requirements for Disruptions to Communications

Authority: Sections 1, 4(i), 4(j), 4(o), 218, 219, 230, 256, 301, 302(a), 303(f), 303(g), 303(j), 303(r), 403, 621(b)(3), and 621(d) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 154(o), 218, 219, 230, 256, 301, 302(a), 303(f), 303(g), 303(j), 303(r), 403, 621(b)(3), and 621(d), unless other noted.

General

§ 4.1 Scope, basis and purpose.

By these rules the Federal Communications Commission is setting forth requirements pertinent to the reporting of disruptions to communications and to the reliability of communications infrastructures.

Reporting Requirements for Disruptions to Communications

§ 4.3 Communications providers covered by the requirements of this part.

(a) "Cable communications" providers are cable service providers that also provide circuit-switched telephony. Also included are affiliated and non-affiliated entities that maintain or provide communications systems or services used by the provider in offering telephony.

(b) "Wireless service" providers include Commercial Mobile Radio Service communications providers that use cellular architecture and CMRS

paging providers. In particular, they include Cellular Radio Telephone Service (part 22 of this chapter), Personal Communications Service (PCS) (part 24), and enhanced Special Mobile Radio Service (part 90) providers, as well as those private paging (part 90) providers that are treated as CMRS providers (see § 20.9 of this chapter, 47 CFR 20.9) and narrowband PCS providers (part 24). Also included are affiliated and non-affiliated entities that maintain or provide communications systems or services used by the provider in offering such communications.

(c) "IXC or LEC tandem facilities" refer to the tandem facilities used in the provision of interexchange or local exchange communications.

(d) "Satellite communications providers" use space stations as a means of providing the public with communications, such as telephony and paging. Also included are affiliated and non-affiliated entities that maintain or provide communications systems or services used by the provider in offering such communications.

(e) "Signaling System 7 (SS7)" is a signaling system used to control telecommunications networks. It is frequently used to "set up," process, control, and terminate circuit-switched telecommunications, including but not limited to domestic and international telephone calls (irrespective of whether the call is wholly or in part wireless, wireline, local, long distance, or is carried over cable or satellite infrastructure), SMS text messaging services, 8XX number type services, local number portability, VoIP signaling gateway services, 555 number type services, and most paging services. For purposes of this rule part, SS7 refers to both the SS7 protocol and the packet networks through which signaling information is transported and switched or routed. It includes future modifications to the existing SS7 architecture that will provide the functional equivalency of the SS7 services and network elements that will exist when the final Report and Order is published. SS7 communications providers are subject to the provisions of part 4 of the Commission's rules regardless of whether or not they provide service directly to end users. Also subject to part 4 of the Commission's rules are affiliated and non-affiliated entities that maintain or provide communications systems or services used by the SS7 provider in offering SS7 communications.

(f) "Wireline communications providers" offer terrestrial communications through direct connectivity, predominantly by wire, coaxial cable, or optical fiber, between the serving central office (as now defined on October 1, 2002 in the glossary to part 36 of this chapter, 47 CFR part 36, Appendix-Glossary) and end user location(s). Also included are affiliated and non-affiliated entities that maintain or provide communications systems or services used by the provider in offering such communications.

(g) "Communications provider" is an entity that provides two-way voice and/or data communications, and/or paging service, by radio, wire, cable, satellite, and/or lightguide for a fee to one or more unaffiliated entities.

§ 4.5 Definitions of outage, special offices and facilities, and 911 special facilities.

(a) "Outage" is defined as a significant degradation in the ability of an end user to establish and maintain a channel of communications as a result of failure or degradation in the performance of a communications provider's network.

(b) "Special offices and facilities" are defined as airports, major military installations, key government facilities, and nuclear power plants. The member agencies of the National Communications System (NCS) will determine which of their locations are "major military installations" and "key government facilities." 911 special facilities are addressed separately in paragraph (e) of this section.

(c) An outage that "potentially affects" an airport is defined as an outage that: disrupts 50% or more of the air traffic control links or other FAA communications links to any airport; or has caused an Air Route Traffic Control Center (ARTCC) or airport to lose its radar; or causes a loss of both primary and backup facilities at any ARTCC or airport; or affects an ARTCC or airport that is deemed important by the FAA as indicated by FAA inquiry to the provider's management personnel; or has affected any ARTCC or airport and that has received any media attention of which the communications provider's reporting personnel are aware.

(d) A "mission-affecting outage" is defined as an outage that is deemed critical to national security/emergency preparedness (NS/EP) operations of the affected facility by the National Communications System member agency operating the affected facility.

(e) An "outage that potentially affects a 911 special facility" is defined as an outage that potentially affects the ability of a communications provider to complete 911 calls (including all associated name, identification, and location data). Such outages include those significant service degradations and switch or transport failures where rerouting to the same or an alternative answering location was not implemented. Examples of such outages include one or more of the following situations:

(1) Isolation of one or more Public Service Answering Points (PSAPs) for at least 30 minutes duration; or

(2) Loss of call processing capabilities in one or more E911 tandems for at least 30 minutes duration; or

(3) Isolation of one or more end office switches or host/remote clusters, for at least 30 minutes duration.

§ 4.7 Definitions of metrics used to determine the general outage-reporting threshold criteria.

(a) "Administrative numbers" are defined as the telephone numbers used by communications providers to perform internal administrative or operational functions necessary to maintain reasonable quality of service standards.

(b) "Assigned numbers" are defined as the telephone numbers working in the Public Switched Telephone Network under an agreement such as a contract or tariff at the request of specific end users or customers for their use, or numbers not yet working but having a customer service order pending. Numbers that are not yet working and have a service order pending for more than five days shall not be classified as assigned numbers.

(c) "Assigned telephone number minutes" are defined as the mathematical result of multiplying the duration of an outage, expressed in minutes, by the sum of the number of assigned numbers (defined in paragraph (b) of this section) potentially affected by the outage and the number of administrative numbers (defined in paragraph (a) of this section) potentially affected by the outage.

(d) "DS3 minutes" are defined as the mathematical result of multiplying the duration of an outage, expressed in minutes, by the number of previously operating DS3 circuits that were affected by the outage.

(e) "User minutes" are defined as:

(1) Assigned telephone number minutes (as defined in paragraph (c) of this section), for telephony and for those paging systems in which each individual user is assigned a telephone number;

(2) The mathematical result of multiplying the duration of an outage, expressed in minutes, by the number of end users potentially affected by the outage, for all other forms of communications.

§ 4.9 Outage reporting requirements—threshold criteria.

(a) *Cable.* All cable communications providers shall submit electronically an Initial Communications Outage Report to the Commission within 120 minutes of discovering that they have experienced on any facilities that they own, operate, lease, or otherwise utilize, an outage of at least 30 minutes duration that: potentially affects at least 900,000 user minutes of telephony service; affects at least 1,350 DS3 minutes; represents the loss of at least one satellite transponder; potentially affects any special offices and facilities (in accordance with paragraphs (a) through (d) of § 4.5); or potentially affects a 911 special facility (as defined in paragraph (e) of § 4.5), in which case they also shall notify, as soon as possible by telephone or other electronic means, any official who has been designated by the management of the affected 911 facility as the provider's contact person for communications outages at that facility, and they shall convey to that person all available information that may be useful to the management of the affected facility in mitigating the effects of the outage on callers to that facility. (DS3 minutes and user minutes are defined in paragraphs (d) and (e) of § 4.7.) Not later than thirty days after the outage, the provider shall submit electronically a Final Communications Outage Report to the Commission. The Initial and Final reports shall comply with all of the requirements of § 4.11.

(b) *Wireless.* All wireless service providers shall submit electronically an Initial Communications Outage Report to the Commission within 120 minutes of discovering that they have experienced on any facilities that they own, operate, lease, or otherwise utilize, an outage of at least 30 minutes duration: of a Mobile Switching Center (MSC); that potentially affects at least 900,000 user minutes of either telephony and associated data (2nd generation or lower) service or paging service; that affects at least 1,350 DS3 minutes; represents the loss of at least one satellite transponder; that potentially affects any special offices and facilities (in accordance with paragraphs (a) through (d) of § 4.5); or that potentially affects a 911 special facility (as defined in (e) of § 4.5), in which case they also shall notify, as soon as possible by telephone or other electronic means, any official who has been designated by the management of the affected 911 facility as the provider's contact person for communications outages at that facility, and they shall convey to that person all available information that may be useful to the management of the affected facility in mitigating the effects of the outage on callers to that facility. (DS3 minutes and user minutes are defined in paragraphs (d) and (e) of § 4.7.) Not later than thirty days after the outage, the provider shall submit electronically a Final Communications Outage Report to the Commission. The Initial and Final reports shall comply with all the requirements of § 4.11.

(c) *IXC or LEC tandem facilities.* In the case of IXC or LEC tandem facilities, providers must, if technically possible, use real-time blocked calls to determine whether criteria for reporting an outage have been reached. Providers must report IXC and LEC tandem outages of at least 30 minutes duration in which at least 90,000 calls are blocked or at least 1,350 DS3-minutes are lost. The number of blocked calls is the sum of the number of blocked originating calls and the number of blocked terminating calls. Providers may use historical data for the appropriate time(s) of day to estimate blocked calls when required real-time blocked call counts are not possible. When using historical data, providers must report incidents where at least 30,000 originating and terminating calls are blocked during a period of at least 30 minutes duration. (DS3 minutes are defined in paragraph (d) of § 4.7.)

(d) *Satellite.* All satellite communications providers shall submit electronically an Initial Communications Outage Report to the Commission within 120 minutes of discovering that they have experienced on any facilities that they own, operate, lease, or otherwise utilize, an outage of at least 30 minutes duration that manifests itself as: a loss of complete accessibility to at least one satellite or transponder; a loss of a satellite communications link that potentially affects at least 900,000 user minutes of either telephony service or paging service; affecting at least 1,350 DS3 minutes; or potentially affecting any special offices and facilities (in accordance with paragraphs (a) through (d) of § 4.5). (DS3 minutes and user minutes are defined in paragraphs (d) and (e) of § 4.7.) Not later than thirty days after the outage, the provider shall submit electronically a Final Communications Outage Report to the Commission. The Initial and Final reports shall comply with all the requirements of § 4.11. Excluded from these outage-reporting requirements are satellite transponders used solely for intra-corporate or intra-organizational private telecommunications networks, and satellite transponders that are used solely for the one-way distribution of video or audio programming.

(e) *Signaling System 7.* Signaling System 7 (SS7) providers shall submit electronically an Initial Communications Outage Report to the Commission within 120 minutes of discovering that they have experienced on any facilities that they own, operate, lease, or otherwise utilize an outage of at least 30 minutes duration that manifests itself as the loss or blocking of at least 90,000 ISDN User Part (ISUP) messages. The number of lost or blocked messages may be based on call logs if available. Otherwise if call logs are not available, the number of lost or blocked messages may be estimated based on the normal message volumes during the applicable time(s) of day. Not later than thirty days after the outage, the provider shall submit electronically a Final Communications Outage Report to the Commission. The Initial and Final reports shall comply with all the requirements of § 4.11.

(f) *Wireline.* All wireline communications providers that operate transmission, routing, or switching facilities and provide interstate or international communications service shall submit electronically an Initial Communications Outage Report to the Commission within 120 minutes of discovering that they have experienced on any facilities that they own, operate, lease, or otherwise utilize, an outage of at least 30 minutes duration that: potentially affects at least 900,000 user minutes of either telephony or paging; affects at least 1,350 DS3 minutes; represents the loss of at least one satellite transponder; potentially affects any special offices and facilities (in accordance with paragraphs (a) through (d) of § 4.5); or (5) potentially affects a 911 special facility (as defined in (e) of § 4.5), in which case they also shall notify, as soon as possible by telephone or other electronic means, any official who has been designated by the management of the affected 911 facility as the provider's contact person for communications outages at that facility, and the provider shall convey to that person all available information that may be useful to the management of the affected facility in mitigating the effects of the outage on efforts to communicate with that facility. (DS3 minutes and user minutes are defined in paragraphs (d) and (e) of § 4.7.) Not later than thirty days after the outage, the provider shall submit electronically a Final Communications Outage Report to the Commission. The Initial and Final reports shall comply with all the requirements of § 4.11.

§ 4.11 Initial and final communications outage reports that must be filed by communications providers.

Initial and final communications outage reports shall be submitted by a person authorized by the communications provider to submit such reports to the Commission. The person submitting the Final report to the Commission shall also be authorized by the provider to legally bind the provider to the truth, completeness, and accuracy of the information contained in the report. Each Initial report shall be attested by the person submitting the report that he/she has read the report prior to submitting it and on oath deposes and states that the information contained therein is true, correct, and accurate to the best of his/her knowledge and belief. Each Final report shall be attested by the person submitting the report that he/she has read the report prior to submitting it and on oath deposes and states that the information contained therein is true, correct, and accurate to the best of his/her knowledge and belief and that the communications provider on oath deposes and states that this information is true, complete, and accurate. The Final report shall contain all pertinent information on the outage, including any information that was not contained in, or that has changed from that provided in, the Initial report.

§ 4.13 Reports by the National Communications System (NCS) and by special offices and facilities, and related responsibilities of communications providers.

Reports by the National Communications System (NCS) and by special offices and facilities (other than 911 special offices and facilities) of outages potentially affecting them (*see* paragraphs (a) through (d) of § 4.5) shall be made according to the following procedures:

(a) When there is a mission-affecting outage, the affected facility will report the outage to the NCS and call the communications provider in order to determine if the outage is expected to last 30 minutes. If the outage is not expected to, and does not, last 30 minutes, it will not be reported to the Commission. If it is expected to last 30 minutes or does last 30 minutes, the NCS, on the advice of the affected special facility, will either:

(1) Forward a report of the outage to the Commission, supplying the information for initial reports affecting special facilities specified in this section of the Commission's Rules;

(2) Forward a report of the outage to the Commission, designating the outage as one affecting "special facilities," but reporting it at a level of detail that precludes identification of the particular facility involved; or

(3) Hold the report at the NCS due to the critical nature of the application.

(b) If there is to be a report to the Commission, an electronic, written, or oral report will be given by the NCS within 120 minutes of an outage to the Commission's Duty Officer, on duty 24 hours a day in the FCC's Communications and Crisis Management Center in Washington, DC. Notification may be served at such other facility designated by the Commission by public notice or (at the time of the emergency) by public announcement only if there is a telephone outage or similar emergency in Washington, DC. If the report is oral, it is to be followed by an electronic or written report the next business day. Those providers whose service failures are in any way responsible for the outage must consult and cooperate in good faith with NCS upon its request for information.

(c) Additionally, if there is to be a report to the Commission, the communications provider will provide a written report to the NCS, supplying the information for final reports for special facilities required by this section of the Commission's rules. The communications provider's final report to the NCS will be filed within 28 days after the outage, allowing the NCS to then file the report with the Commission within 30 days after the outage. If the outage is reportable as described in paragraph (b) of this section, and the NCS determines that the final report can be presented to the Commission without jeopardizing matters of national security or emergency preparedness, the NCS will forward the report as provided in either paragraphs (a)(1) or (a)(2) of this section.

PART 63—EXTENSION OF LINES, NEW LINES, AND DISCONTINUANCE, REDUCTION, OUTAGE AND IMPAIRMENT OF SERVICE BY COMMON CARRIERS; AND GRANTS OF RECOGNIZED PRIVATE OPERATING AGENCY STATUS

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

Authority: Sections 1, 4(i), 4(j), 10, 11, 201–205, 214, 218, 403, and 651 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 160, 161, 201–205, 214, 218, 403, and 571, unless otherwise noted.

6. Section 63.100 is revised to reads as follows:

§ 63.100 Notification of service outage.

The requirements for communications providers concerning communications disruptions and the filing of outage reports are set forth in part 4 of this chapter.

[FR Doc. 04–6618 Filed 3–25–04; 8:45 am]
BILLING CODE 6712–01–P

OFFICE OF PERSONNEL MANAGEMENT

48 CFR Parts 1631 and 1699

RIN 3206–AJ10

Federal Employees Health Benefits Program; Revision of Contract Cost Principles and Procedures, and Miscellaneous Changes, Parts 1631 and 1699

AGENCY: Office of Personnel Management.

ACTION: Proposed rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing a proposed regulation amending the Federal Employees Health Benefits (FEHB) Acquisition Regulation (FEHBAR). This regulation includes additional contract cost principles and procedures for FEHB Program experience-rated contracts and is intended to clarify our requirements and enhance our oversight of FEHB carriers.

DATES: Comments must be received on or before May 25, 2004.

ADDRESSES: Send or deliver comments to Abby L. Block, Deputy Associate Director, Employee and Family Support Policy, Strategic Human Resources Policy Division, Office of Personnel Management, Room 3400, 1900 E Street NW., Washington, DC; 20415–3601, or by fax: (202) 606–0633, or e-mail to: *aseaston@opm.gov).*

FOR FURTHER INFORMATION CONTACT: Anne Easton, Senior Policy Analyst (202) 606–0004.

SUPPLEMENTARY INFORMATION: We are enhancing our oversight of experience-rated FEHB contracts by requiring carriers to apply additional cost principles and procedures. We currently contract with thirty-two experience-rated fee-for-service carriers and Health Maintenance Organizations (HMOs).

Under the FEHB law, 5 U.S.C. 8902, it is part of OPM's responsibility to ensure that rates charged by health benefits plans reasonably and equitably reflect the cost of the benefits provided. Our interest, from a financial standpoint, is to pay a reasonable price for the health care coverage we purchase

from private contractors on behalf of FEHB enrollees.

OPM's independent Inspector General regularly audits experience-rated carriers to determine if they are in compliance with the Cost Principles in part 31 of title 48, Code of Federal Regulations (the Federal Acquisition Regulation (FAR)) and chapter 16 of title 48, Code of Federal Regulations (FEHBAR)). In addition, we have other requirements and practices in place to provide assurance to FEHB Program administrators that carriers' financial reporting and contractual requirements are met. The FEHBAR and part 31 of the FAR are the sole sources of cost accounting principles and practices for FEHB contracts. The basic cost accounting principles in part 31 of the FAR have been in place for over 40 years. During this time period, significant improvements in cost accounting principles and practices have been made. Advances in information technology have enabled FEHB contractors to implement cost accounting practices more complex than those generally used when we adopted the FAR cost principles. Also, we have observed some differences in interpretation regarding the allocation of costs to carriers' contracts. Therefore, we are updating the FEHBAR to allow carriers to use more current contract cost accounting principles and practices and to provide for consistent interpretation of our requirements across the Program. FAR Part 31 provides certain factors that are required to be considered in allocating indirect costs and which must accord with generally accepted accounting principles (GAAP) that are consistently applied. It does not, however, provide specific guidance on the formation of indirect cost groupings and the methods for their allocation. This regulation provides guidance to carriers on allocating certain indirect costs to FEHB experience-rated contracts. For example, we have included a section to supplement FAR 31.203 that describes techniques for accumulating and allocating groupings of indirect costs (FEHBAR 1631.203–70). We have also provided more guidance on the allocation of business unit general and administrative expenses (FEHBAR 1631.203–71) and home office expenses to carriers' business segments (FEHBAR 1631.203–72). These sections also supplement FAR 31.203. Our intent is to supplement, but not to supplant FAR. Therefore, we believe that the provisions of FAR 31.203 dealing with the allocation of indirect costs, including G&A expenses and home office expenses, are rendered more useful for our purposes when supplemented by FEHBAR 1631.203–70: 71 and 72. We believe that the proposed FEHBAR provisions are compatible with existing FAR provisions dealing with the allocation of indirect costs. However, any comments on this topic would be appreciated. In addition, we have modified the FEHBAR to specifically recognize that monthly indirect cost rates are a practice of the insurance industry and are therefore permitted by FAR 31.203(e)(2).

We have added subrogation settlements, prescription drug rebates, and volume discounts to the list of FEHB credits in FEHBAR 1631.201–70. This guidance specifies that the applicable portion of any credit relating to any allowable cost and received by or accruing to the carrier must be credited to the FEHB Program. We have always expected carriers to ensure that the Program actually receives these credits. Idewntifying them makes it even clearer that they are to be credited to the Program. While the list of credits is not intended to be exhaustive, we have added these examples to demonstrate how all credits should be treated. Other enhancements we have made include modifying FAR 31.205–10 to make facilities cost of money (COM) allowable under certain circumstances, even if it is not specifically identified in a carrier proposal (FEHBAR 1631.205–10). This change is intended to more closely reflect the procedures we follow in our annual negotiation process with carriers.

We have also added a provision to establish that compensated personal absence must be assigned to the cost accounting period in which the entitlement was earned (FEHBAR 1631.205–72). This section is included to ensure all carriers are following GAAP requirements applicable to accrual procedures. We are also providing a transition rule to permit carriers to recover prior years' allocable liability for compensated personal absence not previously charged to FEHB contracts. We believe that the provisions of this section ensure that there is compatibility between the applicable requirements of GAAP, FAR and FEHBAR. It should be also stressed that the transition rule dealing with the recovery of prior years' costs applies only to costs that have not been previously charged to contracts or other final cost objectives. Any relevant comments on these points would be appreciated.

Consistent with OPM's waiver of Cost Accounting Standards (CAS) requirements, a new Subpart 1699.70 is added to clarify they do not apply to experience rated FEHB contracts.

We have worked collaboratively with carriers to develop procedures that are consistent with insurance industry practices and assure an equitable allocation of costs to the FEHB Program. When added to our current financial reporting and disclosure requirements, these new provisions will enhance our oversight of the FEHB Program. Because they have been developed in coordination with the standard practices used by experience-rated carriers, we expect they can be implemented within the FEHB Program promptly and without impediments, following the public comment period.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it is based on requirements already in place in the Federal Acquisition Regulation (FAR).

Executive Order 12866, Regulatory Review

This rule has been reviewed by the Office of Management and Budget in accordance with Executive Order 12866.

List of Subjects in 48 CFR Parts 1631 and 1699

Administrative practice and procedure, Government employees, Government procurement, Health facilities, Health insurance, Health professions, Reporting and record keeping requirements, Retirement.

Office of Personnel Management.

Kay Coles James,

Director.

Accordingly, we propose to amend chapter 16 of title 48, Code of Federal Regulations, as follows:

CHAPTER 16—OFFICE OF PERSONNEL MANAGEMENT FEDERAL EMPLOYEES HEALTH BENEFITS ACQUISITION REGULATION

1. The authority citations for 48 CFR part 1631 continues to read as follows:

Authority: 5 U.S.C. 8913; 40 U.S.C. 486(c); 48 CFR 1.301.

PART 1631—CONTRACT COST PRINCIPLES AND PROCEDURES

2. Subpart 1631.1 consisting of section 1631.1 is added to read as follows:

Subpart 1631.1 Definitions.

1631.1 Definitions.

The definitions in FAR 31.001 are applicable to this section unless otherwise noted.

Subpart 1631.2—Contracts with Commercial Organizations

3. Section 1631.201–70 is revised to read as follows:

1631.201–70 Credits.

The provisions of FAR 31.201–5 shall apply to income, rebates, allowances, and other credits resulting from benefit payments. Examples of such credits include:

(a) Coordination of benefit refunds, including subrogation settlements;

(b) Hospital year-end settlements and other applicable provider discounts;

(c) Uncashed and returned checks;

(d) Utilization review refunds;

(e) Contract prescription drug rebates;

(f) Volume discounts;

(g) Refunds and other payments or recoveries attributable to litigation with subscribers or providers of health services; and,

(h) Erroneous benefit payment, overpayment, and duplicate payment recoveries.

4. A new section 1631.203 is added to read as follows:

1631.203 Indirect Costs.

For the purposes of applying FAR 31.203(e) to FEHB Program contracts, OPM considers the monthly rates used by some carriers to be a general practice in the insurance industry.

5. Section 1631.203–70 is revised to read as follows:

1631.203–70 Allocation techniques.

(a) Carriers shall use the following methods for allocating groupings of business unit indirect costs. Carriers shall consistently apply the methods and techniques established to classify direct and indirect costs, to group indirect costs and to allocate indirect costs to cost objectives.

(1) *Input method*—The preferred allocation technique is one that shows the consumption of resources in performance of the activities (input) for the function(s) represented by the cost grouping. This allocation technique should be used in circumstances where there is a direct and definitive relationship between the function(s) and the benefiting cost objectives. Measures of input ordinarily may be expressed in terms such as labor hours or square footage. This means costs may be allocated by use of a rate, such as a rate per labor hour or cost per square foot.

(2) *Output method*—Where input measures are unavailable or impractical to determine, the basis for allocation may be a measure of the output of the function(s) represented by the cost grouping. The output becomes a substitute measure for the use of resources and is a reasonable alternative when a direct measure of input is impractical. Output may be measured in terms of units of end product produced by the function(s). Examples of output measures include number of claims processed by a claims processing center, number of pages printed in a print shop, number of purchase orders processed by a purchasing department, or number of hires by a personnel office.

(3) *Surrogate method*—Where neither activity (input) nor output of the function(s) can be measured practically, a surrogate must be used to measure the resources utilized. Surrogates used to represent the relationship generally measure the benefit to the cost objectives receiving the service and should vary in proportion to the services received. For example, if a personnel department provides various services that cannot be measured practically on an activity (input) or output basis, number of personnel served might reasonably represent the use of resources of the personnel function for the cost objectives receiving the service, where this base varies in proportion to the services performed.

(4) *Other method*—Some cost groupings cannot readily be allocated on measures of specific beneficial or causal relationships under paragraph (a)(1), (a)(2), or (a)(3) of this section. Such costs do not have a direct and definitive relationship to the benefiting cost objectives. Generally, the cost of overall management activities falls in this category. Overall management costs should be grouped in relation to the activities managed. The base selected to measure the allocation of these indirect costs to cost objectives should be a base representative of the entire activity being managed. For example, the total operating expenses of activities managed might be a reasonable base for allocating the general indirect costs of a business unit. Another reasonable method for allocating general indirect costs might be to base them on a percentage of contracts. These examples are not meant to be exhaustive, but rather are examples of allocation methods that may be acceptable under individual circumstances. See also Business Unit General and Administrative (G&A) expenses, FEHBAR 48 CFR 1631.203–71.

(b) Carriers that use multiple cost centers to accumulate and allocate costs shall apply the techniques in paragraph (a) of this section at each step of the allocation process. Accordingly, the allocation of costs among cost centers at the initial entry into the cost accounting system shall be made in compliance with paragraph (a) of this section. Likewise, the allocation of the cost of interim cost centers to final cost centers is subject to paragraph (a) of this section. If costs of final cost centers are allocated among final cost objectives, the allocation shall also be made in accordance with paragraph (a) of this section. It is possible that carriers using multiple cost centers to accumulate and allocate costs may not have any direct costs, *i.e.*, costs identified specifically with a final cost objective.

(c) The allocation of business unit general and administrative expenses and the allocation of home office expenses to segments are also subject to FEHBAR 48 CFR 1631.203–71 and 1631.203–72, respectively.

6. Section 1631.203-71 is added to read as follows:

1631.203–71 Business Unit General and Administrative (G&A) expenses.

G&A expenses shall be allocated to final cost objectives by a base or method that represents the total activity of the business unit.

7. Section 1631.203–72 is added to read as follows:

1631.203–72 Home office expense.

A carrier's practices for allocating home office expenses to the segments of the carrier will be acceptable for purposes of FAR 31.203(b) if they are allocated on the basis of the beneficial or causal relationship between the home office activities and the segments to which the expenses are allocated. Expenses that cannot be allocated on the basis of a more specific beneficial or causal relationship should be allocated on a basis representative of the entire activity being managed. The compliance of such allocations with FAR 31.203 shall be determined on the basis of the facts and circumstances of each situation.

8. Section 1631.205–10 is added to read as follows:

1631.205–10 Cost of money.

For the purposes of FAR 31.205–10(a)(2)(iii), the estimated facilities capital cost of money is specifically identified if it is identified in the prior year's Annual Accounting Statement or, for new experience-rated carriers, the supplemental information supporting submitted costs (such as the Supplemental Schedule of Administrative Expenses).

9. Section 1631.205–72 is amended by designating the existing paragraph as paragraph (a) and adding a new paragraph (b) to read as follows:

1631.205–72 FEHBP compensation for personal services.

(a) * * *

(b)(1) The costs of compensated personal absence shall be assigned to the cost accounting period or periods in which entitlement was earned. Entitlement means an employee's right, whether conditional or unconditional, to receive a determinable amount of compensated personal absence, or pay in lieu thereof.

(2) If at the beginning of the 1st year a carrier subject to paragraph (b)(1) of this section has a liability for accrued but unpaid expenses for compensated personal absences that would otherwise be allocable to FEHB contracts, the carrier may include such costs in a suspense account. The suspense account may be amortized and included in government contract costs at a rate not exceeding 20 percent per year.

10. Part 1699 is added consisting of subpart 1699.7, section 1699.70 to read as follows:

PART 1699—COST ACCOUNTING STANDARDS

Subpart 1699.7—Cost Accounting Standards

1699.70 Cost accounting standards.

With respect to all experience-rated contracts currently existing under the FEHB Program, the Cost Accounting Standards, found at 48 CFR part 9904, of the Code of Federal Regulations, do not apply.

Authority: 5 U.S.C. 8913; 40 U.S.C. 486(c); 48 CFR 1.301.

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BILLING CODE 6325–38–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AT52

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Mexican Spotted Owl

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of public comment period, notice of availability of draft economic analysis and draft environmental assessment, and notice of a public meeting.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the availability of the draft economic analysis and draft environmental assessment for the proposal to designate critical habitat for Mexican spotted owl (owl) (*Strix occidentalis lucida*) under the Endangered Species Act of 1973, as amended. We are also reopening the public comment period for the proposal to designate critical habitat for this species to allow all interested parties to comment on and request changes to the proposed critical habitat designation, as well as the associated draft economic analysis and draft environmental assessment. Over a 10-year time period, the future efficiency impacts associated with owl conservation are forecast to range from $8.7 to $30.4 million (or $0.9 to $3.0 million per year). Comments previously submitted on the July 21, 2000, proposed rule (65 FR 45336) or the November 18, 2003, notice (68 FR 65020) need not be resubmitted as they have been incorporated into the public record as part of this reopening of the comment period and will be fully considered in preparation of the final rule.

DATES: Comments must be submitted directly to the Service (see **ADDRESSES** section) on or before April 26, 2004, or at the public meeting to be held in April 2004.

We will hold a public informational session on April 20, 2004, in Las Cruces, New Mexico, from 5 p.m. to 7 p.m.

ADDRESSES: *Meeting:* The public informational session will be held at the Corbett Center, New Mexico State University Campus, Jordan and University Streets, Las Cruces, New Mexico.

If you wish to comment, you may submit your comments and materials by any one of several methods:

1. You may submit written comments and information to the Field Supervisor, New Mexico Ecological Services Field Office, 2105 Osuna Road, NE., Albuquerque, New Mexico 87113.

2. You may hand-deliver written comments and information to our New Mexico Ecological Services Field Office, at the above address, or fax your comments to 505–346–2542.

You may obtain copies of the draft economic analysis and draft environmental assessment by mail, review comments and materials received, and review supporting documentation used in preparation of this proposed rule, by appointment, during normal business hours, at the above address.

FOR FURTHER INFORMATION CONTACT: Joy Nicholopoulos, New Mexico State Administrator, New Mexico Ecological Services Field Office (telephone 505–761–4706, facsimile 505–346–2542).

SUPPLEMENTARY INFORMATION:

Background

The Mexican spotted owl (owl) inhabits canyon and montane forest habitats across a range that extends from southern Utah and Colorado, through Arizona, New Mexico, and west Texas, to the mountains of central Mexico. On November 18, 2003 (68 FR 65020), we reopened the public comment period on our July 21, 2000, proposed rule to designate critical habitat for the owl (65 FR 45336). The proposal included approximately 5.5 million hectares (ha) (13.5 million acres (ac)) in Arizona, Colorado, New Mexico, and Utah, mostly on Federal lands. On November 12, 2003, the United States District Court for the District of Arizona, (*Center for Biological Diversity* v. *Norton*, Civ. No. 01–409 TUC DCB), ordered the Service to submit a final rule for designation of critical habitat for the owl to the **Federal Register** by August 20, 2004. Additional background information is available in the November 18, 2003, notice reopening the public comment period.

Critical habitat identifies specific areas, both occupied and unoccupied, that are essential to the conservation of a listed species and that may require special management considerations or protection. If the proposed rule is made final, section 7 of the Act will prohibit adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting areas designated as critical habitat must consult with us on the effects of their proposed actions, pursuant to section 7(a)(2) of the Act.

Section 4 of the Act requires that we consider economic and other relevant impacts prior to making a final decision on what areas to designate as critical habitat. We have developed a draft economic analysis and draft environmental assessment for the proposal to designate certain areas as critical habitat for the owl. We solicit data and comments from the public on these draft documents, as well as on all aspects of the proposal. We may revise the proposal, or its supporting documents, to incorporate or address new information received during the comment period. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat,

provided such exclusion will not result in the extinction of the species.

Public Comments Solicited

We intend any final action resulting from this proposal to be as accurate and as effective as possible. Therefore, we solicit comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule. We particularly seek comments concerning:

(1) The reasons why any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act, including whether the benefits of designation will outweigh any threats to the species resulting from designation;

(2) Specific information on the amount and distribution of the owl and its habitat, and which habitat is essential to the conservation of the species and why;

(3) Land use designations and current or planned activities in the subject area and their possible impacts on proposed critical habitat;

(4) Whether our approach to critical habitat designation could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments;

(5) Any foreseeable economic, environmental, or other impacts resulting from the proposed designation of critical habitat, in particular, any impacts on small entities or families;

(6) Whether the economic analysis identifies all State and local costs. If not, what other costs are overlooked;

(7) Whether the economic analysis makes appropriate assumptions regarding current practices and likely regulatory changes imposed as a result of the designation of critical habitat;

(8) Whether the economic analysis correctly assesses the effect on regional costs associated with land use controls that derive from the designation;

(9) Whether the designation will result in disproportionate economic impacts to specific areas that should be evaluated for possible exclusion from the final designation; and

(10) Whether the economic analysis appropriately identifies all costs that could result from the designation.

We also are continuing to accept comments on the proposed critical habitat designation. If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods (*see* **ADDRESSES**).

Comments previously submitted on the July 21, 2000, proposed rule (65 FR 45336) or the November 18, 2003, notice (68 FR 65020) need not be resubmitted as they have been incorporated into the public record as part of this reopening of the comment period and will be fully considered in preparation of the final rule. Comments submitted during this comment period also will be incorporated into the public record and will be fully considered in the final rule. We are required by court order to complete the final designation of critical habitat for the owl by August 20, 2004. To meet this date, all comments or proposed revisions to the proposed rule, associated draft economic analysis, and draft environmental assessment need to be submitted to us during the comment period reopened by this document (*see* **DATES**).

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address, which we will honor to the extent allowable by law. If you wish us to withhold your name or address, you must state this request prominently at the beginning of your comments. However, we will not consider anonymous comments. To the extent consistent with applicable law, we will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

Comments and materials received, as well as supporting documentation used in preparation of the proposal to designate critical habitat, will be available for public inspection, by appointment, during normal business hours at the New Mexico Field Office (*see* **ADDRESSES**).

Authority

The authority for this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Dated: March 22, 2004.

David P. Smith,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 04–6764 Filed 3–25–04; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 040302080–4080–01; I.D. 021104C]

RIN 0648–AR44

Fisheries of the Northeastern United States; Atlantic Mackerel, Squid and Butterfish Fisheries; Framework Adjustment 4

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes to implement measures contained in Framework Adjustment 4 (Framework 4) to the Atlantic Mackerel, Squid, and Butterfish Fishery Management Plan (FMP). This action would extend the limited entry program for the *Illex* squid fishery for an additional 5 years. This action is intended to further the objectives of the FMP and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

DATES: Public comments must be received no later than 5 p.m., eastern standard time, on April 26, 2004.

ADDRESSES: Comments on Framework 4 should be sent to: Patricia A. Kurkul, Regional Administrator, Northeast Regional Office, NMFS, One Blackburn Drive, Gloucester, MA 01930–2298. Please mark the envelope, "Comments-SMB Framework Adjustment 4." Comments on Framework 4 may be submitted by e-mail. The mailbox address for providing e-mail comments is *MSBAR44@noda.gov*. Include in the subject line of the e-mail comment the following document identifier: "Comments-SMB Framework Adjustment 4." Comments also may be sent via facsimile (fax) to 978–281–9135.

Copies of Framework 4, including the Draft Final Environmental Impact Statement (FEIS) and Regulatory Impact Review (RIR)/ Regulatory Flexibility Analysis (RFA), are available from: Daniel Furlong, Executive Director, Mid-Atlantic Fishery Management Council, Room 2115, Federal Building, 300 South New Street, Dover, DE 19904–6790. The FEIS/RIR/RFA is accessible via the Internet at *http://www.nero.noaa.gov*.

FOR FURTHER INFORMATION CONTACT: Eric Jay Dolin, Fishery Policy Analyst, 978–

281–9259, fax 978–281–9135, e-mail *eric.dolin@noaa.gov*.

SUPPLEMENTARY INFORMATION: In 1997, Amendment 5 to the FMP established a limited entry program for the *Illex* squid fishery in response to a concern that fishing capacity could otherwise expand to overexploit the stock. At the time the program was established, there was a concern that the capacity of the limited entry vessels might prove, over time, to be insufficient to fully exploit the annual quota. In response to this concern, a 5–year sunset provision was placed on the *Illex* squid limited entry program. Frameworks 2 and 3 to the FMP each extended the *Illex* squid moratorium for 1 year, and it is scheduled to expire on July 1, 2004. Since the implementation of the limited entry program, the *Illex* squid fishery's performance has demonstrated that the current fleet possesses the capacity to harvest the long-term potential yield from this fishery. The Mid-Atlantic Fishery Management Council (Council) is considering a permanent resolution to the issue of limited entry in an amendment to the FMP (Amendment 9). The Council was planning to present the public hearing document/DEIS for Amendment 9 at its June 2003 meeting, but NMFS review of the draft document indicated that extensive revisions were needed. As a result, the Council developed this action that would extend the moratorium until July 1, 2009, to prevent overcapitalization while Amendment 9 is being revised and considered by the Council. This extension would comply with the criteria in section 303(b)(6) of the Magnuson-Stevens Act. The extension would allow the Council additional time to consider long-term management for the *Illex* squid fishery, including the limited entry program. Vessels that took small quantities of *Illex* squid in the past may continue to do so under the incidental catch provision of the FMP.

Classification

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

The Council prepared an FEIS for this action; a notice of availability of the Draft Environmental Impact Statement was published on September 26, 2003 (68 FR 55604). A description of the action, why it is being considered, and the legal basis for this action are contained in the **SUPPLEMENTARY INFORMATION** section of the preamble of this proposed rule. This proposed rule does not duplicate, overlap, or conflict with other Federal rules. There are no new reporting or recordkeeping requirements contained in any of the alternatives considered for this action.

An IRFA was prepared that describes the impact this proposed rule, if adopted, would have on small entities. There are 72 vessels that have been issued moratorium permits, all of which would be impacted by this action. Since per vessel costs are not available for vessels participating in the *Illex* moratorium fishery, individual vessel profitability could not be estimated. Therefore, changes in gross revenue of the aggregate fleet is used as a proxy for changes in individual vessel profitability. Furthermore, assumptions are made that revenue losses and gains are shared equally among these vessels. There are no large entities (vessels) participating in this fishery, as defined in section 601 of the Regulatory Flexibility Act. Therefore, there are no disproportionate economic impacts. The preferred alternative is not expected to affect revenues or profits of the vessels that currently participate in the fishery. A copy of the complete analysis can be obtained from the Council (see **ADDRESSES**) or via the Internet at *http://www.nero.noaa.gov*. A summary of the analysis follows.

In addition to the preferred Alternative 1, the Council considered three non-preferred alternatives. Alternative 2 would extend the moratorium on entry to the *Illex* fishery for an additional 2 years (through July 1, 2005); Alternative 3 would allow the moratorium on entry to the *Illex* fishery to expire on July 1, 2004 (no action); and Alternative 4 would extend the moratorium on entry to the *Illex* fishery indefinitely. Alternative 4 was rejected from further consideration and analysis because the Council considered the measure to be beyond the scope of a framework action. The framework adjustment process set forth at 50 CFR 648.24 is a mechanism to add management measures to or adjust management measures in the FMP. As a consequence, the *Illex* squid moratorium limitation in the FMP is subject to an adjustment through this framework adjustment process. As reflected in the administrative record underlying the adoption and implementation of this process, this process was developed to make revisions to the measures in the FMP that did not represent major changes to the cornerstone provisions of the FMP. One of the cornerstone provisions in the FMP is the moratorium on entry into the *Illex* squid fishery, which, by virtue of Amendment 5 to the FMP, is of limited duration. Alternative 4 of Framework Action 4 would eliminate the sunset provision of the moratorium and extend the moratorium indefinitely. This would ostensibly close the door on new entry into the fishery. Such a change goes beyond an adjustment to the *Illex* squid moratorium provision of the FMP that can be effected through the framework adjustment. This is the basis for the conclusion that Alternative 4 should be rejected. The framework process involves a somewhat truncated administrative process that incorporates the opportunity for public participation at two Council meetings, which are currently held some 6 weeks apart. Consideration of extension of the *Illex* moratorium indefinitely demands a more deliberative and widespread public process. Under the Magnuson-Stevens Act, the process of amending the FMP is the appropriate mechanism to extend the moratorium indefinitely. This alternative is currently being considered in Amendment 9 to the FMP.

The preferred alternative and Alternative 2 would both extend the moratorium on entry of new vessels into the *Illex* fishery; therefore, no impact is expected on vessels in the fishery through 2009, compared to individual vessel revenues in 2002. The Council assumed that the market and prices would remain stable. Therefore, any changes in individual vessel revenues would be the result of factors outside the scope of the moratorium (e.g., change in fishing practices for individual vessels, or changes in abundance and distribution of *Illex* squid).

Under Alternative 3, the no-action alternative, the *Illex* fishery would revert to open access. In 2002, there were 72 vessels permitted to participate in the directed *Illex* fishery, however, only 50 percent of those vessels (36 vessels) landed any *Illex* squid in 2002. The *Illex* squid vessels currently permitted to participate in the fishery have the capability to harvest the total harvest level. In fact, in 1998, permitted vessels were able to land the total harvest level and the fishery was closed early that year. That year, more than 99 percent of the total *Illex* squid landings were made by 37 vessels or about 50 percent of the vessels holding *Illex* moratorium permits. The remaining 1 percent of the *Illex* squid landings were made by 71 vessels holding incidental catch permits. The elimination of the moratorium of entry to the *Illex* fishery will not affect the manner in which the total harvest level for this species is established. The *Illex* fishery is managed through annual specifications and management measures, which are designed to assure that the target harvest level is not exceeded. Thus, overall *Illex*

landings will not be affected. However, if a significant number of additional vessels enter the fishery as a consequence of Alternative 3, it is possible that the open access condition may affect the current revenue structures of participants and/or create derby-style fishing practices which could potentially lead to an early closure. This situation may create market gluts and price instability in the fishery.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: March 22, 2004.

Rebecca Lent,

Deputy Assistant Administrator for Regulatory Programs, 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 § 648.4, the heading of paragraph (a)(5)(i) is revised to read as follows:

§ 648.4 Vessel permits.

(a) * * *

(5) * * *

(i) *Loligo squid/butterfish and Illex squid moratorium permits (Illex squid moratorium is applicable from July 1, 1997, until July 1, 2009).* * * *

* * * * *

[FR Doc. 04–6856 Filed 3–25–04; 8:45 am]

BILLING CODE 3510–22–S

Notices

Federal Register
Vol. 69, No. 59
Friday, March 26, 2004

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

JOINT BOARD FOR THE ENROLLMENT OF ACTUARIES

Meeting of the Advisory Committee; Meeting

AGENCY: Joint Board for the Enrollment of Actuaries.

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: The Executive Director of the Joint Board for the Enrollment of Actuaries gives notice of a closed meeting of the Advisory Committee on Actuarial Examinations.

DATES: The meeting will be held on April 19, 2004, from 8:30 a.m. to 5 p.m.

ADDRESSES: The meeting will be held at Mercer Human Resource Consulting, 1166 Avenue of the Americas, Conference Room, 30th Floor, New York, NY.

FOR FURTHER INFORMATION CONTACT: Patrick W. McDonough, Executive Director of the Joint Board for the Enrollment of Actuaries, (202) 622–8225.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Advisory Committee on Actuarial Examinations will meet at Mercer Human Resource Consulting, 1166 Avenue of the Americas, Conference Room, 30th Floor, New York, NY on Monday, April 19, 2004, from 8:30 a.m. to 5 p.m.

The purpose of the meeting is to discuss topics and questions that may be recommended for inclusion on future Joint Board examinations in actuarial mathematics, pension law and methodology referred to in 29 U.S.C. 1242(a)(1)(B).

A determination has been made as required by section 10(d) of the Federal Advisory Committee Act, 5 U.S.C. App., that the subject of the meeting falls within the exception to the open meeting requirement set forth in Title 5 U.S.C. 552b(c)(9)(B), and that the public interest requires that such meeting be closed to public participation.

Dated: March 22, 2004.

Patrick W. McDonough,

Executive Director, Joint Board for the Enrollment of Actuaries.

[FR Doc. 04–6835 Filed 3–25–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

March 22, 2004.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *Pamela_Beverly_OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–6746.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB Control number.

Foreign Agricultural Service

Title: Food Donation Programs (Food for Progress & Section 416(b)) and McGovern-Dole International Food for Education and Child Nutrition Program.

OMB Control Number: 0551–0035.

Summary of Collection: The U.S. Department of Agriculture's Foreign Agricultural Service (FAS) helps provide U.S. agricultural commodities to feed millions of hungry people in needy countries through direct donations and concessional programs. The Food for Progress program provides for donations of or sale of U.S. commodities to developing countries and emerging democracies to support democracy and an expansion of private enterprise. The commodities donated through Food for Progress may be used for direct feeding programs, or may be sold in the recipient country, and the proceeds used to support agricultural, economic or infrastructure development programs. Section 416(b) program provides for overseas donations of surplus commodities acquired by the Commodity Credit Corporation. Commodities are made available for donations through agreements with foreign governments, private voluntary organizations, cooperatives, and intergovernmental organizations. The McGovern-Dole International Food for Education and Child Nutrition Program helps support education, child development, and food security for some of the world's poorest children. It provides for donations of U.S. agricultural products, as well as financial and technical assistance, for school feeding and maternal and child nutrition projects in low-income, food-deficit countries that are committed to universal education. The authorities to collection information for these programs are under 7 CFR Part 1499, Foreign Donation Programs and 7 CFR Part 1599, McGovern-Dole International Food for Education and Child Nutrition Program.

Need and Use of the Information: FAS will collect information from cooperating sponsor to determine its ability to carry out a food aid program, to establish terms under which the commodities will be provided, to monitor the progress of commodity distribution, including how

transportation is procured, and to evaluate both the program's success and the Cooperating Sponsor's effectiveness in meeting certain goals.

Description of Respondents: Not for-profit institutions; business or other for-profit.

Number of Respondents: 241.

Frequency of Responses: Recordkeeping; reporting: Semi-annually; quarterly.

Total Burden Hours: 50,434.

Farm Service Agency

Title: Farm Loan Programs Account Servicing Policies.

OMB Control Number: 0560–0161.

Summary of Collection: The Farm Service Agency's (FSA) Farm Loan Program (FLP) provides supervised credit in the form of loans to family farmers and ranchers to purchase land and finance agricultural production. The regulations covering this information collection request describes the policies and procedures the agency will use the service most FLP loans. These loans include Operating, Farm Ownership, Soil and Water, Softwood Timber Production, Emergency, Economic Emergency, Economic Opportunity, Recreation, and Rural Housing loans for farm service buildings. Servicing of accounts is administered in accordance with the provisions of the Consolidated Farm and Rural Development Act (CONACT) as amended by the Food Security Act of 1985, the Agriculture Credit Act of 1987, the Food Agriculture Conservation and Trade Act of 1990, the Agricultural Credit Improvement Act of 1992, and the Federal Agriculture Improvement and Reform Act of 1996.

Need and Use of the Information: The information collected will be used by FSA to service the borrower's loan account and to consider the financially distressed or delinquent borrower's request for debt restructuring including rescheduling, reamortization, consolidation, deferral, and write down. Failure to collect the information would result in borrowers not being provided with available servicing options or could result in the potential demise of their operation and the loss of security property through either voluntary or forced liquidation.

Description of Respondents: Farms; individuals or households; business or other for-profit.

Number of Respondents: 24,189.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 14,312.

Animal and Plant Health Inspection Service

Title: Fruit from Hawaii.

OMB Control Number: 0579–0123.

Summary of Collection: The United States Department of Agriculture is responsible for preventing plant diseases or insect pests from spreading within the United States. Under the Plant Protection Act (7 U.S.C. 7701–7772), the Secretary of Agriculture, is authorized to carry out operations or measures to detect, eradicate, suppress, control, prevent, or retard the spread of plant pests new to the United States. The Animal and Plant Health Inspection Service (APHIS) regulates the interstate movement of fruits and vegetables from Hawaii to prevent the spread of Mediterranean fruit fly, the melon fly, the Oriental fruit fly, and the Malaysian fruit fly pests that occur in Hawaii and can cause millions of dollars in damage to U.S. agriculture.

Need and Use of the Information: APHIS will collect information using several forms to ensure fruits from Hawaii are free from pests and disease.

Description of Respondents: Business or other for-profit.

Number of Respondents: 300.

Frequency of Responses: Recordkeeping; reporting: On occasion.

Total Burden Hours: 327.

Animal and Plant Health Inspection Service

Title: Imported Seed and Screening.

OMB Control Number: 0579–0124.

Summary of Collection: The United States Department of Agriculture (USDA) is responsible for preventing plant diseases or insect pests from entering the United States, preventing the spread of pests not widely distributed in the United States, and eradicating those imported pest when eradication is feasible. The Plant Quarantine Act and the Federal Plant Pest Act authorizes the Department to carry out this mission. Under the authority of the Federal Seed Act of 1939, as amended, the USDA regulates the importation and interstate movement of certain agricultural and vegetable seeds. The Plant Protection & Quarantine Division of USDA's Animal & Plant Health Inspection Service (PHIS) has established a seed analysis program with Canada that allows U.S. companies that import seed for cleaning or processing to enter into compliance agreements with APHIS. This program eliminates the need for sampling shipments of Canadian-origin seed at the border, and allows certain seed importers to clean seed without the direct supervision of an APHIS inspector. APHIS will collect information using two forms.

Need and Use of the Information: APHIS will collect information to prevent the spread of insect pests and noxious weeds from entering into the United States. If the information were not collected, there would be no way of preventing noxious weeds from entering the United States.

Description of Respondents: Business or other for-profit.

Number of Respondents: 30,000.

Frequency of Responses: Recordkeeping: Reporting: On occasion.

Total Burden Hours: 11,345.

Animal and Plant Health Inspection Service

Title: Plum Pox Compensation.

OMB Control Number: 0579–0159.

Summary of Collection: Plum Pox is an extremely serious viral disease of plants that can affect many stone fruit species, including plum, peach, apricot, almond, and nectarine. The United States Department of Agriculture is responsible for preventing plant pests and noxious weeds for entering the United States; preventing the spread of pests new to the United States and eradicating those imported pests and weeds when eradication is feasible. The regulations in 7 CFR 301.74–5 permit owners of commercial stone fruit orchards and owners of fruit tree nurseries to receive compensation under certain circumstances. Owners of commercial stone fruit orchards may receive compensation for losses associated with trees destroyed to control plum pox pursuant to an emergency action notification (EAN) issued by the Animal & Plant Health Inspection Service (APHIS).

Need and Use of the Information: APHIS will collect information using form PPQ, 651 Application for Plum Pox Compensation. The data collected provides the owner's name and address, a description of the owner's property, and a certification statement that the trees removed from the owner's property were stone fruit trees from commercial fruit orchards or fruit tree nurseries. If the information were not collected, APHIS would be unable to compensate eligible grove and nursery owners for the loss of their trees.

Description of Respondents: Business or other for-profit.

Number of Respondents: 6.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 1.

Animal and Plant Health Inspection Service

Title: Importation of Artificially Dwarfed Plants.

OMB Control Number: 0579–0176.

Summary of Collection: Under the Plant Protection Act (7 U.S.C. 7701–

7772), the Secretary of Agriculture is authorized to prohibit or restrict the importation, entry or movement of plants and plant pests, to prevent the introduction of plant pests into the United States or their dissemination within the United States. Plant Protection and Quarantine (PPQ), a unit within USDA's Animal and Plant Health Inspection Service (APHIS), enforce these regulations. Artificially dwarfed plants imported into the United States must be accompanied by a phytosanitary certificate of inspection issued by a plant health official employed by the government of the country from which the plants are exported.

Need and Use of the Information: APHIS will collect information from the phytosanitary certificate to state that the plants were: (1) Grown for at least 2 years in a nursery that is registered with the government of the country of export; (2) grown in pots containing only sterile growing media; (3) grown on benches at least 50 cm above the ground; and (4) inspected at least once each year by the plant protection service of the country of export. The collected information will enable PPQ to verify that the imported plants were grown under conditions that helped keep the plants free from infestation by certain longhorned beetles and other pests. Without the information, APHIS could not verify that imported nursery stock does not present significant risk of introducing plant pests and plant diseases into the United States.

Description of Respondents: Business or other for-profit; farms; State, Local or Tribal Government; individuals or households.

Number of Respondents: 20.

Frequency of Responses: Reporting; on occasion.

Total Burden Hours: 25.

Animal and Plant Health Inspection Service

Title: National Non-Ambulatory Livestock Study.

OMB Control Number: 0579–NEW.

Summary of Collection: The United States Department of Agriculture is responsible for protecting the health of our Nation's livestock and poultry populations by preventing the introduction and dissemination of any pest or disease of livestock and for eradicating such pest and diseases from the United States when feasible. The Center for Epidemiology and Animal Health, Veterinary Services, Animal and Plant Health Inspection Service (APHIS), plans to initiate an information collection to gather data for the National Non-Ambulatory Livestock Study. The objectives of the study is to: (1) Assess the scope of the non-ambulatory livestock; (2) identify the causes that render livestock non-ambulatory; (3) examine humane treatment practices for non-ambulatory livestock; and (4) examine the extent to which non-ambulatory livestock may present handling and disposition problems for stockyards, market agencies, and dealers.

Need and Use of the Information: The collected information will be used to promulgate regulations for the humane treatment, handling, and disposition of non-ambulatory livestock as the Secretary sees fit. The information will also be used to optimize BSE surveillance.

Description of Respondents: Farms; Business or other for-profit; State, Local or Tribal Government; Federal Government.

Number of Respondents: 4,375.

Frequency of Responses: Reporting; on occasion; quarterly.

Total Burden Hours: 5,500.

National Agriculture Statistics Service

Title: Cotton Ginning Survey.

OMB Control Number: 0535–0220.

Summary of Collection: The primary function of the National Agricultural Statistics Services (NASS) is to prepare and issue state and national estimates of crop and livestock production, disposition and prices as well as specialty agricultural and environmental statistics. The Cotton Ginning Survey provides statistics concerning cotton ginning for specific dates and geographic regions and aids in forecasting cotton production, which is required under U.S.C. Title 13, section 42(a).

Need and use of the Information: The ginning data collected provides (1) all segments of the cotton industry-buyers, brokers, crushers, shippers, textile firms, and researches with exact quantities of cotton available at specific geographic locations within the U.S. on a regular basis; (2) precise statistics, especially when at least 50 percent of the forecasted cotton production has been ginned in a state; and (3) (final season ginning data is used to establish final production. If the information were collected less frequent, the cotton industry would be without county level quantities ginned that could seriously affect transportation costs and marketing strategies.

Description of Respondents: Business or other for-profit.

Number of Respondents: 920.

Frequency of Responses: Reporting: Other (biweekly Sept.–Jan.).

Total Burden Hours: 840.

Agricultural Marketing Service

Title: Farmers Market Questionnaire.

OMB Control Number: 0581–0169.

Summary of Collection: The Transportation and Marketing (T&M) Program, Agricultural Marketing Service (AMS) conducts research to find better designs, development techniques, and operating methods for modern farmer's markets under the Agency's Marketing Service Branch. Individual studies are conducted in close cooperation with local interested parties. Recommendations are made available to local decision makers interested in constructing modern farmer's markets to serve area producers and consumers. T&M researchers will survey by mail, with telephone follow-up, the managers of farmer's markets identified in the 2000 National Farmer's Market Directory. These markets represent a varied range of sizes, geographical locations, types, ownership, and structure and will provide a valid overview of farmer's markets in the United States.

Need and Use of the Information: The form, T–6 "Farmer's Market Questionnaire," is used to collect information and will serve as a survey instrument to obtain a clearer picture of existing farmer's market structure as well as provide a measure of growth. Information such as the size of markets, operating times and days, retail and wholesale sales, management structure, and rules and regulations governing the markets are all important questions that need to be answered in the design of a new market. The information developed by this survey will support better designs, development techniques, and operating methods for modern farmers markets and outline improvements that can be applied to revitalize existing markets. If this information is not collected, the ongoing research to develop new farmer's markets must rely on limited and often anecdotal information. This narrow focus will limit the ability of research to provide effective designs and development plans for new markets where such information is not immediately available.

Description of Respondents: Not-for-profit institutions.

Number of Respondents: 3,100.

Frequency of Responses: Reporting: Biennially.

Total Burden Hours: 388.

Rural Utilities Service

Title: Environmental Policies and Procedures (7 CFR Part 1794).

OMB Control Number: 0572–0117.

Summary of Collection: In December 1998, the Rural Utilities Service (RUS)

published its revised Environmental Policies and Procedures and in 2003 revisions were made to clarify policy on certain environmental review processes. The rule promulgated environmental regulations that cover all RUS Federal actions taken by RUS' electric, telecommunications, water and environmental programs. The regulation was necessary to ensure continued RUS compliance with the Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act (NEPA) (40 CFR Parts 1500–1508), and certain related Federal environmental laws, statutes, regulations, and Executive Orders. RUS electric, telecommunications, water and environmental program borrowers provide environmental documentation to assure that policy contained in NEPA is followed.

Need and Use of the Information: RUS will collect information to evaluate the cost and feasibility of the proposed project and the environmental impact. If the information is not collected, the agency would not be in compliance with NEPA and CEQ regulations.

Description of Respondents: Non-for-profit institutions; business or other for-profit.

Number of respondents: 600.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 440,200.

Animal and Plant Health Inspection Service

Title: Animal Welfare; Transportation of Animals on International Carriers.

OMB Control Number: 0579–NEW.

Summary of Collection: Under the Animal Welfare Act (AWA) (7 U.S.C. 2131 *et seq.*), the Secretary of Agriculture is authorized to promulgate standards and other requirements governing the humane handling, care, treatment, and transportation of certain animals by dealers, research facilities, exhibitors, and carriers and intermediate handlers. The Secretary has delegated responsibility for administering the AWA to the Administrator of the Animal and Plant Health Inspection Services (APHIS) of the U.S. Department of Agriculture. APHIS will be applying the AWA regulations and standards for the humane transportation of animals in commerce to all international carriers operating within the United States, its territories, possessions, or the District of Columbia. APHIS believes that animals being transported by international carriers should be afforded the same protection under the AWA as if domestic carriers were transporting them.

Need and Use of the Information: APHIS will collect information using APHIS form 7001, United States Interstate and International Certificate of Health Examination for Small Animals and APHIS form 7011, Application for Registration. The information and certification is necessary for carriers and intermediate handlers to properly care for and deliver the animals to destination in a speedy and humane manner. The information is also used in documenting instances of violations for possible legal action and for location facilities or persons who are evading regulations under the law. Without the information, full enforcement of the AWA would be limited or totally ineffective.

Description of Respondents: Individuals or households; not-for-profit institutions.

Number of Respondents: 20.

Frequency of Responses: Recordkeeping; reporting: On occasion.

Total Burden Hours: 175.

Animal and Plant Health Inspection Service

Title: Emerald Ash Borer.

OMB Control Number: 0579–0233.

Summary of Collection: The Animal and Plant Health Inspection Service (APHIS) is quarantining 13 counties in Michigan because of the emerald ash borer (EAB) and restricting the interstate movement of regulated articles from these quarantined areas. The EAB is a destructive wood-boring insect that attacks ash trees (Fraxinus spp., including green ash, white ash, black ash, and several horticultural varieties of ash). The insect, which is indigenous to Asia and known to occur in China, Korea, Japan, Mongolia, the Russian Far East, Taiwan, and Canada, eventually kills healthy ash trees after it bores beneath their bark and disrupts their vascular tissues. The authority for this collection can be found at CFR Part 301.53–1 through 301.53–9.

Need and Use of the Information: APHIS will collect information to prevent the artificial spread of this plant pest from infested areas in the State of Michigan to noninfested areas of the United States. If APHIS did not collect the information, the effectiveness of their EAB quarantine would be severely compromised, likely resulting in the interstate spread of this destructive (and economically damaging) agricultural pest.

Description of Respondents: Farms; Business or other for-profit; Individuals or households; State, Local or Tribal Government

Number of Respondents: 225.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 180.

Farm Service Agency

Title: Beginning Farmer and Rancher Land Contract Guarantee Pilot Program.

OMB Control Number: 0560–0228.

Summary of Collection: Section 310 F of the consolidated Farm and Rural Development Act authorizes the Secretary to establish a pilot program to provide guarantees of loans made by private sellers of a farm or ranch on a contract land sales basis to qualified beginning farmers or ranchers. Pilot Program has been implemented in six States. The pilot program will be funded using the Guaranteed Farm Ownership loan allocation, and funds will be available for each State to guarantee up to five loans per year. Under the Pilot Program, the Farm Service Agency (FSA) will provide the seller of the land a "prompt payment" guarantee.

Need and Use of the Information: FSA will collect information using several FSA forms to evaluate and determine if the buyer and the sales transaction meet the criteria established by the Agency. Failure to collect this information may result in persons receiving benefits other than intended program beneficiaries.

Description of Respondents: Farms, Individuals or households; Business or other for-profit; Federal Government.

Number of Respondents: 460.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 1,126.

Farm Service Agency

Title: Guaranteed Farm Loan Programs.

OMB Control Number: 0560–0155.

Summary of Collection: The Consolidated Farm and Rural Development Act (CONTACT), as amended, authorizes the Secretary of Agriculture to make and service loans guaranteed by the Farm Service Agency (FSA) to eligible farmers and ranchers. The statutory authorities for the guaranteed loan program is set out in the Code of Federal Regulations, Title 7, Chapter VII, part 762. The loans made and serviced under 762 include farm operating, farm ownership, and soil and water loans. The loan applicant must be a citizen of the United States, own and operate or become the owner and operator of not larger than a family size farm and be unable to obtain sufficient credit elsewhere at reasonable rates and terms.

Need and Use of the Information: FSA will collect information using several

agency forms to determine lender and loan applicant eligibility for farm loan guarantees, and to ensure that the lender protects the government's financial interests. If the information were not collected, the agency would be unable to meet the congressionally mandated mission of the guaranteed loan program.

Description of Respondents: Individuals or households; Farms Business or other for-profit; Federal Government.

Number of Respondents: 16,500.

Frequency of Responses: Reporting: Other (when applying for loans).

Total Burden Hours: 201,240.

Rural Utilities Service

Title: Broadband Pilot Grant Program.

OMB Control Number: 0572–0127.

Summary of Collection: The Rural Utilities Service has the responsibility to deploy broadband service in unserved rural areas and to provide broadband grants for purposes of delivering broadband services to rural areas. Congress has appropriated funds in FY03 and FY04 to continue this program that will promote economic development and provide enhanced educational and health care opportunities.

Need and Use of the Information: RUS will provide financial assistance in the form of grants to eligible entities to provide broadband transmission service in rural communities where such service does not currently exist. RUS will use the information to determine that funds needed to complete the project are adequate based on the amount requested.

Description of Respondents: Business or other for-profit; not-for-profit institutions; State, Local or Tribal Government.

Number of Respondents: 300.

Frequency of Responses: Reporting; On occasion.

Total Burden Hours: 48,010.

Animal and Plant Health Inspection Service

Title: Importation of Mangoes from the Philippines.

OMB Control Number: 0579–0172.

Summary of Collection: The United States Department of Agriculture is responsible for preventing plant pests and noxious weeds from entering the United States. Under the Plant Protection Act (7 U.S.C. 7711–7714), the Secretary of widely distributed throughout the United States. The regulations in "Subpart-Fruit and Vegetables" (7 CFR 319.56 through 319.56–8) allow the importation of mangoes from Guimaras Island in the Republic of the Philippines into the United States under certain conditions. The regulations require the use of box marking to indicate the origin of the fruit, phytosanitary certificate to confirmed that the fruit has been grown and treated in accordance with the regulations and a trust fund agreement between the Republic of the Philippines Department of Agriculture and the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) to cover the Agency's participation in the treatment and inspection activities in the Philippines that are required for the importation of mangoes.

Need and Use of the Information: APHIS will collect information to verify that the commodity was treated adequately with heat to eliminate the pest risk and to verify that the temperature remained at the appropriate level for the entire treatment period, thereby destroying any fruit flies present in the commodity.

Description of Respondents: Business or other for-profit.

Number of Respondents: 20.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 40.

Sondra Blakey,

Departmental Information Collection Clearance Officer.

[FR Doc. 04–6788 Filed 3–25–04; 8:45 am]

BILLING CODE 3410–01–M

DEPARTMENT OF AGRICULTURE

Forest Service

Additional 68.59 Acres Added to Ouachita Purchase Unit, Arkansas

AGENCY: Forest Service, USDA.

ACTION: Notice.

SUMMARY: The Secretary of Agriculture has added 68.59 acres in Garland County Arkansas to the Ouachita Purchase Unit, Arkansas. A copy of the document, which includes the legal descripton of the lands added to the purchase unit, appears at the end of this notice.

DATES: The addition of these lands to the existing Ouachita Purchase Unit was effective February 6, 2004.

ADDRESSES: A copy of the map depicting the lands added to the Ouachita Purchase Unit is on file and available for public inspection in the Office of the Director, Lands Staff, 4th Floor—Sidney R. Yates Federal Building, Forest Service, USDA, 201 14th Street, SW., Washington, DC 20250, between the hours of 8:30 a.m. and 4:30 p.m. on business days. Those wishing to inspect the maps are encouraged to call ahead to (202) 205–1248 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Gregory Smith, Acting Director, Lands Staff, Forest Service, USDA, 201 14th Street, SW., Washington DC 20250 telephone: (202) 205–1248.

SUPPLEMENTARY INFORMATION: Pursuant to the Secretary of Agriculture's authority under Section 17, Pub. L. 94–588 (90 Stat. 2949), 68.59 acres were added to the Ouachita Purchase Unit, Arkansas.

Dated: March 8, 2004.

Gloria Manning,

Associate Deputy Chief, National Forest System.

Proposed Addition to the Ouachita Purchase Unit

The following described lands lying adjacent or proximate to the Ouachita National Forest are determined to be suitable for the protection of the watersheds of navigable streams and for other purposes in accordance with section 6 of Weeks Act of 1911 (16 U.S.C. 515). Therefore, in furtherance of the authority of the Secretary of Agriculture pursuant to the Weeks Act of 1911, as amended, including Section 17 of the National Forest Management Act of 1976 (Pub. L. 94–588; 90 Stat. 2961), these lands are hereby added to the Ouachita Purchase Unit.

Garland County, Arkansas, Fifth Principal Meridian Township 1 North, Range 19 West

Section 30

NE¼NE¼ lying East of Arkansas State Highway #7 and west of Weyerhaeuser Road # 20020, as surveyed by Roy H. Black, RLS #690, recorded in Book T, Page 17 of the survey plat records of Garland County, Arkansas, on March 5, 2003; AND SE¼NE¼ lying East of Arkansas State Highway #7 LESS AND EXCEPT a 1.48 acre tract of land described as follows: Beginning at a capped ¾" rebar at the Northeast corner of said SE¼NE¼, run South 0°16'31" East 938.47 feet along the East line of said SE¼NE¼ to a capped ¾" rebar 20.00 feet West of the center of a paved drive; Thence Northerly along a line 20.00 feet West of the center of said paved drive the following courses and distances:

North 24°04'18" West 201.06 feet;
North 25°04'26" West 112.44 feet;
North 20°13'32" West 44.31 feet;
North 6°48'35" West 43.15 feet;
North 9°48'00" East 47.67 feet;
and North 31°34'03" East 111.69 feet to a capped ¾" rebar;

Thence leaving said paved drive North 10°29'39" East 433.73 feet to the Point of Beginning, as surveyed by Roy H. Black, RLS #690, recorded in Book T, Page 17 of the survey plat records of Garland County, Arkansas on March 5, 2003.

West 273.33 yards of the NE¼SE¼, as surveyed by Roy H. Black, RLS #690, recorded in Book T, Page 17 of the survey plat records of Garland County, Arkansas on March 5, 2003, LESS AND EXCEPT a 2.94

acre tract of land described in Book 736, Page 587 of the deed records of Garland County, Arkansas and LESS AND EXCEPT a 2.07 acre tract of land described in Book 1534, Page 283 of the deed records of Garland County, Arkansas. containing 68.59 acres, more or less;

Executed in Washington, DC this 6th day of February, 2004.

David P. Tenny for Mark Rey,
Under Secretary, Natural Resources and Environment.

[FR Doc. 04–6071 Filed 3–25–04; 8:45 am]
BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Flathead County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Flathead County Resource Advisory Committee will meet in Kalispell, Montana April 14th and April 27th. The purpose of these meetings is to discuss future RAC projects and the filling of the Chairperson and vacant member/alternate positions.

DATES: The meeting will be held from 4 p.m. to 6 p.m.

ADDRESSES: The meetings will be held at the Flathead County Commissioner's Office, Commissioner's Conference Room, 800 South Main, Kalispell, Montana 59901.

FOR FURTHER INFORMATION CONTACT: Kaaren Arnoux, Flathead National Forest, Administration Assistant, (406) 758–5251.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Time will be available for public input on potential projects the committee may be discussing.

Denise Germann,
Public Affairs Specialist.

Cathy Barbouletos,
Forest Supervisor.

[FR Doc. 04–6770 Filed 3–25–04; 8:45 am]
BILLING CODE 3410–11–M

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions and Deletions

AGENCY: Committee for Purchase from People Who Are Blind or Severely Disabled.

ACTION: Proposed additions to and deletions from Procurement List.

SUMMARY: The Committee is proposing to add to the Procurement List products to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities, and to delete services previously furnished by such agencies.

Comments must be received on or before: April 25, 2004.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia, 22202–3259.

FOR FURTHER INFORMATION CONTACT: Sheryl D. Kennerly, (703) 603–7740.

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C 47(a) (2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Additions

If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice for each product or service will be required to procure the products listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the products to the Government.

2. If approved, the action will 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 proposed for addition to the Procurement List. Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

End of Certification

The following products are proposed for addition to Procurement List for production by the nonprofit agency listed:

Products

Product/NSN: Bakery Mix (Requirement for 100% of Operational Rations Only), 8920–00–926–6016 (Biscuit Mix), 8920–00–935–3262 (Chocolate Brownie Mix), 8920–00–823–7229 (Yellow Cake Mix), 8920–00–168–3296 (Chocolate Cookie Mix), 8920–00–435–4918 (Cornbread Mix), 8920–00–935–3264 (Oatmeal Cookie Mix), 8920–00–175–0429 (Sugar Cookie Mix), 8940–00–131–8761 (Vanilla Pudding Mix).
NPA: Advocacy and Resources Corporation, Cookeville, Tennessee.
Contract Activity: Defense Supply Center Philadelphia, Philadelphia, Pennsylvania.

Deletions

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. If approved, the action may result in additional reporting, recordkeeping or other compliance requirements for small entities.

2. If approved, the action may result in authorizing small entities to furnish the services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 46–48c) in connection with the services proposed for deletion from the Procurement List.

End of Certification

The following services are proposed for deletion from the Procurement List:

Services

Service Type/Location: Commissary Shelf Stocking & Custodial, Fort Carson, Colorado.
NPA: NONE CURRENTLY AUTHORIZED.
Contract Activity: Defense Commissary Agency, Fort Lee, Virginia.
Service Type/Location: Commissary Shelf Stocking & Custodial, Fort Riley, Kansas.
NPA: NONE CURRENTLY AUTHORIZED.
Contract Activity: Defense Commissary Agency, Fort Lee, Virginia.
Service Type/Location: Commissary Shelf Stocking, Custodial & Warehousing, McConnell Air Force Base, Kansas.
NPA: NONE CURRENTLY AUTHORIZED.
Contract Activity: Defense Commissary Agency, Fort Lee, Virginia.
Service Type/Location: Janitorial/Custodial, Carl Albert Federal Building and U.S. Courthouse, McAlester, Oklahoma.
NPA: NONE CURRENTLY AUTHORIZED.
Contract Activity: General Services Administration.
Service Type/Location: Janitorial/Custodial. J. Marvin Jones Federal Building & U.S. Courthouse, Amarillo, Texas.
NPA: NONE CURRENTLY AUTHORIZED.

Contract Activity: GSA, Public Buildings Service.
Service Type/Location: Janitorial/Custodial, U.S. Army Reserve Center (Midland), Midland, Texas.
NPA: NONE CURRENTLY AUTHORIZED.
Contract Activity: Department of the Army.
Service Type/Location: Janitorial/Custodial, U.S. Federal Building and Post Office, Idabel, Oklahoma.
NPA: NONE CURRENTLY AUTHORIZED.
Contract Activity: General Services Administration.
Service Type/Location: Janitorial/Custodial, U.S. Federal Building, Courthouse and Post Office, Batesville, Arkansas.
NPA: NONE CURRENTLY AUTHORIZED.
Contract Activity: General Services Administration.
Service Type/Location: Janitorial/Custodial, U.S. Federal Building, Courthouse and Post Office, Pine Bluff, Arkansas.
NPA: NONE CURRENTLY AUTHORIZED.
Contract Activity: General Services Administration.
Service Type/Location: Janitorial/Custodial, U.S. Federal Building, Courthouse and Post Office, Tyler, Texas.
NPA: NONE CURRENTLY AUTHORIZED.
Contract Activity: General Services Administration.
Service Type/Location: Janitorial/Custodial, U.S. Federal Building, Gallup, New Mexico.
NPA: NONE CURRENTLY AUTHORIZED.
Contract Activity: GSA, Public Buildings Service.
Service Type/Location: Janitorial/Custodial, U.S. Federal Building, Russellville, Arkansas.
NPA: NONE CURRENTLY AUTHORIZED.
Contract Activity: General Services Administration.
Service Type/Location: Janitorial/Custodial, U.S. Post Office, Courthouse and Social Security Administration, Hot Springs, Arkansas.
NPA: NONE CURRENTLY AUTHORIZED.
Contract Activity: GSA, Public Buildings Service.
Service Type/Location: Janitorial/Grounds Maintenance, U.S. Army Reserve Center, Hot Springs, Arkansas.
NPA: NONE CURRENTLY AUTHORIZED.
Contract Activity: Department of the Army.

Sheryl D. Kennerly,

Director, Information Management.

[FR Doc. 04–6805 Filed 3–25–04; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to Procurement List.

SUMMARY: This action adds to the Procurement List a product and service to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

EFFECTIVE DATE: April 25, 2004.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia, 22202–3259.

FOR FURTHER INFORMATION CONTACT: Sheryl D. Kennerly, (703) 603–7740.

SUPPLEMENTARY INFORMATION: On November 7, 2003 and February 6, 2004, the Committee for Purchase From People Who Are Blind or Severely Disabled published notice (68 FR 63057 and 69 FR 5831) of proposed additions to the Procurement List. After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the product and service and impact of the additions on the current or most recent contractors, the Committee has determined that the product 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 product and service to the Government.

2. The action will result in authorizing small entities to furnish the product 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 product and service proposed for addition to the Procurement List.

End of Certification

Accordingly, the following product and service are added to the Procurement List:

Product

Product/NSN: Strap, Eyewear, Retention, 8470–01–487–1605.
NPA: Lions Services, Inc., Charlotte, North Carolina.
Contract Activity: Defense Supply Center Philadelphia, Philadelphia, Pennsylvania.

Service

Service Type/Location: Base Supply Center, NASA Ames Research Center, Moffett Field, California.
NPA: Associated Industries for the Blind, Milwaukee, Wisconsin.
Contract Activity: NASA Ames Research Center, Moffett Field, California.

This action does not affect current contracts awarded prior to the effective date of this addition or options that may be exercised under those contracts.

Sheryl D. Kennerly,

Director, Information Management.

[FR Doc. 04–6806 Filed 3–25–04; 8:45 am]

BILLING CODE 6353–01–P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the New Jersey Advisory Committee

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights, that a conference call of the New Jersey Advisory Committee will convene at 2 p.m. and adjourn at 3 p.m., Wednesday March 24, 2004. The purpose of the conference call is to discuss meeting with the governor and receiving his comments on civil rights issues in the state.

This conference call is available to the public through the following call-in number: 1–800–720–5846, contact name Edward Darden. Any interested member of the public may call this number and listen to the meeting. Callers can expect to incur charges for calls not initiated using the supplied call-in number or over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls using the call-in number over land-line connections. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–977–8339 and providing the Service with the conference call number and contact name.

To ensure that the Commission secures an appropriate number of lines for the public, persons are asked to register by contacting Edward Darden of the Eastern Regional Office, (202) 376–7533, TTY (202) 376–8116 by 1 p.m. on Tuesday, March 23, 2004.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC March 19, 2004.

Ivy L. Davis,

Chief, Regional Programs Coordination Unit.

[FR Doc. 04–6803 Filed 3–23–04; 12:43 pm]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Materials Technical Advisory Committee; Notice of Open Meeting

The Materials Technical Advisory Committee (MTAC) will meet on April 15, 2004, 10:30 a.m., in the Herbert C. Hoover Building, Room 3884, 14th Street between Constitution & Pennsylvania Avenues, NW., Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration with respect to technical questions that affect the level of export controls applicable to advanced materials and related technology.

Agenda

1. Opening remarks.
2. Presentation of papers and comments by the public.
3. Update on the status of the Biological Weapons Convention.

The meeting will be open to the public and a limited number of seats will be available. Reservations are not accepted. To the extent that time permits, members of the public may present oral statements to the Committee. Written statements may be submitted at any time before or after the meeting. However, to facilitate distribution of public presentation materials to Committee members, the Committee suggests that presenters forward the public presentation materials to the following address: Ms. Lee Ann Carpenter, Advisory Committees MS: 1099D, 15th St. & Pennsylvania Ave., NW., U.S. Department of Commerce, Washington, DC 20230.

For more information contact Lee Ann Carpenter on (202) 482–2583.

Dated: March 23, 2004.

Lee Ann Carpenter,

Committee Liaison Officer.

[FR Doc. 04–6795 Filed 3–25–04; 8:45 am]

BILLING CODE 3510–JT–M

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of initiation of antidumping and countervailing duty administrative reviews and requests for revocation in part.

SUMMARY: The Department of Commerce (the Department) has received requests to conduct administrative reviews of various antidumping and countervailing duty orders and findings with February anniversary dates. In accordance with the Department's regulations, we are initiating those administrative reviews. The Department of Commerce also received requests to revoke two antidumping duty orders in part.

EFFECTIVE DATE: March 26, 2004.

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 February anniversary dates. The Department also received timely requests to revoke in part the antidumping duty orders on Stainless Steel Bar from India and Stainless Steel Flanges from India.

Initiation of Reviews

In accordance with section 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 February 28, 2005.

	Period to be Reviewed
Antidumping Duty Proceedings	
France: Low Enriched Uranium, A–427–818.	2/1/03–1/31/04
Eurodif S.A.	
India: Certain Preserved Mushrooms, A–533–813.	2/1/03–1/31/04
Argo Dutch Industries, Ltd.	
Dinesh Argo Products Ltd.	
Flex Foods, Ltd.	
Himalaya International, Ltd.	
Premier Mushroom Farms.	
Saptarishi Agro Industries, Ltd.	
Weikfield Agro Products, Ltd.	
India: Stainless Steel Bar, A–533–810.	2/1/03–1/31/04
Chandan Steel Ltd.	
Ferro Alloys Corporation, Limited.	
Isibars Limited.	
Mukand, Ltd.	
Venus Wire Industries Limited.	
Viraj Group.	
India: Forged Stainless Steel Flanges, A–533–809.	2/1/03–1/31/04
Echjay Forgings.	
Viraj Group.	
Japan: Certain Cut-to-Length Carbon-Quality Steel Plate, A–588–847.	2/1/03–1/31/04
Nippon Steel Corporation.	
Nisshin Steel.	
JFE Steel Corporation.	
Kawasho Corporation.	
Sumitomo Metals.	
Kobe Steel Company, Ltd.	
Chubu Steel Plate Co., Ltd.	
The Japan Steel Works, Ltd.	

	Period to be Reviewed
Nakayama Steel Works, Ltd. (Nakayama Seikosho).	
Tokyo Steel Manufacturing Co., Ltd.	
Republic of Korea: Certain Cut-to-Length Carbon-Quality Steel Plate, A–580–836.	2/1/03–1/31/04
Dongkuk Steel Mill Co., Ltd.	
KISCO—Korea Iron & Steel Co., Ltd.	
Union Steel Manufacturing Co.	
Malaysia: Stainless Steel Butt-Weld Pipe Fittings, A–557–809.	2/1/03–1/31/04
Schulz (Mfg.) Sdn. Bhd.	
Republic of Korea: Stainless Steel Butt-Weld Pipe Fittings, A–580–813.	2/1/03–1/31/04
SungKwang Bend Co., Ltd.	
The People's Republic of China: Axes/Adzes*, A–570–803.	2/1/03–1/31/04
Changlu Hardware Goods Factory.	
Changshu Xingang Forgings Factory.	
Changzhou Benxin Tool Co., Ltd.	
Changzhou Honghui Tools Factory.	
Changzhou Jielong Tools Factory.	
Changzhou Jingte Hardware Tools Factory.	
Changzhou Light Industrial Tools Works.	
Changzhou Satellite Metal Products Co., Ltd.	
Changzhou Wujin Benniu Rongqiang Force Plant.	
Changzhou Xingang Forging Factory.	
Changzhou Xinhua Hardware Factory.	
aka Changzhou Xinhua Metal Factory.	
Changzhou Yinhe Tools Factory.	
Changzhou Zhongji Tools Co., Ltd.	
China Hunan Jiahe General Forging Factory.	
China Jiangsu Machinery and Equipment Import and Export Corporation (SUMEC).	
aka CMEC Jiangsu I/E Group Co., Ltd.	
China National Machinery & Equipment Imp.& Exp. Corporation (CMEC).	
China National Machinery Import and Export Corporation (CMC).	
CMC Export Enterprise Department.	
aka CMC Rinda I/E Corp.	
Dagang Hardware Roller Forging Factory.	
Dalian Light Building Tools Factory.	
Dandong Tools Gereral Factory.	
Dawn International Trade Co., Ltd.	
Easyuse Tools Industrial Co., Ltd.	
Feixian Harewaretool Factory.	
Feixian Hualu Tool Co., Ltd.	
Ferly Pacific Trading (Ningbo) Co., Ltd.	
Foundry of Tianjin No. 1 Machine Tool Works.	
Fujian Machinery and Equipment Import and Export Corp. ("FMEC").	
G&M Hardware Tools Co. (Ltd.).	
Guangzhou Gaoxin Weibao Hardware Tool Co., Ltd.	
Handysmart Enterprises.	
Hangzhou Donghua Power Transmission Import & Export Co., Ltd.	
Hangzhou Great Star Tools Co., Ltd.	
Hangzhou Greatstar Co., Ltd.	
Hebei Huatai Import & Export Corp.	
aka Hebei Huatai Import and Export Co., Ltd.	
Hebei Machinery Import & Export Corp.	
aka Hebei Machinery Import and Export Co., Jin Yun Corporation.	
aka Hebei Machinery Import and Export Co., Jinhai Corporation.	
aka Hebei Machinery Import and Export Co., Jinxin Corporation.	
Hebei Province Manufactory of Export Agricultural Tools.	
Hebei Wuqiao Import & Export Corporation.	
Henan Jiaozuo Foreign Trade Corp.	
Henan Jinan Agriculture Production Corp.	
Henan Machinery Import and Export Co., Ltd.	
Hua Guang Hoe Factory of Jiahe Hunan Province.	
Huadu Light Industry Co., Ltd.	
Huanyu Hardware Tools Factory.	
Hunan Xinyu Native Produce and Animal By-Products Import & Export Ltd.	
J Y International Corp.	
JB International Trading Co., Ltd.	
Jiahe Huaguang Steel Hoe Factory.	
Jiangsu Guotai International Group HUATAI Imp & Exp Co., Ltd.	
Jiangsu Hongbao Group Co., Ltd.	
Jiangsu Jurong Tools Factory.	
Jiangsu Sainty International Group Co., Ltd.	
aka Jiangsu Sainty International Group (STIG).	
aka Jiangsu Sainty Corporation Ltd.	
aka STIG Machinery Import & Export Corp., Ltd.	

	Period to be Reviewed
aka STIG Jiangsu Machinery Import & Export Corp., Ltd.	
aka Jiangsu Machinery Import & Export Group Corp.	
aka Sainty International Group Jiangsu Machinery Import & Export Corp., Ltd. (SUMEX).	
aka Jiangsu Sainty Honghai Trading Co., Ltd.	
aka Jiangsu Sainty Shanghai Co., Ltd.	
aka Jiangsu Sainty Changzhou Co., Ltd.	
aka STIG Jiangsu Machinery Import & Export Corp Kunshan Co., Ltd.	
aka Jiangsu Sainty Wuxi Co., Ltd.	
aka Jiangsu Sainty Nantong Co., Ltd.	
aka Jiangsu Sainty Suzhou Co., Ltd.	
aka STIG Jiangsu Machinery Import & Export Corp Suzhou Co., Ltd.	
aka Jiangsu Sainty Sumex Food Co., Ltd.	
aka STIG Jiangsu Machinery Import & Export Corp Yangzhou Tools Co., Ltd.	
aka Jiangsu Sainty Zhangjiagang Co., Ltd.	
aka Jiangsu Sainty Xuzhou Co., Ltd.	
Jiangsu Skyer Tools Co., Ltd.	
Jiangsu Tongrun M & E Group Import & Export Co., Ltd.	
Jiangxi Machinery Import & Export Corporation.	
Jinhua Huadu Light Industrial Co., Ltd.	
Jinhua Runua Foreign Trade Co., Ltd.	
Jinhua Twin Star Tools Corporation Limited.	
Junan Runda Tools Co., Ltd.	
Junan Tools General Factory.	
Jurong City Tool Factory.	
Kunshan Xingji Tools Co., Ltd.	
Laiwu Feixiang Tool Factory.	
Lunan Pingshang Jinxin Metal Tools Factory.	
aka Shandong Ju Nan Ping Shang Tool Works.	
Laiwu Forging Factory.	
Laiwu Laicheng Changzhuang Forging Factory.	
Laoling Pangu Tools.	
Leling Jianye Hardware Tools Co., Ltd.	
Leling Pangu Tools Co., Ltd.	
Leling Zhengtai Tool Co., Ltd.	
Liaoning Machinery Import and Export Corp ("LMC").	
LIMAC.	
Lindhu Jinrun Hardware & Tools Co., Ltd.	
Linshu Goldstar Group Co., Ltd.	
aka Shandong Linshu Tools General Factory.	
Linshu Hardware & Machinery General Factory.	
Linshu Henglida Hardware Tool Co., Ltd.	
Linshu Jinrun Ironware & Tools Co., Ltd.	
Linshu Qianyuan Hardware Factory.	
Linshu Xinxin Machinery Co., Ltd.	
Linyi City Lindong Hardware Tool Co., Ltd.	
Linyi Donglai Trade Co., Ltd.	
Linyi Dongyuan Hardware Tools Co., Ltd.	
Linyi Feida Hardware Machinery Co., Ltd.	
Linyi Guoxin Tools Co., Ltd.	
Linyi Hedong Kangda Hardware Tool Factory.	
Linyi Hedong Metal Machinery Plant.	
Linyi Hedong Taiping Agricultural Machinery Factory.	
Linyi Jinding Hardware Tools Co., Ltd.	
Linyi Jinyu Tool Co., Ltd.	
Linyi Liwang Hardware & Machinery Co., Ltd.	
aka Liwang Hardware Machinery Factory Shandong.	
Linyi Shengda Hardware Tools Co., Ltd.	
Linyi Shiheli Tools Co., Ltd.	
Linyi Wanda Hardware Tool Co., Ltd.	
Linyi Weiye Tools Co., Ltd.	
Linyi Yuanda Metal Tools Factory.	
Lishu County Hafu Forging Factory.	
Longcheng Tools Group.	
Longway Tools Company Ltd.	
Luoyang Tools Factory.	
Nantong Jinzheng Tools Factory.	
Ningbo Feiyuan International Trade Co., Ltd.	
Ningbo Tiangong Great Star Tools Company, Ltd.	
Ningbo Tiangong Tools Company, Ltd.	
Ningbo Tiger Handware Manufacture Co.	
Pangu Tools Co., Ltd.	
Remein.	
Shaanxi Machinery and Equipment Import and Export Corporation.	

	Period to be Reviewed
Shaanxi Machinery I/E Corp.	
aka Sunway Engineering Supply Co.	
Shandong Furun Co., Ltd.	
Shandong Huanyu Hardware Tools Co., Ltd.	
Shandong Huanyu Metal Tools Co., Ltd.	
Shandong Huanyu Tools Co., Ltd.	
Shandong Huarong General Group Corp ("Huarong").	
Shandong Jinma Industrial Group Company ("Jinma").	
Shandong Junan Jinli Tool Co.	
Shandong Laoling Tools Factory.	
Shandong Linyi Dongfang Hardware Factory.	
Shandong Linyi Huanyu Hardware Tools.	
Shandong Machinery Import & Export Corp Hangzhou Office.	
Shandong Machinery Import and Export Corporation ("SMC").	
Shandong Menghu Hardware Tool Co., Ltd.	
Shandong Pangu Tools Co., Ltd. (Laoling Pangu).	
Shandong Rizhao Import & Export Corp.	
Shandong Technical Import and Export Corporation.	
Shandong Yongshun Hardware Tools Co., Ltd.	
Shanghai Founder Co., Ltd.	
Shanghai J.E. Tools.	
Shanghai Machinery and Equipment Import and Export Corporation.	
Shanghai Machinery I&E Corp. Ltd.	
Shanghai Tiandao Tools Co., Ltd.	
Shanghai Tongrun Import & Export Co., Ltd.	
Shanghai Xinghui Tool Co., Ltd.	
Shenqiu Zhaodeying Machine Works.	
Shenzhen Orbit Industrial Development Co., Ltd.	
Shenzhen Sino-Tech Enterprise Development Co., Ltd.	
Stanley (Zhongshan) Hardware Co., Ltd.	
SUMEC Hardware and Tools Co.	
Sun-Rain Stationery & Gifts Co., Ltd.	
Taian Foreign Trading General Corp.	
Tancheng Huatong Hardware Tools Co., Ltd.	
Tangshan Guye Hongda Metal Tools Factory.	
Tangshan Industry Trade Co., Ltd.	
Tangshen Bingren Industrial Co., Ltd.	
Tanshang Guye Hardware Tool Forge Plant.	
Technology Import & Export Corp.	
The PRC Enterprise.	
Tianjin Dagang Hardware Forge Plant.	
Tianjin Jiuzhou Special Tools Co., Ltd.	
Tianjin Longjin Hardware Tools Co., Inc.	
Tianjin Machinery I/E Group Engineering & Agricultural Co., Ltd.	
Tianjin Machinery Imp & Exp Group.	
Tianjin Machinery Import and Export Corporation ("TMC").	
Tianjin Special Tools Factory.	
Tianjin Tongda Group Co., Ltd.	
Tonlii Tools Factory TRTOOLS.	
Wuqiao Huafeng Hardware Tool Co., Ltd.	
Wuqiao No. 2 Tools Factory.	
Wuqiao Tiecheng Changjiang Tools Factory.	
Wuqiao Tools Co., Ltd.	
Wuxi Honghong Trade Co.	
Wuxi Jingsheng Forging and Pressing Co., Ltd.	
Wuyi Huwei Tools.	
Wuxi Yongchang Hoisting Machinery Works.	
Xinyi Hardware Co., Ltd.	
Xuzhou Golden Tiger Tools Making Co., Ltd.	
Xuzhou Jinhu Tools Making Co., Ltd.	
Yansheng International Trade Co., Ltd.	
Yee Hing Industry Co.	
Yongkang Baixi Light Industry Machinery Factory.	
Yongkang Bugao Hardware Tools Manufacturing Co., Ltd.	
aka Zhejiang Yongkang Bugao Tools Co., Ltd.	
aka Yongkang Bugao Hardware Tools Manufacturing Co., Ltd.	
aka Zhejiang Yongkang Bugao Hardware Tools Manufacture Co., Ltd.	
Yongkang Jinchui Tools Co., Ltd.	
Yongkang Tianfang Trade & Industry Co., Ltd.	
Yongkang Zhiying Xindong Stainless Steel Appliance Factory.	
Zhangjiagang Free Trade Zone Tianrui Intl. Trade Co., Ltd.	
Zhangjiagang Tianda Special Hardware Co., Ltd.	
Zhejiang Shaoxing Hardware's Tools Factory.	

	Period to be Reviewed
Zhejiang Yongkang Daxing Machinery Co., Ltd.	
Zhejiang Yongkang Xigong Hardware Tools Co., Ltd.	
Zhejiang Yongkang Jinchui Tools Co., Ltd.	
Zhejiang Yongkang Steel Magnesium Co., Ltd.	
Zhejiang Yongkang Zhengfa Mechanical Manufacturing Company.	
Zhenjiang All Joy Light Industrial Products & Textiles Import & Export Co., Ltd.	
Zhenjiang Foreign Trade Group Corp.	
Zibo Boshan Shima Forging Factory.	
Zibo Boshan Sitong Railway Tools Factory.	
Zibo International Economic and Technical Coop. Corp.	
Zibo Steel Fork Factory.	
Zibo Tianbo Railway Materials Co., Ltd.	
Zibo Zichuan Xinxing Rigging Factory.	
Zigong Steel Spade Factory.	
The People's Republic of China: Bars/Wedges* A–570–803	2/1/03–1/31/04
Changlu Hardware Goods Factory.	
Changshu Xingang Forgings Factory.	
Changzhou Benxin Tool Co., Ltd.	
Changzhou Honghui Tools Factory.	
Changzhou Jielong Tools Factory.	
Changzhou Jingte Hardware Tools Factory.	
Changzhou Light Industrial Tools Works.	
Changzhou Satellite Metal Products Co., Ltd.	
Changzhou Wujin Benniu Rongqiang Force Plant.	
Changzhou Xingang Forging Factory.	
Changzhou Xinhua Hardware Factory.	
aka Changzhou Xinhua Metal Factory.	
Changzhou Yinhe Tools Factory.	
Changzhou Zhongji Tools Co., Ltd.	
China Hunan Jiahe General Forging Factory.	
China Jiangsu Machinery and Equipment Import and Export Corporation (SUMEC).	
aka CMEC Jiangsu I/E Group Co., Ltd.	
China National Machinery & Equipment Imp. & Exp. Corporation (CMEC).	
China National Machinery Import and Export Corporation (CMC).	
CMC Export Enterprise Department.	
aka CMC Rinda I/E Corp.	
Dagang Hardware Roller Forging Factory.	
Dalian Light Building Tools Factory.	
Dandong Tools Gereral Factory.	
Dawn International Trade Co., Ltd.	
Easyuse Tools Industrial Co., Ltd.	
Feixian Harewaretool Factory.	
Feixian Hualu Tool Co., Ltd.	
Ferly Pacific Trading (Ningbo) Co., Ltd.	
Foundry of Tianjin No. 1 Machine Tool Works.	
Fujian Machinery and Equipment Import and Export Corp. ("FMEC").	
G&M Hardware Tools Co. (Ltd.).	
Guangzhou Gaoxin Weibao Hardware Tool Co., Ltd.	
Handysmart Enterprises.	
Hangzhou Donghua Power Transmission Import & Export Co., Ltd.	
Hangzhou Great Star Tools Co., Ltd.	
Hangzhou Greatstar Co., Ltd.	
Hebei Huatai Import & Export Corp.	
aka Hebei Huatai Import and Export Co., Ltd.	
Hebei Machinery Import & Export Corp.	
aka Hebei Machinery Import and Export Co. Jin Yun Corporation.	
aka Hebei Machinery Import and Export Co Jinhai Corporation.	
aka Hebei Machinery Import and Export Co. Jinxin Corporation.	
Hebei Province Manufactory of Export Agricultural Tools.	
Hebei Wuqiao Import & Export Corporation.	
Henan Jiaozuo Foreign Trade Corp.	
Henan Jinan Agriculture Production Corp.	
Henan Machinery Import and Export Co., Ltd.	
Hua Guang Hoe Factory of Jiahe Hunan Province.	
Huadu Light Industry Co. Ltd.	
Huanyu Hardware Tools Factory.	
Hunan Xinyu Native Produce and Animal By-Products Import & Export Ltd.	
J Y International Corp.	
JB International Trading Co., Ltd.	
Jiahe Huaguang Steel Hoe Factory.	
Jiangsu Guotai International Group HUATAI Imp & Exp Co Ltd.	
Jiangsu Hongbao Group Co. Ltd.	
Jiangsu Jurong Tools Factory.	

	Period to be Reviewed
Jiangsu Sainty International Group Co., Ltd.	
aka Jiangsu Sainty International Group (STIG).	
aka Jiangsu Sainty Corporation Ltd.	
aka STIG Machinery Import & Export Corp., Ltd.	
aka STIG Jiangsu Machinery Import & Export Corp., Ltd.	
aka Jiangsu Machinery Import & Export Group Corp.	
aka Sainty International Group Jiangsu Machinery Import & Export Corp., Ltd. (SUMEX).	
aka Jiangsu Sainty Honghai Trading Co., Ltd.	
aka Jiangsu Sainty Shanghai Co., Ltd.	
aka Jiangsu Sainty Changzhou Co., Ltd.	
aka STIG Jiangsu Machinery Import & Export Corp. Kunshan Co., Ltd.	
aka Jiangsu Sainty Wuxi Co., Ltd.	
aka Jiangsu Sainty Nantong Co., Ltd.	
aka Jiangsu Sainty Suzhou Co., Ltd.	
aka STIG Jiangsu Machinery Import & Export Corp. Suzhou Co., Ltd.	
aka Jiangsu Sainty Sumex Food Co., Ltd.	
aka STIG Jiangsu Machinery Import & Export Corp. Yangzhou Tools Co., Ltd.	
aka Jiangsu Sainty Zhangjiagang Co., Ltd.	
aka Jiangsu Sainty Xuzhou Co., Ltd.	
Jiangsu Skyer Tools Co., Ltd.	
Jiangsu Tongrun M & E Group Import & Export Co., Ltd.	
Jiangxi Machinery Import & Export Corporation.	
Jinhua Huadu Light Industrial Co., Ltd.	
Jinhua Runua Foreign Trade Co. Ltd.	
Jinhua Twin Star Tools Corporation Limited.	
Junan Runda Tools Co., Ltd.	
Junan Tools General Factory.	
Jurong City Tool Factory.	
Kunshan Xingji Tools Co., Ltd.	
Laiwu Feixiang Tool Factory.	
Lunan Pingshang Jinxin Metal Tools Factory.	
aka Shandong Ju Nan Ping Shang Tool Works.	
Laiwu Forging Factory.	
Laiwu Laicheng Changzhuang Forging Factory.	
Laoling Pangu Tools.	
Leling Jianye Hardware Tools Co., Ltd.	
Leling Pangu Tools Co., Ltd.	
Leling Zhengtai Tool Co., Ltd.	
Liaoning Machinery Import and Export Corp. ("LMC") LIMAC.	
Lindhu Jinrun Hardware & Tools Co., Ltd.	
Linshu Goldstar Group Co., Ltd.	
aka Shandong Linshu Tools General Factory.	
Linshu Hardware & Machinery General Factory.	
Linshu Henglida Hardware Tool Co., Ltd.	
Linshu Jinrun Ironware & Tools Co., Ltd.	
Linshu Qianyuan Hardware Factory.	
Linshu Xinxin Machinery Co., Ltd.	
Linyi City Lindong Hardware Tool Co., Ltd.	
Linyi Donglai Trade Co., Ltd.	
Linyi Dongyuan Hardware Tools Co., Ltd.	
Linyi Feida Hardware Machinery Co., Ltd.	
Linyi Guoxin Tools Co., Ltd.	
Linyi Hedong Kangda Hardware Tool Factory.	
Linyi Hedong Metal Machinery Plant.	
Linyi Hedong Taiping Agricultural Machinery Factory.	
Linyi Jinding Hardware Tools Co., Ltd.	
Linyi Jinyu Tool Co., Ltd.	
Linyi Liwang Hardware & Machinery Co., Ltd.	
aka Liwang Hardware Machinery Factory Shandong.	
Linyi Shengda Hardware Tools Co., Ltd.	
Linyi Shiheli Tools Co., Ltd.	
Linyi Wanda Hardware Tool Co., Ltd.	
Linyi Weiye Tools Co., Ltd.	
Linyi Yuanda Metal Tools Factory.	
Lishu County Hafu Forging Factory.	
Longcheng Tools Group.	
Longway Tools Company Ltd.	
Luoyang Tools Factory.	
Nantong Jinzheng Tools Factory.	
Ningbo Feiyuan International Trade Co., Ltd.	
Ningbo Tiangong Great Star Tools Company, Ltd.	
Ningbo Tiangong Tools Company, Ltd.	
Ningbo Tiger Handware Manufacture Co.	

	Period to be Reviewed
Pangu Tools Co., Ltd.	
Remein.	
Shaanxi Machinery and Equipment Import and Export Corporation.	
Shaanxi Machinery I/E Corp.	
aka Sunway Engineering Supply Co.	
Shandong Furun Co., Ltd.	
Shandong Huanyu Hardware Tools Co., Ltd.	
Shandong Huanyu Metal Tools Co., Ltd.	
Shandong Huanyu Tools Co., Ltd.	
Shandong Huarong General Group Corp. ("Huarong").	
Shandong Jinma Industrial Group Company ("Jinma").	
Shandong Junan Jinli Tool Co.	
Shandong Laoling Tools Factory.	
Shandong Linyi Dongfang Hardware Factory.	
Shandong Linyi Huanyu Hardware Tools.	
Shandong Machinery Import & Export Corp Hangzhou Office.	
Shandong Machinery Import and Export Corporation ("SMC").	
Shandong Menghu Hardware Tool Co., Ltd.	
Shandong Pangu Tools Co. Ltd. (Laoling Pangu).	
Shandong Rizhao Import & Export Corp.	
Shandong Technical Import and Export Corporation.	
Shandong Yongshun Hardware Tools Co., Ltd.	
Shanghai Founder Co., Ltd.	
Shanghai J.E. Tools.	
Shanghai Machinery and Equipment Import and Export Corporation.	
Shanghai Machinery I&E Corp. Ltd.	
Shanghai Tiandao Tools Co., Ltd.	
Shanghai Tongrun Import & Export Co., Ltd.	
Shanghai Xinghui Tool Co., Ltd.	
Shenqiu Zhaodeying Machine Works.	
Shenzhen Orbit Industrial Development Co., Ltd.	
Shenzhen Sino-Tech Enterprise Development Co., Ltd.	
Stanley(Zhongshan) Hardware Co., Ltd.	
SUMEC Hardware and Tools Co.	
Sun-Rain Stationery & Gifts Co., Ltd.	
Taian Foreign Trading General Corp.	
Tancheng Huatong Hardware Tools Co., Ltd.	
Tangshan Guye Hongda Metal Tools Factory.	
Tangshan Industry Trade Co., Ltd.	
Tangshen Bingren Industrial Co., Ltd.	
Tanshang Guye Hardware Tool Forge Plant.	
Technology Import & Export Corp.	
The PRC Enterprise.	
Tianjin Dagang Hardware Forge Plant.	
Tianjin Jiuzhou Special Tools Co., Ltd.	
Tianjin Longjin Hardware Tools Co., Inc.	
Tianjin Machinery I/E Group Engineering & Agricultural Co., Ltd.	
Tianjin Machinery Imp & Exp Group.	
Tianjin Machinery Import and Export Corporation ("TMC").	
Tianjin Special Tools Factory.	
Tianjin Tongda Group Co., Ltd.	
Tonlii Tools Factory TRTOOLS.	
Wuqiao Huafeng Hardware Tool Co., Ltd.	
Wuqiao No. 2 Tools Factory.	
Wuqiao Tiecheng Changjiang Tools Factory.	
Wuqiao Tools Co., Ltd.	
Wuxi Honghong Trade Co.	
Wuxi Jingsheng Forging and Pressing Co., Ltd.	
Wuyi Huwei Tools.	
Wuxi Yongchang Hoisting Machinery Works.	
Xinyi Hardware Co., Ltd.	
Xuzhou Golden Tiger Tools Making Co., Ltd.	
Xuzhou Jinhu Tools Making Co., Ltd.	
Yansheng International Trade Co., Ltd.	
Yee Hing Industry Co.	
Yongkang Baixi Light Industry Machinery Factory.	
Yongkang Bugao Hardware Tools Manufacturing Co., Ltd.	
aka Zhejiang Yongkang Bugao Tools Co., Ltd.	
aka Yongkang Bugao Hardware Tools Manufacturing Co.,Ltd.	
aka Zhejiang Yongkang Bugao Hardware Tools Manufacture Co., Ltd.	
Yongkang Jinchui Tools Co., Ltd.	
Yongkang Tianfang Trade & Industry Co., Ltd.	
Yongkang Zhiying Xindong Stainless Steel Appliance Factory.	

	Period to be Reviewed
Zhangjiagang Free Trade Zone Tianrui Intl. Trade Co., Ltd.	
Zhangjiagang Tianda Special Hardware Co., Ltd.	
Zhejiang Shaoxing Hardware's Tools Factory.	
Zhejiang Yongkang Daxing Machinery Co., Ltd.	
Zhejiang Yongkang Xigong Hardware Tools Co., Ltd.	
Zhejiang Yongkang Jinchui Tools Co., Ltd.	
Zhejiang Yongkang Steel Magnesium Co., Ltd.	
Zhejiang Yongkang Zhengfa Mechanical Manufacturing Company.	
Zhenjiang All Joy Light Industrial Products & Textiles Import & Export Co., Ltd.	
Zhenjiang Foreign Trade Group Corp.	
Zibo Boshan Shima Forging Factory.	
Zibo Boshan Sitong Railway Tools Factory.	
Zibo International Economic and Technical Coop. Corp.	
Zibo Steel Fork Factory.	
Zibo Tianbo Railway Materials Co., Ltd.	
Zibo Zichuan Xinxing Rigging Factory.	
Zigong Steel Spade Factory.	
THE PEOPLE'S REPUBLIC OF CHINA: Hammers/Sledges* A–570–803	2/1/03–1/31/04
Changlu Hardware Goods Factory.	
Changshu Xingang Forgings Factory.	
Changzhou Benxin Tool Co., Ltd.	
Changzhou Honghui Tools Factory.	
Changzhou Jielong Tools Factory.	
Changzhou Jingte Hardware Tools Factory.	
Changzhou Light Industrial Tools Works.	
Changzhou Satellite Metal Products Co., Ltd.	
Changzhou Wujin Benniu Rongqiang Force Plant.	
Changzhou Xingang Forging Factory.	
Changzhou Xinhua Hardware Factory.	
aka Changzhou Xinhua Metal Factory.	
Changzhou Yinhe Tools Factory.	
Changzhou Zhongji Tools Co., Ltd.	
China Hunan Jiahe General Forging Factory.	
China Jiangsu Machinery and Equipment Import and Export Corporation (SUMEC).	
aka CMEC Jiangsu I/E Group Co., Ltd.	
China National Machinery & Equipment Imp. & Exp. Corporation (CMEC).	
China National Machinery Import and Export Corporation (CMC).	
CMC Export Enterprise Department.	
aka CMC Rinda I/E Corp.	
Dagang Hardware Roller Forging Factory.	
Dalian Light Building Tools Factory.	
Dandong Tools Gereral Factory.	
Dawn International Trade Co., Ltd.	
Easyuse Tools Industrial Co., Ltd.	
Feixian Harewaretool Factory.	
Feixian Hualu Tool Co., Ltd.	
Ferly Pacific Trading (Ningbo) Co., Ltd.	
Foundry of Tianjin No. 1 Machine Tool Works.	
Fujian Machinery and Equipment Import and Export Corp. ("FMEC").	
G&M Hardware Tools Co. (Ltd.).	
Guangzhou Gaoxin Weibao Hardware Tool Co., Ltd.	
Handysmart Enterprises.	
Hangzhou Donghua Power Transmission Import & Export Co., Ltd.	
Hangzhou Great Star Tools Co., Ltd.	
Hangzhou Greatstar Co., Ltd.	
Hebei Huatai Import & Export Corp.	
aka Hebei Huatai Import and Export Co., Ltd.	
Hebei Machinery Import & Export Corp.	
aka Hebei Machinery Import and Export Co. Jin Yun Corporation.	
aka Hebei Machinery Import and Export Co. Jinhai Corporation.	
aka Hebei Machinery Import and Export Co. Jinxin Corporation.	
Hebei Province Manufactory of Export Agricultural Tools.	
Hebei Wuqiao Import & Export Corporation.	
Henan Jiaozuo Foreign Trade Corp.	
Henan Jinan Agriculture Production Corp.	
Henan Machinery Import and Export Co., Ltd.	
Hua Guang Hoe Factory of Jiahe Hunan Province.	
Huadu Light Industry Co. Ltd.	
Huanyu Hardware Tools Factory.	
Hunan Xinyu Native Produce and Animal By-Products Import & Export Ltd.	
J Y International Corp.	
JB International Trading Co., Ltd.	
Jiahe Huaguang Steel Hoe Factory.	

	Period to be Reviewed
Jiangsu Guotai International Group HUATAI Imp & Exp Co Ltd.	
Jiangsu Hongbao Group Co. Ltd.	
Jiangsu Jurong Tools Factory.	
Jiangsu Sainty International Group Co., Ltd.	
aka Jiangsu Sainty International Group (STIG)	
aka Jiangsu Sainty Corporation Ltd.	
aka STIG Machinery Import & Export Corp., Ltd.	
aka STIG Jiangsu Machinery Import & Export Corp., Ltd.	
aka Jiangsu Machinery Import & Export Group Corp.	
aka Sainty International Group Jiangsu Machinery Import & Export Corp., Ltd. (SUMEX).	
aka Jiangsu Sainty Honghai Trading Co., Ltd.	
aka Jiangsu Sainty Shanghai Co., Ltd.	
aka Jiangsu Sainty Changzhou Co., Ltd.	
aka STIG Jiangsu Machinery Import & Export Corp. Kunshan Co., Ltd.	
aka Jiangsu Sainty Wuxi Co., Ltd.	
aka Jiangsu Sainty Nantong Co., Ltd.	
aka Jiangsu Sainty Suzhou Co., Ltd.	
aka STIG Jiangsu Machinery Import & Export Corp. Suzhou Co., Ltd.	
aka Jiangsu Sainty Sumex Food Co., Ltd.	
aka STIG Jiangsu Machinery Import & Export Corp. Yangzhou Tools Co., Ltd.	
aka Jiangsu Sainty Zhangjiagang Co., Ltd.	
aka Jiangsu Sainty Xuzhou Co., Ltd.	
Jiangsu Skyer Tools Co., Ltd.	
Jiangsu Tongrun M & E Group Import & Export Co., Ltd.	
Jiangxi Machinery Import & Export Corporation.	
Jinhua Huadu Light Industrial Co., Ltd.	
Jinhua Runua Foreign Trade Co. Ltd.	
Jinhua Twin Star Tools Corporation Limited.	
Junan Runda Tools Co., Ltd.	
Junan Tools General Factory.	
Jurong City Tool Factory.	
Kunshan Xingji Tools Co., Ltd.	
Laiwu Feixiang Tool Factory.	
Lunan Pingshang Jinxin Metal Tools Factory.	
aka Shandong Ju Nan Ping Shang Tool Works.	
Laiwu Forging Factory.	
Laiwu Laicheng Changzhuang Forging Factory.	
Laoling Pangu Tools.	
Leling Jianye Hardware Tools Co., Ltd.	
Leling Pangu Tools Co., Ltd.	
Leling Zhengtai Tool Co., Ltd.	
Liaoning Machinery Import and Export Corp. ("LMC").	
LIMAC.	
Lindhu Jinrun Hardware & Tools Co., Ltd.	
Linshu Goldstar Group Co., Ltd.	
aka Shandong Linshu Tools General Factory.	
Linshu Hardware & Machinery General Factory.	
Linshu Henglida Hardware Tool Co., Ltd.	
Linshu Jinrun Ironware & Tools Co., Ltd.	
Linshu Qianyuan Hardware Factory.	
Linshu Xinxin Machinery Co., Ltd.	
Linyi City Lindong Hardware Tool Co., Ltd.	
Linyi Donglai Trade Co., Ltd.	
Linyi Dongyuan Hardware Tools Co., Ltd.	
Linyi Feida Hardware Machinery Co., Ltd.	
Linyi Guoxin Tools Co., Ltd.	
Linyi Hedong Kangda Hardware Tool Factory.	
Linyi Hedong Metal Machinery Plant.	
Linyi Hedong Taiping Agricultural Machinery Factory.	
Linyi Jinding Hardware Tools Co., Ltd.	
Linyi Jinyu Tool Co., Ltd.	
Linyi Liwang Hardware & Machinery Co., Ltd.	
aka Liwang Hardware Machinery Factory Shandong.	
Linyi Shengda Hardware Tools Co., Ltd.	
Linyi Shiheli Tools Co., Ltd.	
Linyi Wanda Hardware Tool Co., Ltd.	
Linyi Weiye Tools Co., Ltd.	
Linyi Yuanda Metal Tools Factory.	
Lishu County Hafu Forging Factory.	
Longcheng Tools Group.	
Longway Tools Company Ltd.	
Luoyang Tools Factory.	
Nantong Jinzheng Tools Factory.	

	Period to be Reviewed
Ningbo Feiyuan International Trade Co., Ltd.	
Ningbo Tiangong Great Star Tools Company, Ltd.	
Ningbo Tiangong Tools Company, Ltd.	
Ningbo Tiger Handware Manufacture Co.	
Pangu Tools Co., Ltd.	
Remein.	
Shaanxi Machinery and Equipment Import and Export Corporation.	
Shaanxi Machinery I/E Corp.	
aka Sunway Engineering Supply Co.	
Shandong Furun Co., Ltd.	
Shandong Huanyu Hardware Tools Co., Ltd.	
Shandong Huanyu Metal Tools Co., Ltd.	
Shandong Huanyu Tools Co., Ltd.	
Shandong Huarong General Group Corp. ("Huarong").	
Shandong Jinma Industrial Group Company ("Jinma").	
Shandong Junan Jinli Tool Co.	
Shandong Laoling Tools Factory.	
Shandong Linyi Dongfang Hardware Factory.	
Shandong Linyi Huanyu Hardware Tools.	
Shandong Machinery Import & Export Corp Hangzhou Office.	
Shandong Machinery Import and Export Corporation ("SMC").	
Shandong Menghu Hardware Tool Co., Ltd.	
Shandong Pangu Tools Co. Ltd. (Laoling Pangu).	
Shandong Rizhao Import & Export Corp.	
Shandong Technical Import and Export Corporation.	
Shandong Yongshun Hardware Tools Co., Ltd.	
Shanghai Founder Co., Ltd.	
Shanghai J.E. Tools.	
Shanghai Machinery and Equipment Import and Export Corporation.	
Shanghai Machinery I&E Corp. Ltd.	
Shanghai Tiandao Tools Co., Ltd.	
Shanghai Tongrun Import & Export Co., Ltd.	
Shanghai Xinghui Tool Co., Ltd.	
Shenqiu Zhaodeying Machine Works.	
Shenzhen Orbit Industrial Development Co., Ltd.	
Shenzhen Sino-Tech Enterprise Development Co., Ltd.	
Stanley(Zhongshan) Hardware Co., Ltd.	
SUMEC Hardware and Tools Co.	
Sun-Rain Stationery & Gifts Co., Ltd.	
Taian Foreign Trading General Corp.	
Tancheng Huatong Hardware Tools Co., Ltd.	
Tangshan Guye Hongda Metal Tools Factory.	
Tangshan Industry Trade Co., Ltd.	
Tangshen Bingren Industrial Co., Ltd.	
Tanshang Guye Hardware Tool Forge Plant.	
Technology Import & Export Corp.	
The PRC Enterprise.	
Tianjin Dagang Hardware Forge Plant.	
Tianjin Jiuzhou Special Tools Co., Ltd.	
Tianjin Longjin Hardware Tools Co., Inc.	
Tianjin Machinery I/E Group Engineering & Agricultural Co., Ltd.	
Tianjin Machinery Imp & Exp Group.	
Tianjin Machinery Import and Export Corporation ("TMC").	
Tianjin Special Tools Factory.	
Tianjin Tongda Group Co., Ltd.	
Tonlii Tools Factory.	
TRTOOLS.	
Wuqiao Huafeng Hardware Tool Co., Ltd.	
Wuqiao No. 2 Tools Factory.	
Wuqiao Tiecheng Changjiang Tools Factory.	
Wuqiao Tools Co., Ltd.	
Wuxi Honghong Trade Co.	
Wuxi Jingsheng Forging and Pressing Co., Ltd.	
Wuyi Huwei Tools.	
Wuxi Yongchang Hoisting Machinery Works.	
Xinyi Hardware Co., Ltd.	
Xuzhou Golden Tiger Tools Making Co., Ltd.	
Xuzhou Jinhu Tools Making Co., Ltd.	
Yansheng International Trade Co., Ltd.	
Yee Hing Industry Co.	
Yongkang Baixi Light Industry Machinery Factory.	
Yongkang Bugao Hardware Tools Manufacturing Co., Ltd.	
aka Zhejiang Yongkang Bugao Tools Co., Ltd.	

	Period to be Reviewed
aka Yongkang Bugao Hardware Tools Manufacturing Co.,Ltd.	
aka Zhejiang Yongkang Bugao Hardware Tools Manufacture Co., Ltd.	
Yongkang Jinchui Tools Co., Ltd.	
Yongkang Tianfang Trade & Industry Co., Ltd.	
Yongkang Zhiying Xindong Stainless Steel Appliance Factory.	
Zhangjiagang Free Trade Zone Tianrui Intl. Trade Co., Ltd.	
Zhangjiagang Tianda Special Hardware Co., Ltd.	
Zhejiang Shaoxing Hardware's Tools Factory.	
Zhejiang Yongkang Daxing Machinery Co., Ltd.	
Zhejiang Yongkang Xigong Hardware Tools Co., Ltd.	
Zhejiang Yongkang Jinchui Tools Co., Ltd.	
Zhejiang Yongkang Steel Magnesium Co., Ltd.	
Zhejiang Yongkang Zhengfa Mechanical Manufacturing Company.	
Zhenjiang All Joy Light Industrial Products & Textiles Import & Export Co., Ltd.	
Zhenjiang Foreign Trade Group Corp.	
Zibo Boshan Shima Forging Factory.	
Zibo Boshan Sitong Railway Tools Factory.	
Zibo International Economic and Technical Coop. Corp.	
Zibo Steel Fork Factory.	
Zibo Tianbo Railway Materials Co., Ltd.	
Zibo Zichuan Xinxing Rigging Factory.	
Zigong Steel Spade Factory.	
THE PEOPLE'S REPUBLIC OF CHINA: Picks/Mattocks*.	
A–570–803 2/1/03–1/31/04.	
Changlu Hardware Goods Factory.	
Changshu Xingang Forgings Factory.	
Changzhou Benxin Tool Co., Ltd.	
Changzhou Honghui Tools Factory.	
Changzhou Jielong Tools Factory.	
Changzhou Jingte Hardware Tools Factory.	
Changzhou Light Industrial Tools Works.	
Changzhou Satellite Metal Products Co., Ltd.	
Changzhou Wujin Benniu Rongqiang Force Plant.	
Changzhou Xingang Forging Factory.	
Changzhou Xinhua Hardware Factory.	
aka Changzhou Xinhua Metal Factory.	
Changzhou Yinhe Tools Factory.	
Changzhou Zhongji Tools Co., Ltd.	
China Hunan Jiahe General Forging Factory.	
China Jiangsu Machinery and Equipment Import and Export Corporation (SUMEC).	
aka CMEC Jiangsu I/E Group Co., Ltd.	
China National Machinery & Equipment Imp. & Exp. Corporation (CMEC).	
China National Machinery Import and Export Corporation (CMC).	
CMC Export Enterprise Department	
aka CMC Rinda I/E Corp.	
Dagang Hardware Roller Forging Factory.	
Dalian Light Building Tools Factory.	
Dandong Tools Gereral Factory.	
Dawn International Trade Co., Ltd.	
Easyuse Tools Industrial Co., Ltd.	
Feixian Harewaretool Factory.	
Feixian Hualu Tool Co., Ltd.	
Ferly Pacific Trading (Ningbo) Co., Ltd.	
Foundry of Tianjin No. 1 Machine Tool Works.	
Fujian Machinery and Equipment Import and Export Corp. ("FMEC").	
G&M Hardware Tools Co. (Ltd.).	
Guangzhou Gaoxin Weibao Hardware Tool Co., Ltd.	
Handysmart Enterprises.	
Hangzhou Donghua Power Transmission Import & Export Co., Ltd.	
Hangzhou Great Star Tools Co., Ltd.	
Hangzhou Greatstar Co., Ltd.	
Hebei Huatai Import & Export Corp.	
aka Hebei Huatai Import and Export Co., Ltd.	
Hebei Machinery Import & Export Corp.	
aka Hebei Machinery Import and Export Co. Jin Yun Corporation.	
aka Hebei Machinery Import and Export Co. Jinhai Corporation.	
aka Hebei Machinery Import and Export Co. Jinxin Corporation.	
Hebei Province Manufactory of Export Agricultural Tools.	
Hebei Wuqiao Import & Export Corporation.	
Henan Jiaozuo Foreign Trade Corp.	
Henan Jinan Agriculture Production Corp.	
Henan Machinery Import and Export Co., Ltd.	
Hua Guang Hoe Factory of Jiahe Hunan Province.	

	Period to be Reviewed
Huadu Light Industry Co. Ltd.	
Huanyu Hardware Tools Factory.	
Hunan Xinyu Native Produce and Animal By-Products Import & Export Ltd.	
J Y International Corp.	
JB International Trading Co., Ltd.	
Jiahe Huaguang Steel Hoe Factory.	
Jiangsu Guotai International Group HUATAI Imp & Exp Co Ltd.	
Jiangsu Hongbao Group Co. Ltd.	
Jiangsu Jurong Tools Factory.	
Jiangsu Sainty International Group Co., Ltd.	
aka Jiangsu Sainty International Group (STIG).	
aka Jiangsu Sainty Corporation Ltd.	
aka STIG Machinery Import & Export Corp., Ltd.	
aka STIG Jiangsu Machinery Import & Export Corp., Ltd.	
aka Jiangsu Machinery Import & Export Group Corp.	
aka Sainty International Group Jiangsu Machinery Import & Export Corp., Ltd. (SUMEX).	
aka Jiangsu Sainty Honghai Trading Co., Ltd.	
aka Jiangsu Sainty Shanghai Co., Ltd.	
aka Jiangsu Sainty Changzhou Co., Ltd.	
aka STIG Jiangsu Machinery Import & Export Corp. Kunshan Co., Ltd.	
aka Jiangsu Sainty Wuxi Co., Ltd.	
aka Jiangsu Sainty Nantong Co., Ltd.	
aka Jiangsu Sainty Suzhou Co., Ltd.	
aka STIG Jiangsu Machinery Import & Export Corp. Suzhou Co., Ltd.	
aka Jiangsu Sainty Sumex Food Co., Ltd.	
aka STIG Jiangsu Machinery Import & Export Corp. Yangzhou Tools Co., Ltd.	
aka Jiangsu Sainty Zhangjiagang Co., Ltd.	
aka Jiangsu Sainty Xuzhou Co., Ltd.	
Jiangsu Skyer Tools Co., Ltd.	
Jiangsu Tongrun M & E Group Import & Export Co., Ltd.	
Jiangxi Machinery Import & Export Corporation.	
Jinhua Huadu Light Industrial Co., Ltd.	
Jinhua Runua Foreign Trade Co. Ltd.	
Jinhua Twin Star Tools Corporation Limited.	
Junan Runda Tools Co., Ltd.	
Junan Tools General Factory.	
Jurong City Tool Factory.	
Kunshan Xingji Tools Co., Ltd.	
Laiwu Feixiang Tool Factory.	
Lunan Pingshang Jinxin Metal Tools Factory.	
aka Shandong Ju Nan Ping Shang Tool Works.	
Laiwu Forging Factory.	
Laiwu Laicheng Changzhuang Forging Factory.	
Laoling Pangu Tools.	
Leling Jianye Hardware Tools Co., Ltd.	
Leling Pangu Tools Co., Ltd.	
Leling Zhengtai Tool Co., Ltd.	
Liaoning Machinery Import and Export Corp. ("LMC") LIMAC.	
Lindhu Jinrun Hardware & Tools Co., Ltd.	
Linshu Goldstar Group Co., Ltd.	
aka Shandong Linshu Tools General Factory.	
Linshu Hardware & Machinery General Factory.	
Linshu Henglida Hardware Tool Co., Ltd.	
Linshu Jinrun Ironware & Tools Co., Ltd.	
Linshu Qianyuan Hardware Factory.	
Linshu Xinxin Machinery Co., Ltd.	
Linyi City Lindong Hardware Tool Co., Ltd.	
Linyi Donglai Trade Co., Ltd.	
Linyi Dongyuan Hardware Tools Co., Ltd.	
Linyi Feida Hardware Machinery Co., Ltd.	
Linyi Guoxin Tools Co., Ltd.	
Linyi Hedong Kangda Hardware Tool Factory.	
Linyi Hedong Metal Machinery Plant.	
Linyi Hedong Taiping Agricultural Machinery Factory.	
Linyi Jinding Hardware Tools Co., Ltd.	
Linyi Jinyu Tool Co., Ltd.	
Linyi Liwang Hardware & Machinery Co., Ltd.	
aka Liwang Hardware Machinery Factory Shandong.	
Linyi Shengda Hardware Tools Co., Ltd.	
Linyi Shiheli Tools Co., Ltd.	
Linyi Wanda Hardware Tool Co., Ltd.	
Linyi Weiye Tools Co., Ltd.	
Linyi Yuanda Metal Tools Factory.	

	Period to be Reviewed
Lishu County Hafu Forging Factory.	
Longcheng Tools Group.	
Longway Tools Company Ltd.	
Luoyang Tools Factory.	
Nantong Jinzheng Tools Factory.	
Ningbo Feiyuan International Trade Co., Ltd.	
Ningbo Tiangong Great Star Tools Company, Ltd.	
Ningbo Tiangong Tools Company, Ltd.	
Ningbo Tiger Handware Manufacture Co.	
Pangu Tools Co., Ltd.	
Remein.	
Shaanxi Machinery and Equipment Import and Export Corporation.	
Shaanxi Machinery I/E Corp.	
aka Sunway Engineering Supply Co.	
Shandong Furun Co., Ltd.	
Shandong Huanyu Hardware Tools Co., Ltd.	
Shandong Huanyu Metal Tools Co., Ltd.	
Shandong Huanyu Tools Co., Ltd.	
Shandong Huarong General Group Corp. ("Huarong").	
Shandong Jinma Industrial Group Company ("Jinma").	
Shandong Junan Jinli Tool Co.	
Shandong Laoling Tools Factory.	
Shandong Linyi Dongfang Hardware Factory.	
Shandong Linyi Huanyu Hardware Tools.	
Shandong Machinery Import & Export Corp Hangzhou Office.	
Shandong Machinery Import and Export Corporation ("SMC").	
Shandong Menghu Hardware Tool Co., Ltd.	
Shandong Pangu Tools Co. Ltd. (Laoling Pangu).	
Shandong Rizhao Import & Export Corp.	
Shandong Technical Import and Export Corporation.	
Shandong Yongshun Hardware Tools Co., Ltd.	
Shanghai Founder Co., Ltd.	
Shanghai J.E. Tools.	
Shanghai Machinery and Equipment Import and Export Corporation.	
Shanghai Machinery I&E Corp. Ltd.	
Shanghai Tiandao Tools Co., Ltd.	
Shanghai Tongrun Import & Export Co., Ltd.	
Shanghai Xinghui Tool Co., Ltd.	
Shenqiu Zhaodeying Machine Works.	
Shenzhen Orbit Industrial Development Co., Ltd.	
Shenzhen Sino-Tech Enterprise Development Co., Ltd.	
Stanley (Zhongshan) Hardware Co., Ltd.	
SUMEC Hardware and Tools Co.	
Sun-Rain Stationery & Gifts Co., Ltd.	
Taian Foreign Trading General Corp.	
Tancheng Huatong Hardware Tools Co., Ltd.	
Tangshan Guye Hongda Metal Tools Factory.	
Tangshan Industry Trade Co., Ltd.	
Tangshen Bingren Industrial Co., Ltd.	
Tanshang Guye Hardware Tool Forge Plant.	
Technology Import & Export Corp.	
The PRC Enterprise.	
Tianjin Dagang Hardware Forge Plant.	
Tianjin Jiuzhou Special Tools Co., Ltd.	
Tianjin Longjin Hardware Tools Co., Inc.	
Tianjin Machinery I/E Group Engineering & Agricultural Co., Ltd.	
Tianjin Machinery Imp & Exp Group.	
Tianjin Machinery Import and Export Corporation ("TMC").	
Tianjin Special Tools Factory.	
Tianjin Tongda Group Co., Ltd.	
Tonlii Tools Factory TRTOOLS.	
Wuqiao Huafeng Hardware Tool Co., Ltd.	
Wuqiao No. 2 Tools Factory.	
Wuqiao Tiecheng Changjiang Tools Factory.	
Wuqiao Tools Co., Ltd.	
Wuxi Honghong Trade Co.	
Wuxi Jingsheng Forging and Pressing Co., Ltd.	
Wuyi Huwei Tools.	
Wuxi Yongchang Hoisting Machinery Works.	
Xinyi Hardware Co., Ltd.	
Xuzhou Golden Tiger Tools Making Co., Ltd.	
Xuzhou Jinhu Tools Making Co., Ltd.	
Yansheng International Trade Co., Ltd.	

	Period to be Reviewed
Yee Hing Industry Co.	
Yongkang Baixi Light Industry Machinery Factory.	
Yongkang Bugao Hardware Tools Manufacturing Co., Ltd.	
aka Zhejiang Yongkang Bugao Tools Co., Ltd.	
aka Yongkang Bugao Hardware Tools Manufacturing Co., Ltd.	
aka Zhejiang Yongkang Bugao Hardware Tools Manufacture Co., Ltd.	
Yongkang Jinchui Tools Co., Ltd.	
Yongkang Tianfang Trade & Industry Co., Ltd.	
Yongkang Zhiying Xindong Stainless Steel Appliance Factory.	
Zhangjiagang Free Trade Zone Tianrui Intl. Trade Co., Ltd.	
Zhangjiagang Tianda Special Hardware Co., Ltd.	
Zhejiang Shaoxing Hardware's Tools Factory.	
Zhejiang Yongkang Daxing Machinery Co., Ltd.	
Zhejiang Yongkang Xigong Hardware Tools Co., Ltd.	
Zhejiang Yongkang Jinchui Tools Co., Ltd.	
Zhejiang Yongkang Steel Magnesium Co., Ltd.	
Zhejiang Yongkang Zhengfa Mechanical Manufacturing Company.	
Zhenjiang All Joy Light Industrial Products & Textiles Import & Export Co., Ltd.	
Zhenjiang Foreign Trade Group Corp.	
Zibo Boshan Shima Forging Factory.	
Zibo Boshan Sitong Railway Tools Factory.	
Zibo International Economic and Technical Coop. Corp.	
Zibo Steel Fork Factory.	
Zibo Tianbo Railway Materials Co., Ltd.	
Zibo Zichuan Xinxing Rigging Factory.	
Zigong Steel Spade Factory.	
The People's Republic of China: Certain Preserved Mushrooms [1], A–570–851	2/1/03–2/31/04
China National Cereals, Oils & Foodstuffs.	
Import & Export Corporation.	
China Processed Food Import & Export Co.	
COFCO (Zhangzhou) Food Industrial Co., Ltd.	
Dingyuan Import & Export Corporation.	
Fujian Yu Xing Fruits and Vegetables Foodstuffs Co., Ltd.	
Fujian Zishan Group Co.	
Gerber Food (Yunnan) Co., Ltd.	
Green Fresh Foods (Zhangzhou) Co., Ltd.	
Guangxi Hengxian Pro-Light Foods, Inc.	
Guangxi Yizhou Dongfang Cannery.	
Guangxi Yulin Oriental Food Co., Ltd.	
Inter-Foods D.S. Co., Ltd.	
Mei Wei Food Industry Co., Ltd.	
Nanning Runchao Industrial Trade Co., Ltd.	
Primera Harvest (Xiangfan) Co., Ltd.	
Raoping Xingyu Foods Co., Ltd.	
Raoping Yucun Canned Foods Factory.	
Shangdong Jiufa Edible Fungus Corporation, Ltd.	
Shanghai Superlucky Import & Export Company, Ltd.	
Shantou Hongda Industrial General Corporation.	
Shenxian Dongxing Foods Co., Ltd.	
Shenzhen Qunxingyuan Trading Co., Ltd.	
Tak Fat Trading Co.	
Xiamen International Trade & Industrial Co., Ltd.	
Xiamen Jiahua Import & Export Trading Co., Ltd.	
Xiamen Zhongjia Imp. & Exp. Co., Ltd.	
Zhangzhou Hongning Canned Food Factory.	
Zhangzhou Jingxiang Foods Co., Ltd.	
Zhangzhou Longhai Lubao Food Co., Ltd.	
Zhangzhou Longhai Minhui Industry and Trade Co., Ltd.	
Countervailing Duty Proceedings	
France: Low Enriched Uranium, C–427–819	1/1/03–12/31/03
Eurodif S.A.	
Germany: Low Enriched Uranium, C–428–829	1/1/03–12/31/03
Urenco Deutschland GmbH.	
Republic of Korea: Certain Cut-to-Length Carbon-Quality Steel Plate, C–580–837	1/1/03–12/31/03
Dongkuk Steel Mill Co., Ltd.	
KISCO—Korea Iron & Steel Co., Ltd.	
Union Steel Manufacturing Co.	
The Netherlands: Low Enriched Uranium, C–421–809	1/1/03–12/31/03
Urenco Nederland BV.	
United Kingdom: Low Enriched Uranium, C–412–821	1/1/03–12/31/03
Urenco (Capenhurst) Ltd.	

	Period to be Reviewed
Suspension Agreements	
None.	

*If one of the above named companies does not qualify for a separate rate, all other exporters of certain heavy forged hand tools 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.

[1] If one of the above-named companies does not qualify for a separate rate, all other exporters of certain preserved mushrooms 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: March 23, 2004.

Holly A. Kuga,

Acting Deputy Assistant Secretary, Group II for Import Administration.

[FR Doc. 04–6831 Filed 3–25–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket No.: 040205042–4042–01]

RIN 0693–ZA54

Small Grants Programs; Availability of Funds

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Notice.

SUMMARY: The National Institute of Standards and Technology (NIST) announces that the following programs are soliciting applications for financial assistance for FY 2004: (1) The Electronics and Electrical Engineering Laboratory Grants Program; (2) the Manufacturing Engineering Laboratory Grants Program; (3) the Chemical Science and Technology Laboratory Grants Program; (4) the Physics Laboratory Grants Program; (5) the Materials Science and Engineering Laboratory Grants Program; (6) the Building Research Grants and Cooperative Agreements Program; and (7) the Fire Research Grants Program. The amount of funding available for this year's solicitation is significantly reduced due to budget reductions in the NIST laboratory programs.

The Electronics and Electrical Engineering Laboratory (EEEL) Grants Program provides grants and cooperative agreements for the development of fundamental electrical metrology and of metrology supporting industry and government agencies in the broad areas of semiconductors, electronic instrumentation, radio-frequency technology, optoelectronics, magnetics, video, electronic commerce as applied to electronic products and devices, the transmission and distribution of electrical power, national electrical standards (fundamental, generally quantum-based physical standards), and law enforcement standards.

The Manufacturing Engineering Laboratory (MEL) Grants Program will provide grants and cooperative agreements in the following fields of research: Dimensional Metrology for Manufacturing, Mechanical Metrology for Manufacturing, Intelligent Systems, and Information Systems Integration for Applications in Manufacturing. A list of specific research areas that will be considered for funding may be found later in this document.

The Chemical Science and Technology Laboratory (CSTL) Grants Program will provide grants and cooperative agreements in the following fields of measurement science research, focused on reference methods, reference materials and reference data: Biotechnology, Process Measurements, Surface and Microanalysis Science, Physical and Chemical Properties, and Analytical Chemistry.

The Physics Laboratory (PL) Grants Program will provide grants and cooperative agreements in the following fields of research: Electron and Optical Physics, Atomic Physics, Optical Technology, Ionizing Radiation, and Time and Frequency.

The Materials Science and Engineering Laboratory (MSEL) Grants Program will provide grants and cooperative agreements in the following fields of research: Ceramics; Metallurgy; Polymer Sciences; Materials Reliability; and Neutron Scattering Research and Spectroscopy.

The Building Research Grants and Cooperative Agreements Program will provide grants and cooperative agreements in the following fields of research: Structures, Construction Metrology and Automation, Inorganic Materials, Polymeric Materials, Thermal Machinery, Mechanical Systems and Controls, Heat Transfer and Alternative Energy Systems, Computer Integrated Construction, Indoor Air Quality and Ventilation.

The Fire Research Grants Program will provide funding for innovative ideas in the fire research area generated by the proposal writer, who chooses the topic and approach, consistent with the program description and objectives of this notice.

SUPPLEMENTARY INFORMATION:

Catalog of Federal Domestic Assistance Name and Number: Measurement and Engineering Research and Standards—11.609

Electronics and Electrical Engineering Laboratory (EEEL) Grants Program

I. Funding Opportunity Description

The Electronics and Electrical Engineering Laboratory Grants Program solicits proposals in support of the broad program objectives identified below.

The Electronics and Electrical Engineering Laboratory Grants Program supports the formal mission of the Electronics and Electrical Engineering Laboratory, which is to strengthen the U.S. economy and improve the quality of life by providing measurement

science and technology, and by advancing standards, primarily for the electronics and electrical industries.

More specifically, the Electronics and Electrical Engineering Laboratory Grants Program solicits proposals to support specific programs in the areas of metrology for semiconductors (including mainstream silicon, power devices, and compound semiconductors), superconductors (including cryoelectronics and bulk superconductors), electronic instrumentation, radio-frequency technology (including microwave and millimeter-wave, antennas, and electromagnetic compatibility/interference), optoelectronics, magnetics (including bulk magnetic materials and magnetic data storage), video (including flat-panel displays), electronic commerce as applied to electronic products and devices, the transmission and distribution of electrical power, national electrical standards (fundamental, generally quantum-based physical standards), and law enforcement (clothing, communication systems, emergency equipment, investigative aids, protective equipment, security systems, vehicles, speed-measuring equipment, weapons, and analytical techniques and standard reference materials used by the public safety community).

For details on these various activities, please see the Electronics and Electrical Engineering Laboratory Web site at *http://www.eeel.nist.gov*. Note that documents describing the current programs for the four participating technical divisions and two offices are available through the home page.

As authorized by 15 U.S.C. 272(b) and (c), the NIST Electronics and Electrical Engineering Laboratory conducts a basic and applied research program directly and through grants and cooperative agreements to eligible recipients.

II. Award Information

Over the past three years, the EEEL Grants Program funded a total of approximately $700,000 in grants and cooperative agreements. In fiscal year 2003, the EEEL Grants Program made no new awards. The amount available each year fluctuates considerably based on programmatic needs. Individual awards are expected to range between $5,000 and $150,000.

For the Electronics and Electrical Engineering Laboratory Grants Program, proposals will be considered for research projects from one to three years. When a proposal for a multi-year award is approved, funding will generally be provided for only the first year of the program. If an application is selected for funding, NIST has no obligation to provide any additional funding in connection with that award. Continuation of an award to increase funding or extend the period of performance is at the total discretion of NIST. Funding for each subsequent year of a multi-year proposal will be contingent upon satisfactory progress, continued relevance to the mission of the Electronics and Electrical Engineering Laboratory Grants Program, and the availability of funds. The multi-year awards must have scopes of work that can be easily separated into annual increments of meaningful work that represent solid accomplishments if prospective funding is not made available to the applicant, (*i.e.*, the scopes of work for each funding period must produce identifiable and meaningful results in and of themselves).

III. Eligibility Information

1. Eligible Applicants—The Electronics and Electrical Engineering Laboratory Grants Program is open to institutions of higher education; hospitals; non-profit organizations; commercial organizations; state, local, and Indian tribal governments; foreign governments; organizations under the jurisdiction of foreign governments; and international organizations.

2. Cost Sharing or Matching—The Electronics and Electrical Engineering Laboratory Grants Program does not require any matching funds.

IV. Application and Submission Information

1. Address to Request Application—An application kit, containing all required application forms and certifications is available on the web at *http://www.eee;/most/gpv/eeel_grants/* or by contacting: Sheilda Bryner, (301) 975–2220, *sheilda.bryner@nist.gov*.

2. Content and Form of Application Submission—For the Electronics and Electrical Engineering Laboratory Grants Program, submit one signed original and two copies of the proposal package to: Electronics and Electrical Engineering Laboratory, Attn.: Sheilda Bryner, National Institute of Standards and Technology, 100 Bureau Drive, Stop 8100, Gaithersburg, MD 20899–8100, Tel.: (301) 975–2220, Fax: (301) 975–4091.

3. Submission Dates and Times—The Electronics and Electrical Engineering Laboratory Grants Program proposals must be received no later than 5 p.m. Eastern Standard Time on September 30, 2004. Proposals received after June 30, 2004 will continue to be processed and considered for funding but may be funded in the next fiscal year, subject to the availability of funds.

V. Application Review Information

1. Criteria—For the Electronics and Electrical Engineering Laboratory Grants Program, the evaluation criteria and weights to be used by the technical reviewers in evaluating the proposals are as follows:

Proposal addresses specific program objectives as described in this notice (25%)

Proposal provides evidence of applicant's expertise in relevant technical area (20%)

Proposal offers innovative approach (20%)

Proposal provides realistic schedule with defined milestones (20%)

Proposal provides adequate rationale for budget (15%)

2. Review and Selection Process—For the Electronics and Electrical Engineering Laboratory Grants Program, proposals will be distributed to the appropriate Division Chief or Office Director or designee based on technical area by one or more technical professionals familiar with the programs of the Electronics and Electrical Engineering Laboratory. The proposals will be reviewed in a two-step process. First, at least three independent, objective individuals knowledgeable about the particular scientific area described in the Program Description and Objectives section above that the proposal addresses will conduct a technical review of each proposal, based on the evaluation criteria described above. If non-Federal reviewers are used, the reviewers may discuss the proposals with each other, but scores will be determined on an individual basis, not as a consensus.

Reviews will be conducted on a quarterly basis, and all proposals received during the quarter will be ranked based on the reviewers' scores. Second, the Division Chief or Office Director will make application selections. In making application selections, the Division Chief or Office Director will take into consideration the results of the reviewers' evaluations, the compatibility of the applicant's proposal with the program objectives of the particular division or office that the proposal addresses, the availability of funding, and relevance to the objectives of the Electronics and Electrical Engineering Laboratory Grants Program, as described above. The final approval of selected applications and award of financial assistance will be made by the NIST Grants Officer based on compliance with application

requirements as published in this notice, compliance with applicable legal and regulatory requirements, compliance with Federal policies that best further the objectives of the Department of Commerce, and whether the recommended applicants appear to be responsible. Applicants may be asked to modify objectives, work plans, or budgets and provide supplemental information required by the agency prior to award. The decision of the Grants Officer is final. Applicants should allow up to 90 days processing time.

Unsuccessful applicants will be notified in writing. The Program will retain one copy of each unsuccessful application for three years for record keeping purposes. The remaining copies will be destroyed.

VI. Award Administration Information

Award administration information for this program may be found in the Award Administration Information section at the end of this notice.

VII. Agency Contact(s)

Technical contacts by area are:

Semiconductors; Electronic commerce
Semiconductor Electronics Division—Division Chief: Dr. David G. Seiler; (301) 975–2054; *david.seiler@nist.gov*
Office of Microelectronics Programs—Director: Dr. Stephen Knight; (301) 975–4400; *stephen.knight@nist.gov*
Radio-frequency technology; Superconductors (bulk); Magnetics
Electromagnetics Division—Division Chief: Dr. Dennis S. Friday; (303) 497–3132; *friday@boulder.nist.gov*
Electronic instrumentation; National electrical standards; Superconductors (cryoelectronics)
Quantum Electrical Metrology Division—Division Chief: Dr. James K. Olthoff; (301) 975–2400; *james.olthoff@nist.gov*
Optoelectronics; Video
Optoelectronics Division—Division Chief: Dr. Kent Rochford; (303) 497–5485; *rochford@boulder.nist.gov*
Law enforcement
Office of Law Enforcement Standards—Director: Dr. Kathleen Higgins; (301) 975–2757; *kathleen.higgins@nist.gov*

All grants related administration questions concerning this program should be addressed to: Joyce Brigham, NIST Grants and Agreements Management Division, (301) 975–6328; *joyce.brigham@nist.gov*.

Where Web sites are referenced within this notice, those without internet access may contact the appropriate Program official to obtain information.

Manufacturing Engineering Laboratory (MEL) Grants Program

I. Funding Opportunity Description

All proposals submitted must be in accordance with the program objectives listed below. The appropriate Program Manager for each field of research may be contacted for clarification of the program objectives.

A. Precision Engineering Division, 821—The primary objective is to support laboratory programs in the areas of Engineering Metrology, Large-Scale Metrology, Nanometer-Scale Metrology. and Surface Metrology. The contact person for this division is: Dr. Dennis Swyt, and he may be reached at (301) 975–3463; *dennis.swyt@nist.gov*.

B. Manufacturing Metrology Division, 822—The primary objective is to support laboratory programs in Mechanical Metrology; Advanced Optics Metrology; Predictive Process Engineering; and Smart Machine Tools. The contact person for this division is: Mr. Kevin Jurrens, and he may be reached at (301) 975–6600; *kevin.jurrens@nist.gov*.

C. Intelligent Systems Division, 823—The primary objective is to support laboratory programs in Intelligent Open Architecture Control of Manufacturing Systems, Intelligent Controls of Mobility Systems, and Intelligent Systems. The contact person for this division is: Mr. Albert Wavering, and he may be reached at (301) 975–3418; *albert.wavering@nist.gov*.

D. Manufacturing Systems Integration Division, 826—The primary objective is to pursue semantics- and ontology-based systems integration technology and standards through support of laboratory programs in Manufacturing Enterprise Integration; Manufacturing Simulation and Visualization; Integrated Simulations for Homeland Defense and Emergency Response; Product Engineering; Healthcare Informatics; and Meso-Micro-Nano-Manufacturing. The contact person for this division is: Dr. Steven R. Ray, and he may be reached at (301) 975–3508; *steven.ray@nist.gov*.

As authorized under 15 U.S.C. 272(b) and (c), the MEL conducts a basic and applied research program directly and through grants and cooperative agreements to eligible recipients.

II. Award Information

In fiscal year 2003, the MEL Grants Program funded 12 new awards, totaling $774,677. In fiscal year 2004, the MEL Grants Program anticipates funding of approximately $500,000, including new awards and continuing projects. Individual awards are expected to range from approximately $25,000 to $300,000.

For the MEL Grants Program, proposals will be considered for research projects from one to three years. When a proposal for a multi-year award is approved, funding will generally be provided for only the first year of the program. If an application is selected for funding, NIST has no obligation to provide any additional funding in connection with that award. Continuation of an award to increase funding or extend the period of performance is at the total discretion of NIST. Funding for each subsequent year of a multi-year proposal will be contingent upon satisfactory progress, continued relevance to the mission of the MEL program, and the availability of funds. The multi-year awards must have scopes of work that can be easily separated into annual increments of meaningful work that represent solid accomplishments if prospective funding is not made available to the applicant, (*i.e.*, the scopes of work for each funding period must produce identifiable and meaningful results in and of themselves).

III. Eligibility Information

1. Eligible Applicants—The MEL Grants Program is be open to institutions of higher education; hospitals; non-profit organizations; commercial organizations; state, local, and Indian tribal governments; foreign governments; organizations under the jurisdiction of foreign governments; and international organizations.

2. Cost Sharing or Matching—The MEL Grants Program does not require any matching funds.

IV. Application and Submission Information

1. Address to Request Application Package—An application kit, containing all required application forms and certifications is available by electronic mail to: Mrs. Barbara Horner, *barbara.horner@nist.gov*. Alternatively, Mrs. Horner can be contacted at (301) 975–4345.

2. Content and Form of Application Submission—For the MEL Grants Program, submit one signed original and two copies of the proposal, clearly marked to identify the field of research, to: Manufacturing Engineering Laboratory, Attn: Mrs. Barbara Horner, National Institute of Standards and Technology, 100 Bureau Drive, Stop 8200, Building 220, Room B322,

Gaithersburg, Maryland 20899–8200, Tel: (301) 975–4345, E-mail: *barbara.horner@nist.gov.*

3. Submission Dates and Times—The MEL Grants Program proposals must be received no later than 5 p.m. Eastern Standard Time on September 30, 2004. Proposals received after June 30, 2004 will continue to be processed and considered for funding but may be funded in the next fiscal year, subject to the availability of funds. Each applicant must submit one signed original and two copies of each proposal along with a Grant Application (Standard Form 424 REV. 7/97 and other required forms).

V. Application Review Information

1. Criteria—For the MEL Grants Program, the evaluation criteria the technical reviewers will use in evaluating the proposals are as follows:

a. Rationality. Reviewers will consider the coherence of the applicant's approach and the extent to which the proposal effectively addresses scientific and technical issues.

b. Technical Merit of Contribution. Reviewers will consider the potential technical effectiveness of the proposal and the value it would contribute to the field of manufacturing engineering and metrology research.

c. Qualifications of Technical Personnel. Reviewers will consider the professional accomplishments, skills, and training of the proposed personnel to perform the work in the project.

d. Resources Availability. Reviewers will consider the extent to which the proposer has access to the necessary facilities and overall support to accomplish project objectives.

Each of these factors will be given equal weight in the evaluation process.

2. Review and Selection Process—For the MEL Grants Program responsive proposals will be assigned, as received on a rolling basis, to the most appropriate area for review. At least three independent, objective individuals knowledgeable about the particular scientific area described in the section above that the proposal addresses will conduct a technical review of proposals based on the evaluation criteria. If non-Federal reviewers are used, the reviewers may discuss the proposals with each other, but scores will be determined on an individual basis, not as a consensus. The Division Chief or Laboratory Director will make application selections. In making application selections, the Division Chief or Laboratory Director will take into consideration the results of the reviewers' evaluations, the compatibility of the applicant's proposal with the program objectives of the particular division or center that the proposal addresses, the availability of funds, and relevance to the objectives of the MEL Grants Program. These objectives are described above in the "Program Objectives" section. The final approval of selected applications and award of financial assistance will be made by the NIST Grants Officer based on compliance with application requirements as published in this notice, compliance with applicable legal and regulatory requirements, compliance with Federal policies that best further the objectives of the Department of Commerce, and whether the recommended applicants appear to be responsible. Applicants may be asked to modify objectives, work plans, or budgets and provide supplemental information required by the agency prior to award. The decision of the Grants Officer is final.

Unsuccessful applicants will be notified in writing. The Program will retain one copy of each unsuccessful application for three years for record keeping purposes. The original application will be returned to the applicant.

VI. Award Administration Information

Award administration information for this program may be found in the Award Administration Information section at the end of this notice.

VII. Agency Contact(s)

Technical contacts by area are:

Precision Engineering Division, 821—Dr. Dennis Swyt; (301) 975–3463; *dennis.swyt@nist.gov.*

Manufacturing Metrology Division, 822—Mr. Kevin Jurrens; (301) 975–6600; *kevin.jurrens@nist.gov.*

Intelligent Systems Division, 823—Mr. Albert Wavering; (301) 975–3418; *albert.wavering@nist.gov.*

Manufacturing Systems Integration Division, 826—Dr. Steven R. Ray; (301) 975–3508; *steven.ray@nist.gov.*

All grants related administration questions concerning this program should be addressed to: Joyce Brigham, NIST Grants and Agreements Management Division, (301) 975–6328; *joyce.brigham@nist.gov.*

Where Web sites are referenced within this notice, those without internet access may contact the appropriate Program official to obtain information.

Chemical Science and Technology Laboratory Grants Program

I. Funding Opportunity Description

All proposals submitted to the Chemical Science and Technology Laboratory Grants Program must be in accordance with the program objectives and programs listed below. Proposals submitted to the CSTL Grants Program must address a specific measurement issue relevant to one of the stated CSTL Programs, and must be directed to a specific Division. The appropriate Division Chief for each field of research may be contacted for clarification of the program objectives. Additional information about the Divisions and CSTL Programs may be obtained at the following Web site: *http://www.cstl.nist.gov/*

CSTL is the United States' primary reference laboratory for chemical measurements, entrusted with developing, maintaining, advancing, and enabling the Nation's chemical measurement system, thereby enhancing industry's productivity and competitiveness, establishing comparability of measurements to facilitate equity of global trade, and improving public health, safety, and environmental quality. CSTL focuses its activities in measurement science research on reference methods, reference materials and reference data, and directs these efforts in support of the following specific Program areas aligned with industrial segments and National priorities:

1. Automotive and Aerospace
2. Biomaterials
3. Pharmaceuticals and Biomanufacturing
4. Chemical and Allied Products
5. Energy Systems
6. Environmental Technologies and Services
7. Food and Nutritional Products
8. Forensics and Homeland Security
9. Health and Medical Products and Services
10. Industrial and Analytical Instruments and Services
11. Microelectronics

These Programs are structured to support CSTL's three objectives:

- Provide the national traceability and international comparability structure for measurements in chemistry, chemical engineering, and biotechnology
- Assure that U.S. industry has access to accurate and reliable data and predictive models to determine the chemical and physical properties of materials and processes
- Anticipate and address next-generation measurement needs of the Nation.

CSTL conducts its research and is organized along disciplinary lines:

Biotechnology Division: DNA chemistry, sequencing; Protein

structure, properties, and modeling; Biomaterials; Biocatalysis and bioprocessing measurements. The contact person for this division is: Dr. Vincent L. Vilker, and he may be reached at (301) 975–2629.

Process Measurements Division: Research, calibration services and provision of primary standards for temperature, pressure, vacuum, humidity, fluid flow, air speed, liquid density and volume, and gaseous leak-rate measurements; Sensor research. The contact person for this division is: Dr. James R. Whetstone, and he may be reached at (301) 975–2609.

Surface and Microanalysis Science Division: Nanoscale chemical characterization; Particle characterization and standards; Electronic and advanced materials characterization; Surface and interface chemistry; Advanced isotope metrology. The contact person for this division is: Dr. Richard R. Cavanagh, and he may be reached at (301) 975–2368.

Physical and Chemical Properties Division: Basic reference data; Data for process and product design; Properties of energy-related fluids; Fundamental studies of fluids; Cryogenic technologies; Computational chemistry. The contact person for this division is: Dr. Mickey Haynes, and he may be reached at (303) 497–3247.

Analytical Chemistry Division: Chemical measurements research and services in: Analytical sensing technologies; Classical analytical methods; Gas metrology; Laboratory automation technology; Nuclear analytical methods; Organic analytical methods; and Spectrochemical measurement methods. The contact person for this division is: Dr. Willie E. May, and he may be reached at (301) 975–3108.

As authorized under 15 U.S.C. 272 (b) and (c), the Chemical Science and Technology Laboratory conducts a basic and applied research program directly and through grants and cooperative agreements to eligible recipients.

II. Award Information

No funds have been set aside specifically for support of the CSTL Grants Program. The availability of funds depends upon actual authorization of funds and other costs expected to be incurred by individual divisions within the laboratory. Where funds are identified as available for grants, those funds will be awarded to highly ranked proposals as determined by the process described in this notice.

In fiscal year 2003, the CSTL Grants Program funded 5 new awards, totaling $497,077. In fiscal year 2004, the CSTL Grants Program anticipates funding of approximately $500,000. Individual awards are expected to range from approximately $5,000 to $100,000.

For the Chemical Science and Technology Laboratory Grant Program, proposals will be considered for research projects from one to three years. When a proposal for a multi-year award is approved, funding will generally be provided for only the first year of the program. If an application is selected for funding, NIST has no obligation to provide any additional funding in connection with that award. Continuation of an award to increase funding or extend the period of performance is at the total discretion of NIST. Funding for each subsequent year of a multi-year proposal will be contingent upon satisfactory progress, continued relevance to the mission of the Chemical Science and Technology Laboratory program, and the availability of funds. The multi-year awards must have scopes of work that can be easily separated into annual increments of meaningful work that represent solid accomplishments if prospective funding is not made available to the applicant, (*i.e.* the scopes of work for each funding period must produce identifiable and meaningful results in and of themselves).

III. Eligibility Information

1. Eligible Applicants—The Chemical Science and Technology Laboratory Grants Program is open to institutions of higher education; hospitals; non-profit organizations; commercial organizations; state, local, and Indian tribal governments; foreign governments; organizations under the jurisdiction of foreign governments; and international organizations.

2. Cost Sharing or Matching—The Chemical Science and Technology Laboratory Grants Program does not require any matching funds.

IV. Application and Submission Information

1. Address to Request Application Package—For the CSTL Grants Program, an application kit, containing all required application forms and certifications is available by contacting Mr. Neil Alderoty, (301) 975–8303.

2. Content and Form of Application Submission—For the Chemical Science and Technology Laboratory Grant Program applicants are requested to submit one signed original and two copies of the proposal clearly marked to identify the field of research to: Attn: Dr. William F. Koch, National Institute of Standards and Technology, 100 Bureau Drive, Stop 8300, Gaithersburg, MD 20899–8300, Tel (301) 975–8301, E-Mail: *william.koch@nist.gov.*

3. Submission Dates and Times—The Chemical Science and Technology Laboratory Grants Program proposals must be received no later than 5 p.m. Eastern Standard Time on September 30, 2004. Proposals received after June 30, 2004 will continue to be processed and considered for funding but may be funded in the next fiscal year, subject to the availability of funds.

V. Application Review Information

1. Criteria—For the Chemical Science and Technology Laboratory Grants Program, the evaluation criteria the technical reviewers will use in evaluating the proposals are as follows:

a. Rationality. Reviewers will consider the coherence of the applicant's approach and the extent to which the proposal effectively addresses scientific and technical issues.

b. Qualifications of Technical Personnel. Reviewers will consider the professional accomplishments, skills, and training of the proposed personnel to perform the work in the project.

c. Resources Availability. Reviewers will consider the extent to which the proposer has access to the necessary facilities and overall support to accomplish project objectives.

d. Technical Merit of Contribution. Reviewers will consider the potential technical effectiveness of the proposal and the value it would contribute to the field of measurement science, especially as it pertains to reference methods, reference materials and reference data in Chemical Science and Technology.

Each of these factors will be given equal weight in the evaluation process.

2. Review and Selection Process—For the Chemical Science and Technology Laboratory Grants Program, proposals will be reviewed in a three-step process. First, the Deputy Director of CSTL, or appropriate CSTL Division Chief, will determine the compatibility of the applicant's proposal with CSTL Program Areas, the alignment of the measurement issue that the proposal addresses with division activities, and the relevance to the objectives of the Chemical Science and Technology Laboratory Grants Program. These objectives are described in the "Program Objectives" section. If it is determined that the proposal is incomplete or non-responsive to the scope of the stated objectives, the proposal will not be reviewed for technical merit. If it is determined that all funds available for the CSTL Grants Program for the given year have been exhausted, the proposal will not be reviewed for technical merit. If a proposal is determined to be

incomplete or non-responsive, or if it is determined that all available funds have been exhausted, the CSTL Grants Program will retain one copy of the proposal for three years for record keeping purposes. The remaining copies will be destroyed.

Second, at least three independent, objective individuals knowledgeable about the particular measurement science area described in the section above that the proposal addresses will conduct a technical review of each proposal, based on the evaluation criteria described above. Reviews will be conducted on a quarterly basis, and all responsive, complete proposals received and reviewed since the last quarter will be ranked based on the reviewers' scores. If non-Federal reviewers are used, the reviewers may discuss the proposals with each other, but scores will be determined on an individual basis, not as a consensus.

Third, the Division Chief will make application selections, taking into consideration the results of the reviewers' evaluations, the availability of funds, and the relevance of the proposal to the programmatic priorities of the Division described in the Program Description and Objectives section above.

The final approval of selected applications and award of financial assistance will be made by the NIST Grants Officer based on compliance with application requirements as published in this notice, compliance with applicable legal and regulatory requirements, compliance with Federal policies that best further the objectives of the Department of Commerce, and whether the recommended applicants appear to be responsible. Applicants may be asked to modify objectives, work plans, or budgets and provide supplemental information required by the agency prior to award. The decisions of the Grants Officer are final.

Unsuccessful applicants will be notified in writing. The Program will retain one copy of each unsuccessful application for three years for record keeping purposes. The remaining copies will be destroyed.

VI. Award Administration Information

Award administration information for this program may be found in the Award Administration Information section at the end of this notice.

VII. Agency Contacts

For information on the Chemical Science and Technology Laboratory Grants Program, please contact Dr. William Koch, (301) 975–8301.

All grants related administration questions concerning this program should be addressed to: Joyce Brigham, NIST Grants and Agreements Management Division, (301) 975–6328; *joyce.brigham@nist.gov.*

Where Web sites are referenced within this notice, those without internet access may contact the appropriate Program official to obtain information.

Physics Laboratory Grants Program

I. Funding Opportunity Description

All proposals submitted to the Physics Laboratory Grants Program must be in accordance with the program objectives listed below. The appropriate Program Manager for each field of research may be contacted for clarification of the program objectives.

A. Electron and Optical Physics Division, 841—The primary objective is to supplement division activities in characterization of nanometer-scale electronic and magnetic structures and characterization of EUV optical components to support semiconductor lithography and ultraviolet radiometric metrology and to support ongoing activities in Bose-Einstein condensation and quantum information. The contact person for this division is Dr. Charles W. Clark and he may be reached at (301) 975–3709.

B. Atomic Physics Division, 842—The primary objective is to support division programs aimed at determining basic atomic properties and developing new metrology techniques in atomic spectroscopy, quantum processes, plasma radiation, laser cooling and trapping, and quantum metrology. The contact person for this division is Dr. Wolfgang L. Wiese and he may be reached at (301) 975–3200.

C. Optical Technology Division, 844—The primary objective is to develop, improve, and maintain national standards for radiation thermometry, spectroradiometry, photometry, and spectrophotometry and to conduct basic theoretical and experimental research on the photophysical and photochemical properties of materials, in radiometric and spectroscopic techniques and instrumentation, and in the application of optical technologies. The contact person for this division is Dr. Albert C. Parr and he may be reached at (301) 975–2316.

D. Ionizing Radiation Division, 846—The primary objective is to provide primary standards, measurement methods, and technology to support the Division's work in meeting national needs in radiation interactions and dosimetry, neutron interactions and dosimetry, and radioactivity, including both theoretical/experimental and applied research programs in support of Industry, Health Care, and Homeland Security. The contact person for this division is Dr. Lisa R. Karam and she may be reached at (301) 975–5561.

E. Time and Frequency Division, 847—The primary objective is to supplement division basic and applied research programs in the areas of time and frequency standards, phase noise measurements, network synchronization, ion storage, quantum information, atomic standards and optical frequency measurements in support of future standards, chip-scale atomic clocks, time and frequency dissemination services, support of time and frequency applications such as navigational systems and telecommunications, and measurement methods. The contact person for this division is Dr. Thomas R. O'Brian and he may be reached at (303) 497–4570.

As authorized under 15 U.S.C. 272 (b) and (c), the Physics Laboratory conducts a basic and applied research program directly and through grants and cooperative agreements to eligible recipients.

II. Award Information

In fiscal year 2003, the PL Grants Program funded 8 new awards, totaling $693,131. In fiscal year 2004, the PL Grants Program anticipates funding of approximately $1,700,000, including new awards and continuing projects. Funding availability will be apportioned by quarter. Individual awards are expected to range from approximately $5,000 to $300,000.

For the Physics Laboratory Grants Program, proposals will be considered for research projects from one to three years. When a proposal for a multi-year project is approved, funding will generally be provided for only the first year of the program. If an application is selected for funding, NIST has no obligation to provide any additional funding in connection with that award. Continuation of an award to increase funding or extend the period of performance is at the total discretion of NIST. Funding for each subsequent year of a multi-year proposal will be contingent upon satisfactory progress, continued relevance to the mission of the Physics Laboratory program, and the availability of funds. The multi-year awards must have scopes of work that can be easily separated into annual increments of meaningful work that represent solid accomplishments if prospective funding is not made available to the applicant (*i.e.*, the scopes of work for each funding period

must produce identifiable and meaningful results in and of themselves).

III. Eligibility Information

1. Eligible Applicants—The Physics Laboratory Grants Program is open to institutions of higher education; hospitals; non-profit organizations; commercial organizations; state, local, and Indian tribal governments; foreign governments; organizations under the jurisdiction of foreign governments; and international organizations.

2. Cost Sharing or Matching—The Physics Laboratory Grants Program does not require any matching funds.

IV. Application and Submission Information

1. Address to Request Application Package—For the Physics Laboratory Grants Program, an application kit, containing all required application forms and certifications is available by contacting Ms. Anita Sweigert, (301) 975–4200.

2. Content and Form of Application Submission—For the Physics Laboratory Grant Program applicants are requested to submit one signed original and two copies of the proposal clearly marked to identify the field of research to: Attn. Ms. Anita Sweigert, National Institute of Standards and Technology, 100 Bureau Drive, Stop 8400, Gaithersburg, MD. 20899–8400, Tel (301) 975–4200, E-Mail: *anita.sweigert@nist.gov*.

3. Submission Dates and Times—The Physics Laboratory Grants Program proposals must be received no later than 5 p.m. Eastern Standard Time on September 30, 2004. Any proposals received after June 30, 2004 will be processed and considered for funding, but might not be funded until the next fiscal year, subject to the availability of funds.

V. Application Review Information

1. Criteria—For the Physics Laboratory Grants Program, the evaluation criteria the technical reviewers will use in evaluating the proposals are as follows:

a. Rationality. Reviewers will consider the coherence of the applicant's approach and the extent to which the proposal effectively addresses scientific and technical issues.

b. Qualifications of Technical Personnel. Reviewers will consider the professional accomplishments, skills, and training of the proposed personnel to perform the work in the project.

c. Resources Availability. Reviewers will consider the extent to which the proposer has access to the necessary facilities and overall support to accomplish project objectives.

d. Technical Merit of Contribution. Reviewers will consider the potential technical effectiveness of the proposal and the value it would contribute to the field of physics.

Each of these factors will be given equal weight in the evaluation process.

2. Review and Selection Process—For the Physics Laboratory Grants Program, responsive proposals will be considered as follows: First, at least three independent, objective individuals knowledgeable about the particular scientific area described in the section above that the proposal addresses will conduct a technical review of each proposal, based on the evaluation criteria described above. Reviews will be conducted on a monthly basis, and all proposals received during the month will be ranked based on the reviewers' scores. If non-Federal reviewers are used, reviewers may discuss the proposals with each other, but scores will be determined on an individual basis, not as a consensus.

Next, the Division Chief will make final application selections, taking into consideration the results of the reviewers' evaluations, including rank; the compilation of a slate that, when taken as a whole, is likely to best further the program goals described above; and the availability of funds.

The final approval of selected applications and award of financial assistance will be made by the NIST Grants Officer based on compliance with application requirements as published in this notice, compliance with applicable legal and regulatory requirements, compliance with Federal policies that best further the objectives of the Department of Commerce, and whether the recommended applicants appear to be responsible.

Applicants may be asked to modify objectives, work plans, or budgets and provide supplemental information required by the agency prior to award.

The decisions of the Grants Officer are final.

Unsuccessful applicants will be notified in writing. The Program will retain one copy of each unsuccessful application for three years for record keeping purposes. The remaining copies will be destroyed.

VI. Award Administration Information

Award administration information for this program may be found in the Award Administration Information section at the end of this notice.

VII. Agency Contact(s)

Technical contacts by area are:

Electron and Optical Physics Division, 841—Dr. Charles W. Clark; (301) 975–3709.

Atomic Physics Division, 842—Dr. Wolfgang L. Wiese; (301) 975–3200.

Optical Technology Division, 844—Dr. Albert C. Parr; (301) 975–2316.

Ionizing Radiation Division, 846—Dr. Lisa R. Karam; (301) 975–5561.

Time and Frequency Division, 847—Dr. Thomas R. O'Brian; (303) 497–4570.

All grants related administration questions concerning this program should be addressed to: Joyce Brigham, NIST Grants and Agreements Management Division, (301) 975–6328; *joyce.brigham@nist.gov*.

Where Web sites are referenced within this notice, those without internet access may contact the appropriate Program official to obtain information.

MSEL Grants Program

I. Funding Opportunity Description

All proposals submitted to the MSEL Grants Program must be in accordance with the program objectives listed below. The appropriate Program Manager for each field of research may be contacted for clarification of the program objectives.

A. Laboratory Office, 850—The primary objective is to supplement Materials Science and Engineering Laboratory activities of importance to materials science generally, including portions of Federal research and development programs performed in concert with other Federal agencies; and theoretical and computational materials science. The contact person for the Laboratory Office is: Dr. Stephen W. Freiman and he may be reached at (301) 975–5658 or by e-mail at *stephen.freiman@nist.gov*.

B. Ceramics Division, 852—The primary objective is to supplement division activities in the areas of nanomechanical properties, nanotribology, electronic and optoelectronic materials, x-ray structural characterization methods, and materials property information systems and evaluation methodologies. The contact person for this division is: Dr. Ronald Munro and he may be reached at (301) 975–6127 or by e-mail at *ronald.munro@nist.gov*.

C. Materials Reliability Division, 853—The primary objective is to supplement division activities in the metrology of microelectronic and optoelectronic structures, thin films and nanostructures, and biomaterials. The contact person for this division is: Dr. Thomas Siewert and he may be reached

at (303) 497–3523 or by e-mail at *siewert@boulder.nist.gov*.

D. Polymers Division, 854—The primary objective is to support division programs in electronics materials, biomaterials, combinatorial methods, nano-structured materials and processing characterization through participation in research on metrology, synthesis, processing and characterization of structure, mechanical, thermal and electrical properties. The contact person for this division is: Dr. Bruno Fanconi and he may be reached at (301) 975–6769 or by e-mail at *bruno.fanconi@nist.gov*.

E. Metallurgy Division, 855—The primary objective is to support division programs in magnetic materials, combinatorial methods, computational materials science, mechanics of materials, nanostructured materials and processing, and electronic materials. The contact person for this division is: Dr. Frank W. Gayle and he may be reached at (301) 975–6161 or by e-mail at *frank.gayle@nist.gov*.

F. NIST Center for Neutron Research, 856—The primary objective is to develop high resolution cold and thermal neutron scattering research approaches and related physics, chemistry, macromolecular and materials applications. Awards to universities for participation by university students in the NIST/NSF Center for High Resolution Scattering are also funded under this program. The contact person for this division is: Dr. John J. Rush and he may be reached at (301) 975–6231 or by e-mail at *john.rush@nist.gov*.

The authority for the MSEL Grants Program is as follows: As authorized under 15 U.S.C. 272(b) and (c), the MSEL conducts a basic and applied research program directly and through grants and cooperative agreements to eligible recipients.

II. Award Information

In fiscal year 2003, the MSEL Grants Program funded 32 new awards, totaling $2,816,843. In fiscal year 2004, the MSEL Grants Program anticipates funding of approximately $4,500,000, including new awards and continuing projects. Most grants and cooperative agreements are expected to be in the $25,000 to $100,000 per year range.

For the MSEL Grants Program, proposals will be considered for research projects from one to three years. When a proposal for a multi-year award is approved, funding will generally be provided for only the first year of the program. If an application is selected for funding, NIST has no obligation to provide any additional funding in connection with that award. Continuation of an award to increase funding or extend the period of performance is at the total discretion of NIST. Funding for each subsequent year of a multi-year proposal will be contingent upon satisfactory progress, continued relevance to the mission of the MSEL program, and the availability of funds. The multi-year awards must have scopes of work that can be easily separated into annual increments of meaningful work that represent solid accomplishments if prospective funding is not made available to the applicant, (*i.e.*, the scopes of work for each funding period must produce identifiable and meaningful results in and of themselves).

III. Eligibility Information

1. Eligible Applicants—The MSEL Grants Program is open to institutions of higher education; hospitals; non-profit organizations; commercial organizations; state, local, and Indian tribal governments; foreign governments; organizations under the jurisdiction of foreign governments; and international organizations.

2. Cost Sharing or Matching—The MSEL Grants Program does not require any matching funds.

IV. Application and Submission Information

1. Address to Request Application Package—For the MSEL Grants Program, an application kit, containing all required application forms and certifications is available by contacting Ms. Tanya Burke, (301) 975–4711.

2. Content and Form of Application Submission—For the MSEL Grants Program, submit one signed original and two copies of the proposal, clearly marked to identify the field of research, to: Materials Science and Engineering Laboratory, Attn.: Dr. Stephen W. Freiman, National Institute of Standards and Technology, 100 Bureau Drive, Stop 8500, Gaithersburg, Maryland 20899–8500, Tel: (301) 975–5658, E-mail: *stephen.freiman@nist.gov*.

3. Submission Dates and Times—The MSEL Grants Program proposals must be received no later than 5 p.m. Eastern Standard Time on September 30, 2004. Proposals received after June 30, 2004 will continue to be processed and considered for funding but may be funded in the next fiscal year, subject to the availability of funds. Each applicant must submit one signed original and two copies of each proposal along with a Grant Application (Standard Form 424 REV. 7/97 and other required forms).

V. Application Review Information

1. Criteria—For the MSEL Grants Program, the evaluation criteria the technical reviewers will use in evaluating the proposals are as follows:

a. Rationality. Reviewers will consider the coherence of the applicant's approach and the extent to which the proposal effectively addresses scientific and technical issues.

b. Qualifications of Technical Personnel. Reviewers will consider the professional accomplishments, skills, and training of the proposed personnel to perform the work in the project.

c. Resources Availability. Reviewers will consider the extent to which the proposer has access to the necessary facilities and overall support to accomplish project objectives.

d. Technical Merit of Contribution. Reviewers will consider the potential technical effectiveness of the proposal and the value it would contribute to the field of materials science and engineering and neutron research.

Each of these factors will be given equal weight in the evaluation process.

2. Review and Selection Process—For the MSEL Grants Program proposals will be reviewed in a two-step process. First, at least three independent, objective individuals knowledgeable about the particular scientific area described in the section above that the proposal addresses will conduct a technical review of proposals, as they are received on a rolling basis, based on the evaluation criteria. If non-Federal reviewers are used, the reviewers may discuss the proposals with each other, but scores will be determined on an individual basis, not as a consensus. Second, the Division Chief or Center Director will make application selections. In making application selections, the Division Chief or Center Director will take into consideration the results of the reviewers' evaluations, the compatibility of the applicant's proposal with the program objectives of the particular division or center that the proposal addresses, the availability of funds, and relevance to the objectives of the MSEL Grants Program. These objectives are described above in the "Program Objectives" section. The final approval of selected applications and award of financial assistance will be made by the NIST Grants Officer based on compliance with application requirements as published in this notice, compliance with applicable legal and regulatory requirements, compliance with Federal policies that best further the objectives of the Department of Commerce, and whether the recommended applicants appear to

be responsible. Applicants may be asked to modify objectives, work plans, or budgets and provide supplemental information required by the agency prior to award. The decision of the Grants Officer is final.

Unsuccessful applicants will be notified in writing. The Program will retain one copy of each unsuccessful application for three years for record keeping purposes. The remaining copies will be destroyed.

VI. Award Administration Information

Award administration information for this program may be found in the Award Administration Information section at the end of this notice.

VII. Agency Contact(s)

Technical contacts by area are:

Laboratory Office, 850—Dr. Stephen W. Freiman; (301) 975–5658; *stephen.freiman@nist.gov*.

Ceramics Division, 852—Dr. Ronald Munro; (301) 975–6127; *ronald.munro@nist.gov*.

Materials Reliability Division, 853—Dr. Thomas Siewert; (303) 497–3523; *siewert@boulder.nist.gov*.

Polymers Division, 854—Dr. Bruno Fanconi; (301) 975–6769; *bruno.fanconi@nist.gov*.

Metallurgy Division, 855—Dr. Frank W. Gayle; (301) 975–6161; *frank.gayle@nist.gov*.

NIST Center for Neutron Research, 856—Dr. John J. Rush; (301) 975–6231; *john.rush@nist.gov*.

All grants related administration questions concerning this program should be addressed to: Joyce Brigham, NIST Grants and Agreements Management Division, (301) 975–6328; *joyce.brigham@nist.gov*.

Where Web sites are referenced within this notice, those without internet access may contact the appropriate Program official to obtain information.

Building Research Grants and Cooperative Agreements Program

I. Funding Opportunity Description

The Building Research Grants and Cooperative Agreements Program supports the formal mission of the Building and Fire Research Laboratory, which is to meet the measurement and standards needs of the Building and Fire communities. All proposals submitted must be in accordance with the program objectives listed below. The appropriate Program Manager for each field of research may be contacted for clarification of the program objectives.

A. Materials and Construction Research Division, 861—The primary objective is to support laboratory programs in the areas of Structures, Construction Metrology and Automation, Inorganic Materials, and Polymeric Materials (including safety, security, and sustainability of building and physical infrastructure, service-life performance of building materials, and construction cycle time reductions). The contact person for this division is: Dr. Shyam Sunder, and he may be reached at (301) 975–6061.

B. Building Environment Division, 863—The primary objective is to support laboratory programs in the areas of related to the dynamic modeling of moisture in building walls, the dissemination of Critical Building Information to First Responders, security issues related to ASHRAE's BACnet protocol, secure and reliable BACnet/electric utility communications, biometric applications in building automation systems, information representation and exchange and access methods for building commissioning and operations, life-cycle information management in buildings, and computer integrated building processes and services. The contact person for this division is: Dr. George E. Kelly, and he may be reached at (301) 975–5850.

For details on these various activities, please see the Building and Fire Research Laboratory Web site at *http://www.bfrl.nist.gov*. Note that documents describing the current programs for the two technical divisions are available through the homepage.

As authorized by 15 U.S.C. 272(b) and (c), the NIST Building and Fire Research Laboratory conducts a basic and applied research program directly and through grants and cooperative agreements to eligible recipients.

II. Award Information

Over the past three years, the building divisions of the Building and Fire Research Laboratory funded a total of approximately $1,000,000 in grants and cooperative agreements. In fiscal year 2003, the Building Research Grants and Cooperative Agreements Program funded 6 new awards, totaling $654,793. The amount available each year fluctuates considerably based on programmatic needs. Individual awards are expected to range between $5,000 and $150,000.

For the Building Research Grants and Cooperative Agreements Program, proposals will be considered for research projects from one to three years. When a proposal for a multi-year award is approved, funding will generally be provided for only the first year of the program. If an application is selected for funding, NIST has no obligation to provide any additional funding in connection with that award. Continuation of an award to increase funding or extend the period of performance is at the total discretion of NIST. Funding for each subsequent year of a multi-year proposal will be contingent upon satisfactory progress, continued relevance to the mission of the Building Research Grants and Cooperative Agreements Program, and the availability of funds. The multi-year awards must have scopes of work that can be easily separated into annual increments of meaningful work that represent solid accomplishments if prospective funding is not made available to the applicant, (*i.e.*, the scopes of work for each funding period must produce identifiable and meaningful results in and of themselves).

III. Eligibility Information

1. Eligible Applicants—The Building Research Grants and Cooperative Agreements Program is open to institutions of higher education; hospitals; non-profit organizations; commercial organizations; state, local, and Indian tribal governments; foreign governments; organizations under the jurisdiction of foreign governments; and international organizations.

2. Cost Sharing or Matching—The Building Research Grants and Cooperative Agreements Program does not require any matching funds.

IV. Application and Submission Information

1. Address to Request Application Package—An application kit, containing all required application forms and certifications is available by contacting: Karen Perry, (301) 975–5910.

2. Content and Form of Application Submission—For the Building Research Grants and Cooperative Agreements Program, submit one signed original and two copies of the proposal package to: Building and Fire Research Laboratory, Attn.: Karen Perry, National Institute of Standards and Technology, 100 Bureau Drive, Stop 8602, Gaithersburg, MD 20899–8602, Tel.: (301) 975–5910, Fax: (301) 975–4032, *http://www.bfrl.nist.gov*.

3. Submission Dates and Times—The Building Research Grants and Cooperative Agreements Program proposals must be received no later than 5 p.m. Eastern Standard Time on September 30, 2004. Proposals received after June 30, 2004 will continue to be processed and considered for funding but may be funded in the next fiscal year, subject to the availability of funds.

V. Application Review Information

1. Criteria—The Divisions will score proposals based on the following criteria and weights:

a. Technical quality of the research. Reviewers will assess the rationality, innovation and imagination of the proposal and the fit to NIST's in-house building research programs. (0–35 points)

b. Potential impact of the results. Reviewers will assess the potential impact and the technical application of the results to our in-house programs and the building industry. (0–25 points)

c. Staff and institution capability to do the work. Reviewers will evaluate the quality of the facilities and experience of the staff to assess the likelihood of achieving the objective of the proposal. (0–20 points)

d. Match of budget to proposed work. Reviewers will assess the budget against the proposed work to ascertain the reasonableness of the request. (0–20 points)

2. Review and Selection Process—All applications received in response to this announcement will be reviewed to determine whether or not they are complete and responsive. Incomplete or non-responsive applications will not be reviewed for technical merit. The Program will retain one copy of each non-responsive application for three years for recordkeeping purposes. The remaining copies will be destroyed.

Responsive proposals will be forwarded to the appropriate Division Chief, who will assign them to appropriate reviewers. At least three independent, objective individuals knowledgeable about the particular scientific area described above that the proposal addresses will conduct a technical review of each proposal, based on the evaluation criteria described above. When non-Federal reviewers are used, reviewers may discuss the proposals with each other, but scores will be determined on an individual basis, not as a consensus. Reviews will be conducted no less than once per quarter, and all proposals since the last review session will be ranked based on the reviewers' scores.

Next, the Division Chief, Laboratory Deputy Director, or Laboratory Director will make application selections. In making application selections, the Division Chief, Laboratory Deputy Director, or Laboratory Director will take into consideration the results of the evaluations, the scores of the reviewers, the availability of funds, and relevance to the objectives of the Building Research Grants and Cooperative Agreements Program, as described in the Program Description and Objectives section for this program.

The final approval of selected applications and award of financial assistance will be made by the NIST Grants Officer based on compliance with application requirements as published in this notice, compliance with applicable legal and regulatory requirements, compliance with Federal policies that best further the objectives of the Department of Commerce, and whether the recommended applicants appear to be responsible. Applicants may be asked to modify objectives, work plans, or budgets and provide supplemental information required by the agency prior to award. The award decision of the Grants Officer is final. Applicants should allow up to 90 days processing time.

Unsuccessful applicants will be notified in writing. The Program will retain one copy of each unsuccessful application for three years for record keeping purposes. The remaining copies will be destroyed.

VI. Award Administration Information

Award administration information for this program may be found in the Award Administration Information section at the end of this notice.

VII. Agency Contact(s)

Technical contacts by area are:

Materials and Construction Research Division, 861—Dr. Shyam Sunder; (301) 975–6061.

Building Environment Division, 863—Dr. George E. Kelly; (301) 975–5850.

All grants related administration questions concerning this program should be addressed to: Joyce Brigham, NIST Grants and Agreements Management Division, (301) 975–6328; *joyce.brigham@nist.gov*.

Where Web sites are referenced within this notice, those without internet access may contact the appropriate Program official to obtain information.

Fire Research Grants Program

I. Funding Opportunity Description

The program description and objectives for the Fire Research Grants Program are as follows:

A. Analysis and Prediction Group: The objectives are to develop understanding and predictive methods for dynamic fire phenomena to advance fire science and engineering practice and to perform research into the heat and mass transfer processes occurring in fires in order to improve predictions of (1) the growth, spread, and suppression of fires; (2) the reaction of structures to fires; and (3) emissions transport from fires of all scales. Experiments and metrology are developed and used to support and verify advanced computer simulations of fire phenomena, fire hazards, fire protection, and fire fighting. The contact person for this group is: Dr. Anthony Hamins, and he may be reached at (301) 975–6598.

B. Fire Metrology Group: The objective is to apply measurement science in the development and quantification of experimental methods and to apply these measurement methods, supplemented by theoretical analyses, to understanding fire phenomena, and the reaction of materials and structures to fire. Current areas of emphasis are understanding the effects of soot volume fraction, temperature, and soot optical properties on the radiant flux in a fire environment, developing a quality facility for heat release rate measurements, instituting large field optical diagnostics for the characterization of fire induced flows, and measuring deformation and stress of structural members in a fire. The contact person for this group is: Dr. Jiann Yang, and he may be reached at (301) 975–6662.

C. Fire Fighting Technology Group: The objectives are to conduct research that enables advances in fire fighter safety, fire ground operations, and effectiveness of the fire service; that develop and apply measurements, modeling, and technology, and improve the understanding of the behavior, prevention and control of fires to enhance fire fighting operations and equipment, fire suppression, fire investigations, and disaster response; and that provide input, including experimental data, fire modeling and test protocols, to advance the effectiveness of fire safety standards and codes. The contact person for this group is Mr. Nelson Bryner, and he may be reached at (301) 975–6868.

D. Materials and Products Group: The objective is to perform research enabling the confident development by industry of new, less-flammable materials and products. This capability is based on understanding fundamentally the mechanisms that control the ignition, flame spread and burning rate of materials, as well as the chemical and physical characteristics that affect these aspects of flammability. This includes (1) developing methods of measuring the response of a material to fire conditions that enable assured prediction of the full-scale performance of the final product; (2) developing computational molecular dynamics and other mechanistic approaches to

understand flame retardant mechanisms and the effects of polymer chemical structure on flammability; (3) characterizing the burning rates of charring and non-charring polymers and composites; and (4) delineating and modeling the enthalpy and mass transfer mechanisms of materials combustion. A fifth area of interest is fundamental materials studies to advance the development of inorganic and organic structural fire protective coatings and materials. Prediction and measurement of thermal/mechanical properties, durability, adhesion, and cohesion under fire conditions and long-time environmental exposure are of interest. The contact person for this group is Dr. Marc Nyden, and he can be reached at (301) 975–6692.

E. Integrated Performance Assessment Group: The objectives are to create and disseminate enhanced data, develop fundamental understanding of fire and emergency phenomena, and support computer modeling and prediction of (1) fire detection and building fire systems; (2) human behavior and egress during building (fire) emergencies; (3) toxicity of combustion products; (4) fire hazard and risk assessment; (5) decision analysis; (6) fire fighting operations and training; and (6) fire investigation. Modeling and enhanced data are used to conduct performance evaluation and design of fire protection systems in buildings and to quantify and reduce uncertainty in model predictions. Enhanced data is disseminated through development of multi-medial web-enabled databases. The content and process associated with the building and fire codes and standards system is another current area of focus. In recent decades, tremendous advances have been made in computing, measurement, and information technologies, as well as in the ability to predict various aspects of building life cycle performance. Current approaches to building quality assurance, including public health and safety regulation of buildings, are based on a long history of codes and standards. These, in turn, rest on a number of assumptions, many implicit, about the extent to which building performance or risk can be measured or predicted, and the means for doing so. What is desired is a theoretical basis for an examination of the entire subject of quality control of buildings over their entire life cycles, as a framework for analysis of the opportunities for the use of advances in technology to improve the reliability and cost-effectiveness of building quality control measures. In particular, NIST is interested in funding academic research at the Masters or Ph.D. thesis level in one or more of the following areas: (1) Development of a theoretical framework for building life cycle quality assurance and an analysis of the relative effectiveness of our building and fire codes system; (2) Establishment of a theoretical basis for development of alternative strategies for building life cycle quality assurance, including public health and safety regulation of buildings; and (3) an analysis of the potential impacts of application of advances of measurement, information, computing and building technologies to building life cycle quality and safety assurance. The contact person for this group is: Dr. William Davis, and he can be reached at (301) 975–6884.

As authorized by 15 U.S.C. 278f, the NIST Building and Fire Research Laboratory conducts directly and through grants and cooperative agreements, a basic and applied fire research program.

II. Award Information

For the Fire Research Grants Program, the annual budget is approximately $1.0 to $1.5 million. Because of commitments for the support of multi-year projects and because proposals may have been deferred from the previous year's competition, only a portion of the budget is available to fund applications received in response to this notice. Most grants and cooperative agreements are in the $25,000 to $125,000 per year range, with a maximum requested duration of three years. In fiscal year 2003, the Fire Research Grants Program funded 9 new awards, totaling $844,114.

For the Fire Research Grants Program, proposals will be considered for research projects from one to three years. When a proposal for a multi-year project is approved, funding will normally be provided for only the first year of the program. If an application is selected for funding, DoC has no obligation to provide any additional future funding in connection with that award. Funding for each subsequent year of a multi-year proposal will be contingent on satisfactory progress, continuing relevance to the mission of the NIST Fire Research Program, and the availability of funds.

III. Eligibility Information

1. Eligible Applicants—The Fire Research Grants Program is open to institutions of higher education; hospitals; non-profit organizations; commercial organizations; state, local, and Indian tribal governments; foreign governments; organizations under the jurisdiction of foreign governments; and international organizations.

2. Cost Sharing or Matching—The Fire Research Grants Program does not require any matching funds.

IV. Application and Submission Information

1. Address to Request Application Package—For the Fire Research Grants Program, an application kit, containing all required application forms and certifications is available by contacting Ms. Wanda Duffin-Ricks, (301) 975–6863, Web site: *http://www.bfrl.nist.gov.*

2. Content and Form of Application—For the Fire Research Grants Program submit one signed original and two copies of the proposal to: Building and Fire Research Laboratory (BFRL), Attn.: Ms. Wanda Duffin-Ricks, National Institute of Standards and Technology, 100 Bureau Drive, Stop 8660, Gaithersburg, Maryland 20899–8660, Tel: (301) 975–6863, E-mail: *wanda.duffin@nist.gov,* Web site: *http://www.bfrl.nist.gov.*

3. Submission Dates and Times—The Fire Research Grants Program proposals must be received no later than 5 p.m. Eastern Standard Time on September 30, 2004. Proposals received after April 30, 2004 will continue to be processed and considered for funding but may be funded in the next fiscal year, subject to the availability of funds.

V. Application Review Information

1. Criteria—For the Fire Research Grants Program, the technical evaluation criteria are as follows:

a. Technical quality of the research. Reviewers will assess the rationality, innovation and imagination of the proposal. (0–35 points).

b. Potential impact of the results. Reviewers will assess the potential impact and the technical application of the results to the fire safety community. (0–25 points)

c. Staff and institution capability to do the work. Reviewers will evaluate the quality of the facilities and experience of the staff to assess the likelihood of achieving the objective of the proposal. (0–20 points)

d. Match of budget to proposed work. Reviewers will assess the budget against the proposed work to ascertain the reasonableness of the request. (0–20 points)

2. Review and Selection Process—Prospective proposers are encouraged to contact the above group leaders to determine the extent of interest prior to preparation of a detailed proposal. Responsive proposals will be assigned, as received on a rolling basis, to the most appropriate group. Proposals are evaluated for technical merit based on the evaluation criteria described above

by at least three reviewers chosen from NIST professionals, technical experts from other interested government agencies, and experts from the fire research community at large. When non-Federal reviewers are used, reviewers may discuss the proposals with each other, but scores will be determined on an individual basis, not as a consensus. The group leaders will make funding recommendations to the Division Chief based on the technical evaluation score and the relationship of the work proposed to the objectives of the program.

In making application selections, the Division Chief will take into consideration the results of the evaluations, the scores of the reviewers, the group leader's recommendation, the availability of funds, and relevance to the objectives of the Fire Research Grants Program, as described in the Program Description and Objectives section for this program. The final approval of selected applications and award of financial assistance will be made by the NIST Grants Officer based on compliance with application requirements as published in this notice, compliance with applicable legal and regulatory requirements, compliance with Federal policies that best further the objectives of the Department of Commerce, and whether the recommended applicants appear to be responsible. Applicants may be asked to modify objectives, work plans, or budgets and provide supplemental information required by the agency prior to award. The award decision of the Grants Officer is final. Applicants should allow up to 90 days processing time.

Unsuccessful applicants will be notified in writing. The Program will retain one copy of each unsuccessful application for three years for record keeping purposes. The remaining copies will be destroyed.

VI. Award Administration Information

Award administration information for this program may be found in the Award Administration Information section at the end of this notice.

VII. Agency Contact(s)

Technical contacts by area are:

Analysis and Prediction Group—Dr. Anthony Hamins; (301) 975–6598.

Fire Metrology Group—Dr. George Mulholland; (301) 975–6695.

Fire Fighting Technology Group—Mr. Nelson Bryner; (301) 975–6868.

Materials and Products Group—Dr. Marc Nyden; (301) 975–6692.

Integrated Performance Assessment Group—Dr. Kathy Notarianni; (301) 975–6883.

All grants related administration questions concerning this program should be addressed to: Joyce Brigham, NIST Grants and Agreements Management Division, (301) 975–6328; *joyce.brigham@nist.gov*.

Where Web sites are referenced within this notice, those without internet access may contact the appropriate Program official to obtain information.

VI. Award Administration Information

The following award administration information applies to all programs announced in this notice.

1. Award Notices:

A successful applicant will be notified of award through the receipt of an obligated/approved Financial Assistance Award document. The document, which will include the award period, the budget, special award conditions, and applicable policy and regulatory references that will govern the award, is sent to the successful applicant via surface mail and requires a counter-signature of an authorized official.

2. Administrative and National Policy Requirements:

a. *Catalog of Federal Domestic Assistance Name and Number:* Measurement and Engineering Research and Standards—11.609.

b. The Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements contained in the **Federal Register** notice of October 1, 2001 (66 FR 49917), as amended by the **Federal Register** notice published on October 30, 2002 (67 FR 66109), are applicable to this solicitation. On the form SF–424, the applicant's 9-digit Dun and Bradstreet Data Universal Numbering System (DUNS) number must be entered in the Applicant Identifier block. In addition, the following information is applicable to all programs described above.

c. *Collaborations with NIST Employees:* All applications should include a description of any work proposed to be performed by an entity other than the applicant, and the cost of such work should ordinarily be included in the budget.

If an applicant proposes collaboration with NIST, the statement of work should include a statement of this intention, a description of the collaboration, and prominently identify the NIST employee(s) involved, if known. Any collaboration by a NIST employee must be approved by appropriate NIST management and is at the sole discretion of NIST. Prior to beginning the merit review process, NIST will verify the approval of the proposed collaboration. Any unapproved collaboration will be stricken from the proposal prior to the merit review.

d. *Use of NIST Intellectual Property:* If the applicant anticipates using any NIST-owned intellectual property, to carry out the work proposed, the applicant should identify such intellectual property. This information will be used to ensure that no NIST employee involved in the development of the intellectual property will participate in the review process for that competition. In addition, if the applicant intends to use NIST-owned intellectual property, the applicant must comply with all statutes and regulations governing the licensing of Federal government patents and inventions, described at 35 U.S.C. sec. 200–212, 37 CFR part 401, 15 CFR 14.36, and in section 20 of the Department of Commerce Pre-Award Notification Requirements, 66 FR 49917 (2001), as amended by the **Federal Register** notice published on October 30, 2002 (67 FR 66109). Questions about these requirements may be directed to the Counsel for NIST, 301–975–2803.

Any use of NIST-owned intellectual property by a proposer is at the sole discretion of NIST and will be negotiated on a case-by-case basis if a project is deemed meritorious. The applicant should indicate within the statement of work whether it already has a license to use such intellectual property or whether it intends to seek one.

If any inventions made in whole or in part by a NIST employee arise in the course of an award made pursuant to this notice, the United States government may retain its ownership rights in any such invention. Licensing or other disposition of NIST's rights in such inventions will be determined solely by NIST, and include the possibility of NIST putting the intellectual property into the public domain.

e. *Funding Availability:* For all Financial Assistance programs listed in this notice, awards are contingent on the availability of funds.

f. *Initial Screening of all Applications:* All applications received in response to this announcement will be reviewed to determine whether or not they are complete and responsive to the scope of the stated objectives for each program. Incomplete or non-responsive applications will not be reviewed for technical merit. The Program will retain one copy of each non-responsive

application for three years for record keeping purposes. The remaining copies will be destroyed.

g. *Fees and/or Profit:* It is not the intent of NIST to pay fee or profit for any of the financial assistance awards that may be issued pursuant to this announcement.

h. *Paperwork Reduction Act:* The standard forms in the application kit involve a collection of information subject to the Paperwork Reduction Act. The use of Standard Forms 424, 424A, 424B, SF–LLL, CD–346, SF–269, and SF–272 have been approved by OMB under the respective Control Numbers 0348–0043, 0348–0044, 0348–0040, 0348–0046, 0605–0001, 0348–0039, and 0348–0003.

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

i. *Research Projects Involving Human Subjects, Human Tissue, Data or Recordings Involving Human Subjects:* Any proposal that includes research involving human subjects, human tissue, data or recordings involving human subjects must meet the requirements of the Common Rule for the Protection of Human Subjects, codified for the Department of Commerce at 15 CFR part 27. In addition, any proposal that includes research on these topics must be in compliance with any statutory requirements imposed upon the Department of Health and Human Services (DHHS) and other federal agencies regarding these topics, all regulatory policies and guidance adopted by DHHS, FDA, and other Federal agencies on these topics, and all Presidential statements of policy on these topics.

On December 3, 2000, the U.S. Department of Health and Human Services (DHHS) introduced a new Federalwide Assurance of Protection of Human Subjects (FWA). The FWA covers all of an institution's Federally-supported human subjects research, and eliminates the need for other types of Assurance documents. The Office for Human Research Protections (OHRP) has suspended processing of multiple project assurance (MPA) renewals. All existing MPAs will remain in force until further notice. For information about FWAs, please see the OHRP Web site at *http://ohrp.osophs.dhhs.gov/humansubjects/assurance/fwas.htm*

In accordance with the DHHS change, NIST will continue to accept the submission of human subjects protocols that have been approved by Institutional Review Boards (IRBs) possessing a current, valid MPA from DHHS. NIST also will accept the submission of human subjects protocols that have been approved by IRBs possessing a current, valid FWA from DHHS. NIST will not issue a single project assurance (SPA) for any IRB reviewing any human subjects protocol proposed to NIST.

On August 9, 2001, the President announced his decision to allow Federal funds to be used for research on existing human embryonic stem cell lines as long as prior to his announcement (1) the derivation process (which commences with the removal of the inner cell mass from the blastocyst) had already been initiated and (2) the embryo from which the stem cell line was derived no longer had the possibility of development as a human being. NIST will follow guidance issued by the National Institutes of Health at *http://ohrp.osophs.dhhs.gov/humansubjects/guidance/stemcell.pdf* for funding such research.

j. *Research Projects Involving Vertebrate Animals:* Any proposal that includes research involving vertebrate animals must be in compliance with the National Research Council's "Guide for the Care and Use of Laboratory Animals" which can be obtained from National Academy Press, 2101 Constitution Avenue, NW., Washington, DC 20055. In addition, such proposals must meet the requirements of the Animal Welfare Act (7 U.S.C. 2131 *et seq.*), 9 CFR parts 1, 2, and 3, and if appropriate, 21 CFR part 58. These regulations do not apply to proposed research using pre-existing images of animals or to research plans that do not include live animals that are being cared for, euthanased, or used by the project participants to accomplish research goals, teaching, or testing. These regulations also do not apply to obtaining animal materials from commercial processors of animal products or to animal cell lines or tissues from tissue banks.

k. *Matching Funds:* Although many of the programs described in this notice do not require cost share, if it is determined that your proposal falls within the authority of 19 U.S.C. 2543–45 cost share will be required as follows:

Pursuant to 19 U.S.C. 2543–45, financial assistance shall not exceed 75 percent of such program or activity, when the primary purpose of such program or activity is—

(1) To increase the awareness of proposed and adopted standards-related activities;

(2) To facilitate international trade through the appropriate international and domestic standards-related activities;

(3) To provide adequate United States representation in international standards-related activities; and

(4) To encourage United States exports through increased awareness of foreign standards-related activities that may affect United States exports.

l. *Executive Orders:* This funding notice was determined to be not significant for purposes of Executive Order 12866.

It has been determined that this notice does not contain policies with federalism implications as that term is defined in Executive Order 13132.

Applications under these programs are not subject to Executive Order 12372, "Intergovernmental Review of Federal Programs."

m. *Administrative Procedure Act/Regulatory Flexibility Act:* Notice and comment are not required under the Administrative Procedure Act (5 U.S.C. 553) or any other law, for notices relating to public property, loans, grants, benefits or contracts (5 U.S.C. 553(a)). Because notice and comment are not required under the Administrative Procedure Act, a Regulatory Flexibility Analysis is not required and has not been prepared for this notice, 5 U.S.C. 601 *et seq.*

n. *Limitation of Liability:* In no event will the Department of Commerce be responsible for proposal preparation costs if these programs fail to receive funding or are cancelled because of other agency priorities. Publication of this announcement does not oblige the agency to award any specific project or to obligate any available funds.

The following are examples of the Special Award Conditions that may be applied to the recipients award document:

a. *Program Income:* Program income, as defined at 15 CFR 14.24 (non-profits and colleges) or 15 CFR 14.24.25 (states), earned during the award period shall be retained by the recipient and shall be deducted from the total allowable costs to determine the net allowable costs. Program income shall be used for current costs unless the Grants Officer authorizes otherwise. Program income, which the Recipient did not anticipate at the time of the award, must be used to reduce the Department's contribution rather than to increase the funds committed to the project.

b. *Supplemental Information to DoC, Financial Assistance Standard Term and Condition, K.02, titled "Rights to Inventions."* The Recipient shall submit to the National Institute of Standards and Technology a final patent report listing all inventions disclosed or a certification that no subject inventions were disclosed during the award period. This report is due to the Grants Officer within 90 days from the expiration date of this award.

c. *General Publication Guidelines:*

(a) Whenever possible, the results of the research should be published in the open scientific literature in such a way as to be generally available to American Scientific Libraries.

(b) The Federal Program Officer is responsible for insuring appropriate dissemination of information resulting from a grant/cooperative agreement.

(c) The Journal of Research of NIST may be used as a medium of publication, but the Principal Investigators are free to choose the place of publication in the best scientific interest.

(d) In such publications, acknowledgment shall be made of sponsorship by NIST. Normally this is done by a footnote reading, "This work was performed under the sponsorship of the U.S. Department of Commerce, National Institute of Standards and Technology," or words to that effect.

(e) If the publication is copyrighted, the statement "Reproduction of this article, with the customary credit to the source, is permitted" should be added.

(f) Manuscripts intended for publication shall be forwarded to the Federal Program Officer for review prior to release.

(g) When issuing statements, press releases, requests for proposals, bid solicitations and other documents describing projects or programs funded in whole or in part with Federal money, all recipients receiving Federal funds, including States and local governments, shall clearly state the:

(1) Percentage of the total costs of the program or project which will be financed with Federal money;

(2) Dollar amount of Federal funds for the project or program; and,

(3) Percentage and dollar amount of the total costs of the project or program financed by non-Federal sources.

d. *Interest:* This award is subject to 15 CFR 14.22 requiring recipients of Federal financial assistance to maintain advances of Federal funds in interest bearing accounts. Interest earned on Federal advances deposited in such accounts (with the exception of $250 per year, which may be retained for administrative expenses) shall be remitted promptly, but not less frequently than quarterly to NIST at the address listed below: NIST Accounts Receivable, 100 Bureau Drive, STOP 3751, Building 101, Room A809, Gaithersburg, MD 20899–3751.

e. *Supplementary Condition to DoC Standard Term and Condition D.01, titled, "Organization-wide, Program Specific, and Project Audits, paragraph b.:* Since the period of this award is less than two years and the recipient is a for-profit organization, the NIST requires that the recipient provide the Grant Officer with one of the following audits:

(1) An organization-wide audit that is conducted by an independent Certified Public Accountant (CPA) in accordance with Generally Accepted Government Auditing Standards, that encompasses the period of performance of this award and provides for a review of the costs associated with this award and all other revenue and income of the recipient, and certification that the recipient has complied with all the terms and conditions related to the financial management standards found at 15 CFR 14.21; or

(2) A project audit conducted by an independent CPA in accordance with Generally Accepted Government Auditing Standards, similar to that found in OMB, Circular A–133 and that:

(i) Provides for a review and determination of the appropriateness of the costs associated with this award in accordance with the applicable cost principles as specified on the cover sheet of this award;

(ii) Provides for a new review and determination of the recipient's compliance with the terms, conditions, laws and regulations governing this award; and

(iii) Reviews the financial statements of the organization and provides an opinion.

The Recipient shall submit either (1) or (2) above to the Grants Officer within 90 days of the expiration date of this award.

f. *Return Payments for Funds Withdrawn through ASAP:* Funds that have been withdrawn through ASAP may be returned to ASAP via the Automated Clearing House (ACH) or via FEDWIRE. The ACH or FEDWIRE transaction can only be done by the Recipient's financial institution. Full or partial amounts of payments received by a Payment Requestor/Recipient Organization may be returned to ASAP. All funds returned to the ASAP system will be credited to the ASAP Suspense Account. The Suspense Account allows the Regional Financial Center to monitor returned items and ensure that funds are properly credited to the correct ASAP account. Returned funds that cannot be identified and classified to an ASAP account will be dishonored and returned to the originating depository financial institution (ODFI).

It is essential that the Payment Requestor/Recipient Organization provide its financial institution with ASAP account information (ALC, Recipient ID and Account ID) to which the return is to be credited. Additional detailed information can be found at *http://www.fms.treas.gov/asap/pay-return2.pdf.*

g. *Supervision of the Recipient's Researchers on the NIST Site:* The Recipient shall control the means and manner of its researcher(s)' activities, including research conducted on the NIST campus. The Recipient shall provide a salary, stipend, or other funding to the researcher(s), and shall establish the researcher(s)' work schedule and tenure. The Recipient is the supervisor of record for the researcher(s), and shall coordinate with NIST as needed to ensure that the research remains consistent with NIST program objectives. Staff and affiliates of the Recipient conducting research on a NIST site shall sign and abide by the terms of the NIST Guest Researcher Agreement.

NIST shall collaborate on the research as described in a Special Award Condition, titled NIST Participation, (that will change accordingly per award), and shall coordinate with the Recipient as needed regarding progress on the research. NIST shall have no firing or other terminating authority over the employment or affiliation status of the Recipient's researcher(s). Any issues related to performance or conduct in the laboratory involving researcher(s) shall be immediately reported to the Recipient. Any suspension or termination action on this award will comply with 15 CFR 14.60–.62 and the Department of Commerce Financial Assistance Standard Terms and Conditions, B.02 and B.05.

h. The Recipient shall comply with the requirements found in the Notice of Funding Availability published in the **Federal Register** and incorporated by reference into this award.

i. *NIST Implementation of Department of Commerce, Financial Assistance Standard Terms and Conditions, dated October 2001, Section A.02, Award Payments*

(1) The advance method of payment shall be authorized unless otherwise specified in a special award condition.

(2) Payments will be made through electronic funds transfers, using the Department of Treasury's Automated Standard Application for Payment

(ASAP) system, and in accordance with the requirements of the Debt Collection Improvement Act of 1996. The following information is required when making withdrawals for this award (1) ASAP account identification (id) = award number found on the cover sheet of this award; (2) Agency Location Code (ALC) = 13060001; and (3) Region Code = 01. Recipients do not need to submit a "Request for Advance or Reimbursement" (SF–270) for payments relating to this award. If you are not enrolled as an ASAP Recipient Organization you must complete the enrollment process with your Federal Reserve Bank, Regional Finance Center. Enrollment applications and information can be found at *http//www.fms.treas.gov/asap/handbook.html*. If you need a paper copy of the enrollment documentation please contact the Grant Specialist responsible for this award.

(3) Advances taken through the ASAP shall be limited to the minimum amounts necessary to meet immediate disbursement needs. Advanced funds not disbursed in a timely manner must be promptly returned, via an ASAP credit, to the account from which the advanced funding was withdrawn. Advances shall be for periods not to exceed 30 days.

(4) This award has the following control or withdraw limits set in ASAP

___ None

___ Agency Review required for all withdrawals (see explanation below)

___ Agency Review required for all withdrawal requests over $____(see explanation below)

___ Maximum Draw Amount controls (see explanation below)

$____ each month

$____ each quarter

$____ each year

3. Reporting:

a. The Department of Commerce Financial Assistance Standard Terms and Conditions dated October, 2001 provides policy guidelines for recipients. Financial and Programmatic Reporting Requirements for grants and cooperative agreements are outlined below. Please see the Department of Commerce Financial Assistance Standard Terms and Conditions dated October, 2001 which can be found on the Internet at *http://www.osec.doc.gov/oebam/standards.htm*.

b. Financial Requirements—Financial Reports

(1) The Recipient shall submit a "Financial Status Report" (SF–269) on a semi-annual basis for the periods ending March 31 and September 30, or any portion thereof, unless otherwise specified in a special award condition. Reports are due no later than 30 days following the end of each reporting period. A final SF–269 shall be submitted within 90 days after the expiration date of the award.

(2) The Recipient shall submit a "Federal Cash Transactions Report" (SF–272) for each award where funds are advanced to Recipients. The SF–272 should be submitted on a quarterly basis for periods ending March 31, June 30, September 30, and December 31. The SF–272 is due 15 working days following the end of each reporting period unless otherwise specified in a special award condition.

(3) All financial reports shall be submitted in triplicate (one original and two copies) to the Grants Officer.

c. Programmatic Requirements—Performance (Technical) Reports

(1) The Recipient shall submit performance (technical) reports in triplicate (one original and two copies) to the Federal Program Officer in the same frequency as the Financial Status Report (SF–269).

(2) Unless otherwise specified in the award provisions, performance (technical) reports shall contain brief information as prescribed in the applicable uniform administrative requirements incorporated into the award.

Dated: March 17, 2004.

Hratch G. Semerjian,

Acting Director, NIST.

[FR Doc. 04–6789 Filed 3–25–04; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 031904C]

Fisheries of the Exclusive Economic Zone Off Alaska; Public Workshop

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

ACTION: Notice of workshop.

SUMMARY: NMFS will present a workshop on proposed catch-monitoring standards for catcher processors that intend to participate in fisheries for crab species managed under the Fishery Management Plan for the Commercial King and Tanner Crab Fisheries in the Bering Sea/Aleutian Islands (Crab FMP).

DATES: Tuesday, May 4, 2004, 10 a.m. – 4 p.m., Pacific local time (P.l.t.)

ADDRESSES: The workshop will be held at the Nordby Center, located in Fishermen's terminal, 1711 W. Nickerson Street, Seattle, WA.

FOR FURTHER INFORMATION CONTACT: Alan Kinsolving, 907–586–7228.

SUPPLEMENTARY INFORMATION: NMFS and the State of Alaska Department of Fish and Game are developing proposed regulations to implement a quota-based program for the crab fisheries covered by the Crab FMP. One aspect of this process is the development of catch monitoring, weighing, and accounting standards for catcher processors that catch and process crab. NMFS is conducting a workshop on May 4, 2004, from 10 a.m. to 4 p.m., P.l.t., so that interested industry members may provide guidance to NMFS on the development and implementation of these standards.

This workshop is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Alan Kinsolving (see **FOR FURTHER INFORMATION CONTACT**).

Dated: March 22, 2004.

Alan D. Risenhoover,

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

[FR Doc. 04–6858 Filed 3–25–04; 8:45 am]

BILLING CODE 3510–22–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Denial of Commercial Availability Request under the African Growth and Opportunity Act (AGOA) and the Andean Trade Promotion and Drug Eradication Act (ATPDEA)

March 24, 2004.

AGENCY: The Committee for the Implementation of Textile Agreements (CITA).

ACTION: Denial of the request alleging that two patented fusible interlining fabrics, used in the construction of waistbands, cannot be supplied by the domestic industry in commercial quantities in a timely manner under the AGOA and the ATPDEA.

SUMMARY: On January 20, 2004, the Chairman of CITA received a petition from Levi Strauss and Co. alleging that a certain ultra-fine Lycra crochet material, classified under subheading 5903.90.2500 of the Harmonized Tariff Schedule of the United States (HTSUS), cannot be supplied by the domestic

industry in commercial quantities in a timely manner. The petition requested that apparel containing waistbands of such fabrics be eligible for preferential treatment under the AGOA and the ATPDEA.

FOR FURTHER INFORMATION CONTACT: Richard Stetson, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, 202-482-3400.

SUPPLEMENTARY INFORMATION:

Authority: Section 112(b)(5)(B) of the AGOA; Section 1 of Executive Order No. 13191 of January 17, 2001; Presidential Proclamations 7350 of October 4, 2000; Section 204 (b)(3)(B)(ii) of the ATPDEA, Presidential Proclamation 7616 of October 31, 2002, Executive Order 13277 of November 19, 2002, and the United States Trade Representative's Notice of Further Assignment of Functions of November 25, 2002.

BACKGROUND:

The AGOA and the ATPDEA provide for quota- and duty-free treatment for qualifying textile and apparel products. Such treatment is generally limited to products manufactured from yarns and fabrics formed in the United States or a beneficiary country. The AGOA and the ATPDEA also provide for quota- and duty-free treatment for apparel articles that are both cut (or knit-to-shape) and sewn or otherwise assembled in one or more beneficiary countries from fabric or yarn that is not formed in the United States, if it has been determined that such fabric or yarn cannot be supplied by the domestic industry in commercial quantities in a timely manner. In Executive Order No. 13191 (66 FR 7271) and pursuant to Executive Order No. 13277 (67 FR 70305) and the United States Trade Representative's Notice of Redelegation of Authority and Further Assignment of Functions (67 FR 71606), CITA has been delegated the authority to determine whether yarns or fabrics cannot be supplied by the domestic industry in commercial quantities in a timely manner under the AGOA or the ATPDEA. On March 6, 2001, CITA published procedures that it will follow in considering requests (66 FR 13502).

On January 20, 2004, the Chairman of CITA received a petition from Levi Strauss and Co. alleging that certain ultra-fine Lycra crochet outer-fusible material with a fold line that is knitted into the fabric and a fine Lycra crochet inner-fusible material with an adhesive coating that is applied after going through a finishing process to remove all shrinkage from the product, classified under item 5903.90.2500 of the Harmonized Tariff Schedule of the United States (HTSUS), for use in apparel articles (waistbands), cannot be supplied by the domestic industry in commercial quantities in a timely manner and requesting quota- and duty-free treatment under the AGOA and the ATPDEA for apparel articles that are both cut and sewn in one or more AGOA or ATPDEA beneficiary countries utilizing such fabrics. In describing the product, the petitioner uses the trademark name "Lycra". CITA will not make a determination on a trademark name, so the term "elastomeric" has been substituted.

The two fabrics at issue are:

Fusible Interlining 1 -

An ultra-fine elastomeric crochet outer-fusible material with a fold line that is knitted into the fabric. A patent is pending for this fold-line fabric.

The fabric is a 45mm wide base substrate, crochet knitted in narrow width, synthetic fiber based (49% polyester/43% elastane/8% nylon with a weight of 4.4 oz., a 110/110 stretch and a dull yarn), stretch elastomeric material with adhesive coating that has the following characteristics:

1. The 45mm is divided as follows: 34mm solid followed by a 3mm seam allowing it to fold over followed by 8mm of solid.
2. In the length it exhibits excellent stretch and recovery properties at low extension levels.
3. It is delivered pre-shrunk with no potential for relaxation shrinkage during high temperature washing or fusing and deliveredlap laid, i.e., tension free adhesion level will be maintained or improved through garment processing temperatures of up to 350 degrees and dwell times of 20 minute durations.
4. The duration and efficacy of the bond will be such that the adhesive will not become detached from the fabric or base substrate during industrial washing or in later garment wear or after-care of 50 home washes.

In summary, the desired fabric will be an interlining fabric with the above properties. The finished interlining fabric is a fabric that has been coated with an adhesive coating after going through a finishing process to remove all shrinkage from the product and impart a stretch to the fabric. This finishing process of imparting stretch to fabrics is patented, U.S. Patent 5,987,721.

Fusible Interlining 2 -

A fine elastomeric crochet inner-fusible material with an adhesive coating that is applied after going through a finishing process to remove all shrinkage from the product. (Sample Number 2) This finishing process of imparting stretch to fabrics is patented, U.S. Patent 5,987,721.

Specifically, the fabric is a 40mm synthetic fiber based stretch elastomeric fusible (80% nylon type 6/20% spandex with a weight of 4.4 oz., a 110/110 stretch and a dull yarn), with the following characteristics:

1. It is supplied pre-coated with an adhesive that will adhere to 100% cotton and other composition materials such as polyester/cotton blends during fusing at a temperature of 180 degrees.
2. The adhesive is of a melt flow index which will not strike back through the interlining substrate or strike through the fabric to which it is fused and whose adhesion level will be maintained or improved through garment processing temperatures of up to 350 degrees and dwell times of 20 minute durations.
3. The duration and efficacy of the bond will be such that the adhesive will not become detached from the fabric or base substrate during industrial washing or in later garment wear or after-care of 50 home washes.
4. Delivered on rolls of more than 350 yards or lap laid in boxes.

Both interlining fabrics are classifiable under 5903.90.2500, HTSUS. The adhesive coating adds approximately 25% - 30% weight to the fusible interlining 1 and adds approximately 20% - 25% weight to the fusible interlining 2.

The fusible interlining fabrics are used in the construction of waistbands in pants, shorts, skirts, and other similar products that have waistbands.

Fusible interlining 1 reinforces the twill pant fabric and also exclusively contributes to the "stretch ability" of the twill pant fabric in the waistband area. Fusible interlining 2 is used on the underside of the waistband lining fabric. This interlining reinforces the waistband lining, which is made from pocketing-type fabric, and also exclusively contributes to that fabric's "stretch ability." It also serves to "firm up" the seam area of the waistband lining so that the fabric will not rip or otherwise be damaged during the assembly/sewing process.

On February 2, 2004, CITA solicited public comments regarding this request, particularly with respect to whether these fabrics can be supplied by the domestic industry in commercial quantities in a timely manner. On February 18, 2004, CITA and the Office of the U.S. Trade Representative offered

to hold consultations with the relevant Congressional committees. We also requested the advice of the U.S. International Trade Commission and the relevant Industry Sector Advisory Committees.

CITA has determined that the domestic industry can supply a product substitutable for the two fabrics described above in commercial quantities in a timely manner. On the basis of currently available information, including review of the request, public comment and advice received, and its understanding of the industry, CITA has determined that there is domestic capacity to supply a substitutable product in commercial quantities in a timely manner. Levi Strauss and Co.'s request is denied.

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc.04–6939 Filed 3–24–04; 3:16 pm]

BILLING CODE 3510–DR–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Denial of Commercial Availability Request under the African Growth and Opportunity Act (AGOA), the United States-Caribbean Basin Trade Partnership Act (CBTPA), and the Andean Trade Promotion and Drug Eradication Act (ATPDEA)

March 24, 2004.

AGENCY: The Committee for the Implementation of Textile Agreements (CITA).

ACTION: Denial of the request alleging that three patented fusible interlining fabrics, used in the construction of waistbands, cannot be supplied by the domestic industry in commercial quantities in a timely manner under the AGOA, the CBTPA, and the ATPDEA.

SUMMARY: On January 20, 2004, the Chairman of CITA received a petition from Levi Strauss and Co. alleging that three patented fusible interlining fabrics, of the specifications detailed below, classified in subheading 5903.90.2500 of the Harmonized Tariff Schedule of the United States (HTSUS), cannot be supplied by the domestic industry in commercial quantities in a timely manner. The petition requested that apparel containing waistbands of such fabrics be eligible for preferential treatment under the AGOA, the CBTPA, and the ATPDEA.

FOR FURTHER INFORMATION CONTACT: Richard Stetson, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, 202-482-3400.

SUPPLEMENTARY INFORMATION:

Authority: Section 112(b)(5)(B) of the AGOA; Section 213(b)(2)(A)(v)(II) of the Caribbean Basin Economic Recovery Act, as added by Section 211(a) of the CBTPA; Sections 1 and 6 of Executive Order No. 13191 of January 17, 2001; Presidential Proclamations 7350 and 7351 of October 4, 2000; Section 204 (b)(3)(B)(ii) of the ATPDEA, Presidential Proclamation 7616 of October 31, 2002, Executive Order 13277 of November 19, 2002, and the United States Trade Representative's Notice of Further Assignment of Functions of November 25, 2002.

BACKGROUND:

The AGOA, the CBTPA, and the ATPDEA provide for quota- and duty-free treatment for qualifying textile and apparel products. Such treatment is generally limited to products manufactured from yarns and fabrics formed in the United States or a beneficiary country. The AGOA, the CBTPA, and the ATPDEA also provide for quota- and duty-free treatment for apparel articles that are both cut (or knit-to-shape) and sewn or otherwise assembled in one or more beneficiary countries from fabric or yarn that is not formed in the United States, if it has been determined that such fabric or yarn cannot be supplied by the domestic industry in commercial quantities in a timely manner. In Executive Order No. 13191 (66 FR 7271) and pursuant to Executive Order No. 13277 (67 FR 70305) and the United States Trade Representative's Notice of Redelegation of Authority and Further Assignment of Functions (67 FR 71606), CITA has been delegated the authority to determine whether yarns or fabrics cannot be supplied by the domestic industry in commercial quantities in a timely manner under the AGOA, the CBTPA, or the ATPDEA. On March 6, 2001, CITA published procedures that it will follow in considering requests (66 FR 13502).

On January 20, 2004, the Chairman of CITA received a petition from Levi Strauss and Co. alleging that certain fusible composition material, of the specifications detailed below, classified in HTSUS subheading 5903.90.2500, for use in waistbands of apparel articles, cannot be supplied by the domestic industry in commercial quantities in a timely manner and requesting quota- and duty-free treatment under the AGOA, the CBTPA, and the ATPDEA for apparel articles that are both cut and sewn in one or more beneficiary countries utilizing such fabrics.

The three fabrics at issue are:

Fusible A - Composition

A knitted outer-fusible material. The fusible width variance is not less the 3/4 inches wide (18 to 20 mm) or more the 6 inches (153 to 155 mm) wide. The fabric substrate is, synthetic fiber based (made of 49 percent polyester / 43 percent elastomeric filament / 8 percent nylon with an average weight of 4.4 ounces, not greater than 5 ounces, a 110/110 stretch, and a dull yarn), stretch elastomeric material with an adhesive (thermoplastic resin) coating. This fusible may have a fiber variance of up to 3 percent for each fiber.

Fusible B - Composition

A knitted inner and outer fusible material with an adhesive (thermoplastic resin) coating that is applied after going through a finishing process to remove all shrinkage from the product. The fabric is a synthetic fiber based stretch elastomeric fusible consisting of 80 percent nylon type 6 / 20 percent elastomeric filament with a weight of 4.4 ounces, not greater than 5 ounces, a 110/110 stretch, and a dull yarn. The fusible width variance is not less the 3/4 inches wide (18 to 20 mm) or more than 6 inches (153 to 155 mm) wide. This fusible may have a fiber variance of up to 3 percent for each fiber.

Fusible C - Composition

A knitted fusible material used to shape countour waistbands and is applied on top of the main fusible only a reinforcement. The fusible width variance is not less than 1/4 inches wide (5 to 6 mm) or more than 1 inch (25 to 27 mm) wide. The fabric is 11.2 percent nylon / 34.4 percent polyester / 54.4 percent elastomeric at a weight of 300 grams to not greater than 400 grams per square meter. This fusible may have a fiber variance of up to 3 percent for each fiber.

With each of these, the following applies:

a) In the length it exhibits excellent stretch and recovery properties at low extension levels.

b) It is delivered pre-shrunk with no potential for relaxation shrinkage during high temperature washing or fusing and deliveredlap laid, i.e., tension free.

c) It is supplied pre-coated with an adhesive that will adhere to 100 percent cotton and other composition materials such polyester/cotton blend during fusing at a temperature of 180 degrees Celsius.

d) The adhesive is of a melt flow index which will not strike back

through the interlining substrate or strike through the fabric to which it is fused and whose adhesion level will be maintained or improved through garment processing temperatures of up to 350 degrees Fahrenheit and dwell times of 20 minute durations.

e) The duration and efficacy of the bond will be such that the adhesive will not, during industrial washing, later garment wear or after-care of 30 home washes, become detached from the fabric or base substrate.

The finished interlining fabric is a fabric that has been coated with an adhesive coating after going through a finishing process to remove all shrinkage from the product and impart a stretch to the fabric. This finishing process of imparting stretch to fabric is patented, U.S. Patent 5,987,721.

On February 2, 2004, CITA solicited public comments regarding this request, particularly with respect to whether these fabrics can be supplied by the domestic industry in commercial quantities in a timely manner. On February 18, 2004, CITA and the Office of the U.S. Trade Representative offered to hold consultations with the relevant Congressional committees. We also requested the advice of the U.S. International Trade Commission and the relevant Industry Sector Advisory Committees.

CITA has determined that the domestic industry can supply a product substitutable for the three fabrics described above in commercial quantities in a timely manner. On the basis of currently available information, including review of the request, public comment and advice received, and its understanding of the industry, CITA has determined that there is domestic capacity to supply a substitutable product in commercial quantities in a timely manner. Levi Strauss and Co.'s request is denied.

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc.04–6940 Filed 3–24–04; 3:16 pm]

BILLING CODE 3510–DR–S

DEPARTMENT OF DEFENSE

Defense Contract Management Agency; Proposed Collection; Comment Request

AGENCY: Defense Contract Management Agency, DoD.

ACTION: Notice.

In compliance with Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Defense Contract Management Agency announces the proposed reinstatement of a public information collection and seeks public comment on the provisions thereof. Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by May 25, 2004.

ADDRESSES: Written comments and recommendations on the proposed information collection should be sent to Director, Defense Contract Management Agency, Attn: Gary Moorman, 6350 Walker Lane, Suite 300 Alexandria, VA 22310.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the above address, or call Mr. Gary Moorman, at 703–254–2134.

Title; Associated Form; and OMB Number: Request for Government Approval for Aircrew Qualifications and Training, DD Form 2627, OMB No. 0704–0347; Request for Approval of Contractor Flight Crewmember, DD Form 2627, OMB No. 0704–0347 (both forms have the same OMB number).

Needs and Uses: The information collection requirement is necessary to request qualification training for contractor crewmembers. The DD Form 2628 requests approval for contractor personnel to function as a flight crewmember.

Affected Public: Individuals; business or other for profit; not-for-profit institutions; State, local or tribal government.

Annual Burden Hours: 7.

Number of Respondents: 42.

Responses Per Respondent: 2.

Average Burden Per Response: 5 minutes.

Frequency: On occasion.

SUPPLEMENTARY INFORMATION:

Summary of Information Collection

The requirement to have government approval of contract flight crewmembers is in Defense Contract Management Agency Directive 1, Chapter 8, Contractor's Flight and Ground Operations. The contractor provides a personal history and requests the government approve training in a particular type government aircraft (Form 2627). The contractor certifies the crewmember has passed a flight evaluation and, with the Form 2628, requests approval for the personnel to operate and fly government aircraft. Without the approvals, the contractor cannot use their personnel as requested.

Dated: March 22, 2004.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 04–6762 Filed 3–25–04; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Office of the Secretary

TRICARE; Implementation of the TRICARE Home Health Agency Prospective Payment System

AGENCY: Office of the Secretary, Department of Defense

ACTION: Notice of implementation of Home Health Agency Prospective Payment System.

SUMMARY: This notice is to advise interested parties of the phased-in implementation of the Home Health Agency Prospective Payment System (HHA PPS). Public notification of HHA PPS implementation was required under a previous interim final rule (67 FR 40597) published in the **Federal Register** on June 13, 2002, if TRICARE was unable to effectively and efficiently implement the HHA PPS within the specified statutory effective date of August 12, 2002.

The HHA PPS will be implemented with the start health care delivery date of the following regional groupings of states under each of the TRICARE Next Generation of Contracts (T–Nex); *e.g.*, as of June 1, 2004, home health agency services in the state of Washington will be processed and paid under the HHA PPS as part of the West T-Nex regional contract.

T-Nex region/contractor	States	Start healthcare delivery
North (Health Net Federal Services, Inc.)	Illinois, Indiana, Kentucky, Michigan, Ohio, Wisconsin, West Virginia, Virginia (except the Northern Virginia/National Capital Area), North Carolina, Eastern Iowa, Rock Island, IL, Fort Campbell catchment area of Tennessee.	1 July 2004.
	Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Northern Virginia, West Virginia (portion).	1 September 2004.
South (Humana Military Healthcare Services)	Oklahoma, Arkansas and major portions of Texas and Louisiana.	1 November 2004.
	Alabama, Florida, Georgia, Mississippi, Eastern Louisiana, South Carolina, Tennessee, small area of Arkansas, New Orleans area.	1 August 2004.
West (TriWest Healthcare Alliance Corp.)	Washington, Oregon, Northern Idaho	1 June 2004.
	California, Hawaii, Alaska	1 July 2004.
	Arizona, Colorado, Idaho, Iowa, Kansas, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, western portion of Texas, Wyoming.	1 October 2004.

FOR FURTHER INFORMATION CONTACT: David Bennett, Medical Benefits and Reimbursement Systems, TRICARE Management Activity, telephone (303) 676–3494.

Dated: March 22, 2004.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 04–6761 Filed 3–25–04; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Science Board

AGENCY: Department of Defense.

ACTION: Notice of advisory committee meeting.

SUMMARY: The Defense Science Board (DSB) Task Force on Strategic Strike Skills will meet in closed session on April 14, 2004, in Arlington, VA. The Task Force will assess the future strategic strike force skills needs of the Department of Defense (DoD).

The mission of the DSB is to advise the Secretary of Defense and the Under Secretary of Defense for Acquisition, Technology & Logistics on scientific and technical matters as they affect the perceived needs of the Department of Defense. Last summer the DSB assessed DoD needs for future strategic strike forces. Assessed was the application of technology for non-nuclear weapons systems, communications, planning systems, and intelligence as well as the integration of strategic strike with active defenses as part of the new triad. This "skills" study will complement the previous strategic forces study by focusing on the people and the skills necessary to develop, maintain, plan, and successfully execute future strategic strike forces. At this meeting, the Task Force will: Assess current skills available, both nuclear and non-nuclear of current long-range strike forces; identify, assess and recommend new/modified/enhanced skill sets necessary for successful future strike force development, planning, and operations; and recommend a strategy for the successful evolution of the current skills to those required by future strike forces.

In accordance with section 10(d) of the Federal Advisory Committee Act, Pub. L. 92–463, as amended (5 U.S.C. app. II), it has been determined that this Defense Science Board Task Force meeting concerns matters listed in 5 U.S.C. 552b(c)(1) and that, accordingly, the meeting will be closed to the public.

Dated: March 22, 2004.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 04–6760 Filed 3–25–04; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Department of the Army

Army Science Board; Notice of Open Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), announcement is made of the following Committee Meeting:

Name of Committee: Army Science Board (ASB).

Date(s) of Meeting: April 1–2, 2004.

Time(s) of Meeting: 0800–1700, April 1, 2004, 0800–1700, April 2, 2004.

Place: Arlington, VA.

Agenda: The FCS Urban Operations Study and Force Balance Study of the Army Science Board FY04 Summer Studies are holding a joint plenary on April 1–2, 2004. The meetings will be held at the Crystal City Sheraton in Arlington, VA and will begin at 0800 hrs on the 1st and will end at approximately 1700 hrs on the 2nd. For further information on the FCS Urban Operations Study, please contact MAJ Al Visconti at (865) 574–8798 or e-mail at *viscontiaj@ornl.gov*. For the Force Balance Study, please contact MAJ Al Klee at (703) 604–2212 or e-mail at *alvin.klee@hqda.army.mil*.

Wayne Joyner,

Program Support Specialist, Army Science Board.

[FR Doc. 04–6807 Filed 3–25–04; 8:45 am]

BILLING CODE 3710–08–M

DEPARTMENT OF DEFENSE

Defense Logistics Agency

Notice of Availability of a Final Environmental Impact Statement

AGENCY: Defense National Stockpile Center, DoD.

ACTION: Notice of availability of a Final Mercury Management Environmental Impact Statement.

SUMMARY: The Defense Logistics Agency (DLA) announces the availability of its Final Mercury Management Environmental Impact Statement (Final EIS). This announcement is pursuant to

the Council on Environmental Quality's regulations (40 CFR parts 1500–1508) and DLA's regulation (DLAR 1000.22) that implement the National Environmental Policy Act (NEPA).

The Defense National Stockpile Center (DNSC) inventory of elemental mercury (approximately 4,436 metric tons) is currently stored in enclosed warehouses at four sites in the United States: Near New Haven, Indiana; in Oak Ridge, Tennessee; in Hillsborough, New Jersey; and near Warren, Ohio. Because the mercury has been declared in excess of national defense needs, DNSC must decide on a strategy for the long-term management of this excess commodity. The Final EIS analyzes in detail three alternatives for managing the National Defense Stockpile inventory of excess mercury: (1) Consolidated storage of the mercury stockpile at one site, (2) no-action, *i.e.*, leave the mercury at the existing storage locations, and (3) sale of the stockpile. DNSC's preferred alternative is consolidated storage. The Final EIS evaluates a range of locations that would be environmentally acceptable consolidation sites.

The Final EIS reflects changes made in response to comments received during the public comment period on the Draft EIS. No sooner than 30 days after the United States Environmental Protection Agency's Notice of Availability for DNSC's Final Mercury Management EIS is published in the **Federal Register**, the DLA intends to issue a Record of Decision (ROD) which will announce the selection of the alternative that will be implemented. DLA will publish its ROD in the **Federal Register**.

ADDRESSES: Bound copies of the Final EIS (about 1000 pages) and Executive Summary (about 20 pages) are available by writing to: Attention: Project Manager, Mercury Management EIS; DNSC–E; Defense National Stockpile Center, 8725 John J. Kingman Road, Suite 3229, Fort Belvoir, VA 22060–6223, or calling toll free at 1–888–306–6682. Electronic versions of the Executive Summary and the Final EIS are found on the Internet at *http://www.mercuryeis.com*. Copies of the Final EIS may also be reviewed at the information repository locations listed in the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Requests for information can be made by: Leaving a voice message at 1–888–306–6682; faxing a message to 1–888–306–8818; e-mailing a request to *information@mercuryeis.com*; or accessing the Mercury Management EIS Web site at *http://www.mercuryeis.com*.

SUPPLEMENTARY INFORMATION: The DNSC is responsible for the disposition of stockpiled materials declared in excess of national defense needs. The United States Congress has determined that the U.S. Department of Defense no longer needs to maintain a stockpile of commodity grade mercury because of the increased use of mercury substitutes and because of increases in the nation's secondary mercury production through recovery and recycling. The DNSC excess mercury was offered for sale in open competitions until 1994 when concerns over mercury accumulation in the environment prompted DNSC to suspend sales. The DNSC inventory of mercury (approximately 4,436 metric tons) is stored in enclosed warehouses at four sites in the United States: New Haven, Indiana (557 metric tons); Oak Ridge, Tennessee (699 metric tons); Hillsborough, New Jersey (2,617 metric tons); and Warren, Ohio (564 metric tons).

As custodian of the mercury, DNSC must decide on a strategy for long-term management of this material. In compliance with NEPA and DLA Regulation 1000.22, "Environmental Considerations in DLA Actions in the United States," DNSC prepared the EIS to evaluate the environmental impacts of a range of reasonable alternatives for long-term management (*i.e.*, 40 years) of the excess mercury. The alternatives are: (1) No action, *i.e.*, maintaining storage at the four existing sites; (2) consolidation and storage at one of three current DNSC mercury storage sites or at another location; and (3) sale of the mercury inventory.. Three other candidate locations (*i.e.*, Hawthorne Army Depot, Hawthorne, Nevada; PEZ Lake Development, Romulus, New York; and Utah Industrial Depot, Tooele, Utah) were evaluated as possible consolidation sites and to analyze the environmental acceptability of a wider range of sites. The PEZ Lake Development site is included in the EIS to broaden the range of environmental and socioeconomic settings analyzed; however, the site is no longer under consideration as a consolidated storage site. The company which manages the site, withdrew it from consideration based on business development plans.

The Final EIS describes the potential environmental, human health, and socioeconomic impacts of these alternatives, together with cost considerations. Several treatment technologies were considered as possible alternatives for mercury management. Based on the immaturity of bulk mercury treatment technologies and the lack of an EPA-approved path forward, bulk treatment and disposal of elemental mercury is not considered viable at this time and is not evaluated in detail in the Final EIS.

The DLA's preferred alternative is consolidated storage at one location. Managing the mercury at one site rather than at multiple sites would simplify storage operations and result in economies of scale (fewer resources would be required to maintain the mercury inventory). Consolidating the excess DNSC mercury inventory at one site does not result in significant environmental impacts at any site analyzed and would slightly improve environmental conditions at the sites where the mercury would be removed. The preferred alternative is also compatible with DNSC's long-term depot closure plans. The EIS evaluates a range of locations that would be acceptable consolidation sites. If a site other than one of those analyzed in the Final EIS is selected, additional environmental documentation would be prepared as needed.

The Department of Energy (DOE) and EPA are Cooperating Agencies in the preparation of this Final EIS. DOE is recognized because of their special expertise and because some of the DNSC excess mercury is stored at its Y–12 National Security Complex in Oak Ridge, Tennessee. EPA is recognized because of its special expertise in the areas of mercury fate and effects in the environment, mercury stabilization and disposal technologies, and the regulation of hazardous material.

The public comment period for the Draft EIS began with the publication of the EPA Notice of Availability in the **Federal Register** on April 11, 2003, and continued until July 18, 2003. In response to public requests to extend the comment period, the deadline for submittal of comments was extended informally until September 2, 2003. The Draft EIS or the Executive Summary was distributed to more than 830 individuals and organizations.

During the comment period, DNSC held seven meetings to receive comments on the Draft EIS. The meetings were held in the communities that could be affected by the proposed actions, as well as in Washington, DC. Approximately 230 people attended the public meetings. The transcript of each meeting is available at a nearby information repository. Locations of these repositories are listed below:

Allen County Public Library, 435 Ann Street, New Haven, Indiana 46774.

Bridgewater Branch Library, North Bridge Street and Vogt Drive, Bridgewater, New Jersey 08807.
Fairfax County Public Library, 12000 Government Center Parkway, Suite 324, Fairfax, Virginia 22035.
Ford Memorial Library, 7169 North Main Street, Ovid, New York 14521.
Hillsborough Public Library, 379 South Branch Road, Hillsborough, New Jersey 08844.
Martin Luther King Jr. Library, 901 G Street, NW., Washington, DC 20001.
Mineral County Public Library, P.O. Box 1390, Hawthorne, Nevada 89415.
Oak Ridge Public Library, 1401 Oak Ridge Turnpike, Oak Ridge, Tennessee 37830.
Raritan Valley Community College, Evelyn S. Field Library, North Branch, Route 28 and Lamington Road, Somerville, New Jersey 08876.
Seneca Army Depot, 5786 State Route 96, Building 123, Romulus, New York 14541.
Somerville Public Library, 35 West End Avenue, Somerville, New Jersey 08876.
Tooele City Public Library, 128 West Vine Street, Tooele, Utah 84074.
Warren-Trumbull County Public Library, 444 Mahoning Avenue, NW., Warren, Ohio 44483.
Waterloo Library and Historical Society, 31 East Williams Street, Waterloo, New York 13165.
West End Branch Library, 1101 24th and L Street, NW., Washington, DC 20037.

The DNSC received 295 comment documents (*i.e.*, letters, e-mails, faxes, voice messages, comment forms, and meeting transcripts) containing 633 comments. Volume II of the Final EIS presents the comment documents, identifies the specific comment(s) from each, and provides DNSC's responses. The majority of the comments received on the Draft EIS are related to the Consolidated Storage Alternative, impacts on human health and safety, and environmental and economic impacts.

Input from the public meetings along with comments received by other means (*i.e.*, mail, phone, fax, e-mail, and Web site), were used by DNSC in preparing the Final EIS. DNSC considered all comments received.

A copy of the Final EIS is available for public review at the information repositories listed in this notice. No sooner than 30 days after the EPA's Notice of Availability for DNSC's Final Mercury Management EIS is published in the **Federal Register**, the DLA intends to issue a ROD which will announce the selection of the alternative that will be implemented. DLA will publish its ROD in the **Federal Register**.

Issued at Fort Belvoir, Virginia, on this 08 day of March, 2004.

Cornel A. Holder,

Administrator, Defense National Stockpile Center, Defense Logistics Agency.

[FR Doc. 04–6435 Filed 3–25–04; 8:45 am]

BILLING CODE 3620–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before May 25, 2004.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: March 22, 2004.

Angela C. Arrington,

Leader, Regulatory Information Management Group, Office of the Chief Information Officer.

Office of Postsecondary Education

Type of Review: Reinstatement.

Title: Annual Performance Report for the Upward Bound, Upward Bound Math/Science, and Veterans Upward Bound Programs.

Frequency: Annually.

Affected Public: Not-for-profit institutions; State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 950

Burden Hours: 14,250.

Abstract: Upward Bound grantees must submit the report annually. The reports are used to evaluate the performance of grantees prior to awarding continuation funding and to assess a grantee's prior experience at the end of the budget period. The Department will also aggregate the data across grantees to provide descriptive information on the program and to analyze the impact of the program on the academic progress of participating students.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov*, by selecting the "Browse Pending Collections" link and by clicking on link number 2482. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, SW, Room 4050, Regional Office Building 3, Washington, DC 20202–4651 or to the e-mail address *vivian_reese@ed.gov*. Requests may also be electronically mailed to the internet address *OCIO_RIMG@ed.gov* or faxed to 202–708–9346. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Joseph Schubart at his e-mail address *Joe.Schubart@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 04–6769 Filed 3–25–04; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

National Advisory Committee on Institutional Quality and Integrity, (National Advisory Committee); Meeting

AGENCY: National Advisory Committee on Institutional Quality and Integrity, Department of Education.

What Is the Purpose of This Notice?

The purpose of this notice is to announce the public meeting of the National Advisory Committee and invite third-party oral presentations before the Committee. This notice also presents the proposed agenda and informs the public of its opportunity to attend this meeting. The notice of this meeting is required under section 10(a)(2) of the Federal Advisory Committee Act.

When and Where Will the Meeting Take Place?

We will hold the public meeting on June 10, 2004, from 8:45 a.m. until approximately 5:30 p.m., and on June 11, 2004, from 8 a.m. until approximately 4 p.m. at the Hotel Monaco, 700 F Street, NW., Washington, DC 20004. You may call the hotel on (202) 628–7177 to inquire about rooms.

What Assistance Will Be Provided to Individuals with Disabilities?

The meeting site is accessible to individuals with disabilities. If you will need an auxiliary aid or service to participate in the meeting (*e.g.*, interpreting service, assistive listening device, or materials in an alternate format), notify the contact person listed in this notice at least two weeks before the scheduled meeting date. Although we will attempt to meet a request received after that date, we may not be able to make available the requested auxiliary aid or service because of insufficient time to arrange it.

Who Is the Contact Person for the Meeting?

Please contact Ms. Bonnie LeBold, the Executive Director of the National Advisory Committee on Institutional Quality and Integrity, if you have questions about the meeting. You may contact her at the U.S. Department of Education, room 7007, MS 7592, 1990 K St., NW, Washington, DC 20006, telephone: (202) 219–7009, fax: (202) 219–7008, e-mail: *Bonnie.LeBold@ed.gov*.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service at 1–800–877–8339.

What Is the Authority for the National Advisory Committee?

The National Advisory Committee on Institutional Quality and Integrity is established under Section 114 of the Higher Education Act (HEA) as amended, 20 U.S.C. 1011c.

What Are the Functions of the National Advisory Committee?

The Committee advises the Secretary of Education about:

- The establishment and enforcement of the criteria for recognition of accrediting agencies or associations under subpart 2 of part H of Title IV, HEA.
- The recognition of specific accrediting agencies or associations.
- The preparation and publication of the list of nationally recognized accrediting agencies and associations.
- The eligibility and certification process for institutions of higher education under Title IV, HEA.
- The development of standards and criteria for specific categories of vocational training institutions and institutions of higher education for which there are no recognized accrediting agencies, associations, or State agencies in order to establish the interim eligibility of those institutions to participate in Federally funded programs.
- The relationship between: (1) accreditation of institutions of higher education and the certification and eligibility of such institutions, and (2) State licensing responsibilities with respect to such institutions.
- Any other advisory functions relating to accreditation and institutional eligibility that the Secretary may prescribe.

What Items Will Be On the Agenda for Discussion at the Meeting?

Agenda topics will include the review of agencies that have submitted petitions for initial recognition or renewal of recognition, as well as agencies that have submitted interim reports.

What Agencies Will the Advisory Committee Review at the Meeting?

The Advisory Committee will review the following agencies during its June 10–11, 2004, meeting.

Nationally Recognized Accrediting Agencies

Petitions for Initial Recognition

1. Middle States Commission on Secondary Schools (Requested scope of recognition: The accreditation of institutions with postsecondary, non-degree granting career and technology programs, in Delaware, Maryland, New Jersey, New York, Pennsylvania, the Commonwealth of Puerto Rico, the District of Columbia, and the U.S. Virgin Islands)

Petitions for Renewal of Recognition

1. Accrediting Bureau of Health Education Schools (Current scope of recognition: The accreditation of private, postsecondary allied health education institutions and institutions that offer predominantly allied health programs, private medical assistant programs, and public and private medical laboratory technician programs leading to the Associate of Applied Science and the Associate of Occupational Science degrees.) (Requested scope of recognition: The accreditation of private, postsecondary institutions in the United States offering predominantly allied health education, medical assistant programs, and medical laboratory technician programs leading to a certificate, diploma or the Associate of Applied Science and Associate of Occupational Science degrees, including those offered via distance education.)

2. Association of Theological Schools in the United States and Canada, Commission on Accrediting (Current scope of recognition: The accreditation and preaccreditation ("Candidate for Accredited Status") of freestanding institutions, as well as schools affiliated with larger institutions, that offer graduate professional education for ministry and graduate study of theology in the United States) (Requested scope of recognition: The accreditation and preaccreditation ("Candidate for Accredited Membership") of theological schools and seminaries, as well as schools or programs that are parts of colleges or universities, in the United States, offering post baccalaureate degrees in professional and academic theological education, including delivery via distance education.)

3. Commission on Massage Therapy Accreditation (Current scope of recognition: The accreditation of institutions in the United States, that award postsecondary certificates or diplomas in the practice of massage therapy and bodywork.) (Requested scope of recognition: the accreditation of institutions in the United States, that award postsecondary certificates, postsecondary diplomas, and Associates degrees, in the practice of massage therapy and bodywork.)

4. North Central Association Commission on Accreditation and School Improvement, Board of Trustees (Requested scope of recognition: the

accreditation and preaccreditation ["Candidacy status"] of schools offering non-degree, postsecondary education in Arizona, Arkansas, Colorado, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, South Dakota, West Virginia, Wisconsin, Wyoming, and in the Navajo Nation.)

Interim Reports (An interim report is a follow-up report on an accrediting agency's compliance with specific criteria for recognition that was requested by the Secretary when the Secretary granted renewed recognition to the agency.)

1. American Academy for Liberal Education.

2. American Optometric Association, Accreditation Council on Optometric Education.

3. American Speech-Language-Hearing Association, Council on Academic Accreditation in Audiology and Speech-Language Pathology.

4. National Accrediting Commission of Cosmetology Arts and Sciences.

5. National Association of Schools of Art and Design, Commission on Accreditation.

6. National Association of Schools of Dance, Commission on Accreditation.

7. National Association of Schools of Music, Commission on Accreditation, Commission on Non-Degree-Granting Accreditation, Commission on Community/Junior College Accreditation.

8. National Association of Schools of Theatre, Commission on Accreditation.

9. New England Association of Schools and Colleges, Commission on Institutions of Higher Education.

10. New England Association of Schools and Colleges, Commission on Technical and Career Institutions.

11. New York State Board of Regents, the Commissioner of Education.

12. North Central Association of Colleges and Schools, The Higher Learning Commission.

13. Northwest Commission on Colleges and Universities.

State Agencies Recognized for the Approval of Public Postsecondary Vocational Education

Petition for Initial Recognition

1. Pennsylvania State Board for Vocational Education.

Petition for Renewal of Recognition

1. Puerto Rico State Agency for the Approval of Public Postsecondary Vocational, Technical Institutions and Programs.

Interim Reports

1. Oklahoma Board of Career and Technology Education.

State Agencies Recognized for the Approval of Nurse Education

Petitions for Renewal of Recognition

1. Montana State Board of Nursing.
2. North Dakota Board of Nursing.

Who Can Make Third-Party Oral Presentations at This Meeting?

We invite you to make a third-party oral presentation before the National Advisory Committee concerning the recognition of any agency published in this notice.

How Do I Request To Make an Oral Presentation?

You must submit a written request to make an oral presentation concerning an agency listed in this notice to the contact person *so that the request is received via mail, fax, or e-mail no later than May 21, 2004.* Your request *(no more than 6 pages maximum)* must include:

1. The names, addresses, phone and fax numbers, and e-mail addresses of all persons seeking an appearance,

2. The organization they represent, and

3. A brief summary of the principal points to be made during the oral presentation.

If you wish, you may attach documents illustrating the main points of your oral testimony. Please keep in mind, however, that *any attachments are included in the 6-page limit.* Please do not send materials directly to Committee members. Only materials submitted by the deadline to the contact person listed in this notice and in accordance with these instructions become part of the official record and are considered by the Committee in its deliberations. Documents received after the May 21, 2004 deadline will not be distributed to the Advisory Committee for their consideration. Individuals making oral presentations may not distribute written materials at the meeting.

If I Cannot Attend the Meeting, Can I Submit Written Comments Regarding an Accrediting Agency in Lieu of Making an Oral Presentation?

This notice requests third-party oral testimony, not written comment. A request for written comments on agencies that are being reviewed during this meeting was published in the **Federal Register** on February 5, 2004. The Advisory Committee will receive and consider only written comments submitted by the deadline specified in that **Federal Register** notice.

How Do I Request To Present Comments Regarding General Issues Rather Than Specific Accrediting Agencies?

At the conclusion of the meeting, the Committee, at its discretion, may invite attendees to address the Committee briefly on issues pertaining to the functions of the Committee, which are listed earlier in this notice. If you are interested in making such comments, you should inform Ms. LeBold before or during the meeting.

How May I Obtain Access to the Records of the Meeting?

We will record the meeting and make a transcript available for public inspection at the U.S. Department of Education, 1990 K St., NW., Washington, DC 20006 between the hours of 9 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays. It is preferred that an appointment be made in advance of such inspection.

How May I Obtain Electronic Access to This Document?

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/legislation/FedRegister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register.** Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Authority: 5 U.S.C. Appendix 2.

Dated: March 19, 2004.

Sally L. Stroup,

Assistant Secretary for Postsecondary Education.

[FR Doc. 04–6758 Filed 3–25–04; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Tribal Leaders Summit: Solicitation of Comments

AGENCY: Department of Energy.

ACTION: Notice of Comment Period.

SUMMARY: The Department of Energy is soliciting comments related to the implementation of its American Indian and Alaska Native Tribal Government Policy and its interactions with tribal governments.

DATES: Interested parties should submit comments in writing on or before April 30, 2004.

ADDRESSES: Fax comments to (202) 586–7314, attention Kristen Ellis. If you are unable to send your comments by fax, please contact Kristen Ellis, telephone (202) 586–5810, to make other arrangements.

FOR FURTHER INFORMATION CONTACT: Kristen Ellis, (202) 586–5810.

SUPPLEMENTARY INFORMATION: The Department of Energy hosted the first DOE/Tribal Leaders Summit on February 23, 2004 in Washington, DC.

This event followed the government-to-government format required for interactions with tribal governments, and was therefore not open to the public. The goal of the Summit was to identify successes and barriers to communication between tribal entities and the Department, and to work towards developing a framework for future interactions.

Various DOE Program Offices presented information of possible interest to tribes, including the offices of Energy Efficiency and Renewable Energy, Economic Impact and Diversity, Nuclear Energy, Science and Technology, Environmental Management, and the National Nuclear Security Administration. Tribal representatives from the National Congress of American Indians (NCAI), Council for Energy Resource Tribes (CERT), the Southern Ute nation, and the DOE State and Tribal Government Working Group (STGWG) also addressed the participants with their individual, tribal and/or organizational perspective.

At the Summit, the Department announced a period to solicit further comments from tribal participants. Comments might address future topical or regional summits, protocols, or departmental goals or procedures that affect tribes. With this notice, the Department is soliciting comments from all interested stakeholders, including state or local governments or those living or working near the Department's sites or who otherwise may be affected by the Department's activities related to tribes. Although the Department will accept comments from any source, it is primarily interested in comments from any interested Tribal leader or Tribal leader's representative, whether or not they attended the summit. These comments will be considered by the Department as it implements its policy. A copy of the comment form distributed at the Summit is available at *http://www.ci.doe.gov.*

Rick A. Dearborn,

Assistant Secretary, Congressional and Intergovernmental Affairs.

[FR Doc. 04–6797 Filed 3–25–04; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Notice of Renewal of the Secretary of Energy Advisory Board

Pursuant to section 14(a)(2)(A) of the Federal Advisory Committee Act and in accordance with title 41 of the Code of Federal Regulations, section 101–6.1015, and following consultation with the Committee Management Secretariat of the General Services Administration, notice is hereby given that the Secretary of Energy Advisory Board (the Board) has been renewed for an additional two-year period, beginning in March 2004.

The Board will continue to provide independent, balanced, and authoritative advice to the Secretary of Energy on matters concerning the Department's management, basic science, research, development and technology activities; energy and national security responsibilities, environmental cleanup activities; energy-related economic activities; the operations of the Department; and on any other activities and operations of the Department of Energy as the Secretary may direct.

The Board members are selected to assure well-balanced representation in fields of importance to the Department of Energy, such as management, basic science, renewable energy, energy policy, environmental science, economics, business expertise and broad public policy interests. Membership of the Board will continue to be determined in accordance with the requirements of the Federal Advisory Committee Act (Public Law 92–463) and implementing regulations.

The renewal of the Board has been determined to be in the public interest, important and vital to the conduct of the Department's business in connection with the performance of duties established by statute for the Department of Energy. The Board will operate in accordance with the provisions of the Federal Advisory Committee Act (Public Law 92–463), the General Services Administration Final Rule on Federal Advisory Committee Management, and other directives and instructions issued in implementation of those acts.

FOR FURTHER INFORMATION CONTACT: Ms. Rachel M. Samuel, U.S. Department of Energy, ME–76, FORS, Washington, DC 20585, Telephone: (202) 586–3279.

Issued in Washington, DC on March 19, 2004.

James N. Solit,

Advisory Committee Management Officer.

[FR Doc. 04–6796 Filed 3–25–04; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

[Docket No. EA–258–A]

Application To Export Electric Energy; Brascan Energy Marketing Inc.

AGENCY: Office of Fossil Energy, DOE.

ACTION: Notice of application.

SUMMARY: Brascan Energy Marketing Inc. (BEMI) has applied to renew its authority to transmit electric energy from the United States to Canada pursuant to section 202(e) of the Federal Power Act.

DATES: Comments, protests or requests to intervene must be submitted on or before April 12, 2004.

ADDRESSES: Comments, protests or requests to intervene should be addressed as follows: Office of Coal & Power Import/Export (FE–27), Office of Fossil Energy, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–0350 (FAX 202–287–5736).

FOR FURTHER INFORMATION CONTACT: Xavier Puslowski (Program Office) 202–586–4608 or Michael Skinker (Program Attorney) 202–586–2793.

SUPPLEMENTARY INFORMATION: Exports of electricity from the United States to a foreign country are regulated and require authorization under section 202(e) of the Federal Power Act (FPA) (16 U.S.C. 824a(e)).

On April 26, 2002, the Office of Fossil Energy (FE) of the Department of Energy (DOE) issued Order No. EA–258 authorizing Maclaren Energy, Inc. (now known as Brascan Energy Marketing Inc.) to transmit electric energy from the United States to Canada as a power marketer. That two-year authorization expires on April 26, 2004.

On February 12, 2004, FE received an application from Brascan Energy Marketing Inc. (BEMI) to renew its authorization to transmit electric energy from the United States to Canada. BEMI is a power marketer that is incorporated under the laws of Ontario, Canada, with its principal place of business in

Gatineau, Quebec, Canada. BEMI does not own generation or transmission assets and does not have a franchised electric power service area. BEMI operates as a wholesale and retail marketer of electric power and arranges services in related areas such as fuel supplies and transmission services.

BEMI proposes to arrange for the delivery of electric energy to Canada over the existing international transmission facilities owned by Basin Electric Power Cooperative, Bonneville Power Administration, Eastern Maine Electric Cooperative, International Transmission Company, Joint Owners of the Highgate Project, Long Sault, Inc., Maine Electric Power Company, Maine Public Service Company, Minnesota Power Inc., New York Power Authority, Niagara Mohawk Power Corporation, Northern States Power, and Vermont Electric Transmission Company.

The construction, operation, maintenance, and connection of each of the international transmission facilities to be utilized by BEMI, as more fully described in the application, has previously been authorized by a Presidential permit issued pursuant to Executive Order 10485, as amended.

Procedural Matters

Any person desiring to become a party to this proceeding or to be heard by filing comments or protests to this application should file a petition to intervene, comment or protest at the address provided above in accordance with §§ 385.211 or 385.214 of the FERC's Rules of Practice and Procedures (18 CFR 385.211, 385.214). Fifteen copies of each petition and protest should be filed with DOE on or before the date listed above.

Comments on the BEMI application to export electric energy to Canada should be clearly marked with Docket EA–258–A. Additional copies are to be filed directly with Patricia Bood, General Counsel, Brascan Energy Marketing Inc., 480 de la Cite Blvd., Suite 200, Gatineau, Quebec J8T 8R3 and Amy S. Koch, Patton Boggs LLP, 2550 M Street, NW., Washington, DC 20037.

A final decision will be made on this application after the environmental impacts have been evaluated pursuant to the National Environmental Policy Act of 1969, and a determination is made by the DOE that the proposed action will not adversely impact on the reliability of the U.S. electric power supply system.

Copies of this application will be made available, upon request, for public inspection and copying at the address provided above or by accessing the Fossil Energy Home Page at *http://www.fe.de.gov*. Upon reaching the Fossil Energy Home page, select "Electricity Regulation," and then "Pending Procedures" from the options menus.

Issued in Washington, DC, on March 18, 2004.

Anthony J. Como,

Deputy Director, Electric Power Regulation, Office of Coal & Power Import/Export, Office of Coal & Power Systems, Office of Fossil Energy.

[FR Doc. 04–6798 Filed 3–25–04; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Innovative Energy Systems Pilot Project—Chemicals

AGENCY: Golden Field Office, U.S. Department of Energy.

ACTION: Notice of issuance of a funding opportunity announcement.

SUMMARY: The U.S. Department of Energy (DOE), is announcing its intention to establish a five-year collaborative pilot project to jointly support the research, development, and demonstration of projects which will improve the energy efficiency and enhance the productivity of energy systems throughout the chemical industry that are integrated with the chemical processing and energy supply systems within plant boundaries. This pilot project was conceived by Vision 2020 (an organization representing the chemical industry's technology development interests) with the goal of commercializing one or more innovative energy systems that will have widespread application and yield significant energy savings to the chemical industry. Future technology demonstrations of successful research and development (R&D) are anticipated to be conducted by the U.S. chemical industry once the technology risks have been minimized and the costs associated with any technology have been validated by the Innovative Energy Systems Pilot Project.

DATES: The Funding Opportunity Announcement was issued on March 16, 2004.

ADDRESSES: To obtain a copy of the Announcement, interested parties should access the DOE Golden Field Office Home page at *http://www.go.doe.gov/funding.html*, click on the word "access." The link will open the Industry Interactive Procurement System (IIPS) Web site and provide instructions on using IIPS. The Announcement can also be obtained directly through IIPS at *http://e-center.doe.gov* by browsing opportunities by Contract Activity, for those Announcements issued by the Golden Field Office. DOE will not issue paper copies of the Announcement.

IIPS provides the medium for disseminating Announcements, receiving financial assistance applications, and evaluating the applications in a paperless environment. The application may be submitted in the Industry Interactive Procurement System (IIPS) by the applicant or a designated representative that receives authorization from the applicant; however, the application documentation must reflect the name and title of the representative authorized to enter the applicant into a legally binding contract or agreement. The applicant or the designated representative must first register in IIPS, entering their first name and last name, and then entering the company name/address of the applicant.

For questions regarding the operation of IIPS, contact the IIPS Help Desk at *IIPS_HelpDesk@e-center.doe.gov* or at (800) 683–0751.

FOR FURTHER INFORMATION CONTACT: Jean Siekerka, Contract Specialist, DOE Golden Field Office, 1617 Cole Boulevard, Golden, CO 80401–3393 or via facsimile to Jean at (303) 275–4788 or electronically to *jean.siekerka@go.doe.gov*.

SUPPLEMENTARY INFORMATION: This Funding Opportunity Announcement (FOA) employs a two-phased approach to achieve its objectives:

- *Phase 1* involves selecting a Project Integrator with the expertise, resources, and project and contract management capabilities to solicit, review, select and manage contracts for innovative technology development projects addressing the aforementioned energy-saving opportunities in the chemical industry.
- *Phase 2* involves the Project Integrator conducting a fair and open competitive Innovative Energy Systems Challenge (Challenge) solicitation (Request for Proposals, RFP) to attract potential innovative energy systems technology development projects that meet the following objectives:

1. Target the often overlooked areas of high-risk R&D in the areas of energy systems integrated with chemical processing and energy supply systems within chemical plant boundaries;

2. Through a fair and open competitive solicitation process, identify and facilitate development of innovative technologies that could cost-effectively achieve a significant (≥30 percent) reduction in on-site and off-site energy losses in the chemical industry;

3. Identify opportunities where energy efficiency and/or renewable energy technologies can support achievement of the ≥30 percent energy savings objective;

4. Lead to one or more innovative energy system designs ready for pilot-scale testing and/or computer models ready for beta-testing that address the aforementioned energy savings objective; and

5. Deliver a high-quality commercialization plan for the selected technology development projects.

After obtaining DOE cost share approval, the Project Integrator will issue contracts for the individual technology development projects, manage the contracts, and provide required reports to DOE.

Phase 1 funding: Approximately $500,000-$750,000 is expected to be available for the first two years to fund the Project Integrator organization. No cost share will be required under this phase.

Phase 2 funding: Approximately $6,000,000 in DOE cost share funding is expected to be available for an estimated five to eight projects that would run for up to five years. Individual Phase 2 projects will require either a minimum of 20% Non-Federal cost share for applied research and/or development projects or a minimum of 50% Non-Federal cost share for projects involving commercial demonstration, as appropriate. The Project Integrator will make the determination to fund in whole or in part, any, all, or none of the applications submitted in response to its solicitation, subject to the availability of DOE funds.

Issued in Golden, Colorado, on March 19, 2004.

Jerry L. Zimmer,

Director, Office of Acquisition and Financial Assistance.

[FR Doc. 04-6799 Filed 3-25-04; 8:45 am]

BILLING CODE 6450-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC04-76-000, et al.]

The Narragansett Electric Company, et al.; Electric Rate and Corporate Filings

March 19, 2004.

The following filings have been made with the Commission. The filings are listed in ascending order within each docket classification.

1. The Narragansett Electric Company

[Docket No. EC04-76-000]

Take notice that on March 17, 2004, the Narragansett Electric Company (NEC) filed with the Federal Energy Regulatory Commission an application pursuant to section 203 of the Federal Power Act for approval of the transfer of certain transmission facilities to Rhode Island State Energy Statutory Trust 2000 in connection with the operation of a generation facility in Johnston, Rhode Island. The facilities consist of two short "tap lines."

NEC states that a copy of this application has been served on the Rhode Island Public Utilities Commission.

Comment Date: April 7, 2004.

2. Nevada Power Company

[Docket No. EL04-90-000]

Take note that on March 16, 2004, Nevada Power Company tendered for filing a Petition for the issuance of a Declaratory Order regarding the contractual rights and obligations of Nevada Power Company's Transmission Service Agreements with Calpine Corporation and Reliant Energy Services, Inc. that require the use of Nevada Power Companies Centennial Transmission Project.

Comment Date: April 15, 2004.

3. Triton Power Michigan LLC

[Docket No. ER02-1437-001]

Take notice that on March 15, 2004, Triton Power Michigan LLC filed an amendment to its market-based rate tariff in compliance with the Commission's Order Amending Market-Based Rate Tariffs and Authorizations issued November 17, 2003, in Docket Nos. EL01-118-000 and 001, 105 FERC ¶ 61,218 (2003).

Comment Date: April 6, 2004.

4. Thermo Cogeneration Partnership, L.P.

[Docket No. ER02-1785-001]

Take notice that on March 15, 2004, Thermo Cogeneration Partnership, L.P. filed an amendment to its market-based rate tariff in compliance with the Commission's Order Amending Market-Based Rate Tariffs and Authorizations issued November 17, 2003, in Docket Nos. EL01-118-000 and 001, 105 FERC ¶ 61,218 (2003).

Comment Date: April 6, 2004.

5. Wisconsin Power & Light Company

[Docket No. ER03-684-001]

Take notice that on March 16, 2004, Wisconsin Power & Light Company (Wisconsin Power) tendered for filing a Refund Report in response to the Commission's Order issued February 11, 2004, in Docket No. ER03-684-000, 106 FERC ¶ 61,112.

Wisconsin Power states that copies of this filing have been served upon all affected customers, parties to the service list and the Public Service Commission of Wisconsin.

Comment Date: April 6, 2004.

6. Deseret Generation & Transmission Co-operative, Inc.

[Docket No. ER04-221-001]

Take notice that on March 16, 2004, Deseret Generation & Transmission Co-operative, Inc. (Deseret) submitted an informational filing, providing the exact amount paid as a 2003 Rate Rebate to each of its six member cooperatives under Service Agreement Nos. 1 through 6 of FERC Electric Tariff, Original Volume No. 1.

Deseret states that copies of this filing were served upon Deseret's six member cooperatives.

Comment Date: April 6, 2004.

7. DJWG, LLC

[Docket No. ER04-289-001]

Take notice that on March 17, 2004, DJWG, LLC (DJWG) filed a supplement to its application for market-based rates as power marketer filed on December 15, 2003.

Comment Date: April 7, 2004.

8. Idaho Power Company

[Docket No. ER04-495-001]

Take notice that on March 12, 2004, Idaho Power Company (Idaho Power) filed First Revised Service Agreement No. 174 under its Open Access Transmission Tariff. Idaho Power requests an effective date of April 1, 2004.

Comment Date: April 2, 2004.

9. Idaho Power Company

[Docket No. ER04-643-000]

On March 17, 2004, the Commission issued "Notice of Filing" in Docket No. ER04-643-000. The notice was issued in error and is hereby rescinded.

10. New England Power Pool

[Docket No. ER04-654-000]

Take notice that on March 17, 2004, New England Power Pool (NEPOOL) Participants Committee filed to terminate the membership of Solaro Energy Marketing Corporation (Solaro). The Participant Committee seeks an effective date for the termination of the Participant status of Solaro of the earlier of a Commission order accepting the filing, or May 1, 2004, 50 days after the initiation of termination proceedings.

Comment Date: April 7, 2004.

11. Midwest Independent Transmission System Operator, Inc.

[Docket No. ER04–656–000]

Take notice that on March 17, 2004, Midwest Independent Transmission System Operator, Inc. (Midwest ISO) pursuant to sections 35.15 and 131.53 of the Commission regulations, 18 CFR 35.15 and 131.53, submitted Notices of Cancellation for various Transmission Service Agreements under the Midwest ISO Joint Open Access Transmission Tariff.

Midwest ISO has requested waiver of the requirements set forth in 18 CFR 385.2010. Midwest ISO states that it has electronically served a copy of this filing, with attachments, upon all Midwest ISO Members, Member representatives of Transmission Owners and Non-Transmission Owners, the Midwest ISO Advisory Committee participants, as well as all State commissions within the region. In addition, the filing has been electronically posted on the Midwest ISO's Web site at *http://www.midwestiso.org* under the heading "Filings to FERC" for other interested parties in this matter.

Comment Date: April 7, 2004.

12. Mystic I, LLC

[Docket No. ER04–657–000]

Take notice that on March 17, 2004, Mystic I, LLC, filed a notice of succession to the rate schedule of Exelon Mystic, LLC.

Comment Date: April 7, 2004.

13. Southwest Power Pool, Inc.

[Docket No. ER04–658–000]

Take notice that on March 17, 2004, Southwest Power Pool, Inc. (SPP), pursuant to section 205 of the Federal Power Act and section 35.13 of the Commission's regulations submitted revisions to its open access transmission tariff (Tariff) intended to clarify and update certain provisions of the SPP Tariff. SPP seeks an effective date of April 1, 2004, for these changes.

SPP states that it has served a copy of its transmittal letter on each of its Members and Customers, and on all affected State commissions.

Comment Date: April 7, 2004.

14. Fore River Development, LLC

[Docket No. ER04–659–000]

Take notice that on March 17, 2004, Fore River Development, LLC, filed a notice of succession to the rate schedule of Exelon Fore River Development, LLC.

Comment Date: April 7, 2004.

15. Mystic Development, LLC

[Docket No. ER04–660–000]

Take notice that on March 17, 2004, Mystic Development, LLC, filed a notice of succession to the rate schedule of Exelon Mystic Development, LLC.

Comment Date: April 7, 2004.

Standard Paragraph

Any person desiring to intervene or to protest this filing should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's rules of practice and procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. All such motions or protests should be filed on or before the comment date, and, to the extent applicable, must be served on the applicant and on any other person designated on the official service list. This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov*, using the "FERRIS" link. Enter the docket number excluding the last three digits in the docket number filed to access the document. For assistance, call (202) 502–8222 or TTY, (202) 502–8659. Protests and interventions may be filed electronically via the Internet in lieu of paper; *see* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages electronic filings.

Magalie R. Salas,

Secretary.

[FR Doc. E4–682 Filed 3–25–04; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6649–7]

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 the **Federal Register** dated April 4, 2003 (68 FR 16511).

Draft EISs

ERP No. D–AFS–D65029–PA Rating LO, Spring Creek Project Area (SCPA), To Achieve and Maintain Desired Conditions, Allegheny National Forest, Marienville Ranger District, Elk and Forest Counties, PA.

Summary: EPA expressed lack of objections with the proposed action which combines the Preferred Alternative and implementing all the recreation proposals in Alternative 2.

ERP No. D–AFS–J65402–WY Rating EC2, Tongue Allotment Management Plan, Proposal to Continue Livestock Grazing on All or Portions of the 22 Allotment, Bighorn National Forest, Tongue and Medicine Wheel/Paintrock Ranger Districts, Johnson, Sheridan and Bighorn Counties, WY.

Summary: EPA expressed environmental concerns with continuing adverse impacts to water quality from livestock grazing and recreation. Especially impacts to streams and riparian zones from physical disturbance, fecal coliform and other bacteria in streams, and other waterbodies and limited resource to manage recreation and livestock activities.

ERP No. D–AFS–L65447–ID Rating LO, EastBridge Cattle Allotment Management Plan Revision (AMP), Authorization of Continued Grazing, Caribou-Targhee National Forest, Soda Springs Ranger District, Caribou and Bonneville Counties, ID and Lincoln County, WY.

Summary: EPA used a screening tool to conduct a limited review of the draft EIS and based upon the screen, does not foresee having any environmental objections to the proposed project.

ERP No. D–NAS–E12006–FL Rating LO, International Space Research Park (ISRP) to Bring New Research and Development Uses to the John F. Kennedy Center, Brevard County, FL.

Summary: EPA has no objections to the proposed research center.

ERP No. D–SFW–K39083–CA Rating EC2, South Bay Salt Ponds Initial Stewardship Plan, To Maintain and Enhance the Biological and Physical Conditions, South San Francisco Bay, CA.

Summary: EPA expressed environmental concerns about how conclusions were reached regarding air emissions and environmental justice impacts. Concerns were also expressed about the hydraulic models, monitoring plan development, the alternatives

analysis, and Spartina alterniflora eradication. EPA requested that the final EIS clarify or provide additional information to address these concerns.

ERP No. D–UAF–D52001–WV Rating EC2, Aircraft Conversion for the 167th Air Wing (167 AW) of the West Virginia Air National Guard, Converting C–13OH Transport Aircraft to the Larges C–5 Transport Aircraft, Acquisition of Land via Lease, and Construction of Facilities on existing and acquired Parcel, Berkeley County, WV.

Summary: EPA expressed concern related to aircraft noise impacts, land use specific to runway protection zones affecting residences, agricultural land/undeveloped areas and aviation safety resulting from the closure of Runway 17/35. EPA requested additional information to fully assess the impacts associated with the proposed action and its relationship to the surrounding community and the function of the airport.

ERP No. D–USN–E11051–MS Rating LO, Purchase of Land in Hancock County, Mississippi, for a Naval Special Operations Forces Training Range, To Improve Riverine and Jungle Training Available, John C. Stennis Space Center, Hancock County, MS.

Summary: EPA has no environmental objections to the proposed land purchase.

ERP No. DS–NOA–K91008–00 Rating LO, Pelagic Fisheries of the Western Pacific Region, Fishery Management Plan, Regulatory Amendment, Management Measures to Implement New Technologies for the Western Pacific Pelagic Longline Fisheries, Hawaii, American Samoa, Guam and Commonwealth of the Northern Marianas Islands.

Summary: While EPA has no objection to the proposed project, EPA requested clarification on upcoming management measures for FMP and on NMFS's consultation under section 7 of the Endangered Species Act.

Final EISs

ERP No. F–AFS–E65064–AL, Alabama National Forests Revised Land and Resource Management Plan, Implementation, Bankhead National Forest, Lawrence, Winston and Franklin Counties, AL.

Summary: EPA continues to express concerns about designation of source water protection areas and provided additional comments on strengthening forest-wide standards related to protection of water quality.

ERP No. F–AFS–K65247–CA, Giant Sequoia National Monument Management Plan, Implementation, Establishment of Management Directions for Land and Resources, Sequoia National Forest, Fresno, Kern and Tulane Counties, CA.

Summary: EPA expressed continuing concerns regarding the changes in guideline for management of sequoia groves and old forest ecosystems, the deferral of addressing road impacts in the Monument, and the selection of the alternative that offers less specific environmental protections, especially in reference to habitat fragmentation road decommissioning target and reducing sedimentation.

ERP No. F–COME–F36164–IL, Programmatic EIS—East St. Louis and Vicinity, Illinois Ecosystem Restoration and Flood Damage Reduction Project, Implementation, Madison and St. Clair Counties, IL.

Summary: EPA has no objection to this multi-objective ecological restoration and flood control project which will take a tiered approach to test and implement upland sediment control measures in order to protect the viability of lowland ecological restoration in the flood zone.

ERP No. F–DOE–C22003–NY, West Valley Demonstration Project, Waste Management, Onsite Management and Offsite Transportation of Radioactive Waste, West Valley, Cattaraugus County, NY.

Summary: No formal comment letter was sent to the preparing agency.

ERP No. F–FHW–F40412–OH, OH–161/37 Improvement, from OH–161(New Albany Bypass) to west of OH–161/37 Interchange with OH–16, Funding, Franklin and Licking Counties, OH.

Summary: While EPA has no objections with the preferred alternative, EPA did request clarification of indirect wetland impacts, monitoring/mitigation, and habitat specifics for the Indiana Bat be included in the ROD.

ERP No. F–FRC–E03011–FL, Tractebel Calypso Pipeline Project, Natural Gas Transportation Service for 832,000 dekatherms/day to South Florida, Construction and Operation, Right-of-Way Grant and U.S. Army COME Section 10 and 404 Permits Issuance, Exclusive Economic Zone (EEZ) with the Bahamas, Fort Lauderdale, Broward County, FL.

Summary: EPA's remaining concerns include (1) whether the proposed Calypso and Ocean Express pipelines could be combined into one single alignment to reduce potential environmental impacts, (2) the success potential of the proposed Horizontal Directional Drilling techniques, (3) qualification of deepwater impacts, and (4) the turbidity threshold proposed for this project.

ERP No. F–NPS–C61055–NJ, Morristown National Historical Park General Management Plan, Implementation, Morris and Somerset Counties, NJ.

Summary: No formal comment letter was sent to the preparing agency.

ERP No. F–SFW–K91011–CA, Programmatic EIS—San Francisco Estuary Invasive Spartina Project, Spartina Control Program to Preserve and Restore Ecological Integrity of the Estuary's Intertidal Habitats, Alameda, Contra Costa, Marin, Napa, San Francisco and San Mateo, CA.

Summary: EPA's previous concerns have been addressed, therefore EPA has no objections to the action as proposed.

ERP No. FS–AFS–L65232–OR Deep Vegetation Management Project, Implementation, Selected Preferred Alternative is C, Ochoo National Forest, Paulina Ranger District, Crook and Wheeler Counties, OR.

Summary: No formal comment letter was sent to the preparing agency.

Dated: March 23, 2004.

Ken Mittelholtz,

Environmental Protection Specialist, Office of Federal Activities.

[FR Doc. 04–6850 Filed 3–25–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–6649–6]

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 March 15, 2004, through March 19, 2004, pursuant to 40 CFR 1506.9.

EIS No. 040122, FINAL EIS, FAA, CT, Groton-New London Airport, Construction of Runway 5–23 Safety Area, Permits and Approvals, Town of Groton, New London County, CT, Wait Period Ends: April 26, 2004, Contact: John Silva (617) 238–7602.

EIS No. 040123, FINAL EIS, AFS, OR, Monument Fire Recovery Project, Whitman Unit—Wallowa-Whitman National Forest (WWNF) Timber Harvest of Fire Killed/Dying Trees, Reforestation, Recovery of Herbaceous, Native Vegetation and Maintenance or Improvement of Water Quality, Implementation, Baker County, OR, Wait Period Ends: April 26, 2004, Contact: Roger LeMaster (541) 523–4476.

EIS No. 040124, FINAL EIS, EPA, TX, LA, General New Source NPDES Permit of Discharges from the Offshore Subcategory of the Oil and Gas Extraction Point Source Category to the Territorial Seas of Texas, Wait Period Ends: April 26, 2004, Contact: Hector Pena (214) 665–7453.

EIS No. 040125, FINAL EIS, AFS, UT, Prima East Clear Creek Federal No. 22–42 Gas Exploration Well, Application for Permit to Drill (APD) including a Surface Use Plan of Operations, Approval, Castle Valley Ridge, Ferron/Price Ranger District, Manti-La Sal National Forest, Carbon and Emery Counties, UT, Wait Period Ends: April 26, 2004, Contact: Karl Boyer (435) 637–2817.

EIS No. 040126, FINAL EIS, AFS, OR, Toolbox Fire Recovery Project, Promote the Recovery of the Toolbox Complex Fires of July 2002, Fremont-Winema National Forest, Silver Lake Ranger District, Lake County, OR, Wait Period Ends: April 26, 2004, Contact: Rick Elston (541) 576–7569. This document is available on the Internet at: *http://www.fs.fed.us/r6/winema/management/analyses/toolbox/index.shtml.*

EIS No. 040127, DRAFT SUPPLEMENT, BLM, NV, Clark County Regional Flood Control Master Plan, Updated Information to the 1991 FEIS, Facilities Construction and Operation, Right-of-Way Approval and U.S. Army COE Section 404 Permit, Clark County, NV, Comment Period Ends: May 25, 2004, Contact: Adrian Garcia (702) 515–5089.

EIS No. 040128, FINAL EIS, DOD, NV, TN, NJ, OH, IN, NY, UT, Mercury Management Project, Site Selection and Implementation of a Long-Term (*i.e.*, 40 Years) Management Plan for the Defense Stockpile of Elemental Mercury, Hawthore, NV; New Haven, IN; Oak Ridge, TN; Romulus, NY; Somerville, NJ; Tooele UT and Warren OH, Wait Period Ends: April 26, 2004, Contact: Dennis Lynch (703) 767–7609.

EIS No. 040129, DRAFT EIS, EPA, FL, Palm Beach Harbor Ocean Dredged Material Disposal Site and the Port Everglades Harbor Ocean Dredged Material Disposal Site, Designation, FL, Comment Period Ends: May 10, 2004, Contact: Christopher McArthur (404) 562–9391. This document is available on the Internet at: *http://planning.saj.usace.army.mil/envdocs/PalmBeachandBrowardco/index.html.*

EIS No. 040130, DRAFT EIS, AFS, ID, North Sheep Allotments—Sheep and Goat Allotment Management Plans, To Authorize Continued Sheep Grazing for Fisher Creek, Smiley Creek, North Fork-Boulder and Baker Creek Sheep and Goat Grazing Allotments, Sawtooth National Forest, Ketchum Ranger District, Sawtooth National Recreation Area, Blaine and Custer Counties, ID, Comment Period Ends: May 10, 2004, Contact: Mike O'Farrell (208) 622–0082.

EIS No. 040131, DRAFT EIS, AFS, KY, Land Between the Lakes National Recreation Area, Proposes to Revise TVA's 1994 Natural Resources Management Plan, to Develop an Land Management Resources Plan or Area Plan, Gold Pond, KY, Comment Period Ends: June 30, 2004, Contact: Barbara Wysock (270) 924–2131. This document is available on the Internet at: *http//www.lbl.org/ADMIN/plan.*

EIS No. 040132, FINAL EIS, AFS, WA, Stimson Access Project, To Access their Private Property through National Forest System Lands, Idaho Panhandle National Forests, Priest Lake Ranger District, Pend Oreille County, WA, Wait Period Ends: April 26, 2004, Contact: Gianna Vaccaro (208) 265–6625. This document is available on the Internet at: *http://www.fs.fed.us/ipnf/eco/manage/nepa/index.html.*

EIS No. 040133, FINAL EIS, AFS, MI, Baltimore Vegetative Management Project, Implementation, Ottawa National Forest, Ontonagon Ranger District, Ontonagon County, MI, Wait Period Ends: April 26, 2004, Contact: Bruce Prud'homme (906) 884–2085.

EIS No. 040134, DRAFT EIS, FTA, CA, Silicon Valley Rapid Transit Corridor, Construct BART Extension to Milpitas, San Jose and Santa Clara, in the Cities of Fremont, Milpitas, San Jose and Santa Clara, Alameda and Santa Clara Counties, CA, Comment Period Ends: May 14, 2004, Contact: Jerome Wiggins (415) 744–2819. This document is available on the Internet at: *http://www.vtabart-vta.org.*

Amended Notices

EIS No. 040097, FINAL EIS, USN, CA, China Lake Naval Air Weapons Station, Proposed Military Operational Increases and Implementation of Associated Comprehensive Land Use and Integrated Natural Resources Management Plans, Located on the North and South Ranges, Inyo, Kern and San Bernardino Counties, CA, Wait Period Ends: April 5, 2004, Contact: John O'Gara (760) 939–3213. Revision of **Federal Register** notice published on 03/05/2004: correction to telephone.

EIS No. 040121, FINAL SUPPLEMENT, NOA, HI, GU, AS, Pelagic Fisheries of the Western Pacific Region, Fishery Management Plan, Regulatory Amendment, Management Measures to Implement New Technologies for the Western Pacific Pelagic Longline Fisheries, Hawaii, American Samoa, Guam and Commonwealth of the Northern Mariana Island, Wait Period Ends: March 29, 2004, Contact: Alvin Katekaru (808) 973–2937. Revision of **Federal Register** notice published on 3/19/2004: correction to waiver granted under § 1502.9(c)(4). It should be a 20–Day waiver for the above EIS.

Dated: March 23, 2004.

Ken Mittelholtz,

Environmental Protection Specialist, Office of Federal Activities.

[FR Doc. 04–6851 Filed 3–25–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7640–4]

National Environmental Justice Advisory Council; Notification of Meeting and Public Comment/Open Meetings

Pursuant to the Federal Advisory Committee Act (FACA), Public Law 92–463, we now give notice that the National Environmental Justice Advisory Council (NEJAC), along with its various subcommittees, will meet on the dates and times described below. The NEJAC and the subcommittee meetings will take place at the Sheraton New Orleans Hotel, 500 Canal Street, New Orleans, Louisiana 70130. The meeting dates are as follows: April 13, 2004 through April 16, 2002. All times noted are Central Standard Time. All meetings are open to the public. Due to limited space, seating at the NEJAC meeting will be on a first-come basis. This is the sixth in a series of focused policy issue meetings for the NEJAC. Documents that are the subject of NEJAC reviews are normally available from the originating EPA office and are *not* available from the NEJAC. To help prepare for this specific focused policy issue meeting the following background information is provided:

Request and Policy Issue

The Charter for the NEJAC states that the advisory committee shall provide independent advice to the Administrator on areas that may include, among other things, "advice on EPA's progress, quality and adequacy in

planning, developing and implementing environmental justice strategies, projects and programs" relating to environment justice. In order to provide such independent advice, the Agency requests that the NEJAC convene a focused, issue-oriented public meeting in New Orleans, Louisiana. The meeting shall be used to receive comments on, discuss, and analyze issues related to cumulative risks and impacts and environmental justice. The Agency, furthermore, requests that the NEJAC produce a comprehensive report on the differing views, interests, concerns, and perspectives expressed by the stakeholder participants on the focused policy issue, and provide advice and recommendations for the Agency's review and consideration. In order to fulfill this charge, the NEJAC is being asked to discuss and provide recommendations regarding the following broad public policy question:

In order to ensure environmental justice for all communities and tribes, what short- and long-term actions should the Agency take in proactively implementing the concepts contained in its *Framework for Cumulative Risk Assessment?*

Meeting

Registration for the NEJAC meeting will begin on Tuesday, April 13, 2004 at 7 a.m. The NEJAC will convene Tuesday, April 13, 2004 from 9 a.m. to 5 p.m. The NEJAC will reconvene on Wednesday, April 14, 2004 from 8:30 a.m. to 5 p.m. The meetings on Tuesday and Wednesday will be organized to create the best environment for a deliberative process. The meeting will be conducted in a roundtable fashion, except during the public comment sessions. One public comment sessions dedicated to the focused policy issue is scheduled for Tuesday, April 13, 2004 from 7 p.m. to 9 p.m. General environmental justice public comment issues will be heard on Wednesday, April 14, 2004, from 7 p.m. to 9 p.m.

Correspondence concerning the meeting should be sent to Ms. Victoria Robinson, NEJAC Program Manager, U.S. Environmental Protection Agency, at 1200 Pennsylvania Avenue, NW., (MC2201A), Washington, DC 20460, by telephone: (202) 564–6349, or by FAX at (202) 564–1624. Additional information about the meeting is available at the Internet Web site: *http://www.epa.gov/compliance/environmentaljustice/nejac/next_meeting.html.*

The following Subcommittees of the NEJAC will meet on Thursday, April 15, 2004 from 8:30 a.m. to 5:30 p.m.: Air and Water; Enforcement; Health and Research; Indigenous Peoples; International; and Waste and Facility Siting. The full NEJAC will reconvene Friday, April 16, 2004, from 8:30 a.m. to 5 p.m., to address all other business requiring Executive Council action. All times shown are local, Central Standard time. Any member of the public wishing additional information about the subcommittee meetings should contact the specific Designated Federal Official (DFO) at the telephone number listed below.

Subcommittee	Federal Official and Telephone Number
Air & Water ...	Mr. Wil Wilson—(202) 564–1954 Ms. Alice Walker—(202) 564–0498
Enforcement ..	Ms. Vicki Simons—(202) 564–8626
Health & Research.	Mr. Gary Carroll—(202) 566–0518 Mr. Sam Williams—(202) 564–6782
Indigenous Peoples.	Mr. Daniel Gogal—(202) 564–2576
International ..	Ms. Wendy Graham—(202) 564–6602
Waste/Facility Siting.	Mr. Kent Benjamin—(202) 566–0185

Members of the public are encouraged to provide comments relevant to the focus issue being deliberated by the NEJAC. Members of the public who wish to participate in either public comment period are encouraged to pre-register by April 1, 2004. Individuals or groups making oral presentations during the public comment period will be limited to a total time of five minutes. Only one representative of a community, an organization, or a group will be allowed to speak. Any number of written comments can be submitted for the record. The suggested format for individuals making public comment should be as follows:

Request To Make Public Comment

Speaker's Template

Name of Speaker:

Name of Organization/Community:

Address/Phone/FAX/E-Mail:

Description of Concern:

Relationship to the Policy Issue:

Recommendations/desired Outcome:

If you wish to submit written comments of any length (at least 50 copies), they should also be received by Friday, April 2, 2004. Written comments received after that date will be provided to the Council as logistics allow. All information should be sent to the address or fax number cited below.

Registration

Pre-registration for all attendees is recommended. To register online, visit the Web site: *http://NEJACregistration.org;* or request a registration form by calling the toll-free Registration Hotline at (888) 335–4299. Correspondence concerning registration should be sent to Ms. Jen Grund of Tetra Tech EM Inc. at: 1881 Campus Commons, Suite 200, Reston, Virginia 20191, telephone: (703) 390–0603, or FAX: (703) 391–5876. Hearing-impaired individuals or non-English speaking attendees wishing to arrange for a sign language or foreign language interpreter, may make appropriate arrangements using these numbers also. In addition, NEJAC offers a toll-free Registration Hotline at (888) 335–4299 or send an e-mail to *nejac@ttemi.com.*

Dated: March 15, 2004.

Charles Lee,

Designated Federal Officer, National Environmental Justice Advisory Council.

[FR Doc. 04–6828 Filed 3–25–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7640–9]

Second Meeting of the World Trade Center Expert Technical Review Panel To Continue Evaluation on Issues Relating To Impacts of the Collapse of the World Trade Center Towers

AGENCY: Environmental Protection Agency.

ACTION: Notice of meeting.

SUMMARY: The World Trade Center Expert Technical Review Panel will hold its second meeting to provide for greater input on ongoing efforts to monitor the situation for New York residents and workers impacted by the collapse of the World Trade Center. The panel members will help guide the EPA's use of the available exposure and health surveillance databases and registries to characterize any remaining exposures and risks, identify unmet public health needs, and recommend any steps to further minimize the risks associated with the aftermath of the World Trade Center attacks. The panel will meet several times over the course of approximately two years, and these panel meetings will be open to the public, except where the public interest requires otherwise. Information on the

panel meeting agendas, documents (except where the public interest requires otherwise), and public registration to attend the meetings will be available from an Internet Web site. EPA has established an official public docket for this action under Docket ID No. ORD–2004–0003.

DATES: The second meeting of this panel will be held on April 12, 2004 from 10 a.m. to 5 p.m., eastern daylight savings time. On-site registration will begin at 9 a.m.

ADDRESSES: The meeting will be held at the Alexander Hamilton U.S. Custom House, One Bowling Green, New York, NY, in the Auditorium (basement level). A government-issued identification (*e.g.*, driver's license) is required for entry.

SUPPLEMENTARY INFORMATION:

I. Meeting Information

Eastern Research Group, Inc., (ERG), an EPA contractor, will facilitate the meeting. To attend the meeting as an observer, please register by visiting the Web site at: *http://www.epa.gov/wtc/panel*. You may also register for the meeting by calling ERG's conference registration line at (781) 674–7374 or by faxing a registration request to (781) 674–2906 (include full address and contact information). Pre-registration is strongly recommended as space is limited, and registrations will be accepted on a first-come, first-served basis. The deadline for pre-registration is April 8, 2004. Registrations will continue to be accepted after this date, including on-site registration, if space allows. In addition, there will be a limited time at the meeting for oral comments from the public. Oral comments will be limited to five (5) minutes each. If you wish to make a statement during the observer comment period, please check the appropriate box when you register at the Web site.

FOR FURTHER INFORMATION CONTACT: For meeting information, registration and logistics, please see the Web site *http://www.epa.gov/wtc/panel* or contact ERG at (781) 674–7374. The meeting agenda and logistical information will be posted on the Web site and will also be available in hard copy. For further information only regarding the technical panel, contact Ms. Lisa Matthews, EPA Office of the Science Advisor, telephone (202) 564–4499.

II. Background Information

Immediately following the September 11, 2001, terrorist attack on New York City's World Trade Center, many federal agencies, including the EPA, were called upon to focus their technical and scientific expertise on the national emergency. EPA, other federal agencies, New York City, and New York State public health and environmental authorities focused on numerous cleanup, dust collection and ambient air monitoring activities to ameliorate and better understand the human health impacts of the disaster. Detailed information concerning the environmental monitoring activities that were conducted as part of this response is available at the EPA Response to 9–11 Web site at *http://www.epa.gov/wtc/*.

In addition to environmental monitoring, EPA efforts also included toxicity testing of the dust on laboratory mice, as well as the development of a human exposure and health risk assessment. This risk assessment document, *Exposure and Human Health Evaluation of Airborne Pollution from the World Trade Center Disaster* (*http://www.epa.gov/ncea/wtc.htm*), has been subjected to public comment and expert peer review, and is currently undergoing revisions prior to finalization. Numerous additional studies by other Federal and State agencies, universities, and other organizations have documented impacts to both the outdoor and indoor environments, and to human health.

While these monitoring and assessment activities were ongoing, and the cleanup at Ground Zero itself was occurring, EPA began planning for a program to clean and monitor residential apartments. From June 2002 until December 2002, residents impacted by World Trade Center dust and debris in an area of about 1 mile by 1 mile south of Canal Street were eligible to request federally funded cleaning and monitoring for airborne asbestos or only monitoring of their residences. The cleanup continued into the summer of 2003, by which time the EPA had cleaned and monitored 3400 apartments and monitored an additional 800 apartments. Detailed information on this portion of the EPA response is also available at *http://www.epa.gov/wtc/*.

A critical component of understanding long-term human health impacts is the establishment of health registries. The World Trade Center Health Registry is a comprehensive and confidential health survey of those most directly exposed to the contamination resulting from the collapse of the World Trade Center towers. It is intended to give health professionals a better picture of the health consequences of 9/11. It was established by the Agency for Toxic Substances and Disease Registry (ATSDR) and the New York City Department of Health and Mental Hygiene (NYCDHMH), in cooperation with a number of academic institutions, public agencies and community groups. Detailed information about the registry can be obtained from the registry Web site at: *http://www.nyc.gov/html/doh/html/wtc/index.html*.

In order to obtain individual advice on the effectiveness of these programs, unmet needs and data gaps, the EPA has convened a technical panel of experts who have been involved with World Trade Center assessment activities. Dr. Paul Gilman, EPA Science Advisor, serves as Chair of the panel, and Dr. Paul Lioy, Professor of Environmental and Community Medicine at the Environmental and Occupational Health Sciences Institute of the Robert Wood Johnson Medical School-UMDNJ and Rutgers University, serves as Vice Chair. A full list of the panel members and a charge statement and operating principles for the panel are available from the panel Web site listed above. Panel meetings will each be one-day meetings, and they will occur over the course of approximately a two-year . period. Panel members will provide individual advice on issues the panel addresses. These meetings will occur in New York City and nearby locations. All of the meetings will be announced on the Web site and by a **Federal Register** Notice, and they will be open to the public for attendance and also to provide brief oral comment. The focus of the second meeting is to discuss a draft resampling proposal to evaluate the incidence of recontamination in apartments cleaned in the EPA cleanup effort around the World Trade Center site. The panel will also begin discussing the appropriateness of the use of asbestos as a surrogate measure for other contaminants of concern. Future meetings will address planned activities by EPA regarding monitoring, assessment and health registries. Further information on these meetings can be found at the Web site identified earlier: *http://www.epa.gov/wtc/panel*.

III. How To Get Information on E–DOCKET

EPA has established an official public docket for this action under Docket ID No. ORD–2004–0003. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that

is available for public viewing at the Office of Environmental Information (OEI) Docket in the Headquarters EPA Docket Center, (EPA/DC) EPA West Building, Room B102, 1301 Constitution Avenue, NW., Washington, DC 20460. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OEI Docket is (202) 566–1752; facsimile: (202) 566–1753; or e-mail: *ORD.Docket@epa.gov*.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the appropriate docket identification number.

Dated: March 22, 2004.

Paul Gilman,

EPA Science Advisor and Assistant Administrator for Research and Development.

[FR Doc. 04–6826 Filed 3–25–04; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than April 9, 2004.

A. Federal Reserve Bank of Minneapolis (Jacqueline G. Nicholas, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. Kenneth Hilton Johnson, Chicago, Illinois; to retain control of BNCCORP, Inc., Bismark, North Dakota, and thereby indirectly retain control of BNC National Bank, Phoenix, Arizona.

Board of Governors of the Federal Reserve System, March 22, 2004.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E4–689 Filed 3–25–04; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center Web site at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than April 19, 2004.

A. Federal Reserve Bank of St. Louis (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63166–2034:

1. American Community Bancorp, Inc., Evansville, Indiana; to become a bank holding company by acquiring 100 percent of the voting shares of Bank of Evansville, National Association, Evansville, Indiana.

2. FSB Bancshares, Inc., Henderson, Tennessee; to merge with American City Bancorp, Inc., Tullahoma, Tennessee, and thereby indirectly acquire voting shares of American City Bank, Tullahoma, Tennessee.

B. Federal Reserve Bank of San Francisco (Tracy Basinger, Director, Regional and Community Bank Group) 101 Market Street, San Francisco, California 94105–1579:

1. Doctors' Bancorp, Manhattan Beach, California; to become a bank holding company by acquiring 100 percent of the voting shares of Beach Business Bank, Manhattan Beach, California (in organization).

Board of Governors of the Federal Reserve System, March 22, 2004.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E4–688 Filed 3–25–04; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies; Correction

This notice corrects a notice (FR Doc. 4-4325) published on pages 13037 and 13038 of the issue for March 19, 2004.

Under the Federal Reserve Bank of Boston heading, the entry for Salisbury Bancorp, Inc., Lakeville, Connecticut, is revised to read as follows:

A. Federal Reserve Bank of Boston (Richard Walker, Community Affairs Officer) 600 Atlantic Avenue, Boston, Massachusetts 02106–2204:

1. Salisbury Bancorp, Inc., Lakeville, Connecticut; to merge with Canaan National Bancorp, Inc., Canaan, Connecticut, and thereby indirectly acquire the Canaan National Bank, Canaan, Connecticut.

Comments on this application must be received by April 5, 2004.

Board of Governors of the Federal Reserve System, March 22, 2004.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. E4–690 Filed 3–25–04; 8:45 am]

BILLING CODE 6210–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Notice of Meeting

In accordance with section 10(d) of the Federal Advisory Committee Act (5 U.S.C., Appendix 2), announcement is made of a Health Care Policy and

Research Special Emphasis Panel (SEP) meeting.

A Special Emphasis Panel is a group of experts in fields related to health care research who are invited by the Agency for Healthcare Research and Quality (AHRQ), and agree to be available, to conduct on an as needed basis, scientific reviews of applications for AHRQ support. Individual members of the Panel do not attend regularly-scheduled meetings and do not serve for fixed terms or a long period of time. Rather, they are asked to participate in particular review meetings which require their type of expertise.

Substantial segments of the upcoming SEP meeting listed below will be closed to the public in accordance with the Federal Advisory Committee Act, section 10(d) of 5 U.S.C., Appendix 2 and 5 U.S.C. 552(b)(c)(6). Grant applications for Building the Evidence to Promote Bioterrorism and other Public Health Emergency Preparedness in Health Care Systems (UOI) Awards are to be reviewed and discussed at this meeting. These discussion are likely to reveal personal information concerning individuals associated with the applications. This information is exempt from mandatory disclosure under the above-cited statutes.

SEP Meeting on: Building the Evidence to Promote Bioterrorism and other Public Health Emergency Preparedness in Health Care Systems (UOI) Awards.

Dates: May 6–7, 2004 (Open on May 6 from 8 a.m. to 8:15 a.m. and closed for the remainder of the meeting.

Place: Holiday Inn Select Bethesda, Versailles II Room, 8120 Wisconsin Avenue, Bethesda, Maryland 20814.

Contact Person: Anyone wishing to obtain a roster of members, agenda or minutes of the nonconfidential portions of this meeting should contact Mrs. Bonnie Campbell, Committee Management Officer, Office of Extramural Research, Education and Priority Populations, AHRQ, 540 Gaither Road, Room 2038, Rockville, Maryland 20850, Telephone (301) 427–1554.

Agenda items for this meeting are subject to change as priorities dictate.

Dated: March 19, 2004.

Carolyn M. Clancy,

Director.

[FR Doc. 04–6755 Filed 3–25–04; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Notice of Meeting

In accordance with section 10(d) of the Federal Advisory Committee Act (5 U.S.C., Appendix 2), announcement is made of a Health Care Policy and Research Special Emphasis Panel (SEP) meeting.

A Special Emphasis Panel is a group of experts in fields related to health care research who are invited by the Agency for Healthcare Research and Quality (AHRQ), and agree to be available, to conduct on an as needed basis, scientific reviews of applications for AHRQ support. Individual members of the Panel do not attend regularly-scheduled meetings and do not serve for fixed terms or a long period of time. Rather, they are asked to participate in particular review meetings which require their type of expertise.

Substantial segments of the upcoming SEP meeting listed below will be closed to the public in accordance with the Federal Advisory Committee Act, section 10(d) of 5 U.S.C., Appendix 2 and 5 U.S.C. 552b(c)(6). Grant applications for AHRQ Minority Research Infrastructure Support Program (R24) Awards are to be reviewed and discussed at this meeting. These discussions are likely to reveal personal information concerning individuals associated with the applications. This information is exempt from mandatory disclosure under the above-cited statutes.

SEP Meeting on: AHRQ Minority Research Infrastructure Support Program (R24) Awards.

Dates: April 16, 2004 (Open April 16 from 8 a.m. to 8:15 a.m. and closed for the remainder of the meeting.)

Place: John M. Eisenberg Building, AHRQ Conference Center, 540 Gaither Road, Rockville, Maryland 20850.

Contact Person: Anyone wishing to obtain a roster of members, agenda or minutes of the nonconfidential portions of this meeting should contact Mrs. Bonnie Campbell, Committee Management Officer, Office of Extramural Research, Education and Priority Populations, AHRQ, 540 Gaither Road, Room 2038, Rockville, Maryland 20850. Telephone (301) 427–1554.

Agenda items for this meeting are subject to change as priorities dictate.

Dated: March 19, 2004.

Carolyn M. Clancy,

Director.

[FR Doc. 04–6757 Filed 3–25–04; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Meeting of the National Advisory Council for Healthcare Research and Quality

AGENCY: Agency for Healthcare Research and Quality (AHRQ), HHS

ACTION: Notice of public meeting.

SUMMARY: In accordance with section 10(a) of the Federal Advisory Committee Act, this notice announces a meeting of the National Advisory Council for Healthcare Research and Quality.

DATES: The meeting will be held on Friday, April 2, 2004, from 9 a.m. to 4 p.m. and is open to the public.

ADDRESSES: The meeting will be held at the Agency Conference Center, 540 Gaither Road, First Floor, Rockville, Maryland 20850.

FOR FURTHER INFORMATION CONTACT: Anne Lebbon, Coordinator of the Advisory Council, at the Agency for Healthcare Research and Quality, 540 Gaither Road, Rockville, Maryland 20850, (301) 427–1215. For press-related information, please contact Karen Migdail at (301) 427–1855.

If sign language interpretation or other reasonable accommodation for a disability is needed, please contact Mr. Donald L. Inniss, Director, Office of Equal Employment Opportunity Program, Program Support Center, on (301) 443–1144 no later than March 25, 2004.

Agenda, roster and minutes are available from Ms. Bonnie Campbell, Committee Management Officer, Agency for Healthcare Quality and Research, 540 Gaither Road, Rockville, Maryland 20850. Her phone number is (301) 427–1554. Minutes will be available after April 19, 2003.

SUPPLEMENTARY INFORMATION:

I. Purpose

Section 921 of the Public Health Service Act (42 U.S.C. 299c) established the National Advisory Council for Healthcare Research and Quality. In accordance with its statutory mandate, the Council is to advise the Secretary of the Department of Health and Human Services and the Director, Agency for Healthcare Research and Quality (AHRQ), on matters related to actions of the Agency to enhance the quality, improve the outcomes, reduce the costs of health care services, improve access to such services through scientific research, and to promote improvements in clinical practice and in the

organization, financing, and delivery of health care services. The Council is composed of members of the public appointed by the Secretary and Federal ex-officio members.

II. Agenda

On Friday, April 2, 2004, the meeting will begin at 9 a.m., with the call to order by the Council Chair. The Director, AHRQ, will present the status of the Agency's current research, programs, and initiatives. Tentative agenda items include Building the Science Base for Evaluating the Effectiveness of Health Care Interventions, the Agency's HCAHPS program, and the Agency's new mission. The official agenda will be available on AHRQ's Web site at *http://www.ahrq.gov* no later than March 18. The meeting will adjourn at 4 p.m.

Dated: March 16, 2004.

Carolyn M. Clancy,

Director.

[FR Doc. 04–6756 Filed 3–25–04; 8:45 am]

BILLING CODE 4160–90–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Competitive Funds for National Programs To Improve the Health, Education, and Well-Being of Young People, Program Announcement Number 04010

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the following meeting:

Name: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Competitive Funds for National Programs to Improve the Health, Education, and Well-Being of Young People, Program Announcement Number 04010.

Times and Dates: 8:30 a.m.–9 a.m., April 13, 2004 (Open). 9 a.m.–3:30 p.m., April 13, 2004 (Closed).

Place: Teleconference Number: 1.888.390.5183 pass code DASH for the open portion of the meeting.

Status: portions of the meeting will be closed to the public in accordance with provisions set forth in section 552b(c) (4) and (6), title 5 U.S.C., and the Determination of the Director, Management Analysis and Services Office, CDC, pursuant to Public Law 92–463.

Matters To Be Discussed: The meeting will include the review, discussion, and evaluation of applications received in response to Program Announcement Number 04010.

For Further Information Contact: Nosrat Irannejad, MPH, Lead Education Program Specialist, National Center for Chronic Disease Prevention and Health Promotion, 4770 Buford Highway, MS–K31, Atlanta, GA 30341. Telephone 770.488.6124.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: March 16, 2004.

Alvin Hall,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 04–6771 Filed 3–25–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Meeting Notice

The National Center for Environmental Health (NCEH) of the Centers for Disease Control and Prevention (CDC) announces the following meeting.

Name: Current Status of the Vessel Sanitation Program (VSP) and Experience to Date with Program Operations—public meeting between CDC and the cruise ship industry, private sanitation consultants, and other interested parties.

Time and Date: 9 a.m.–4 p.m., April 27, 2004.

Place: Auditorium, Port Everglades Administration Building, 1850 Eller Drive, Ft. Lauderdale, Florida 33316.

Status: Open to the public, limited by the space available. The meeting room accommodates approximately 100 people.

Purpose: During the past 18 years, as part of the revised VSP, CDC has conducted a series of public meetings with members of the cruise ship industry, private sanitation consultants, and other interested parties. This meeting is a continuation of that series of public meetings to discuss current status of VSP and experience to date with programs operations.

Matters to be discussed but are not limited to: 2003 Program Review; plans to revise the Operations Manual 2000; plans to revise the "Construction Guidelines"; updates on outbreaks and Norovirus.

The official record of this meeting will remain open for a period of 15 days following the meeting (through May 12, 2004) so that additional materials or comments may be submitted to be made part of the record of the meeting.

Advanced registration is encouraged. Please provide the following information: Name, title, company name, mailing address, telephone number, facsimile number and e-mail address to Lisa Beaumier, at 770–488–7138, fax: 770–488–4127, or *lbeaumier@cdc.gov*. If you need additional information, please contact Lisa Beaumier (contact information provided above).

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: March 18, 2004.

Alvin Hall,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 04–6527 Filed 3–25–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare and Medicaid Services

[CMS–2183–N]

Funding Opportunity Title: Medicaid Program; Medicaid Infrastructure Grant Program To Support the Competitive Employment of People With Disabilities

ACTION: Notice.

Catalog of Federal Domestic Assistance No. 93.768

Important Dates

Deadline for Letter of Intent To Apply: States are encouraged to submit a notice of intent to apply for a grant no later than May 1, 2004. Submission of your letter of intent is optional and will not affect the approval of your application.

Date of Applicant's Teleconference: States interested in participating in a teleconference regarding this grant solicitation should check the Ticket to Work Web site listed below for the date and time.

Deadline for Grant Submission: Grant applications must be submitted by June 6, 2004 to be considered under the fiscal year 2005 annual funding cycle. Facsimile transmissions will not be accepted. Applications postmarked after June 6, 2004 will not be considered.

Funding Opportunity Description: This notice announces the availability of funding, through grants, for eligible States under section 203 of the Ticket to Work and Work Incentives Improvement Act of 1999 (TWWIIA). The grant program is designed to assist States in developing infrastructure to support the competitive employment of people with disabilities by extending

necessary Medicaid coverage to those individuals. This notice also contains pertinent information where States may apply for the grant program.

Award Information: A total of $40 million has been appropriated by the legislation for the Medicaid infrastructure grant program for fiscal year 2005. As stipulated in section 203 of TWWIIA, funds appropriated under this section for previous fiscal years that are not awarded to States are available for award in 2005.

We expect to award approximately 46 grants. This includes both new and continuation grants. Award amounts will be between $500,000 and $2.0 million. Criteria for evaluating applications for funding will be listed in the grant solicitation (Web site address listed below).

Eligibility Information

Eligible Applicants: As authorized in section 203 of the TWWIIA legislation, entities eligible to apply are: States (or an instrumentality of the State as determined by State law), the District of Columbia, Puerto Rico, Guam, the United States Virgin Islands, and the Commonwealth of the Northern Marianas Islands.

Cost Sharing or Matching: Not applicable.

Application and Submission Information

Address To Obtain Application Package: Standard application forms and related instructions are available from the following Web site: *http://forms.psc.gov/forms/ACFFSF/acffsf.html* or from Nicole Nicholson, Centers for Medicare & Medicaid Services, Office of Operations Management, Acquisition and Grants Group, C2–21–15 Central Building, 7500 Security Boulevard, Baltimore, MD 21244–1850, (410) 786–5158, e-mail: *NNicholson@cms.hhs.gov.* Applications must be formally submitted to Nicole Nicholson.

Please note: Applicants are only required to submit an original application and two copies.

Web site: You may access up-to-date information about the Medicaid infrastructure grants and obtain information from the full grant solicitation grant at: *http://www.cms.hhs.gov/twwiia.*

Content and Form of Application Submission: This information is included in the grant solicitation referenced in the above Web site address.

Submission Dates: Applications are due June 6, 2004.

Intergovernmental Review: Applications for these grants are not subject to review under Executive Order 12372—Intergovernmental Review by Federal Agencies (45 CFR part 100).

Funding Restrictions: Not applicable.

Other Submission Requirements: Not applicable.

Application Review Information

Criteria: Specific criteria can be found in Appendix Three of the solicitation mentioned in the above-referenced Web site.

Review Selection Process: A panel of experts will conduct an objective review of all applications. The panelists will assess each application based on the review criteria to determine the merits of the proposal and the extent to which the State evidences the capacity to implement the Medicaid Infrastructure Grant. We reserve a limited right to ensure adequate reasonable geographic and other representation among States receiving grants. However, we will not exercise this right if there is a major qualitative difference between high-ranked applications and any application that would remedy a geographical imbalance. CMS will make final award decisions based on consideration of the comments and recommendations of the review panelists and availability of funds.

Anticipated Announcement Award Date: October 29, 2004.

Award Administration Information

Award Notice: Successful applicants will receive an award letter, notice of grant award, a profile sheet outlining the award amount, project officer and grant officer information, and grant terms and conditions.

Administrative and National Policy Requirements: Solicitation requirements can be found in the general solicitation referenced in the Web site mentioned above.

Reporting: Grantees are to submit three quarterly progress reports describing success in completing project goals and objectives and an annual report outlining yearly accomplishments. Reports are to be submitted to the grants officer electronically.

Agency Contacts

Questions about the grants may be directed to: Joe Razes, TWWIIA Program Manager, Disabled and Elderly Health Programs Group, Center for Medicaid and State Operations, Centers for Medicare & Medicaid Services, Room S2–14–26, 7500 Security Boulevard, Baltimore, MD 21244–1850, (410) 786–6126, fax: 410–786–9004, e-mail: *JRazes@cms.hhs.gov.*

Questions regarding the solicitation process may be directed to: Nicole Nicholson, Centers for Medicare & Medicaid Services, Office of Operations Management, Acquisition and Grants Group, C2–21–15 Central Building, 7500 Security Boulevard, Baltimore, MD 21244–1850, (410) 786–5158, fax: 410–786–9088, e-mail: *nnicholson@cms.hhs.gov.*

Application Receipt: CMS will not automatically notify applicants of the receipt of their application. Please contact Nicole Nicholson at *nnicholson@cms.hhs.gov* to confirm receipt.

SUPPLEMENTARY INFORMATION: This notice is the fifth such notice announcing the availability of funds for Medicaid infrastructure grants authorized by the Ticket to Work and Work Incentives Improvement Act. A total of 40 States currently have been awarded Medicaid infrastructure grants under the Ticket to Work Medicaid Infrastructure Grant Program, which provides Federal grant funding for 11 years through 2011. This notice is consistent with the four previous notices in soliciting States to apply for grants that will expand services and supports for workers with disabling conditions. States that wish to apply for these grants and desire further detailed information, such as application requirements, review procedures, an explanation of a timely submission, necessary forms, and other relevant information, should refer to the above-listed websites.

Approval of Collection of Information

This notice does not impose any new information collection and record keeping requirements subject to the Paperwork Reduction Act (PRA). Consequently, it does not need to be reviewed by the Office of Management and Budget (OMB) under the authority of PRA. The information collection requirements associated with applying for a grant are approved under OMB approval number 0938–0811.

Dated: March 5, 2004.

Dennis G. Smith,

Acting Administrator, Centers for Medicare & Medicaid Services.

[FR Doc. 04–6351 Filed 3–25–04; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–9020–N]

Medicare and Medicaid Programs; Quarterly Listing of Program Issuances—October 2003 Through December 2003

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

ACTION: Notice.

SUMMARY: This notice lists CMS manual instructions, substantive and interpretive regulations, and other **Federal Register** notices that were published from October 2003 through December 2003, relating to the Medicare and Medicaid programs. This notice provides information on national coverage determinations affecting specific medical and health care services under Medicare. Additionally, this notice identifies certain devices with investigational device exemption (IDE) numbers approved by the Food and Drug Administration (FDA) that potentially may be covered under Medicare. Finally, this notice also includes listings of all approval numbers from the Office of Management and Budget for collections of information in CMS regulations.

Section 1871(c) of the Social Security Act requires that we publish a list of Medicare issuances in the **Federal Register** at least every 3 months. Although we are not mandated to do so by statute, for the sake of completeness of the listing, and to foster more open and transparent collaboration efforts, we are also including all Medicaid issuances and Medicare and Medicaid substantive and interpretive regulations (proposed and final) published during this 3-month time frame.

FOR FURTHER INFORMATION CONTACT: It is possible that an interested party may have a specific information need and not be able to determine from the listed information whether the issuance or regulation would fulfill that need. Consequently, we are providing information contact persons to answer general questions concerning these items. Copies are not available through the contact persons. (*See* Section III of this notice for how to obtain listed material.)

Questions concerning items in Addendum III may be addressed to Karen Bowman, Office of Strategic Operations and Regulatory Affairs, Centers for Medicare & Medicaid Services, C5–16–03, 7500 Security Boulevard, Baltimore, MD 21244–1850, or you can call (410) 786–5252.

Questions concerning national coverage determinations in Addendum V may be addressed to Patricia Brocato-Simons, Office of Clinical Standards and Quality, Centers for Medicare & Medicaid Services, C1–09–06, 7500 Security Boulevard, Baltimore, MD 21244–1850, or you can call (410) 786–0261.

Questions concerning FDA-approved Category B IDE numbers listed in Addendum VI may be addressed to Eileen Davidson, Office of Clinical Standards and Quality, Centers for Medicare & Medicaid Services, S3–26–10, 7500 Security Boulevard, Baltimore, MD 21244–1850, or you can call (410) 786–6874.

Questions concerning approval numbers for collections of information in Addendum VII may be addressed to Dawn Willinghan, Office of Strategic Operations and Regulatory Affairs, Regulations Development and Issuances Group, Centers for Medicare & Medicaid Services, C5–09–26, 7500 Security Boulevard, Baltimore, MD 21244–1850, or you can call (410) 786–6141.

Questions concerning all other information may be addressed to Gwendolyn Johnson, Office of Strategic Operations and Regulatory Affairs, Regulations Development Group, Centers for Medicare & Medicaid Services, C5–12–26, 7500 Security Boulevard, Baltimore, MD 21244–1850, or you can call (410) 786–6954.

SUPPLEMENTARY INFORMATION:

I. Program Issuances

The Centers for Medicare & Medicaid Services (CMS) is responsible for administering the Medicare and Medicaid programs. These programs pay for health care and related services for 39 million Medicare beneficiaries and 35 million Medicaid recipients. Administration of the two programs involves (1) furnishing information to Medicare beneficiaries and Medicaid recipients, health care providers, and the public and (2) maintaining effective communications with regional offices, State governments, State Medicaid agencies, State survey agencies, various providers of health care, all Medicare contractors that process claims and pay bills, and others. To implement the various statutes on which the programs are based, we issue regulations under the authority granted to the Secretary of the Department of Health and Human Services under sections 1102, 1871, 1902, and related provisions of the Social Security Act (the Act). We also issue various manuals, memoranda, and statements necessary to administer the programs efficiently.

Section 1871(c)(1) of the Act requires that we publish a list of all Medicare manual instructions, interpretive rules, statements of policy, and guidelines of general applicability not issued as regulations at least every 3 months in the **Federal Register**. We published our first notice June 9, 1988 (53 FR 21730). Although we are not mandated to do so by statute, for the sake of completeness of the listing of operational and policy statements, and to foster more open and transparent collaboration, we are continuing our practice of including Medicare substantive and interpretive regulations (proposed and final) published during the respective 3-month time frame.

II. How To Use the Addenda

This notice is organized so that a reader may review the subjects of manual issuances, memoranda, substantive and interpretive regulations, national coverage determinations (NCDs), and Food and Drug Administration (FDA)-approved investigational device exemptions (IDEs) published during the subject quarter to determine whether any are of particular interest. We expect this notice to be used in concert with previously published notices. Those unfamiliar with a description of our Medicare manuals may wish to review Table I of our first three notices (53 FR 21730, 53 FR 36891, and 53 FR 50577) published in 1988, and the notice published March 31, 1993 (58 FR 16837). Those desiring information on the Medicare National Coverage Determination Manual (NCDM, formerly the Medicare Coverage Issues Manual (CIM)) may wish to review the August 21, 1989, publication (54 FR 34555). Those interested in the revised process used in making NCDs under the Medicare program may review the September 26, 2003, publication (68 FR 55634).

To aid the reader, we have organized and divided this current listing into six addenda:

- Addendum I lists the publication dates of the most recent quarterly listings of program issuances.
- Addendum II identifies previous **Federal Register** documents that contain a description of all previously published CMS Medicare and Medicaid manuals and memoranda.
- Addendum III lists a unique CMS transmittal number for each instruction in our manuals or Program Memoranda and its subject matter. A transmittal may consist of a single or multiple instruction(s). Often, it is necessary to use information in a transmittal in

conjunction with information currently in the manuals.

- Addendum IV lists all substantive and interpretive Medicare and Medicaid regulations and general notices published in the **Federal Register** during the quarter covered by this notice. For each item, we list the—
- Date published;
- **Federal Register** citation;
- Parts of the Code of Federal Regulations (CFR) that have changed (if applicable);
- Agency file code number; and
- Title of the regulation.
- Addendum V includes completed NCDs, or reconsiderations of completed NCDs, from the quarter covered by this notice. Completed decisions are identified by the section of the NCDM (or CIM) in which the decision appears, the title, the date the publication was issued, and the effective date of the decision.
- Addendum VI includes listings of the FDA-approved IDE categorizations, using the IDE numbers the FDA assigns. The listings are organized according to the categories to which the device numbers are assigned (that is, Category A or Category B), and identified by the IDE number.
- Addendum VII includes listings of all approval numbers from the Office of Management and Budget (OMB) for collections of information in CMS regulations in title 42; title 45, subchapter C; and title 20 of the CFR.

III. How To Obtain Listed Material

A. Manuals

Those wishing to subscribe to program manuals should contact either the Government Printing Office (GPO) or the National Technical Information Service (NTIS) at the following addresses: Superintendent of Documents, Government Printing Office, ATTN: New Orders, P.O. Box 371954, Pittsburgh, PA 15250–7954, Telephone (202) 512–1800, Fax number (202) 512–2250 (for credit card orders); or National Technical Information Service, Department of Commerce, 5825 Port Royal Road, Springfield, VA 22161, Telephone (703) 487–4630.

In addition, individual manual transmittals and Program Memoranda listed in this notice can be purchased from NTIS. Interested parties should identify the transmittal(s) they want. GPO or NTIS can give complete details on how to obtain the publications they sell. Additionally, most manuals are available at the following Internet address: *http://cms.hhs.gov/manuals/default.asp.*

B. Regulations and Notices

Regulations and notices are published in the daily **Federal Register**. Interested individuals may purchase individual copies or subscribe to the **Federal Register** by contacting the GPO at the address given above. When ordering individual copies, it is necessary to cite either the date of publication or the volume number and page number.

The **Federal Register** is also available on 24x microfiche and as an online database through *GPO Access*. The online database is updated by 6 a.m. each day the **Federal Register** is published. The database includes both text and graphics from Volume 59, Number 1 (January 2, 1994) forward. Free public access is available on a Wide Area Information Server (WAIS) through the Internet and via asynchronous dial-in. Internet users can access the database by using the World Wide Web; the Superintendent of Documents home page address is *http://www.gpoaccess.gov/fr/index.html*, by using local WAIS client software, or by telnet to *swais.gpoaccess.gov*, then log in as guest (no password required). Dial-in users should use communications software and modem to call (202) 512–1661; type swais, then log in as guest (no password required).

C. Rulings

We publish rulings on an infrequent basis. Interested individuals can obtain copies from the nearest CMS Regional Office or review them at the nearest regional depository library. We have, on occasion, published rulings in the **Federal Register**. Rulings, beginning with those released in 1995, are available online, through the CMS Home Page. The Internet address is *http://cms.hhs.gov/rulings.*

D. CMS's Compact Disk-Read Only Memory (CD–ROM)

Our laws, regulations, and manuals are also available on CD–ROM and may be purchased from GPO or NTIS on a subscription or single copy basis. The Superintendent of Documents list ID is HCLRM, and the stock number is 717–139–00000–3. The following material is on the CD–ROM disk:

- Titles XI, XVIII, and XIX of the Act.
- CMS-related regulations.
- CMS manuals and monthly revisions.
- CMS program memoranda.

The titles of the Compilation of the Social Security Laws are current as of January 1, 1999. (Updated titles of the Social Security Laws are available on the Internet at *http://www.ssa.gov/OP_Home/ssact/comp-toc.htm.*) The remaining portions of CD–ROM are updated on a monthly basis.

Because of complaints about the unreadability of the Appendices (Interpretive Guidelines) in the State Operations Manual (SOM), as of March 1995, we deleted these appendices from CD–ROM. We intend to re-visit this issue in the near future and, with the aid of newer technology, we may again be able to include the appendices on CD–ROM.

Any cost report forms incorporated in the manuals are included on the CD–ROM disk as LOTUS files. LOTUS software is needed to view the reports once the files have been copied to a personal computer disk.

IV. How To Review Listed Material

Transmittals or Program Memoranda can be reviewed at a local Federal Depository Library (FDL). Under the FDL program, government publications are sent to approximately 1,400 designated libraries throughout the United States. Some FDLs may have arrangements to transfer material to a local library not designated as an FDL. Contact any library to locate the nearest FDL.

In addition, individuals may contact regional depository libraries that receive and retain at least one copy of most Federal Government publications, either in printed or microfilm form, for use by the general public. These libraries provide reference services and interlibrary loans; however, they are not sales outlets. Individuals may obtain information about the location of the nearest regional depository library from any library.

For each CMS publication listed in Addendum III, CMS publication and transmittal numbers are shown. To help FDLs locate the materials, use the CMS publication and transmittal numbers. For example, to find the Medicare Benefit Policy Manual, Inpatient Hospital Services publication, use CMS-Pub. 100–02, Transmittal No. 01.

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance, Program No. 93.774, Medicare—Supplementary Medical Insurance Program, and Program No. 93.714, Medical Assistance Program)

Dated: March 9, 2004.

Jacquelyn Y. White,

Director, Office of Strategic Operations and Regulatory Affairs.

Addendum I

This addendum lists the publication dates of the most recent quarterly listings of program issuances.

November 2, 1999 (64 FR 59185)
December 7, 1999 (64 FR 68357)

January 10, 2000 (65 FR 1400)
May 30, 2000 (65 FR 34481)
June 28, 2002 (67 FR 43762)
September 27, 2002 (67 FR 61130)
December 27, 2002 (67 FR 79109)
March 28, 2003 (68 FR 15196)
June 27, 2003 (68 FR 38359)
September 26, 2003 (69 FR 55618)

Addendum II—Description of Manuals, Memoranda, and CMS Rulings

An extensive descriptive listing of Medicare manuals and memoranda was published on June 9, 1988, at 53 FR 21730 and supplemented on September 22, 1988, at 53 FR 36891 and December 16, 1988, at 53 FR 50577. Also, a complete description of the former CIM (now the NCDM) was published on August 21, 1989, at 54 FR 34555. A brief description of the various Medicaid manuals and memoranda that we maintain was published on October 16, 1992, at 57 FR 47468.

ADDENDUM III.—MEDICARE AND MEDICAID MANUAL INSTRUCTIONS

[October 2003 through December 2003]

Transmittal No.	Manual/Subject/Publication No.
	Manual System (CMS-Pub. 100–00)
01	Introduction.
	Medicare Benefit Policy (CMS-Pub. 100–02)
01	Inpatient Hospital Services. Inpatient Psychiatric Hospital Services. Duration of Covered Inpatient Services. Inpatient Psychiatric Benefit Days Reduction and Lifetime Limitation. Lifetime Reserve Days. Hospital Services Covered Under Part B. Home Health Services. Coverage of Extended Care Skilled Nursing Facility Services Under Hospital Coverage of Hospice Services Under Hospital Insurance. Ambulance Services. End-Stage Renal Disease. Comprehensive Outpatient Rehabilitation Facility Coverage. Rural Health Clinic and Federally Qualified Health Center Services. Medical Devices. Covered Medical and Other Health Services. General Exclusions from Coverage.
02	Provider Education Article Stopping Abuse of the Power Wheelchair Benefit.
03	Fecal-Occult Blood Tests.
	Medicare National Coverage Determinations (CMS-Pub. 100–03)
02	Artificial Hearts and Related Devices.
03	Lung Volume Reduction Surgery (Reduction Pneumoplasty).
04	Provider Education Article Ventricular Assist Devices for Destination Therapy.
05	Colorectal Cancer Screening Test.
	Medicare Claims Processing (CMS-Pub. 100–04)
01	General Billing Requirements. Admission and Registration Requirements. Inpatient Part A Hospital. Part B Hospital (Including Inpatient Hospital Part B and Outpatient Prospective Payment System). Part B Outpatient Rehabilitation and Comprehensive Outpatient Rehabilitation Facility Services. Skilled Nursing Facility Inpatient Part A Billing. Skilled Nursing Facility Part B (Including Inpatient Part B and Outpatient Fee Schedule). Outpatient ESRD Hospital, Independent Facility, and Physician/Supplier Claims. Rural Health Clinics and Federal Qualified Health Centers. Home Health Agency Billing. Hospice. Physician/Practitioner Billing. Radiology Services. Ambulatory Surgical Centers. Ambulance. Laboratory Services from Independent Labs, Physicians, and Providers. Drugs and Biologicals. Preventive and Screening Services. Indian Health Services (not yet available). Durable Medical Equipment, Prosthetics, Orthotics and Supplies Parenteral and Enteral. Medicare Summary Notices. Remittance Notices to Providers. Fee Schedule Administration and Coding Requirements. EDI Support Requirements. Completing and Processing UB–92 (CMS–1450) Data Set. Completing and Processing Form CMS–1500 Data Set. Contractor Instructions for Common Working File. Coordination With Medigap, Medicaid, and Other Complementary Insurers.

ADDENDUM III.—MEDICARE AND MEDICAID MANUAL INSTRUCTIONS—Continued

[October 2003 through December 2003]

Transmittal No.	Manual/Subject/Publication No.
	Appeals of Claims Decisions.
	Financial Liability Protections.
02	File Descriptions for Retrieving the 2004 Pricing and Health Common Coding Data Files through Centers for Medicare & Medicaid Services.
	Mainframe Telecommunications System.
03	New Effective Data for CR2112 (Revisions to the Outpatient Prospective Payment System Pricer Software and Outpatient Code Editor).
04	October 2003 Update to the Health Care Provider Taxonomy Code.
05	Type of Service.
06	Implementation of the Coding, Testing, and Implementation Phase and Provider Education for Change Request 2631, Revisions to the Medicare.
	Carrier Manual for Jurisdiction and Unprocessable Claims.
07	Correction of Duplicate Editing in Common Working File for Immunosuppressive Drug Claims at the Durable Medical Equipment Regional Carrier.
08	Annual Update of Healthcare Common Procedure Coding System Codes Used for Home Health Consolidated Billing Enforcement.
09	Reasonable Charge Update for 2004 for Splints, Casts, Dialysis Supplies, Dialysis Equipment, Therapeutic Shoes, and Certain Intraocular Lenses.
10	Billing Instructions for Claims for Ventricular Assist Devices for Beneficiaries in a Medicare+Choice Plan.
11	Use of GY Modifier to Identify Clinical Diagnostic Laboratory Services That Are Not Covered by Medicare.
12	Certificate for Physician-Performed Microscopy Procedures.
13	Confirming Outcome & Assessment Information Set Assessment Items.
	Therapy Threshold.
	Hospitalization Within 14 Days of Start Care.
14	Modifier for Transportation of Portable X-rays.
15	Implementation Guide Edits.
16	Payment Limit for Purchased Service.
17	Billing and Payment Procedures Regarding Ownership and Provider Numbers.
	Payment Procedures for Terminated Home Health Agency.
18	Expansion of Beneficiary History and Claims In Process Files in tne Viable Information Processing System Medicare System.
19	Annual Update of Healthcare Common Procedure Coding System Codes Used For Skilled Nursing Facility Consolidated Billing Enforcement.
20	Updated Skilled Nursing Facility to Pay File Available for Download.
21	Update to Medicare Deductible, Coinsurance, and Premium Rates for Calendar Year 2004.
22	Schedule Release for January Updates to Software Programs and Pricing/Coding Files.
23	Claims Information and Claims Forms and Formats.
	Paper Claim Submission to Carriers.
	Electronic Claim Submission to Carriers.
24	Billing Non-Covered Charges to Fiscal Intermediaries "Summary and New Instructions.
25	Billing Non-Covered Charges to Fiscal Intermediaries.
26	Lung Volume Reduction Surgery.
27	CPT Code for Lung Volume Reduction Surgery and Instructions for Processing Claims for Beneficiaries in a Risk Medicare+Choice Plan.
28	Consolidation of the Claims Crossover Process & the Adding of Common Working File.
	Crossover Disposition Indicators.
29	Consolidation of Claims Crossover.
30	The Financial Limitation.
	Discipline Specific Outpatient Rehabilitation Modifiers—All Claims.
31	Dialysis Provider Number Series.
32	Remittance Advice Remark Code and Claim Adjustment Reason Code Update.
33	Mammography Quality Standards Act of 1992 File.
34	ANSIX12 Transaction 835 Companion Document and Flat File Change for.
	Durable Medical Equipment Regional Carriers, and Correction in the Companion Document for Fiscal Intermediaries.
35	Minimum Number of Pricing Files that Must be Maintained Online for Single Drug Pricer.
36	Revenue Code 068X.
37	Medicare Physician Fee Schedule Data Base.
38	Revised Skilled Nursing Facility No Pay/File—Effective January 1, 2004.
39	The Supplemental Security Income Medicare Beneficiary Data for Fiscal Year 2002 for Inpatient Rehabilitation Facility Paid Under the Prospective Payment System.
40	Healthcare Common Procedure Coding System and Diagnosis Codes.
	Roster Claims Submitted to Carriers for Mass Immunization.
	Claims Submitted to Fiscal Intermediaries for Mass Immunizations of Influenza and Pneumococcal Pneumonia Vaccine.
41	Payment for Anesthesia in a Critical Access Hospital.
42	Financial Limitation on Therapy Services.
43	Displaying Material With CDT–4 Code.
	American Dental Association's Copyright Notice.
	Point and Click License, and Shrink Wrap License.
44	Mandatory Electronic Submission of Claims.
	Small Providers and Full-Time Equivalent Employee Assessments Exceptions.
	Electronic and Paper Claims Implications Of Mandatory Electronic Submission.
45	Outpatient Provider Specific File.

ADDENDUM III.—MEDICARE AND MEDICAID MANUAL INSTRUCTIONS—Continued

[October 2003 through December 2003]

Transmittal No.	Manual/Subject/Publication No.
46	Outpatient Prospective Payment System Outpatient Code Editors.
47	Carriers Specific Requirements for Certain Specialties/Services.
48	National Council for Prescription Drug Programs.
49	Fiscal Intermediaries Health Insurance Portability and Accountability Act.
	Claim Level Edits.
50	Description of Healthcare Common Procedure Coding System.
51	January Medicare Outpatient Code Editor (OCE) Specifications Version 19.1 For Bills From Hospitals That Are Not Paid Under the Outpatient Prospective Payment System.
52	Colorectal Cancer Screening.
53	January Outpatient Code Editor Specifications Version 5.0.
54	Payment Allowance Limit for Drugs and Biologicals Not Paid on a Cost or Prospective Payment Basis.
55	Calculation of the Payment Allowance Limit for Durable Medical Equipment Regional Carrier Drugs.
56	Ambulance Inflation Factor.
	Medicare Secondary Payer (CMS–Pub. 100–05)
01	Background and Overview.
	Medicare Secondary Payer Provisions.
	Medicare Secondary Providers Billing Requirements.
	Coordination of Benefits Contractor Requirements.
	Contractor Prepayment Processing Requirements.
	Medicare Secondary Payer Common Working File Process.
	Contractor MSP.
	Recovery Rules.
02	Individuals Not Subject to the Limitation on Payment.
03	Non-Employer Group Health Plan "Send to Common Working File".
	Switch Error.
04	Data Center Testing Production.
05	Data Center Testing Production.
06	Auto Notice of Change to Medicare Secondary Payer.
	Medicare Financial Management.
	Medicare Financial Management. (CMS–Pub. 100–06)
23	Clarification of Existing Instructions to Chapters 1 and 2 of the Medicare Financial Management.
24	Installation of Version 32.0 of the Provider Statistical and Reimbursement Reporting Stem.
25	Initial Interest Rate Manual Instruction and Business Requirement.
26	Incremental Cost Budgeting and Reporting for Productivity Investment Projects.
27	Revision to Chapters 8, 9 and 10 of the Medicare Financial Management Manual.
28	Uncollectible Accounts Forms.
29	Revisions to Chapters 3 and 4.
	Medicare Program Integrity (CMS-Pub. 100–08)
52	The Report of Benefit Saving.
53	Informing Beneficiaries About Which Local Medical Review Policy and/or National Determination Is Associated With Their Claims Denial.
54	Informing Beneficiaries About Which Lab Negotiated National Coverage.
55	Quarterly Update To Correct Coding Initiative Edit, Version 10.0, Effective January 1, 2004.
56	Update of Codes in the Program Integrity Management Reporting System and the Contractor Administrative Cost and Financial Management System.
57	Quarterly Update to Correct Coding Initiative Edits, Version 10.0, Effective January 1, 2004.
58	Provider Enrollment Manual Section 20.
59	Documentation Specifications for Areas Selected for Prepayment or Postpayment.
	Medicare Review.
60	Provider Enrollment, Chain and Ownership System.
	Medicare Contractor Beneficiary and Provider Communications (CMS Pub. 100–09)
1	Contains General Instructions and Requirements for Medicare Carriers, Including Durable Medical Equipment Regional Carrier and Intermediaries, for Processing Correspondence.
2	Revised Disclosure Desk Reference for Call Centers (Fourth Version).
3	Corrections and Reorganization of Material.
	Medicare Quality Improvement Organizations (CMS–Pub. 100–10)
11	Medicare+Choice Organizations.
12	Quality Improvement Organization.
13	Hospital Self-Generated Data

ADDENDUM III.—MEDICARE AND MEDICAID MANUAL INSTRUCTIONS—Continued

[October 2003 through December 2003]

Transmittal No.	Manual/Subject/Publication No.
	Medicare End-Stage Renal Disease Network Organizations (CMS Pub. 100–14)
4	Confidentiality and Disclosure.
	Medicare Managed Care (CMS Pub. 100–16)
32	Contacts With Medicare+Choice Organizations.
33	Contacts With Medicare+Choice Organizations.
34	Medicare+Choice Beneficiary Grievances.
35	Contacts With Medicare+Choice Organizations.
36	Medicare+Choice Organizations.
37	Revisions to Chapter 15.
38	Medicare Cost Plan Enrollment and Disenrollment Instructions.
39	Quality Assessment.
40	Manualization of the Plan Communication Guide.
	End-Stage Renal Disease (CMS-Pub. 100–14)
1	Forward.
	Purpose of the Network Manual.
	Statutes and Regulations.
	End-Stage Renal Disease Network Organizations Manual Revisions.
	Acronyms and Glossary.
	Purpose of End-Stage Renal Disease Network Organization.
	Requirements for End-Stage Renal Disease Network Organization.
	Responsibilities of End-Stage Renal Disease Network Organization.
	Health Care Quality Improvement Program Goals.
	Network Organization's Role in Health Care Quality Improvement Program.
2	Forward.
	Purpose of the Network Manual.
	Statutes and Regulations.
	Revision to the End-Stage Renal Disease Organizations Manual.
	Purpose of End-Stage Renal Disease Network Organization.
	Requirements for End-Stage Renal Disease Network Organizations.
	Responsibilities of End-Stage Renal Disease Network Organizations Goals.
	Network Organization's Role in Health Care Quality Improvement Program.
3	Organizational Structure.
	Establishing the Network Computer.
	Board of Directors.
	Other Committees.
	Network Staff.
	Required Administrative Reports/Activities.
	Quarterly Progress and Status Reports.
	Annual Report.
	Semi Annual Report of Network Operating Costs.
	New End Stage Renal Disease Patient Orientation Package Activities.
	Internal Quality Control Program.
	Internal Quality Control Program Requirements.
	Managed Care Manual (CMS Pub. 100–16)
26	Alternate Employer Group Enrollment Election.
	Optional Employer Group Medicare+Choice Enrollment Election.
	Request Submitted via Internet.
	Request Signature and Data.
	Effective Dates.
	Notice Requirements.
	Optional Employer Group Medicare+Choice Disenrollment Election.
	Medigap-Guaranteed Issue Notification Requirements.
	General Rule.
	Effective Date.
	Researching and Acting on a Change of Address.
	Clarified the Notice Requirements for Out of Area Permanent.
27	Noncontracted Provider Appeals.
	Storage of Appeal Case Files by the Independent Review Entity.
	Representative Filing on Behalf of the Enrollee.
	Storage of Hearing Files.
28	Streamlined Marketing Review Process.
	Introduction.
	Marketing Review Process.
	Guidelines for Advertising Material.

ADDENDUM III.—MEDICARE AND MEDICAID MANUAL INSTRUCTIONS—Continued

[October 2003 through December 2003]

Transmittal No.	Manual/Subject/Publication No.
	Guidelines for Advertising (Pre-enrollment) Material.
	Guidelines for Beneficiary Notification Materials.
	Model Annual Notice of Change.
	General Guidance on Dual Eligibility.
	Guideline for Outreach Program.
	Submission Requirements.
	Center for Medicare+Medicaid Services Review/Approval Process.
	Model Direct Mail Letter.
	Summary of Benefits for Medicare+Choice Organizations.
	Referral Programs.
	Allowable Actions for Medicare+Choice Organizations.
	Specific Guidance About the Use of Independent Insurance Agents.
	Answers to Frequently Asked Questions About Promotional Marketing of Multiple Lines of Business.
29	Introduction.
	Quality Assessment and Performance Improvement Program.
	Administration of the Quality Assessment and Performance Improvement Program.
	Medicare+Choice Organizations Using Physician Incentive Plans.
	Health Information System.
	Quality Assessment and Performance Improvement.
	Centers for Medicare & Medicaid Services Directed Special Projects.
	Reporting Time Frames.
	Communication Process.
	Quality Assessment and Performance Improvement.
	Process for Centers for Medicare & Medicaid Services Multi-Year Quality Assessment and Performance Improvement Program Project Approvals.
	Evaluation of Quality Assessment and Performance Improvement Program Projects.
	The Medicare+Choice Deeming Program.
	Terminology.
	General Rule.
	Obligations of Deemed Medicare & Medicaid Organizations.
	Oversight of Accrediting Organizations.
	Application Requirements.
	Reporting Requirements.
	Informal Hearing Procedures.
30	Reasonable Cost-Based Payments—General.
	Reasonable Cost Payments.
	Bill Processing.
	Principles of Payments.
	Budget and Enrollment Forecast.
	Interim Per Capita Rate.
	Interim Payment for Health Care Prepayment Plans.
	Electronic Transfer of Funds.
	Payment Report.
	Interim and Final Cost and Enrollment Report.
	Adjustment of Payments.
	Final Cost Report.
	Final Settlement Process for Medicare Health Care Prepayment Plans.
	Final Settlement Payment for Medicare Health Care Prepayment Plans.
	Recovery of Overpayment.
	Interest Charges for Medicare Overpayments/Underpayments.
	The Basic Rules.
	Definition of Final Determination.
	Rate of Interest.
	Accrual of Interest.
	Waiver of Interest.
	Rules Applicable to Partial Payments.
	Exception to Applicability.
	Nonallowable Interest Cost.
	Centers for Medicare & Medicaid Services General Payment Principles.
	Medicare Payments to Health Care Prepayment Plans.
	Prudent Buyer Principle.
	Allowable Costs.
	Costs Not Reimbursable Directly to the Health Care Prepayment Plans.
	Deductible and Coinsurance.
	Hospice Care Costs.
	Medicare as Secondary Payer.
31	Overview of Enrollment and Payment Process.
	Purpose of the Chapter.
	Medicare+Choice Organization Data Processing Responsibilities.
	Centers for Medicare & Medicaid Services Group Health Plan System.
	Enrollment/Disenrollment Requirements and Effective Dates.

ADDENDUM III.—MEDICARE AND MEDICAID MANUAL INSTRUCTIONS—Continued

[October 2003 through December 2003]

Transmittal No.	Manual/Subject/Publication No.
	General.
	Enrollments.
	Disenrollments.
	Cost Based Medicare+Choice Organizations Only.
	Medicare+Choice Organizations Only.
	Cost Based Medicare+Choice Organizations Only—Employer Group Health Plan.
	Retroactive Enrollment.
	Medicare Membership Information.
	The Centers for Medicare & Medicaid Services Medicare+Choice.
	Organizations Only Interface.
	Submitting Medicare Membership Information to Centers for Medicare & Medicaid Services.
	Submission of Enrollment/Disenrollment Transaction Records.
	Submission of Correction Transaction Records.
	Health Insurance Claim Number.
	Transaction Type Code and the Prior Commercial Indicator.
	Transaction Type Codes.
	Prior Commercial Months Field.
	Special Status Beneficiaries—Medicare+Choice Organizations.
	Special Status Beneficiaries.
	Special Status—Hospice.
	Special Status—End-Stage Renal Disease.
	Special Status—Institutionalized.
	Special Status—Medicaid/Medical Assistance Only.
	Special Status—Working Aged.
	When to Submit "Special Status" Information (Medicare+Choice Organizations Only).
	Other Medicare Membership Information.
	Risk Adjustment Payment.
	Bonus Payment.
	Extra Payment in Recognition of Quality Congestive Heart Failure.
	Outpatient Care.
	Benefit Stabilization Fund.
	Electronic Submission of Membership Records to Centers for Medicare & Medicaid Services.
	Timeliness Requirements.
	Record Submission Schedule.
	Sending the Transaction File to Centers for Medicare & Medicaid Services.
	Electronic Data Transfer.
	Centers for Medicare & Medicaid Services Data Center Access.
	Data Processing Vendor.
	Receiving Medicare Membership Information From Centers for Medicare & Medicaid Services.
	General.
	Centers for Medicare & Medicaid Services Transaction Reply/Monthly Activity Report.
	Transaction Reply Field Information.
	Plan Payment Report.
	Demographic Report-Medicare+Choice Organizations Only.
	Medicare Fee-For-Service Bill Itemization and Summary Report.
	Monthly Membership Report.
	Bonus Payment Report.
	Working Aged Transaction Status Report.
	Retroactive Payment Adjustment Policy.
	Standard Operating Procedures for State and County Code Adjustments.
	Standard Operating Procedures for Processing of Institutional Adjustments.
	Standard Operating Procedures for Medicaid Retroactive Adjustments.
	Standard Operating Procedures for End-Stage Renal Disease Retroactive Adjustments.
	Processing of Working Aged Retroactive Adjustments.
	Standard Operating Procedures for Retroactive Adjustment Plan Elections.
	Centers for Medicare & Medicaid Services, Social Security Act.
	Administration, and Customer Service Center Disenrollments.
	General.
	Medicare Customer Service Center Disenrollments.
	Centers for Medicare & Medicaid Services Disenrollments.
	Coordination With the Medicare Fee-For-Services Program.
	Pro-Rate Deductible.
	Duplicate Payment Prevention by Cost-Based Medicare+Choice Organizations.
	One Time Notification (CMS Pub. 100–20)
06	Either Impact Multiple Manuals or Have No Manual Impact.
07	Common Working File Edits for Inserts for Therapeutic Shoes.
08	Revised X12N 4010A1 837 Professional Flat File.
09	Shared System Maintainer Hours for Resolution of Problems Detected During Health Insurance Portability and Accountability Act Transaction Release Testing.

ADDENDUM III.—MEDICARE AND MEDICAID MANUAL INSTRUCTIONS—Continued

[October 2003 through December 2003]

Transmittal No.	Manual/Subject/Publication No.
10	Changes to the Laboratory National Coverage Determination Edit Software for January 1, 2004.
11	Calendar Year 2004 Participation Enrollment and Medicare Participating Physicians and Suppliers Directory Procedures.
12	New Waived Tests—January 1, 2004.
13	Program Integrity Management Reporting System for Part A—Phase 3.
14	Comprehensive Error Rate Testing Program—Requirements Update for Medicare Part A Provider Address File and Sample Claims Resolution File.
15	Changes in Transitional Outpatient Payment (TOP) for 2004.
16	Implementation of Correction to: Changes to the Hospital Inpatient Prospective Payment System and Fiscal Year 2004 Rates; as Published in the October 6, 2003, **Federal Register** (68 FR 57732); and Extension of the Provision Equalizing the Urban and Rural Standardized Medicare Inpatient Hospital Payments as Required by Public Law 108–89.
17	Fee Schedule Update for 2004 for Durable Medical Equipment, Prosthetics, Orthotics, and Supplies.
18	Change in Coding on Medicare Claims for Darbepoetin Alfa (Trade Name Aranesp) and Epoetin Alfa (Trade Name Epogen) of Treatment of Anemia in End-Stage Renal Disease Patients on Dialysis.
19	Change in Payment for Darbepoetin Alfa (Trade Name Aranesp) for Treatment of Anemia In End-Stage Renal Disease Patients on Dialysis.
20	2004 Annual Update for Clinical Laboratory Fee Schedule and Laboratory Services to Reasonable Charge Payment.
21	Indian Health Service (IHS) Hospital Payment Rates for Calendar Year 2003.
22	Clarification to Transmittal B–03–059 (CR 2755)—Minimum Number of Pricing Files That Must Be Maintained Online for Medicare Single Drug Pricer.
23	Payment for Ambulance Services Furnished by New Suppliers.
24	Instructions for Fiscal Intermediary Standard System (FISS) and Multi-Carrier System Healthcare Integrated General Ledger Accounting System Changes.
25	Clarification of Mammography Annual Screening Examination.
26	Coding and Billing Instructions for Velcade™ (Bortezomib).
27	Emergency Correction to the 2004 Healthcare Common Procedure Coding System File.
28	2004 Medicare Physician Fee Schedule Increase and Extension of the Annual Participation Enrollment Period.
29	Revised American National Standards Institute X12N 837 Professional Health Care Claim Companion Document.
30	Changes in Transitional Outpatient Payment (TOP) for 2004.
31	Emergency Revised 2004 Update of the Durable Medical Equipment Provider of Services and Clinical Laboratory Fee Schedules.
32	January 2004 Update of the Hospital Outpatient Prospective Payment System.
33	Change of Medicare Part A Plan Under Contract With the Blue Cross/Blue Shield Association and Change of Part B Carrier in the State of Rhode Island From Blue Cross/Blue Shield of Rhode Island to Arkansas Blue Cross/Blue Shield.
34	2004 Medicare Physician Fee Schedule Annual Changes.
35	Emergency Correction to the Fee Schedule Update for 2004 for Durable Medical Equipment, Prosthetics, Orthotics, and Supplies
36	Additional Modification Regarding Change Request 2963: Change in Coding on Medicare Claims for Darbepoetin Alfa (Trade Name Aranesp) and Epoetin Alfa (Trade Name Epogen) for Treatment of Anemia In End-Stage Renal Disease Patient on Dialysis.
37	Home Health Cost Reporting Processes.

ADDENDUM IV.—REGULATION DOCUMENTS PUBLISHED IN THE FEDERAL REGISTER

[October 2003 through December 2003]

Publication date	FR Vol. 68 page no.	CFR parts affected	File code	Title of regulation
October 6, 2003	57732	42 CFR Parts 412 and 413	CMS–1470–CN	Medicare Program; Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 2004 Rates; Correction.
October 10, 2003	58756	42 CFR Parts 409, 411, 413, 440, 483, 488, and 489.	CMS–1469–CN	Medicare Program; Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities; Correction.
October 24, 2003	61005		CMS–1253–N	Medicare Program; November 17, 2003, Meeting of the Practicing Physicians Advisory Council.
October 24, 2003	61004		CMS–4061–N	Medicare Program: Meeting of the Advisory Panel on Medicare Education-November 20, 2003.
October 24, 2003	61002		CMS–8018–N	Medicare Program; Part A Premium for 2004 for the Uninsured Aged and for Certain Disabled Individuals Who Have Exhausted Other Entitlement.
October 24, 2003	60997		CMS–8017–N	Medicare Program; Monthly Actuarial Rates and Monthly Supplementary Medical Insurance Premium Beginning January 1, 2004.
October 24, 2003	60995		CMS–8016–N	Medicare. Program; Inpatient Hospital Deductible and Hospital and Extended Care Services Coinsurance Amounts for 2004.
November 7, 2003	63398	42 CFR Parts 410 and 4419.	CMS–1471–FC	Medicare Program; Changes to the Hospital Outpatient Prospective Payment System and Calendar Year 2004 Payment Rates.

ADDENDUM IV.—REGULATION DOCUMENTS PUBLISHED IN THE FEDERAL REGISTER—Continued

[October 2003 through December 2003]

Publication date	FR Vol. 68 page no.	CFR parts affected	File code	Title of regulation
November 7, 2003	63692	42 CFR Parts 400, 405, and 426.	CMS–3063–F	Medicare Program: Review of National Coverage Determinations and Local Coverage Determinations.
November 7, 2003	63196	42 CFR Parts 410, and 414	CMS–1476–FC	Medicare Program; Revisions to Payment Policies Under the Physician Fee Schedule for Calendar Year 2004.
November 19, 2003 ...	65346	42 CFR Part 426	OFR Correction	Medicare Program; Review of National Coverage Determinations and Local Coverage Determinations.
November 28, 2003 ...	66920	42 CFR Parts 412, 413, and 424.	CMS–1213–P	Medicare Program; Prospective Payment System for Inpatient Psychiatric Facilities.
November 28, 2003 ...	66721	42 CFR Part 408	CMS–6016–F	Medicare Program; Reduction in Medicare Part B Premiums as Additional Benefits Under Medicare+Choice Plans.
November 28, 2003 ...	66710	42 CFR Parts 403, 489, and 498.	CMS–1909–F	Medicare Program; Religious Nonmedical Health Care Institutions and Advance Directives.
December 5, 2003	67960	42 CFR Part 414	CMS–1232–FC	Medicare Program: Coverage and Payment of Ambulance Services; Inflation Update for CY 2004.
December 5, 2003	67955	42 CFR Parts 412, 413, 476, and 484.	CMS–3055–F	Medicare Program; Photocopying Reimbursement Methodology.
December 15, 2003 ...	69928	.....	CMS–4063–N	Medicare Program; Medicare Prescription Drug Discount Card.
December 15, 2003 ...	69840	42 CFR Parts 403 and 408.	CMS–4063–IFC	Medicare Program, Prescription Drug Discount Card.
December 15, 2003 ...	69707	.....	CMS 1370–N	Medicare Program; The Practicing Physicians Advisory Council's Request for Nominations.
December 24, 2003 ...	74792	42 CFR Parts 405 and 491.	CMS–1910–F	Medicare Program; Rural Health Clinics: Amendments to Participation Requirements and Payment Provisions; and Establishment of a Quality Assessment and Performance Improvement Program.
December 24, 2003 ...	74622	.....	CMS–1247–N	Medicare Program; Town Hall Meeting in Calendar Year 2004 for Ambulance Condition Codes.
December 24, 2003 ...	74621	.....	CMS–1254–N	Medicare Program, Meeting of the Advisory Panel on Ambulatory Payment Classification Groups—February 18, 19, and 20, 2004.
December 24, 2003 ...	74613	.....	CMS–1226–GNC	Medicare Program; Criteria and Standards for Evaluating Intermediary, Carrier, and Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) Regional Carrier Performance During Fiscal Year 2004.
December 24, 2003 ...	74607	.....	CMS–3119–PN	Medicare Program; Procedures for Maintaining Code Lists in the Negotiated National Coverage Determinations for Clinical Diagnostic Laboratory Services.
December 24, 2003 ...	74590	.....	CMS–9019–N	Medicare and Medicaid Programs; Quarterly Listing of Program Issuances—July 2003 Through September 2003.
December 24, 2003 ...	74491	42 CFR Part 411.	CMS–18089–F4	Medicare and Medicaid Programs; Physicians' Referrals to Health Care Entities With Which They Have Financial Relationships: Extension of Partial Delay of Effective Date.
December 31, 2003 ...	75442	42 CFR Parts 410 and 419.	CMS–1471–CN	Medicare Program; Changes to the Hospital Outpatient Prospective Payment System and Calendar Year 2004 Payment Rates; Final Rule; Correction.

Addendum V—National Coverage Determinations [October 2003 Through December 2003]

A national coverage determination (NCD) is a determination by the Secretary with respect to whether or not a particular item or service is covered nationally under Title XVIII of the Social Security Act, but does not include a determination of what code, if any, is assigned to a particular item or service covered under this title, or determination with respect to the amount of payment made for a particular item or service so covered. We include below all of the NCDs that were issued during the quarter covered by this notice. The entries below include information concerning completed decisions as well as sections on program and decision memoranda, which also announce pending decisions or, in some cases, explain why it was not appropriate to issue an NCD. We identify completed decisions by the section of the NCDM (or CIM) in which the decision appears, the title, the date the publication was issued, and the effective date of the decision. Information on completed decisions as well as pending decisions has also been posted on the CMS Web site at *http://cms.hhs.gov/coverage*.

National Coverage Determinations

[October 2003 Through December 2003]

100–03	Title	Issue date	Effective date
20.9	Ventricular Assist Devices (VADs)	10/17/03	10/01/03
240.1	Lung Volume Reduction Surgery (LVRS)	11/04/03	10/01/03
210.3	Fecal Occult Blood Tests (FOBT)	12/19/03	01/01/04

Medicare Claims Processing Manual

100–04	Title	Issue date	Effective date
AB03–104	Changes to the Laboratory NCD Edit Software for 01/01/04	10/24/03	01/01/04

One-Time Notification

100–20	Title	Issue date	Effective date
AB03–127	2004 Annual Update for Clinical Lab Fee Schedule	11/07/03	01/01/04

Addendum VI—FDA-Approved Category B IDEs

Under the Food, Drug, and Cosmetic Act (21 U.S.C. 360c), devices fall into one of three classes. To assist CMS under this categorization process, the FDA assigns one of two categories to each FDA-approved IDE. Category A refers to experimental IDEs, and Category B refers to nonexperimental IDEs. To obtain more information about the classes or categories, please refer to the **Federal Register** notice published on April 21, 1997 (62 FR 19328).

The following list includes all Category B IDEs approved by FDA during the 4th quarter, October through December 2003.

G020078
G020185
G020237
G030132
G030149
G030156
G030161
G030178
G030180
G030182
G030185
G030186
G030187
G030189
G030190
G030191
G030195
G030197
G030198
G030200
G030201
G030202
G030204
G030205
G030206
G030207
G030208
G030209
G030210
G030214
G030216
G030217
G030219
G030220
G030221
G030222
G030224
G030225
G030226
G030229
G030230
G030232
G030236
G030238
G030239
G030240
G030246
G030248
G030249
G030250
G030255
G030259
G939227

Addendum VII Approval Numbers for Collections of Information

Below we list all approval numbers for collections of information in the referenced sections of CMS regulations in Title 42; Title 45, Subchapter C; and Title 20 of the Code of Federal Regulations, which have been approved by the Office of Management and Budget:

OMB Control No.	Approved CFR Sections in Title 42, Title 45, and Title 20 (Note: Sections in Title 45 are preceded by "45 CFR," and sections in Title 20 are preceded by "20 CFR")
0938–0008	414.40, 424.32, 424.44
0938–0022	413.20, 413.24, 413.106
0938–0023	424.103
0938–0025	406.28, 407.27
0938–0027	486.100–486.110
0938–0033	405.807
0938–0034	405.821
0938–0035	407.40
0938–0037	413.20, 413.24
0938–0041	408.6, 408.22
0938–0042	410.40, 424.124
0938–0045	405.711
0938–0046	405.2133
0938–0050	413.20, 413.24
0938–0062	431.151, 435.1009, 440.220, 440.250, 442.1, 442.10–442.16, 442.30, 442.40, 442.42, 442.100–442.119, 483.400–483.480, 488.332, 488.400, 498.3–498.5
0938–0065	485.701–485.729
0938–0074	491.1–491.11
0938–0080	406.7, 406.13
0938–0086	420.200–420.206, 455.100–455.106

OMB Control No.	Approved CFR Sections in Title 42, Title 45, and Title 20 (Note: Sections in Title 45 are preceded by "45 CFR," and sections in Title 20 are preceded by "20 CFR")
0938–0101	430.30
0938–0102	413.20, 413.24
0938–0107	413.20, 413.24
0938–0146	431.800–431.865
0938–0147	431.800–431.865
0938–0151	493.1405, 493.1411, 493.1417, 493.1423, 493.1443, 493.1449, 493.1455, 493.1461, 493.1469, 493.1483, 493.1489
0938–0155	405.2470
0938–0170	493.1269–493.1285
0938–0193	430.10–430.20, 440.167
0938–0202	413.17, 413.20
0938–0214	411.25, 489.2, 489.20
0938–0236	413.20, 413.24
0938–0242	416.44, 418.100, 482.41, 483.270, 483.470
0938–0245	407.10, 407.11
0938–0246	431.800–431.865
0938–0251	406.7
0938–0266	416.41, 416.47, 416.48, 416.83
0938–0267	410.65, 485.56, 485.58, 485.60, 485.64, 485.66
0938–0269	412.116, 412.632, 413.64, 413.350, 484.245
0938–0270	405.376
0938–0272	440.180, 441.300–441.305
0938–0273	485.701–485.729
0938–0279	424.5
0938–0287	447.31
0938–0296	413.170, 413.184
0938–0300	431.800
0938–0301	413.20, 413.24
0938–0302	418.22, 418.24, 418.28, 418.56, 418.58, 418.70, 418.74, 418.83, 418.96, 418.100
0938–0313	418.1–418.405
0938–0328	482.12,482.13, 482.21, 482.22, 482.27, 482.30, 482.41, 482.43, 482.45, 482.53, 482.56, 482.57, 482.60, 482.61, 482.62, 482.66, 485.618, 485.631
0938–0334	491.9
0938–0338	486.104, 486.106, 486.110
0938–0354	441.60
0938–0355	484.10–484.52
0938–0357	409.40–409.50, 410.36, 410.170, 411.4–411.15, 421.100, 424.22, 484.18, 489.21
0938–0358	412.20–412.30
0938–0359	412.40–412.52
0938–0360	405.2100–405.2184
0938–0365	484.10, 484.11, 484.12, 484.14, 484.16, 484.18, 484.20, 484.36, 484.48, 484.52
0938–0372	414.330
0938–0378	482.60–482.62
0938–0379	442.30, 488.26
0938–0386	405.2100–405.2171
0938–0391	488.18, 488.26, 488.28
0938–0426	476.104, 476.105, 476.116, 476.134
0938–0429	447.53
0938–0443	473.18, 473.34, 473.36, 473.42
0938–0444	1004.40, 1004.50, 1004.60, 1004.70
0938–0445	412.44, 412.46, 431.630, 456.654, 466.71, 466.73, 466.74, 466.78
0938–0447	405.2133
0938–0449	440.180, 441.300–441.310
0938–0454	424.20
0938–0456	412.105
0938–0463	413.20, 413.24
0938–0465	411.404, 411.406, 411.408
0938–0467	431.17, 431.306, 435.910, 435.920, 435.940–435.960
0938–0469	417.107, 417.478
0938–0470	417.143, 417.408, 417.800–417.840, 422.6
0938–0477	412.92
0938–0484	424.123
0938–0486	498.40–498.95
0938–0501	406.15
0938–0502	433.138
0938–0512	486.301–486.325
0938–0526	462.102, 462.103, 475.100, 475.106, 475.107
0938–0534	410.38, 424.5
0938–0544	493.1–493.2001
0938–0564	411.32
0938–0565	411.20–411.206
0938–0566	411.404, 411.406, 411.408
0938–0567	Part 498 Subparts D and E, and 20 CFR 404.933
0938–0573	412.230, 412.256

OMB Control No.	Approved CFR Sections in Title 42, Title 45, and Title 20 (Note: Sections in Title 45 are preceded by "45 CFR," and sections in Title 20 are preceded by "20 CFR")
0938–0581	493.1–493.2001
0938–0599	493.1–493.2001
0938–0600	405.371, 405.378, 413.20
0938–0610	417.436, 417.801, 422.128, 430.12, 431.20, 431.107, 434.28, 483.10, 484.10, 489.102
0938–0612	493.1–493.2001
0938–0618	433.68, 433.74, 447.272
0938–0653	493.1771, 493.1773, 493.1777
0938–0655	493.1840
0938–0657	405.2110, 405.2112
0938–0658	405.2110, 405.2112
0938–0667	482.12, 488.18, 489.20, 489.24
0938–0673	430.10
0938–0679	410.38
0938–0685	410.32, 410.71, 413.17, 424.57, 424.73, 424.80, 440.30, 484.12
0938–0686	493.551–493.557
0938–0688	486.301–486.325
0938–0690	488.4–488.9, 488.201
0938–0691	412.106
0938–0692	466.78, 489.20, 489.27
0938–0700	417.479, 417.500; 422.208, 422.210; 434.44, 434.67, 434.70; 1003.100, 1003.101, 1003.103, 1003.106
0938–0701	422.152
0938–0702	45 CFR 146.111, 146.115, 146.117, 146.150, 146.152, 146.160, 146.180
0938–0703	45 CFR 148.120, 148.124, 148.126, and 148.128
0938–0714	411.370–411.389
0938–0717	424.57
0938–0721	410.33
0938–0722	422.370–422.378
0938–0723	421.300–421.318
0938–0730	405.410, 405.430, 405.435, 405.440, 405.445, 405.455, 410.61, 415.110, 424.24
0938–0732	417.126, 417.470
0938–0734	45 CFR 5b
0938–0739	413.337, 413.343, 424.32, 483.20
0938–0742	422.300–422.312
0938–0749	424.57
0938–0753	422.000–422.700
0938–0754	441.152
0938–0758	413.20, 413.24
0938–0760	Part 484 Subpart E, 484.55
0938–0761	484.11, 484.20
0938–0763	422.1–422.10, 422.50–422.80, 422.100–422.132, 422.300–422.312, 422.400–422.404, 422.560–422.622
0938–0768	417.800–417.840
0938–0770	410.2
0938–0778	422.64, 422.111, 422.560–422.622
0938–0779	417.126, 417.470, 422.64, 422.210
0938–0781	411.404–411.406, 484.10
0938–0786	438.352, 438.360, 438.362, 438.364
0938–0787	406.28, 407.27
0938–0790	460.12, 460.22, 460.26, 460.30, 460.32, 460.52, 460.60, 460.70, 460.71, 460.72, 460.74, 460.80, 460.82, 460.98, 460.100, 460.102, 460.104, 460.106, 460.110, 460.112, 460.116, 460.118, 460.120, 460.122, 460.124, 460.132, 460.152, 460.154, 460.156, 460.160, 460.164, 460.168, 460.172, 460.190, 460.196, 460.200, 460.202, 460.204, 460.208, 460.210
0938–0792	491.3, 491.8, 491.11
0938–0798	413.24, 413.65, 419.42
0938–0802	419.43
0938–0810	482.45
0938–0819	45 CFR 146.121
0938–0823	420.410
0938–0824	440.10, 482.13
0938–0827	45 CFR 146.141
0938–0829	422.568
0938–0832	Part 489
0938–0833	483.350–483.376
0938–0841	431.636, 457.50, 457.60, 457.70, 457.340, 457.350, 457.431, 457.440, 457.525, 457.560, 457.570, 457.740, 457.750, 457.810, 457.940, 457.945, 457.965, 457.985, 457.1005, 457.1015, 457.1180
0938–0842	412, 413
0938–0846	411.1, 411.350–411.357, 424.22
0938–0857	Part 419
0938–0860	Part 419
0938–0866	45 CFR Part 162
0938–0872	413.337, 483.20
0938–0873	422.152
0938–0874	45 CFR Parts 160 and 162
0938–0878	Part 422 Subparts F and G

OMB Control No.	Approved CFR Sections in Title 42, Title 45, and Title 20 (Note: Sections in Title 45 are preceded by "45 CFR," and sections in Title 20 are preceded by "20 CFR")
0938–0883	45 CFR Parts 160 and 164
0938–0887	45 CFR 148.316, 148.318, 148.320
0938–0897	412.22, 412.533
0938–0907	412.30, 412.304, 413.65
0938–0913	414.707

[FR Doc. 04–6350 Filed 3–25–04; 8:45 am]
BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–2062–N]

RIN 0938–AJ74

Medicaid Program; Disproportionate Share Hospital Payments

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

ACTION: Notice.

SUMMARY: This notice announces the final Federal share disproportionate share hospital (DSH) allotments for Federal fiscal years (FFYs) 2001 and 2002, and the preliminary Federal share DSH allotments for FFYs 2003 and 2004. It also announces the final FFYs 2000, 2001, and 2002, and the preliminary FFYs 2003 and 2004, limitations on aggregate DSH payments that States may make to institutions for mental disease (IMDs) and other mental health facilities. In addition, this notice describes the methodologies for determining the amounts of States' FFY DSH allotments for FFY 2001 and thereafter. It also republishes the Federal share DSH allotments for FFYs 1998 through 2000, and the final FFYs 1998 and 1999 limitations on aggregate DSH payments that States may make to IMDs and other mental health facilities. Additionally, the notice specifies a format to be used by States when submitting their annual DSH report to ensure that Federal funds provided for DSH adjustments are made in accordance with the Medicaid statutory requirements.

FOR FURTHER INFORMATION CONTACT: Richard Strauss, (410) 786–2019 (DSH Allotments and IMD DSH Limits); Jonas Eberly, (410) 786–6232 (Annual DSH report for DSH payments).

SUPPLEMENTARY INFORMATION:

I. Background

A. DSH Allotments and IMD DSH Limits Published in October 8, 1998 ***Federal Register****.*

We published a notice in the October 8, 1998 **Federal Register** (63 FR 54142) that announced the Federal share DSH allotments for FFYs 1998 through 2002 and the IMD DSH limits for FFYs 1998 and 1999. The DSH allotments and IMD DSH limits published in that notice specified and were determined in accordance with the sections 1923(f) and (1923(h) of the Social Security Act (the Act), as amended by the Balanced Budget Act of 1997 (BBA) (Pub. L. 105–33, enacted on August 5, 1997). The notice also reflected the FFY 1998 DSH allotment for one State, specified in accordance with section 601 of Pub. L. 105–78 (enacted on November 13, 1997).

Additional legislative changes relating to the amounts or methodologies for calculating the States' DSH allotments or IMD DSH limits have been made to the Act since the publication of the October 8, 1998 notice. In this section and in Section II of this notice, we describe each of the legislative changes related to the DSH allotments and IMD DSH limits for fiscal years that were not included in the October 8, 1998 notice.

B. DSH Allotments For FFYs 1998 Through 2000

Section 4721(a) of the BBA amended section 1923(f) of the Act to require that Federal Medicaid DSH expenditures be limited by the statutorily defined Federal share DSH allotments for FFYs 1998 through 2002 specified in a chart in section 1923(f)(2) of the Act. Section 601 of Pub. L. 105–78 amended the DSH allotment contained in this chart for the State of Minnesota for FFY 1998. The October 8, 1998 notice published the statutorily prescribed DSH allotments for all States for FFYs 1998 through 2002, in accordance with the amounts specified in the chart at section 1923(f)(2) of the Act, as established by the BBA and as amended by Pub. L. 105–78. Subsequent to the publication of the DSH allotments for these years, a number of legislative actions revised the DSH allotments specified in the chart at section 1923(f)(2) of the Act, for certain States. Specifically, sections 702, 703, and 704 of Pub. L. 105–277 (enacted on October 21, 1998) amended the FFY 1999 DSH allotments for Minnesota, New Mexico, and Wyoming, respectively, and section 601(a) of the Medicare, Medicaid, SCHIP Balanced Budget Refinement Act of 1999 (BBRA) (Pub. L. 106–113, enacted on November 29, 1999) amended the FFYs 2000, 2001, and 2002 DSH allotments for the District of Columbia, Minnesota, New Mexico, and Wyoming.

C. DSH Allotments For FFYs 2001 and 2002

Section 701(a) of the Benefits Improvement and Protection Act of 2000 (BIPA) (Pub. L. 106–554, enacted on December 21, 2000) added a new section 1923(f)(4) of the Act that provided for a "Special Rule For Fiscal Years 2001 and 2002," under which States' DSH allotments for FFY 2001 and 2002 would be determined through the application of a methodology. The DSH allotments for these fiscal years, calculated under this methodology, supercede the DSH allotments for the years that are specified in the chart at section 1923(f)(2) of the Act. Under section 1923(f)(4) of the Act, the DSH allotments for FFY 2001 and FFY 2002 are determined by increasing the States' prior FFY DSH allotments by the Consumer Price Index for all Urban Consumers (CPI–U) for the prior fiscal year, subject to the limitation that an increase to a State's DSH allotment for a fiscal year could not result in the DSH allotment exceeding 12 percent of the State's total Federal medical assistance expenditures for the allotment year (referred to as the 12-percent limit). The application of this special rule for FFY 2001 and FFY 2002 had the effect of increasing States' DSH allotments for those years, as compared to the allotments they would have received under the chart at section 1923(f)(2) of the Act. In fact, the chart contained at section 1923(f)(2) of the Act would have provided for a decrease in States' DSH allotments over the fiscal years.

The BIPA also added a new section 1923(f)(5) of the Act, which established a "Special Rule For Extremely Low DSH States." Under this rule, States with FFY 1999 DSH expenditures that were

greater than zero percent and less than 1 percent of the States' FFY 1999 total medical assistance expenditures were considered to be "low-DSH States." Under section 1923(f)(5) of the Act, the Low-DSH States' FFY 2001 DSH allotments were increased to 1 percent of the States' total FFY 2001 medical assistance expenditures. The Low-DSH States' increased FFY 2001 DSH allotments were the basis for calculating the States' FFY 2002 DSH allotments. That is, similar to the methodology applied for determining the other (non-Low-DSH) States' allotments, the Low-DSH States' FFY 2002 allotments were determined by increasing their FFY 2001 allotment (as determined under the Low-DSH provision at section 1923(f)(5) of the Act) by the CPI–U for the prior fiscal year, subject to the 12-percent limit.

D. DSH Allotments for FFY 2003

Section 1923(f)(3) of the Act, as established by the BBA and amended by the BIPA, provides that the States' FFY 2003 DSH allotments are calculated by increasing their FFY 2002 allotments (as specified in the chart in Section 1923(f)(2) of the Act) by the CPI–U for the prior fiscal year, subject to the 12-percent limit. That is, the FFY 2003 allotments were *not* based on the FFY 2002 DSH allotments as were determined under section 1923(f)(4) of the Act. Since the FFY 2002 DSH allotments specified in the chart in section 1923(f)(2) of the Act are lower than the actual FFY 2002 DSH allotments (determined under section 1923(f)(4) of the Act), in general, States' FFY 2003 DSH allotments are lower than their FFY 2002 allotments. The exception to this, are the FFY 2003 DSH allotments for the Low-DSH States. Under the Low-DSH State provision, the Low-DSH States' FFY 2003 allotments are determined by increasing their *actual* FFY 2002 DSH allotments (not their FFY 2002 allotments specified in the chart in section 1923(f)(2) of the Act) by the CPI–U for the previous fiscal year. Therefore, Low-DSH States' DSH allotments increase (in general by the CPI–U) from FFY 2002 to FFY 2003.

E. DSH Allotments for FFY 2004

Section 1001(a) of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (enacted on December 8, 2003) amended section 1923(f)(3) of the Act to provide for a "Special, Temporary Increase In Allotments On A One-Time, Non-Cumulative Basis." Under this provision, States' FFY 2004 DSH allotments are determined by increasing their FFY 2003 allotments by 16 percent, and the fiscal year DSH allotment amounts so determined are not subject to the 12-percent limit.

F. DSH Allotments for FFY 2005, and Thereafter

Under the MMA amendments to section 1923(f) of the Act, each State's DSH allotment for FFY 2005 and for subsequent fiscal years is equal to the State's DSH allotment for FFY 2004, subject to the 12-percent limit. Furthermore, in the first fiscal year for which the Secretary estimates that a State's DSH allotment equals (or no longer exceeds) the DSH allotment as would have been determined under the statute in effect prior to the enactment of MMA, the allotment for that fiscal year will be calculated by increasing the State's DSH allotment for the previous fiscal year by the CPI–U for the prior fiscal year, subject to the 12-percent limit. The following example illustrates how the fiscal year DSH allotment would be calculated for fiscal years after FFY 2004.

Example—A State's FFY 2003 DSH allotment is $100 million. Under the MMA, the State's FFY 2004 DSH allotment would be $116 million ($100 million increased by 16 percent). The State's DSH allotment continues to $116 million for fiscal years following FFY 2004. However, for each fiscal year after FFY 2004, CMS would calculate the DSH allotments for the State in accordance with the statute in effect prior to the enactment of MMA. Under this methodology, the State's DSH allotment is determined by increasing the State's DSH allotment for the previous fiscal year by the CPI–U for the previous fiscal year. For purposes of this example, in accordance with this methodology the State's FFY 2007 DSH allotment is determined to be $115 million and the CPI–U for FFY 2007 is 2 percent. Therefore, under the prior law methodology, the State's FFY 2008 DSH allotment would be $117.3 million, calculated as $115 million increased by the 2 percent CPI–U for FFY 2007. Since $117.3 is greater than $116 million (the FFY 2004 DSH allotment calculated under MMA), the State's FFY 2008 DSH allotment would be $118.32 million, calculated as $116 million increased by 2 percent (the CPI–U for FFY 2007, the previous fiscal year). For FFY 2009 and thereafter, the State's DSH allotment would be calculated by increasing the previous fiscal year's DSH allotment by the CPI–U. Note, in each of the FFYs 2005 and thereafter, the DSH allotment would be subject to the 12-percent limit (in this example, that is not an issue).

G. DSH Allotments For Low-DSH States for FFYs 2004 and Thereafter

The MMA also amended section 1923(f)(5) of the Act regarding the calculation of the DSH allotments for Low-DSH States for FFY 2004 and subsequent fiscal years. Under section 1923(f)(5)(B) of the Act, as amended by MMA, new criteria are applied for determining whether a State is a Low-DSH State beginning with FFY 2004. Specifically, under section 1923(f)(5)(B) of the Act, as amended by MMA, a State is considered a Low-DSH State for FFY 2004 if its total DSH payments under its State plan for *FFY 2000* (including Federal and State shares) as reported to us as of August 31, 2003, is greater than 0 percent and less than 3 percent of the State's total FFY 2000 expenditures under its State plan for medical assistance. For States; that meet the new Low-DSH criteria, their FFY 2004 DSH allotments are calculated by increasing their FFY 2003 DSH allotments by 16 percent. Furthermore, the DSH allotments for FFYs 2005 through 2008 for the States meeting this Low-DSH criteria would be determined by increasing the previous fiscal year's allotment by 16 percent. The Low-DSH States' DSH allotments for FFYs 2004 through 2008 would not be subject to the 12-percent limit. The Low-DSH States' DSH allotments for FFYs 2009 and thereafter would be calculated by increasing such States' DSH allotments for the prior fiscal year by the CPI-U for that prior fiscal year. For FFYs 2009 and thereafter, the DSH allotments so determined would be subject to the 12-percent limit.

H. IMD DSH Limits for FFYs 1998 and Thereafter

Section 4721(b) of the BBA added section 1923(h) to the Act to provide that Federal financial participation (FFP) is not available for DSH payments to institutions for mental disease (IMD) and other mental health facilities that are in excess of a State-specific aggregate limit.

In the October 8, 1998 **Federal Register** notice, we interpreted the aggregate limit of IMD and other mental health facilities to be the lesser of a State's FFY 1995 total computable (State and Federal share) IMD and other mental health facility DSH expenditures applicable to the State's FFY 1995 DSH allotment (as reported on the Form CMS–64 as of January 1, 1997), or the amount equal to the product of the State's s current year total computable DSH allotment and the applicable percentage.

Each State's IMD limit on DSH payments to IMDs and other mental health facilities is calculated by first determining the State's total computable DSH expenditures attributable to the FFY 1995 DSH allotment for mental health facilities and inpatient hospitals. This is based on the total computable DSH expenditures reported by the State on the Form CMS–64 as mental health DSH and inpatient hospital as of January 1, 1997.

Once we determine the total computable amount of DSH expenditures applicable to the FFY 1995 DSH allotment, we then calculate an "applicable percentage." The applicable percentage for FFY 1998 through FFY 2000 (1995 IMD DSH percentage) is calculated by dividing the total computable amount of IMD and mental health DSH expenditures applicable to the State's FFY 1995 DSH allotment by the total computable amount of all DSH expenditures (mental health facility plus inpatient hospital) applicable to the FFY 1995 DSH allotment. For FFY 2001 and thereafter, the applicable percentage is defined as the lesser of the applicable percentage as calculated above (for FFYs 1998 through 2001) or 50 percent for FFY 2001; 40 percent for FFY 2002; and 33 percent for each subsequent FFY.

The applicable percentage is then applied to each State's total computable FFY DSH allotment for the current FFY. The State's total computable FFY DSH allotment is calculated by dividing the State's Federal share DSH allotment for the FFY by the State's Federal medical assistance percentage (FMAP) for that FFY.

In the final step of the calculation, the State's total computable IMD DSH limit for the FFY is set at the lesser of the product of a State's current fiscal year total computable DSH allotment and the applicable percentage for that fiscal year, or the State's FFY 1995 total computable IMD and other mental health facility DSH expenditures applicable to the State's FFY 1995 DSH allotment as reported on the Form CMS–64.

I. Preliminary and Final DSH Allotments and IMD DSH Limits

In general, we initially determines States' DSH allotments and IMD DSH limits for a fiscal year using estimates of medical assistance expenditures, including DSH expenditures in their Medicaid programs. These estimates are provided by States each year on the August quarterly Medicaid budget reports (Form CMS–37) prior to the Federal fiscal year for which the DSH allotments and IMD DSH limits are being determined. The DSH allotments and IMD DSH limits determined using these estimates are referred to as "preliminary." Only after we receive States" reports of the actual related medical assistance expenditures through the quarterly expenditure report (Form CMS–64), are the "final" DSH Allotments and IMD DSH limits determined. In this regard, the DSH allotments for FFY 1998 through FFY 2000, as published in the October 8, 1998 **Federal Register** notice were considered as final since these allotments were prescribed in the chart in section 1923(f)(2) of the Act. Similarly, the FFY 1998 and FFY 1999 IMD DSH limits published in the October 8, 1998 **Federal Register** were also considered as final, since these limits were based on the actual expenditures from FFY 1995 and the final FFY 1998 and FFY 1999 DSH allotments. This notice also announces the final FFY 2001 and 2002 DSH allotments (since they are based on the actual related expenditures), the preliminary FFY 2003 and 2004 DSH allotments (based on estimated expenditures), the final FFY 2000 through 2002 IMD DSH limits (based on the final DSH allotments for those fiscal years), and the preliminary FFY 2003 and 2004 IMD DSH limits (based on the preliminary DSH allotments for those years).

J. Annual Reporting of DSH Payments

Section 4721(c) of the BBA added section 1923(a)(2)(D) of the Act to require that States submit an annual report to us describing the DSH payments made to each disproportionate share hospital. This notice describes the contents of the DSH report for FFY 2004.

II. Calculation of the Final FFY 2001 Federal Share State DSH Allotments, the Final FFY 2002 Federal Share State DSH Allotments, the Preliminary FFY 2003 Federal Share State DSH Allotments, and the Preliminary FFY 2004 Federal Share State DSH Allotments

Section 701(a)(1)(A) of BIPA, amended section 1923(f)(4) of the Act, to revise the formula for computing the Federal share DSH allotments for FFY 2001 and FFY 2002. For FFY 2001 and FFY 2002, a State's Federal share DSH allotment increased from the prior year allotment by the (CPI-U) to the extent that the current year DSH allotment or the increased allotment does not exceed 12 percent of the Federal share of the State's total medical assistance expenditures (including DSH) for the current year.

Section 701(a)(2)(A) of BIPA, amended section 1923(f)(5) of the Act, to provide for calculating the DSH allotment under a "special rule for extremely low DSH States." The special rule applies to States whose FFY 1999 total DSH expenditures are greater than zero percent, but less than one percent, of their total FFY 1999 medical assistance expenditures (including DSH) as reported to us as of August 31, 2000. Under the special rule, the DSH allotments for FFY 2001 for these extremely Low-DSH States will be increased to 1 percent of the State's total amount of medical assistance expenditures (including DSH) under their plan for FFY 2001. However, application of the special rule cannot result in a decrease in the extremely Low-DSH State FFY 2001 allotments from an amount as would be calculated by application of the provisions of section 1923(f)(4) of the Act, as amended by BIPA. For subsequent fiscal years, the allotments for extremely Low-DSH States will be equal to their allotment for the previous FFY, increased by the percentage change in the CPI-U for the previous year, to the extent that the DSH allotment for that year does not exceed 12 percent of the Federal Share of the State's total medical assistance expenditures (including DSH) for the year.

Chart 1 of Addendum A to this notice represents a republication for the States' FFY 1998 through FFY 2000 DSH allotments; these amounts were previously published in the **Federal Register** on October 8, 1998, in a chart which reflected the DSH allotments in section 1923(f)(2) of the Act, as amended through the provisions of section 601 of Pub. L. 105–78. Chart 1 updates the chart published in the **Federal Register** on October 8, 1998 for certain States to reflect the further amendments made to the DSH allotments for FFY 1998 through FFY 2000 in section 1923(f)(2) of the Act, as amended by BBRA.

Charts 2 and 3 of Addendum A to this notice provides the States' final FFY 2001 and FFY 2002 DSH allotments, respectively.

Charts 4 and 5 of Addendum A to this notice provides the States' "preliminary" FFY 2003 and FFY 2004 DSH allotments. These preliminary allotments for each State were computed using the August 2002 and August 2003 estimates submitted by the States on the Form CMS–37. We will publish the final FFY 2003 and FFY 2004 DSH allotments for each State following receipt of, the States' four quarterly Medicaid expenditure reports

(Form CMS–64) for FFY 2003 and FFY 2004.

Chart 6 of Addendum A to this notice provides the determination of the Low-DSH States in accordance with the 1-percent test established by BIPA for determining State FY 2001 DSH allotments.

Chart 7 of Addendum A to this notice provides the determination of the Low-DSH States in accordance with the 3-percent test established by MMA for determining State FY 2004 DSH allotments.

III. Calculation of the FFYs 2000 through 2004 IMD DSH Limits

Section 1923(h) of the Act specifies the methodology to be used to establish the limits on the amount of DSH payments that a State can make to IMDs and other mental health facilities. FFP is not available for IMD/DSH payments that exceed the lesser of the State's FFY 1995 total computable mental health DSH expenditures applicable to the State's FFY 1995 DSH allotment as reported to us on the Form CMS–64 as of January 1, 1997; or the amount equal to the product of the State's current FFY total computable DSH allotment and the applicable percentage. The amounts of the limits on IMD DSH expenditures were made available to the States as part of their CMS–64 report. We are publishing these limits along with an explanation of the calculation of these limits in the **Federal Register** notice as a courtesy to providers and the general public.

For FFY 2000, the applicable percentage is computed as the ratio of—

(1) The State's FFY 1995 total computable (Federal and State share) mental health DSH payments applicable to the State's FFY 1995 DSH allotment and as reported on the Form CMS–64 as of January 1, 1997

(2) The State's FFY 1995 total computable amount of all DSH expenditures (mental health facility and inpatient hospital) applicable to the State's FFY 1995 DSH allotment as reported on the Form CMS–64 as of January 1, 1997.

For FFY 2000, the applicable percentage is calculated and applied to the State's FFY 2000 total computable DSH allotment. A State's total computable FFY 2000 DSH allotment is calculated by dividing the State's Federal share DSH allotment for FFY 2000 by the State's Federal medical assistance percentage (FMAP) for FFY 2000. This result is then compared to the State's FFY 1995 total computable mental health DSH expenditures applicable to the State's FFY 1995 DSH allotment as reported on the Form CMS–64 as of January 1, 1997. The lesser of these two amounts is the State's limitation on total computable IMD/DSH expenditures for FFY 2000.

For FFY 2001, the applicable percentage is the lesser of 50 percent or the 1995 DSH IMD percentage of the amount computed for FFY 2000. This percentage is applied to the State's FFY 2001 total computable DSH allotment. This result is then compared to the State's FFY 1995 total computable mental health DSH expenditures applicable to the State's FFY 1995 DSH allotment as reported on the Form CMS–64 as of January 1, 1997. The lesser of these two amounts is the State's limitation on total computable IMD/DSH expenditures for FFY 2001.

For FFY 2002, the applicable percentage is the lesser of 40 percent or the 1995 DSH IMD percentage of the amount computed for FFY 2000. This percentage is applied to the State's FFY 2002 total computable DSH allotment. This result is then compared to the State's FFY 1995 total computable mental health DSH expenditures applicable to the State's FFY 1995 DSH allotment as reported on the Form CMS–64 as of January 1, 1997. The lesser of these two amounts is the State's limitation on total computable IMD/DSH expenditures for FFY 2002.

For FFY 2003, the applicable percentage is the lesser of 33 percent or the 1995 DSH IMD percentage of the amount computed for FFY 2000. This percentage is applied to the State's FFY 2003 total computable DSH allotment. This result is then compared to the State's FFY 1995 total computable mental health DSH expenditures applicable to the State's FFY 1995 DSH allotment as reported on the Form CMS–64 as of January 1, 1997. The lesser of these two amounts is the State's limitation on total computable IMD/DSH expenditures for FFY 2003.

For FFY 2004, the applicable percentage is the lesser of 33 percent or the 1995 DSH IMD percentage of the amount computed for FFY 2000. This percentage is applied to the State's FFY 2004 total computable DSH allotment. This result is then compared to the State's FFY 1995 total computable mental health DSH expenditures applicable to the State's FFY 1995 DSH allotment as reported on the Form CMS–64 as of January 1, 1997. The lesser of these two amounts is the State's limitation on total computable IMD/DSH expenditures for FFY 2004.

Charts 8 and 9 of Addendum A to this notice represents a republication of the detail of each States' IMD/DSH limitation for FFY 1998 and FFY 1999; these amounts were previously published in the **Federal Register** on October 8, 1998, in a chart which reflected the IMD DSH limits in section 1923(h) of the Act, as amended through the provisions of section 601 of Pub. L. 105–78. Charts 8 and 9 updates the chart published in the **Federal Register** on October 8, 1998 for certain States to reflect the further amendments made to the DSH allotments for FFY 1998 through FFY 2000 in section 1923(f)(2) of the Act (which are used in the determination of the IMD DSH limits), as amended BBRA.

Charts 10 through 14 of Addendum A to this notice detail each State's IMD/DSH limitation for FFYs 2000 through 2004, respectively, in accordance with section 1923(h) of the Act. We will address future payments in subsequent issuances.

IV. Annual Reporting Requirements

Section 4721(a) of Pub. L. 105–33, amended section 1923(a) of the Act requiring States to provide an annual report to the Secretary describing the disproportionate share payments to each DSH.

In the October 8, 1998 **Federal Register** (63 FR 54142), we published a notice that addressed the annual reporting requirements. In that notice, we recommended that a State submit hospital-specific data (name of hospital, type of hospital—for example, children's, psychiatric, public versus private—and annual payment) to its CMS regional office at the close of the first quarter of the FFY following the FFY in which the DSH was paid. We requested comments from the public regarding the format and the data that would be collected in this report.

In response to the October 8, 1998 notice, we received several comments regarding the content and the availability of this report. Many comments indicated that the reports should include more specific details including the formula the State uses for qualifying the hospital for the DSH payment, and the components used to calculate the hospital-specific DSH payments.

In addition to these comments requesting that more detailed data would be required on the DSH annual report, the Office of the Inspector General (OIG) made recommendations about States' DSH programs based on the findings from their State audits. The BIPA provided that the 175 percent hospital specific DSH limit would apply to qualifying public hospitals in all States. The limit, allowing DSH payments of up to 175 percent of each hospital's cost of unreimbursed care, would apply for two State fiscal years

beginning on the first day of the State fiscal year that begins after September 30, 2002 and ends on the last day of the succeeding State fiscal year.

The OIG has begun to monitor States' disproportionate share hospital payments to determine whether the results from their reviews of uncompensated care claimed by hospitals at selected States and their review of enhanced payments and intergovernmental transfer of funds by public hospitals to the States would support the need for increased DSH reimbursements. To date, they have completed or are in the process of completing audits in several States.

Based on current audit results, the OIG believes that DSH payments presently are not always being retained and used by the public hospitals and the DSH payments received are not always correctly calculated.

Based upon the statutory requirement that States provide an annual report to the Secretary describing the disproportionate share hospital payments, each State must submit DSH expenditure information utilizing an Excel format containing the mandatory requirements listed in Addendum B.

States may submit their annual report electronically to *NIRT@cms.hhs.gov*. These reports must be submitted by the end of the first quarter of the FFY following the reporting FFY. Therefore, by December 31, 2004, all FFY 2004 DSH reports must be sent to the CMS Central Office at the following address: National Institutional Reimbursement Team, CMS, CMSO, Mailstop: S3–13–15, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

V. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995 (PRA), 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 OMB approves an information collection, 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.

The requirements associated with this notice are currently approved under OMB approval number 0938–0746 (CMS–R–0266, Medicaid Disproportionate Share Annual Report for Hospitals and Institutions), with a current expiration date of October 30, 2005. However, as reflected in this notice, we are proposing to modify the currently approved requirements by providing a structured format for State reporting and refining the currently approved collection requirements. The format will not impose any additional burden.

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, Attn: John Burke (CMS–2062–N), Room C5–13–28, 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 (CMS–2062–N).

VI. Impact Statement

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 through 612, requires a regulatory flexibility analysis for every rule subject to proposed rulemaking procedures under the Administrative Procedure Act, 5 U.S.C. 553, unless we certify that the rule will not have a significant economic impact on a substantial number of small entities. For purposes of the RFA, States and individuals are not considered small entities. However, providers with receipts ranging from less than $5 million to less than $25 million depending on their provider type are considered small entities (65 FR 69432, November 17, 2000). Due to the various controlling statutes, the effects on providers are not a result of any independent regulatory impact and not this notice. The purpose of the notice is to simply announce the latest distributions as required by the statute.

Additionally, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a notice may have a significant impact on the operations of a substantial number of small rural hospitals. Such an 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.

The BBA and the BBRA set statutorily defined limits on the amount of Federal share DSH expenditures available for FFYs 1998 through 2002. The BIPA amended sections of the Act that set forth these statutorily defined Federal DSH allotments. The following table displays our estimates of the impact of changes to the Federal DSH allotments as a result of BBA, BBRA, and BIPA.

FEDERAL COST (SAVINGS)

[in billions of dollars]

Fiscal year	2001	2002	2003	2004	2005
BBA	–2.8	–3.5	–4.0	–4.5	–5.0
BBRA	*	*	*	*	*
BIPA	0.2	0.7	0.0	0.0	0.0
Total	–2.6	–2.8	–4.0	–4.5	–5.0

* = <$50 million.

Based on these findings, the limits initially imposed by the BBA and the BBRA will negatively impact the availability of FFP to States, thus potentially negatively impacting the availability of Medicaid expenditures to hospitals, especially IMDs. However, the BIPA reduces the Federal savings, thus increasing the amount of Federal funding available to States under the DSH program. While overall, the statute still mandates some reduction in DSH

payments, we do not believe that this notice will have a significant economic impact on a substantial number of small entities because it reflects no new policies or procedures.

In section 202 of the Unfunded Mandates Reform Act requires that agencies prepare an assessment of anticipated costs and benefits for any rule that may result in an annual expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $110 million or more. This notice has no consequential effect on State, local, or tribal governments, or the private sector, and will not create an unfunded mandate.

In accordance with the provisions of Executive Order 12866, this notice was reviewed by the Office of Management and Budget (OMB).

We have reviewed this notice under the threshold criteria of Executive Order 13132, Federalism. We have determined that it does not significantly affect the rights, roles, and responsibilities of States.

Addendum A

This addendum contains the charts 1 through 6 (including associated keys) that are referred to in the preamble of this notice.

CHART 1.—DSH ALLOTMENTS FOR FY 1998 THROUGH FY 2000—FROM SECTION 1902(f)(2) OF THE SOCIAL SECURITY ACT

[Key to Chart of the FFY 1998 Through 2000 DSH Allotments]

Column	Description
Column A	STATE.
Column B	FY 1998 DSH ALLOTMENTS Federal Share. This column contains the FFY 1998 DSH allotments from section 1923(f)(2) of the Act, as amended.
Column C	FY 1999 DSH ALLOTMENTS Federal Share. This column contains the FFY 1999 DSH allotments from section 1923(f)(2) of the Act, as amended.
Column D	FY 2000 DSH ALLOTMENTS Federal Share. This column contains the FFY 1999 DSH allotments from section 1923(f)(2) of the Act, as amended.

DSH ALLOTMENTS FOR FY 1998 THROUGH FY 2000—FROM SECTION 1902(f)(2) OF THE SOCIAL SECURITY ACT *

A	B	C	D
State	FY 1998 DSH allotments Federal share	TY 1999 DSH allotments Federal share	FY 2000 DSH allotments Federal share
Alabama	$293,000,000	269,000,000	248,000,000
Alaska	10,000,000	10,000,000	10,000,000
Arizona	81,000,000	81,000,000	81,000,000
Arkansas	2,000,000	2,000,000	2,000,000
California	1,085,000,000	1,068,000,000	986,000,000
Colorado	93,000,000	85,000,000	79,000,000
Connecticut	200,000,000	194,000,000	164,000,000
Delaware	4,000,000	4,000,000	4,000,000
District of Columbia	23,000,000	23,000,000	32,000,000
Florida	207,000,000	203,000,000	197,000,000
Georgia	253,000,000	248,000,000	241,000,000
Hawaii	0	0	0
Idaho	1,000,000	1,000,000	1,000,000
Illinois	203,000,000	199,000,000	193,000,000
Indiana	201,000,000	197,000,000	191,000,000
Iowa	8,000,000	8,000,000	8,000,000
Kansas	51,000,000	49,000,000	42,000,000
Kentucky	137,000,000	134,000,000	130,000,000
Louisiana	880,000,000	795,000,000	713,000,000
Maine	103,000,000	99,000,000	84,000,000
Maryland	72,000,000	70,000,000	68,000,000
Massachusetts	288,000,000	282,000,000	273,000,000
Michigan	249,000,000	244,000,000	237,000,000
Minnesota	33,000,000	33,000,000	33,000,000
Mississippi	143,000,000	141,000,000	136,000,000
Missouri	436,000,000	423,000,000	379,000,000
Montana	200,000	200,000	200,000
Nebraska	5,000,000	5,000,000	5,000,000
Nevada	37,000,000	37,000,000	37,000,000
New Hampshire	140,000,000	136,000,000	130,000,000
New Jersey	600,000,000	582,000,000	515,000,000
New Mexico	5,000,000	9,000,000	9,000,000
New York	1,512,000,000	1,482,000,000	1,436,000,000
North Carolina	278,000,000	272,000,000	264,000,000
North Dakota	1,000,000	1,000,000	1,000,000
Ohio	382,000,000	374,000,000	363,000,000
Oklahoma	16,000,000	16,000,000	16,000,000
Oregon	20,000,000	20,000,000	20,000,000
Pennsylvania	529,000,000	518,000,000	502,000,000
Rhode Island	62,000,000	60,000,000	58,000,000
South Carolina	313,000,000	303,000,000	262,000,000

DSH ALLOTMENTS FOR FY 1998 THROUGH FY 2000—FROM SECTION 1902(f)(2) OF THE SOCIAL SECURITY ACT*—Continued

A	B	C	D
State	FY 1998 DSH allotments Federal share	TY 1999 DSH allotments Federal share	FY 2000 DSH allotments Federal share
South Dakota	1,000,000	1,000,000	1,000,000
Tennessee	0	0	0
Texas	979,000,000	950,000,000	806,000,000
Utah	3,000,000	3,000,000	3,000,000
Vermont	18,000,000	18,000,000	18,000,000
Virginia	70,000,000	68,000,000	66,000,000
Washington	174,000,000	171,000,000	166,000,000
West Virginia	64,000,000	63,000,000	61,000,000
Wisconsin	7,000,000	7,000,000	7,000,000
Wyoming	67,000	95,000	100,000
Total	10,272,267,000	9,958,295,000	9,278,300,000

*DSH Allotments in section 1923(f)(2) of the Act as initially enacted by section 4721 of Public Law 105–33 and amended as follows:
Section 601 of Public Law 105–78, for FY 1998 for MN
Sections 702–704 of Public Law 105–277, for FY 1999 for MN, NM, and WY, respectively.
Sections 601(a)(1)–(4) of Public Law 106–113, for FYs 2000–2002 for D.C., MN, NM, and WY, respectively.

CHART 2.—FINAL FY 2001 DSH ALLOTMENTS

[Key to Chart of the FFY 2001 Final DSH Allotments]

Column	Description
Column A	STATE.
Column B	FY 2001 FEDERAL MEDICAL ASSISTANCE PERCENTAGE (FMAP).
Column C	FY 2000 FEDERAL SHARE DSH ALLOTMENT (FINAL). This column contains the Final FFY 2000 DSH allotments from section 1923(f)(2) of the Act.
Column D	FFY 2000 DSH Allotment INCR. BY CPIU. This column contains the FFY 2000 DSH allotments in Column C increased by the CPIU for that fiscal year.
Column E	ACTUAL TOTAL MAP FOR FY 2001. This column contains the total computable medical assistance expenditures, including DSH expenditures for FFY 2001.
Column F	DSH TOTAL EXPENDITURES FOR FY 2001. This column contains the actual total computable DSH expenditures for FFY 2001.
Column G	ACTUAL TOTAL MAP NET OF DSH FY 2001. This column contains the total computable medical assistance expenditures, net of DSH expenditures, for FFY 2001.
Column H	12 PERCENT LIMIT (In FS). This column contains the 12 Percent Limit; this is a Federal share amount.
Column I	GREATER OF COL H OR COL C. This column contains amount which is the greater of Column H (the 12-percent limit) or Column C (the Federal share FFY 2000 DSH allotment).
Column J	LESSER OF COL I OR COL D. This column contains the lesser of Column I or Column D (the Federal share DSH allotment for FFY 2000).
Column K	LOW–DSH STATES. This column indicates "Special Rule" for those States that meet the Low-DSH criteria in determining the FFY 2001 allotments, as contained in section 1923(f)(5) of the Act.
Column L	LOW–DSH RULE STATES FY 2001 AMOUNT. This column contains the FFY 2001 allotment amounts for Low-DSH States; this amount is equal to 1 percent of the State's Total Medical Assistance expenditures for 2001.
Column M	FY 2001 FS DSH ALLOTMENT (=GREATER OF COL J OF COL L). The amount in this column is equal to the greater of Column J or Column L and represents the final Federal Share DSH allotment.

FINAL FY 2001 DSH ALLOTMENTS

A	B	C	D	E	F	G	H	I	J	K	L	M
STATE	FY 2001 FMAP	FY 2000 FEDERAL SHARE DSH ALLOTMENT (FINAL)	FY 2000 DSH ALLOTMENT INCR BY CPIU 1.035	ACTUAL TOTAL MAP FOR FY 2001	DSH TOTAL EXPENDITURES FOR FY 2001	ACTUAL TOTAL MAP NET OF DSH FY 2001	12 PERCENT LIMIT (In FS)	GREATER OF COL H OR COL C	LESSER OF COL I OR COL D	LOW-DSH STATES	LOW-DSH STATES FY 2001 AMOUNT	FY 2001 FS DSH ALLOTMENT (= GREATER OF COL J OR COL L)
ALABAMA	69.99%	$248,000,000	$256,680,000	$2,886,401,740	$386,737,888	$2,519,683,852	$364,927,821	$384,927,821	$256,680,000	N/A	N/A	$256,680,000
ALASKA	60.13%	$10,000,000	$10,350,000	$606,613,980	$13,974,874	$592,639,306	$88,847,874	$88,847,874	$10,350,000	N/A	N/A	$10,350,000
ARIZONA	65.77%	$81,000,000	$83,835,000	$2,865,261,326	$102,773,900	$2,562,487,428	$376,123,782	$376,123,782	$83,835,000	N/A	N/A	$83,835,000
ARKANSAS	73.02%	$2,000,000	$2,070,000	$1,854,913,659	$22,684,594	$1,832,229,065	$263,105,932	$263,105,932	$2,070,000	SPECIAL RULE	$18,576,696	$18,576,696
CALIFORNIA	51.25%	$986,000,000	$1,020,510,000	$23,892,094,138	$1,926,284,309	$21,965,809,827	$3,441,778,572	$3,441,778,572	$1,020,510,000	N/A	N/A	$1,020,510,000
COLORADO	50.00%	$79,000,000	$81,765,000	$2,142,029,851	$186,310,107	$1,955,719,744	$308,797,854	$308,797,854	$81,765,000	N/A	N/A	$81,765,000
CONNECTICUT	50.00%	$164,000,000	$169,740,000	$3,220,804,212	$290,828,041	$2,929,976,171	$462,627,816	$462,627,816	$169,740,000	N/A	N/A	$169,740,000
DELAWARE	50.00%	$4,000,000	$4,140,000	$591,974,246	$4,140,000	$587,834,246	$92,815,934	$92,815,934	$4,140,000	N/A	N/A	$4,140,000
DISTRICT OF COLUMBIA	70.00%	$32,000,000	$33,120,000	$985,761,914	$82,381,187	$903,380,747	$130,834,453	$130,834,453	$33,120,000	N/A	N/A	$33,120,000
FLORIDA	56.82%	$197,000,000	$203,895,000	$8,809,434,647	$338,809,359	$8,270,625,286	$1,259,388,984	$1,259,388,984	$203,895,000	N/A	N/A	$203,895,000
GEORGIA	59.67%	$241,000,000	$249,435,000	$5,037,084,681	$425,146,203	$4,611,938,878	$892,748,599	$892,748,599	$249,435,000	N/A	N/A	$249,435,000
HAWAII	53.85%	$0	$0	$839,268,827	$0	$839,268,827	$98,708,808	$98,708,808	$0	N/A	N/A	$0
IDAHO	70.76%	$1,000,000	$1,035,000	$707,902,289	$10,047,333	$697,854,956	$100,844,554	$100,844,554	$1,035,000	SPECIAL RULE	$7,078,588	$7,078,586
ILLINOIS	50.00%	$193,000,000	$199,755,000	$7,806,513,218	$379,003,552	$7,427,509,864	$1,172,764,864	$1,172,764,864	$199,755,000	N/A	N/A	$199,755,000
INDIANA	62.04%	$191,000,000	$197,685,000	$4,075,130,589	$856,156,539	$3,418,974,050	$508,684,828	$508,684,828	$197,685,000	N/A	N/A	$197,685,000
IOWA	62.67%	$8,000,000	$8,280,000	$1,863,107,543	$14,273,308	$1,868,834,235	$247,887,014	$247,887,014	$8,280,000	SPECIAL RULE	$16,958,949	$16,958,949
KANSAS	59.85%	$42,000,000	$43,470,000	$1,688,410,544	$48,990,903	$1,639,419,641	$246,067,124	$246,067,124	$43,470,000	N/A	N/A	$43,470,000
KENTUCKY	70.39%	$130,000,000	$134,550,000	$3,364,490,045	$191,149,308	$3,173,340,737	$459,081,047	$459,081,047	$134,550,000	N/A	N/A	$134,550,000
LOUISIANA	70.53%	$713,000,000	$737,955,000	$4,248,873,479	$672,307,509	$3,378,585,970	$488,280,785	$713,000,000	$713,000,000	N/A	N/A	$713,000,000
MAINE	66.12%	$84,000,000	$86,940,000	$1,327,242,175	$49,160,020	$1,278,082,155	$187,376,479	$187,376,479	$86,940,000	N/A	N/A	$86,940,000
MARYLAND	50.00%	$68,000,000	$70,380,000	$3,389,359,931	$62,821,780	$3,328,538,151	$525,242,866	$525,242,866	$70,380,000	N/A	N/A	$70,380,000
MASSACHUSETTS	50.00%	$273,000,000	$282,555,000	$6,678,665,751	$485,282,645	$6,193,383,106	$977,902,596	$977,902,596	$282,555,000	N/A	N/A	$282,555,000
MICHIGAN	56.18%	$237,000,000	$245,295,000	$7,248,298,265	$431,720,496	$6,816,575,789	$1,040,168,112	$1,040,168,112	$245,298,000	N/A	N/A	$245,295,000
MINNESOTA	51.11%	$33,000,000	$34,155,000	$3,835,870,579	$64,322,138	$3,771,548,443	$591,451,315	$591,451,315	$34,155,000	N/A	N/A	$34,155,000
MISSISSIPPI	78.82%	$136,000,000	$140,760,000	$2,450,252,810	$178,733,044	$2,271,519,768	$323,045,014	$323,045,014	$140,780,000	N/A	N/A	$140,760,000
MISSOURI	61.03%	$379,000,000	$392,265,000	$4,814,979,882	$458,086,472	$4,359,911,410	$851,238,980	$651,238,980	$392,285,000	N/A	N/A	$392,285,000
MONTANA	73.04%	$200,000	$207,000	$462,357,404	$244,000	$482,113,404	$69,227,188	$69,227,188	$207,000	SPECIAL RULE	$4,888,057	$4,888,057
NEBRASKA	60.38%	$5,000,000	$5,175,000	$1,198,760,099	$318,398	$1,198,441,703	$179,483,861	$179,483,861	$5,175,000	SPECIAL RULE	$12,186,243	$12,186,243
NEVADA	50.38%	$37,000,000	$38,295,000	$674,337,888	$76,042,490	$598,295,398	$94,254,920	$94,254,920	$38,295,000	N/A	N/A	$38,295,000
NEW HAMPSHIRE	50.00%	$130,000,000	$134,550,000	$873,408,109	$158,389,610	$715,038,499	$112,900,818	$130,000,000	$130,000,000	N/A	N/A	$130,000,000
NEW JERSEY	50.00%	$516,000,000	$533,025,000	$7,162,673,141	$1,117,457,748	$6,045,215,393	$954,507,894	$954,507,894	$533,025,000	N/A	N/A	$533,025,000
NEW MEXICO	73.80%	$9,000,000	$9,315,000	$1,477,067,980	$18,265,039	$1,481,802,941	$209,477,781	$209,477,781	$9,315,000	N/A	N/A	$9,315,000
NEW YORK	50.00%	$1,436,000,000	$1,466,280,000	$31,375,401,539	$2,455,754,341	$28,919,647,198	$4,568,260,084	$4,586,260,084	$1,466,260,000	N/A	N/A	$1,466,280,000
NORTH CAROLINA	62.47%	$264,000,000	$273,240,000	$6,150,881,587	$415,287,761	$5,735,393,826	$851,888,375	$851,888,375	$273,240,000	N/A	N/A	$273,240,000
NORTH DAKOTA	69.99%	$1,000,000	$1,035,000	$406,527,014	$1,081,172	$405,465,842	$58,724,375	$58,724,375	$1,035,000	SPECIAL RULE	$4,113,430	$4,113,430
OHIO	59.03%	$383,000,000	$375,705,000	$8,571,648,882	$637,259,313	$7,934,389,549	$1,195,087,868	$1,195,087,868	$375,705,000	N/A	N/A	$375,705,000
OKLAHOMA	71.24%	$16,000,000	$16,560,000	$2,051,767,564	$22,701,904	$2,029,065,880	$292,810,207	$292,810,207	$16,560,000	N/A	N/A	$16,560,000
OREGON	60.00%	$20,000,000	$20,700,000	$2,658,358,391	$30,493,735	$2,627,864,656	$394,179,698	$394,179,698	$20,700,000	N/A	N/A	$20,700,000
PENNSYLVANIA	53.82%	$502,000,000	$519,570,000	$10,908,343,146	$761,018,574	$10,147,324,572	$1,588,783,701	$1,566,783,701	$519,570,000	N/A	N/A	$519,570,000
RHODE ISLAND	53.79%	$58,000,000	$60,030,000	$1,203,128,878	$81,058,128	$1,122,068,752	$173,312,500	$173,312,500	$60,030,000	N/A	N/A	$60,030,000
SOUTH CAROLINA	70.44%	$282,000,000	$271,170,000	$3,074,455,990	$371,947,782	$2,702,508,228	$390,892,588	$390,892,588	$271,170,000	N/A	N/A	$271,170,000
SOUTH DAKOTA	68.31%	$1,000,000	$1,035,000	$469,734,499	$1,074,602	$468,659,897	$88,224,097	$88,224,097	$1,035,000	SPECIAL RULE	$4,756,226	$4,756,226
TENNESSEE	63.79%	$0	$0	$5,519,373,714	$0	$5,519,373,714	$815,788,799	$815,788,799	$0	N/A	N/A	$0
TEXAS	60.57%	$806,000,000	$834,210,000	$11,604,639,813	$1,348,133,952	$10,256,505,661	$1,535,184,145	$1,535,184,145	$834,210,000	N/A	N/A	$834,210,000
UTAH	71.44%	$3,000,000	$3,105,000	$833,720,115	$724,083	$832,996,052	$120,139,781	$120,139,781	$3,105,000	SPECIAL RULE	$8,448,217	$8,448,217
VERMONT	82.40%	$18,000,000	$18,630,000	$601,467,093	$28,500,000	$574,967,093	$85,423,882	$85,423,882	$18,630,000	N/A	N/A	$18,630,000
VIRGINIA	51.85%	$86,000,000	$88,310,000	$3,038,646,387	$236,402,440	$2,800,443,947	$437,248,739	$437,248,739	$88,310,000	SPECIAL RULE	$28,555,168	$88,310,000
WASHINGTON	50.70%	$186,000,000	$171,810,000	$4,308,724,247	$327,823,840	$3,977,900,407	$625,362,948	$625,362,948	$171,810,000	N/A	N/A	$171,810,000
WEST VIRGINIA	75.34%	$61,000,000	$63,135,000	$1,548,618,901	$102,033,841	$1,446,583,080	$206,477,236	$206,477,236	$63,135,000	N/A	N/A	$63,135,000
WISCONSIN	59.29%	$7,000,000	$7,245,000	$4,014,120,292	$11,854,904	$4,002,265,388	$602,142,478	$602,142,478	$7,245,000	SPECIAL RULE	$40,709,287	$40,709,287
WYOMING	64.60%	$100,000	$103,500	$243,408,927	$240,932	$243,167,995	$35,837,230	$35,837,230	$103,500	N/A	N/A	$103,500
TOTAL		$9,278,300,000	$9,603,040,500	$216,895,305,919	$15,854,175,832	$201,041,130,087	$30,744,039,993	$30,985,878,393	$9,573,535,500		$146,270,837	$9,682,064,171

CHART 3.—FINAL 2002 FINAL DSH ALLOTMENTS

[Key to the Chart of the Final FFY 2002 DSH Allotments]

Column	Description
Column A	State.
Column B	FY 2002 FEDERAL MEDICAL ASSISTANCE PERCENTAGE (FMAP).
Column C	FY 2001 FEDERAL SHARE DSH ALLOTMENT (FINAL). This column contains the FFY 2001 DSH allotments from section 1923(f)(2) of the Act.
Column D	FFY 2001 DSH Allotment INCR. BY CPIU. This column contains the FFY 2001 DSH allotments in Column C increased by the CPIU for that fiscal year.
Column E	ACTUAL TOTAL MAP FOR FY 2002. This column contains the total computable medical assistance expenditures, including DSH expenditures for FFY 2002.
Column F	DSH TOTAL EXPENDITURES FOR FY 2002. This column contains the actual total computable DSH expenditures for FFY 2002.
Column G	ACTUAL TOTAL MAP NET OF DSH FY 2002. This column contains the total computable medical assistance expenditures, net of DSH expenditures, for FFY 2001.
Column H	12 PERCENT LIMIT (In FS). This column contains the 12 Percent Limit; this is a Federal share amount.
Column I	GREATER OF COL H OR COL C. This column contains amount which is the greater of Column H (the 12-percent limit) or Column C (the Federal share FFY 2001 DSH allotment).
Column J	LESSER OF COL I OR COL D. This column contains the lesser of Column I or Column D.
Column K	FY 2002 FS DSH ALLOTMENT (=COL J). The amount in this column represents the final Federal Share DSH allotment for FFY 2002, and is equal to Column J.

FINAL FY 2002 DSH ALLOTMENTS										
A	B	C	D	E	F	G	H	I	J	K
STATE	FY 2002 FMAP	FY 2001 FEDERAL SHARE DSH ALLOTMENT (FINAL)	FY 2001 DSH ALLOTMENT INCR. BY CPIU 1.026	ACTUAL TOTAL MAP FOR FY 2002	DSH TOTAL EXPENDITURES FOR FY 2002	ACTUAL TOTAL MAP NET OF DSH FY 2002	12 PERCENT LIMIT (In FS)	GREATER OF COL H OR COL C	LESSER OF COL I OR COL D	FY 2002 FS DSH ALLOTMENT (=Col J)
ALABAMA	70.45%	$256,680,000	$263,353,680	$3,093,200,847	$373,816,436	$2,719,384,411	$393,322,084	$393,322,084	$263,353,680	$263,353,680
ALASKA	57.38%	$10,350,000	$10,619,100	$685,772,985	$18,296,235	$667,476,750	$101,277,609	$101,277,609	$10,619,100	$10,619,100
ARIZONA	64.98%	$83,835,000	$86,014,710	$3,541,609,119	$87,623,900	$3,453,985,219	$508,357,779	$508,357,779	$86,014,710	$86,014,710
ARKANSAS	72.64%	$18,576,696	$19,059,690	$2,237,817,554	$14,529,026	$2,223,288,528	$319,590,393	$319,590,393	$19,059,690	$19,059,690
CALIFORNIA	51.40%	$1,020,510,000	$1,047,043,260	$26,890,540,967	$1,349,520,564	$25,541,020,403	$3,998,401,367	$3,998,401,367	$1,047,043,260	$1,047,043,260
COLORADO	50.00%	$81,765,000	$83,890,890	$2,323,068,699	$161,758,218	$2,161,310,481	$341,259,550	$341,259,550	$83,890,890	$83,890,890
CONNECTICUT	50.00%	$169,740,000	$174,153,240	$3,456,338,545	$241,650,894	$3,214,687,651	$507,582,261	$507,582,261	$174,153,240	$174,153,240
DELAWARE	50.00%	$4,140,000	$4,247,640	$634,046,351	$3,398,112	$630,648,239	$99,576,038	$99,576,038	$4,247,640	$4,247,640
DISTRICT OF COLUMBIA	70.00%	$33,120,000	$33,981,120	$1,021,772,693	$40,350,226	$981,422,467	$142,137,047	$142,137,047	$33,981,120	$33,981,120
FLORIDA	56.43%	$203,895,000	$209,196,270	$9,871,508,234	$391,959,504	$9,479,548,730	$1,444,783,079	$1,444,783,079	$209,196,270	$209,196,270
GEORGIA	59.00%	$249,435,000	$255,920,310	$6,241,211,454	$433,162,860	$5,808,048,594	$874,914,554	$874,914,554	$255,920,310	$255,920,310
HAWAII	56.34%	$0	$0	$740,007,314	$0	$740,007,314	$112,833,592	$112,833,592	$0	$0
IDAHO	71.02%	$7,078,586	$7,262,629	$773,534,776	$10,270,825	$763,263,951	$110,214,176	$110,214,176	$7,262,629	$7,262,629
ILLINOIS	50.00%	$199,755,000	$204,948,630	$8,809,060,004	$376,593,238	$8,432,466,766	$1,331,442,121	$1,331,442,121	$204,948,630	$204,948,630
INDIANA	62.04%	$197,685,000	$202,824,810	$4,448,318,143	$399,358,564	$4,048,959,579	$602,391,972	$602,391,972	$202,824,810	$202,824,810
IOWA	62.86%	$16,958,949	$17,399,882	$2,575,146,342	$27,611,312	$2,547,535,030	$377,832,604	$377,832,604	$17,399,882	$17,399,882
KANSAS	60.20%	$43,470,000	$44,600,220	$1,836,717,196	$40,921,943	$1,795,795,253	$269,145,745	$269,145,745	$44,600,220	$44,600,220
KENTUCKY	69.94%	$134,550,000	$138,048,300	$3,763,204,047	$197,381,038	$3,565,823,009	$516,521,218	$516,521,218	$138,048,300	$138,048,300
LOUISIANA	70.30%	$713,000,000	$731,538,000	$4,885,971,853	$860,852,348	$4,025,119,505	$582,434,102	$713,000,000	$713,000,000	$713,000,000
MAINE (EST.) 8-02CMS37	66.58%	$86,940,000	$89,200,440	$1,433,703,000	$47,878,000	$1,385,825,000	$202,861,624	$202,861,624	$89,200,440	$89,200,440
MARYLAND	50.00%	$70,380,000	$72,209,880	$3,613,476,100	$136,920,147	$3,476,555,953	$548,929,887	$548,929,887	$72,209,880	$72,209,880
MASSACHUSETTS	50.00%	$282,555,000	$289,901,430	$8,063,005,258	$623,222,072	$7,439,783,186	$1,174,702,608	$1,174,702,608	$289,901,430	$289,901,430
MICHIGAN	56.36%	$245,295,000	$251,672,670	$7,562,053,407	$405,171,927	$7,156,881,480	$1,091,150,154	$1,091,150,154	$251,672,670	$251,672,670
MINNESOTA	50.00%	$34,155,000	$35,043,030	$4,414,511,470	$59,456,079	$4,355,055,391	$687,640,325	$687,640,325	$35,043,030	$35,043,030
MISSISSIPPI	76.09%	$140,760,000	$144,419,760	$2,877,013,521	$189,419,753	$2,687,593,768	$382,897,194	$382,897,194	$144,419,760	$144,419,760
MISSOURI	61.06%	$392,265,000	$402,463,890	$5,360,607,640	$536,707,050	$4,823,900,590	$720,458,304	$720,458,304	$402,463,890	$402,463,890
MONTANA	72.83%	$4,888,057	$5,015,147	$571,456,455	$331,812	$571,124,643	$82,054,922	$82,054,922	$5,015,147	$5,015,147
NEBRASKA	59.55%	$12,186,243	$12,503,085	$1,339,132,070	$11,020,071	$1,328,111,999	$199,593,866	$199,593,866	$12,503,085	$12,503,085
NEVADA	50.00%	$38,295,000	$39,290,670	$808,198,344	$76,361,314	$731,837,030	$115,553,215	$115,553,215	$39,290,670	$39,290,670
NEW HAMPSHIRE	50.00%	$130,000,000	$133,380,000	$1,016,094,814	$181,453,768	$834,641,046	$131,785,428	$131,785,428	$131,785,428	$131,785,428
NEW JERSEY	50.00%	$533,025,000	$546,883,650	$7,745,877,997	$1,215,520,277	$6,530,357,720	$1,031,109,114	$1,031,109,114	$546,883,650	$546,883,650
NEW MEXICO	73.04%	$9,315,000	$9,557,190	$1,776,811,668	$12,290,293	$1,764,521,395	$253,369,547	$253,369,547	$9,557,190	$9,557,190
NEW YORK	50.00%	$1,486,260,000	$1,524,902,760	$36,295,107,368	$2,861,322,894	$33,433,784,474	$5,279,018,601	$5,279,018,601	$1,524,902,760	$1,524,902,760
NORTH CAROLINA	61.46%	$273,240,000	$280,344,240	$6,723,598,560	$460,076,683	$6,263,521,877	$933,981,531	$933,981,531	$280,344,240	$280,344,240
NORTH DAKOTA	69.87%	$4,113,430	$4,220,379	$461,401,546	$2,293,987	$459,107,559	$66,517,045	$66,517,045	$4,220,379	$4,220,379
OHIO	58.78%	$375,705,000	$385,473,330	$9,658,040,587	$654,304,618	$9,003,735,969	$1,357,604,789	$1,357,604,789	$385,473,330	$385,473,330
OKLAHOMA	70.43%	$16,560,000	$16,990,560	$2,260,403,490	$24,124,038	$2,236,279,452	$323,466,360	$323,466,360	$16,990,560	$16,990,560
OREGON	59.20%	$20,700,000	$21,238,200	$2,571,560,664	$22,932,488	$2,548,628,176	$383,590,139	$383,590,139	$21,238,200	$21,238,200
PENNSYLVANIA	54.65%	$519,570,000	$533,078,820	$12,130,925,035	$779,176,586	$11,351,748,449	$1,745,481,039	$1,745,481,039	$533,078,820	$533,078,820
RHODE ISLAND	52.45%	$60,030,000	$61,590,780	$1,358,500,649	$88,170,993	$1,270,329,656	$197,662,666	$197,662,666	$61,590,780	$61,590,780
SOUTH CAROLINA	69.34%	$271,170,000	$278,220,420	$3,292,901,444	$391,072,974	$2,901,828,470	$421,094,076	$421,094,076	$278,220,420	$278,220,420
SOUTH DAKOTA	65.93%	$4,756,226	$4,879,888	$549,884,391	$1,071,469	$548,812,922	$80,511,558	$80,511,558	$4,879,888	$4,879,888
TENNESSEE	63.64%	$0	$0	$5,786,863,330	$0	$5,786,863,330	$855,792,368	$855,792,368	$0	$0
TEXAS	60.17%	$834,210,000	$855,899,460	$13,523,486,149	$1,423,123,110	$12,100,363,039	$1,813,773,330	$1,813,773,330	$855,899,460	$855,899,460
UTAH	70.00%	$8,448,217	$8,667,870	$984,502,099	$12,675,340	$971,826,759	$140,747,324	$140,747,324	$8,667,870	$8,667,870
VERMONT	63.06%	$18,630,000	$19,114,380	$660,731,979	$28,868,690	$631,863,289	$93,643,476	$93,643,476	$19,114,380	$19,114,380
VIRGINIA	51.45%	$68,310,000	$70,086,060	$3,812,166,436	$181,748,547	$3,630,417,889	$568,167,302	$568,167,302	$70,086,060	$70,086,060
WASHINGTON	50.37%	$171,810,000	$176,277,060	$5,168,511,470	$357,884,399	$4,810,627,071	$757,814,810	$757,814,810	$176,277,060	$176,277,060
WEST VIRGINIA	75.27%	$63,135,000	$64,776,510	$1,584,166,286	$82,978,727	$1,501,187,559	$214,308,938	$214,308,938	$64,776,510	$64,776,510
WISCONSIN	58.57%	$40,709,267	$41,767,708	$4,208,896,549	$49,198,878	$4,159,697,671	$627,786,539	$627,786,539	$41,767,708	$41,767,708
WYOMING	61.97%	$103,500	$106,191	$274,565,128	$148,252	$274,416,876	$40,837,976	$40,837,976	$106,191	$106,191
TOTAL		$9,662,064,171	$9,913,277,840	$245,717,002,047	$15,945,980,479	$229,771,021,568	$35,157,923,346	$35,288,489,244	$9,893,145,267	$9,893,145,267

CHART 4.—PRELIMINARY FY 2003 DSH ALLOTMENTS

[Key to the Chart of the Preliminary FFY 2003 DSH Allotments]

Column	Description
Column A	STATE.
Column B	FY 2003 FEDERAL MEDICAL ASSISTANCE PERCENTAGE (FMAP).
Column C	FY 2002 FEDERAL SHARE DSH ALLOTMENT (FINAL). This column contains the FFY 2002 DSH allotments from the chart in section 1923(f)(2) of the Act.
Column D	FFY 2002 DSH Allotment INCR. BY CPIU. This column contains the FFY 2002 DSH allotments in Column C increased by the CPIU for that fiscal year.
Column E	08/15/02 EST. OF TC MAP EXP: INCLUDING DSH FOR FY 2003. This column contains the August 2002 estimates of total computable medical assistance expenditures, including DSH expenditures for FFY 2003.
Column F	08/15/02 EST. OF TC DSH EXPENDITURES FOR FY 2003. This column contains the August 2002 estimates of the total computable DSH expenditures for FFY 2003.
Column G	08/15/02 EST. OF TC MAP EXP. NET OF DSH FY 2003. This column contains the total computable medical assistance expenditures, net of DSH expenditures, for FFY 2003.
Column H	12 PERCENT LIMIT (In FS). This column contains the 12 Percent Limit; this is a Federal share amount.
Column I	GREATER OF COL. H OR COL. C. This column contains amount which is the greater of Column H (the 12-percent limit) or Column C (the Federal share FFY 2001 DSH allotment).
Column J	LESSER OF COL. I OR COL. D. This column contains the lesser of Column I or Column D.
Column K	FY 2003 FS DSH ALLOTMENT (=COL. J). The amount in this column represents the preliminary Federal Share DSH allotment for FFY 2003, and is equal to Column J.

PRELIMINARY FY 2003 DSH ALLOTMENTS										
A	B	C	D	E	F	G	H	I	J	K
STATE	FY 2003 FMAP	FY 2002 FEDERAL SHARE DSH ALLOTMENT	FY 2002 DSH ALLOTMENT INCR BY CPIU 1.015	08/15/02 EST. OF TC MAP EXP. INCLUDING DSH FOR FY 2003	08/15/02 EST. OF TC DSH EXPENDITURES FOR FY 2003	08/15/02 EST. OF TC MAP EXP. NET OF DSH FY 2003	12 PERCENT LIMIT (In FS)	GREATER OF COL H OR COL C	LESSER OF COL I OR COL D	FY 2003 FS DSH ALLOTMENT (=Col J)
ALABAMA	70.60%	$246,000,000	$249,690,000	$3,109,966,000	$366,738,000	$2,743,228,000	$396,597,741	$396,597,741	$249,690,000	$249,690,000
ALASKA	58.27%	$9,000,000	$9,135,000	$765,549,000	$17,400,000	$748,149,000	$113,061,532	$113,061,532	$9,135,000	$9,135,000
ARIZONA	67.25%	$81,000,000	$82,215,000	$4,130,701,000	$154,131,000	$3,976,570,000	$580,831,129	$580,831,129	$82,215,000	$82,215,000
ARKANSAS	74.28%	$19,059,690	$19,345,585	$2,342,191,000	$20,630,000	$2,321,561,000	$332,265,031	$332,265,031	$19,345,585	$19,345,585
CALIFORNIA	50.00%	$877,000,000	$890,155,000	$28,531,376,000	$2,496,578,000	$26,034,798,000	$4,110,757,579	$4,110,757,579	$890,155,000	$890,155,000
COLORADO	50.00%	$74,000,000	$75,110,000	$2,476,596,000	$151,848,000	$2,324,748,000	$367,065,474	$367,065,474	$75,110,000	$75,110,000
CONNECTICUT	50.00%	$160,000,000	$162,400,000	$3,594,238,000	$236,885,000	$3,357,353,000	$530,108,368	$530,108,368	$162,400,000	$162,400,000
DELAWARE	50.00%	$4,000,000	$4,060,000	$683,877,000	$2,832,000	$681,045,000	$107,533,421	$107,533,421	$4,060,000	$4,060,000
DISTRICT OF COLUMBIA	70.00%	$32,000,000	$32,480,000	$1,143,176,000	$45,714,000	$1,097,462,000	$158,942,772	$158,942,772	$32,480,000	$32,480,000
FLORIDA	58.83%	$160,000,000	$162,400,000	$11,240,311,000	$280,129,000	$10,960,182,000	$1,652,242,171	$1,652,242,171	$162,400,000	$162,400,000
GEORGIA	59.60%	$215,000,000	$218,225,000	$6,445,868,000	$437,914,000	$6,007,954,000	$902,707,710	$902,707,710	$218,225,000	$218,225,000
HAWAII	58.77%	$0	$0	$817,808,000	$0	$817,808,000	$123,316,424	$123,316,424	$0	$0
IDAHO	70.96%	$7,262,629	$7,371,568	$815,539,000	$10,271,000	$805,268,000	$116,299,492	$116,299,492	$7,371,568	$7,371,568
ILLINOIS	50.00%	$172,000,000	$174,580,000	$9,010,668,000	$329,975,000	$8,680,693,000	$1,370,635,737	$1,370,635,737	$174,580,000	$174,580,000
INDIANA	61.97%	$171,000,000	$173,565,000	$4,655,865,000	$397,854,000	$4,258,011,000	$633,665,659	$633,665,659	$173,565,000	$173,565,000
IOWA	63.50%	$17,399,882	$17,660,880	$2,219,259,000	$28,969,000	$2,190,290,000	$324,077,860	$324,077,860	$17,660,880	$17,660,880
KANSAS	60.15%	$33,000,000	$33,495,000	$1,761,048,000	$50,350,000	$1,710,698,000	$256,444,822	$256,444,822	$33,495,000	$33,495,000
KENTUCKY	69.89%	$116,000,000	$117,740,000	$3,777,055,000	$199,112,000	$3,577,943,000	$518,353,642	$518,353,642	$117,740,000	$117,740,000
LOUISIANA	71.28%	$631,000,000	$640,465,000	$5,016,393,000	$811,730,000	$4,204,663,000	$606,697,123	$631,000,000	$631,000,000	$631,000,000
MAINE	66.22%	$84,000,000	$85,260,000	$1,519,550,000	$48,944,000	$1,470,606,000	$215,529,759	$215,529,759	$85,260,000	$85,260,000
MARYLAND	50.00%	$61,000,000	$61,915,000	$3,903,603,000	$57,613,000	$3,845,990,000	$607,261,579	$607,261,579	$61,915,000	$61,915,000
MASSACHUSETTS	50.00%	$244,000,000	$247,660,000	$8,785,131,000	$601,000,000	$8,184,131,000	$1,292,231,211	$1,292,231,211	$247,660,000	$247,660,000
MICHIGAN	55.42%	$212,000,000	$215,180,000	$8,112,353,000	$393,180,000	$7,719,173,000	$1,182,302,813	$1,182,302,813	$215,180,000	$215,180,000
MINNESOTA	50.00%	$33,000,000	$33,495,000	$4,889,941,000	$64,000,000	$4,825,941,000	$761,990,684	$761,990,684	$33,495,000	$33,495,000
MISSISSIPPI	76.62%	$122,000,000	$123,830,000	$3,159,463,000	$165,158,000	$2,994,305,000	$426,042,060	$426,042,060	$123,830,000	$123,830,000
MISSOURI	61.23%	$379,000,000	$384,685,000	$5,349,560,000	$543,391,000	$4,806,169,000	$717,322,920	$717,322,920	$384,685,000	$384,685,000
MONTANA	72.96%	$5,015,146	$5,090,373	$681,575,000	$256,000	$681,319,000	$97,852,430	$97,852,430	$5,090,373	$5,090,373
NEBRASKA	59.52%	$12,503,085	$12,690,631	$1,392,640,000	$15,341,000	$1,377,299,000	$207,012,213	$207,012,213	$12,690,631	$12,690,631
NEVADA	52.39%	$37,000,000	$37,555,000	$897,679,000	$80,663,000	$817,016,000	$127,170,492	$127,170,492	$37,555,000	$37,555,000
NEW HAMPSHIRE	50.00%	$130,000,000	$131,950,000	$1,100,183,000	$179,452,000	$920,731,000	$145,378,579	$145,378,579	$131,950,000	$131,950,000
NEW JERSEY	50.00%	$515,000,000	$522,725,000	$8,333,635,000	$1,066,050,000	$7,267,585,000	$1,147,513,421	$1,147,513,421	$522,725,000	$522,725,000
NEW MEXICO	74.56%	$9,000,000	$9,135,000	$1,868,313,000	$13,272,000	$1,855,041,000	$265,304,073	$265,304,073	$9,135,000	$9,135,000
NEW YORK	50.00%	$1,285,000,000	$1,304,275,000	$41,215,940,000	$2,744,260,000	$38,471,680,000	$6,074,475,789	$6,074,475,789	$1,304,275,000	$1,304,275,000
NORTH CAROLINA	62.56%	$236,000,000	$239,540,000	$7,616,524,000	$460,900,000	$7,155,624,000	$1,062,474,298	$1,062,474,298	$239,540,000	$239,540,000
NORTH DAKOTA	68.36%	$4,220,379	$4,283,685	$461,615,000	$553,000	$461,062,000	$67,107,590	$67,107,590	$4,283,685	$4,283,685
OHIO	58.83%	$325,000,000	$329,875,000	$10,602,086,000	$584,736,000	$10,017,350,000	$1,510,110,700	$1,510,110,700	$329,875,000	$329,875,000
OKLAHOMA	70.56%	$16,000,000	$16,240,000	$2,595,493,000	$24,853,000	$2,570,640,000	$371,689,259	$371,689,259	$16,240,000	$16,240,000
OREGON	60.16%	$20,000,000	$20,300,000	$2,900,562,000	$29,578,000	$2,870,984,000	$430,361,455	$430,361,455	$20,300,000	$20,300,000
PENNSYLVANIA	54.69%	$449,000,000	$455,735,000	$13,342,763,000	$641,554,000	$12,701,209,000	$1,952,576,585	$1,952,576,585	$455,735,000	$455,735,000
RHODE ISLAND	55.40%	$52,000,000	$52,780,000	$1,438,508,000	$94,673,000	$1,343,835,000	$205,848,274	$205,848,274	$52,780,000	$52,780,000
SOUTH CAROLINA	69.81%	$262,000,000	$265,930,000	$3,568,925,000	$383,103,000	$3,185,822,000	$461,654,870	$461,654,870	$265,930,000	$265,930,000
SOUTH DAKOTA	65.29%	$4,879,888	$4,953,086	$514,558,000	$1,075,000	$513,483,000	$75,493,275	$75,493,275	$4,953,086	$4,953,086
TENNESSEE	64.59%	$0	$0	$6,112,499,000	$0	$6,112,499,000	$900,870,075	$900,870,075	$0	$0
TEXAS	59.99%	$765,000,000	$776,475,000	$14,925,288,000	$1,422,469,000	$13,502,819,000	$2,025,507,260	$2,025,507,260	$776,475,000	$776,475,000
UTAH	71.24%	$8,667,871	$8,797,889	$1,114,220,000	$12,000,000	$1,102,220,000	$159,059,054	$159,059,054	$8,797,889	$8,797,889
VERMONT	62.41%	$18,000,000	$18,270,000	$696,780,000	$28,900,000	$667,880,000	$99,224,100	$99,224,100	$18,270,000	$18,270,000
VIRGINIA	50.53%	$70,086,060	$71,137,351	$3,664,718,000	$172,227,000	$3,492,491,000	$549,625,446	$549,625,446	$71,137,351	$71,137,351
WASHINGTON	50.00%	$148,000,000	$150,220,000	$5,141,800,000	$303,400,000	$4,838,400,000	$763,957,895	$763,957,895	$150,220,000	$150,220,000
WEST VIRGINIA	75.04%	$54,000,000	$54,810,000	$1,569,591,000	$71,279,000	$1,498,312,000	$214,022,841	$214,022,841	$54,810,000	$54,810,000
WISCONSIN	58.43%	$41,767,708	$42,394,224	$4,546,190,000	$13,830,000	$4,532,360,000	$684,451,763	$684,451,763	$42,394,224	$42,394,224
WYOMING	61.32%	$100,000	$101,500	$295,898,000	$0	$295,898,000	$44,147,118	$44,147,118	$101,500	$101,500
TOTAL		$8,627,962,338	$8,757,381,773	$264,855,068,000	$16,256,770,000	$248,598,298,000	$38,047,173,568	$38,071,476,446	$8,747,916,772	$8,747,916,772

CHART 5.—PRELIMINARY FY 2004 DSH ALLOTMENTS

[Key to the Chart of the Preliminary FFY 2004 DSH Allotments]

Column	Description
Column A	STATE.
Column B	FY 2004 FEDERAL MEDICAL ASSISTANCE PERCENTAGE (FMAP).
Column C	FY 2003 FEDERAL SHARE DSH ALLOTMENT. This column contains the preliminary FFY 2003 DSH allotments.
Column D	FY 2004 FS DSH ALLOTMENT = COL. C x 1.16. This column contains the FFY 2003 DSH allotments in Column C increased by 16 percent.

PRELIMINARY FY 2004 DSH ALLOTMENTS			
A	B	C	D
STATE	FY 2004 FMAP	FY 2003 FEDERAL SHARE DSH ALLOTMENT	FY 2004 FS DSH ALLOTMENT = COL C x 1.16
ALABAMA	70.75%	$249,690,000	$289,640,400
ALASKA	58.39%	$9,135,000	$10,596,600
ARIZONA	67.26%	$82,215,000	$95,369,400
ARKANSAS	74.67%	$19,345,585	$22,440,879
CALIFORNIA	50.00%	$890,155,000	$1,032,579,800
COLORADO	50.00%	$75,110,000	$87,127,600
CONNECTICUT	50.00%	$162,400,000	$188,384,000
DELAWARE	50.00%	$4,060,000	$4,709,600
DISTRICT OF COLUMBIA	70.00%	$32,480,000	$37,676,800
FLORIDA	58.93%	$162,400,000	$188,384,000
GEORGIA	59.58%	$218,225,000	$253,141,000
HAWAII	58.90%	$0	$0
IDAHO	70.46%	$7,371,568	$8,551,019
ILLINOIS	50.00%	$174,580,000	$202,512,800
INDIANA	62.32%	$173,565,000	$201,335,400
IOWA	63.93%	$17,660,880	$20,486,621
KANSAS	60.82%	$33,495,000	$38,854,200
KENTUCKY	70.09%	$117,740,000	$136,578,400
LOUISIANA	71.63%	$631,000,000	$731,960,000
MAINE	66.01%	$85,260,000	$98,901,600
MARYLAND	50.00%	$61,915,000	$71,821,400
MASSACHUSETTS	50.00%	$247,660,000	$287,285,600
MICHIGAN	55.89%	$215,180,000	$249,608,800
MINNESOTA	50.00%	$33,495,000	$38,854,200
MISSISSIPPI	77.08%	$123,830,000	$143,642,800
MISSOURI	61.47%	$384,685,000	$446,234,600
MONTANA	72.85%	$5,090,373	$5,904,833
NEBRASKA	59.89%	$12,690,631	$14,721,132
NEVADA	54.93%	$37,555,000	$43,563,800
NEW HAMPSHIRE	50.00%	$131,950,000	$153,062,000
NEW JERSEY	50.00%	$522,725,000	$606,361,000
NEW MEXICO	74.85%	$9,135,000	$10,596,600
NEW YORK	50.00%	$1,304,275,000	$1,512,959,000
NORTH CAROLINA	62.85%	$239,540,000	$277,866,400
NORTH DAKOTA	68.31%	$4,283,685	$4,969,074
OHIO	59.23%	$329,875,000	$382,655,000
OKLAHOMA	70.24%	$16,240,000	$18,838,400
OREGON	60.81%	$20,300,000	$23,548,000
PENNSYLVANIA	54.76%	$455,735,000	$528,652,600
RHODE ISLAND	56.03%	$52,780,000	$61,224,800
SOUTH CAROLINA	69.86%	$265,930,000	$308,478,800
SOUTH DAKOTA	65.67%	$4,953,086	$5,745,580
TENNESSEE	64.40%	$0	$0
TEXAS	60.22%	$776,475,000	$900,711,000
UTAH	71.72%	$8,797,889	$10,205,551
VERMONT	61.34%	$18,270,000	$21,193,200
VIRGINIA	50.00%	$71,137,351	$82,519,327
WASHINGTON	50.00%	$150,220,000	$174,255,200
WEST VIRGINIA	75.19%	$54,810,000	$63,579,600
WISCONSIN	58.41%	$42,394,224	$49,177,299
WYOMING	59.77%	$101,500	$117,740
TOTAL		$8,747,916,772	$10,147,583,455

CHART 6.—FY 1999 DSH PAYMENTS AS REPORTED AS OF AUGUST 31, 2000—LOW-DSH STATES USING "1 PERCENT TEST"

[Key to the Chart of the Low-DSH Determinations]

Column	Description
Column A	STATE.
Column B	FY 1999 I/P HOSPITAL DSH Total Computable. This column contains the States' total computable FFY 1999 inpatient hospital DSH expenditures as reported on the Form CMS–64 as reported on the Form CMS–64 as of August 31, 2000.
Column C	FY 1999 MENTAL HEALTH DSH Total Computable. This column contains the total computable FFY 1999 mental health facility DSH expenditures as reported on the Form CMS–64 as of August 31, 2000.
Column D	TOTAL FY 1999 DSH Total Computable Col B + C. This column contains the total FFY 1999 DSH payments as reported on the Form CMS–64 as of August 31, 2000 (calculated as the sum of Column B and Column C).
Column E	FY 1999 MAP EXPENDITURES Total Computable. This column contains the FFY 1999 total computable medical assistance expenditures, including DSH payments.
Column F	TC DSH AS A PERCENT OF TC MAP Col D/E. This column present the total computable FFY 1999 DSH as a percentage of the FFY 1999 total computable medical assistance expenditures, calculated as Column D divided by Column E.
Column G	LOW-DSH STATES. (0 < Col F, Col F < 1%)FFY. This columns presents the Low-DSH States. Low-DSH States are those with a percentage entry in this column. States that are not determined to be a Low-DSH States are indicated by an "N/A" entry in this column. Low-DSH States are those whose entry in Column F is greater than 0 but less than 1 percent.

FY 1999 DSH PAYMENTS AS REPORTED AS OF AUGUST 31, 2000 - LOW DSH STATE USING "1 PERCENT TEST"						
STATE	FY 1999 I/P HOSPITAL DSH Total Computable	FY 1999 MENTAL HEALTH DSH Total Computable	TOTAL FY 1999 DSH Total Computable Col B + C	FY 1999 MAP EXPENDITURES Total Computable	TC DSH AS A PERCENT OF TC MAP Col D/E	LOW-DSH STATES (0<Col F, Col F<1%)
A	B	C	D	E	F	G
ALABAMA	$385,033,879	$3,301,620	$388,335,499	$2,427,519,078	16 00%	N/A
ALASKA	$0	$14,037,389	$14,037,389	$406,229,439	3 46%	N/A
ARIZONA	$123,664,038	$0	$123,664,038	$2,007,954,429	6.16%	N/A
ARKANSAS	**$1,913,417**	**$259,500**	**$2,172,917**	**$1,459,969,027**	**0.15%**	**0.15%**
CALIFORNIA	$2,071,774,972	$0	$2,071,774,972	$20,269,068,147	10 22%	N/A
COLORADO	$156,471,672	$19,068	$156,490,740	$1,833,259,417	8 54%	N/A
CONNECTICUT	$237,981,325	$100,169,478	$338,150,803	$2,960,948,487	11 42%	N/A
DELAWARE	$0	$7,069,000	$7,069,000	$456,731,853	1 55%	N/A
DISTRICT OF COLUMBIA	$30,090,696	$2,766,447	$32,857,143	$917,287,157	3 58%	N/A
FLORIDA	$211,403,195	$149,714,985	$361,118,180	$6,726,454,617	5.37%	N/A
GEORGIA	$404,224,079	$0	$404,224,079	$3,673,705,109	11.00%	N/A
HAWAII	$0	$0	$0	$586,224,188	0 00%	N/A
IDAHO	**$1,431,639**	**$0**	**$1,431,639**	**$510,246,081**	**0.28%**	**0.28%**
ILLINOIS	$165,398,443	$76,743,966	$242,142,409	$6,424,741,398	3 77%	N/A
INDIANA	$56,337,114	$55,278,187	$111,615,301	$2,935,398,738	3 80%	N/A
IOWA	**$12,634,239**	**$0**	**$12,634,239**	**$1,385,636,313**	**0.91%**	**0.91%**
KANSAS	$6,429,204	$38,345,569	$44,774,773	$1,222,928,982	3 66%	N/A
KENTUCKY	$154,172,283	$35,817,792	$189,990,075	$2,675,474,096	7.10%	N/A
LOUISIANA	$711,511,230	$77,218,848	$788,730,078	$3,270,380,597	24 12%	N/A
MAINE	$0	$50,714,800	$50,714,800	$1,146,482,437	4 42%	N/A
MARYLAND	$21,744,971	$118,255,027	$139,999,998	$2,911,522,330	4 81%	N/A
MASSACHUSETTS	$457,110,081	$103,200,000	$560,310,081	$5,769,017,255	9 71%	N/A
MICHIGAN	$173,715,940	$262,237,293	$435,953,233	$6,241,543,032	6 98%	N/A
MINNESOTA	$60,294,407	$2,041,484	$62,335,891	$3,079,893,907	2 02%	N/A
MISSISSIPPI	$182,279,420	$0	$182,279,420	$1,795,513,132	10 15%	N/A
MISSOURI	$436,165,215	$199,562,749	$635,727,964	$3,609,633,176	17 61%	N/A
MONTANA	**$205,849**	**$0**	**$205,849**	**$385,697,755**	**0.05%**	**0.05%**
NEBRASKA	**$8,051,069**	**$0**	**$8,051,069**	**$981,616,453**	**0.82%**	**0.82%**
NEVADA	$73,559,997	$0	$73,559,997	$541,969,257	13 57%	N/A
NEW HAMPSHIRE	$120,250,559	$31,495,981	$151,746,540	$777,631,278	19 51%	N/A
NEW JERSEY	$849,201,243	$314,898,384	$1,164,099,627	$5,754,986,373	20 23%	N/A
NEW MEXICO	$12,332,145	$231,015	$12,563,160	$1,103,811,077	1 14%	N/A
NEW YORK	$1,396,721,442	$592,800,000	$1,989,521,442	$28,739,135,499	6 92%	N/A
NORTH CAROLINA	$227,672,613	$170,292,750	$397,965,363	$4,885,503,195	8 15%	N/A
NORTH DAKOTA	**$177,068**	**$988,478**	**$1,165,546**	**$338,609,805**	**0.34%**	**0.34%**
OHIO	$548,514,478	$93,432,758	$641,947,236	$6,859,803,468	9 36%	N/A
OKLAHOMA	$19,410,438	$3,173,880	$22,584,318	$1,478,639,476	1 53%	N/A
OREGON	$13,085,559	$19,975,092	$33,060,651	$1,949,066,404	1 70%	N/A
PENNSYLVANIA	$268,751,917	$352,273,480	$621,025,397	$9,627,196,439	6 45%	N/A
RHODE ISLAND	$59,285,851	$39,880	$59,325,731	$1,045,906,876	5 67%	N/A
SOUTH CAROLINA	$397,673,483	$36,113,203	$433,786,686	$2,421,301,188	17 92%	N/A
SOUTH DAKOTA	**$308,761**	**$751,298**	**$1,060,059**	**$374,386,871**	**0.28%**	**0.28%**
TENNESSEE	$0	$0	$0	$4,178,613,010	0 00%	N/A
TEXAS	$1,228,613,442	$292,513,592	$1,521,127,034	$10,351,321,230	14 70%	N/A
UTAH	**$2,963,070**	**$732,110**	**$3,695,180**	**$741,946,415**	**0.50%**	**0.50%**
VERMONT	$21,380,122	$6,805,593	$28,185,715	$469,021,440	6 01%	N/A
VIRGINIA	**$12,883,240**	**$5,589,517**	**$18,472,757**	**$2,477,370,906**	**0.75%**	**0.75%**
WASHINGTON	$213,017,695	$110,876,380	$323,894,075	$3,529,717,373	9.18%	N/A
WEST VIRGINIA	$64,110,423	$20,121,775	$84,232,198	$1,352,706,331	6 23%	N/A
WISCONSIN	**$8,329,433**	**$1,901,439**	**$10,230,872**	**$2,754,463,533**	**0.37%**	**0.37%**
WYOMING	$0	$0	$0	$200,684,719	0 00%	N/A
NATION	**$11,608,281,356**	**$3,351,759,807**	**$14,960,041,163**	**$180,024,868,793**	**8.31%**	

LOW DSH STATE U/1% TEST

CHART 7.—FY 2000 DSH PAYMENTS AS REPORTED AS OF AUGUST 31, 2003—LOW-DSH STATES USING "3 PERCENT TEST"

[Key to the Chart of the Low-DSH Determinations]

Column	Description
Column A	STATE.
Column B	FY 2000 I/P HOSPITAL DSH Total Computable. This column contains the States' total computable FFY 2000 inpatient hospital DSH expenditures as reported on the Form CMS–64 as reported on the Form CMS–64 as of August 31, 2003.
Column C	FY 2000 MENTAL HEALTH DSH Total Computable. This column contains the total computable FFY 2000 mental health facility DSH expenditures as reported on the Form CMS–64 as of August 31, 2003.
Column D	TOTAL FY 2000 DSH Total Computable Col. B + C. This column contains the total FFY 2000 DSH payments as reported on the Form CMS–64 as of August 31, 2003 (calculated as the sum of Column B and Column C).
Column E	FY 2000 MAP EXPENDITURES Total Computable. This column contains the FFY 2000 total computable medical assistance expenditures, including DSH payments.
Column F	TC DSH AS A PERCENT OF TC MAP Col. D/E. This column presents the total computable FFY 2000 DSH as a percentage of the FFY 2000 total computable medical assistance expenditures, calculated as Column D divided by Column E.
Column G	LOW-DSH STATES. (0 < Col. F, Col. F < 3%) FFY. This columns presents the Low-DSH States. Low-DSH States are those with a percentage entry in this column. States that are not determined to be Low-DSH States are indicated by an "N/A" entry in this column. Low-DSH States are those whose entry in Column F is greater than 0 but less than 3 percent.

FY 2000 DSH PAYMENTS AS REPORTED AS OF AUGUST 31, 2003 - LOW DSH STATE USING "3 PERCENT TEST"						
STATE	FY 2000 I/P HOSPITAL DSH Total Computable	FY 2000 MENTAL HEALTH DSH Total Computable	TOTAL FY 2000 DSH Total Computable COL B + C	FY 2000 MAP EXPENDITURES Total Computable	TC DSH AS A PERCENT OF TC MAP Col D/E	LOW-DSH STATES (0 < Col F, Col F < 3%)
A	B	C	D	E	F	G
ALABAMA	$353,173,872	$3,301,620	$356,475,492	$2,696,375,751	13.22%	N/A
ALASKA	**$0**	**$12,856,407**	**$12,856,407**	**$481,281,298**	**2.67%**	**2.67%**
ARIZONA	$99,044,300	$23,831,900	$122,876,200	$2,225,044,559	5.52%	N/A
ARKANSAS	**$2,256,113**	**$489,254**	**$2,745,367**	**$1,579,670,038**	**0.17%**	**0.17%**
CALIFORNIA	$1,908,263,981	$0	$1,908,263,981	$21,150,591,241	9.02%	N/A
COLORADO	$156,812,187	$37,352	$156,849,539	$1,944,315,136	8.07%	N/A
CONNECTICUT	$229,046,247	$84,679,352	$313,725,599	$3,141,982,373	9.98%	N/A
DELAWARE	**$0**	**$7,069,000**	**$7,069,000**	**$523,748,320**	**1.35%**	**1.35%**
DISTRICT OF COLUMBIA	$41,865,316	$3,848,969	$45,714,285	$827,804,186	5.52%	N/A
FLORIDA	$200,639,067	$147,845,588	$348,484,655	$7,525,260,503	4.63%	N/A
GEORGIA	$402,471,610	$0	$402,471,610	$4,321,247,201	9.31%	N/A
HAWAII	$0	$0	$0	$641,774,557	0.00%	N/A
IDAHO	**$1,425,517**	**$0**	**$1,425,517**	**$577,303,622**	**0.25%**	**0.25%**
ILLINOIS	$268,235,653	$76,163,753	$344,399,406	$7,487,650,546	4.60%	N/A
INDIANA	$210,827,165	$89,215,480	$300,042,645	$3,469,954,218	8.65%	N/A
IOWA	**$12,727,761**	**$0**	**$12,727,761**	**$1,637,949,106**	**0.78%**	**0.78%**
KANSAS	$8,218,580	$39,228,949	$47,447,529	$1,410,784,891	3.36%	N/A
KENTUCKY	$149,108,180	$35,157,066	$184,265,246	$3,034,651,254	6.07%	N/A
LOUISIANA	$783,767,534	$66,163,772	$849,931,306	$3,443,268,554	24.68%	N/A
MAINE	$0	$48,053,303	$48,053,303	$1,184,602,684	4.06%	N/A
MARYLAND	$21,190,107	$114,809,891	$135,999,998	$3,029,230,799	4.49%	N/A
MASSACHUSETTS	$430,470,215	$100,256,982	$530,727,197	$6,345,106,895	8.36%	N/A
MICHIGAN	$184,248,863	$245,800,130	$430,048,993	$6,740,820,182	6.38%	N/A
MINNESOTA	**$64,472,554**	**-$362,996**	**$64,109,558**	**$3,322,271,106**	**1.93%**	**1.93%**
MISSISSIPPI	$173,907,092	$0	$173,907,092	$1,978,270,095	8.79%	N/A
MISSOURI	$277,424,914	$178,006,610	$455,431,524	$3,939,465,005	11.56%	N/A
MONTANA	**$218,638**	**$0**	**$218,638**	**$450,228,083**	**0.05%**	**0.05%**
NEBRASKA	**$2,679,595**	**$1,800,908**	**$4,480,503**	**$1,046,569,334**	**0.43%**	**0.43%**
NEVADA	$73,999,996	$0	$73,999,996	$598,188,701	12.37%	N/A
NEW HAMPSHIRE	$130,738,142	$25,930,968	$156,669,110	$791,841,232	19.79%	N/A
NEW JERSEY	$662,166,005	$371,056,837	$1,033,222,842	$6,069,845,736	17.02%	N/A
NEW MEXICO	**$12,090,836**	**$184,124**	**$12,274,960**	**$1,222,368,395**	**1.00%**	**1.00%**
NEW YORK	$1,673,569,324	$574,614,770	$2,248,184,094	$30,186,294,675	7.45%	N/A
NORTH CAROLINA	$244,588,558	$176,842,977	$421,431,535	$5,464,863,059	7.71%	N/A
NORTH DAKOTA	**$67,005**	**$988,478**	**$1,055,483**	**$428,657,394**	**0.25%**	**0.25%**
OHIO	$526,833,923	$91,880,922	$618,714,845	$7,479,847,366	8.27%	N/A
OKLAHOMA	**$19,056,935**	**$2,928,955**	**$21,985,890**	**$1,613,315,267**	**1.36%**	**1.36%**
OREGON	**$13,378,984**	**$19,975,000**	**$33,353,984**	**$2,110,836,095**	**1.58%**	**1.58%**
PENNSYLVANIA	$309,818,588	$367,216,721	$677,035,309	$10,387,923,145	6.52%	N/A
RHODE ISLAND	$83,023,623	$41,182	$83,064,805	$1,151,540,265	7.21%	N/A
SOUTH CAROLINA	$328,486,456	$46,066,796	$374,553,252	$2,664,608,648	14.06%	N/A
SOUTH DAKOTA	**$313,851**	**$751,299**	**$1,065,150**	**$395,665,682**	**0.27%**	**0.27%**
TENNESSEE	$0	$0	$0	$4,941,572,835	0.00%	N/A
TEXAS	$1,057,974,747	$253,950,160	$1,311,924,907	$10,609,803,586	12.37%	N/A
UTAH	**$3,321,798**	**$819,606**	**$4,141,404**	**$810,160,698**	**0.51%**	**0.51%**
VERMONT	$24,500,000	$0	$24,500,000	$516,874,481	4.74%	N/A
VIRGINIA	$122,073,243	$4,505,832	$126,579,075	$2,728,848,408	4.64%	N/A
WASHINGTON	$204,943,080	$114,097,740	$319,040,820	$3,962,522,212	8.05%	N/A
WEST VIRGINIA	$64,331,873	$16,308,842	$80,640,715	$1,378,345,915	5.85%	N/A
WISCONSIN	**$9,008,835**	**$2,583,720**	**$11,592,555**	**$3,266,901,080**	**0.35%**	**0.35%**
WYOMING	**$156,152**	**$0**	**$156,152**	**$218,851,375**	**0.07%**	**0.07%**
NATION	**11,546,937,015**	**3,348,998,219**	**$14,895,935,234**	**$195,156,897,787**	**7.63%**	

: LOW DSH STATE U/3% TEST

CHART 8.—FINAL FY 1998 IMD DSH LIMITS

[Key to the Chart of the FFY 1998 IMD Limitations]

Column	Description
Column A	STATE.
Column B	INPATIENT HOSPITAL SERVICES FY 95 DSH TOTAL COMPUTABLE. This column contains the States' total computable FFY 1995 inpatient hospital DSH expenditures as reported on the Form CMS–64.
Column C	IMD AND MENTAL HEALTH SERVICES FY 95 DSH TOTAL COMPUTABLE. This column contains the total computable FFY 1995 mental health facility DSH expenditures as reported on the Form CMS–64 as of January 1, 1997.
Column D	TOTAL INPATIENT & IMD & MENTAL HEALTH FY 95 DSH TOTAL COMPUTABLE, Col. B + C. This column contains the total computation of all inpatient hospital DSH expenditures and mental health facility DSH expenditures for FFY 1995 as reported on the Form CMS–64 as of January 1, 1997 (representing the sum of Column B and Column C).
Column E	APPLICABLE PERCENTAGE Col. C/D. This column contains the "applicable percentage" representing the total computable FFY 1995 mental health facility DSH expenditures divided by total computable all inpatient hospital and mental health facility DSH expenditures for FFY 1995 (the amount in Column C divided by the amount in Column D).
Column F	FY 1998 FEDERAL SHARE DSH ALLOTMENT. This column contains the States' final FFY 2002 DSH allotments.
Column G	FFY 1998 FMAP.
Column H	FY 1998 DSH ALLOTMENT TOTAL COMPUTABLE Col. F/G. This column contains FFY 1998 total computable DSH allotment (determined as Column F/Column G).
Column I	APPLICABLE PERCENT OF FY 1998 DSH ALLOTMENT. Col. E x H. This column contains the applicable percent of FFY 1998 total computable DSH allotment (calculated as Column E x Column H).
Column J	FY 1998 IMD DSH LIMIT TOTAL COMPUTABLE Lesser of Col. C or I. The column contains the lesser of the lesser of Column I or C.
Column K	FY 1998 IMD DSH LIMIT FEDERAL SHARE. This column contains the total computable IMD DSH Limit from Col. J and converts that amount into a Federal share (calculated as Col. G x Col. J).

FINAL FY 1998 IMD DSH LIMITS											
A	B	C	D	E	F	G	H	I	J	K
STATE	INPATIENT HOSPITAL SERVICES FY 95 DSH TOTAL COMPUTABLE	IMD AND MENTAL HEALTH SERVICES FY 95 DSH TOTAL COMPUTABLE	TOTAL INPATIENT & IMD & MENTAL HEALTH FY 95 DSH TOTAL COMPUTABLE Col B + C	APPLICABLE PERCENT Col C/D	FY 1998 FEDERAL SHARE DSH ALLOTMENT	FY 1998 FMAP	FY 1998 DSH ALLOTMENT TOTAL COMPUTABLE Col F/G	APPLICABLE PERCENT OF FY 1998 DSH ALLOTMENT Col E x H	FY 1998 IMD DSH LIMIT TOTAL COMPUTABLE Lesser of Col C or I	FY 1998 IMD DSH LIMIT FEDERAL SHARE Col G x J
ALABAMA	$413,006,229	$4,451,770	$417,457,999	1.07%	$293,000,000	99.32%	$422,977,438	$4,507,430	$4,451,770	$3,085,967
ALASKA	$2,506,827	$17,811,795	$20,119,892	87.54%	$10,000,000	89.80%	$19,722,408	$14,638,754	$14,638,754	$8,753,875
ARIZONA	$93,919,100	$28,474,900	$122,391,000	23.27%	$81,000,000	66.33%	$123,985,918	$28,845,966	$28,845,966	$19,602,852
ARKANSAS	$2,422,649	$819,351	$3,242,000	28.27%	$2,000,000	72.84%	$2,745,744	$683,932	$693,932	$505,460
CALIFORNIA	$2,191,436,462	$0	$2,191,436,462	0.00%	$1,085,000,000	51.23%	$2,117,899,688	$0	$0	$0
COLORADO	$173,900,441	$594,776	$174,495,217	0.34%	$83,000,000	51.87%	$175,949,394	$609,958	$594,776	$309,105
CONNECTICUT	$303,359,275	$105,573,725	$408,933,000	25.82%	$200,000,000	50.00%	$400,000,000	$103,267,503	$103,267,503	$51,633,752
DELAWARE	$0	$7,069,000	$7,069,000	100.00%	$4,000,000	50.00%	$8,000,000	$8,000,000	$7,069,000	$3,534,500
DISTRICT OF COLUMBIA	$39,832,234	$6,545,136	$46,077,370	14.20%	$23,000,000	70.00%	$32,857,143	$4,667,247	$4,667,247	$3,267,073
FLORIDA	$184,468,014	$149,714,986	$334,183,000	44.80%	$207,000,000	55.98%	$371,957,855	$166,642,625	$149,714,986	$83,316,390
GEORGIA	$407,343,567	$0	$407,343,567	0.00%	$253,000,000	60.84%	$415,844,839	$0	$0	$0
HAWAII	$0	$0	$0	0.00%	$0	50.00%	$0	$0	$0	$0
IDAHO	$2,081,429	$0	$2,081,429	0.00%	$1,000,000	99.59%	$1,436,988	$0	$0	$0
ILLINOIS	$315,868,508	$89,406,279	$405,279,784	22.06%	$203,000,000	50.00%	$406,000,000	$89,587,828	$89,406,275	$44,704,138
INDIANA	$79,960,753	$153,566,302	$233,527,085	65.79%	$201,000,000	81.41%	$327,309,256	$215,236,355	$153,566,302	$94,305,066
IOWA	$12,011,250	$0	$12,011,250	0.00%	$8,000,000	93.75%	$12,546,020	$0	$0	$0
KANSAS	$11,587,208	$79,663,508	$88,250,719	86.87%	$51,000,000	69.71%	$85,412,829	$74,196,232	$74,196,232	$44,303,784
KENTUCKY	$158,804,908	$37,443,073	$196,247,981	18.08%	$137,000,000	70.37%	$194,685,236	$37,144,909	$37,144,909	$26,136,873
LOUISIANA	$1,079,812,159	$132,917,149	$1,211,429,318	10.97%	$880,000,000	70.03%	$1,256,604,312	$137,873,717	$132,917,149	$93,051,879
MAINE	$99,957,958	$60,958,342	$160,916,300	37.88%	$103,000,000	66.04%	$156,966,081	$59,083,099	$59,083,099	$39,018,479
MARYLAND	$22,226,467	$120,873,631	$143,099,998	84.47%	$72,000,000	50.00%	$144,000,000	$121,633,744	$120,873,631	$60,436,768
MASSACHUSETTS	$469,653,946	$105,835,054	$575,289,000	18.36%	$288,000,000	50.00%	$576,000,000	$105,758,508	$105,835,054	$52,917,527
MICHIGAN	$133,258,800	$304,765,552	$438,024,352	99.58%	$249,000,000	83.58%	$464,725,844	$323,343,892	$304,765,552	$193,293,383
MINNESOTA	$24,240,000	$5,267,214	$29,497,214	17.82%	$33,000,000	62.14%	$43,291,139	$11,280,220	$5,267,214	$2,741,111
MISSISSIPPI	$182,808,033	$0	$182,808,033	0.00%	$143,000,000	77.09%	$195,497,470	$0	$0	$0
MISSOURI	$521,946,524	$207,234,618	$729,181,142	28.42%	$436,000,000	60.88%	$716,523,401	$204,205,688	$204,205,688	$123,912,000
MONTANA	$237,048	$0	$237,048	0.00%	$200,000	70.56%	$283,447	$0	$0	$0
NEBRASKA	$8,449,102	$1,911,337	$8,260,438	21.83%	$5,000,000	91.17%	$8,173,841	$1,792,370	$1,792,370	$1,096,393
NEVADA	$73,560,000	$0	$73,660,000	0.00%	$37,000,000	50.00%	$74,000,000	$0	$0	$0
NEW HAMPSHIRE	$92,675,915	$94,753,948	$187,424,954	50.56%	$140,000,000	50.00%	$280,000,000	$141,555,954	$94,753,948	$47,379,974
NEW JERSEY	$736,742,539	$357,370,461	$1,094,113,000	32.66%	$600,000,000	50.00%	$1,200,000,000	$391,958,364	$357,370,461	$178,685,231
NEW MEXICO	$6,490,015	$254,786	$6,744,801	3.78%	$9,000,000	72.91%	$12,394,987	$488,223	$254,786	$185,000
NEW YORK	$2,418,869,368	$605,000,000	$3,023,869,368	20.01%	$1,512,000,000	50.00%	$3,024,000,000	$606,026,136	$606,000,000	$302,500,000
NORTH CAROLINA	$183,201,966	$236,072,927	$429,274,893	54.99%	$279,000,000	93.09%	$440,640,355	$242,323,044	$236,072,927	$148,938,220
NORTH DAKOTA	$214,823	$968,479	$1,203,001	82.17%	$1,000,000	70.43%	$1,418,849	$1,188,857	$968,479	$696,185
OHIO	$836,731,956	$93,432,758	$929,164,714	14.95%	$382,000,000	58.14%	$657,034,744	$97,571,837	$93,432,758	$54,321,806
OKLAHOMA	$20,019,968	$3,273,248	$23,293,217	14.05%	$19,000,000	70.51%	$22,891,817	$3,188,737	$3,188,737	$2,248,378
OREGON	$11,437,908	$18,975,092	$31,413,000	93.99%	$20,000,000	91.46%	$32,541,490	$19,975,092	$19,975,092	$12,279,592
PENNSYLVANIA	$388,207,318	$879,199,682	$967,407,001	59.87%	$529,000,000	53.39%	$990,622,281	$878,199,682	$878,199,682	$309,234,710
RHODE ISLAND	$108,503,197	$2,397,633	$110,901,000	2.16%	$62,000,000	53.17%	$119,507,109	$2,521,207	$2,397,633	$1,274,928
SOUTH CAROLINA	$366,681,364	$72,079,341	$438,757,705	19.43%	$313,000,000	70.23%	$445,678,485	$73,213,243	$72,076,341	$50,919,214
SOUTH DAKOTA	$321,120	$751,299	$1,072,419	70.06%	$1,000,000	97.75%	$1,476,015	$1,034,044	$751,299	$509,005
TENNESSEE	$0	$0	$0	0.00%	$0	63.36%	$0	$0	$0	$0
TEXAS	$1,220,615,401	$292,813,592	$1,513,028,993	19.33%	$979,000,000	62.28%	$1,571,833,208	$303,901,831	$292,813,592	$182,177,465
UTAH	$3,521,116	$934,586	$4,555,702	20.51%	$3,000,000	72.58%	$4,133,370	$847,946	$847,946	$615,439
VERMONT	$18,979,252	$9,071,297	$29,050,549	31.23%	$18,000,000	52.18%	$28,948,218	$9,039,342	$9,039,342	$5,620,863
VIRGINIA	$129,313,480	$7,770,268	$137,083,748	5.97%	$70,000,000	51.49%	$135,948,728	$7,705,932	$7,705,932	$3,967,754
WASHINGTON	$171,725,918	$163,936,438	$335,562,250	48.52%	$174,000,000	52.18%	$333,652,924	$162,904,217	$162,904,217	$84,954,549
WEST VIRGINIA	$66,962,606	$15,687,045	$85,849,581	22.00%	$64,000,000	73.97%	$86,573,997	$18,112,381	$15,687,045	$13,914,088
WISCONSIN	$6,609,524	$4,492,011	$11,101,835	40.46%	$7,000,000	58.84%	$11,896,669	$4,813,746	$4,492,011	$2,643,099
WYOMING	$0	$0	$0	0.00%	$67,000	63.02%	$105,315	$0	$0	$0
TOTAL	$13,502,879,245	$4,180,441,152	$17,683,115,397		$10,276,297,000		$16,164,908,397	$4,395,280,390	$4,164,272,353	$2,321,917,681

CHART 9.—FINAL FY 1999 IMD DSH LIMITS

[Key to the Chart of the FFY 1999 IMD Limitations]

Column	Description
Column A	STATE.
Column B	INPATIENT HOSPITAL SERVICES FY 95 DSH TOTAL COMPUTABLE. This column contains the States' total computable FFY 1995 inpatient hospital DSH expenditures as reported on the Form CMS–64.
Column C	IMD AND MENTAL HEALTH SERVICES FY 95 DSH TOTAL COMPUTABLE. This column contains the total computable FFY 1995 mental health facility DSH expenditures as reported on the Form CMS–64 as of January 1, 1997.
Column D	TOTAL INPATIENT & IMD & MENTAL HEALTH FY 95 DSH TOTAL COMPUTABLE, Col. B + C. This column contains the total computation of all inpatient hospital DSH expenditures and mental health facility DSH expenditures for FFY 1995 as reported on the Form CMS–64 as of January 1, 1997 (representing the sum of Column B and Column C).
Column E	APPLICABLE PERCENTAGE Col. C/D. This column contains the "applicable percentage" representing the total computable FFY 1995 mental health facility DSH expenditures divided by total computable all inpatient hospital and mental health facility DSH expenditures for FFY 1995 (the amount in Column C divided by the amount in Column D).
Column F	FY 1999 FEDERAL SHARE DSH ALLOTMENT. This column contains the States' final FFY 1999 DSH allotments.
Column G	FFY 1999 FMAP.
Column H	FY 1999 DSH ALLOTMENT TOTAL COMPUTABLE Col. F/G. This column contains FFY 1999 total computable DSH allotment (determined as Column F/Column G).
Column I	APPLICABLE PERCENT OF FY 1999 DSH ALLOTMENT. Col. E x H. This column contains the applicable percent of FFY 1999 total computable DSH allotment (calculated as Column E x Column H).
Column J	FY 1999 IMD DSH LIMIT TOTAL COMPUTABLE Lesser of Col. C or I. The column contains the lesser of the lesser of Column I or C.
Column K	FY 1999 IMD DSH LIMIT FEDERAL SHARE. This column contains the total computable IMD DSH Limit from Col. J and converts that amount into a Federal share (calculated as Col. G x Col. J).

FINAL FY 1999 IMD DSH LIMITS											
A	B	C	D	E	F	G	H	I	J	K
STATE	INPATIENT HOSPITAL SERVICES FY 65 DSH TOTAL COMPUTABLE	IMD AND MENTAL HEALTH SERVICES FY 95 DSH TOTAL COMPUTABLE	TOTAL INPATIENT & IMD & MENTAL HEALTH FY 95 DSH TOTAL COMPUTABLE Col B + C	APPLICABLE PERCENT * Col C/D	FY 1999 FEDERAL SHARE DSH ALLOTMENT	FY 1999 FMAP	FY 1999 DSH ALLOTMENT TOTAL COMPUTABLE Col F/G	APPLICABLE PERCENT OF FY 1999 DSH ALLOTMENT Col E x H	FY 1999 IMD DSH LIMIT TOTAL COMPUTABLE Lesser of Col C or I	FY 1999 IMD DSH LIMIT FEDERAL SHARE Col G x J
ALABAMA	$413,006,229	$4,451,770	$417,457,999	1.07%	$269,000,000	69.27%	$386,335,495	$4,141,208	$4,141,208	$2,868,515
ALASKA	$2,506,827	$17,611,765	$20,118,592	87.54%	$10,000,000	59.60%	$19,722,408	$14,638,754	$14,638,754	$8,753,975
ARIZONA	$93,916,100	$28,474,900	$122,391,000	23.27%	$81,000,000	65.50%	$123,664,122	$28,771,068	$28,474,900	$18,651,060
ARKANSAS	$2,422,549	$819,351	$3,242,000	25.27%	$2,000,000	72.96%	$2,741,228	$692,791	$692,791	$505,460
CALIFORNIA	$2,191,435,462	$0	$2,191,435,462	0.00%	$1,068,000,000	51.55%	$2,071,774,976	$0	$0	$0
COLORADO	$173,900,441	$594,776	$174,495,217	0.34%	$65,000,000	50.59%	$168,017,365	$572,696	$572,696	$289,727
CONNECTICUT	$303,359,275	$105,573,725	$408,933,000	25.82%	$194,000,000	50.00%	$388,000,000	$100,169,478	$100,169,478	$50,084,739
DELAWARE	$0	$7,069,000	$7,069,000	100.00%	$4,000,000	50.00%	$8,000,000	$8,000,000	$7,069,000	$3,534,500
DISTRICT OF COLUMBIA	$39,532,234	$6,545,136	$46,077,370	14.20%	$23,000,000	70.00%	$32,857,143	$4,667,247	$4,667,247	$3,267,073
FLORIDA	$164,468,014	$149,714,686	$334,163,000	44.80%	$203,000,000	55.62%	$363,668,938	$162,924,774	$149,714,986	$83,570,905
GEORGIA	$407,343,557	$0	$407,343,557	0.00%	$248,000,000	60.47%	$410,120,721	$0	$0	$0
HAWAII	$0	$0	$0	0.00%	$0	50.00%	$0	$0	$0	$0
IDAHO	$2,081,429	$0	$2,081,429	0.00%	$1,000,000	69.85%	$1,431,539	$0	$0	$0
ILLINOIS	$316,856,508	$89,408,276	$405,276,784	22.06%	$199,000,000	50.00%	$396,000,000	$87,802,942	$87,802,942	$43,901,471
INDIANA	$79,960,783	$153,566,302	$233,527,085	65.75%	$197,000,000	51.01%	$322,897,886	$212,336,116	$153,566,302	$93,690,601
IOWA	$12,011,250	$0	$12,011,250	0.00%	$6,000,000	63.32%	$12,634,239	$0	$0	$0
KANSAS	$11,587,208	$76,683,508	$88,250,716	86.87%	$49,000,000	60.05%	$81,598,688	$70,884,665	$70,884,665	$42,598,362
KENTUCKY	$158,604,908	$37,443,073	$199,247,981	18.08%	$134,000,000	70.53%	$189,990,075	$36,249,098	$36,249,098	$25,566,499
LOUISIANA	$1,079,512,169	$132,917,149	$1,211,429,318	10.97%	$795,000,000	70.37%	$1,129,742,788	$123,954,592	$123,954,592	$67,226,825
MAINE	$99,957,958	$60,658,342	$160,916,300	37.88%	$69,000,000	66.40%	$149,096,368	$56,480,720	$56,480,720	$37,503,198
MARYLAND	$22,226,467	$120,873,531	$143,099,998	64.47%	$70,000,000	50.00%	$140,000,000	$118,255,028	$118,255,028	$56,127,514
MASSACHUSETTS	$459,653,946	$105,635,054	$575,289,000	18.36%	$262,000,000	50.00%	$564,000,000	$103,552,158	$103,552,158	$51,781,079
MICHIGAN	$133,258,800	$304,765,552	$438,024,352	69.56%	$244,000,000	52.72%	$462,822,458	$322,019,407	$304,765,552	$160,672,395
MINNESOTA	$24,240,000	$5,257,214	$29,497,214	17.82%	$33,000,000	51.50%	$54,077,670	$11,420,401	$5,257,214	$2,707,465
MISSISSIPPI	$182,608,033	$0	$182,608,033	0.00%	$141,000,000	76.79%	$163,841,573	$0	$0	$0
MISSOURI	$621,946,524	$207,234,618	$729,181,142	28.42%	$423,000,000	60.24%	$702,191,235	$199,564,037	$199,564,037	$120,217,376
MONTANA	$237,048	$0	$237,048	0.00%	$200,000	71.73%	$276,823	$0	$0	$0
NEBRASKA	$6,449,102	$1,811,337	$6,260,439	21.93%	$5,000,000	61.46%	$8,135,373	$1,783,913	$1,783,913	$1,096,393
NEVADA	$73,560,000	$0	$73,560,000	0.00%	$37,000,000	50.00%	$74,000,000	$0	$0	$0
NEW HAMPSHIRE	$92,675,916	$94,753,948	$187,429,964	50.55%	$136,000,000	50.00%	$272,000,000	$137,507,630	$94,753,948	$47,376,974
NEW JERSEY	$736,742,539	$357,370,461	$1,094,113,000	32.66%	$582,000,000	50.00%	$1,164,000,000	$380,197,673	$367,370,461	$176,685,231
NEW MEXICO	$6,490,015	$254,786	$6,744,801	3.78%	$9,000,000	72.96%	$12,332,148	$455,649	$254,786	$185,943
NEW YORK	$2,418,666,360	$605,000,000	$3,023,869,368	20.01%	$1,482,000,000	50.00%	$2,964,000,000	$593,021,649	$593,021,649	$296,510,825
NORTH CAROLINA	$193,201,960	$236,072,627	$429,274,593	54.99%	$272,000,000	63.07%	$431,269,646	$237,166,235	$236,072,627	$148,891,006
NORTH DAKOTA	$214,523	$668,478	$1,203,001	82.17%	$1,000,000	69.94%	$1,429,797	$1,174,631	$668,478	$691,342
OHIO	$535,731,959	$93,432,755	$629,164,714	14.85%	$374,000,000	56.26%	$641,949,860	$95,331,362	$93,432,755	$54,433,925
OKLAHOMA	$20,019,969	$3,273,248	$23,293,217	14.05%	$16,000,000	70.84%	$22,586,110	$3,173,883	$3,173,883	$2,248,376
OREGON	$11,437,908	$19,675,092	$31,413,000	63.59%	$20,000,000	60.55%	$33,030,563	$21,003,972	$19,975,092	$12,094,918
PENNSYLVANIA	$386,207,319	$579,199,682	$967,407,001	59.87%	$518,000,000	53.77%	$963,362,470	$576,776,166	$576,778,166	$310,133,620
RHODE ISLAND	$108,503,167	$2,397,833	$110,901,000	2.16%	$60,000,000	54.05%	$111,008,326	$2,400,154	$2,397,833	$1,296,029
SOUTH CAROLINA	$366,681,364	$72,076,341	$438,757,705	15.43%	$303,000,000	69.85%	$433,786,666	$71,259,733	$71,259,733	$49,774,924
SOUTH DAKOTA	$321,120	$751,299	$1,072,419	70.06%	$1,000,000	68.16%	$1,487,136	$1,027,624	$751,299	$512,085
TENNESSEE	$0	$0	$0	0.00%	$0	63.09%	$0	$0	$0	$0
TEXAS	$1,220,515,401	$292,513,592	$1,513,028,993	19.33%	$950,000,000	62.45%	$1,521,216,974	$294,096,573	$292,513,592	$182,674,738
UTAH	$3,621,116	$934,586	$4,555,702	20.51%	$3,000,000	71.76%	$4,179,437	$857,397	$857,397	$615,439
VERMONT	$19,979,252	$9,071,297	$29,050,549	31.23%	$18,000,000	61.97%	$29,046,313	$9,099,974	$9,069,974	$5,620,663
VIRGINIA	$129,313,460	$7,770,268	$137,083,748	5.67%	$66,000,000	51.60%	$131,782,946	$7,469,605	$7,469,805	$3,864,419
WASHINGTON	$171,725,815	$163,836,435	$335,562,250	48.82%	$171,000,000	52.50%	$325,714,286	$159,028,220	$159,028,220	$83,489,816
WEST VIRGINIA	$66,962,606	$18,867,045	$85,649,651	22.00%	$63,000,000	74.47%	$84,597,825	$18,611,641	$16,611,641	$13,860,069
WISCONSIN	$6,509,524	$4,492,011	$11,101,535	40.48%	$7,000,000	58.85%	$11,894,647	$4,812,928	$4,492,011	$2,643,548
WYOMING	$0	$0	$0	0.00%	$95,000	64.08%	$148,252	$0	$0	$0
TOTAL	$13,502,679,245	$4,180,441,152	$17,683,120,397		$9,958,295,000		$17,619,241,868	$4,263,348,721	$4,114,540,805	$2,263,177,338

CHART 10.—FINAL FY 2000 IMD DSH LIMITS

[Key to the Chart of the FFY 2000 IMD Limitations]

Column	Description
Column A	STATE.
Column B	INPATIENT HOSPITAL SERVICES FY 95 DSH TOTAL COMPUTABLE. This column contains the States' total computable FFY 1995 inpatient hospital DSH expenditures as reported on the Form CMS–64.
Column C	IMD AND MENTAL HEALTH SERVICES FY 95 DSH TOTAL COMPUTABLE. This column contains the total computable FFY 1995 mental health facility DSH expenditures as reported on the Form CMS–64 as of January 1, 1997.
Column D	TOTAL INPATIENT & IMD & MENTAL HEALTH FY 95 DSH TOTAL COMPUTABLE, Col. B + C. This column contains the total computation of all inpatient hospital DSH expenditures and mental health facility DSH expenditures for FFY 1995 as reported on the Form CMS–64 as of January 1, 1997 (representing the sum of Column B and Column C).
Column E	APPLICABLE PERCENTAGE Col. C/D. This column contains the "applicable percentage" representing the total computable FFY 1995 mental health facility DSH expenditures divided by total computable all inpatient hospital and mental health facility DSH expenditures for FFY 1995 (the amount in Column C divided by the amount in Column D).
Column F	FY 2000 FEDERAL SHARE DSH ALLOTMENT. This column contains the States' final FFY 2000 DSH allotments.
Column G	FFY 2000 FMAP.
Column H	FY 2000 DSH ALLOTMENT TOTAL COMPUTABLE Col. F/G. This column contains FFY 2000 total computable DSH allotment (determined as Column F/Column G).
Column I	APPLICABLE PERCENT OF FY 2000 DSH ALLOTMENT. Col. E x H. This column contains the applicable percent of FFY 2000 total computable DSH allotment (calculated as Column E x Column H).
Column J	FY 2000 IMD DSH LIMIT TOTAL COMPUTABLE Lesser of Col. C or I. The column contains the lesser of the lesser of Column I or C.
Column K	FY 2000 IMD DSH LIMIT FEDERAL SHARE. This column contains the total computable IMD DSH Limit from Col. J and converts that amount into a Federal share (calculated as Col. G x Col. J).

FINAL FY 2000 IMD DSH LIMITS

A	B	C	D	E	F	G	H	I	J	K
STATE	INPATIENT HOSPITAL SERVICES FY 95 DSH TOTAL COMPUTABLE	IMD AND MENTAL HEALTH SERVICES FY 95 DSH TOTAL COMPUTABLE	TOTAL INPATIENT & IMD & MENTAL HEALTH FY 95 DSH TOTAL COMPUTABLE Col B + C	APPLICABLE PERCENT Col C/D	FY 2000 FEDERAL SHARE DSH ALLOTMENT	FY 2000 FMAP	FY 2000 DSH ALLOTMENT TOTAL COMPUTABLE Col F/G	APPLICABLE PERCENT OF FY 2000 DSH ALLOTMENT Col E x H	FY 2000 IMD DSH LIMIT TOTAL COMPUTABLE Lesser of Col C or I	FY 2000 IMD DSH LIMIT FEDERAL SHARE Col G x J
ALABAMA	$413,006,229	$4,451,770	$417,457,999	1.07%	$246,000,000	69.57%	$356,475,492	$3,601,453	$3,601,453	$2,844,671
ALASKA	$2,506,627	$17,611,765	$20,118,582	87.54%	$10,000,000	59.60%	$16,722,408	$14,636,754	$14,636,754	$6,753,376
ARIZONA	$93,916,100	$28,474,900	$122,391,000	23.27%	$61,000,000	65.92%	$122,676,214	$25,587,767	$26,474,900	$16,770,854
ARKANSAS	$2,422,649	$819,351	$3,242,000	25.27%	$2,000,000	72.65%	$2,745,367	$693,837	$693,837	$505,480
CALIFORNIA	$2,191,435,492	$0	$2,191,435,492	0.00%	$956,000,000	51.67%	$1,906,263,983	$0	$0	$0
COLORADO	$173,900,441	$594,776	$174,495,217	0.34%	$79,000,000	50.00%	$156,000,000	$536,551	$536,551	$269,276
CONNECTICUT	$303,358,275	$105,573,725	$408,833,000	25.62%	$164,000,000	50.00%	$326,000,000	$84,676,353	$84,679,353	$42,339,676
DELAWARE	$0	$7,069,000	$7,069,000	100.00%	$4,000,000	50.00%	$6,000,000	$7,069,000	$7,069,000	$3,534,500
DISTRICT OF COLUMBIA	$39,532,234	$8,545,136	$46,077,370	14.20%	$32,000,000	70.00%	$45,714,286	$6,493,561	$6,493,561	$4,545,493
FLORIDA	$164,466,014	$149,714,956	$334,163,000	44.50%	$167,000,000	56.52%	$348,549,156	$155,151,060	$149,714,866	$84,618,810
GEORGIA	$407,343,557	$0	$407,343,557	0.00%	$241,000,000	59.66%	$402,471,610	$0	$0	$0
HAWAII	$0	$0	$0	0.00%	$0	51.01%	$0	$0	$0	$0
IDAHO	$2,051,429	$0	$2,051,429	0.00%	$1,000,000	70.15%	$1,425,517	$0	$0	$0
ILLINOIS	$315,666,508	$89,406,276	$405,276,764	22.06%	$193,000,000	50.00%	$386,000,000	$85,155,617	$85,155,617	$42,577,808
INDIANA	$79,960,763	$153,566,302	$233,527,065	65.76%	$161,000,000	61.74%	$309,361,840	$203,434,677	$153,566,302	$94,811,635
IOWA	$12,011,250	$0	$12,011,250	0.00%	$6,000,000	63.06%	$12,686,330	$0	$0	$0
KANSAS	$11,587,208	$76,663,508	$86,250,716	88.87%	$42,000,000	60.03%	$66,965,017	$80,776,699	$60,775,699	$36,485,453
KENTUCKY	$156,604,908	$37,443,073	$196,247,661	19.06%	$130,000,000	70.55%	$164,266,478	$35,157,066	$35,157,066	$24,803,310
LOUISIANA	$1,076,$12,169	$132,917,149	$1,211,429,318	10.97%	$713,000,000	70.32%	$1,013,936,261	$111,246,357	$111,246,357	$78,229,845
MAINE	$99,957,958	$60,956,342	$160,916,300	37.66%	$84,000,000	66.22%	$126,849,564	$46,053,300	$46,053,300	$31,620,695
MARYLAND	$22,226,467	$120,873,531	$143,099,998	84.47%	$66,000,000	50.00%	$136,000,000	$114,576,313	$114,576,313	$67,436,157
MASSACHUSETTS	$469,653,646	$105,635,054	$575,269,000	18.36%	$273,000,000	60.00%	$546,000,000	$100,256,963	$100,256,963	$60,126,491
MICHIGAN	$133,256,600	$304,765,552	$438,024,352	69.56%	$237,000,000	65.11%	$430,046,993	$299,216,512	$299,219,512	$184,596,220
MINNESOTA	$24,240,000	$5,257,214	$29,497,214	17.82%	$33,000,000	51.46%	$64,102,564	$11,424,636	$5,257,214	$2,706,414
MISSISSIPPI	$162,806,033	$0	$162,806,033	0.00%	$136,000,000	76.60%	$177,063,333	$0	$0	$0
MISSOURI	$521,946,524	$207,234,618	$729,181,142	28.42%	$379,000,000	60.51%	$626,342,753	$176,007,759	$176,007,759	$107,712,495
MONTANA	$237,048	$0	$237,048	0.00%	$200,000	72.30%	$276,625	$0	$0	$0
NEBRASKA	$6,449,102	$1,611,337	$8,260,439	21.93%	$5,000,000	60.66%	$8,242,678	$1,600,908	$1,600,908	$1,096,393
NEVADA	$73,560,000	$0	$73,560,000	0.00%	$37,000,000	50.00%	$74,000,000	$0	$0	$0
NEW HAMPSHIRE	$92,675,916	$94,753,648	$187,429,564	50.55%	$130,000,000	50.00%	$260,000,000	$131,441,308	$94,753,948	$47,376,974
NEW JERSEY	$736,742,539	$357,370,461	$1,094,113,000	32.66%	$515,000,000	50.00%	$1,030,000,000	$336,429,212	$336,429,212	$166,214,606
NEW MEXICO	$8,490,015	$254,766	$6,744,601	3.76%	$9,000,000	73.32%	$12,274,659	$483,689	$254,766	$186,809
NEW YORK	$2,416,569,368	$605,000,000	$3,023,669,368	20.01%	$1,438,000,000	50.00%	$2,672,000,000	$574,614,770	$574,614,770	$287,307,385
NORTH CAROLINA	$193,201,966	$236,072,627	$429,274,593	54.98%	$264,000,000	62.49%	$422,487,596	$232,329,228	$232,329,228	$145,152,535
NORTH DAKOTA	$214,523	$966,478	$1,203,001	82.17%	$1,000,000	70.42%	$1,420,051	$1,166,523	$966,478	$696,086
OHIO	$535,731,956	$93,432,758	$629,164,714	14.85%	$383,000,000	55.67%	$616,714,646	$61,650,923	$81,880,923	$53,906,537
OKLAHOMA	$20,019,969	$3,273,248	$23,293,217	14.05%	$16,000,000	71.06%	$22,506,662	$3,162,721	$3,162,721	$2,246,378
OREGON	$11,437,906	$19,975,092	$31,413,000	63.59%	$20,000,000	56.66%	$33,365,570	$21,210,346	$19,975,092	$11,977,065
PENNSYLVANIA	$386,207,319	$579,199,682	$967,407,001	59.87%	$502,000,000	53.62%	$932,736,759	$556,443,336	$556,443,336	$300,554,203
RHODE ISLAND	$108,503,167	$2,397,833	$110,901,000	2.16%	$56,000,000	53.77%	$107,686,840	$2,332,230	$2,332,230	$1,254,040
SOUTH CAROLINA	$366,681,364	$72,076,341	$438,757,705	16.43%	$262,000,000	69.95%	$374,553,252	$61,529,240	$61,529,240	$43,039,703
SOUTH DAKOTA	$321,120	$751,299	$1,072,419	70.06%	$1,000,000	68.72%	$1,455,160	$1,019,448	$751,299	$516,293
TENNESSEE	$0	$0	$0	0.00%	$0	63.10%	$0	$0	$0	$0
TEXAS	$1,220,515,401	$292,513,592	$1,513,028,993	19.33%	$806,000,000	61.36%	$1,313,559,322	$253,950,160	$253,950,160	$155,823,618
UTAH	$3,821,116	$934,586	$4,555,702	20.51%	$3,000,000	71.56%	$4,192,672	$860,153	$860,153	$615,439
VERMONT	$19,979,252	$6,071,297	$29,050,549	31.23%	$16,000,000	62.24%	$26,920,308	$9,030,628	$9,030,628	$5,620,863
VIRGINIA	$129,313,480	$7,770,268	$137,083,748	5.67%	$66,000,000	51.67%	$127,733,695	$7,240,262	$7,240,262	$3,741,054
WASHINGTON	$171,725,615	$163,536,435	$335,562,250	48.52%	$166,000,000	51.63%	$320,277,531	$156,373,901	$156,373,901	$81,046,593
WEST VIRGINIA	$66,962,606	$16,667,045	$85,646,651	22.00%	$61,000,000	74.76%	$81,572,913	$17,648,091	$17,946,091	$13,420,057
WISCONSIN	$6,609,524	$4,492,011	$11,101,535	40.46%	$7,000,000	56.76%	$11,906,613	$4,816,659	$4,492,011	$2,840,404
WYOMING	$0	$0	$0	0.00%	$100,000	64.04%	$156,152	$0	$0	$0
TOTAL	$13,502,679,245	$4,160,441,152	$17,663,120,397		$9,276,300,000		$15,442,052,401	$4,019,236,753	$3,916,817,914	$2,154,062,603

CHART 11.—FINAL FY 2001 IMD DSH LIMITS

[Key to the Chart of the FFY 2001 IMD Limitations]

Column	Description
Column A	STATE.
Column B	INPATIENT HOSPITAL SERVICES FY 95 DSH TOTAL COMPUTABLE. This Column contains the States' total computable FFY 1995 inpatient hospital DSH expenditures as reported on the Form CMS–64.
Column C	IMD AND MENTAL HEALTH SERVICES FY 95 DSH TOTAL COMPUTABLE. This Column contains the total computable FFY 1995 mental health facility DSH expenditures as reported on the Form CMS–64 as of January 1, 1997.
Column D	TOTAL INPATIENT & IMD & MENTAL HEALTH FY 95 DSH TOTAL COMPUTABLE, Col. B + C. This Column contains the total computation of all Inpatient hospital DSH expenditures and mental health facility DSH expenditures for FFY 1995 as reported on the Form CMS–64 as of January 1, 1997 (representing the sum of Column B and Column C).
Column E	APPLICABLE PERCENTAGE Col. C/D. This Column contains the "applicable percentage" representing the total computable FFY 1995 mental health facility DSH expenditures divided by total computable all inpatient hospital and mental health facility DSH expenditures for FFY 1995 (the amount in Column C divided by the amount in Column D).
Column F	FY 2001 FEDERAL SHARE DSH ALLOTMENT. This Column contains the States' final FFY 2001 DSH allotments.
Column G	FFY 2001 FMAP.
Column H	FY 2001 DSH ALLOTMENT TOTAL COMPUTABLE Col. F/G. This Column contains FFY 2001 total computable DSH allotment (determined as Column F/Column G).
Column I	APPLICABLE PERCENT OF FY 2001 DSH ALLOTMENT. Col. E x H. This Column contains the applicable percent of FFY 2001 total computable DSH allotment (calculated as Column E x Column H).
Column J	FY 2001 IMD DSH LIMIT TOTAL COMPUTABLE Lesser of Col. C or I. The Column contains the lesser of the lesser of Column I or C.
Column K	FY 2001 IMD DSH LIMIT FEDERAL SHARE, Col. G x J. This Column contains the total computable IMD DSH Limit from Col. J and converts that amount into a Federal share (calculated as Col. G x Col. J).

FINAL FY 2001 IMD DSH LIMITS

A	B	C	D	E	F	G	H	I	J	K
STATE	INPATIENT HOSPITAL SERVICES FY 95 DSH TOTAL COMPUTABLE	IMD AND MENTAL HEALTH SERVICES FY 95 DSH TOTAL COMPUTABLE	TOTAL INPATIENT & IMD & MENTAL HEALTH FY 95 DSH TOTAL COMPUTABLE Col B + C	APPLICABLE PERCENT Col C/D	FY 2001 FEDERAL SHARE DSH ALLOTMENT	FY 2001 FMAP	FY 2001 DSH ALLOTMENT TOTAL COMPUTABLE Col F/G	APPLICABLE PERCENT OF FY 2001 DSH ALLOTMENT Col E x H	FY 2001 IMD DSH LIMIT TOTAL COMPUTABLE Lesser of Col C or I	FY 2001 IMD DSH LIMIT FEDERAL SHARE Col G x J
ALABAMA	$413,006,229	$4,451,770	$417,457,999	1.07%	$258,680,000	89.99%	$368,738,105	$3,910,593	$3,910,593	$2,737,234
ALASKA	$2,608,827	$17,611,765	$20,115,592	50.00%	$10,350,000	80.13%	$17,212,706	$5,606,353	$5,606,353	$5,175,000
ARIZONA	$93,918,100	$28,474,900	$122,391,000	23.27%	$83,835,000	85.77%	$127,466,930	$29,665,641	$26,474,900	$18,727,942
ARKANSAS	$2,422,849	$819,351	$3,242,000	25.27%	$16,578,696	73.02%	$25,440,559	$8,429,595	$819,351	$596,290
CALIFORNIA	$2,191,435,462	$0	$2,191,435,462	0.00%	$1,020,510,000	51.25%	$1,991,239,024	$0	$0	$0
COLORADO	$173,900,441	$594,776	$174,495,217	0.34%	$61,785,000	50.00%	$183,630,000	$557,400	$557,400	$278,700
CONNECTICUT	$303,359,275	$105,573,725	$408,933,000	25.52%	$189,740,000	50.00%	$339,460,000	$87,643,130	$87,643,130	$43,821,565
DELAWARE	$0	$7,069,000	$7,069,000	60.00%	$4,140,000	50.00%	$8,280,000	$4,140,000	$4,140,000	$2,070,000
DISTRICT OF COLUMBIA	$39,632,234	$8,545,136	$48,077,370	14.20%	$33,120,000	70.00%	$47,314,286	$6,720,536	$6,545,136	$4,581,595
FLORIDA	$164,485,014	$149,714,986	$334,183,000	44.80%	$203,895,000	68.62%	$360,111,268	$181,330,928	$149,714,966	$84,788,625
GEORGIA	$407,343,557	$0	$407,343,557	0.00%	$249,435,000	69.87%	$418,024,133	$0	$0	$0
HAWAII	$0	$0	$0	0.00%	$0	53.85%	$0	$0	$0	$0
IDAHO	$2,081,429	$0	$2,081,429	0.00%	$7,078,586	70.78%	$10,003,655	$0	$0	$0
ILLINOIS	$315,888,508	$89,406,276	$405,276,784	22.06%	$199,755,000	50.00%	$399,510,000	$88,138,063	$88,138,063	$44,068,032
INDIANA	$79,950,783	$153,686,302	$233,527,085	60.00%	$197,865,000	82.04%	$318,641,199	$159,320,800	$153,686,302	$95,272,534
IOWA	$12,011,250	$0	$12,011,250	0.00%	$18,958,949	62.67%	$27,080,714	$0	$0	$0
KANSAS	$11,687,208	$78,683,508	$88,250,716	60.00%	$43,470,000	59.85%	$72,831,579	$38,315,789	$38,315,789	$21,736,000
KENTUCKY	$158,504,905	$37,443,073	$196,247,981	19.08%	$134,550,000	70.39%	$191,149,311	$38,470,274	$38,470,274	$25,671,426
LOUISIANA	$1,078,512,169	$132,917,149	$1,211,429,318	10.97%	$713,000,000	70.53%	$1,010,917,340	$110,917,120	$110,917,120	$76,229,845
MAINE	$99,957,958	$80,955,342	$160,916,300	37.88%	$58,940,000	86.12%	$131,488,203	$49,810,385	$49,810,385	$32,934,627
MARYLAND	$22,226,487	$120,673,631	$143,099,998	60.00%	$70,360,000	50.00%	$140,760,000	$70,380,000	$70,380,000	$36,190,000
MASSACHUSETTS	$486,663,946	$105,835,054	$575,289,000	18.38%	$282,555,000	60.00%	$685,110,000	$103,765,977	$103,765,977	$51,882,989
MICHIGAN	$133,258,800	$304,765,552	$438,024,352	60.00%	$245,295,000	56.16%	$436,623,354	$218,311,677	$216,311,877	$122,647,500
MINNESOTA	$24,240,000	$5,257,214	$29,497,214	17.62%	$34,155,000	51.11%	$66,826,453	$11,910,310	$5,257,214	$2,686,962
MISSISSIPPI	$182,608,033	$0	$182,608,033	0.00%	$140,760,000	76.82%	$183,233,533	$0	$0	$0
MISSOURI	$521,948,524	$207,234,618	$729,181,142	28.42%	$392,285,000	61.03%	$642,741,276	$182,868,249	$182,868,249	$111,482,432
MONTANA	$237,048	$0	$237,048	0.00%	$4,888,057	73.04%	$8,892,302	$0	$0	$0
NEBRASKA	$8,449,102	$1,511,337	$8,280,439	21.93%	$12,186,243	60.35%	$20,152,582	$4,425,607	$1,811,337	$1,093,885
NEVADA	$73,580,000	$0	$73,560,000	0.00%	$36,295,000	50.38%	$76,042,494	$0	$0	$0
NEW HAMPSHIRE	$92,675,918	$94,753,948	$167,429,884	60.00%	$130,000,000	60.00%	$260,000,000	$130,000,000	$94,753,948	$47,376,974
NEW JERSEY	$736,742,539	$357,370,461	$1,094,113,000	32.66%	$533,025,000	60.00%	$1,066,050,000	$348,204,235	$346,204,235	$174,102,117
NEW MEXICO	$6,490,015	$254,786	$8,744,801	3.76%	$9,315,000	73.60%	$12,621,951	$478,796	$254,786	$186,032
NEW YORK	$2,418,689,388	$805,000,000	$3,023,889,388	20.01%	$1,486,260,000	50.00%	$2,972,520,000	$594,728,256	$594,728,256	$297,363,143
NORTH CAROLINA	$193,201,986	$238,072,627	$429,274,593	60.00%	$273,240,000	62.47%	$437,393,949	$218,696,975	$216,896,975	$136,620,000
NORTH DAKOTA	$214,523	$988,478	$1,203,001	50.00%	$4,113,430	69.99%	$5,877,188	$2,938,584	$988,478	$891,836
OHIO	$535,731,958	$93,432,758	$629,164,714	14.65%	$375,705,000	59.03%	$638,484,610	$94,518,799	$93,432,758	$55,153,357
OKLAHOMA	$20,019,969	$3,273,248	$23,293,217	14.05%	$18,560,000	71.24%	$23,245,368	$3,266,524	$3,286,624	$2,327,072
OREGON	$11,437,908	$19,975,092	$31,413,000	60.00%	$20,700,000	60.00%	$34,500,000	$17,250,000	$17,250,000	$10,350,000
PENNSYLVANIA	$368,207,319	$579,199,652	$967,407,001	60.00%	$519,570,000	53.82%	$968,955,453	$484,492,727	$464,492,727	$259,785,000
RHODE ISLAND	$108,503,187	$2,397,633	$110,901,000	2.18%	$60,030,000	53.79%	$111,600,869	$2,412,981	$2,397,833	$1,289,794
SOUTH CAROLINA	$386,681,364	$72,076,341	$436,757,705	16.43%	$271,170,000	70.44%	$384,965,928	$83,239,788	$63,239,788	$44,546,093
SOUTH DAKOTA	$321,120	$751,299	$1,072,419	60.00%	$4,756,226	65.31%	$8,962,708	$3,481,354	$751,299	$513,212
TENNESSEE	$0	$0	$0	0.00%	$0	63.79%	$0	$0	$0	$0
TEXAS	$1,220,515,401	$292,513,592	$1,513,028,993	19.33%	$834,210,000	60.67%	$1,377,285,973	$286,266,555	$286,266,555	$161,277,852
UTAH	$3,621,116	$934,568	$4,555,702	20.51%	$8,446,217	71.44%	$11,825,611	$2,425,952	$934,586	$887,668
VERMONT	$19,979,252	$9,071,297	$29,050,549	31.23%	$18,630,000	62.40%	$29,855,789	$9,322,734	$9,071,297	$5,660,489
VIRGINIA	$129,313,480	$7,770,288	$137,083,748	5.67%	$88,310,000	51.65%	$131,745,419	$7,467,877	$7,467,677	$3,671,991
WASHINGTON	$171,725,615	$163,836,435	$335,562,250	48.82%	$171,810,000	50.70%	$336,875,740	$185,464,228	$163,838,435	$83,066,073
WEST VIRGINIA	$66,962,606	$18,687,045	$85,649,651	22.00%	$83,135,000	76.34%	$83,800,106	$16,438,142	$16,438,142	$13,889,790
WISCONSIN	$6,609,524	$4,492,011	$11,101,535	40.46%	$40,709,287	59.29%	$88,881,289	$27,782,390	$4,492,011	$2,663,313
WYOMING	$0	$0	$0	0.00%	$103,500	64.60%	$180,217	$0	$0	$0
TOTAL	$13,502,879,245	$4,180,441,152	$17,663,120,397		$9,882,064,171		$17,127,828,814	$3,842,285,746	$3,740,782,855	$2,067,056,589

CHART 12.—FINAL FFY 2002 IMD DSH LIMITS

[Key to the Chart of the FFY 2002 IMD Limitations]

Column	Description
Column A	STATE.
Column B	INPATIENT HOSPITAL SERVICES FY 95 DSH TOTAL COMPUTABLE. This column contains the States' total computable FFY 1995 inpatient hospital DSH expenditures as reported on the Form CMS–64.
Column C	IMD AND MENTAL HEALTH SERVICES FY 95 DSH TOTAL COMPUTABLE. This column contains the total computable FFY 1995 mental health facility DSH expenditures as reported on the Form CMS–64 as of January 1, 1997.
Column D	TOTAL INPATIENT & IMD & MENTAL HEALTH FY 95 DSH TOTAL COMPUTABLE, Col. B + C. This column contains the total computation of all inpatient hospital DSH expenditures and mental health facility DSH expenditures for FFY 1995 as reported on the Form CMS–64 as of January 1, 1997 (representing the sum of Column B and Column C).
Column E	APPLICABLE PERCENTAGE Col. C/D. This column contains the "applicable percentage" representing the total computable FFY 1995 mental health facility DSH expenditures divided by total computable all inpatient hospital and mental health facility DSH expenditures for FFY 1995 (the amount in Column C divided by the amount in Column D).
Column F	FY 2002 FEDERAL SHARE DSH ALLOTMENT. This column contains the States' final FFY 2002 DSH allotments.
Column G	FFY 2002 FMAP.
Column H	FY 2002 DSH ALLOTMENT TOTAL COMPUTABLE Col. F/G. This column contains FFY 2002 total computable DSH allotment (determined as Column F/Column G).
Column I	APPLICABLE PERCENT OF FY 2002 DSH ALLOTMENT. Col. E x H. This column contains the applicable percent of FFY 2002 total computable DSH allotment (calculated as Column E x Column H).
Column J	FY 2002 IMD DSH LIMIT TOTAL COMPUTABLE Lesser of Col. C or I. The column contains the lesser of the lesser of Column I or C.
Column K	FY 2002 IMD DSH LIMIT FEDERAL SHARE, Col. G x J. This column contains the total computable IMD DSH Limit from Col. J and converts that amount into a Federal share (calculated as Col. G x Col. J).

FINAL FY 2002 IMD DSH LIMITS

A	B	C	O	E	F	G	H	I	J	K
STATE	INPATIENT HOSPITAL SERVICES FY 95 DSH TOTAL COMPUTABLE	IMD AND MENTAL HEALTH SERVICES FY 95 DSH TOTAL COMPUTABLE	TOTAL INPATIENT & IMD & MENTAL HEALTH FY 95 DSH TOTAL COMPUTABLE Col B + C	APPLICABLE PERCENT Col C/D	FY 2002 FEDERAL SHARE DSH ALLOTMENT	FY 2002 FMAP	FY 2002 DSH ALLOTMENT TOTAL COMPUTABLE Col F/G	APPLICABLE PERCENT OF FY 2002 DSH ALLOTMENT Col E x H	FY 2002 IMD DSH LIMIT TOTAL COMPUTABLE Lesser of Col C or I	FY 2002 IMD DSH LIMIT FEDERAL SHARE Col G x J
ALABAMA	$413,006,229	$4,451,770	$417,457,999	1.07%	$283,353,580	70.45%	$373,816,437	$3,986,377	$3,986,377	$2,808,402
ALASKA	$2,506,827	$17,811,765	$20,118,592	40.00%	$10,616,100	57.38%	$18,508,823	$7,402,649	$7,402,649	$4,247,640
ARIZONA	$93,918,100	$28,474,900	$122,391,000	23.27%	$84,014,710	64.98%	$132,371,053	$30,798,611	$28,474,900	$18,502,990
ARKANSAS	$2,422,649	$819,351	$3,242,000	25.27%	$919,059,690	72.64%	$26,238,580	$8,631,274	$819,351	$595,177
CALIFORNIA	$2,191,435,452	$0	$2,191,436,482	0.00%	$1,047,043,280	51.40%	$2,037,049,144	$0	$0	$0
COLORADO	$173,900,441	$594,776	$174,495,217	0.34%	$83,890,890	50.00%	$167,781,780	$571,693	$571,893	$285,946
CONNECTICUT	$303,359,275	$105,573,725	$408,933,000	25.82%	$174,153,240	50.00%	$348,306,480	$89,921,852	$89,921,852	$44,960,926
DELAWARE	$0	$7,089,000	$7,069,000	40.00%	$4,247,640	50.00%	$8,495,280	$3,398,112	$3,398,112	$1,899,056
DISTRICT OF COLUMBIA	$39,532,234	$6,545,136	$46,077,370	14.20%	$33,981,120	70.00%	$48,544,457	$8,895,577	$6,545,136	$4,581,595
FLORIDA	$184,468,014	$149,714,986	$334,183,000	40.00%	$209,196,270	58.43%	$370,718,182	$148,287,273	$148,287,273	$83,678,508
GEORGIA	$407,343,557	$0	$407,343,557	0.00%	$255,920,310	59.00%	$433,783,237	$0	$0	$0
HAWAII	$0	$0	$0	0.00%	$0	58.34%	$0	$0	$0	$0
IDAHO	$2,081,429	$0	$2,081,429	0.00%	$7,282,629	71.02%	$10,226,175	$0	$0	$0
ILLINOIS	$316,868,508	$89,408,276	$406,276,784	22.06%	$204,948,630	50.00%	$409,897,260	$90,427,801	$89,408,276	$44,704,138
INDIANA	$79,960,783	$153,588,302	$233,527,085	40.00%	$202,824,810	62.04%	$326,925,870	$130,770,348	$130,770,348	$81,129,924
IOWA	$12,011,250	$0	$12,011,250	0.00%	$17,399,882	82.88%	$27,880,373	$0	$0	$0
KANSAS	$11,587,208	$76,863,508	$88,250,716	40.00%	$44,600,220	60.20%	$74,088,744	$29,634,898	$29,834,598	$17,840,088
KENTUCKY	$158,604,908	$37,443,073	$196,247,981	19.08%	$138,048,300	89.94%	$197,381,041	$37,659,255	$37,443,073	$28,187,685
LOUISIANA	$1,078,512,165	$132,917,149	$1,211,429,316	10.97%	$713,000,000	70.30%	$1,014,224,751	$111,280,006	$111,280,006	$78,229,845
MAINE	$99,957,958	$60,958,342	$160,916,300	37.68%	$89,200,440	88.58%	$133,974,827	$50,752,368	$50,752,368	$33,790,927
MARYLAND	$22,226,467	$120,873,531	$143,099,998	40.00%	$72,209,880	50.00%	$144,419,760	$57,767,904	$57,767,904	$28,883,952
MASSACHUSETTS	$469,853,946	$105,836,054	$575,269,000	18.36%	$289,901,430	50.00%	$579,802,880	$106,483,893	$105,635,054	$52,817,527
MICHIGAN	$133,258,800	$304,765,552	$438,024,352	40.00%	$251,872,870	56.36%	$446,544,837	$178,817,935	$178,817,935	$100,869,088
MINNESOTA	$24,240,000	$5,257,214	$29,497,214	17.82%	$35,043,030	50.00%	$70,086,080	$12,491,282	$5,257,214	$2,628,807
MISSISSIPPI	$182,608,033	$0	$182,606,033	0.00%	$144,419,760	78.09%	$189,801,235	$0	$0	$0
MISSOURI	$621,948,524	$207,234,618	$729,161,142	28.42%	$402,483,890	81.06%	$859,128,546	$187,325,542	$187,325,542	$114,380,976
MONTANA	$237,048	$0	$237,048	0.00%	$5,015,147	72.83%	$8,888,100	$0	$0	$0
NEBRASKA	$6,449,102	$1,811,337	$8,260,439	21.93%	$12,503,085	59.55%	$20,995,945	$4,603,960	$1,811,337	$1,078,651
NEVADA	$73,580,000	$0	$73,580,000	0.00%	$39,290,870	50.00%	$78,581,340	$0	$0	$0
NEW HAMPSHIRE	$92,675,916	$94,753,948	$187,429,864	40.00%	$131,785,428	50.00%	$283,570,857	$105,428,343	$94,753,948	$47,376,974
NEW JERSEY	$736,742,539	$357,370,461	$1,094,113,000	32.86%	$548,883,650	50.00%	$1,093,767,300	$357,257,545	$357,257,545	$178,628,772
NEW MEXICO	$6,490,015	$254,786	$6,744,801	3.78%	$9,557,190	73.04%	$13,064,871	$494,283	$254,786	$186,096
NEW YORK	$2,418,889,368	$605,000,000	$3,023,659,368	20.01%	$1,824,902,760	50.00%	$3,049,805,520	$610,186,170	$605,000,000	$302,500,000
NORTH CAROLINA	$193,201,966	$236,072,627	$429,274,593	40.00%	$280,344,240	61.46%	$456,140,970	$182,458,388	$162,458,388	$112,137,896
NORTH DAKOTA	$214,523	$988,478	$1,203,001	40.00%	$4,220,379	69.87%	$8,040,331	$2,418,132	$988,478	$890,850
OHIO	$535,731,956	$93,432,758	$829,164,714	14.85%	$385,473,330	56.78%	$855,789,946	$97,388,881	$93,432,758	$54,919,778
OKLAHOMA	$20,019,969	$3,273,248	$23,293,217	14.06%	$18,990,560	70.43%	$24,124,038	$3,389,998	$3,273,248	$2,305,349
OREGON	$11,437,908	$19,975,092	$31,413,000	40.00%	$21,238,200	59.20%	$35,875,338	$14,350,135	$14,350,135	$8,495,280
PENNSYLVANIA	$388,207,319	$579,199,682	$967,407,001	40.00%	$533,078,820	54.65%	$975,441,674	$390,176,829	$390,176,829	$213,231,528
RHODE ISLAND	$106,503,167	$2,397,833	$110,901,000	2.16%	$61,590,780	52.45%	$117,427,807	$2,538,947	$2,397,833	$1,257,663
SOUTH CAROLINA	$386,881,384	$72,076,341	$436,757,705	18.43%	$278,220,420	89.34%	$401,240,871	$85,913,313	$85,913,313	$45,704,291
SOUTH DAKOTA	$321,120	$751,269	$1,072,415	40.00%	$4,879,688	85.93%	$7,401,620	$2,980,848	$751,299	$495,331
TENNESSEE	$0	$0	$0	0.00%	$0	63.64%	$0	$0	$0	$0
TEXAS	$1,220,515,401	$292,513,592	$1,513,028,993	19.33%	$855,899,480	80.17%	$1,422,488,772	$275,005,603	$275,005,603	$165,470,871
UTAH	$3,621,116	$934,586	$4,555,702	20.51%	$6,687,870	70.00%	$12,382,672	$2,640,281	$934,586	$854,210
VERMONT	$19,979,252	$9,071,297	$29,050,649	31.23%	$19,114,380	63.06%	$30,311,418	$9,486,015	$9,071,297	$5,720,360
VIRGINIA	$129,313,480	$7,770,288	$137,083,748	8.87%	$70,086,060	51.45%	$136,221,891	$7,721,404	$7,721,404	$3,972,663
WASHINGTON	$171,726,615	$163,836,435	$335,582,250	40.00%	$176,277,060	50.37%	$349,984,364	$139,985,753	$139,985,753	$70,510,824
WEST VIRGINIA	$68,982,806	$18,887,045	$85,849,851	22.00%	$84,776,510	75.27%	$88,058,888	$16,933,073	$18,887,045	$14,216,279
WISCONSIN	$8,809,524	$4,492,011	$11,101,535	40.00%	$41,787,708	58.57%	$71,312,459	$28,524,984	$4,492,011	$2,630,971
WYOMING	$0	$0	$0	0.00%	$106,191	61.97%	$171,359	$0	$0	$0
TOTAL	$13,502,876,245	$4,180,441,152	$17,883,120,397		$9,893,145,288		$17,564,637,421	$3,812,820,894	$3,542,215,356	$1,974,807,211

CHART 13.—PRELIMINARY FY 2003 IMD DSH LIMITS

[Key to the Chart of the FFY 2003 IMD Limitations]

Column	Description
Column A	STATE.
Column B	INPATIENT HOSPITAL SERVICES FY 95 DSH TOTAL COMPUTABLE. This column contains the States' total computable FFY 1995 inpatient hospital DSH expenditures as reported on the Form CMS–64.
Column C	IMD AND MENTAL HEALTH SERVICES FY 95 DSH TOTAL COMPUTABLE. This column contains the total computable FFY 1995 mental health facility DSH expenditures as reported on the Form CMS–64 as of January 1, 1997.
Column D	TOTAL INPATIENT & IMD & MENTAL HEALTH FY 95 DSH TOTAL COMPUTABLE, Col. B + C. This column contains the total computation of all inpatient hospital DSH expenditures and mental health facility DSH expenditures for FFY 1995 as reported on the Form CMS–64 as of January 1, 1997 (representing the sum of Column B and Column C).
Column E	APPLICABLE PERCENTAGE Col. C/D. This column contains the "applicable percentage" representing the total computable FFY 1995 mental health facility DSH expenditures divided by total computable all inpatient hospital and mental health facility DSH expenditures for FFY 1995 (the amount in Column C divided by the amount in Column D).
Column F	FY 2003 FEDERAL SHARE DSH ALLOTMENT. This column contains the States' preliminary FFY 2003 DSH allotments.
Column G	FFY 2003 FMAP.
Column H	FY 2003 DSH ALLOTMENT TOTAL COMPUTABLE Col. F/G. This column contains FFY 2003 total computable DSH allotment (determined as Column F/Column G).
Column I	APPLICABLE PERCENT OF FY 2003 DSH ALLOTMENT. Col. E x H. This column contains the applicable percent of FFY 2003 total computable DSH allotment (calculated as Column E x Column H).
Column J	FY 2003 IMD DSH LIMIT TOTAL COMPUTABLE Lesser of Col. C or I. The column contains the lesser of Column I or C.
Column K	FY 2003 IMD DSH LIMIT FEDERAL SHARE, Col. G x J. This column contains the total computable IMD DSH Limit from Col. J and converts that amount into a Federal share (calculated as Col. G x Col. J).

PRELIMINARY FY 2003 IMD DSH LIMITS

A	B	C	D	E	F	G	H	I	J	K
STATE	INPATIENT HOSPITAL SERVICES FY 95 DSH TOTAL COMPUTABLE	IMD AND MENTAL HEALTH SERVICES FY 95 DSH TOTAL COMPUTABLE	TOTAL INPATIENT & IMD & MENTAL HEALTH FY 95 DSH TOTAL COMPUTABLE Col B + C	APPLICABLE PERCENT Col C/D	FY 2003 FEDERAL SHARE DSH ALLOTMENT	FY 2003 FMAP	FY 2003 DSH ALLOTMENT TOTAL COMPUTABLE Col F/G	APPLICABLE PERCENT OF FY 2003 DSH ALLOTMENT Col E x H	FY 2003 IMD DSH LIMIT TOTAL COMPUTABLE Lesser of Col C or I	FY 2003 IMD DSH LIMIT FEDERAL SHARE Col G x J
ALABAMA	$413,006,229	$4,451,770	$417,457,999	1.07%	$249,690,000	70.60%	$353,668,555	$3,771,520	$3,771,520	$2,662,683
ALASKA	$2,506,527	$17,811,765	$20,118,592	33.00%	$9,135,000	58.27%	$15,677,021	$5,173,417	$5,173,417	$3,014,550
ARIZONA	$93,916,100	$28,474,900	$122,391,000	23.27%	$82,215,000	67.25%	$122,252,758	$28,442,744	$28,442,744	$19,127,746
ARKANSAS	$2,422,649	$519,351	$3,242,000	25.27%	$19,345,585	74.28%	$26,044,138	$6,562,138	$819,351	$608,614
CALIFORNIA	$2,159,879,543	$1,555,919	$2,191,435,462	0.071%	$590,155,000	50.00%	$1,780,310,000	$1,264,020	$1,264,020	$632,010
COLORADO	$173,900,441	$594,776	$174,495,217	0.34%	$75,110,000	50.00%	$150,220,000	$512,033	$512,033	$256,016
CONNECTICUT	$303,359,275	$105,573,725	$408,933,000	25.82%	$162,400,000	50.00%	$324,800,000	$83,853,213	$83,853,213	$41,926,606
DELAWARE	$0	$7,069,000	$7,069,000	33.00%	$4,060,000	50.00%	$8,120,000	$2,679,600	$2,679,600	$1,339,800
DISTRICT OF COLUMBIA	$39,532,234	$6,545,136	$46,077,370	14.20%	$32,480,000	70.00%	$46,400,000	$6,590,965	$6,545,136	$4,561,595
FLORIDA	$164,468,014	$149,714,986	$334,183,000	33.00%	$162,400,000	58.83%	$276,049,635	$91,096,379	$91,096,379	$53,592,000
GEORGIA	$407,343,557	$0	$407,343,557	0.00%	$216,225,000	59.60%	$366,149,329	$0	$0	$0
HAWAII	$0	$0	$0	0.00%	$0	58.77%	$0	$0	$0	$0
IDAHO	$2,061,429	$0	$2,061,429	0.00%	$7,371,568	70.96%	$10,388,343	$0	$0	$0
ILLINOIS	$315,868,508	$89,408,276	$405,276,754	22.06%	$174,550,000	50.00%	$349,160,000	$77,028,329	$77,028,329	$36,514,165
INDIANA	$79,960,783	$153,566,302	$233,527,085	33.00%	$173,565,000	81.97%	$280,079,071	$92,426,093	$92,426,093	$57,276,480
IOWA	$12,011,250	$0	$12,011,250	0.00%	$17,660,880	63.50%	$27,612,410	$0	$0	$0
KANSAS	$11,557,208	$76,663,508	$68,250,716	33.00%	$33,495,000	60.15%	$55,685,756	$18,376,309	$16,376,309	$11,063,350
KENTUCKY	$158,804,908	$37,443,073	$196,247,981	19.08%	$117,740,000	69.89%	$168,464,730	$32,142,176	$32,142,176	$22,464,167
LOUISIANA	$1,078,512,185	$132,917,149	$1,211,429,315	10.97%	$631,000,000	71.25%	$885,241,302	$97,128,036	$97,128,036	$69,232,664
MAINE	$99,957,958	$60,958,342	$160,916,300	33.00%	$55,260,000	66.22%	$128,752,643	$42,468,372	$42,468,372	$26,135,800
MARYLAND	$22,226,467	$120,873,531	$143,099,998	33.00%	$61,915,000	50.00%	$123,830,000	$40,863,900	$40,663,900	$20,431,850
MASSACHUSETTS	$469,653,946	$105,635,054	$575,269,000	18.36%	$247,660,000	50.00%	$495,320,000	$90,951,078	$90,951,078	$45,475,539
MICHIGAN	$133,258,800	$304,765,552	$435,024,352	33.00%	$215,180,000	55.42%	$388,271,382	$128,129,556	$125,129,556	$71,009,400
MINNESOTA	$24,240,000	$5,257,214	$29,497,214	17.62%	$33,495,000	50.00%	$66,990,000	$11,939,459	$5,257,214	$2,628,607
MISSISSIPPI	$182,608,033	$0	$182,608,033	0.00%	$123,630,000	76.62%	$161,615,766	$0	$0	$0
MISSOURI	$521,946,524	$207,234,618	$729,161,142	28.42%	$384,685,000	61.23%	$628,262,290	$176,553,285	$178,553,295	$109,328,183
MONTANA	$237,048	$0	$237,048	0.00%	$5,090,373	72.96%	$6,976,937	$0	$0	$0
NEBRASKA	$6,449,102	$1,811,337	$8,260,439	21.93%	$12,580,631	59.52%	$21,321,625	$4,675,375	$1,811,337	$1,078,108
NEVADA	$73,560,000	$0	$73,560,000	0.00%	$37,555,000	52.39%	$71,683,527	$0	$0	$0
NEW HAMPSHIRE	$92,675,918	$94,753,948	$157,429,664	33.00%	$131,950,000	50.00%	$263,900,000	$87,087,000	$87,087,000	$43,543,500
NEW JERSEY	$736,742,539	$357,370,461	$1,094,113,000	32.66%	$522,725,000	50.00%	$1,045,450,000	$341,475,651	$341,475,651	$170,737,825
NEW MEXICO	$6,490,015	$284,766	$6,744,801	3.76%	$9,135,000	74.56%	$12,251,678	$462,817	$284,786	$159,968
NEW YORK	$2,416,869,368	$605,000,000	$3,023,869,368	20.01%	$1,304,275,000	50.00%	$2,606,550,000	$521,905,069	$521,905,069	$260,952,534
NORTH CAROLINA	$193,201,966	$236,072,627	$429,274,593	33.00%	$239,540,000	62.56%	$382,696,419	$128,355,818	$126,355,818	$79,045,200
NORTH DAKOTA	$214,523	$986,478	$1,203,001	33.00%	$4,283,685	68.36%	$6,266,361	$2,067,899	$968,478	$675,724
OHIO	$535,731,956	$93,432,758	$629,164,714	14.85%	$329,875,000	58.83%	$560,725,520	$83,269,367	$83,289,387	$48,987,380
OKLAHOMA	$20,019,969	$3,273,248	$23,293,217	14.05%	$16,240,000	70.56%	$23,015,873	$3,234,275	$3,234,275	$2,282,104
OREGON	$11,437,808	$19,975,092	$31,413,000	33.00%	$20,300,000	60.16%	$33,743,351	$11,135,306	$11,135,306	$6,699,000
PENNSYLVANIA	$388,207,319	$579,199,682	$867,407,001	33.00%	$455,735,000	54.69%	$833,305,906	$274,990,949	$274,990,949	$150,382,550
RHODE ISLAND	$108,503,167	$2,397,833	$110,901,000	2.16%	$52,780,000	55.40%	$95,270,758	$2,058,856	$2,059,886	$1,141,177
SOUTH CAROLINA	$366,651,364	$72,076,341	$438,757,705	16.43%	$285,930,000	69.81%	$380,933,964	$62,577,422	$62,577,422	$43,685,299
SOUTH DAKOTA	$321,120	$751,299	$1,072,419	33.00%	$4,953,066	65.29%	$7,588,286	$2,503,474	$751,299	$490,523
TENNESSEE	$0	$0	$0	0.00%	$0	84.59%	$0	$0	$0	$0
TEXAS	$1,220,515,401	$292,513,592	$1,513,028,993	19.33%	$776,475,000	59.99%	$1,294,340,723	$250,234,633	$250,234,633	$150,115,756
UTAH	$3,621,116	$934,586	$4,555,702	20.51%	$8,797,889	71.24%	$12,349,648	$2,533,486	$934,586	$665,799
VERMONT	$19,879,252	$9,071,297	$29,050,549	31.23%	$18,270,000	62.41%	$29,274,158	$9,141,120	$9,071,297	$5,661,396
VIRGINIA	$129,313,480	$7,770,268	$137,083,748	5.67%	$71,137,351	50.53%	$140,782,408	$7,979,918	$7,770,268	$3,926,316
WASHINGTON	$171,725,815	$163,536,435	$335,562,250	33.00%	$150,220,000	50.00%	$300,440,000	$99,145,200	$99,145,200	$49,572,600
WEST VIRGINIA	$66,962,606	$16,887,045	$55,849,651	22.00%	$54,810,000	75.04%	$73,041,045	$16,068,133	$16,069,133	$12,058,278
WISCONSIN	$6,609,524	$4,492,011	$11,101,535	33.00%	$42,394,224	58.43%	$72,555,577	$23,943,340	$4,492,011	$2,624,682
WYOMING	$0	$0	$0	0.00%	$101,500	81.32%	$165,525	$0	$0	$0
TOTAL	$13,501,123,326	$4,161,997,071	$17,683,120,397		$8,747,916,773		$15,516,392,975	$2,972,539,785	$2,933,115,562	$1,837,820,824

CHART 14.—PRELIMINARY FY 2004 IMD DSH LIMITS

[Key to the Chart of the FFY 2004 IMD Limitations]

Column	Description
Column A	STATE.
Column B	INPATIENT HOSPITAL SERVICES FY 95 DSH TOTAL COMPUTABLE. This column contains the States' total computable FFY 1995 inpatient hospital DSH expenditures as reported on the Form CMS–64.
Column C	IMD AND MENTAL HEALTH SERVICES FY 95 DSH TOTAL COMPUTABLE. This column contains the total computable FFY 1995 mental health facility DSH expenditures as reported on the Form CMS–64 as of January 1, 1997.
Column D	TOTAL INPATIENT & IMD & MENTAL HEALTH FY 95 DSH TOTAL COMPUTABLE, Col. B + C. This column contains the total computation of all inpatient hospital DSH expenditures and mental health facility DSH expenditures for FFY 1995 as reported on the Form CMS–64 as of January 1, 1997 (representing the sum of Column B and Column C).
Column E	APPLICABLE PERCENTAGE Col. C/D. This column contains the "applicable percentage" representing the total computable FFY 1995 mental health facility DSH expenditures divided by total computable all inpatient hospital and mental health facility DSH expenditures for FFY 1995 (the amount in Column C divided by the amount in Column D).
Column F	FY 2004 FEDERAL SHARE DSH ALLOTMENT. This column contains the States' preliminary FFY 2004 DSH allotments.
Column G	FFY 2004 FMAP.
Column H	FY 2004 DSH ALLOTMENT TOTAL COMPUTABLE Col. F/G. This column contains FFY 2004 total computable DSH allotment (determined as Column F/Column G).
Column I	APPLICABLE PERCENT OF FY 2004 DSH ALLOTMENT. Col. E x H. This column contains the applicable percent of FFY 2004 total computable DSH allotment (calculated as Column E x Column H).
Column J	FY 2004 IMD DSH LIMIT TOTAL COMPUTABLE Lesser of Col. C or I. The column contains the lesser of the lesser of Column I or C.
Column K	FY 2004 IMD DSH LIMIT FEDERAL SHARE, Col. G x J. This column contains the total computable IMD DSH Limit from Col. J and converts that amount into a Federal share (calculated as Col. G x Col. J).

PRELIMINARY FY 2004 IMD DSH LIMITS										
A	B	C	O	E	F	G	H	I	J	K
STATE	INPATIENT HOSPITAL SERVICES FY 98 OSH TOTAL COMPUTABLE	IMD AND MENTAL HEALTH SERVICES FY 95 OSH TOTAL COMPUTABLE	TOTAL INPATIENT & IMD & MENTAL HEALTH FY 95 DSH TOTAL COMPUTABLE Col B + C	APPLICABLE PERCENT Col C/D	FY 2004 FEDERAL SHARE DSH ALLOTMENT	FY 2004 FMAP	FY 2004 DSH ALLOTMENT TOTAL COMPUTABLE Col F/G	APPLICABLE PERCENT OF FY 2004 DSH ALLOTMENT Col E x H	FY 2004 IMD DSH LIMIT TOTAL COMPUTABLE Lesser of Col C or I	FY 2004 IMD DSH LIMIT FEDERAL SHARE Col G x J
ALABAMA	$413,006,229	$4,451,770	$417,457,999	1.07%	$288,640,400	70.76%	$409,385,724	$4,385,687	$4,385,687	$3,088,724
ALASKA	$2,806,827	$17,611,765	$20,118,592	33.00%	$10,589,800	88.39%	$18,147,971	$5,988,830	$5,988,830	$3,496,878
ARIZONA	$93,916,100	$28,474,900	$122,361,000	23.27%	$95,368,400	67.29%	$141,762,180	$32,888,678	$28,474,600	$16,152,216
ARKANSAS	$2,422,646	$819,351	$3,242,000	28.27%	$22,440,878	74.67%	$30,053,406	$7,565,401	$816,351	$611,809
CALIFORNIA	$2,186,879,543	$1,555,919	$2,191,435,462	0.071%	$1,032,579,800	80.00%	$2,095,159,600	$1,466,263	$1,496,263	$733,132
COLORADO	$173,900,441	$564,775	$174,495,217	0.34%	$87,127,600	80.00%	$174,255,200	$593,958	$563,958	$296,879
CONNECTICUT	$303,389,275	$105,573,725	$408,633,000	25.82%	$188,384,000	80.00%	$379,768,000	$97,269,727	$87,269,727	$48,634,863
DELAWARE	$0	$7,069,000	$7,069,000	33.00%	$4,709,600	80.00%	$9,419,200	$3,108,336	$3,108,336	$1,554,168
DISTRICT OF COLUMBIA	$39,532,234	$6,845,135	$46,077,370	14.20%	$37,676,800	70.00%	$53,824,000	$7,845,519	$9,545,136	$4,581,565
FLORIDA	$184,468,014	$146,714,986	$334,183,000	33.00%	$188,384,000	58.93%	$319,874,190	$105,492,483	$105,492,483	$62,168,720
GEORGIA	$407,343,857	$0	$407,343,557	0.00%	$283,141,000	59.89%	$424,878,767	$0	$0	$0
HAWAII	$0	$0	$0	0.00%	$0	88.80%	$0	$0	$0	$0
IDAHO	$2,081,429	$0	$2,081,429	0.00%	$8,551,019	70.49%	$12,135,690	$0	$0	$0
ILLINOIS	$315,868,808	$86,408,276	$405,276,784	22.06%	$202,512,800	60.00%	$405,025,900	$89,352,882	$89,352,882	$44,678,431
INDIANA	$78,960,783	$153,686,302	$233,527,085	33.00%	$201,335,400	82.32%	$323,087,073	$106,612,134	$106,612,134	$66,440,682
IOWA	$12,011,250	$0	$12,011,250	0.00%	$20,486,921	63.63%	$32,048,395	$0	$0	$0
KANSAS	$11,587,208	$76,663,808	$88,250,716	33.00%	$38,854,200	60.82%	$63,883,920	$21,081,684	$21,081,684	$12,821,886
KENTUCKY	$158,804,908	$37,443,073	$196,247,981	19.08%	$136,878,400	70.09%	$164,861,494	$37,178,833	$37,178,833	$28,058,434
LOUISIANA	$1,079,512,169	$132,917,149	$1,211,429,318	10.67%	$731,960,000	71.63%	$1,021,862,348	$112,117,698	$112,117,698	$80,310,122
MAINE	$86,657,656	$60,658,342	$160,916,300	33.00%	$68,901,600	66.01%	$149,828,208	$46,443,309	$46,443,306	$32,637,528
MARYLAND	$22,226,467	$120,873,531	$143,096,998	33.00%	$71,821,400	60.00%	$143,642,800	$47,402,124	$47,402,124	$23,701,062
MASSACHUSETTS	$466,853,646	$108,636,054	$575,286,000	18.36%	$287,285,900	90.00%	$574,571,200	$105,803,281	$105,803,251	$52,751,625
MICHIGAN	$133,258,800	$304,788,552	$438,024,362	33.00%	$249,609,800	85.89%	$446,807,284	$147,380,397	$147,380,397	$82,370,604
MINNESOTA	$24,240,000	$5,257,214	$29,497,214	17.82%	$38,854,200	90.00%	$77,708,400	$13,846,772	$5,257,214	$2,628,607
MISSISSIPPI	$182,808,033	$0	$182,608,033	0.00%	$143,842,800	77.08%	$186,385,475	$0	$0	$0
MISSOURI	$521,946,524	$207,234,918	$729,181,142	28.42%	$449,234,900	91.47%	$728,638,832	$206,313,148	$206,313,148	$126,820,862
MONTANA	$237,048	$0	$237,048	0.00%	$5,904,833	72.88%	$8,105,467	$0	$0	$0
NEBRASKA	$6,449,102	$1,911,337	$8,280,436	21.93%	$14,721,132	59.89%	$24,580,284	$8,389,626	$1,811,337	$1,084,810
NEVADA	$73,560,000	$0	$73,560,000	0.00%	$43,563,800	64.93%	$76,307,848	$0	$0	$0
NEW HAMPSHIRE	$92,675,616	$94,783,948	$187,426,664	33.00%	$163,062,000	50.00%	$306,124,000	$101,020,920	$94,753,946	$47,379,874
NEW JERSEY	$739,742,539	$357,370,461	$1,094,113,000	32.66%	$606,361,000	50.00%	$1,212,722,000	$396,111,755	$357,370,461	$178,685,231
NEW MEXICO	$9,490,015	$254,786	$6,744,801	3.78%	$10,596,600	74.85%	$14,157,114	$534,787	$254,786	$190,707
NEW YORK	$2,418,869,368	$605,000,000	$3,023,886,368	20.01%	$1,512,958,000	80.00%	$3,025,918,000	$608,409,980	$608,000,000	$302,800,000
NORTH CAROLINA	$193,201,968	$236,072,627	$426,274,863	33.00%	$277,896,400	82.85%	$442,110,422	$145,896,439	$145,896,439	$91,699,912
NORTH DAKOTA	$214,523	$988,478	$1,203,001	33.00%	$4,869,078	68.31%	$7,274,300	$2,400,819	$688,478	$678,226
OHIO	$535,731,959	$93,432,758	$629,164,714	14.85%	$362,655,000	66.23%	$648,049,299	$95,940,167	$93,432,758	$88,340,223
OKLAHOMA	$20,019,969	$3,273,248	$23,293,217	14.06%	$19,838,400	70.24%	$26,820,046	$3,768,851	$3,273,248	$2,299,129
OREGON	$11,437,906	$18,975,082	$31,413,000	33.00%	$23,848,000	80.81%	$38,723,894	$12,778,885	$12,778,885	$7,770,840
PENNSYLVANIA	$388,207,319	$579,199,682	$967,407,001	33.00%	$528,662,600	54.76%	$965,369,196	$318,581,735	$318,581,735	$174,458,358
RHODE ISLAND	$109,803,167	$2,397,833	$110,901,000	2.16%	$61,224,800	86.03%	$109,271,492	$2,362,600	$2,362,600	$1,323,768
SOUTH CAROLINA	$366,881,384	$72,076,341	$436,757,705	16.43%	$308,478,800	69.89%	$441,897,134	$72,537,856	$72,076,341	$80,352,532
SOUTH DAKOTA	$321,120	$751,299	$1,072,419	33.00%	$5,745,880	65.67%	$8,749,170	$2,897,226	$751,269	$493,376
TENNESSEE	$0	$0	$0	0.00%	$0	64.40%	$0	$0	$0	$0
TEXAS	$1,220,816,401	$292,813,592	$1,813,028,983	19.33%	$900,711,000	60.22%	$1,485,700,784	$289,163,529	$286,183,529	$174,134,277
UTAH	$3,621,116	$834,586	$4,555,702	20.51%	$10,205,551	71.72%	$14,229,718	$2,919,178	$934,888	$670,288
VERMONT	$19,979,252	$8,071,297	$29,050,849	31.23%	$21,163,200	61.34%	$34,550,375	$10,788,667	$9,071,297	$8,564,334
VIRGINIA	$126,313,480	$7,770,269	$137,083,748	8.67%	$82,519,327	80.00%	$168,038,654	$9,384,826	$7,770,268	$3,885,134
WASHINGTON	$171,725,815	$193,836,435	$335,562,280	33.00%	$174,255,200	80.00%	$348,810,400	$115,008,432	$115,008,432	$87,504,216
WEST VIRGINIA	$69,962,606	$18,887,045	$85,846,651	22.00%	$63,579,900	78.19%	$94,889,885	$18,903,009	$19,603,008	$13,987,502
WISCONSIN	$9,609,524	$4,492,011	$11,101,538	33.00%	$49,177,300	96.41%	$84,193,286	$27,783,785	$4,492,011	$2,823,784
WYOMING	$0	$0	$0	0.00%	$117,740	89.77%	$196,986	$0	$0	$0
TOTAL	$13,501,123,326	$4,191,997,071	$17,683,120,397		$10,147,583,456		$17,984,747,611	$3,441,693,075	$3,338,142,781	$1,868,148,779

Addendum B: General Instructions and Mandatory Hospital DSH Reporting Requirements

States are required to submit, at least annually, DSH expenditure information by December 31 of each year for the prior Federal fiscal year (FFY). For example, FFY 2004 reports should be submitted electronically to CMS central office no later than December 31, 2004. Total DSH expenditures reported on this form must reflect the total DSH expenditures reported on the form CMS 64–9D for that year. States must use an Excel spreadsheet format, as specified in Addendum C.

Column	Description
Column A	Hospital Name/City Location.
Column B	Medicaid Provider Number.
Column C	Type of Hospital. Indicate if it is an acute, psychiatric, teaching, children's, rehabilitative or other. If other, specify type.
Column D	Type of Hospital Ownership. Indicate whether it is a privately owned and operated facility, State government owned or operated facility, non-State government owned or operated facility or a facility owned or operated by the IHS or tribal government.
Column E	Total Uncompensated Care. Indicate the total of the cost of services to Medicaid patients, less the amount paid by the State under the non-DSH payment provisions of the State plan and the cost of services to uninsured patients, less any cash payments made by them for the FFY being reported.
Column F	Total Medicaid Revenue. Indicate the total Medicaid revenue paid to the hospital for regular Medicaid payments, DSH payments and supplemental payments for the FFY being reported.

(Please see Addendum C for spreadsheet format and a sample spreadsheet.)

Addendum C: The Formatting Requirements for Submission of the Annual DSH Report

Excel Spreadsheet Format Requirements and Sample Spreadsheet

The following is the format for and a sample of the DSH report that States must submit beginning with FFY 2004:

Part I. Definition of Uncompensated Care

- Indicate the components and methodology used by the State to calculate uncompensated care.

Part II. FFY (Insert Year Reported)

Column	Description
Column A	Hospital Name/City Location.
Column B	Medicaid Provider Number.
Column C	Type of Hospital. Indicate if it is an acute, psychiatric, teaching, children's, rehabilitative or other. If other, specify type.
Column D	Type of Hospital Ownership. Indicate whether it is a privately owned and operated facility, State government owned or operated facility, non-State government owned or operated facility or a facility owned or operated by the IHS or tribal government.
Column E	Total Uncompensated Care. Indicate the total of the cost of services to Medicaid patients, less the amount paid by the State under the non-DSH payment provisions of the State plan and the cost of services to uninsured patients, less any cash payments made by them for the FFY being reported.
Column F	Total Medicaid Revenue. Indicate the total Medicaid revenue paid to the hospital for regular Medicaid payments, DSH payments and supplemental payments for the FFY being reported.
Column F1	Regular Service Payment. Indicate the regular Medicaid payments paid to the hospital, not including any DSH or supplemental payments for the FFY being reported.
Column F2	DSH Payment. Indicate the total DSH payments paid to the hospital for the FFY being reported. The payments and prior period adjustments.
Column F3	Non-DSH Supplemental Payment. Indicate any Medicaid supplemental payments paid to the Sample Excel Spreadsheet.

Expanation of DSH Methodology (Qualification and Payment)

A	B	C	D	E				
Hospital Name	Medicaid Provider Number	Type of Hospital	Type of Hospital Ownership	Total DSH Payments				

Authority: Section 1923(a)(2), (f), and (h) of the Social Security Act (42 U.S.C. 1396r–4(a)(2), (f), and (h), and Public Law 105–33).

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

Dated: December 28, 2002.

Thomas A. Scully,

Acting Administrator, Center for Medicare and Medicaid Services.

Dated: December 2, 2003.

Tommy G. Thompson,

Secretary.

[FR Doc. 04–6834 Filed 3–25–04; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–4071–N]

Medicare Program; Listening Session on Performance Measures for Public Reporting on the Quality of Hospital Care—April 27, 2004

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

ACTION: Notice of meeting.

SUMMARY: This notice announces the first in a series of listening sessions to discuss next steps in the development of an expanded set of performance measures for public reporting on the quality of hospital care. Health care consumers, payers, plans, providers, purchasers and other interested parties are invited to attend this session to present their individual views. The opinions and alternatives provided during this session (and subsequent listening sessions) will assist us in our collaboration with the National Voluntary Hospital Reporting Initiative (NVHRI), as well as in our other hospital quality reporting and improvement efforts. Attendance at the listening session is free and open to the public, but advance registration is strongly encouraged.

DATES: *Meeting Date:* The listening session announced in this notice will be held on Tuesday, April 27, 2004, from 9 a.m. until noon.

Comment Deadline: Written comments must be received by July 30, 2004.

ADDRESSES: The listening session will be held at the Hilton Logan Airport, 85 Terminal Road, Boston, MA 02128; (617) 568–6700.

Written Statements or Comments: We will accept written comments, questions or other statements, not to exceed three single-spaced, typed pages that are received by July 30, 2004. Send written comments, questions, or other statements to via mail to Lisa Lang, Centers for Medicare & Medicaid Services, Quality Measurement and Health Assessment Group, Mailstop S3–24–14, 7500 Security Boulevard, Baltimore, Maryland 21244–1850; or via email to *lisa.lang@cms.hhs.gov.*

FOR FURTHER INFORMATION CONTACT: Lisa Lang, (410) 786–1182. You may also send inquiries via email to *llang@cms.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In December 2002, the American Hospital Association (AHA), Federation of American Hospitals (FAH), Association of American Medical Colleges (AAMC) joined the Joint Commission on the Accreditation of Hospital Organizations (JCAHO) and CMS in the development of the National Voluntary Hospital Reporting Initiative (NVHRI), a voluntary initiative to collect and report hospital quality performance information. This collaboration expanded to include the National Quality Forum (NQF), Agency for Healthcare Research and Quality (AHRQ), American Medical Association, Consumer-Purchaser Disclosure Project, American Association of Retired Persons (AARP) American Federation of Labor-Congress of Industrial Organizations (AFL–CIO), and other external stakeholders. The collaborators support this initiative as the beginning of an ongoing effort to make hospital performance information more accessible to the public, payers, and providers of care and to stimulate the adoption of quality improvement strategies. As part of the NVHRI, hospitals across the country are currently voluntarily reporting a "starter set" of 10 clinical performance measures for three clinical conditions (heart attack, heart failure, and pneumonia) on the CMS Web site *http://www.cms.hhs.gov.*

In furtherance of this effort, we intend to engage the broad stakeholder community to identify its wishes for what should be included in an expanded set of measures for hospital public reporting. With input from the public and private sectors and from consumers, we will identify a set of measures that are both robust and of high priority to these stakeholders. The collaborators will host five listening sessions for this purpose. Sessions will be conducted in Boston, Orlando, Dallas, San Francisco, and Chicago. More detailed information about the second and subsequent meetings will be presented in another **Federal Register** notice.

The discussion at the Boston listening session will draw upon, but not be limited to, the priority areas for measurement of clinical quality performance identified by the National Quality Forum, the Institute of Medicine, and others would like to receive about hospital quality of care. We anticipate that these listening sessions will help identify priority areas for assessing clinical quality of care, some of which have performance measures that are ready for the immediate next phase of public reporting and others, where the measures will need refinement or final testing. We also expect that some areas of interest will require additional research and development. After reviewing the set of measures determined to be appropriate for public reporting, we will ask the National Quality Forum to formally consider any measures that it has not yet endorsed.

The listening sessions are a key element of the CMS Hospital Quality Initiative. The Hospital Quality Initiative uses a variety of tools to stimulate and support a significant improvement in the quality of hospital care. The initiative aims to refine and standardize hospital data, data transmission, and performance measures to construct a single robust, prioritized, and standard quality measure set for hospitals. Our ultimate goal is that all private and public purchasers, oversight and accrediting entities, payers, and providers of hospital care would voluntarily use the same measures in their public reporting activities.

Through the listening sessions, we expect to be able to identify a robust and comprehensive measure set for hospital public reporting, and thereby support the efforts of the NVHRI, as well as the CMS Quality Improvement Organization (QIO) program and other CMS hospital quality improvement and reporting efforts. The listening sessions will provide a unique opportunity to consult with a broad and diverse set of public and private stakeholders to assess the face validity and demand for measures to be proposed for the next and subsequent expansions of the current public reporting activity.

In advance of the meeting, participants may wish to consult the CMS Hospital Quality Initiative Web site (*http://www.cms.hhs.gov/quality/hospital/*) to learn more about the NVHRI and other activities related to the CMS Hospital Quality Initiative. Participants may also wish to review

relevant reports of the National Quality Forum (such as "National Voluntary Consensus Standards for Hospital Care: An Initial Performance Measure Set" and "Reaching the Tipping Point: Measuring and Reporting Quality Using the NQF-Endorsed Hospital Care Measures") and the Institute of Medicine (such as "Priority Areas for National Action: Transforming Health Care Quality"). Synopses of these reports are available on these organizations' websites.

More detailed information about this project and subsequent listening sessions, the Hospital Quality Initiative, the NVHRI and other related activities may be found at *http://www.cms.hhs.gov/quality/hospital.*

II. Meeting Format

The first listening session will consist of three parts. First, a presentation on our current activities related to public reporting of hospital quality measures, as well as a discussion of priority areas and examples of measures as developed by such groups as the Institute of Medicine and the National Quality Forum. The next portion of the meeting will be reserved for a panel discussion and comments from key stakeholders, both local and national. The last third of the meeting will be reserved for comments, questions, and feedback from interested parties in attendance.

Time for participants to ask questions or offer comments will be limited according to the number of registered participants. Individuals who wish to offer comments need not indicate their interest in advance, but they should register for and attend the meeting.

We are interested in a national public dialogue on public reporting of performance measures of hospital care beyond the ten measures currently included in the NVHRI. We believe that an active discussion will help us clearly identify the complementary and competing priorities and concerns of the various stakeholders interested in public reporting. Therefore, we are providing an opportunity for those persons who are unable to attend one of the five listening sessions to submit written comments to one of addresses listed in the **ADDRESSES** section of this notice by July 30, 2004. However, we will not be able to respond personally to the written comments received.

III. Registration Instructions

The New York State Quality Improvement Organization, IPRO, is coordinating registration for this listening session. There is no registration fee. You may register online by visiting the IPRO Web site at *http://www.ipro.org* or you may call 1–800–852–3685, ext. 258. You will receive a registration confirmation.

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

Dated: March 18, 2004.

Dennis G. Smith,

Acting Administrator, Centers for Medicare and Medicaid Services.

[FR Doc. 04–6669 Filed 3–25–04; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Uniform Project Description (UPD) for Discretionary Grant Application Form.

OMB No.: 0970–0139.

Description: The Administration for Children and Families (ACF) has more than 40 discretionary grant programs. The proposed information collection form would be a uniform discretionary application form usable for all of these grant programs to collect the information from grant applicants needed to evaluate and rank applicants and protect the integrity of the grantee selection process. All ACF discretionary grant programs would be eligible but not required to use this project description portion of the application form. When using the UPD, the project description portion of a program announcement consists of a series of text options which can be selected for individual projects. The combination of selected text options solicits information necessary to evaluate applications solicited for the particular program announcement. Guidance for the content of information requested in the project description is found in OMB Circulars A–102 and A–110.

Respondents: Applicants for ACF Discretionary Grant Programs

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hour per response	Total burden hours
UPD	11,050	1	40	442,000

Estimated Total Annual Burden Hours: 442,000

SUPPLEMENTARY INFORMATION: Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. E-mail address: *grjohnson@acf.hhs.gov.*

OMB Comment: OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Attn: Desk Officer for ACF, E-mail address: *katherine_t._astrich@omb.eop.gov.*

Dated: March 22, 2004.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 04–6736 Filed 3–25–04; 8:45 am]

BILLING CODE 4184–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Health Resources and Services Administration (HRSA) publishes abstracts of information collection requests under review by the Office of Management and Budget, in compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). To request a copy of the

clearance requests submitted to OMB for review, call the HRSA Reports Clearance Office on (301)–443–1129.

Proposed Project: Healthcare Integrity and Protection Data Bank for Final Adverse Information on Health Care Providers, Suppliers, and Practitioners (OMB No. 0915–0239)—Revision

Section 221(a) of the Health Insurance Portability and Accountability Act (HIPAA) of 1996 specifically directs the Secretary to establish a national health care fraud and abuse data collection program for the reporting and disclosure of certain final adverse actions taken against health care providers, suppliers, and practitioners. A final rule was published October 26, 1999, in the **Federal Register** to implement the statutory requirements of section 1128E of the Social Security Act (The Act) as added by section 221(a) of HIPAA. The Act requires the Secretary to implement the national healthcare fraud and abuse data collection program. This data bank is known as the Healthcare Integrity and Protection Data Bank (HIPDB). It contains the following types of information: (1) Civil judgments against a health care provider, supplier, or practitioner in Federal or State court related to the delivery of a health care item or service; (2) Federal or State criminal convictions against a health care provider, supplier, or practitioner related to the delivery of a health care item or service; (3) Actions by Federal or State agencies responsible for the licensing and certification of health care providers, suppliers, or practitioners; (4) Exclusion of a health care provider, practitioner or supplier from participation in Federal or State health care programs; and (5) Any other adjudicated actions or decisions that the Secretary shall establish by regulations. Access to this data bank is limited to Federal and State government agencies and health plans.

This request is for a revision of reporting and querying forms previously approved on March 15, 2001. The reporting forms and the request for information forms (query forms) must be accessed, completed, and submitted to the HIPDB electronically through the HIPDB Web site at *http://www.npdb-hipdb.com*. All reporting and querying is performed through this secure Web site. Due to overlap in requirements for the HIPDB, some of the National Practitioner Data Bank's burden has been subsumed under the HIPDB.

Estimates of burden are as follows:

Regulation citation	Number of respondents	Frequency of responses	Hours per response (min.)	Total burden hours
61.6 (a), (b) Errors & Omissions	172	4.3	15	184.9
61.6 Revisions/Appeal Status	107	23.25	30	1,243.9
61.7 Reporting by State Licensure Boards	275	70.3	45	14,499.4
61.8 Reporting of State Criminal Convictions	62	8	45	372
61.9 Reporting of Civil Judgments	54	13	45	526.5
61.10(b) Reporting Exclusions from participating in Federal and State Health Care Programs	10	441.4	45	3,310.5
61.11 Reporting of adjudicated actions/decisions	410	12.5	45	3,843.8
61.12 Request for Information State Licensure Boards	1,000	67.5	5	5,622.8
61.12 Request for Information State Certification Agencies	16	6	5	8
61.12 Request for Information States/District Attorneys & Law Enforcement	2,000	25	5	4,165
61.12 Request for Information State Medicaid Fraud Units	47	50	5	195.8
61.12 Request for Information Health Plans	2,841	263.8	5	62,429.7
61.12 Request for Information Health Care Providers, Suppliers, Practitioners (self-query)	37,925	1	25	15,799.6
61.12(a)(4) Request by Researchers for Aggregate Data	1	1	30	.5
61.15 Place Report in Dispute	459	1	5	38.2
61.15 Add a Statement	238	1	45	178.5
61.15 Request for Secretarial Review	43	1	480	344
Entity Registration	2,500	1	60	2,500
Entity Registration—Update	451	1	5	37.6
Entity Reactivation	450	1	60	450
Authorized Agent Designation	100	1	15	25
Authorized Agent Designation—Update	250	1	5	20.8
Account Discrepancy	1,000	1	15	250
Electronic Funds Transfer Authorization	400	1	15	100
Total				116,146.5

Numbers in the table may not add up exactly due to rounding.

Written comments and recommendations concerning the proposed information collection should be sent within 30 days of this notice to: Desk Officer, Health Resources and Services Administration, Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503.

Dated: March 15, 2004.

Tina M. Cheatham,

Director, Division of Policy Review and Coordination.

[FR Doc. 04–6739 Filed 3–25–04; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Health Resources and Services Administration (HRSA)

publishes abstracts of information collection requests under review by the Office of Management and Budget, in compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). To request a copy of the clearance requests submitted to OMB for review, call the HRSA Reports Clearance Office on (301) 443–1129.

The following request has been submitted to the Office of Management and Budget for review under the Paperwork Reduction Act of 1995:

Proposed Project: The Health Education Assistance Loan (HEAL) Program: Physician's Certification of Borrower's Total and Permanent Disability Form (OMB No. 0915–0204)—Revision

The Health Education Assistance (HEAL) program provided federally-insured loans to students in schools of allopathic medicine, osteopathic medicine, dentistry, veterinary medicine, optometry, podiatric medicine, pharmacy, public health, allied health, or chiropractic, and graduate students in health administration or clinical psychology through September 30, 1998. Eligible lenders, such as banks, savings and loan associations, credit unions, pension funds, State agencies, HEAL schools, and insurance companies, make new refinanced HEAL loans which are insured by the Federal Government against loss due to borrower's death, disability, bankruptcy, and default. The basic purpose of the program was to assure the availability of funds for loans to eligible students who needed to borrow money to pay for their educational loans. Currently, the program refinances previous HEAL loans, monitors the Federal liability, and assists in default prevention activities. The HEAL borrower, the borrower's physician, and the holder of the loan completes the Physician's Certification form to certify that the HEAL borrower meets the total and permanent disability provisions.

The Department uses this form to obtain detailed information about disability claims which includes the following: (1) The borrower's consent to release medical records to the Department of Health and Human Services and to the holder of the borrower's HEAL loans, (2) pertinent information supplied by the certifying physician, (3) the Physician's Certification that the borrower is unable to engage in any substantial gainful activity because of a medically determinable impairment that is expected to continue for a long and indefinite period of time or to result in death, and (4) information from the lender on the unpaid balance. Failure to submit the required documentation will result in disapproval of a disability claim.

The estimate of burden for the Physician's Certification form is as follows:

Type of respondent	Number of respondents	Responses per respondent	Total responses	Minutes per response	Total burden hours
Borrower*	94	1	94	5	8
Physician	94	1	94	30	47
Lender	23	4	94	10	16
Total	211		282		71

*Includes 2 categories of borrowers requesting disability waivers: (1) whose loans have previously defaulted and (2) whose loans have not defaulted.

Written comments and recommendations concerning the proposed information collection should be sent within 30 days of this notice to: Desk Officer, Health Resources and Services Administration, Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503.

Dated: March 15, 2004.

Tina M. Cheatham,

Director, Division of Policy Review and Coordination.

[FR Doc. 04–6740 Filed 3–25–04; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Warren Grant Magnuson Clinical Center; Submission for OMB Review; Comment Request; Customer and Other Partners Satisfaction Surveys

SUMMARY: In compliance with the requirement of section 3507(A)(1)(D) of the Paperwork Reduction Act of 1995 for the opportunity for public comment on the proposed data collection projects, the Warren Grant Magnuson Clinical Center (CC), the National Institutes of Health, (NIH) has submitted to the Office of Management and Budget (OMB) a request to review and approve the information collection listed below. This proposed information collection was previously published in the **Federal Register** on December 19, 2003 (Volume 68, Number 244, page 70821), and allowed 60 days for public comments. No public comments were received. The purpose of this notice is to provide an additional 30 days for public comment.

5 CFR 1320.5. Respondents to this request for information collection should not respond unless the request displays a currently valid OMB control number.

Proposed Collection

Title: Generic Clearance for Satisfaction Surveys of Customer and Other Partners.

Type of Information Collection Request: Extension (OMB Control Number: 0925–0458).

Need and Use of Information Collection: The information collected in these surveys will be used by Clinical Center personnel: (1) To evaluate the satisfaction of various Clinical Center customers and other partners with Clinical Center services; (2) to assist with the design of modifications of these services, based on customer input; (3) to develop new services, based on customer need; and (4) to evaluate the satisfaction of various Clinical Center customers and other partners with implemented service modifications. These surveys will almost certainly lead to quality improvement activities that will enhance and/or streamline the Clinical Center's operations. The major mechanisms by which the Clinical Center will request customer input is through surveys and focus groups. The surveys will be tailored specifically to each class of customers and to that class of customer's needs. Surveys will either be collected as written documents, as faxed documents, mailed electronically or collected by telephone from customers. Information gathered from these surveys of Clinical Center

customers and other partners will be presented to, and used directly by, Clinical Center management to enhance the services and operations of our organization.

Frequency of Response: The participants will respond yearly.

Affected public: Individuals and households, businesses and other for profit, small businesses and organizations.

Types of respondents: These surveys are designed to assess the satisfaction of the Clinical Center's major internal and external customers with the services provided. These customers include, but are not limited to, the following groups of individuals: Clinical Center patients, family members of Clinical Center patients, visitors to the Clinical Center, National Institutes of Health investigators, NIH intramural collaborators, private physicians or organizations who refer patients to the Clinical Center, volunteers, vendors and collaborating commercial enterprises, small business, regulators, and other organizations. The annual reporting burden is as follows:

TABLE 1.—BURDEN ESTIMATE FOR FY 2005

Customer	Type of survey	Estimated number to be surveyed	Expected response rate	Time to complete survey	Estimated burden hours
Clinical Center Patients	Questionnaire	3,000	60%	25 minutes	1253
Family Members of Patients	Questionnaire	1000	40%	10 minutes	167
Former physician employees and trainees.	Electronic	500	20%	10 minutes	83.5
Referring physicians and practitioners.	Questionnaire	500	20%	10 minutes	83.5
Vendors and Collaborating Commercial Enterprises.	Questionnaire	2000	20%	15 minutes	500
Volunteers	Questionnaire	275	60%	40 minutes	183.7
Total			n = 2,965		2270.7

Estimated costs to the respondents consists of their time; time is estimated using a rate of $10.00 per hour for patients and the public; $30.00 for vendors, regulators, organizations and $55.00 for health care professionals. The estimated annual costs to respondents for each year for which the generic clearance extension is requested is $40,222 annually. A contract has been let with a vendor to provide assistance in survey administration. The estimated annual cost of this contract is $36,000.00. There are no capital costs to report.

Requests for Comments: Written comments and/or suggestions from the public and affected agencies are invited on one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the Clinical Center and the agency, including whether the information shall have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimize the burden of the collection of information on those who are to respond, including the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Direct Comments to OMB: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the: Office of Management and Budget, Office of Regulatory Affairs, New Executive Office Building, Room 10235, Washington, DC 20503, Attention: Desk Officer for NIH. To request more information on the proposed project or to obtain a copy of the data collection plans and instruments, contact: Dr. David K. Henderson, Deputy Director for Clinical Care, Warren G. Magnuson Clinical Center, National Institutes of Health, Building 10, Room 2C 146, 9000 Rockville Pike, Bethesda, Maryland 20892, or call non-toll free: (301) 496–3515, or e-mail your request or comments, including your address to: *dhenderson@cc.nih.gov*.

Comments Due Date: Comments regarding this information collection are best assured of having their full effect if received within 30 days of the date of this publication.

Dated: March 22, 2004.

David K. Henderson,

Deputy Director for Clinical Care, CC, National Institutes of Health.

[FR Doc. 04–6846 Filed 3–25–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or 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 Health, Lung, and Blood Institute Special Emphasis Panel Review of Cultural Competence and Health Disparities Academic Awards (K07s).

Date: May 14, 2004.

Time: 8 a.m. to 5 p.m.

Place: Double Tree Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Zoe Huang, MD, Health Scientist Administrator, Review Branch, Room 7190, Division of Extramural Affairs, National Heart, Lung, and Blood Institute, National Institutes of Health, 6701 Rockledge Drive, MSC 7924, Bethesda, MD 20892–7924, (301) 435–0314.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research, 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: March 29, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–6837 Filed 3–25–04; 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 Sexually Transmitted Infections and Topical Microbicide Clinical Research Centers.

Date: April 18–21, 2004.

Time: April 18, 2004, 7 p.m. to 9 p.m.

Agenda: To review and evaluate grant applications.

Place: Marriott Crystal City, 1999 Jefferson Davis Highway, Arlington, VA 22202.

Time: April 19, 2004, 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Marriott Crystal City, 1999 Jefferson Davis Highway, Arlington, VA 22202.

Time: April 20, 2004, 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Marriott Crystal City, 1999 Jefferson Davis Highway, Arlington, VA 22202.

Time: April 21, 2004, 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Marriott Crystal City, 1999 Jefferson Davis Highway, Arlington, VA 22202.

Contact Person: Nancy B. Saunders, PhD., Scientific Review Administrator, Scientific Review Program, Division of Extramural Activities, NIAID/NIH/DHHS, Room 3134, 6700–B Rockledge Drive, MSC 7616, Bethesda, MD 20892–7616, (301) 435–3569, *ns120v@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: March 19, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–6838 Filed 3–25–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Environmental Health Sciences Special Emphasis Panel SBRP Conference Support 2004–2005.

Date: April 20, 2004.

Time: 1 p.m to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: NIEHS/National Institutes of Health, Building 4401, East Campus, 79 T.W. Alexander Drive, Research Triangle Park, NC 27709, (Telephone Conference Call).

Contact Person: Sally Eckert-Tilotta, PhD, National Inst. of Environmental Health Sciences Office of Program Operations, Scientific Review Branch, P.O. Box 12233, MD EC–30, Research Triangle Park, NC 27709, (919) 541–1446, *eckertt1@niehs.nih.gov.*

(Catalog of Federal Domestic Assistance Program Nos. 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences; 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing, National Institutes of Health, HHS)

Dated: March 19, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–6841 Filed 3–25–04; 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 Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Special Emphasis Panel Review of R25 Grant Application.

Date: April 14, 2004.

Time: 1 p.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, NIAAA, 5635 Fishers Lane, Room 3033, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Jeffrey I. Toward, PhD, Scientific Review Administrator, National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism, Extramural Project Review Branch, OSA, 5635 Fishers Lane, Bethesda, MD 20892–9304, (301) 435–5337, *Jtoward@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Special Emphasis Panel Review of K01 Grant Applications.

Date: April 22, 2004.

Time: 1 p.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, NIAAA, 5635 Fishers Lane, Room 3033,

Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Jeffrey I. Toward, PhD, Scientific Review Administrator, National Institutes of Health, National Institute on Alcohol Abuse and Alcoholism, Extramural Project Review Branch, OSA, 5635 Fishers Lane, Bethesda, MD 20892–9304, (301) 435–5337, *Jtoward@mail.nih.gov.*

(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: March 19, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–6843 Filed 3–25–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institutes of Mental Health; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Mental Health Special Emphasis Panel, Depression Related Studies Part 2.

Date: March 26, 2004.

Time: 12 p.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: David I. Sommers, PhD, Scientific Review Administrator, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6144, MSC 9606, Bethesda, MD 20892–9606, (301) 433–7861, *dsommers@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute of Mental Health Special Emphasis Panel, Building Translational Research in Behavioral Science.

Date: April 7, 2004.

Time: 3 p.m. to 4:30 p.m.

Agenda: To review and evaluate grants applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Benjamin Xu, PhD, Scientific Review Administrator, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6143, MSC 9608, Bethesda, MD 20892–9608, (301) 433–1178. *benxu1@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS)

Dated: March 19, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–6844 Filed 3–25–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Mental Health Special Emphasis Panel, Scientist Development Award for New Minority Faculty.

Date: March 29, 2004.

Time: 9 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Mark Czarnolewski, PhD, Scientific Review Administrator, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6153, MSC 9608, Bethesda, MD 20892–9608, (301) 402–8152, *mczarnol@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute of Mental Health Special Emphasis Panel, Mental Health Research Education Grants.

Date: March 29–30, 2004.

Time: 9 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: St. Gregory Hotel, 2033 M Street, NW., Washington, DC 20036.

Contact Person: Eve K. Moscicki, SCD, MPH, Scientific Review Administrator, Office of Child and Adolescent Research, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 7167, MSC 9630, Bethesda, MD 20892–9630, (301) 443–3775, *EMOSCICK@MAIL.NIH.GOV.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS)

Dated: March 19, 2004

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–6845 Filed 3–25–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Child Health and Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial

property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel Infrastructure for Data Sharing & Archiving.

Date: April 16, 2004.

Time: 8:30 a.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

Contact Person: Marita R. Hopmann, PhD, Scientific Review Administrator, Division of Scientific Review, National Institute of Child Health and Human Development, 6100 Building, Room 5E01, Bethesda, MD 20892, (301) 435–6911, *hopmannm@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: March 19, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–6842 Filed 3–25–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel Molecular Mechanisms Regulating Metastasis.

Date: March 25, 2004.

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: Elaine Sierra-Rivera, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6184, MSC 7804, Bethesda, MD 20892, (301) 435–1779, *riverase@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 ZRG1 ONC–M Events in Prostate Carcinogenesis.

Date: April 1, 2004.

Time: 1 p.m. to 2:30 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: Elaine Sierra-Rivera, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6184, MSC 7804, Bethesda, MD 20892, (301) 435–1779, *riverase@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 Lung Cancer Screening.

Date: April 2, 2004.

Time: 10 a.m. to 11 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Charles N. Rafferty, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3172, MSC 7816, Bethesda, MD 20892, (301) 435–3562, *raffertc@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 MDCN member Conflict: Development, Neurodegeneration and Synaptic Function.

Date: April 5, 2004.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Georgetown Suites, 1111 30th Street, NW., Washington, DC 20007.

Contact Person: Carole L. Jelsema, PhD, Chief and Scientific Review Administrator, MDCN Scientific Review Group, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4146, MSC 7850, Bethesda, MD 20892, (301) 435–1248, *jelsemac@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 Review SEP AARR E(04).

Date: April 14, 2004.

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: Kenneth A. Roebuck, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5214, MSC 7852, Bethesda, MD 20892, (301) 435–1166, *roebuckk@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: March 19, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–6836 Filed 3–25–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Center for Scientific Review Special Emphasis Panel, April 1, 2004, 12 p.m. to April 1, 2004, 2 p.m., National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, which was published in the **Federal Register** on March 15, 2004, 69 FR 12171–12173.

The meeting time has been changed to 3 p.m. to 5 p.m. The meeting date and location remain the same. The meeting is closed to the public.

Dated: March 19, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–6839 Filed 3–25–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Center for Scientific Review Special Emphasis Panel, March 31, 2004, 1 p.m. to March 31, 2004, 6 p.m., Holiday Inn Select Betheda, 8120 Wisconsin Ave, Bethesda, MD 20814 which was published in the **Federal**

Register on March 17, 2004, 69 FR 12705–12707.

The meeting will be held at the Four Points by Sheraton Bethesda, 8400 Wisconsin Avenue, Bethesda, MD 20814.

The date and time remain the same. The meeting is closed to the public.

Dated: March 19, 2004.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 04–6840 Filed 3–25–04; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (301) 443–7978.

Pretesting of Substance Abuse Prevention and Treatment and Mental Health Services Communication Messages—(OMB No. 0930–0196, Reinstatement)—As the Federal agency responsible for developing and disseminating authoritative knowledge about substance abuse prevention, addiction treatment, and mental health services and for mobilizing consumer support and increasing public understanding to overcome the stigma attached to addiction and mental illness, the Substance Abuse and Mental Health Services Administration (SAMHSA) is responsible for development and dissemination of a wide range of education and information materials for both the general public and the professional communities. This submission is for generic approval and will provide for formative and qualitative evaluation activities to (1) assess audience knowledge, attitudes, behavior and other characteristics for the planning and development of messages, communication strategies and public information programs; and (2) test these messages, strategies and program components in developmental form to assess audience comprehension, reactions and perceptions. Information obtained from testing can then be used to improve materials and strategies while revisions are still affordable and possible. The annual burden associated with these activities is summarized below.

Activity	No. of respondents	Responses/respondent	Hours per response	Total hours
Individual In-depth Interviews:				
General Public	400	1	.75	300
Service Providers	200	1	.75	150
Focus Group Interviews:				
General Public	3,000	1	1.5	4,500
Service Providers	1,500	1	1.5	2,250
Telephone Interviews:				
General Public	335	1	.08	27
Service Providers	165	1	.08	13
Self-Administered Questionnaires:				
General Public	2,680	1	.25	670
Service Providers	1,320	1	.25	330
Gatekeeper Reviews:				
General Public	1,200	1	.50	600
Service Providers	900	1	.50	450
Total	11,700			9,290

Written comments and recommendations concerning the proposed information collection should be sent by April 26, 2004: SAMHSA Desk Officer, Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503; due to potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, respondents are encouraged to submit comments by fax to: (202) 395–6974.

Dated: March 19, 2004.

Anna Marsh,

Executive Officer, SAMHSA.

[FR Doc. 04–6772 Filed 3–25–04; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

Bureau of Citizenship and Immigration Services

Agency Information Collection Activities: Proposed Collection; Comment Request

ACTION: Notice of Information Collection under Review: Application for Temporary Protected Status.

The Department of Homeland Security, Bureau of Citizenship and Immigration Services (CIS), has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on January 13, 2004, at 69 FR 1992, allowing for a 60-day public comment period. No comments were received by the CIS on this proposed information collection.

The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until April 26, 2004. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Office of Management and Budget,

Office of Information and Regulatory Affairs, Attention: Department of Homeland Security Desk Officer, 725–17th Street, NW., Room 10235, Washington, DC 20530.

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 agency's 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: Revision of a currently approved collection.*

(2) *Title of the Form/Collection:* Application for Temporary Protected Status.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–821. Bureau of 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 provided on this collection is used by the DHS to determine whether an applicant for Temporary Protected Status (TPS) meets the eligibility requirements. Such TPS benefits include employment authorization and relief from the threat of removal or deportation from the U.S. while in such status.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 176,000 responses at 30 minutes (.50 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 88,000 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, Bureau of Citizenship and Immigration Services, 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 Chief Information Officer, Regional Office Building 3, 7th and D Streets, SW., Suite 4626–36, Washington, DC 20202.

Dated: March 23, 2004.

Richard A. Sloan,

Department Clearance Officer, Department of Homeland Security, Bureau of Citizenship and Immigration Services.

[FR Doc. 04–6792 Filed 3–25–04; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, U.S. Department of Homeland Security.

ACTION: Notice and request for comments.

SUMMARY: The Federal Emergency Management Agency (FEMA) has submitted the following information collection to the Office of Management and Budget (OMB) for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). The submission describes the nature of the information collection, the categories of respondents, the estimated burden (*i.e.*, the time, effort and resources used by respondents to respond) and cost, and includes the actual data collection instruments FEMA will use.

Title: Approval and Coordination of Requirements to Use the National Emergency Training Center (NETC) for Extracurricular Training Activities.

OMB Number: 1660–0029.

Abstract: FEMA Form 75–10, Request for Housing Accommodations, will be used by respondents to request housing accommodations at the NETC campus. FEMA Form 75–11, Request for Use of NETC Facilities, is used by respondents to request to use NETC facilities for extracurricular training activities. Extracurricular training is training over and above regularly scheduled training sessions of the National Fire Academy and Emergency Management Institute. The policy of the NETC is to accommodate other training activities on a space-available basis at the Emmitsburg campus. In order for NETC to approve and schedule the use of its facilities, information must be provided by special group organizations. A written, e-mail or telephone request for use of NETC facilities is initially made to determine availability of the facilities. If space is available, the contact person for the special group must follow up by completing FEMA Form 75–11 to provide information on the number of participants, meals, and special requirements. The information is used to assign classrooms, schedule equipment, and arrange for food service.

Affected Public: Not-for-profit institutions; Federal Government; State, Local or Tribal Government; Individuals or households; and Business or other for-profit.

Number of Respondents: 1,600.

Estimated Time per Respondent: FEMA Form 75–10—5 minutes; FEMA Form 75–11—10 minutes.

Estimated Total Annual Burden Hours: 142 hours.

Frequency of Response: On occasion.

Comments: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs at OMB, Attention: Desk Officer for the Department of Homeland Security/FEMA at email address *kflee@omb.eop.gov* or facsimile number (202) 395–7285. Comments must be submitted on or before April 26, 2004. In addition, interested persons may also send comments to FEMA (see contact information below).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Muriel B. Anderson, Chief, Records Management Branch, FEMA at 500 C Street, SW., Room 316, Washington, DC 20472, facsimile number (202) 646–3347, or e-mail address: *InformationCollections@dhs.gov.*

Dated: March 1, 2004.

Edward W. Kernan,

Division Director, Information Resources Management Division, Information Technology Services Directorate.

[FR Doc. 04–6780 Filed 3–25–04; 8:45 am]

BILLING CODE 9110–17–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, U.S. Department of Homeland Security.

ACTION: Notice and request for comments.

SUMMARY: The Federal Emergency Management Agency, 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 revised information collections. In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)), this notice seeks comments on the enhancement of an existing Web-based database of Mitigation Success Stories, which documents mitigation and flood insurance strategies that worked well for different hazards, mitigation activities or project types. The All-hazards Success Story Database promotes mitigation practices that encourage communities, individuals, and other key decision-makers to take action to reduce hazard risks.

Supplementary Information: The Government Performance Results Act (GPRA) requires agencies to set missions and goals, and measure performance against them. FEMA will partially fulfill these requirements by collecting and sharing information describing successful mitigation and flood insurance practices occurring in communities nationwide. The Mitigation Success Stories database addresses FEMA's strategic goal of reducing the loss of life and property due to disasters through communications strategies aimed at assisting individuals, governments, and communities make sound risk management decisions.

Collection of Information

Title: Federal Emergency Management Agency (FEMA) Mitigation Success Story Database.

Type of Information Collection: Existing collection in use without OMB approval.

OMB Number: 1660–NEW6.

Abstract: Early mitigation actions, which focus on the prevention of loss of life and less damage to buildings and other structures, have been implemented throughout the United States. This database serves a dual purpose in providing a venue for gaining and disseminating knowledge about effective and efficient mitigation strategies implemented in communities nationwide. Federal, State, local officials or individuals experienced in hazard mitigation projects, community planning and floodplain administration, and other mitigation and flood insurance related projects constitute typical respondents to this information collection. The database offers visitors of the FEMA Web site a centralized, user-friendly venue to search a variety of best practices, success stories, and mitigation projects. By sharing information, communities and individuals can learn about available Federal programs to support the implementation of mitigation projects relevant to individual conditions and characteristics.

Affected Public: Individuals or Households; Businesses or Other for-Profit and Not-for-Profit Organizations; and Federal, State, Local, or Tribal Governments.

Estimated Total Annual Burden Hours: 563 Hours.

ANNUAL BURDEN HOURS

Project/activity (survey, form(s), focus group, etc.)	No. of respondents (A)	Frequency of responses (B)	Burden hours per respondent (C)	Annual responses (A×B)	Total annual burden hours (A×B×C)
Mitigation Success Story Database Submissions:					
Electronic	15	1	1.5	15	23
Personal	135	1	4.0	135	540
Total	150	1		150	563

Estimated Cost: $49,382.00

ANNUAL COST TO RESPONDENTS (BURDEN HOURS)

Program	Burden hrs	Average hr. rate ($)	Average cost per respondent ($)	Annualized cost all respondents ($)
Database Submissions				
Electronic	23	22.50	34.00	782.00
Personal	540	22.50	90.00	48,600.00
Grand Total	563			49,382.00

Comments: Written comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) 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; (c) enhance the quality, utility, and clarity of the information to be

collected; and (d) 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. Comments must be received on or before May 25, 2004.

ADDRESSES: Interested persons should submit written comments on the proposed information collection to Muriel B. Anderson, Chief, Records Management Branch, FEMA at 500 C Street, SW., Room 316, Washington, DC 20472, facsimile number (202) 646–3347, or email address: *FEMA-Information-Collections@dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Contact Melis Mull, Program Analyst, Risk Communication Branch, Mitigation Division, FEMA/DHS, 202/646–4135 for additional information. You may contact Ms. Anderson for copies of the proposed information collection (see addressee information above).

Dated: March 22, 2004.

George S. Trotter,

Acting Division Director, Information Resources Management Division, Information Technology Services Directorate.

[FR Doc. 04–6781 Filed 3–25–04; 8:45 am]

BILLING CODE 9110–13–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4901–N–13]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning Development, HUD.

ACTION: Notice.

SUMMARY: This notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

FOR FURTHER INFORMATION CONTACT: Kathy Barruss, room 7266, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impaired (202) 708–2565 (these telephone numbers are not toll-free), or call the toll-free Title V information line at 1–800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with 24 CFR part 581 and section 501 of the Steward B. McKinney Homeless Assistance Act (42 U.S.C. 11411), as amended, HUD is publishing this Notice to identify Federal buildings and other real property that HUD has reviewed for suitability afor use to assist the homeless. The properties were reviewed using information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal property. This notice is also published in order to comply with the December 12, 1988, Court Order in *National Coalition for the Homeless* v. *Veterans Administration*, No. 88–2503–0G (D.D.C.).

Properties reviewed are listed in this notice according to the following categories: Suitable/available, suitable/unavailable, suitable/to be excess, and unsuitable. The properties listed in the three suitable categories have been reviewed by the landholding agencies, and each agency has transmitted to HUD: (1) its intention to make the property available for use to assist the homeless, (2) its intention to declare the property excess to the agency's needs, or (3) a statement of the reasons that the property cannot be declared excess or made available for use as facilities to assist the homeless.

Properties listed as suitable/available will be available exclusively for homeless use for a period of 60 days from the date of this notice. Where property is described as for "off-site use only" recipients of the property will be required to relocate the building to their own site at their own expense. Homeless assistance providers interested in any such property should send a written expression of interest to HHS, addressed to Shirley Kramer, Division of Property Management, Program Support Center, HHS, room 5B–41, 5600 Fishers Lane, Rockville, MD 20857; (301) 443–2265. (This is not a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit their written expressions of interest as soon as possible. For complete details concerning the processing of applications, the reader is encouraged to refer to the interim rule governing this program, 24 CFR part 581.

For properties listed as suitable/to be excess, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law, subject to screening for other Federal use. At the appropriate time, HUD will publish the property in a notice showing it as either suitable/available or suitable/unavailable.

For properties listed as suitable/unavailable, the landholding agency has decided that the property cannot be declared excess or made available for use to assist the homeless, and the property will not be available.

Properties listed as unsuitable will not be made available for any other purpose for 20 days from the date of this notice. Homeless assistance providers interested in a review by HUD of the determination of unsuitability should call the toll free information line at 1–800–927–7588 for detailed instructions or write a letter to Kathy Burruss at the address listed at the beginning of this notice. Included in the request for review should be the property address (including ZIP Code), the date of publication in the **Federal Register**, the landholding agency, and the property number.

For more information regarding particular properties identified in this notice (*i.e.*, acreage, floor plan, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following addresses: *Energy:* Mr. Tom Knox, Department of Energy, Office of Engineering & Construction Management, CR–80, Washington, DC 20585; (202) 586–8715; *GSA:* Mr. Brian K. Polly, Assistant Commissioner, General Services Administration, Office of Property Disposal, 18th and F Streets, NW., Washington, DC 20405; (202) 501–0052; *Navy:* Mr. Charles C. Cocks, Director, Department of the Navy, Real Estate Policy Division, Naval Facilities Engineering Command, Washington Navy Yard, 1322 Patterson Ave., SE., Suite 1000, Washington, DC 20374–5065; (202) 685–9200; (these are not toll-free numbers).

Dated: March 18, 2004.

Mark R. Johnston,

Acting Director, Office of Special Needs Assistance Programs.

Title V, Federal Surplus Property Program Federal Register Report for 3/26/2004

Suitable/Available Properties

Buildings (by State)

California

Facility #29
Fleet ASW Training Center
Point Loma Co: CA
Landholding Agency: Navy
Property Number: 77200410033
Status: Excess
Comment: Metal bldg. most recent use—storage, off-site use only

Minnesota

Lakes Project Office

307 Main Street East
Remer Co: Cass MN
Landholding Agency: GSA
Property Number: 54200410015
Status: Surplus
Comment: Office bldg/oil shed/maintenance garage, minor water damage
GSA Number: 5–D–MN–548–A

Summary of Suitable/Available Properties

Total number of Properties = 2

Suitable/Unavailable Properties

Buildings (by State)

California

SSA Building
1230 12th Street
Modesto Co: CA 95354
Landholding Agency: GSA
Property Number: 54200330003
Status: Surplus
Comment: Republish: GSA status change to UNAVAILABLE. 11,957 sq. ft., needs repair, presence of asbestos/lead paint, most recent use—office
GSA Number: 9–G–CA–1610

Indiana

Soc. Sec. Admin. Ofc.
327 West Marion
Elkhart Co: IN
Landholding Agency: GSA
Property Number: 54200310016
Status: Surplus
Comment: Republish: GSA status change to UNAVAILABLE. 6600 sq. ft., most recent use—office
GSA Number: 1–G–IN–596

Iowa

23 Buildings
Former Naval Housing
Waverly Co: Bremer IA 50677
Landholding Agency: GSA
Property Number: 54200340006
Status: Surplus
Comment: Republish: GSA status change to UNAVAILABLE. 2 to 3 bedroom homes, 864 to 1760 sq. ft., presence of asbestos/lead paint
GSA Number: 7–I–IA–0463–5

Louisiana

SSA Baton Rouge Dist. Ofc.
350 Donmoor Avenue
Baton Rouge Co: LA 70806
Landholding Agency: GSA
Property Number: 54200330005
Status: Surplus
Comment: Republish: GSA status change to UNAVAILABLE. 9456 sq. ft., most recent use—office
GSA Number: 7–G–LA–0567

Michigan

Detroit Job Corp Center
10401 E. Jefferson
1265 St. Clair
Detroit Co: Wayne MI
Landholding Agency: GSA
Property Number: 54200230012
Status: Surplus
Comment: Republish: GSA status change to UNAVAILABLE. Parcel One = 80,590 sq. ft. bldg., needs repair, presence of asbestos; Parcel Two = 5140 sq. ft. bldg.
GSA Number: 2–L–MI–757

Nevada

Young Fed Bldg/Courthouse
300 Booth Street
Reno Co: NV 89502
Landholding Agency: GSA
Property Number: 54200330006
Status: Surplus
Comment: Republish: GSA status change to UNAVAILABLE. 133, 439 sq. ft. (85,637 sq. ft. available), presence of asbestos/lead paint.
GSA Number: 9–G–NV–529

Suitable/Unavailable Properties

Land (by State)

New Mexico

H Marker Facility
Roswell Co: Chaves NM 88201
Landholding Agency: GSA
Property Number: 54200330011
Status: Surplus
Comment: Republish: GSA status change to UNAVAILABLE. 12.398 acres, subject to existing easements
GSA Number: 7–U–NM–0587

Utah

0.5 acres
2968 W. Alice Way
West Valley Co: Salt Lake UT 84119
Landholding Agency: GSA
Property Number: 54200340004
Status: Excess
Comment: Republish: GSA status change to UNAVAILABLE. paved
GSA Number: 7–U–UT–0515

Unsuitable Properties

Buildings (by State)

California

Bldg. 26
Fleet ASW Training Center
San Diego Co: CA
Landholding Agency: Navy
Property Number: 77200410034
Status: Excess
Reason: Secured Area

Bldgs. 64, 65, 66
Fleet Combat Training Center
San Diego Co: CA
Landholding Agency: Navy
Property Number: 77200410035
Status: Excess
Reason: Secured Area

Bldgs. 2537, 2538
Marine Corps Base
Camp Pendleton Co: CA 92055
Landholding Agency: Navy
Property Number: 77200410037
Status: Excess
Reason: Extensive deterioration

Bldg. 18416
Marine Corps Base
Camp Pendleton Co: CA 92055
Landholding Agency: Navy
Property Number: 77200410038
Status: Excess
Reason: Extensive deterioration

Bldg. 33439
Marine Corps Base
Camp Pendleton Co: CA 92055–
Landholding Agency: Navy
Property Number: 77200410039
Status: Excess
Reason: Extensive deterioration

Bldg. 43299
Marine Corps Base
Camp Pendleton Co: CA 92055–
Landholding Agency: Navy
Property Number: 77200410040
Status: Excess
Reason: Extensive deterioration

Georgia

Bldg. 80
Naval Air Station
Marietta Co: Cobb GA 30060–
Landholding Agency: Navy
Property Number: 77200410036
Status: Excess
Reasons: Within 2000 ft. of flammable or explosive material; Secured Area; Extensive deterioration

Guam

Bldg. 464
Naval Forces
Marianas Co: Waterfront GU
Landholding Agency: Navy
Property Number: 77200410041
Status: Excess
Reason: Extensive deterioration

Idaho

Bldgs. Tan 603, Tan 608
Idaho Natl Eng & Env Lab
Scoville Co: Butte ID 83415–
Landholding Agency: Energy
Property Number: 41200410030
Status: Excess
Reason: Secured Area

Bldg. Tan 624
Idaho Natl Eng & Env Lab
Scoville Co: Butte ID 83415–
Landholding Agency: Energy
Property Number: 41200410031
Status: Excess
Reason: Secured Area

Bldgs. Tan 630, Tan 633
Idaho Natl Eng & Env Lab
Scoville Co: Butte ID 83415–
Landholding Agency: Energy
Property Number: 41200410032
Status: Excess
Reason: Secured Area

Bldgs. Tan 649, Tan 650
Idaho Natl Eng & Env Lab
Scoville Co: Butte ID 83415–
Landholding Agency: Energy
Property Number: 41200410033
Status: Excess
Reason: Secured Area

Bldg. Tan 694
Idaho Natl Eng & Env Lab
Scoville Co: Butte ID 83415–
Landholding Agency: Energy
Property Number: 41200410034
Status: Excess
Reason: Secured Area

Bldg. Tan 719
Idaho Natl Eng & Env Lab
Scoville Co: Butte ID 83415–
Landholding Agency: Energy
Property Number: 41200410035
Status: Excess
Reason: Secured Area

Bldgs. Tan 725, Tan 726
Idaho Natl Eng & Env Lab
Scoville Co: Butte ID 83415–

Landholding Agency: Energy
Property Number: 41200410036
Status: Excess
Reason: Secured Area

New Mexico

Bldgs. 870C & 9830
Kirtland AFB
Albuquerque Co: Bernalillo NM 87185–
Landholding Agency: Energy
Property Number: 41200410037
Status: Excess
Reason: Secured Area

[FR Doc. 04–6559 Filed 3–25–04; 8:45 am]
BILLING CODE 4210–29–M

DEPARTMENT OF THE INTERIOR

Office of the Secretary; Revised Departmental Strategic Plan for FY 2003–2008

AGENCY: Office of the Secretary, Interior.

ACTION: Notice of availability.

SUMMARY: On September 30, 2003, the Department of the Interior released its revised Departmental Strategic Plan for FY 2003–2008. While the document remains available to the public through the Departmental Internet Web site, *http://www.doi.gov,* a limited number of printed copies of the Strategic Plan are now available upon request.

ADDRESSES: Written requests can be submit by: E-mail: *strategic_plan@ios.doi.gov:*

Fax: (202) 208–2619.

Mail: U.S. Department of the Interior, Office of the Secretary—Planning and Performance Management, 1849 C Street NW., Mail Stop 5258, Washington, DC 20240. Attention: GPRA Project Manager.

FOR FURTHER INFORMATION CONTACT: LeRon E. Bielak at (202) 208–1818.

SUPPLEMENTARY INFORMATION: The DOI has significantly departed from its past approaches to strategic planning. The DOI plan stands as the Government Performance and Results Act document for the entire agency. Commonality of mission function and desired results is given much greater weight than in previous plans. This overall approach is aimed at greater integration of purpose and function across the Department and at achieving improved performance and results.

Dated: March 2, 2004.

LeRon E. Bielak,

Acting Director—Office of Planning and Performance Management.

[FR Doc. 04–6808 Filed 3–25–04; 8:45 am]
BILLING CODE 4310–10–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–957–04–1910–BJ–5115]

Filing of Plats of Survey, Nebraska

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of filing of plats of survey, Nebraska.

SUMMARY: The Bureau of Land Management (BLM) is scheduled to file the plats of surveys of the lands described below thirty (30) calendar days from the date of this publication in the BLM Wyoming State Office, Cheyenne, Wyoming.

FOR FURTHER INFORMATION CONTACT: Bureau of Land Management, 5353 Yellowstone Road, P.O. Box 1828, Cheyenne, Wyoming 82003.

SUPPLEMENTARY INFORMATION: These surveys were executed at the request of the Bureau of Indian Affairs and are necessary for the management of these lands. The lands surveyed are:

The plats (in 5 sheets) representing the dependent resurvey of the First Guide Meridian East through T. 25 N., between Rs. 8 and 9 E., a portion of the Sixth Standard Parallel North, through R. 9 E., portions of the east boundary, the north boundary, portions of the subdivisional lines, the subdivision of certain sections, and the adjusted original meanders of the right bank of the Missouri River, the corrective dependent resurvey of certain sections, and the survey of the subdivision of certain sections, and a portion of the present right bank of the Missouri River, Township 25 North, Range 9 East, Sixth Principal Meridian, Nebraska, was accepted March 12, 2004.

Copies of the preceding described plats are available to the public.

Dated: March 16, 2004.

John P. Lee,

Chief Cadastral Surveyor, Division of Support Services.

[FR Doc. 04–6773 Filed 3–25–04; 8:45 am]
BILLING CODE 4467–22–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

Agency Information Collection Activities: Proposed Collection, Comment Request

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Notice of an extension of a currently approved information collection (OMB control number 1010–0074).

SUMMARY: To comply with the Paperwork Reduction Act (PRA) of 1995, we are inviting comments on a collection of information that we will submit to the Office of Management and Budget (OMB) for review and approval. The information collection request (ICR) is titled "30 CFR Part 206—Product Valuation, Subpart J—Indian Coal (Forms MMS–4292, Coal Washing Allowance Report, and MMS–4293, Coal Transportation Allowance Report)."

DATES: Submit written comments on or before May 25, 2004.

ADDRESSES: Submit written comments to Sharron L. Gebhardt, Lead Regulatory Specialist, Minerals Management Service, Minerals Revenue Management, P.O. Box 25165, MS 302B2, Denver, Colorado 80225. If you use an overnight courier service, our courier address is Building 85, Room A–614, Denver Federal Center, Denver, Colorado 80225.

FOR FURTHER INFORMATION CONTACT: Sharron L. Gebhardt, telephone (303) 231–3211, FAX (303) 231–3781.

SUPPLEMENTARY INFORMATION: *Title:* 30 CFR Part 206—Product Valuation, Subpart J—Indian Coal (Forms MMS–4292, Coal Washing Allowance Report, and MMS–4293, Coal Transportation Allowance Report).

OMB Control Number: 1010–0074.

Bureau Form Number: Forms MMS–4292 and MMS–4293.

Abstract: The Secretary of the U.S. Department of the Interior (DOI) is responsible for collecting royalties from lessees who produce minerals from leased Federal and Indian lands. The Secretary is required by various laws and acts including 25 U.S.C. 396d and the Indian Minerals Development Act (25 U.S.C. 2103) to manage mineral resources production on Federal and Indian lands, collect the royalties due, and distribute the funds in accordance with those laws.

The Secretary also has an Indian trust responsibility to manage Indian lands and seek advice and information from Indian beneficiaries. MMS performs the royalty management functions and assists the Secretary in carrying out DOI's Indian trust responsibility.

Indian tribes and allottees receive all royalties generated from Indian lands. Both groups have expressed concern that DOI will ensure they receive the proper royalty amount. Failure to collect the data described in this information collection could result in the undervaluation of the minerals and render it impossible for the Secretary to

fulfill his/her statutory and trust responsibilities to the Indians. The information that is collected under this ICR is essential for the royalty valuation process.

We developed Form MMS–4292, Coal Washing Allowance Report, and Form MMS–4293, Coal Transportation Allowance Report, for industry to use when reporting or requesting a washing or transportation allowance. Historically, the lessee requested approval of royalty deductions by submitting a letter which provided information enabling the Government to evaluate the reasonableness of the deductions. Under the product value regulations at 30 CFR Part 206—Product Valuation, Subpart J—Indian Coal, we normally accept costs incurred under arm's-length contracts for transporting and/or washing coal. (An arm's-length contract is a contract or agreement between independent, nonaffiliated persons with opposing economic interest regarding that contract.) The regulations further provide that we normally accept the contract sales prices arrived at by the lessee in their arm's-length contract as being representative of value for ad valorem leases (30 CFR 206.456, Valuation standards for ad valorem leases).

In those instances when Indian coal is washed or transported under non-arm's-length conditions, it is necessary for us to obtain cost data. The information collected on the forms enables us to accurately determine if the lessee correctly computed the coal value and the gross proceeds for royalty calculation purposes.

Proprietary information that is submitted to MMS is protected, and there are no questions of a sensitive nature included in this information collection. The requirement to respond is required when claiming washing and/or transportation allowances.

For this ICR renewal, we have no change in the burden hours submitted to OMB. We have changed the title of this ICR from "Coal Washing and Transportation Allowance (Forms MMS–4292 and MMS–4293)" to "30 CFR Part 206—Product Valuation, Subpart J—Indian Coal (Forms MMS–4292, Coal Washing Allowance Report, and MMS–4293, Coal Transportation Allowance Report)," to clarify the regulatory language we are covering under 30 CFR Part 206.

Frequency of Response: Annually.

Estimated Number and Description of Respondents: 1 lessee.

Estimated Annual Reporting and Recordkeeping "Hour" Burden: 4 hours.

The following chart shows the breakdown of the estimated burden hours by CFR section and paragraph:

RESPONDENT ANNUAL BURDEN HOUR CHART

30 CFR section	Reporting requirement	Burden hours per response	Annual number of responses	Annual burden hours
206.458 (a)(1), (b)(1), (c)(1)(i) and (iii), (c)(2)(i) and (iii).	Determination of washing allowances. ..... (a) Arm's-length contracts. (1) * * * However, before any deduction may be taken, the lessee must submit a completed page one of Form MMS–4292, Coal Washing Allowance Report, * * * (b) Non-arm's-length or no contract. (1) * * * However, before any estimated or actual deduction may be taken, the lessee must submit a completed Form MMS–4292 * * * (c) Reporting requirements. (1) Arm's-length contracts. (i) * * * the lessee shall submit page one of the initial Form MMS–4292 prior to, or at the same time, as the washing allowance determined pursuant to an arm's-length contract is reported on Form MMS–4430, Solid Minerals Production and Royalty Report. * * * (iii) After the initial reporting period and for succeeding reporting periods, lessees must submit page one of Form MMS–4292 * * * (2) Non-arm's-length or no contract. (i) * * * the lessee shall submit an initial Form MMS–4292 prior to, or at the same time as, the washing allowance determined pursuant to a non-arm's-length contract or no contract situation is reported on Form MMS–4430, Solid Minerals Production and Royalty Report. * * * (iii) For calendar-year reporting periods succeeding the initial reporting period, the lessee shall submit a completed Form MMS–4292 containing the actual costs for the previous reporting period. If coal washing is continuing, the lessee shall include on Form MMS–4292 its estimated costs for the next calendar year. * * *	2	1	2
206.461 (a)(1), (b)(1), (c)(1)(i) and (iii), (c)(2)(i) and (iii).	Determination of transportation allowances. ..... (a) Arm's-length contracts. (1) * * * However, before any deduction may be taken, the lessee must submit a completed page one of Form MMS–4293, Coal Transportation Allowance Report * * * (b) Non-arm's-length or no contract. (1) * * * However, before any estimated or actual deduction may be taken, the lessee must submit a completed Form MMS–4293 * * *	2	1	2

RESPONDENT ANNUAL BURDEN HOUR CHART—Continued

30 CFR section	Reporting requirement	Burden hours per response	Annual number of responses	Annual burden hours
	(c) Reporting requirements. (1) Arm's-length contracts. (i) * * * the lessee shall submit page one of the initial Form MMS–4293 prior to, or at the same time as, the transportation allowance determined pursuant to an arm's-length contract is reported on Form MMS–4430, Solid Minerals Production and Royalty Report. * * * (iii) After the initial reporting period and for succeeding reporting periods, lessees must submit page one of Form MMS–4293 * * * (2) Non-arm's-length or no contract. (i) * * * the lessee shall submit an initial Form MMS–4293 prior to, or at the same time as, the transportation allowance determined pursuant to a non-arm's-length contract or no contract situation is reported on Form MMS–4430, Solid Minerals Production and Royalty Report. * * * (iii) For calendar-year reporting periods succeeding the initial reporting period, the lessee shall submit a completed Form MMS–4293 containing the actual costs for the previous reporting period * * *			
Total		4	2	4

Estimated Annual Reporting and Recordkeeping "Non-hour Cost" Burden: We have identified no "non-hour" cost burdens.

Comments: The PRA (44 U.S.C. 3501, *et seq.*) provides an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Before submitting an ICR to OMB, PRA Section 3506(c)(2)(A) requires each agency "* * * to provide notice * * * and otherwise consult with members of the public and affected agencies concerning each proposed collection of information * * *." Agencies must specifically solicit comments to: (a) Evaluate whether the proposed collection of information is necessary for the agency to perform its duties, including whether the information is useful; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) enhance the quality, usefulness, and clarity of the information to be collected; and (d) minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology.

The PRA also requires agencies to estimate the total annual reporting "non-hour cost" burden to respondents or recordkeepers resulting from the collection of information. We have not identified non-hour cost burdens for this information collection. If you have costs to generate, maintain, and disclose this information, you should comment and provide your total capital and startup cost components or annual operation, maintenance, and purchase of service components. You should describe the methods you use to estimate major cost factors, including system and technology acquisition, expected useful life of capital equipment, discount rate(s), and the period over which you incur costs. Capital and startup costs include, among other items, computers and software you purchase to prepare for collecting information; monitoring, sampling, and testing equipment; and record storage facilities. Generally, your estimates should not include equipment or services purchased: (i) before October 1, 1995; (ii) to comply with requirements not associated with the information collection; (iii) for reasons other than to provide information or keep records for the Government; or (iv) as part of customary and usual business or private practices.

We will summarize written responses to this notice and address them in our ICR submission for OMB approval, including appropriate adjustments to the estimated burden. We will provide a copy of the ICR to you without charge upon request.

Public Comment Policy: We will make copies of the comments available for public review, including names and addresses of respondents, during regular business hours at our offices in Lakewood, Colorado. Upon request, we will withhold an individual respondent's home address from the public record, as allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you request that we withhold your name and/or address, state your request prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

MMS Federal Register Liaison Officer: Denise Johnson (202) 208–3976.

Dated: March 19, 2004.

Lucy Querques Denett,

Associate Director for Minerals Revenue Management.

[FR Doc. 04–6804 Filed 3–25–04; 8:45 am]

BILLING CODE 4310– MR–P

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: Carnegie Museum of Natural History, Pittsburgh, PA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the possession of the Carnegie Museum of Natural History, Pittsburgh, PA. These human remains and associated funerary objects were removed from burial grounds on the Fort Peck Indian Reservation, MT.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25

U.S.C. 3003(d)(3). The determinations within this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations within this notice.

A detailed assessment of the human remains was made by Carnegie Museum of Natural History professional staff in consultation with representatives of the Assiniboine and Sioux tribes of the Fort Peck Indian Reservation, Montana.

In 1898, human remains representing a minimum of five individuals were removed from a burial ground at Wolf Point on the Fort Peck Indian Reservation. The original collector is not know, but may have been Dr. Brewer Mattocks. In response to an inquiry from Dr. Mattocks in 1913, the U.S. Department of the Interior determined that Wolf Point was located on the Fort Peck Indian Reservation. Dr. Mattocks donated the human remains to the Carnegie Museum of Natural History in 1913 (Accession no. 4839) and 1914 (Accession no. 5214). No known individuals were identified. The six associated funerary objects are five brass and one gold cameo finger rings (Accession no. 5214) which Dr. Mattocks also donated to the Carnegie Museum of Natural History in 1914.

Although the lands from which the human remains and associated funerary objects were removed were under the jurisdiction of the U.S. Department of the Interior, Bureau of Indian Affairs, the Carnegie Museum of Natural History has possession and control of the human remains and associated funerary objects because their removal from tribal land predates permit requirements established by the Antiquities Act of 1906.

The brass and gold cameo finger rings date the five burials to the Historic period (mid- to late 19th century). The burial ground at Wolf Point was commonly used by Assiniboine and Sioux residents of the Fort Peck Indian Reservation.

Officials of the Carnegie Museum of Natural History have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of five individuals of Native American Ancestry. Officials of the Carnegie Museum of Natural History also have determined that, pursuant to 25 U.S.C. 3001(3)(A), the six objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the Carnegie Museum of Natural History have determined that, pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Assiniboine and Sioux tribes of the Fort Peck Indian Reservation, Montana.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains and associated funerary objects should contact Dr. David R. Watters, Carnegie Museum of Natural History, 5800 Baum Boulevard, Pittsburgh, PA 15206–3706, telephone (412) 665–2605, before April 26, 2004. Repatriation of the human remains and associated funerary objects to the Assiniboine and Sioux tribes of the Fort Peck Indian Reservation, Montana may proceed after that date if no additional claimants come forward.

The Carnegie Museum of Natural History is responsible for notifying the Assiniboine and Sioux tribes of the Fort Peck Indian Reservation, Montana that this notice has been published.

Dated: January 27, 2004.

John Robbins,

Assistant Director, Cultural Resources.

[FR Doc. 04–6653 Filed 3–25–04; 8:45 am]

BILLING CODE 4310–50–M

DEPARTMENT OF JUSTICE

Notice of Lodging Proposed Consent Decree

In accordance with the Departmental Policy, 28 CFR 50.7, notice is hereby given that a proposed Consent Decree in *United States* v. *Sandstone Mining, L.L.C., et al.* (E.D.N.C.), No. 7:04–CV–58F was lodged with the United States District Court for the Eastern District of North Carolina on March 16, 2004.

This proposed Consent Decree concerns a compliant filed by the United States against Defendants Sandstone Mining, L.L.C., Sandstone Mining No. 2, L.L.C., Socastee Harvest, L.L.C., Robert L. Wiseman, and Stephen Wiseman, pursuant to section 301(a) of the Clean Water Act, 33 U.S.C. 1311(a), to obtain injunctive relief from and impose civil penalties against the Defendants for violating the Clean Water Act by discharging pollutants without a permit into waters of the United States. The proposed Consent Decree resolves these allegations by requiring the Defendants to restore the impacted areas and to pay a civil penalty.

The Department of Justice will accept written comments relating to this proposed Consent Decree for thirty (30) days from the date of publication of this Notice. Please address comments to Martin F. McDermott, U.S. Department of Justice, Environment and Natural Resources Division, Environmental Defense Section, P.O. Box 23986, Washington, DC 20026–3986 and refer to *United States* v. *Sandstone Mining, L.L.C., et al.*, DJ #90–5–1–1–05972.

The proposed Consent Decree may be examined at the Clerk's Office, United States District Court for the Eastern District of North Carolina, Terry Sandford Federal Building and Courthouse, 301 New Bern Avenue, Raleigh, North Carolina 27601. In addition, the proposed Consent Decree may be viewed by *http://www.usdoj.gov/enrd/open.html.*

Stephen Samuels,

Environmental Defense Section, Environment & Natural Resources Division.

[FR Doc. 04–6829 Filed 3–25–04; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Settlement Agreement Under the Comprehensive Environmental Response, Compensation and Liability Act

Under 28 CFR 50.7, notice is hereby given that on March 19, 2004, a motion to approve a proposed Settlement Agreement was filed in the United States Bankruptcy Court for the District of Nevada in *In re Washington Group, International, Inc., et al.*, Case No. BK–N–01–31627 (Bankr. D. Nev.). The Court's action on the proposed Agreement is subject to the United States' determination whether to proceed with the Agreement following any public comment on its terms. Further, the proposed Agreement is subject to the notice provisions of Rule 9019(a) of the Federal Rules of Bankruptcy Procedure.

The United States filed a proof of claim in the above bankruptcy seeking reimbursement for response costs expended by the United States Department of Agriculture, Forest Service, under Section 104 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. 9604, to investigate releases of selenium from four reclaimed phosphate mines located in southeastern Idaho—the North Maybe, South Maybe, Champ and Mountain Fuel Mines ("the Mines"). In its proof of claim, the United States included an unliquidated claim for compensation for CERCLA response costs which the Forest Service anticipates incurring at the Mines. The

Forest Service expects to incur, among other potential expenses, additional investigative costs and the costs of abating selenium releases, including releases into pit lakes, seeps and streams, and the uptake of selenium into forage grasses and other plants. Releases of selenium from the Mines have caused the deaths of domestic animals and may endanger wildlife. Under the proposed Agreement, the United States will be awarded an allowed general unsecured claim against Washington Group International, Inc. and affiliated debtors in the amount of $30 million. In addition, the United States will receive payments from two insurance companies totaling $4.5 million.

As is typical, the proposed Agreement provides contribution protection to the settling parties. In addition, through the motion to approve the Agreement, the reorganized debtors and the Plan Committee [1] are seeking an injunction which would preclude any and all persons and entities from asserting claims against the settling insurers that arise out of or relate to the Policies and relate to the Sites.

The Department of Justice will receive comments relating to the proposed Settlement Agreement during a period ending April 14, 2004. Comments must be received by that date. If sent by U.S. Mail, comments must be addressed to the Assistant Attorney General for the Environmental and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611. Any comments sent by a delivery service other than U.S. Mail must be addressed to the Assistant Attorney General for the Environment and Natural Resources Division, in care of Chief, Environmental Enforcement Section, Room 13073, 1425 New York Avenue, NW., Washington, DC 20005. Comments should refer to *In re Washington Group International, et al.*, DOJ Ref. #90–11–2–07499/1.

The proposed Settlement Agreement may be examined at the office of the United States Attorney, District of Nevada, 100 West Liberty Street, Suite 600, Reno, Nevada 89501 and the U.S. Department of Agriculture, Pacific Region—Portland Office, 1220 SW. Third Avenue, Room 1734, Portland, OR 97204–2825. During the public comment period, the proposed Settlement Agreement may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/open.html*. A copy of the proposed Settlement Agreement may be obtained by mail from the Consent Decree Library, PO Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by telefaxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), telefax no. (202) 514–0097, phone confirmation number (202) 514–1547. The Agreement, without exhibits, consists of 18 pages. Including Exhibits A and B, the Agreement consists of 30 pages. Exhibit C is a voluminous exhibit consisting of ten insurance policies. Copies of the insurance policies may be obtained by calling David Street at (202) 514–5471. In requesting copies of the Agreement, specify whether copies of exhibits are sought and include a check in the appropriate amount (25 cents per page reproduction cost) for *In re Washington Group International, Inc., et al.*, payable to the U.S. Treasury.

Robert E. Maher, Jr.,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 04–6763 Filed 3–25–04; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review; Comment Request

March 17, 2004.

The Department of Labor (DOL) has submitted the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35). A copy of each ICR, with applicable supporting documentation, may be obtained by contacting the Department of Labor (DOL). To obtain documentation, contact Ira Mills on 202–693–4122 (this is not a toll-free number) or E-Mail: *mills.ira@dol.gov*.

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL, Office of Management and Budget, Room 10235, Washington, DC 20503 202–395–7316 (this is not a toll-free number), within 30 days from the date of this publication in the **Federal Register**.

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Agency: Employment and Training Administration.

Type of Review: Extension of a currently approved collection.

Title: Domestic Agriculture In-Season Wage Report.

OMB Number: 1205–0017.

Frequency: Annually.

Affected Public: Individuals or households; State, local or tribal government; Federal government.

Number of Respondents: 38,805.

Number of Annual Responses: 38,805.

Form No.	Affected public	Respondents	Frequency	Average time	
				Per response	Total hours
ETA 232	States	600	Once	11 hours	6,600
ETA 232A	Employers	38,805	Once	15 min.	9,701

[1] Formally known as the Plan Committee in Bankruptcy Case No. 01–31627–GWZ, before the Bankruptcy Court for the District of Nevada.

Burden Hours Total: 16,301.

Total annualized capital/startup costs: $0.

Total annual costs (operating/maintaining systems or purchasing services): $0.

Description: State employment agencies need prevailing wage rates in order to process employers' applications for intrastate and interstate and H–2A foreign workers. The wage rate cover agriculture and logging jobs. Domestic Migrant and local seasonal as well as foreign H–2A farmworkers are hired for these jobs.

Ira L. Mills,

Departmental Clearance Officer.

[FR Doc. 04–6784 Filed 3–25–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review; Comment Request

March 18, 2004.

The Department of Labor (DOL) has submitted the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35). A copy of each ICR, with applicable supporting documentation, may be obtained by contacting the Department of Labor (DOL). To obtain documentation, contact Ira Mills on 202–693–4122 (this is not a toll-free number) or E-Mail: *mills.ira@dol.gov.*

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL, Office of Management and Budget, Room 10235, Washington, DC 20503, 202–395–7316 (this is not a toll-free number), within 30 days from the date of this publication in the **Federal Register.**

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Agency: Employment Standards Administration.

Type of Review: Extension of a currently approved collection.

Title: Records to be kept by Employers—Fair Labor Standards Act (FLSA).

OMB Number: 1215–0017.

Frequency: Weekly.

Affected Public: Business or other for-profit; Individuals or household; Farms; Not-for-profit institutions; Federal government; State, local, or tribal government.

Number of Respondents: 5,800,000.

Number of Annual Responses: 5,800,000.

Estimated Time Per Response:

29 CFR	Employers	Employees	Burden hours
516.2	5,787,400	86,250,000	622,400
516.15	(59)	(1,000)	67
516.26	(2,000)	(25,000)	2,083
516.28	(227,000)	(1,815,400)	30,257
516.31	(1,150)	(4,600)	153
516.33	(91,800)	(918,000)	4,590
519.7 & 519.17	(350)	(5,300)	442
520.508	(400)	(424)	2
525.16	(6,139)	(350,000)	350,000
553.50	(10,925)	(1,187,500)	5,463
570.50	(500)	(500)	8
570.72	(12,000)	(20,000)	333

Burden Hours Total: 1,015,798.

Total annualized capital/startup costs: $0.

Total annual costs (operating/maintaining systems or purchasing services): $0.

Description: The FLSA sets minimum wage, overtime pay, and child labor and Recordkeeping standards. The requirements apply to employees engaged in interstate commerce or in the production of goods for interstate commerce and to employees in certain enterprises (including employees of a public agency). However, the law provides exemptions from some of its standards for employees in certain types of employment.

Ira L. Mills,

Departmental Clearance Officer.

[FR Doc. 04–6785 Filed 3–25–04; 8:45 am]

BILLING CODE 4510–27–P

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB review; comment request

March 18, 2004.

The Department of Labor (DOL) has submitted the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35). A copy of each ICR, with applicable supporting documentation, may be obtained by contacting the Department of Labor (DOL). To obtain documentation, contact Ira Mills on 202–693–4122 (this is not a toll-free number) or E-Mail: *mills.ira@dol.gov.*

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL, Office of Management and Budget, Room 10235, Washington, DC 20503 202–395–7316 (this is not a toll-free number), within 30 days from the date of this publication in the **Federal Register.**

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will be have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Agency: Employment Standards Administration.

Type of Review: Revision of a currently approved collection.

Title: Construction Recordkeeping and Reporting.

OMB Number: 1215–0163.

Frequency: Annually.

Affected Public: Business or other for-profit, Not-for-profit institutions.

Total Respondents: 100,000.

Total Annual Responses: 100,000.

Average Time per Response, Recordkeeping: 48 hours.

Records Maintenance: 8 to 24 hours.

Affirmative Action Plan, Initial Development: 18 hours.

Affirmative Action Plan, Annual Update: 7.5 hours.

Affirmative Action Plan, Maintenance: 7.5 hours.

Compliance Reviews: 1–2 hours.

Total Burden Hours, Recordkeeping and Reporting: 4,841,468.

Total Burden Cost (capital/startup): $8,217.

Total Annual Costs (operating/maintaining systems or purchasing services): $0.

Description: Part 60–4 sets out the purpose and scope of the affirmative action requirements for construction contractors. Accordingly, contractors should implement the specific affirmative action steps in accordance with 41 CFR 60–4.3(a)7, Standard Federal Equal Employment Opportunity Construction Contract specifications (Executive Order 11246, as amended).

Ira L. Mills,

Departmental Clearance Officer.

[FR Doc. 04–6786 Filed 3–25–04; 8:45 am]

BILLING CODE 4510–CM–M

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB review; comment request

March 18, 2004.

The Department of Labor (DOL) has submitted the following public information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35). A copy of each ICR, with applicable supporting documentation, may be obtained by contacting the Department of Labor (DOL). To obtain documentation, contact Ira Mills on 202–693–4122 (this is not a toll-free number) or E-Mail: *mills.ira@dol.gov*.

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL, Office of Management and Budget, Room 10235, Washington, DC 20503 202–395–7316 (this is not a toll-free number), within 30 days from the date of this publication in the **Federal Register**.

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Agency: Employment Standards Administration.

Type of Review: Extension of a currently approved collection.

Title: Certification By School Official.

OMB Number: 1215–0061.

Frequency: Annually.

Affected Public: State, local, or tribal government; Not-for-profit institutions.

Number of Respondents: 500.

Number of Annual Responses: 500.

Estimated Time Per Response: 10 minutes.

Burden Hours Total: 84.

Total annualized capital/startup costs: $0.

Total annual costs (operating/maintaining systems or purchasing services): $0.

Description: In order to be a dependent that is eligible for black lung benefits, a child aged 18 to 23 must be a full-time student as described in the Black Lung Benefits Act, 30 USC 901 *et. seq.* and attending regulations 20 CFR 725.209. The form CM–981 is used to verify full-time student status.

Ira L. Mills,

Departmental Clearance Officer.

[FR Doc. 04–6787 Filed 3–25–04; 8:45 am]

BILLING CODE 4510–CK–M

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 or prevailing rates and fringe benefits have been made in accordance with 29 CFR part 1, by authority of the Secretary of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR part 1, Appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedeas decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register**, or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR parts 1 and 5. Accordingly, the applicable decisions, 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

Massachusetts
MA030019 (Jun. 13, 2003)

Volume II

Maryland
MD030002 (Jun. 13, 2003)
MD030015 (Jun. 13, 2003)
MD030019 (Jun. 13, 2003)
MD030031 (Jun. 13, 2003)
MD030043 (Jun. 13, 2003)
MD030055 (Jun. 13, 2003)

Pennsylvania
PA030007 (Jun. 13, 2003)
PA030021 (Jun. 13, 2003)
PA030023 (Jun. 13, 2003)
PA030024 (Jun. 13, 2003)
PA030029 (Jun. 13, 2003)
PA030033 (Jun. 13, 2003)
PA030040 (Jun. 13, 2003)
PA030052 (Jun. 13, 2003)
PA030060 (Jun. 13, 2003)
PA030065 (Jun. 13, 2003)

Virginia
VA030025 (Jun. 13, 2003)
VA030087 (Jun. 13, 2003)
VA030088 (Jun. 13, 2003)
VA030092 (Jun. 13, 2003)
VA030099 (Jun. 13, 2003)

Volume III

None

Volume IV

Illinois
IL030001 (Jun. 13, 2003)
IL030009 (Jun. 13, 2003)
IL030010 (Jun. 13, 2003)
IL030039 (Jun. 13, 2003)
IL030053 (Jun. 13, 2003)
IL030055 (Jun. 13, 2003)
IL030056 (Jun. 13, 2003)
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IL030069 (Jun. 13, 2003)

Michigan
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MI030101 (Jun. 13, 2003)
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MI030105 (Jun. 13, 2003)
MI030106 (Jun. 13, 2003)

Wisconsin
WI030003 (Jun. 13, 2003)
WI030006 (Jun. 13, 2003)
WI030007 (Jun. 13, 2003)
WI030013 (Jun. 13, 2003)
WI030016 (Jun. 13, 2003)
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WI030032 (Jun. 13, 2003)
WI030033 (Jun. 13, 2003)
WI030039 (Jun. 13, 2003)
WI030040 (Jun. 13, 2003)

Volume V

Iowa
IA030005 (Jun. 13, 2003)

Volume VI

Idaho
ID030003 (Jun. 13, 2003)
ID030015 (Jun. 13, 2003)
ID030019 (Jun. 13, 2003)

Oregon
OR030001 (Jun. 13, 2003)
OR030002 (Jun. 13, 2003)

OR030007 (Jun. 13, 2003)

Volume VII

Arizona
AZ030002 (Jun. 13, 2003)
AZ030003 (Jun. 13, 2003)
AZ030004 (Jun. 13, 2003)
AZ030005 (Jun. 13, 2003)
AZ030008 (Jun. 13, 2003)
AZ030010 (Jun. 13, 2003)
AZ030011 (Jun. 13, 2003)
AZ030012 (Jun. 13, 2003)
AZ030016 (Jun. 13, 2003)
AZ030017 (Jun. 13, 2003)
California
CA030001 (Jun. 13, 2003)
CA030004 (Jun. 13, 2003)
CA030009 (Jun. 13, 2003)
CA030013 (Jun. 13, 2003)
CA030030 (Jun. 13, 2003)
CA030032 (Jun. 13, 2003)
CA030033 (Jun. 13, 2003)
Hawaii
HI030001 (Jun. 13, 2003)
Nevada
NV030002 (Jun. 13, 2003)

General Wage Determination Publication

General wage determinations issued under the Davis-Bacon and related Acts, including those noted above, may be found in the Government Printing Office (GPO) document entitled "General Wage Determinations Issued Under the Davis-Bacon And Related Acts". This publication is available at each of the 50 Regional Government Depository Libraries and many of the 1,400 Government Depository Libraries across the country.

General wage determinations issued under the Davis-Bacon and related Acts are available electronically at no cost on the Government Printing Office site at *http://www.access.gpo.gov/davisbacon.* They are also available electronically by subscription to the Davis-Bacon Online Service (*http://davisbacon.fedworld.gov*) of the National Technical Information Service (NTIS) of the U.S. Department of Commerce at 1–800–363–2068. This subscription offers value-added features such as electronic delivery of modified wage decisions directly to the user's desktop, the ability to access prior wage decisions issued during the year, extensive Help desk Support, etc.

Hard-copy subscriptions may be purchased from: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402; (202) 512–1800.

When ordering hard-copy subscription(s), be sure to specify the State(s) of interest, since subscriptions may be ordered for any or all of the six separate volumes, arranged by State. Subscriptions include an annual edition (issued in January or February) which includes all current general wage determinations for the States covered by each volume. Throughout the remainder of the year, regular weekly updates will be distributed to subscribers.

Signed in Washington, DC this 18 day of March, 2004.

John Frank,

Acting Chief, Branch of Construction Wage Determinations.

[FR Doc. 04–6473 Filed 3–25–04; 8:45 am]

BILLING CODE 4510–27–M

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. ICR 1218–0238 (2004)]

Standard on Portable Fire Extinguishers (Annual Maintenance Certification Record); Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for comment.

SUMMARY: OSHA solicits comments concerning its proposal to extend OMB approval of the Information Collection requirement contained in the Portable Fire Extinguishers Standard (Annual Maintenance Certification Record) (29 CFR 1910.157(e)(3)). The annual maintenance inspection ensures that portable fire extinguishers are in safe operating condition in case of a fire, while the maintenance record provides evidence to employees and Agency compliance officers that employers performed the required inspections.

DATES: Comments must be submitted by the following date:

Hard Copy: Your comments must be submitted (postmarked or received) by May 25, 2004.

Facsimile and electronic transmission. Your comments must be received by May 25, 2004.

ADDRESSES:

I. Submission of Comments

Regular mail, express delivery, hand delivery, and messenger service. Submit your comments and attachments to the OSHA Docket Office, Docket No. ICR 1218–0238 (2004), Room N–2625, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. OSHA Docket Office and Department of Labor hours of operation are 8:15 a.m. to 4:45 p.m., e.s.t.

Facsimile: If your comments, including any attachments, are 10 pages or fewer, you may fax them to the OSHA Docket Office at (202) 693–1648. You must include the docket number, ICR 1218–0238 (2004), in your comments.

Electronic: You may submit comments, but not attachments, through the Internet at *http://ecomments.osha.gov/.*

II. Obtaining Copies of the Supporting Statement for the Information Collection Request

The Supporting Statement for the Information Collection Request (ICR) is available for downloading from OSHA's Web site at *http://www.osha.gov.* The Complete ICR, containing the OMB Form 83–I, Supporting Statement, and attachments, is available for inspection and copying in the OSHA Docket Office, at the address listed above. A printed copy of the ICR can be obtained by contacting Theda Kenney at (202) 693–2222.

FOR FURTHER INFORMATION CONTACT: Theda Kenney, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, Room N–3609, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document by (1) hard copy, (2) fax transmission (facsimile), or (3) electronically through the OSHA Web page. Please note that you cannot attach materials such as studies or journal articles to electronic comments. If you have additional materials, you must submit three copies of them to the OSHA Docket Office at the address above. The additional materials must clearly identify your electronic comments by name, date, subject and docket number so that we can attach them to your receipt comments. Because of security related problems there may be a significant delay in the receipt of comments by regular mail. Please contact the OSHA Docket Office at (202) 693–2350 for information about security procedures concerning the delivery of materials by express delivery, hand delivery and messenger service.

II. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (*i.e.,* employer burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the

Paperwork Reduction Act of 1995 (PRA–95) (44 U.S.C. 3506(c)(2)(A)).

This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is correct. The Occupational Safety and Health Act of 1970 (the Act) authorizes information collection by employers as necessary or appropriate for enforcement of the Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657).

Paragraph (e)(3) of the Standard specifies that employers must subject each portable fire extinguisher to an annual maintenance inspection and record the date of the inspection. In addition, this provision requires employers to retain the inspection record for one year after the last entry or for the life of the shell, whichever is less, and to make the record available to OSHA upon request. This recordkeeping requirement assures employees and Agency compliance officers that portable fire extinguishers located in the workplace will operate normally in case of fire; in addition, this requirement provides evidence to OSHA compliance officers during an inspection that the employer performed the required maintenance checks on the portable fire extinguishers.

III. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information-collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

IV. Proposed Actions

OSHA is proposing to extend the information collections requirements in the Portable Fire Extinguishers Standard (Annual Maintenance Certification Record) (29 CFR 1910.157(e)(3)). The Agency will summarize the comments submitted in response to this notice, and will include this summary in its request to OMB to extend the approval of the information collection requirement.

Type of Review: Extension of currently approved information collection requirements.

Title: Portable Fire Extinguishers Standard (Annual Maintenance Certification Record) (29 CFR 1910.157(e)(3)).

OMB Number: 1218–0238.

Affected Public: Business or other for-profit; not-for-profit institutions; Federal government; State, local, or tribal governments.

Number of Respondents: 9,000,000.

Frequency of Recordkeeping: Annually.

Average Time Per Response: 30 minutes (.50 hour) to perform and record the required maintenance inspection.

Total Annual Hours Requested: 67,500.

Estimated Cost (Operation and Maintenance): $19,440,000.

V. Authority and Signature

John L. Henshaw, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506), and Secretary of Labor's Order No. 5–2002 (67 FR 65008).

Signed at Washington, DC, on March 23, 2004.

John L. Henshaw,

Assistant Secretary of Labor.

[FR Doc. 04–6847 Filed 3–25–04; 8:45 am]

BILLING CODE 4510–26–M

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. ICR–1218–0233(2004)]

Construction Records for Rigging Equipment for Material Handling; Extension of the Office of Management and Budget's (OMB) Approval of Information-Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor

ACTION: Request for Comment.

SUMMARY: OSHA solicits comment concerning its proposal to extend OMB approval of the information-collection requirements contained in paragraphs (b)(1), (b)(6)(i), (b)(6)(ii), (c)(15)(iii), (c)(1)(i), (ii), and (iii), and (f)(2) of the Rigging Equipment for Construction Standard (29 CFR 1926.251). These paragraphs require affixing identification tags or markings on rigging equipment, developing and maintain; inspection records; and retaining proof-testing certificates.

DATES: Comments must be submitted by the following dates: *Hard Copy:* Your comments must be submitted (postmarked or received) by May 25, 2004.

Faxcsimile and electronic transmission: Your comments must be received by May 25, 2004.

ADDRESSES:

I. Submission of Comments

Regular mail, express delivery, hand-delivery, and messenger service: Submit your comments and attachments to the OSHA Docket Office, Docket No. ICR 1218–0233(2004), Room N–2625, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. OSHA Docket Office and Department of Labor hours of operation are 8:15 a.m. to 4:45 p.m., e.s.t.

Facsimile: If your comments, including any attachments, are 10 pages or fewer, you may fax them to the OSHA Docket Office at (202) 693–1648. You must include the docket number, ICR 1218–0233(2004), in your comments.

Electronic: You may submit comments, but not attachments, through the Internet at *http://ecomments.osha.gov/.*

II. Obtaining Copies of the Supporting Statement for the Information Collection Request

The Supporting Statement for the Information Collection Request (ICR) is available for downloading from OSHA's Web site at *http://www.osha.gov.* The complete ICR, containing the OMB 83–I Form, Supporting Statement, and attachments is available for inspection and copying in the OSHA Docket Office, at the address listed above. A printed copy of the supporting statement can be obtained by contacting Todd Owen at (202) 693–2222.

FOR FURTHER INFORMATION CONTACT: Noah Connell, Directorate of Construction, OSHA, U.S. Department of Labor, Room N–3467, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document by (1) hard copy, (2) FAX transmission (facsimile), or (3) electronically through the OSHA webpage. Please note you cannot attach

materials such as studies or journal articles to electronic comments. If you have additional materials, you must submit three copies of them to the OSHA Docket Office at the address above. The additional materials must clearly identify your electronic comments by name, date, subject and docket number so we can attach them to your comments. Because of security-related problems there may be a significant delay in the receipt of comments by regular mail. Please contact the OSHA Docket Office at (202) 693–2350 for information about security procedures concerning the delivery of material by express delivery, hand delivery and messenger service.

II. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (*i.e.*, employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information-collection requirements in accordance with the Paperwork Reducton Act of 1995 (PRA–95) (44 U.S.C. 3506(c)(2)(A)).

This program ensures that information is in the desired format, reporting burden (time and costs) is minimized, collection instruments are understandable, and OSHA's estimate of the information-collection burden is correct.

This program ensures that information is in the desired format, reporting burden (time and cost) is minimal. collection instruments are clearly understood, and OSHA's estimate of the information-collection burden is correct. The Occupational Safety and Health Act of 1910 (the Act) authorizes information collection by employers as necessary or appropriate for enforcement of the Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The Rigging Equipment in Construction Standard (*i.e.*, "the Standard") specifies the paperwork requirements. The following section describes who uses the information collected under each requirement, as well as how they use it.

Alloy Steel Chains, Paragraph (b)

Paragraph (b)(1) requires that alloy steel chains have permanently affixed durable identification tags, stating size, grade, rated capacity and sling manufacturer. Paragraph (b)(6)(i) requires the employer to make a thorough periodic inspection of alloy steel chain slings in use on a regular basis, but at least once a year. Paragraph (b)(6)(ii) requires the employer to make and maintain a record of the most recent month in which each alloy steel chain was inspected and make the record available for examination.

End Attachments, Paragraph (c)

Paragraph (c)(15)(ii) requires that all welded end attachments of wire rope slings be proof tested by the manufacturer at twice their rated capacity prior to initial use, and that the employer retain a certificate of the proof test and make it available for examination.

Synthetic Webbing (nylon, polyester, and polypropylene), Paragraph (e)

Paragraphs (e)(1)(i), (ii), and (iii) requires that synthetic web slings be marked or coded to show the manufactures trademark, rated capacity for the type of hitch and type of synthetic web material.

Shackles and Hooks, Paragraph (f)

Paragraph (f)(2) requires that all hooks for which no applicable manufacturer's recommendations are available be tested twice before they are put into use. The employer shall maintain a record of the dates and results of the tests.

III. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information-collection requirements are necessary for the proper performance of the Agency's functions to protect workers, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information-collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

IV. Proposed Actions

OSHA is proposing to extend the collection-of-information in the Rigging Equipment Standard (29 CFR 1926.251).

The Agency will summarize the comments submitted in response to this notice, and will include this summary in its request to OMB to extend the approval of these information-collection requirements.

Type of Review: Extension of a currently-approved information-collection requirement.

Title: Rigging Equipment for Material handling (29 CFR 1926.25(b)(1), (b)(6)(i), (b)(6)(ii), (c)(15)(ii), (e)(1)(i), (ii), and (iii), and (f)(2).

OMB Number: 1218–0233.

Affected Public: Business or other for-profit; Not-for-profit institutions; Federal government; State, local or tribal governments.

Number of Respondents: 1,327,370.

Frequency of Recordkeeping: On occasion.

Average Time Per Response: Average 3 minutes (.05 hour) for an employer to maintain and disclose a certificate to 30 minutes (.5 hour) for employer to acquire information and make a tag for a sling.

Estimated Total Burden Hours: 56,335.

Estimated Cost (Operation and Maintenance): $0.

IV. Authority and Signature

John L. Henshaw, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506), and Secretary of Labor's Order No. 5–2002 (67 FR 65008).

Signed at Washington, DC, on March 23, 2004.

John L. Henshaw,

Assistant Secretary of Labor.

[FR Doc. 04–6848 Filed 3–25–04; 8:45 am]

BILLING CODE 4510–26–M

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. ICR–1218–0218(2004)]

Hydrostatic Testing Provision of the Portable Fire Extinguishers Standard; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for comment.

SUMMARY: OSHA solicits comments concerning its proposal to extend OMB approval of the information collection requirement contained in the Hydrostatic Testing Provision of the Portable Fire Extinguishers Standard (29 CFR 1910.157(f)(16)). The paperwork provision of the hydrostatic testing provision specifies requirements for developing and maintaining certification records to demonstrate that portable fire extinguishers have been tested in accordance with and at intervals specified by the Standard (29

CFR 1910.157(f)(16)). The purpose of the requirement is to reduce employees' risk of death or serious injury by ensuring that portable fire extinguishers are in safe operating condition.

DATES: Comments must be submitted by the following dates:

Hard copy: Your comments must be submitted (postmarked or received) by May 25, 2004.

Facsimile and electronic transmission: Your comments must be received by May 25, 2004.

ADDRESSES:

I. Submission of Comments

Regular mail, express delivery, hand delivery, and messenger service: Submit your comments and attachments to the OSHA Docket Office, Docket No. ICR 1218–0218(2004), Room N–2625, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. OSHA Docket Office and Department of Labor hours of operation are: 8:15 a.m. to 4:45 p.m., e.s.t.

Facsimile: If your comments, including any attachments, are 10 pages or fewer, you may fax them to the OSHA Docket Office at (202) 693–1648. You must include the docket number, ICR 1218–0218(2004), in your comments.

Electronic: You may submit comments, but not attachments, through the Internet at *http://ecomments.osha.gov/*.

II. Obtaining Copies of the Supporting Statement for the Information Collection Request

The Supporting Statement for the Information Collection Request (ICR) is available for downloading from OSHA's Web site at *http://www.osha.gov*. The supporting statement is available for inspection and copying in the OSHA Docket Office, at the address listed above. A printed copy of the ICR can be obtained by contacting Theda Kenney at (202) 693–2222.

FOR FURTHER INFORMATION CONTACT: Theda Kenney, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, Room N–3609, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document by (1) hard copy, (2) fax transmission (facsimile), or (3) electronically through the OSHA Web page. Please note you cannot attach materials such as studies or journal articles to electronic comments. If you have additional materials, you must submit three copies of them to the OSHA Docket Office at the address above. The additional materials must clearly identify your electronic comments by name, date, subject and docket number so we can attach them to your comments. Because of security-related problems, there may be a significant delay in the receipt of comments by regular mail. Please contact the OSHA Docket Office at (202) 693–2350 for information about security procedures concerning the delivery of materials by express delivery, hand delivery, and messenger service.

II. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (*i.e.*, employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA–95) (44 U.S.C. 3506(c)(2)(A)).

This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is correct. The Occupational Safety and Health Act of 1970 (the "Act") authorizes information collection by employers regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657).

The following section describes who uses the information on the hydrostatic testing of portable fire extinguishers that is collected under the records requirement (29 CFR 1910.157(f)(16)), as well as how they use it. The purpose of the requirement is to reduce employees' risk of death or serious injury by ensuring that portable fire extinguishers are in safe operating condition.

The following describes who uses the information in the certification record, as well as how they use it. The purpose of the requirement is to reduce employees' risk of death or serious injury by ensuring that portable fire extinguishers are in safe operation condition.

Test Records (§ 1910.157(f)(16))

Paragraph (f)(16) requires employers to develop and maintain a certification record of hydrostatic testing of portable fire extinguishers. The certification record must include the date of inspection, the signature of the person who performed the test, and the serial number (or other identifier) of the fire extinguisher that was tested.

Disclosure of Test Certification Records

The certification record must be made available to the Assistant Secretary or his representative upon request. The certification record provides assurance to employers, employees, and OSHA compliance officers that the fire extinguishers have been hydrostatically tested in accordance with and at the intervals specified in § 1910.157(f)(16), thereby ensuring that they will operate properly in the event employees need to use them. Additionally, these records provide the most efficient means for compliance officers to determine that an employer is complying with the hydrostatic testing provision.

III. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information-collection requirements are necessary for the proper performance of the Agency's functions to protect workers, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information-collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

IV. Proposed Actions

OSHA is proposing to extend the information collection requirement in the Hydrostatic Testing Provision of the Portable Fire Extinguishers Standard (29 CFR 1910.157(f)(16)). OSHA will summarize the comments submitted in response to this notice, and will include this summary in the request to OMB to extend the approval of the information collection requirement.

Type of Review: Extension of a currently-approved information-collection requirement.

Title: The Hydrostatic Testing Provision of the Portable Fire Extinguishers Standard (29 CFR 1910.157(f)(16)).

OMB Number: 1218–0218.

Affected Public: Business or other for-profit; not-for-profit institutions; State, local or tribal government; Federal government.

Number of Respondents: 9,000,000.

Frequency of Recordkeeping: On occasion.

Average Time per Response: Varies from one minute (.02 hour) to maintain

a certification record of fire extinguishers tested off-site to 32 minutes (.55 hour) to test fire extinguishers on-site and to generate and maintain the certification record.

Total Annual Hours Requested: 123,180.

Estimate Cost (Operation and Maintenance): $12,240,000.

V. Authority and Signature

John L. Henshaw, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506), and Secretary of Labor's Order No. 5–2002 (67 FR 65008).

Signed in Washington, DC, on March 23, 2004.

John L. Henshaw,

Assistant Secretary of Labor.

[FR Doc. 04–6849 Filed 3–25–04; 8:45 am]

BILLING CODE 4510–26–M

NATIONAL SCIENCE FOUNDATION

Notice of Permit Applications Received Under the Antarctic Conservation Act of 1978 (P.L. 95–541)

AGENCY: National Science Foundation.

ACTION: Notice of Permit Applications Received Under the Antarctic Conservation Act of 1978, Pub. L. 95–541.

SUMMARY: The National Science Foundation (NSF) is required to publish notice of permit applications received to conduct activities regulated under the Antarctic Conservation Act of 1978. NSF has published regulations under the Antarctic Conservation Act at Title 45 Part 670 of the Code of Federal Regulations. This is the required notice of permit applications received.

DATES: Interested parties are invited to submit written data, comments, or views with respect to this permit application by April 26, 2004. This application may be inspected by interested parties at the Permit Office, address below.

ADDRESSES: Comments should be addressed to Permit Office, Room 755, Office of Polar Programs, National Science Foundation, 4201 Wilson Boulevard, Arlington, Virginia 22230.

FOR FURTHER INFORMATION CONTACT: Nadene G. Kennedy at the above address or (703) 292–7405.

SUPPLEMENTARY INFORMATION: The National Science Foundation, as directed by the Antarctic Conservation Act of 1978 (Pub. L. 95–541), as amended by the Antarctic Science, Tourism and Conservation Act of 1996, has developed regulations for the establishment of a permit system for various activities in Antarctica and designation of certain animals and certain geographic areas requiring special protection. The regulations establish such a permit system to designate Antarctic Specially Protected Areas.

The applications received are as follows:

1. Applicant

Stacy Kim, Moss Landing Marine Laboratories, San Jose State University, 8272 Moss Landing Road, Moss Landing, CA 95039–9647.

Activity for Which Permit is Requested

Enter Antarctic Specially Protected Area. The applicant proposes to enter the Cape Royds Antarctic Specially Protected Area (ASPA #121) for the purpose of diving within the marine boundaries of the site. This area is near a penguin rookery and experiences significant organic enrichment from runoff of guano. This natural enrichment to the pelagic and benthic communities can be compared to the anthropogenic enrichment from the near McMurdo Station. Access to the site will be via tracked vehicle across the sea ice from McMurdo Station, approaching the vicinity of Shackleton's Depot. Depending on the sea ice, it may be necessary to walk diving gear to the dive locations within the marine boundaries of the site, but outside the marked boundaries of the rookery. The applicant proposes to make approximately 3–4 dives to collect samples.

Location

Cape Royds, Ross Island (ASPA #121).

Dates

October 13, 2004 to December 10, 2004.

Nadene G. Kennedy,

Permit Officer, Office of Polar Programs.

[FR Doc. 04–6819 Filed 3–25–04; 8:45 am]

BILLING CODE 7555–01–M

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Computer and Information Science and Engineering; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Advisory Committee for Computer and Information Science and Engineering—(1115).

Date and Time: April 23, 2004: 8 a.m. to 3:30 p.m.

Place: Stafford II, room 555, 4121 Wilson Blvd., Arlington, VA 22230.

Type of Meeting: Open.

Contact Person: Gwen Barber-Blount, Office of the Assistant Director, Directorate for Computer and Information Science and Engineering, National Science Foundation, 4201 Wilson Blvd., Suite 1105, Arlington, VA 22230. Telephone: (703) 292–8900.

Minutes: May be obtained from the contact person listed above.

Purpose of Meeting: To advise NSF on the impact of its policies, programs and activities on the CISE community. To provide advice to the Assistant Director/CISE on issues related to long range planning, and to form ad hoc subcommittees to carry out needed studies and tasks.

Agenda: Report from the Assistant Director. Discussion of education, diversity, workforce issues in IT; science of design; and cyberinfrastructure.

Dated: March 23, 2004.

Susanne Bolton,

Committee Management Officer.

[FR Doc. 04–6812 Filed 3–25–04; 8:45 am]

BILLING CODE 7555–01–M

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Mathematical and Physical Sciences; Notice of Meeting

In accordance with Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name: Advisory Committee for Mathematical and Physical Sciences (#66).

Date/Time: April 22, 2004, 8 AM–6 PM; April 23, 2004, 8 AM–3:30 PM.

Place: National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230, Room 375.

Type of Meeting: Open.

Contact Person: Dr. Morris L. Aizenman, Senior Science Associate, Directorate for Mathematical and Physical Sciences, Room 1005 National Science Foundation, 4201 Wilson Boulevard, Arlington, VA 22230. (703) 292–8807.

Purpose of Meeting: To provide advice and recommendations concerning NSF science and education activities within the Directorate for Mathematical and Physical Sciences.

Agenda: Briefing on current status of Directorate, Update and Discussion of MPS Long-term Planning Activities, Meeting of MPSAC with Divisions within MPS Directorate, Review by MPSAC of Committee of Visitors Reports for the Division of Chemistry and the Division of Mathematical Sciences.

Summary of Minutes: May be obtained from the contact person listed above.

Dated: March 23, 2004.

Susanne E. Bolton,

Committee Management Officer.

[FR Doc. 04–6811 Filed 3–25–04; 8:45 am]

BILLING CODE 7555–01–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 52–008–ESP; ASLBP No. 04–822–02–ESP]

Dominion Nuclear North Anna, LLC; Establishment of Atomic Safety and Licensing Board

Pursuant to delegation by the Commission dated December 29, 1972, published in the **Federal Register**, 37 FR 28710, the Commission's March 2, 2004, memorandum and order (CLI–04–08, 59 NRC__(Mar. 2, 2004)), and sections 2.104, 2.300, 2.303, 2.309, 2.311, 2.318, and 2.321 of the Commission's regulations, all as amended, an Atomic Safety and Licensing Board is being established to preside over the following proceeding:

Dominion Nuclear North Anna, LLC (Early Site Permit for North Anna ESP Site)

This Board is being established pursuant to a November 25, 2003 notice of hearing published in the **Federal Register** (68 FR 67489 (Dec. 2, 2003)). The hearing will consider the September 25, 2003, application of Dominican Nuclear North Anna, LLC, (DNNA) pursuant to 10 CFR part 52 for an early site permit (ESP) for the North Anna ESP site, as well as the January 2, 2004, hearing request and petition to intervene submitted by the Blue Ridge Environmental Defense League, the Nuclear Information and Resource Service, and Public Citizen regarding the DNNA ESP application.

The Board is comprised of the following administrative judges:

G. Paul Bollwerk, III, Chair, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001;

Dr. Paul B. Abramson, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001;

Dr. Anthony J. Baratta, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

All correspondence, documents, and other materials shall be filed with the administrative judges in accordance with 10 CFR 2.302, and the March 8, 2004, initial prehearing order issued in the proceeding.

Issued in Rockville, Maryland, this 22nd day of March, 2004.

G. Paul Bollwerk, III,

Chief Administrative Judge, Atomic Safety and Licensing Board Panel.

[FR Doc. E4–686 Filed 3–25–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 52–007–ESP; ASLBP No. 04–821–01–ESP]

Exelon Generation Company, LLC; Establishment of Atomic Safety and Licensing Board

Pursuant to delegation by the Commission dated December 29, 1972, published in the **Federal Register**, 37 FR 28710, the Commission's March 2, 2004, memorandum and order (CLI–04–08, 59 NRC __ (Mar. 2, 2004)), and sections 2.104, 2.300, 2.303, 2.309, 2.311, 2.318, and 2.321 of the Commission's regulations, all as amended, an Atomic Safety and Licensing Board is being established to preside over the following proceeding:

Exelon Generation Company, LLC (Early Site Permit for Clinton ESP Site)

This Board is being established pursuant to a December 8, 2003, notice of hearing published in the **Federal Register** (68 FR 69426 (Dec. 12, 2003)). The hearing will consider the September 25, 2003, application of Exelon Generation Company, LLC, (Exelon) pursuant to 10 CFR part 52 for an early site permit (ESP) for the Clinton ESP site, as well as the January 12, 2004, hearing request and petition to intervene submitted by the Blue Ridge Environmental Defense League, the Nuclear Information and Resource Service, Public Citizen, the Environmental Law and Policy Center, and the Nuclear Energy Information Service regarding the Exelon ESP application.

The Board is comprised of the following administrative judges:

G. Paul Bollwerk, III, Chair, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001;

Dr. Paul B. Abramson, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001;

Dr. Anthony J. Baratta, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

All correspondence, documents, and other materials shall be filed with the administrative judges in accordance with 10 CFR 2.302, and the March 8, 2004, initial prehearing order issued in the proceeding.

Issued in Rockville, Maryland, this 22nd day of March, 2004.

G. Paul Bollwerk, III,

Chief Administrative Judge, Atomic Safety and Licensing Board Panel.

[FR Doc. E4–687 Filed 3–25–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 72–26]

Notice of Issuance of Materials License SNM–2511; Diablo Canyon Independent Spent Fuel Storage Installation

The U.S. Nuclear Regulatory Commission (NRC or the Commission) has issued Materials License No. SNM–2511 to the Pacific Gas and Electric Company (PG&E) for the receipt, possession, storage, and transfer of spent fuel at the Diablo Canyon Independent Spent Fuel Storage Installation (ISFSI), located in San Luis Obispo County, California. This Materials License is issued under the provisions of title 10 of the Code of Federal Regulations, part 72 (10 CFR part 72), and is effective as of the date of issuance. A license for an ISFSI under 10 CFR part 72 is issued for 20 years, but the licensee may seek to renew the license prior to its expiration.

The Diablo Canyon ISFSI is licensed to provide interim storage in a dry cask storage system for up to 2100 metric tons of uranium contained in intact and damaged fuel assemblies and associated radioactive materials resulting from the operation of the Diablo Canyon Power Plant. The dry cask storage system authorized for use is a site-specific version of the HI–STORM 100 system designed by Holtec International.

Following receipt of PG&E's application dated December 21, 2001, the NRC staff published a "Notice of Docketing, Notice of Proposed Action, and Notice of Opportunity for Hearing for a Materials License for the Diablo Canyon Independent Spent Fuel Storage Installation" in the **Federal Register** on April 22, 2002 (67 FR 19600). The "Notice of Issuance of Environmental Assessment and Finding of No Significant Impact for the Diablo Canyon Independent Spent Fuel Storage Installation," was published in the **Federal Register** on October 30, 2003 (68 FR 61838). The scope of the staff's Environmental Assessment (EA)

included the construction, operation and decommissioning of an ISFSI at the Diablo Canyon site, including impacts resulting from the use of the HI–STORM 100 dry cask storage system.

The NRC staff has completed its environmental, safeguards, and safety reviews of the Diablo Canyon ISFSI license application and safety analysis report, as amended. The NRC staff issued Materials License No. SNM–2511 and its Safety Evaluation Report (SER) for the Diablo Canyon Independent Spent Fuel Storage Installation on March 22, 2004.

For further details with respect to this action, *see* the application dated December 21, 2001, the staff's EA dated October 24, 2003, Materials License SNM–2511 and the staff's SER, dated March 22, 2004, and other related documents, which are publicly available in the records component of NRC's Agencywide Documents Access and Management System (ADAMS). The NRC maintains ADAMS, which provides text and image files of NRC's public documents. These documents may be accessed through the NRC's Public Electronic Reading Room on the Internet at *http://www.nrc.gov/reading-rm/adams.html*. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr@nrc.gov*.

Dated in Rockville, Maryland, this 22nd day of March, 2004.

For the Nuclear Regulatory Commission.

James R. Hall,

Senior Project Manager, Licensing Section, Spent Fuel Project Office, Office of Nuclear Material Safety and Safeguards.

[FR Doc. E4–683 Filed 3–25–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 52–009–ESP; ASLBP No. 04–823–03–ESP]

System Energy Resources, Inc.; Establishment of Atomic Safety and Licensing Board

Pursuant to delegation by the Commission dated December 29, 1972, published in the **Federal Register**, 37 FR 28710, the Commission's March 2, 2004, memorandum and order (CLI–04–08, 59 NRC__ (Mar. 2, 2004)), and sections 2.104, 2.300, 2.303, 2.309, 2.311, 2.318, and 2.321 of the Commission's regulations, all as amended, an Atomic Safety and Licensing Board is being established to preside over the following proceeding:

System Energy Resources, Inc. (Early Site Permit for Grand Gulf ESP Site)

This Board is being established pursuant to a January 7, 2004 notice of hearing published in the **Federal Register** (69 FR 2636 (Jan. 16, 2004)). The hearing will consider the October 16, 2003, application of System Energy Resources, Inc., (SERI) pursuant to 10 CFR part 52 for an early site permit (ESP) for the Grand Gulf ESP site, as well as the February 12, 2004, hearing request and petition to intervene submitted by the Nuclear Information and Resource Service, Public Citizen, the National Association for the Advancement of Colored People Clairborne County, Mississippi Branch, and the Mississippi Chapter of the Sierra Club regarding the SERI ESP application.

The Board is comprised of the following administrative judges:

G. Paul Bollwerk, III, Chair, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001;

Dr. Paul B. Abramson, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001;

Dr. Anthony J. Baratta, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

All correspondence, documents, and other materials shall be filed with the administrative judges in accordance with 10 CFR 2.302, and the March 8, 2004, initial prehearing order issued in the proceeding.

Issued in Rockville, Maryland, this 22nd day of March, 2004.

G. Paul Bollwerk, III,

Chief Administrative Judge, Atomic Safety and Licensing Board Panel.

[FR Doc. E4–685 Filed 3–25–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Appointments to Performance Review Boards for Senior Executive Service

AGENCY: Nuclear Regulatory Commission.

ACTION: Appointment to Performance Review Boards for Senior Executive Service.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has announced the following appointments to the NRC Performance Review Boards.

The following individuals are appointed as members of the NRC Performance Review Board (PRB) responsible for making recommendations to the appointing and awarding authorities on performance appraisal ratings and performance awards for Senior Executives and Senior Level employees:

Patricia G. Norry, Deputy Executive Director for Management Services, Office of the Executive Director for Operations;

Edward T. Baker, Deputy Director, Office of International Programs;

Stephen G. Burns, Deputy General Counsel, Office of the General Counsel;

James E. Dyer, Director, Office of Nuclear Reactor Regulation;

Jesse L. Funches, Chief Financial Officer;

William F. Kane, Deputy Executive Director for Homeland Protection and Preparedness, Office of the Executive Director for Operations;

Luis A. Reyes, Regional Administrator, Region II;

Jacqueline E. Silber, Deputy Chief Information Officer;

Jack R. Strosnider, Deputy Director, Office of Nuclear Regulatory Research;

Martin J. Virgilio, Director, Office of Nuclear Material Safety and Safeguards;

Michael F. Weber, Deputy Director, Office of Nuclear Security and Incident Response.

The following individuals will serve as members of the NRC PRB Panel that was established to review appraisals and make recommendations to the appointing and awarding authorities for NRC PRB members:

Karen D. Cyr, General Counsel, Office of the General Counsel;

Samuel J. Collins, Deputy Executive Director for Reactor Programs, Office of the Executive Director for Operations;

Carl J. Paperiello, Deputy Executive Director for Materials, Research, and State Programs, Office of the Executive Director for Operations.

All appointments are made pursuant to section 4314 of chapter 43 of title 5 of the United States Code.

EFFECTIVE DATE: March 26, 2004.

FOR FURTHER INFORMATION CONTACT: Secretary, Executive Resources Board, U.S. Nuclear Regulatory Commission, Washington, DC 20555; (301) 415–7530.

Dated in Rockville, Maryland, this 5th day of March, 2004.

For the U.S. Nuclear Regulatory Commission,

Carolyn J. Swanson,

Secretary, Executive Resources Board.

[FR Doc. E4–684 Filed 3–25–04; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

[Program Application, OMB No. 3206–0082]

Proposed Collection; Comment Request for a Revised Collection of Information: OPM Form 1300, Presidential Management Fellows

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, May 22, 1995), this notice announces that the Office of Personnel Management (OPM) intends to submit a request to the Office of Management and Budget (OMB). The OPM is requesting OMB to approve a revised collection associated with the OPM Form 1300, Presidential Management Fellows Program Application, which was given emergency approval September 2003. Approval of the Presidential Management Fellows Program (PMF) application is necessary to facilitate the timely nomination, selection and placement of Presidential Management Fellows finalists in Federal agencies.

On November 21, 2003, President George W. Bush signed Executive Order 13318, changing the name of the Presidential Management Intern (PMI) Program to the Presidential Management Fellows (PMF) Program. The OPM is presently finalizing new regulations affecting the program, which may impact the application process.

Comments are particularly invited on: whether this information is necessary for the proper performance of functions of OPM, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

For copies of this proposal, contact Mary Beth Smith-Toomey at (202) 606–8358, FAX (202) 418–3251 or e-mail to *mbtoomey@opm.gov*. Please include your mailing address with your request.

DATES: Comments on this proposal should be received on or before May 25, 2004.

ADDRESSES: Send or deliver comments to: Office of Personnel Management, Division for Human Resources Products and Services, ATTN: Rob Timmins, 1900 E Street, NW., Room 1425, Washington, DC 20415–9820, Email: *ratimmin@opm.gov*.

Office of Personnel Management.

Kay Coles James,

Director.

[FR Doc. 04–6791 Filed 3–25–04; 8:45 am]

BILLING CODE 6325–38–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94–409, that the Securities and Exchange Commission will hold the following meeting during the week of March 29, 2004: A closed meeting will be held on Tuesday, March 30, 2004, at 10:30 a.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (6), (7), (9), and (10) and 17 CFR 200.402(a)(3), (5), (6), (7), 9(ii), and (10), permit consideration of the scheduled matters at the closed meeting.

Commissioner Goldschmid, as duty officer, voted to consider the items listed for the closed meeting in closed session.

The subject matter of the closed meeting scheduled for Tuesday, March 30, 2004, will be:

Formal orders of investigation;

Institution and settlement of injunctive actions; and

Institution and settlement of administrative proceedings of an enforcement nature.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: The Office of the Secretary at (202) 942–7070.

Dated: March 23, 2004.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04–6889 Filed 3–23–04; 4:52 pm]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: [To be announced].

STATUS: Closed Meeting.

PLACE: 450 Fifth Street, NW., Washington, DC.

ANNOUNCEMENT OF ADDITIONAL MEETING: Additional Meeting.

A Closed Meeting will be held on Monday, March 29, 2004 at 4 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matter may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c) (5), (7) (9), and (10) and 17 CFR 200.402(a) (5), (7), (9), and (10) permit consideration of the scheduled matter at the Closed Meeting.

Commissioner Glassman, as duty officer, voted to consider the item listed for the closed meeting in a closed session and determined that no earlier notice thereof was possible.

The subject matter of the Closed Meeting to be held on Monday, March 29, 2004 will be: Institution and settlement of administrative proceedings of an enforcement nature.

At times, changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact the Office of the Secretary at (202) 942–7070.

Dated: March 24, 2004.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04–6982 Filed 3–24–04; 3:47 pm]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49453; File No. SR–Amex–2004–13]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the American Stock Exchange LLC Relating to the Listing and Trading of Contingent Principal Protection Notes Linked to the Performance of the Dow Jones Industrial Average (DJIA)

March 19, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 18, 2004, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and is approving the proposal on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade, contingent principal protected notes ("Notes"), the return which is based upon the performance of which is linked to the Dow Jones Industrial Average ("DJIA" or "Index").

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 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 III 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

Under section 107A of the Amex Company Guide ("Company Guide"), the Exchange may approve for listing and trading securities which cannot be readily categorized under the listing criteria for common and preferred stocks, bonds, debentures, or warrants.[3] The Amex proposes to list for trading under section 107A of the Company Guide notes, the performance of which is linked to the DJIA that provide for contingent principal protection ("Contingent Principal Protected Notes" or "Notes").[4] Citigroup will issue the Notes under the name "Index Leading StockMarket Securities" or "Index LASERS." The DJIA is determined, calculated and maintained solely by Dow Jones.[5] The Notes will provide for an uncapped participation in the positive performance of the DJIA during their term while also reducing the risk exposure to the principal investment amount as long as the Index does not at any time decline to a pre-established level to be determined at the time of issuance (the "Contingent Level"). This Contingent Level will be a pre-determined percentage decline from the level of the Index at the close of the market on the date the Notes are priced for initial sale to the public (the "Initial Level"). The Issuer expects that the Contingent Level will be between 70 and 75 percent of the initial value of the Index. A decline of the Index to the Contingent Level is referred to as a "Contingent Event."

The Notes will conform to the initial listing guidelines under section 107A[6] and continued listing guidelines under sections 1001–1003[7] of the Company Guide. The Notes are senior non-convertible debt securities of Citigroup. The Notes will have a term of no more than ten (10) years. Citigroup will issue the Notes in denominations of whole units (a "Unit"), with each Unit representing a single Note. The original public offering price will be $10 per Unit. The Notes will entitle the owner at maturity to receive at least 100 percent of the principal investment amount as long as the DJIA never experiences a Contingent Event. In the case of a positive Index return, the holder would receive the full principal investment amount of the Note plus the product of $10, the percentage change of the DJIA during the term, and the upside participation rate (expected to be between 110 and 120 percent). Accordingly, even if the Index declines but never reaches the Contingent Level, the holder will receive the principal investment amount of the Notes at maturity. If however, the Notes experience a Contingent Event during the term, the holder loses the "principal protection" and will be entitled to receive a payment based on the percentage change of the Index, positive or negative. In this case, the Notes will not have a minimum principal investment amount that will be repaid,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 27753 (March 1, 1990), 55 FR 8626 (March 8, 1990) (order approving File No. SR–Amex–89–29).

[4] Citigroup Global Markets Holdings, Inc. ("Citigroup") and Dow Jones & Co. ("Dow Jones") have entered into a non-exclusive license agreement providing for the use of the DJIA by Citigroup and certain affiliates and subsidiaries in connection with certain securities including these Notes. Dow Jones is not responsible and will not participate in the issuance and creation of the Notes.

[5] The DJIA is a price-weighted index comprised of 30 common stocks chosen by the editors of the Wall Street Journal ("WSJ") as representative of the broad market of U.S. industry. A price-weighted index refers to an index that assigns weights to component stocks based on the price per share rather than total market capitalization of such component stock. The corporations represented in the DJIA tend to be leaders within their respective industries and their stocks are typically widely held by individuals and institutional investors. Changes in the composition of the DJIA are made solely by the editors of the WSJ. In addition, changes to the common stocks included in the DJIA tend to be made infrequently with most substitutions the result of mergers and other extraordinary corporate actions. However, over time, changes are made to more accurately represent the broad market of U.S. industry. In choosing a new corporation for the DJIA, the editors of the WSJ focus on the leading industrial companies with a successful history of growth and wide interest among investors. Dow Jones, publisher of the WSJ, is not affiliated with Citigroup and has not participated in any way in the creation of the Notes. The number of common stocks in the DJIA has remained at 30 since 1928, and, in an effort to maintain continuity, the constituent corporations represented in the DJIA have been changed on a relatively infrequent basis.

[6] The initial listing standards for the Notes require: (1) A market value of at least $4 million; and (2) a term of at least one year. Because the Notes will be issued in $1,000 denominations, the minimum public distribution requirement of one million units and the minimum holder requirement of 400 holders do not apply. In addition, the listing guidelines provide that the issuer has assets in excess of $100 million, stockholder's equity of at least $10 million, and pre-tax income of at least $750,000 in the last fiscal year or in two of the three prior fiscal years. In the case of an issuer which is unable to satisfy the earning criteria stated in section 101 of the Company Guide, the Exchange will require the issuer to have the following: (1) Assets in excess of $200 million and stockholders' equity of at least $10 million; or (2) assets in excess of $100 million and stockholders' equity of at least $20 million.

[7] The Exchange's continued listing guidelines are set forth in sections 1001 through 1003 of part 10 to the Exchange's Company Guide. Section 1002(b) of the Company Guide states that the Exchange will consider removing from listing any security where, in the opinion of the Exchange, it appears that the extent of public distribution or aggregate market value has become so reduced to make further dealings on the Exchange inadvisable. With respect to continued listing guidelines for distribution of the Notes, the Exchange will rely, in part, on the guidelines for bonds in section 1003(b)(iv). Section 1003(b)(iv)(A) provides that the Exchange will normally consider suspending dealings in, or removing from the list, a security if the aggregate market value or the principal amount of bonds publicly held is less than $400,000.

and accordingly, payment on the Notes prior to or at maturity may be less than the original issue price of the Notes. Accordingly, if the Index experiences a negative return and a Contingent Event, the Notes would be fully exposed to any decline in the level of the DJIA.[8] The Notes, however, are not leveraged on the downside.[9] The Notes are also not callable by the Issuer.

The payment that a holder or investor of a Note will be entitled to receive (the "Redemption Amount") will depend on the relation of the level of the DJIA at the close of the market on a single business day (the "Valuation Date") shortly before maturity of the Notes (the "Final Level") and the Initial Level. In addition, whether the Notes retain "principal protection" or are fully exposed to the performance of the Index is determined by whether the DJIA ever experiences a Contingent Event during the term of the Notes.

If the percentage change of the Index is positive and the Index never experiences a Contingent Event, the Redemption Amount per Unit will equal:

$$\$10+\left[\$10\times\left(\frac{\text{Final Level}-\text{Initial Level}}{\text{Initial Level}}\right)\times\text{Participation Rate}\right]$$

If the percentage change of the Index is zero or negative and the Index never experiences a Contingent Event, the redemption amount per unit will equal the principal investment amount of $10.

If the Index experiences a Contingent Event, the Redemption Amount per Unit will equal:

$$\$10+\left[\$10\times\left(\frac{\text{Final Level}-\text{Initial Level}}{\text{Initial Level}}\right)\right]$$

The Notes are cash-settled in U.S. dollars and do not give the holder any right to receive a portfolio security, dividend payments or any other ownership right or interest in the portfolio or index of securities comprising the DJIA. The Notes are designed for investors who want to participate or gain exposure to the DJIA while partially limiting their investment risk, and who are willing to forego market interest payments on the Notes during the term of the Notes. The Commission has previously approved the listing of securities and options linked to the performance of the DJIA.[10]

As of February 6, 2004, the market capitalization of the securities included in the DJIA ranged from a high of approximately $333.2 billion to a low of approximately $8.4 billion. The average daily trading volume for these same securities for the last six (6) months ranged from a high of approximately 127.74 million shares to a low of approximately 0.31 million shares. The Index levels will be disseminated at least once every fifteen (15) seconds throughout the trading day.

Because the Notes are linked to a portfolio of equity securities, the Amex's existing equity floor trading rules will apply to the trading of the Notes. First, pursuant to Amex Rule 411, the Exchange will impose a duty of due diligence on its members and member firms to learn the essential facts relating to every customer prior to trading the Notes.[11] Second, the Notes will be subject to the equity margin rules of the Exchange.[12] Third, the Exchange will, prior to trading the Notes, distribute a circular to the membership providing guidance with regard to member firm compliance responsibilities (including suitability recommendations) when handling transactions in the Notes and highlighting the special risks and characteristics of the Notes. With respect to suitability recommendations and risks, the Exchange will require members, member organizations and employees thereof recommending a transaction in the Notes: (1) To determine that such transaction is suitable for the customer, and (2) to have a reasonable basis for believing that the customer can evaluate the special characteristics of, and is able to bear the financial risks of such transaction. In addition, Citigroup will deliver a prospectus in connection with the initial sales of the Notes.

The Exchange represents that its surveillance procedures are adequate to properly monitor the trading of the Notes. Specifically, the Amex will rely on its existing surveillance procedures governing equities, which have been deemed adequate under the Act. In addition, the Exchange also has a general policy, which prohibits the distribution of material, non-public information by its employees.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6 of the Act[13] in general and furthers the objectives of section 6(b)(5)[14] 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 facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Exchange did not receive any written comments on the proposed rule change.

III. 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 written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission,

[8] A negative return of the Global Titan Index, together with a Contingent Event, will reduce the redemption amount at maturity with the potential that the holder of the Note could lose his entire investment amount.

[9] Telephone Conversation between Jeffrey P. Burns, Associate General Counsel, Amex, and Florence Harmon, Senior Special Counsel, Division, Commission, on March 19, 2004.

[10] *See* Securities Exchange Act Release Nos. 46883 (November 21, 2002), 67 FR 71216 (November 29, 2002) (approving the listing and trading of Market Recovery Notes on the DJIA); 39525 (January 8, 1998), 63 FR 2438 (January 15, 1998) (approving the listing and trading of DIAMONDS℠ Trust Units, portfolio depositary receipts based on the DJIA); and 39011 (September 3, 1997), 62 FR 47840 (September 11, 1997) (approving the listing and trading of options on the DJIA).

[11] Amex Rule 411 requires that every member, member firm or member corporation use due diligence to learn the essential facts, relative to every customer and to every order or account accepted.

[12] *See* Amex Rule 462 and section 107B of the Company Guide.

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(5).

450 Fifth Street, NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. SR–Amex–2004–13. The file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the 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 the File No. SR–Amex–2004–13 and should be submitted by April 16, 2004.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

After careful consideration, 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, and, in particular, with the requirements of section 6(b)(5) of the Act.[15] The Commission finds that this proposal is similar to several approved instruments currently listed and traded on the Amex.[16] Accordingly, the Commission finds that the listing and trading of the Notes based on the DJIA is consistent with the Act and will promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to and facilitating transactions in securities, and, in general, protect investors and the public interest consistent with section 6(b)(5) of the Act.[17]

As described more fully above, at maturity, the holder of the Note will receive an amount of at least 100 percent of the principal investment amount as long as the DJIA never experiences a Contingent Event. If the Index has a negative or positive return and the Index never experience a Contingent Event, the holder would receive the full principal investment amount of the Notes plus the product of $10, the percentage change of the DJIA during the term, and the upside participation rate (which is expected, according to Amex, to be between 110–120 percent). If the Index declines but never reaches the Contingent Level, the holder will receive the principal investment amount of the Notes at maturity. However, if the Notes experience a Contingent Event during the term, the holder loses the principal protection and will be entitled to receive a payment based on the percentage change of the Index. Accordingly, a negative return, together with a Contingent Event, will reduce the redemption amount at maturity with the potential that the holder of the Note could lose their entire investment amount.

The Amex requests that the Commission approve the proposal, on an accelerated basis to accommodate the timetable of listing the Notes. The Commission notes that it has previously approved the listing of options on, and securities the performance of which have been linked to or based on, the DJIA.[18] The Commission has also previously approved the listing of securities with a structure substantially the same as that of the Notes.[19]

The Commission notes that the Notes are non-principal protected instruments, but are not leveraged on the downside. The Notes are debt instruments, the price of which will be derived from and based upon the value of the DJIA. The Notes do not have a minimum principal amount that will be repaid at maturity, and the payments of the Notes prior to or at maturity may be less than the original issue price of the Notes. Accordingly, the level of risk involved in the purchase or sale of the Notes is similar to the risk involved in the purchase or sale of traditional common stock. Because the final rate of return of the Notes is derivatively priced, based on the performance of the 30 common stocks underlying the DJIA, and because the Notes are instruments that do not guarantee a return of principal, there are several issues regarding the trading of this type of product. However, for the reasons discussed below, the Commission believes that the Amex's proposal adequately addresses the concerns raised by this type of product.

The Commission notes that the Exchange's rules and procedures that address the special concerns attendant to the trading of hybrid securities will be applicable to the Notes. In particular, by imposing the hybrid listing standards, suitability, disclosure, and compliance requirements noted above, the Commission believes that the Exchange has addressed adequately the potential problems that could arise from the hybrid nature of the Notes.

Moreover, the Commission notes that the Exchange will distribute a circular to its membership calling attention to the specific risks associated with the Notes. The Commission also notes that Citigroup will deliver a prospectus in connection with the initial sales of the Notes. In addition, the Commission notes that Amex will incorporate and rely upon its existing surveillance procedures governing equities, which have been deemed adequate under the Act.

In approving the product, the Commission recognizes that the DJIA is a price-weighted index comprised of 30 common stocks chosen by the editors of the Wall Street Journal ("WSJ") as representative of the broad market of U.S. industry, with each stock affecting the DJIA in proportion to its market price. The Commission notes that the changes in the composition of the DJIA as made solely by the editors of the WSJ. The changes to these common stocks tend to be made infrequently with most substitutions the result of mergers and other extraordinary corporate actions. Further, the Commission notes that the DJIA has remained at 30 since 1928. As of February 6, 2004, the market capitalization of the securities included in the DJIA ranged from a high of approximately $333.2 billion to a low of approximately $8.4 billion. In addition, the average daily trading volume for these same securities for the last six (6) months ranged from a high of approximately 127.74 million shares to a low of approximately 0.31 million shares. Given the compositions of the stocks underlying the DJIA, the Commission believes that the listing and trading of the Notes that are linked to the DJIA, should not unduly impact the market for the underlying securities comprising the DJIA or raise manipulative concerns. As discussed more fully above, the underlying stocks comprising the DJIA are well-capitalized, highly liquid stocks.

[15] 15 U.S.C. 78f(b)(5).

[16] *See, e.g.*, Securities Exchange Act Release No. 48152 (July 10, 2003), 68 FR 42435 (July 17, 2003) (order approving File No. SR–Amex–2003–62); Securities Exchange Act Release No. 48486 (September 11, 2003), 68 FR 54758 (September 18, 2003) (order approving File No. SR–Amex–2003–74).

[17] In approving the proposed rule, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[18] *See supra* note 10.

[19] *See supra* note 16.

Moreover, the issuers of the underlying securities comprising the DJIA, are subject to reporting requirements under the Act, and all of the component stocks are either listed or traded on, or traded through the facilities of, U.S. securities markets. Additionally, the Amex's surveillance procedures will serve to deter as well as detect any potential manipulation.

Furthermore, the Commission notes that the Notes are depending upon the individual credit of the issuer, Citigroup. To some extent this credit risk is minimized by the Exchange's listing standards in Section 107A of the Company Guide which provide the only issuers satisfying substantial asset and equity requirements may issue securities such as the Notes. In addition, the Exchange's "Other Securities" listing standards further require that the Notes have a market value of at least $4 million.[20] In any event, financial information regarding Citigroup, in addition to the information on the 30 common stocks comprising the DJIA, will be publicly available.[21]

The Commission also has a systemic concern, however, that a broker-dealer such as Citigroup, or a subsidiary providing a hedge for the issuer will incur position exposure. However, as the Commission has concluded in previous approval orders for other hybrid instruments issued by broker-dealers,[22] the Commission believes that this concern is minimal given the size of the Notes issuance in relation to the net worth of Citigroup.

Finally, the Commission notes that the value of the DJIA will be disseminated at least once every fifteen seconds throughout the trading day. The Commission believes that providing access to the value of the DJIA at least once every fifteen seconds throughout the trading day is important and will provide benefits to investors in the product.

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. The Commission believes that the Notes will provide investors with an additional investment choice and that accelerated approval of the proposal will allow investors to begin trading the Notes promptly. In addition, the Commission notes that it has previously approved the listing and trading of similar Notes and other hybrid securities based on the Index.[23] Accordingly, the Commission believes that there is good cause, consistent with sections 6(b)(5) and 19(b)(2) of the Act,[24] to approve the proposal, on an accelerated basis.

V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[25] that the proposed rule change (SR–Amex–2004–13) is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[26]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04–6765 Filed 3–25–04; 8:45 am]

BILLING CODE 8010–01–P

[20] *See* Company Guide Section 107A.

[21] The SEC notes that the 30 component stocks that comprise the DJIA are reporting companies under the Act, and the Notes will be registered under Section 12 of the Act.

[22] *See, e.g.*, Securities Exchange Act Release Nos. 44913 (October 9, 2001), 66 FR 52469 (October 15, 2001) (order approving the listing and trading of notes whose return is based on the performance of the Nasdaq-100 Index) (File No. SR–NASD–2001–73); 44483 (June 27, 2001), 66 FR 35677 (July 6, 2001) (order approving the listing and trading of notes whose return is based on a portfolio of 20 securities selected from the Amex Institutional Index) (File No. SR–Amex–2001–40); and 37744 (September 27, 1996), 61 FR 52480 (October 7, 1996) (order approving the listing and trading of notes whose return is based on a weighted portfolio of healthcare/biotechnology industry securities) (File No. SR–Amex–96–27).

[23] *See supra* note 22.

[24] 15 U.S.C. 78*f*(b)(5) and 78s(b)(2).

[25] 15 U.S.C. 78s(b)(2).

[26] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49441; File No. SR–Amex–2003–44]

Self-Regulatory Organizations; American Stock Exchange LLC; Order Granting Approval to Proposed Rule Change Relating to Percentages Used to Allocate Executed Options Contracts Between the Specialist and Registered Options Traders

March 17, 2004.

On May 14, 2003, the American Stock Exchange LLC ("Amex") filed with the Securities and Exchange Commission ("Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Amex Rules 933 and 950 to revise the percentages used to allocate executed contracts between the specialist and registered options traders in certain trades executed on the Exchange.[3] On November 18, 2003, Amex filed Amendment No. 1 to the proposed rule change.[4] The proposed rule change was published for comment in the **Federal Register** on December 31, 2003.[5] The Commission received no comments on the proposal.

The Exchange proposes to revise the allocation percentages set forth in Amex Rules 933 and 950, by which options contracts in certain options trades are allocated as between the specialist and registered options traders,[6] in connection with the re-institution of an exchange-sponsored payment-for-order-flow program.[7] The proposed rule change would revise the percentages allocated to the specialist and the registered options traders, respectively, for those options classes in which the Exchange does not collect a marketing fee from registered options traders for a payment-for-order-flow program.[8] For those options classes in which the Exchange collects a marketing fee from registered options traders for a payment-for-order-flow program, the allocation percentages would comply with the percentages currently in place.[9] Further, for options in which no payment-for-order-flow marketing fee is collected from the registered options traders, the Exchange proposes to vary the specialist and registered options trader allocation percentages depending on the type of option. Specifically, the allocation percentages for trading in options on Exchange Traded Funds, Trust Issued Receipts, and indexes would differ somewhat from those used for equity options.[10]

The Commission finds that the proposed rule change is consistent with

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] In addition, the Exchange proposed to correct the paragraph reference to the allocation provisions in Amex Rule 933 from (d) to (h).

[4] *See* letter from Claire P. McGrath, Senior Vice President and Deputy General Counsel, Amex, to Nancy Sanow, Assistant Director, Division of Market Regulation, Commission, dated November 17, 2003.

[5] *See* Securities Exchange Act Release No. 48975 (December 23, 2003), 68 FR 75667 ("Notice").

[6] Specifically, the proposed rule change relates to the allocation of contracts when the specialist and registered options traders are on parity, as governed by Commentary .06 to Amex Rule 950(d); the allocation of trades through Quick Trade, the Exchange's automated allocation feature, as governed by Commentary .07 to Amex Rule 950(d); and the allocation of trades by AutoEx, the Exchange's automatic execution system, as governed by Amex Rule 933(d), renumbered by this proposal as Amex Rule 933(h).

[7] *See* Securities Exchange Act Release No. 48053 (June 17, 2003), 68 FR 37880 (June 25, 2003) (File No. SR–Amex–2003–50).

[8] *See* Notice for a more complete description of the revisions. The allocation percentages would vary depending on the type of option, *i.e.*, whether it is an equity option or an option on an Exchange Traded Fund, Trust Issued Receipt, or index.

[9] In this case, there would be no distinction in the allocation percentages between equity options and options on Exchange Traded Funds, Trust Issued Receipts, and indexes.

[10] *See* Notice for a more complete description of the revisions.

the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange,[11] and, in particular, the requirements of section 6(b)(5) of the Act.[12] Specifically, the Commission believes that the Exchange's proposed revisions to its specialist participation guarantees to account for whether or not the Exchange has instituted a payment-for-order-flow program are appropriate, particularly as they do not alter the Exchange's requirement that the specialist's participation percentage be limited to 40% (60% when there is only one registered options trader on parity with the specialist or signed on to AutoEx or Quick Trade).[13] The Commission has found with respect to participation guarantees in other contexts that a maximum guarantee of 40% (where more than one trader is participating with the specialist) is not inconsistent with statutory standards of competition and free and open markets.[14]

It is therefore ordered, pursuant to section 19(b)(2) of the Act[15], that the proposed rule change (File No. SR-Amex-2003–44) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[16]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04–6766 Filed 3–25–04; 8:45 am]

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SMALL BUSINESS ADMINISTRATION

Region I Regulatory Fairness Board; Public Federal Regulatory Enforcement Fairness Hearing

The Small Business Administration Region I Regulatory Fairness Board and the SBA Office of the National Ombudsman will hold a Public Hearing on Thursday, March 25, 2004 at 8:30 a.m. at the Ferguson Library, One Public Library Plaza, 3rd Floor Auditorium, Stamford, CT 06904, 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 Marie Record in writing or by fax, in order to be put on the agenda. Marie Record, District Director, Connecticut District Office, 330 Main Street, 2nd Floor, Hartford, CT 06106, phone (860) 240–4670 or (860) 240–4700 ext. 241, fax (860) 240–4717, e-mail: *marie.record@sba.gov.*

For more information, see our Web site at *http://www.sba.gov/ombudsman.*

Dated: March 22, 2004.

Peter Sorum,

Senior Advisor, Office of the National Ombudsman.

[FR Doc. 04–6854 Filed 3–25–04; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Region VII Regulatory Fairness Board; Public Federal Regulatory Enforcement Fairness Hearing

The Small Business Administration Region VII Regulatory Fairness Board and the SBA Office of the National Ombudsman will hold a Public Hearing on Wednesday, April 14, 2004, at 8:30 a.m. at the Center for Emerging Technologies, 4041 Forest Park Avenue, St. Louis, MO 63108, 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 Rose E. Garland in writing or by fax, in order to be put on the agenda. Rose Garland, Economic Development Specialist, St. Louis District Office, 200 North Broadway, Suite 1500, St. Louis, MO 63102, phone (314) 539–6600 ext. 232, fax (314) 539–3785, e-mail: *rose.garland@sba.gov.*

For more information, see our Web site at *http://www.sba.gov/ombudsman.*

Dated: March 22, 2004.

Peter Sorum,

Senior Advisor, Office of the National Ombudsman.

[FR Doc. 04–6855 Filed 3–25–04; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice 4673]

Certification Related to Serbia and Montenegro Under Section 1511 of the National Defense Authorization Act, 1994 (Public Law 103–160)

Pursuant to the authority vested in me as Deputy Secretary of State, including under Section 1511 of the National Defense Authorization Act, 1994 (Public Law 103–160), the President's Delegation of Responsibilities Related to the Federal Republic of Yugoslavia, dated March 22, 2001, and the Secretary of State's Delegation of Authority Number 245, dated April 23, 2001, I hereby certify that the waiver of the application of the prohibitions in Section 1511(a)(6) of Public Law 103–160 is necessary to achieve a negotiated settlement of the conflict in Bosnia-Herzegovina that is acceptable to the parties, and I hereby waive the application of this prohibition with respect to the suspension of the application of duty-free treatment accorded to articles of Serbia and Montenegro under the Generalized System of Preferences.

This Determination shall be published in the **Federal Register,** and copies shall be provided to the appropriate committees of the Congress.

Dated: February 20, 2004.

Richard L. Armitage,

Deputy Secretary of State, Department of State.

[FR Doc. 04–6820 Filed 3–25–04; 8:45 am]

BILLING CODE 4710–23–P

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Technical Corrections to the Harmonized Tariff Schedule of the United States

AGENCY: Office of the United States Trade Representative.

ACTION: Notice.

SUMMARY: The United States Trade Representative (USTR) is making technical corrections to the Harmonized Tariff Schedule of the United States (HTS) as set forth in the Annex to this notice, pursuant to authority delegated to the USTR in Presidential Proclamation 6969 of January 27, 1997 (62 FR 4415). These modifications correct one inadvertent omission in Presidential Proclamation 6763 of December 23, 1994 (60 FR 1007), two inadvertent errors in Presidential Proclamation 7351 of October 2, 2000

[11] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[12] 15 U.S.C. 78f(b)(5).

[13] The Commission notes that, in the context of a trade in which a member firm is facilitating a customer order, the total number of contracts guaranteed to the member firm and the specialist in the aggregate may not exceed 40% of the total transaction. *See* Amex Rule 950(d), Comm. 02(d)(3).

[14] *See, e.g.*, Securities Exchange Act Release Nos. 42455 (February 24, 2000), 65 FR 11388 (March 2, 2000) at 11398; and 43100 (July 31, 2000), 65 FR 48778 (August 9, 2000) at notes 96–99 and accompanying text.

[15] 15 U.S.C. 78s(b)(2).

[16] 17 CFR 200.30–3(a)(12).

(65 FR 59329), and one inadvertent error in provisions added to the HTS pursuant to Proclamation 7529 of March 5, 2002 (67 FR 10553) and Proclamation 7576 of July 3, 2002 (67 FR 45285) so that the intended tariff treatment is provided.

EFFECTIVE DATE: As indicated in the Annex.

FOR FURTHER INFORMATION CONTACT: Jean Kemp, Office of the U.S. Trade Representative, (202) 395–6160.

SUPPLEMENTARY INFORMATION:

Proclamation 7351 implemented the United States-Caribbean Basin Trade Partnership Act (CBTPA). Section 211 of the CBTPA provides that eligible textile and apparel articles of a designated CBTPA beneficiary country shall enter the United States free of duty and free of quantitative limitations. The annex to Proclamation 7351 made modifications to the HTS in order to implement the tariff treatment provided under the CBTPA. The Annex to this notice modifies the annex to Proclamation 7351 to correct two inadvertent errors so that the intended tariff treatment is provided. Proclamation 6763 implemented the trade agreements resulting from the Uruguay Round of multilateral trade negotiations. The annex to Proclamation 6763 made modifications to the HTS in order to implement the tariff treatment provided under the Uruguay Round Agreements, including the tariff treatment provided to pharmaceutical products (see annex to Proclamation 6763 at section 1, paragraph 13). The Annex to this notice modifies the annex to Proclamation 7351 to correct one inadvertent omission so that the intended tariff treatment is provided. On March 5, 2002, Proclamation 7529 established increases in duty and a tariff-rate quota (safeguard measures) pursuant to section 203 of the Trade Act of 1974 (19 U.S.C. 2253) (Trade Act) on imports of certain steel products described in paragraph 7 of that proclamation. Effective with respect to goods entered, or withdrawn from warehouse for consumption, on or after 12:01 a.m., e.s.t., on March 20, 2002, the annex to Proclamation 7529 modified subchapter III of chapter 99 of the HTS so as to provide for such increased duties and a tariff-rate quota. Pursuant to Proclamation 7529 and Proclamation 7576 of July 3, 2002, the USTR subsequently found that particular products should be excluded from the actions under section 203 of the Trade Act. On August 30, 2002, the USTR modified the provisions that were added to subchapter III of chapter 99 of the HTS by Proclamation 7529 to implement those exclusions. 67 FR 56182. On November 14, 2002, the USTR made technical corrections to subchapter III of chapter 99 of the HTS. 67 FR 69065. The Annex to this notice modifies the provisions of subchapter III of chapter 99 of the HTS that were added pursuant to Proclamations 7529 and 7576 to correct an inadvertent error so that the intended tariff treatment is provided.

Proclamation 6969 authorized the USTR to exercise the authority provided to the President under section 604 of the Trade Act of 1974 (19 U.S.C. 2483) to embody rectifications, technical or conforming changes, or similar modifications in the HTS. Under the authority vested in the USTR by proclamation 6969, the rectifications, technical and conforming changes, and similar modifications set forth in the Annex to this notice shall be embodied in the HTS with respect to goods entered, or withdrawn from warehouse for consumption, on or after the dates indicated in the Annex.

Robert B. Zoellick,

United States Trade Representative.

Annex

The Harmonized Tariff Schedule of the United States is hereby modified as set forth herein:

(1) Effective with respect to goods entered, or withdrawn from warehouse for consumption, on or after January 1, 2004, general note 3(f)(i) is modified by deleting "subparagraph (b)" and by inserting in lieu thereof subdivision (f)(ii)".

(2) Effective with respect to goods entered, or withdrawn from warehouse for consumption, on or after January 1, 2004, general note 4(d) is modified by deleting the following subheadings and the country or countries set out opposite each such subheading:

2902.11.00 Argentina; India
2902.60.00 India
2902.90.40 India
2902.90.60 India
2905.59.30 India
4802.55.10 Argentina
4802.56.10 Argentina
4802.56.60 Colombia
4802.57.10 Argentina
4809.10.20 Guatemala
4816.20.00 Indonesia
4823.20.10 Brazil
5701.10.13 Pakistan
5702.10.10 Pakistan
5702.20.10 India
5702.91.20 Pakistan
5805.00.20 Pakistan
5904.90.90 Guatemala; India
7308.90.70 Venezuela
7308.90.95 Argentina

(3) Effective with respect to goods of Singapore under the terms of general note 25 that are entered, or withdrawn from warehouse for consumption, on or after January 1, 2004, TCR 62.1 of general note 25(o) is modified by inserting after "5516" the expression ", 5801 through 5802".

(4) Effective with respect to goods entered, or withdrawn from warehouse for consumption, on or after January 10, 2002, chapter 29 of the HTS is modified—

(A) by deleting subheading 2932.99.80 and by inserting in the article description of subheading 2912.29.30 in alphabetical sequence the expression "Paraldehyde, USP grade"; and

(B) by deleting from the article description of subheading 2933.99.13 the product "3–Quinuclidinol" and by redesignating such subheading as 2933.99.12, and by inserting in numerical sequence the following new provision, with the language inserted in the columns entitled "Heading/Subheading", "Article Description", "Rates of Duty 1–General", "Rates of Duty 1–Special" and "Rates of Duty 2" and with the article description at the same level of indentation as that of subheading 2933.99.12 (as redesignated herein):

"2933.39.15	:	Quinuclidin–3–ol	:	5.8%	:	Free (A+,CA,CL,D,E,IL,JO,K,MX).	:	15.4¢/kg+
	:	.....	:	.....	:	.....	:	39.5%"
	:	.....	:	.....	:	4.3% (SG)	:	

The rate of duty in the special subcolumn followed by the symbol "SG" in parentheses for subheadings 2933.99.12 (as redesignated herein) and 2933.99.15 shall be subject to all staged reductions previously proclaimed by the President for subheading 2933.99.13.

(5) U.S. note 11 to subchapter III of chapter 99 is modified as follows:

(A) Effective with respect to goods entered, or withdrawn from warehouse for consumption, on or after September 1, 2002, and before the close of November 13, 2002, subdivision (c)(cxcvi) of such note is modified by deleting the language "austenitic, ferritic or martensitic crystalline structure as applicable, and containing oxides of lime silicoaluminate that form the $CaO–Al_2O_3–SiO_2$ ternary composition primarily comprising anorthite and/or pseudowollastonite phases; with calcium content between 30 and 100 ppm and oxygen content between 70 and 200 ppm; products referred to as 'UGIMA'" and by inserting the following language in lieu thereof: "microstructure containing complex oxides of lime-silico-aluminate (comprising

metallurgical phases anhorthite and/or pseudowollastonite); with calcium content from 30 to 300 ppm and oxygen from 70 to 300 ppm, and with calcium-to-oxygen ratio from 0.2 to 0.6; sometimes referred to as (but not limited to) products known as 'UGIMA' ".

(B) Effective with respect to goods entered, or withdrawn from warehouse for consumption, on or after September 1, 2002, such subdivision (c)(cxcvi) is further modified by deleting the language "5,000 t during the 12-month period beginning on September 1, 2002 or September 1, 2003 or during the period from September 1, 2004 through March 20, 2005," and by inserting in lieu thereof the language "5,590 t during the 12-month period beginning on September 1, 2002, and not to exceed 5,000 t during the period beginning on September 1, 2003 through December 5, 2003,".

(6) Effective with respect to goods entered, or withdrawn from warehouse for consumption, on or after January 1, 2004:

(A) U.S. note 12(b) to subchapter XI to chapter 99 is modified by deleting the following:

Beginning in calendar year 2015, quantitative limitations on the aggregate quantity of goods of Chile's trade surplus entered under subheading 9911.17.05 shall cease to apply on such originating goods of Chile.

and by inserting the following in lieu thereof:

Beginning in calendar year 2015, the aggregate quantity of originating goods of Chile entered under heading 9911.17.05 in any calendar year shall be the quantity of goods equal to the amount of Chile's trade surplus in subdivision (a) of this note.

(B) The article description of subheading 9911.96.26 is modified by deleting "$2.025¢/kg" and inserting "$2.025/kg" in lieu thereof.

(C) The article description of subheading 9911.96.44 is modified by deleting "$1.341¢/kg" and inserting "$1.341/kg" in lieu thereof.

(D) The article description of subheading 9911.96.63 is modified by deleting "$1.236kg" and inserting "$1.236/kg" in lieu thereof.

(E) The article description of subheading 9911.96.68 is modified by deleting "93.6¢kg" and inserting "93.6¢/kg" in lieu thereof.

(F) The article description of subheading 9911.96.73 is modified by deleting "84.6¢kg" and inserting "84.6¢/kg" in lieu thereof.

(G) The article description of subheading 9911.97.24 is modified by deleting "$2.214¢/kg" and inserting "$2.214/kg" in lieu thereof.

[FR Doc. 04–6782 Filed 3–25–04; 8:45 am]

BILLING CODE 3190–W3–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Aviation Proceedings, Agreements Filed the Week Ending March 12, 2004

The following Agreements were filed with the Department of Transportation under the provisions of 49 U.S.C. 412 and 414. Answers may be filed within 21 days after the filing of the application.

Docket Number: OST–2004–17290.
Date Filed: March 10, 2004.
Parties: Members of the International Air Transport Association.
Subject: Mail Vote 363, PTC2 AFR 0145 dated 09 March 2004, TC2 Within Africa Resolution 002e r1, Intended effective date: 01 April 2004.

Docket Number: OST–2004–17291.
Date Filed: March 10, 2004.
Parties: Members of the International Air Transport Association.
Subject: Mail Vote 364, PTC2 AFR 0146 dated 09 March 2004, PTC2 Within Africa Resolutions r1–r23, Intended effective date: 01 May 2004.

Docket Number: OST–2004–17340.
Date Filed: March 12, 2004.
Parties: Members of the International Air Transport Association.
Subject: Mail Vote 365, PTC23 EUR–SASC 0125 dated 16 March 2004, TC23 Special Passenger Amending Resolution from Pakistan to Europe r1–r2, Intended effective date: 01 April 2004.

Andrea M. Jenkins,
Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. 04–6859 Filed 3–25–04; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (Formerly Subpart Q) During the Week Ending March 12, 2004

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under subpart B (formerly subpart Q) of the Department of Transportation's Procedural Regulations (*See* 14 CFR 301.201 *et seq.*). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: OST–2004–17264.
Date Filed: March 8, 2004.
Due Date for Answers, Conforming Applications, or Motion to Modify Scope: March 29, 2004.
Description: Application of JetBlue Airways Corporation, requesting a certificate of public convenience and necessity to engage in foreign scheduled air transportation of persons, property and mail from the United States to the Bahamas, Bermuda, Canada, the Dominican Republic and Jamaica.

Docket Number: OST–2004–17311.
Date Filed: March 10, 2004.
Due Date for Answers, Conforming Applications, or Motion to Modify Scope: March 31, 2004.
Description: Application of Omega Air Holdings, LLC, d/b/a Omega Air Cargo, requesting a certificate of public convenience and necessity to engage in interstate scheduled and charter all-cargo operations.

Docket Number: OST–2004–17312.
Date Filed: March 10, 2004.
Due Date for Answers, Conforming Applications, or Motion to Modify Scope: March 31, 2004.
Description: Application of Omega Air Holdings, LLC, d/b/a Omega Air Cargo, requesting a certificate of public convenience and necessity to engage in foreign charter all-cargo operations.

Docket Number: OST–2004–17315.
Date Filed: March 10, 2004.
Due Date for Answers, Conforming Applications, or Motion to Modify Scope: March 31, 2004.
Description: Application of Cargojet Airways Ltd. d/b/a Starjet Airways, requesting a foreign air carrier permit to engage in charter and scheduled foreign air transportation of persons, property, and mail between any point or points in Canada and any point or points in the United States, and other charter foreign air transportation.

Andrea M. Jenkins,
Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. 04–6860 Filed 3–25–04; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2004–21]

Petitions for Exemption; Dispositions of Petitions Issued

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of dispositions of prior petitions.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption part 11 of title 14, Code of Federal Regulations (14 CFR), this notice contains a summary of certain dispositions of certain petitions previously received. The purpose of this

notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities.

FOR FURTHER INFORMATION CONTACT: Tim Adams (202) 267–8033, or Sandy Buchanan-Sumter (202) 267–7271, Office of Rulemaking (ARM–1), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85 and 11.91.

Issued in Washington, DC on March 22, 2004.

Donald P. Byrne,

Assistant Chief Counsel for Regulations.

Dispositions of Petitions

Docket No.: FAA–2002–11562.
Petitioner: United Airlines.
Section of 14 CFR Affected: 14 CFR 121.697(a)(3), (b), (c), and (d) and 121.709(b)(3).
Description of Relief Sought/ Disposition: To permit United Airlines to use computerized signatures to satisfy the airworthiness release signature requirements of part 121, in lieu of physical signatures.
Grant, 3/5/04, Exemption No. 5121H.

Docket No.: FAA–2002–11723.
Petitioner: United States Coast Guard.
Section of 14 CFR Affected: 14 CFR 91.117(b) and (c), 91.119(c), 91.159(a), and 91.209(a).
Description of Relief Sought/ Disposition: To permit the United States Coast Guard to conduct air operations in support of drug law enforcement and drug traffic interdiction without meeting part 91 provisions governing: (1) Aircraft speed, (2) minimum safe altitudes, (3) cruising operations for flights conducted under visual flight rules, and (4) use of aircraft lights.
Grant, 3/2/04, Exemption No. 5231G.

Docket No.: FAA–2004–17233.
Petitioner: Mason County Aviation, Inc.
Section of 14 CFR Affected: 14 CFR 135.143(c)(2).
Description of Relief Sought/ Disposition: To permit Mason County Aviation, Inc., to operate certain aircraft under part 135 without a TSO–C112 (Mode S) transponder installed on those aircraft.
Grant, 3/12/04, Exemption No. 8262.

Docket No.: FAA–2002–12762.
Petitioner: Air Madura LLC.
Section of 14 CFR Affected: 14 CFR 135.143(c)(2).
Description of Relief Sought/ Disposition:
To permit Air Madura LLC to operate certain aircraft under part 135 without a TSO-C112 (Mode S) transponder installed on those aircraft.
Grant, 3/12/04, Exemption No. 7860A.

Docket No.: FAA–2002–12719.
Petitioner: Pathfinder Aviation.
Section of 14 CFR Affected: 14 CFR 135.143(c)(2).
Description of Relief Sought/ Disposition: To permit Pathfinder Aviation to operate certain aircraft under part 135 without a TSO–C112 (Mode S) transponder installed on those aircraft.
Grant, 3/12/04, Exemption No. 7844A.

Docket No.: FAA–2002–11556.
Petitioner: Grant Aviation, Inc.
Section of 14 CFR Affected: 14 CFR 135.143(c)(2).
Description of Relief Sought/ Disposition: To permit Grant Aviation, Inc., to operate certain aircraft under part 135 without a TSO–C112 (Mode S) transponder installed on those aircraft.
Grant, 3/12/04, Exemption No. 7221B.

Docket No.: FAA–2004–17214.
Petitioner: Croman Corporation.
Section of 14 CFR Affected: 14 CFR 135.143(c)(2).
Description of Relief Sought/ Disposition: To permit Croman Corporation to operate certain aircraft under part 135 without a TSO–C112 (Mode S) transponder installed on those aircraft.
Grant, 3/12/04, Exemption No. 8261.

Docket No.: FAA–2002–12171.
Petitioner: Universal Airlines, Inc.
Section of 14 CFR Affected: 14 CFR 91.9(a).
Description of Relief Sought/ Disposition: To permit operating of Universal Airlines, Inc.'s, DC–6A and DC–6B aircraft without complying with the zero fuel and landing weight requirements of the operating limitations prescribed for the aircraft in the Federal Aviation Administration approved flight manual, subject to certain conditions and limitations.
Grant, 3/11/04, Exemption No. 7829A.

Docket No.: FAA–2003–15510.
Petitioner: ATA Airlines, Inc.
Section of 14 CFR Affected: 14 CFR 121.693(e) and 121.697(e)(2).
Description of Relief Sought/ Disposition: To permit ATA Airlines, Inc., to (1) prepare a load manifest for the military charter supplemental operations without including the names of passengers and (2) provide relief from the requirement to retain at its principal base of operations an original or a copy of the passenger list as part of the load manifest for at least 3 months.
Denial, 3/11/04, Exemption No. 8263.

Docket No.: FAA–2004–17218.
Petitioner: Centurion Flight Services, Inc.
Section of 14 CFR Affected: 14 CFR 135.143(c)(2).
Description of Relief Sought/ Disposition: To permit Centurion Flight Services, Inc., to operate certain aircraft under part 135 without a TSO–C112 (Mode S) transponder installed on those aircraft.
Grant, 3/12/04, Exemption No. 8260.

Docket No.: FAA–2004–17184.
Petitioner: Ms. Suzanne K. Ishii-Regan and Mr. Matthew D. Regan, parents of Patrick Regan.
Section of 14 CFR Affected: 14 CFR 121.311(b) and 121.311(c)(1).
Description of Relief Sought/ Disposition: To permit Patrick Regan to be secured by a personal safety belt, the E–Z–ON Modified Vest, while aboard an aircraft.
Grant, 3/13/04, Exemption No. 8264.

Docket No.: FAA–2001–11090.
Petitioner: Army Aviation Heritage Foundation.
Section of 14 CFR Affected: 14 CFR 91.319, 119.5(g), and 119.25(b).
Description of Relief Sought/ Disposition: To permit the Army Aviation Heritage Foundation to operate its former military UH–1H (Huey) helicopter that holds an experimental airworthiness certificate for the purpose of carrying passengers on local educational flights.
Grant, 3/15/04, Exemption No. 7736B.

Docket No.: FAA–2003–15964.
Petitioner: Era Aviation, Inc.
Section of 14 CFR Affected: 14 CFR 121.354(b).
Description of Relief Sought/ Disposition: To permit Era Aviation, Inc., to operate its de Havilland Canada DHC–6 Twin Otter aircraft after March 29, 2005, without having an approved terrain awareness and warning system that meets the requirements for Class A equipment in Technical Standard Order C151 installed on each aircraft, subject to certain conditions and limitations.
Grant, 3/15/04, Exemption No. 8270.

Docket No.: FAA–2004–17325.
Petitioner: Tulsa Air and Space Center Airshows, Inc.
Section of 14 CFR Affected: 14 CFR 91.315, 119.5(g), and 119.21(a).
Description of Relief Sought/ Disposition: To permit Tulsa Air and Space Center Airshows, Inc., to operate its former military North American P–51 airplane for the purpose of carrying passengers on local flights for compensation or hire.
Denial, 3/13/04, Exemption No. 8268.

Docket No.: FAA–2002–11468.
Petitioner: The Collings Foundation.
Section of 14 CFR Affected: 14 CFR 91.319(a), 119.5(g), and 119.21(a).
Description of Relief Sought/ Disposition: To permit The Collings Foundation to operate its military

McDonnell Douglas F–4D Phantom II aircraft, which has an experimental airworthiness certificate, for the purpose of carrying passengers on local flights in return for receiving donations.

Denial, 3/11/04, Exemption No. 8267.

Docket No.: FAA–2002–11969.

Petitioner: Firelands Museum of Military History, Inc.

Section of 14 CFR Affected: 14 CFR 91.319, 119.5(g), and 119.25(b).

Description of Relief Sought/ Disposition: To permit Firelands Museum of Military History, Inc., to operate its former military Bell UH–1H Huey helicopters, which were issued experimental airworthiness certificates for the purpose of exhibition, to carry passengers on local flights for compensation or hire.

Denial, 3/11/04, Exemption No. 8266.

Docket No.: FAA–2002–11884.

Petitioner: Indiana Aviation Museum, Inc.

Section of 14 CFR Affected: 14 CFR 91.315 and 91.319(a)(2).

Description of Relief Sought/ Disposition: To permit Indiana Aviation Museum Inc., to operate its Cessna A–37 Attack Jet aircraft, Chance Vought F4U–5 Corsair aircraft, North American P–51D Mustang aircraft, and North American T–28B Trojan Aircraft, which have been issued limited or experimental airworthiness certificates, to carry passengers on local flights in return for donations.

Denial, 3/15/04, Exemption No. 8265.

[FR Doc. 04–6746 Filed 3–25–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

RTCA Special Committee 193/ EUROCAE Working Group 44: Terrain and Airport Databases

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of RTCA Special Committee 193/EUROCAE Working Group 44 meeting.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of RTCA Special Committee 193/ EUROCAE Working Group 44: Terrain and Airport Databases.

DATES: The meeting will be held March 29–April 2, 2004 from 9 a.m.–5 p.m.

ADDRESSES: The meeting will be held at Instituto Superior Tecnico (IST), Lisbon, Portugal.

FOR FURTHER INFORMATION CONTACT: RTCA Secretariat, 1828 L Street, NW., suite 805, Washington, DC 20036; telephone (202) 833–9339; fax (202) 833–9434; Web site *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for a Special Committee 193/EUROCAE Working Group 44 meeting. The agenda will include:

- March 29:
  - Opening Plenary Session (Welcome and Introductory Remarks, Review/ Approval of Meeting Agenda, Review Summary of Previous Meeting)
  - Subgroup 4 (Data Exchange Format)
  - Resolution of Action Items
  - Presentations
  - Resolve Final Review and Comments (FRAC) on draft document, Interchange Standards for Terrain, Obstacle, and Aerodrome Mapping Data
  - Resolution of comments
- March 30:
  - Subgroup 4 (Continue previous day activities)
  - Final Review and Comments (FRAC)
  - Continued Resolution of comments
- March 31:
  - Subgroup 4 (Continue previous day activities)
  - Final Review and Comments (FRAC)
- April 1:
  - Subgroup 4 (Continue previous day activities)
  - Final Review and Comments (FRAC)
- April 2:
  - Closing Plenary Session (Summary of Subgroup 4, Assign Tasks, Other Business, Date and Place of Next Meeting, Adjourn)

Attendance is open to the interested public but limited to space availability. With the approval of the chairmen, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on March 2, 2004.

Robert Zoldos,

FAA System Engineer, RTCA Advisory Committee.

[FR Doc. 04–6862 Filed 3–25–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

RTCA Special Committee 201: Aeronautical Operational Control (AOC) Message Hazard Mitigation (AMHM)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of RTCA Special Committee 201 meeting.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of RTCA Special Committee 201: Aeronautical Operational Control (AOC) Message Hazard Mitigation (AMHM).

DATES: The meeting will be held on May 4–6, 2004, beginning at 9 a.m.

ADDRESSES: The meeting will be held at Fedex, MD–10/MD–Training Module D, Memphis, TN.

FOR FURTHER INFORMATION CONTACT: (1) RTCA Secretariat, 1828 L Street, NW., Suite 805, Washington, DC 20036–5133; telephone (202) 833–9339; fax (202) 833–9434; web site *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., Appendix 2), notice is hereby given for a Special Committee 201 meeting. The agenda will include:

- May 4:
- Opening Session (Welcome, Introductory and Administrative Remarks, Review Agenda, Background).
- Review of phonecon discussions and conclusions.
- Review comments to draft DO–AMHM Safety Requirements Standards for AOC Datalink Services, draft Version G.
- Prepare draft Version H for final review and comment (FRAC) prior to submission to the RTCA PMC for approval.
- Closing Session (Other Business, Date and Place of Next Meeting, Closing Remarks, Adjourn).

Note: This agenda will be followed as appropriate over the course of 3 days.

Attendance is open to the interested public but limited to space availability. With the approval of the chairmen, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on March 12, 2004.

Robert Zoldos,

FAA System Engineer, RTCA Advisory Committee.

[FR Doc. 04–6863 Filed 3–25–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Application (04–04–C–00–GUC) To Impose and To Use a Passenger Facility Charge (PFC) at the Gunnison-Crested Buttle Regional Airport, Submitted by the County of Gunnison, CO

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of intent to rule on application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to use a PFC at the Gunnison-Crested Butte Regional Airport under the provisions of 49 U.S.C. 40117 and part 158 of the Federal Aviation Regulations (14 CFR 158).

DATES: Comments must be received on or before April 26, 2004.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Craig A. Sparks, Manager; Denver Airports District Office, DEN–ADO; Federal Aviation Administration; 26805 E. 68th Avenue, Suite 224; Denver, CO 80249–6361.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. John DeVore, Chief Executive Officer, Gunnison County, at the following address: Gunnison-Crested Butte Regional Airport, 711 West Rio Grande, Gunnison Colorado 81230.

Air Carriers and foreign air carriers may submit copies of written comments previously provided to the Gunnison-Crested Butte Regional Airport, under § 158.23 of part 158.

FOR FURTHER INFORMATION CONTACT: Mr. Chris Schaffer, (303) 342–1258; Denver Airports District Office, DEN–ADO; Federal Aviation Administration, 26805 E. 68th Avenue, Suite 224; Denver, CO 80249–6361. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application (04–04–C–00–GUC) to use a PFC at the Gunnison-Crested Butte Regional Airport, under the provisions of 49 U.S.C. 40117 and part 158 of the Federal Aviation Regulations (14 CFR part 158).

On March 17, 2004, the FAA determined that the application to impose a PFC submitted by the County of Gunnison, Gunnison, Colorado, was substantially complete within the requirements of § 158.25 of part 158. The FAA will approve or disapprove the application, in whole or in part, no later than June 17, 2004.

The following is a brief overview of the application.

Level of the proposed PFC: $4.50.

Proposed charge effective date: July 1, 2004.

Proposed charge expiration date: October 1, 2013.

Total requested for use approval: $2,278,137.00.

Brief description of proposed projects: Runway rehabilitation and shift, Gold Basin Road relocation, taxiway rehabilitation, construction of an aircraft rescue and fire fighting/snow removal equipment storage building, acquire snow removal equipment broom, terminal area study/terminal design, security enhancement.

Class or classes of air carriers which the public agency has requested not be required to collect PFC's: None.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT** and at the FAA Regional Airports Office located at: Federal Aviation Administration, Northwest Mountain Region, Airports Division, ANM–600, 1601 Lind Avenue, SW., Suite 315, Renton, WA 98055–4056.

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the Gunnison-Crested Butte Regional Airport.

Issued in Renton, Washington on March 17, 2004.

David A. Field,

Manager, Planning, Programming and Capacity Branch, Northwest Mountain Regionn.

[FR Doc. 04–6753 Filed 3–25–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administrator

Notice of Passenger Facility Charge (PFC) Approvals and Disapprovals

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Monthly Notice of PFC Approvals and Disapprovals. In January 2004, there were three applications approved. This notice also includes information on one application, approved in November 2003, inadvertently left off the November 2003 notice. Additionally, eight approved amendments to previously approved applications are listed.

SUMMARY: The FAA publishes a monthly notice, as appropriate, of PFC approvals and disapprovals under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR part 158). This notice is published pursuant to paragraph (d) of § 158.29.

PFC Applications Approved

Public Agency: Salt Lake City Department of Airports, Salt Lake City, Utah.

Application Number: 03–07–C–00–SLC.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $68,667,132.

Earliest Charge Effective Date: June 1, 2004.

Estimated Charge Expiration Date: August 1, 2006.

Class of Air Carriers Not Required To Collect PFC's: Air taxi/commuter operators filing FAA Form 1800–31.

Determination: Approved. Based on information submitted in the public agency's application, the FAA has determined that the approved class accounts for less than 1 percent of the total annual enplanements at Salt Lake City International Airport.

Brief Description of Project Approved for Collection and Use: West runway 16R/34L.

Decision Date: November 19, 2003.

FOR FURTHER INFORMATION CONTACT: Christopher Schaffer, Denver Airports District Office, (303) 342–1258.

Public Agency: Dallas-Fort Worth International Airport Board, Dallas/Fort Worth, Texas.

Application Number: 03–07–C–00–DFW.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $59,604,952.

Earliest Charge Effective Date: October 1, 2013.

Estimated Charge Expiration Date: March 1, 2014.

Class of Air Carriers Not Required To Collect PFC's: All air taxi/commercial operators.

Determination: Approved. Based on information submitted in the public

agency's application, the FAA has determined that the approved class accounts for less than 1 percent of the total annual enplanements at Dallas-Fort Worth International Airport.

Brief Description of Project Approved for Collection and Use: Air Transportation and Security Act compliance.

Decision Date: January 21, 2004.

FOR FURTHER INFORMATION CONTACT: G. Thomas Wade, Southwest Region Airports Division, (817) 222–5613.

Public Agency: Clearfield-Jefferson Counties Airport Authority, Falls Creek, Pennsylvania.

Application Number: 04–04–C–00–DUJ.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $325,413.

Earliest Charge Effective Date: April 1, 2004.

Estimated Charge Expiration Date: October 1, 2013.

Class of Air Carriers Not Required To Collect PFC's: Non-scheduled on-demand air carriers filing FAA Form 1800–31.

Determination: Approved. Based on information submitted in the public agency's application, the FAA has determined that the approved class accounts for less than 1 percent of the total annual enplanements at Dubois-Jefferson County Airport.

Brief Description of Projects Approved for Collection and Use:

Airport master plan.

Wildlife hazard assessment.

Runway safety areas—runway 7 end.

Electrical vault.

Snow removal equipment.

High inensity runway lighting.

Aircraft rescue and firefighting building.

Aircraft rescue and firefighting vehicle.

Replace security card gates.

Expand terminal apron.

Security enhancements.

Improve runway 25 safety area (land acquisition) phase I.

PFC application/formulation.

Decision Date: January 27, 2004.

FOR FURTHER INFORMATION CONTACT: Lori Ledebohm, Harrisburg Airports District Office, (717) 730–2835.

Public Agency: City of San Jose, California.

Application Number: 04–14–C–00–SJC.

Application Type: Impose and use a PFC.

PFC Level: $4.50.

Total PFC Revenue Approved in This Decision: $97,197.000.

Earliest Charge Effective Date: August 1, 2014.

Estimated Charge Expiration Date: September 1, 2017.

Class of Air Carriers Not Required To Collect PFC'S: Nonscheduled/on-demand air carriers filing FAA Form 1800–31.

Determination: Approved. Based on information submitted in the public agency's application, the FAA has determined that the approved class accounts for less than 1 percent of the total annual enplanements at Norman Y. Mineta San Jose International Airport.

Brief Description of Project Approved for Collection and Use: Taxiway Y reconstruction.

Decision Date: January 29, 2004.

FOR FURTHER INFORMATION CONTACT: Marlys Lingsch, San Francisco Airports District Office, (650) 876–2806.

Amendments to PFC Approvals:

Amendment No. city, state	Amendment approved date	Original approved net PFC revenue	Amended approved net PFC revenue	Original estimated charge exp. date	Amended estimated charge exp. date
*99–01–C0–2–FAI Fairbanks, AK	12/31/03	$5,460,000	$5,460,000	03/01/06	10/01/06
*95–04–C–02–AUS Austin, TX	01/09/04	333,232,479	343,074,546	07/01/20	01/01/20
98–01–C–02–JNU Juneau, AK	01/12/04	1,172,772	1,186,073	08/01/00	08/01/00
01–01–C–01–SFO San Francisco, CA	01/21/04	112,738,745	0	01/01/04	01/01/04
95–03–C–02–SBP San Luis Obispo, CA	01/21/04	711,439	571,447	05/01/97	05/01/97
99–05–C–01–SBP San Luis Obispo, CA	01/21/04	1,229,113	1,040,111	07/01/15	07/01/15
98–01–C–01–EKO Elko, NV	01/21/04	774,635	595,051	02/01/01	02/01/01
95–03–C–02–MF Medford, OR	01/21/04	2,082,935	2,192,466	06/01/04	09/01/04

(**Note:** The amendments denoted by an asterisk (*) include a change to the PFC level charged from $3.00 per enplaned passenger to $4.50 per enplaned passenger. For Fairbanks, AK and Austin, TX, this change is effective on April 1, 2004.

Issued in Washington, DC on March 18, 2004.

JoAnn Horne,

Manager, Financial Analysis and Passenger Facility Charge Branch.

[FR Doc. 04–6752 Filed 3–25–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Rule on Application 04–02–C–00–BFF To Impose and Use the Revenue From a Passenger Facility Charge (PFC) at Western Nebraska Regional Airport, Scottsbluff, NE

AGENCY: Federal Aviation Administration, (FAA), (DOT).

ACTION: Notice of Intent to Rule on Application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Western Nebraska Regional Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

DATES: Comments must be received on or before April 26, 2004.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address: Federal Aviation Administration, Central Region, Airports Division, 901 Locust, Kansas City, MO 64106.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Darwin Skelton, Airport Manager, Western

Nebraska Regional Airport, at the following address: Western Nebraska Regional Airport, 250094 Robertson Road, Scottsbluff, Nebraska 69361.

Air carriers and foreign air carriers may submit copies of written comments previously provided to the Western Nebraska Regional Airport, under section 158.23 of Part 158.

FOR FURTHER INFORMATION CONTACT: Lorna K. Sandridge, PFC Program Manager, FAA, Central Region, 901 Locust, Kansas City, MO 64106, (816) 329–2641. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at the Western Nebraska Regional Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

On January 14, 2004, the FAA determined that the application to impose and use the revenue from a PFC submitted by the Western Nebraska Regional Airport was not substantially complete within the requirements of § 158.25 of Part 158. The Western Nebraska Regional Airport submitted supplemental information on March 10, 2004, to complete the application. The FAA will approve or disapprove the supplemental application, in whole or in part, no later than July 8, 2004.

The following is a brief overview of the application.

Level of the proposed PFC: $4.50.

Proposed charge effective date: October, 2004.

Proposed charge expiration date: April, 2007.

Total estimated PFC revenue: $112,710.

Brief description of proposed project(s): Construct new terminal.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT**.

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at the Western Nebraska Regional Airport.

Issued in Kansas City, Missouri on March 12, 2004.

Jim Johnson,

Acting Manager, Airports Division, Central Region

[FR Doc. 04–6754 Filed 3–25–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Policy Statement PS-ACE100–2002–005, Circuit Breakers and Fuses, Section 23.1357(d)

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of issuance of policy statement.

SUMMARY: This notice announces policy statement PS–ACE100–2002–005 on Circuit Breakers and Fuses. The policy statement provides clarification on installed circuit breakers, which includes either primary or secondary (in-line) circuit protection. It also clarifies policy contained in advisory circular AC–23–17A. The policy applies to normal, utility, acrobatic, and commuter category airplanes as well as non-rigid airships certificated in the normal category with nine seats or fewer, excluding the pilot's seat. This notice is necessary to inform manufacturers and modifiers of these aircraft about this policy.

DATES: Policy statement PS–ACE100–2002–005 was issued by the Manager of the Small Airplane Directorate on February 23, 2004.

How to Obtain Copies: The policy statement will be available on the Internet at *http://www.faa.gov/certification/aircraft*. You may obtain a paper copy of PS–ACE100–2002–005 either by writing to the Small Airplane Directorate, Regulations and Policy Office, ACE–111, 901 Locust, Kansas City, MO 64106; by calling the office at telephone 816–329–4127; or by faxing your request to Mr. Wes Ryan at 816–329–4090.

Issued in Kansas City, Missouri, on February 23, 2004.

James E. Jackson,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–6749 Filed 3–25–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Policy Statement Number PS–ACE100–2004–10023]

Proposed Small Airplane Directorate Policy on Flammability of Electrical Wire

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of availability; request for comments.

SUMMARY: This notice announces a Federal Aviation Administration (FAA) proposed policy on the applicability of AC 43.13–1B for flammability of electrical wire used in part 23 aircraft per 14 CFR 23.853, 23.1359. The FAA proposes that any electrical wire listed in section 7 of AC 43.13–1B complies with part 23 flammability requirements. This notice is necessary to advise the public of this FAA policy and give all interested persons an opportunity to present their views on it.

DATES: Send your comments by April 26, 2004.

Discussion: The Small Airplane Directorate is making the proposed policy statement on flammability of electrical wire used in part 23 aircraft available to the public and all manufacturers for their comments.

ADDRESSES: Copies of the proposed policy statement, PS–ACE100–2004–10023, may be requested from the following: Small Airplane Directorate, Standards Office (ACE–110), Aircraft Certification Service, Federal Aviation Administration, 901 Locust Street, Room 301, Kansas City, MO 64106. The proposed policy statement is also available on the Internet at the following address *http://www.faa.gov/certification/aircraft*. Send all comments on this proposed policy statement to the individual identified under **FOR FURTHER INFORMATION CONTACT.**

FOR FURTHER INFORMATION CONTACT: Les Taylor, Federal Aviation Administration, Small Airplane Directorate, Regulations & Policy, ACE–111, 901 Locust Street, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4134; fax: 816–329–4090; e-mail: *leslie.b.taylor@faa.gov*.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite your comments on this proposed policy statement. Send any data or views as you may desire. Identify the proposed Policy Statement Number PS–ACE100–2004–10023 on your comments, and if you submit your comments in writing, send two copies of your comments to the above address. The Small Airplane Directorate will consider all communications received on or before the closing date for comments. We may change the proposal contained in this notice because of the comments received.

Comments sent by fax or the Internet must contain "Comments to proposed policy statement PS–ACE100–2004–10023" in the subject line. You do not need to send two copies if you fax your comments or send them through the Internet. If you send comments over the

Internet as an attached electronic file, format it in either Microsoft Word 97 for Windows or ASCII text. State what specific change you are seeking to the proposed policy memorandum and include justification (for example, reasons or data) for each request.

Issued in Kansas City, Missouri on February 23, 2004.

James E. Jackson,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–6745 Filed 3–25–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Policy Statement No. PS–ANM100–2004–10021]

Installation of "No Stowage" Placards on a Surface Not Designed or Intended To Be Used for Stowage

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed policy; request for comments.

SUMMARY: The Federal Aviation Administration (FAA) announces the availability of proposed policy on installation of "no stowage" placards on surfaces not designed or intended to be used for stowage.

DATES: Send your comments on or before April 26, 2004.

ADDRESSES: Address your comments to the individual identified under **FOR FURTHER INFORMATION CONTACT.**

FOR FURTHER INFORMATION CONTACT: Michael T. Thompson, Federal Aviation Administration, Transport Airplane Directorate, Transport Standards Staff, Airframe and Cabin Safety Branch, ANM–115, 1601 Lind Avenue, SW., Renton, WA 98055–4056; telephone (425) 227–1157; fax (425) 227–1232; e-mail: *Michael.T.Thompson@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

The proposed policy is available on the Internet at the following address: *http://www.airweb.faa.gov/rgl.* If you do not have access to the Internet, you can obtain a copy of the policy by contacting the person listed under **FOR FURTHER INFORMATION CONTACT.**

The FAA invites your comments on this proposed policy. We will accept your comments, data, views, or arguments by letter, fax, or e-mail. Send your comments to the person indicated in **FOR FURTHER INFORMATION CONTACT.** Mark your comments, "Comments to Policy Statement No. PS–ANM100–2004–10021."

Use the following format when preparing your comments:

- Organize your comments issue-by-issue.
- For each issue, state what specific change you are requesting to the proposed policy.
- Include justification, reasons, or data for each change you are requesting.

We also welcome comments in support of the proposed policy.

We will consider all communications received on or before the closing date for comments. We may change the proposed policy because of the comments received.

Background

If has been brought to the attention of the Transport Airplane Directorate, Transport Standards Staff that an aircraft certification office has, in some instances, required an applicant to install "No Stowage" or "No Stowage During Taxi, Takeoff and Landing" placards on some surfaces that were not designed or intended to be used for stowage. Although not designed for stowage, these surfaces could, because of their shapes and locations, accommodate the placement of articles upon them. The placards were intended to address a concern that carry-on or other articles, not on the airplane type design, could be inappropriately stowed there and, in case of an accident or severe turbulence, become injurious projectiles. The Staff has investigated this practice and determined that the part 25 regulations relating to the stowage of cargo, baggage, carry-on articles and equipment do not require the installation of these placards for surfaces such as these. Therefore, while an applicant may be encouraged to install such placards, they cannot be required to install the placards.

This policy memorandum is meant to address surfaces that are clearly not intended to be stowage compartments, which must meet the requirements of § 25.787.

Issued in Renton, Washington, on March 16, 2004.

Michael Kaszycki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–6750 Filed 3–25–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice To Rescind a Notice of Intent To Prepare a Supplemental Draft Environmental Impact Statement (SDEIS): Pulaski County, AK

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Rescind Notice of Intent to prepare a SDEIS.

SUMMARY: The FHWA is issuing this notice to advise the public that the Notice of Intent published on February 18, 1999 to prepare a Supplemental Draft Environmental Impact Statement (SDEIS) for a proposed highway project in Pulaski County, Arkansas is being rescinded.

FOR FURTHER INFORMATION CONTACT: Randal J. Looney, Environmental Specialist, Federal Highway Administration, Arkansas Division, 700 West Capitol Avenue, Room 3130, Little Rock, Arkansas 72201–3298, Telephone: (501) 324–6430.

SUPPLEMENTARY INFORMATION:

Background

The FHWA, in cooperation with the Arkansas Highway and Transportation Department, is rescinding the notice of intent to prepare a Supplemental Draft Environmental Impact Statement (SDEIS) on a proposal to construct the North Belt Freeway, a four-lane, divided, fully controlled access facility located on new alignment in northern Pulaski County.

In 1994, a Final Environmental Impact Statement (FEIS) and a Record of Decision (ROD) identified a selected alignment (1A). However, a portion of this alignment was not compatible with the City of Sherwood's Master Street Plan, and the project was not included in the Transportation Improvement Program (TIP) developed by Metroplan, the responsible Metropolitan Planning Organization (MPO). On February 18, 1999, FHWA published a NOI to prepare a SDEIS as part of the development process for the construction of this proposed freeway project.

The proposed project will primarily serve central Arkansas including Little Rock, North Little Rock, Sherwood, Jacksonville, and northern Pulaski County, Arkansas. The SDEIS was to have addressed a new alignment alternative (1B) proposed by the City of Sherwood and three previously studied alternatives located between the Highway 107/Brockington Road interchange and the eastern boundary of

Camp Robinson near Maryland Avenue and Batesville Pike. The three previously studied alternatives were evaluated in the project's Draft EIS in 1991 and in the project's Final EIS in 1994.

The SDEIS was to focus on a limited study are between Batesville Pike and Brockington Road in northern Pulaski County, since this is the portion of the proposed corridor where several alternative alignments were still being considered. The remaining portions of the selected and approved North Belt Freeway alignment to the east toward Highway 67 and to the west through Camp Robinson ending at the I–40/I–430 interchange were to be reviewed only to a level necessary to document if any substantial changes have taken place since the completion and approval of the project's FEIS and ROD.

A preliminary study of the project alignments completed in 2003 attempted to establish if the local community and MPO could support the originally selected project alternative. The public involvement process associated with this reevaluation indicated public opposition for the originally selected alignment alternative. The City of Sherwood and Metroplan, citing the project's incompatibility with local and regional plans, refused to endorse the originally selected alignment alternative as the locally preferred route. Therefore, an SDEIS will be conducted to evaluate all feasible alternatives, possibly including alignments not evaluated in the project's original DEIS and FEIS. The original NOI for the SDEIS is being rescinded because it limited the area of study. A notice of intent to announce an SDEIS with an expanded study area for this project will be published subsequent to this NOI.

To ensure that the full range of issues related to this proposed action and all significant issues are identified, comments and suggestions are invited from all interested parties regarding this action to rescind the NOI published on February 18, 1999 for the proposed North Belt Freeway. Comments or questions concerning this proposed action should be directed to the FHWA Arkansas Division at the address provided above.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation of Federal programs and activities apply to this program.

Issued on: March 16, 2004.

Sandra L. Otto,

Division Administrator, FHWA, Little Rock, Arkansas.

[FR Doc. 04–6809 Filed 3–25–04; 8:45 am]

BILLING CODE 4910–22–M

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

Office of Hazardous Materials Safety; Notice of Application for Exemptions

AGENCY: Research and Special Programs Administration, DOT.

ACTION: List of applications for exemption.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, exemptions from the Department of Transportation's Hazardous Material Regulations (49 CFR part 107, Subpart B), notice is hereby given that the Office of Hazardous Materials Safety has received the application described herein. Each mode of transportation for which a particular exemption is requested is indicated by a number in the "Nature of Application" portion of the table below as follows: 1—Motor vehicle, 2—Rail freight, 3—Cargo vessel, 4—Cargo aircraft only, 5—Passenger-carrying aircraft.

DATES: Comments must be received on or before April 26, 2004.

ADDRESS COMMENTS TO: Record Center, Research and Special Programs Administration, U.S. Department of Transportation, Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If Confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the exemption number.

FOR FURTHER INFORMATION CONTACT: Copies of the applications are available for inspection in the Records Center, Nassif Building, 400 7th Street SW., Washington, DC or at *http://dms.dot.gov.*

This notice of receipt of applications for modification of exemption is published in accordance with Part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on March 23, 2004.

R. Ryan Posten,

Exemptions Program Officer, Office of Hazardous Materials Exemptions & Approvals.

NEW EXEMPTIONS—FEBRUARY 2004

Application number	Docket number	Applicant	Regulation(s) affected	Nature of exemption thereof
13482–N		U.S. Vanadium Corporation (Subsidiary of Straegic Minerals Corporation), Niagara Falls, NY.	49 CFR 172.102 (SP B14).	To authorize the transportation in commerce of certain uninsulated DOT specification 51 portable tanks that are currently authorized for certain hazardous materials, except that the portable tanks do not meet the provisions of Section 172.101 SP B14. (modes 1, 3).
13483–N		Norris Cylinder Company, Longview, TX.	49 CFR 173.301(a)(1); 173.301(a)(2); 173.302a(a)(1).	To authorize the transportation of a non-DOT specification cylinder conforming in part with the DOT-3AA specification, for use in transporting non-liquefied compressed gases. (modes 1, 4).
13484–N		Air Liquide America L.P., Houston, TX.	49 CFR 177.834	To authorize cargo tanks to remain connected while standing without the physical presence of an unloader. (mode 1).
13485–N		Taylor-Wharton (Harsco Gas and Fluid Control Group), Harrisburg, PA.	49 CFR 173.301(a); 173.302a; 173.304a(a); 173.3; 180.205(c)(f)(g).	To authorize the manufacture, mark, sale and use of a non-DOT specification cylinder conforming with all regulation applicable to a DOT-3AA specification cylinder for use in transporting Division 2.1, 2.2 and 2.3 hazardous materials. (modes 1, 2, 3, 4, 5).

NEW EXEMPTIONS—FEBRUARY 2004—Continued

Application number	Docket number	Applicant	Regulation(s) affected	Nature of exemption thereof
13487–N		University of Colorado Health Services Center, Denver, CO.	49 CFR 173.197	To authorize the one-way transportation in commerce of certain infectious materials in alternative packaging. (mode 1).
13522–N		Green-Port Environmental Managers, LTD., Scipio Center, NY.	49 CFR 173.25; 173.29(a); 173.301(a)(9); 177.840.	To authorize the transportation in commerce of DOT-Specification 39 cylinders for disposal in alternative outside packaging. (mode 1).

[FR Doc. 04–6864 Filed 3–25–04; 8:45 am]
BILLING CODE 4909–60–M

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

Office of Hazardous Materials Safety; Notice of Applications for Modification of Exemption

AGENCY: Research and Special Programs Administration, DOT.

ACTION: List of Applications for Modification of Exemption.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, exemptions from the Department of Transportation's Hazardous Material Regulations (49 CFR part 107, Subpart B), notice is hereby given that the Office of Hazardous Materials Safety has received the application described herein. This notice is abbreviated to expedite docketing and public notice. Because the sections affected, modes of transportation, and the nature of application have been shown in earlier **Federal Register** publications, they are not repeated here. Request of modifications of exemptions (*e.g.* to provide for additional hazardous materials, packaging design changes, additional mode of transportation, etc.) are described in footnotes to the application number. Application numbers with the suffix "M" demote a modification request. Their applications have been separated from the new application for exemption to facilitate processing.

DATES: Comments must be received on or before April 12, 2004.

ADDRESS COMMENTS TO: Record Center, Research and Special Programs Administration, U.S. Department of Transportation, Washington, DC 20590. Comments should refer to the application number and be submitted in triplicate. If Confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the exemption number.

FOR FURTHER INFORMATION CONTACT: Copies of the applications are available for inspection in the Records Center, Nassif Building, 400 7th Street SW., Washington, DC or at *http://dms.dot.gov.*

This notice of receipt of applications for modification of exemption is published in accordance with Part 107 of the Federal hazardous materials transportation law (49 U.S.C. 5117(b); 49 CFR 1.53(b)).

Issued in Washington, DC, on March 23, 2004.

R. Ryan Posten,

Exemptions Program Officer, Office of Hazardous Materials Exemptions & Approvals.

MODIFICATION EXEMPTIONS—FEBRUARY 2004

Application number	Docket number	Applicant	Modification of exemption	Nature of exemption thereof
8495–M		Kidde Aerospace Wilson, SC	8495	To modify the exemption to clarity and authorize the use of the service pressure to determine the maximum allowable sidewall stress for the non-DOT specification cylinders.
7280–M		Department of Defense, Ft. Eustis, VA.	7280	To modify the exemption to authorize the use of 5,000 or 7,500 gallon fuel-servicing tanker semi-trailers and the transportation of Class 3 and additional Class 9 materials.
9894–M		Luxfer Gas Cylinders, Riverside, CA.	9894	To modify the exemption to authorize the transportation of additional Division 2.2 materials in non-DOT specification fiber reinforced plastic hoop wrapped cylinders.
11043–M		Onyx Environmental Services, L.L.C., Ledgewood, NJ.	11043	To modify the exemption to authorize the transportation of Division 2.1 materials on the same transport vehicle with Class 3, 4, 5, and 8 materials.
11440–M		PPG Industries, Inc., Pittsburgh, PA.	11440	To modify the exemption to authorize the use of wooden pallets for the transportation of Division 6.1 materials in polyethylene drums or composite packaging.
12122–M	RSPA–98–4313	ARC Automotive, Inc., Knoxville, TN.	12122	To modify the exemption to authorize an increase of the maximum service pressure to 8,000 psig at 70 degrees F for the non-DOT specification pressure vessels for use as components of automobile vehicle safety systems.
12844–M	RSPA–01–10753	Delphi Automotive Systems, Vandalia, OH.	12844	To modify the exemption to authorize an increase of maximum service pressure from 5,000 to 6,000 psig for the non-DOT specification pressure vessels used as components of automobile vehicle safety systems.

MODIFICATION EXEMPTIONS—FEBRUARY 2004—Continued

Application number	Docket number	Applicant	Modification of exemption	Nature of exemption thereof
12899–M	RSPA–02–11387 ...	Pencor Reservoir Fluid Specialists, Broussard, LA.	12899	To modify the exemption to authorize the use of an optional pressure compensating end cap closure for the non-DOT specification oil well sampling cylinders.
13221–M	RSPA–03–14967 ...	Toxco, Inc., Oak Ridge, TN	13221	To modify the exemption to authorize bulk containers to be shipped in sealed freight containers and increase the number of authorized non-bulk containers to 83 for the transportation of Division 4.3 materials.
13305–M	RSPA–03–16420 ...	Matheson Tri-Gas, East Rutherford, NJ.	13305	To modify the exemption to authorize the one-way transportation, for cleaning and final disposition, of older DOT Specification 5A drums containing a Division 4.3 material.
13323–M	RSPA–03–16488 ...	Integrated Ocean Drilling Program/Texas A&M University (Former Grantee: Ocean Drilling Program/Texas A&M University), College Station, TX.	13323	To reissue the exemption originally issued on an emergency basis for the transportation of a Division 2.1 material in non-DOT specification cylinders.
12135–M	RSPA–98–4418	Daicel Safety Systems, Inc., Washington, DC.	12135	To modify the exemption to authorize an increase in the maximum allowable service pressure for the non-DOT specification pressure vessels from 4560 PSIG to 8990 PSIG.

[FR Doc. 04–6865 Filed 3–25–04; 8:45 am]
BILLING CODE 4909–60–M

UTAH RECLAMATION MITIGATION AND CONSERVATION COMMISSION

Notice of Availability of the Decision Notice and Finding of No Significant Impact for the Warm-Water Interim Hatchery Facility in Cache County, UT

AGENCY: Utah Reclamation Mitigation and Conservation Commission.

ACTION: Notice of availability.

SUMMARY: On September 24, 2003 the Utah Reclamation Mitigation and Conservation Commission (Commission) and the Utah Division of Wildlife Resources (Division) released an Environmental Assessment (EA) evaluating construction and operation of an interim warm-water fish hatchery to produce stockable June sucker (*Chasmistes liorus*), which is listed as endangered by the U.S. Fish and Wildlife Service (USFWS). The EA considers two potential sites for the Interim Facility: the first site is on approximately 2.4 acres of Utah State land at Goshen Warm Springs in the City of Genola, Utah County, Utah (Goshen Warm Springs Alternative); the second site is on approximately 0.1 acre of Utah State land operated as the Fisheries Experiment Station (FES) in Logan, Utah (FES Alternative).

The June sucker, a fish endemic to Utah Lake that spawns in the Provo River, is a species targeted for recovery. The USFWS listed the species as endangered with critical habitat in 1986. In 1999, the USFWS adopted a June Sucker Recovery Plan with a stated goal to prevent the extinction of the species and eventually remove the fish from the endangered species list. A 1998 Fish Hatchery Production Plan developed by the Commission and the Division identified an immediate need for June sucker production. In order to offset a further decline in June sucker numbers until a permanent Production Facility could be planned and constructed, the Interim Facility is proposed for immediate construction and operation.

After careful review of impacts to affected resources analyzed in the EA, and examination of public comments, the Commission and the Division have selected the preferred alternative (FES Alternative), to construct the Interim Facility at the existing facility in Logan, Utah, for implementation. The FES is managed by the Division and is currently rearing June sucker for use as broodstock. The facility will be an approximately 4,200 square-foot addition to an existing building, allowing space for fish tanks as well as equipment necessary for water recirculation and heating, and will have an annual production capacity of 36,000 stockable June sucker at 8.5 inches in length.

The Commission and the Division selected the FES Alternative because no significant impacts will be created, and because the FES Alternative provides the best opportunity to meet interim production needs for June sucker while maintaining cost efficiency. Additional security will not have to be provided, as at Goshen Warm Springs, because of existing coverage at the FES. The FES Alternative would be substantially less expensive to construct and operate, because of the existing infrastructure (parking, utilities, etc.) and proximity to existing June sucker brood stock production at FES.

The Environmentally Preferred Alternative is the FES Alternative. The FES Alternative has less overall associated environmental impacts than the Goshen Warm Springs Alternative. The FES Alternative would: be sited, primarily, on Utah State lands currently developed for aquaculture operations; require less land conversion and development; result in no surface water quality impacts; and result in no direct wetland impacts. The action, along with identified requisite mitigation, is consistent with Commission and Division policies and other laws and regulations.

The FES alternative does not constitute an action that normally requires preparation of an Environmental Impact Statement (EIS). Information derived from public involvement, including that from other agencies, was considered and factored into the decision. Since the preferred alternative, as mitigated, will not cause unacceptable impacts, or create unsafe or unhealthful conditions, it is appropriate to approve the action considering governing laws and policies. Based on the foregoing, it was determined that an EIS is not required for this project and thus will not be prepared.

ADDRESSES: Copies of the FONSI can be obtained from the Utah Reclamation

Mitigation and Conservation Commission, 102 West 500 South, Suite 315, Salt Lake City, Utah 84101.

FOR FURTHER INFORMATION CONTACT: Maureen Wilson, (801) 524–3146.

Dated: March 17, 2004.

Michael C. Weland,

Executive Director, Utah Reclamation Mitigation and Conservation Commission.

[FR Doc. 04–6810 Filed 3–25–04; 8:45 am]

BILLING CODE 4310–05–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Women Veterans, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that the Advisory Committee on Women Veterans will meet April 20–22, 2004, from 8 a.m. to 4:30 p.m., in Room 560, Lafayette Building, 811 Vermont Avenue, NW., Washington, DC 20420. The meeting is open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs regarding the needs of women veterans with respect to health care, rehabilitation, compensation, outreach, and other programs and activities administered by VA designed to meet such needs. The Committee will make recommendations to the Secretary regarding such programs and activities.

On April 20, the agenda will include briefings and updates on issues related to women veterans' issues in VA's Veterans Health Administration, data on recent combat veterans from the Department of Defense Manpower Data Center Database, the release of the Capital Asset Realignment for Enhanced Services (CARES) Report, focus group site visits, compensation and pension benefits, plans for incorporating and providing service to women veterans into VA's Vet Centers, and presentation of a Certificate of Appointment to one new Committee member. On April 21, the Committee will be briefed on legislative issues affecting women veterans, upcoming initiatives of the Center for Women Veterans, and will begin preparation of the 2004 report. On April 22, the Committee will discuss any new issues that the Committee members may introduce, as well as continue preparation of the 2004 report.

Any member of the public wishing to attend should contact Ms. Rebecca Schiller, at the Department of Veterans Affairs, Center for Women Veterans (OOW), 810 Vermont Avenue, NW., Washington, DC 20420. Ms. Schiller may be contacted wither by phone at (202) 273–6193, fax at (202) 273–7092, or e-mail at *OOW@mail.va.gov*. Interested persons may attend, appear before, or file statements with the Committee. Written statements must be filed before the meeting, or within 10 days after the meeting.

By Direction of the Secretary.

Dated: March 19, 2004.

E. Philip Riggin,

Committee Management Officer.

[FR Doc. 04–6737 Filed 3–25–04; 8:45 am]

BILLING CODE 8320–01–M

Corrections

Federal Register
Vol. 69, No. 59
Friday, March 26, 2004

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Science Board

Correction

In notice document 04–5642 beginning on page 11599 in the issue of March 11, 2004, make the following correction:

On page 5642, in the third column, in the **SUMMARY** section, in the 4th line, "March 19, 2004," should read, "March 19, 2004, and March 31, 2004".

[FR Doc. C4–5462 Filed 3–25–04; 8:45 am]
BILLING CODE 1505–01–D

Federal Register

Friday,
March 26, 2004

Part II

Department of Energy

Federal Energy Regulatory Commission

18 CFR Part 35
Standardization of Generator Interconnection Agreements and Procedures; Order on Rehearing; Rule

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 35

[Docket No. RM02–1–001; Order No. 2003–A]

Standardization of Generator Interconnection Agreements and Procedures

Issued March 5, 2004.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Order on rehearing.

SUMMARY: The Federal Energy Regulatory Commission (Commission) reaffirms its determinations in Order No. 2003 and clarifies certain provisions. Order No. 2003 requires all public utilities that own, control, or operate facilities for transmitting electric energy in interstate commerce to file revised open access transmission tariffs containing standard generator interconnection procedures and a standard agreement that the Commission adopted in that order and to provide interconnection service under them to electric generating facilities having a capacity of more than 20 megawatts. Any non-public utility that seeks voluntary compliance with the reciprocity condition of an open access transmission tariff may satisfy this condition by adopting these revised procedures and agreement.

EFFECTIVE DATE: April 26, 2004.

FOR FURTHER INFORMATION CONTACT:

Patrick Rooney (Technical Information), Office of Markets, Tariffs and Rates, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–6205.

Roland Wentworth (Technical Information), Office of Markets, Tariffs and Rates, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8262.

Bruce Poole (Technical Information), Office of Markets, Tariffs and Rates, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8468.

Abraham Silverman (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE.,Washington, DC 20426, (202) 502–6444.

Michael G. Henry (Legal Information), Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE.,Washington, DC 20426, (202) 502–8532.

SUPPLEMENTARY INFORMATION:

Table of Contents

Before Commissioners: Pat Wood, III, Chairman, Nora Mead Brownell, Joseph T. Kelliher, and Suedeen G. Kelly.

I. Introduction and Summary

1. On July 24, 2003, the Commission issued a Final Rule (Order No. 2003)[1] requiring all public utilities that own, control, or operate facilities used for transmitting electric energy in interstate commerce to have on file standard procedures and a standard agreement for interconnecting generating facilities capable of producing more than 20 megawatts of power (Large Generators) to their transmission facilities.[2] Order No. 2003 requires that all public utilities subject to it modify their open access transmission tariffs(OATTs) to incorporate the Large Generator Interconnection Procedures (LGIP) and Large Generator Interconnection Agreement (LGIA).[3]

2. Interconnection plays a crucial role in bringing much-needed generation into national energy markets to meet the growing needs of electricity customers. Currently, the interconnection process is fraught with delays and lack of standardization that discourage merchant generators from entering into the energy marketplace, in turn stifling the growth of competitive energy markets. The delays and lack of standardization inherent in the current system undermine the ability of generators to compete in the market and provide an unfair advantage to utilities that own both transmission and generation facilities. As a result, the Commission concluded in Order No. 2003 that there is a pressing need for a single, uniformly applicable set of procedures and agreements to govern the process of interconnecting Large Generators to a Transmission Provider's Transmission System.[4]

3. We reaffirm here the legal and policy conclusions on which Order No. 2003 is based. Adoption of the LGIP and LGIA will prevent undue discrimination, preserve reliability, increase energy supply, and lower wholesale prices for customers by increasing the number and variety of generation resources competing in wholesale electricity markets while ensuring that the reliability of the Transmission System is protected. At its core, Order No. 2003 ensures that generators independent of Transmission Providers and generators affiliated with Transmission Providers are offered Interconnection Service on comparable terms.

4. We recognize that issues will arise that are not covered by the LGIP and LGIA. When that happens, we expect the Parties to follow the spirit of Order No. 2003 and to deal with one another in good faith. Transmission Providers should not use the fact that the LGIP and LGIA do not explicitly cover a particular situation to delay or deny Interconnection Service. While we expect that the vast majority of Interconnection Requests will be efficiently processed under Order 2003, the Commission will continue to step in where necessary and resolve any disputes on a case-by-case basis.

A. Summary of Order Nos. 2003 and 2003-A

1. Jurisdiction

5. Order No. 2003 requires that each public utility that owns, controls, or operates facilities used for transmitting electric energy in interstate commerce to amend its OATT to include interconnection procedures and an interconnection agreement for electric generating facilities having a capacity of more than 20 megawatts.

6. We reaffirm our jurisdictional holding that Order No. 2003 does not expand the Commission's jurisdiction beyond that asserted in Order No. 888 and upheld in court.[5] The Final Rule applies only to interconnection to transmission facilities that are already subject to an OATT. Order No. 2003 applies to an interconnection to a public utility's Transmission System that, at the time the interconnection is requested, is used either to transmit electric energy in interstate commerce or to sell electric energy at wholesale in interstate commerce under a Commission-filed OATT. Additionally, we continue to assert that dual use

[1] Standardization of Generator Interconnection Agreements and Procedures, Order No. 2003, 68 FR 49845 (Aug. 19, 2003), FERC Stats. & Regs. ¶ 31,146 (2003).

[2] Capitalized terms used in this Order on Rehearing have the meanings specified in Section 1 of the Final Rule Large Generator Interconnection Procedures (LGIP) and Article 1 of the Final Rule Large Generator Interconnection Agreement (LGIA), as amended herein, or the open access transmission tariff (OATT). Generating Facility means the device for which the Interconnection Customer has requested interconnection. The owner of the Generating Facility is the Interconnection Customer. The entity (or entities) with which the Generating Facility is interconnecting is the Transmission Provider. A Large Generator is any energy resource having a capacity of more than 20 megawatts, or the owner of such a resource.

[3] Provisions of the LGIP are referred to as "Sections" whereas provisions of the LGIA are referred to as "Articles."

[4] In another rulemaking, the Commission proposed a separate set of procedures and an agreement applicable to Small Generators (defined as any energy resource having a capacity of no larger than 20 MW, or the owner of such a resource) that seek to interconnect to facilities of jurisdictional Transmission Providers that are already subject to an OATT. *See* Standardization of Small Generator Interconnection Agreements and Procedures, Notice of Proposed Rulemaking, 60 FR 49974 (Aug. 19, 2003), FERC Stats. & Regs. ¶ 32,572 (2003).

[5] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 FR 21540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888–A, 62 FR 12274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888–B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888–C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group* v. *FERC*, 225 F.3d 667 (DC. Cir. 2000), *aff'd sub nom. New York* v. *FERC*, 535 U.S. 1 (2002) (*TAPS* v. *FERC*).

facilities (those used both for wholesale and retail transactions) are subject to Order No. 2003 if the facilities are subject to an OATT on file with the Commission when the Interconnection Request is submitted.

2. Pricing and Cost Recovery Provisions

7. In general, we reaffirm the pricing policy adopted in Order No. 2003 for the recovery of the costs of Network Upgrades associated with an interconnection.[6] That is, the Commission's existing pricing policy continues to apply to non-independent Transmission Providers, and an independent Transmission Provider may propose a customized pricing policy to fit its circumstances. We also reaffirm that all Distribution Upgrades (upgrades to the Transmission Provider's "distribution" or lower voltage facilities that are subject to an OATT) are to be paid for by the Interconnection Customer (direct assignment).

8. In this Order on Rehearing, we clarify that, consistent with the Commission's "higher of" ratemaking policy, a non-independent Transmission Provider continues to have the option to charge the Interconnection Customer the "higher of" an average embedded cost (rolled-in) rate or an incremental cost rate for the Network Upgrades needed for either Energy Resource Interconnection Service and Network Resource Integration Service. Incremental pricing is not the same as direct assignment.

9. We reaffirm the Order No. 2003 requirement that, unless the Transmission Provider and the Interconnection Customer agree otherwise, the Interconnection Customer must initially fund the cost of any Network Upgrades associated with the interconnection of its Generating Facility to a non-independent Transmission Provider's transmission system and that the Transmission Provider must reimburse the funded amount on a dollar-for-dollar basis with interest. This reimbursement is in the form of credits against the rates the Interconnection Customer pays for the delivery component of transmission service. However, we are granting rehearing on two aspects of the Order No. 2003 crediting policy. First, we are requiring the Transmission Provider to provide credits to the Interconnection Customer only against transmission delivery service taken with respect to the interconnecting Generating Facility. The Transmission Provider need not provide credits against other Transmission Services. Second, we are giving the Transmission Provider two options regarding the payment of credits. At the end of five years from the Commercial Operation Date of the Generating Facility, the Transmission Provider may either: (1) reimburse the Interconnection Customer for the remaining balance of the upfront payment, plus accrued interest, or (2) continue to provide credits to the Interconnection Customer until the total of all credits equals the Interconnection Customer's upfront payment, plus accrued interest.

10. In addition, we are eliminating the requirement that any Affected System Operator refund an Interconnection Customer's upfront payments for Network Upgrades built on the Affected System as a consequence of the interconnection of the Generating Facility. We instead are requiring the Affected System to provide credits toward the Interconnection Customer's upfront payment only when transmission service is taken by the Interconnection Customer on the Affected System.

11. These modifications ensure that the Transmission Provider can recover the "higher of" the incremental cost rate of the Network Upgrades or the embedded cost transmission rate, which in turn ensures that the native load and other Transmission Customers of the Transmission Provider and the Affected System will not subsidize Network Upgrades required to interconnect merchant generation.

3. Interconnection Products and Services

12. We reaffirm the decision in Order No. 2003 to have the Transmission Provider offer both Energy Resource Interconnection Service and Network Resource Interconnection Service. We more fully explain these services, clarifying two elements. First, neither Energy Resource Interconnection Service nor Network Resource Interconnection Service guarantees delivery service. Although these services both provide the Interconnection Customer with the capability to deliver the output of the Generating Facility into the Transmission System at the Point of Interconnection, neither service provides the Interconnection Customer with the right to withdraw power at any particular Point of Delivery. However, when an Interconnection Customer wants to deliver the output of the Generating Facility to a particular load (or set of loads) regardless of whether it has chosen Energy Resource Interconnection Service or Network Resource Integration Service, it may simultaneously request Network Interconnection Transmission Service or Point to Point Transmission Service under the OATT. Second, Network Resource Interconnection Service is not the same as, or a substitute for Network Integration Transmission Service under the OATT.

13. Also, this Order on Rehearing clarifies certain study requirements for Network Resource Interconnection Service.

4. Summary of Substantive Clarifications or Grants of Rehearing for the Large Generator Interconnection Procedures

14. Section numbers refer to the LGIP, which appears in Appendix B, attached.

15. Section 2.3—Base Case Data—We reiterate the importance of keeping energy infrastructure information secure and clarify that we expect all Parties to comply with the recommendations of the National Infrastructure Protection Center, as well as any best practice recommendations or requirements that may be issued by the North American Electric Reliability Council (NERC) or other electric reliability authorities. We also clarify section 2.3 to emphasize that the Transmission Provider is permitted to require that the Interconnection Customer sign a confidentiality agreement before the release of commercially sensitive information or Critical Energy Infrastructure Information in the Base Case data.

16. Section 3.1—Interconnection Requests—General—We clarify that the Interconnection Customer may select multiple Points of Interconnection to be evaluated in the Interconnection Feasibility Study. After receiving the results, the Interconnection Customer must select its Point of Interconnection. Before completing the Interconnection Facilities Study, the Interconnection Customer may request changes in the engineering details of the proposed interconnection (per LGIP sections 8.3 and 8.4), but may not alter the location of the Point of Interconnection (unless it submits a new Interconnection Request).

17. Section 3.3.4—Scoping Meeting—We clarify issues relating to the sharing of information between the Transmission Provider and its Affiliates.

18. Section 4.1—Queue Position—General—We clarify that the Transmission Provider may allocate the cost of the common upgrades for clustered Interconnection Requests without regard to Queue Position.

[6] Network Upgrades are facilities on the Transmission Provider's side of the Point of Interconnection with the Transmission Provider's Transmission System.

19. Section—4.4—Queue Position—Modifications "We clarify that Queue Position will not be lost when a change in the requested Point of Interconnection is acceptable under any provision of the LGIP that expressly allows a minor change in the Point of Interconnection.

20. Section 6—Interconnection Feasibility Study—The Transmission Provider and the Interconnection Customer may agree to skip the Interconnection Feasibility Study. We also clarify that a lower queued Interconnection Request is not to be included in the Interconnection Feasibility Study, unless the study is for a cluster.

21. Section 11.1—LGIA—Tender—We modify this section to allow an additional 30 days after the Interconnection Customer submits comments to the Transmission Provider for the Transmission Provider to complete the draft appendices. We give the Interconnection Customer an additional 30 days to execute and return the draft appendices.

22. Section 13.6—Local Furnishing Bonds—This new provision is applicable only to a Transmission Provider that has financed facilities for the local furnishing of electric energy with tax-exempt bonds. Such a Transmission Provider is not required to provide Interconnection Service to an Interconnection Customer if the provision of such Transmission Service would jeopardize the tax-exempt status of any local furnishing bond(s) used to finance Transmission Provider's facilities that would be used in providing such Interconnection Service.

23. Appendix 1—We make some ministerial changes to the Interconnection Request and revise Item 3 to state more clearly that the Interconnection Customer must request either Energy Resource Interconnection Service or Network Resource Interconnection Service. In addition, if it requests the latter, we permit it to request that the Generating Facility be also studied for the former.

5. Summary of Substantive Clarifications or Grants of Rehearing for the Large Generator Interconnection Agreement

24. Article numbers refer to the LGIA, which appears in Appendix B, attached.

25. Article 2.3.1—Written Notice—We revise this article to state that the Interconnection Customer may terminate the LGIA after giving the Transmission Provider 90 Calendar Days advance written notice, or by the Transmission Provider notifying the Commission after the Generating Facility permanently ceases Commercial Operation.

26. Article 4.3—Generator Balancing Service Arrangements—We delete this article because we now recognize that this requirement is more closely related to delivery service than to Interconnection Service. Because delivery service requirements are addressed elsewhere in the OATT, the balancing service requirement, and requirements related to Ancillary Services generally, should not appear in the LGIA.

27. Article 5.2—General Conditions Applicable to Option to Build—We modify this article to state that the Interconnection Customer cannot retain ownership of the Transmission Provider's Interconnection Facilities or Stand Alone Network Upgrades unless the Transmission Provider agrees.

28. Article 5.3—Liquidated Damages—We reiterate that the Transmission Provider is not required to agree to liquidated damages and further explain the process for selecting construction milestones and the possible inclusion of a liquidated damages provision. We also explain that if liquidated damages are selected, they are the Interconnection Customer's exclusive remedy for the Transmission Provider's failure to meet its schedule.

29. Article 5.4—Power System Stabilizers & Article 5.10.3—ICIF Construction—We revise these articles to state that the Interconnection Customer is exempt from these provisions if the Generating Facility is a wind generator.

30. Article 5.13—Lands of Other Property Owners—We clarify that the Transmission Provider must assist the Interconnection Customer in siting Interconnection Facilities and Network Upgrades in a manner comparable to that it provides to itself and its Affiliates.

31. Article 5.16—Suspension—We clarify that the period during which work may be suspended will begin on the date for which the suspension is requested in the written notice to the Transmission Provider, or on the date of the notice if no date is specified. We also clarify that the Interconnection Customer may not suspend work for a cumulative period of more than three years for each project.

32. Article 5.17—Taxes—We clarify the Parties' indemnification and security obligations to better reflect the specific risks that the Transmission Provider faces with respect to taxation.

33. Article 6.4—Right to Inspect—We make the confidentiality requirement reciprocal.

34. Article 9.6.1—Power Factor Design Criteria—We exempt wind generators from the requirements of this article.

35. Article 9.6.3—Payment for Reactive Power—If the Transmission Provider pays its generators or those of an Affiliate for reactive power service within the established range, it must also pay the Interconnection Customer.

36. Article 18.3—Insurance—We modify this article to require that self-insuring entities obtain minimum insurance coverage. Furthermore, we clarify that additional insurance to cover the interconnection is not required if the Transmission Provider's existing insurance satisfies Article 18.3.6 and that each Party to the interconnection agreement complies with the notification requirements contained in Article 18.3.9. The notification requirement in Article 18.3.9 is also expanded to require notification if a Party self-insures or intends to rely on existing insurance.

37. Article 19.1—Assignment—We amend Article 19.1 to provide that any financing arrangement entered into by the Interconnection Customer shall provide that prior to or upon the exercise of the secured party's, trustee's or mortgagee's assignment rights pursuant to said arrangement, the secured creditor, the trustee or mortgagee will notify the Transmission Provider of the date and particulars of any such exercise of assignment rights, including providing the Transmission Provider with proof that it meets the requirements of Articles 11.5 and 18.3. We also clarify that the Interconnection Customer, not the assignee, must inform the Transmission Provider of any assignment for purposes of providing collateral.

38. Article 22—Confidentiality—We are amending this article to give state regulatory bodies conducting an investigation greater access to information that would otherwise be considered Confidential Information.

39. Appendix G—Requirements of Generators Relying on Newer Technologies—We include an appendix which may be used to provide requirements for generators relying on newer technologies, such as wind generators.

B. Compliance Issues and Variations From the Pro Forma LGIP & LGIA

40. Order No. 2003 said that it would become effective 60 days after publication in the **Federal Register**. However, the Commission later delayed

the effective date until January 20, 2004.[7]

41. On January 8, 2004, the Commission issued a notice clarifying the compliance process.[8] The OATTs of all non-independent Transmission Providers were deemed to include the *pro forma* LGIA and LGIP as of January 20, 2004. Every independent Transmission Provider was required to make a compliance filing on or before January 20, 2004 by filing either (1) a notice that it intended to adopt the *pro forma* LGIP and LGIA, or (2) new standard interconnection procedures and agreement developed according to Order No. 2003's "independent entity variation" standard.[9]

42. Order 2003–A takes effect 30 days after its publication in the **Federal Register**.

1. Non-Independent Transmission Provider Compliance With This Order and Requests for Variations

43. As with the January 20, 2004 compliance process, the Commission will deem the OATT of a non-independent Transmission Provider to be revised to adopt the Order No. 2003–A *pro forma* LGIA and LGIP on its effective date. All Transmission Providers are directed to make ministerial filings reflecting the revisions in this order upon their next filing(s) with the Commission.[10]

44. Several *pro forma* LGIP and LGIA provisions specifically allow the Transmission Provider to follow "Good Utility Practice" or otherwise adopt region-specific practices or standards. Moreover, Order No. 2003 allows the Transmission Provider to justify variations to any provision based on regional reliability requirements.[11] However, the Commission will accept a regional variation from the *pro forma* LGIP and LGIA only if it is an existing and established regional reliability standard.[12]

45. A non-independent Transmission Provider seeking variations from Order No. 2003–A's *pro forma* LGIA and LGIP based on existing regional reliability standards must file them with the Commission on or before the effective date of this order.[13] Regional variation filings must specify the proposed changes and explain why such changes are necessary. The Commission will solicit comments on these filings before acting on them. Non-independent Transmission Providers need not re-file regional reliability variations they filed on or before the January 20, 2004 effective date of Order No. 2003.

46. A non-independent Transmission Provider also continues to have the right to file proposed changes to its LGIP and LGIA under section 205 of the FPA using the "consistent with or superior to" standard.

47. Pending Commission approval of any variations, the *pro forma* LGIP and LGIA will remain in effect.

2. Independent Transmission Provider Compliance With This Order and Requests for Variations

48. Under Order No. 2003, an independent Transmission Provider has greater flexibility to tailor the LGIP and LGIA than does a non-independent Transmission Provider. Under the "independent entity variation" standard, an independent Transmission Provider may propose customized interconnection procedures and a customized interconnection agreement that fit the needs of its region instead of the *pro forma* LGIP and LGIA.

49. An independent Transmission Provider that on January 20, 2004 elected to adopt Order No. 2003's *pro forma* LGIP and LGIA must file on or before the effective date of this Order on Rehearing either (1) a notice that it intends to adopt the Order No. 2003–A *pro forma* LGIP and LGIA, or (2) new standard interconnection procedures and agreements developed according to Order No. 2003's "independent entity variation" standard.

50. An independent Transmission Provider that filed its own tailored interconnection agreement and procedures under Order No. 2003's independent entity variation on or before January 20, 2004 is not required to re-file its interconnection agreement and procedures with the Commission unless a change is needed to reflect this Order on Rehearing.

51. In either event, the independent Transmission Provider will continue to have the right to propose changes to its LGIP and LGIA using the "independent entity variation" standard.

3. Other Compliance and Variation Issues

52. We clarify that for a non-independent Transmission Owner belonging to an RTO or ISO, the RTO's or ISO's Commission-approved standards and procedures shall govern all interconnections with facilities under the operational control of the RTO or ISO.[14]

53. A non-independent Transmission Provider that belongs to an RTO or ISO, but also retains operational control over portions of the Transmission System, must follow the compliance procedures for a non-independent Transmission Provider.[15] Such entities will have two sets of interconnection agreements and procedures: One governing interconnections to the portions of the Transmission System under the control of the RTO or ISO, and a *pro forma* LGIA and LGIP governing interconnections to the portion of the Transmission System over which it retains operational control.

54. In regards to the portion of the Transmission System over which it retains operational control, the Transmission Provider is responsible for meeting all of the requirements of Order No. 2003 to the same extent as a Transmission Provider who does not happen to belong to an RTO or ISO. A non-independent Transmission Provider does not receive special consideration simply because a portion of its Transmission System is independently operated.

55. A non-independent Transmission Provider that belongs to an RTO or ISO and has turned over control of all of its Transmission System to the RTO or ISO may request that the Commission waive Order No. 2003's requirement that it adopt the LGIA and LGIP. If waiver is granted, then the non-independent entity would be free to request (under FPA Section 205) amendments to its OATT that would harmonize its interconnection procedures with the RTO's or ISO's interconnection procedures.

56. If an RTO or ISO adopts the *pro forma* LGIA and LGIP, it must also enter into a contractual agreement with its Transmission Owners allocating responsibility for the interconnection process between the Transmission Owner and the Transmission Provider. In addition, both the Transmission

[7] A September 26, 2003 order (unpublished) extended the effective date of the Final Rule until January 20, 2004 for independent Transmission Providers. The October 7, 2003 order (105 FERC ¶ 61,043) granted the same extension to non-independent Transmission Providers.

[8] Notice Clarifying Compliance Procedures, 69 FR 2,135 (Jan. 14, 2004) (Compliance Notice).

[9] Order No. 2003 at P 827.

[10] All Order No. 2003 compliance filings should be made under the "ER04–" docket heading. The ministerial filing must include the entire *pro forma* LGIP and LGIA and be included in the entity's first filing (of any type) with the Commission after the effective date of this order.

[11] *See* Order No. 2003 at P 824.

[12] *See* Order No. 2003 at P 823.

[13] Requests for regional variations will be treated as compliance filings under the Commission's Regulations.

[14] *See* Compliance Notice.

[15] *Id.*

Provider and the Transmission Owner must sign the LGIA.[16] In such situations, the Interconnection Customer should file its Interconnection Request with the independent Transmission Provider. The independent Transmission Provider must then work with the Transmission Owner to fulfill the Interconnection Customer's Interconnection Request.

57. A non-public utility with a "safe harbor" OATT must adopt the *pro forma* LGIA and LGIP if it wishes to retain its safe harbor status.[17] Doing so will require all public utility Transmission Providers to offer the non-public utility open access to the public utility's Transmission System.

C. Procedural Discussion

58. The Commission received 47 timely requests for rehearing or for clarification of Order No. 2003.

59. Under Section 313(a) of the Federal Power Act (FPA),[18] requests for rehearing of a Commission order were due within thirty days after issuance of Order No. 2003, *i.e.*, no later than August 25, 2003. Because the 30-day rehearing deadline is statutorily based, it cannot be extended. Therefore, the Commission rejects all requests for rehearing or clarification filed after August 25, 2003 as a matter of law.[19] However, the Commission will consider these late filed requests for rehearing as requests for reconsideration.

60. The South Carolina PSC filed a motion to intervene out-of-time. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for the granting of such late intervention. We find, however, that in this instance the burden of allowing the intervention is minimal and find good cause to allow it.

II. Discussion

A. Definitions Used in the LGIP and LGIA

61. The LGIP and LGIA adopted in Order No. 2003 use a common set of definitions, several of which are addressed by petitioners.

62. Commercial Operation Date—The LGIP and LGIA define Commercial Operation Date to mean the date on which the Interconnection Customer begins Commercial Operation of the Generating Facility after Trial Operation of such unit has been completed. The Interconnection Customer notifies the Transmission Provider of this event using a form provided in the LGIA.

Rehearing Request

63. Central Maine[20] notes that "commercial operation" is itself undefined. It proposes that Commercial Operation Date should be defined as the date on which dispatch of the Generating Facility is turned over to the Control Area.

Commission Conclusion

64. We reject Central Maine's proposed definition because the Interconnection Customer will not always turn over the Generating Facility to the Control Area for dispatch.

65. Since the definition of Commercial Operation Date includes the term "commercial operation," it is necessary to define the latter. Therefore, we are adding "Commercial Operation" to the list of LGIP and LGIA definitions and are defining it as follows: "Commercial Operation shall mean the status of a Generating Facility that has commenced generating electricity for sale, excluding electricity generated during Trial Operation."

66. Control Area—The LGIP and LGIA define Control Area to mean an electrical system or systems bounded by interconnection metering and telemetry, capable of controlling generation to maintain its interchange schedule with other Control Areas and contributing to frequency regulation of the interconnection. Order No. 2003 states that the Control Area is to be certified by the North American Electric Reliability Council (NERC).

Rehearing Request

67. Duke Energy notes that the Applicable Reliability Council certifies a Control Area, not NERC, and asks that the definition be so revised.

Commission Conclusion

68. We agree with Duke Energy and revise the definition of Control Area.

69. Network Resource—The LGIP and LGIA define Network Resource to mean that portion of a Generating Facility that is (1) integrated with the Transmission Provider's Transmission System, (2) designated as a Network Resource under the terms of the OATT, and (3) subject to redispatch directives as ordered by the Transmission Provider under the OATT.

Rehearing Request

70. APS states that the term Network Resource is already defined in the OATT and that the term should have a consistent definition in the LGIP, LGIA, and OATT.

Commission Conclusion

71. We agree with APS and adopt the OATT's definition of Network Resource in the LGIP and LGIA.

72. Network Upgrades—The LGIP and LGIA define Network Upgrades to mean the additions, modifications, and upgrades to the Transmission Provider's Transmission System required at or beyond the point at which the Interconnection Customer interconnects to the Transmission Provider's Transmission System.

Rehearing Requests

73. Reliant argues that the Commission should clarify that the Transmission Provider can own transmission facilities on the generator's side of the Point of Interconnection. According to Reliant, this is important because some Transmission Providers may attempt to confuse the Commission's definitions of Network Upgrades and Transmission Provider's Interconnection Facilities.

74. EEI seeks clarification that "Network Upgrades occur at or beyond the Point of Interconnection, that is, where the Interconnection Facilities (including the Transmission Provider's Interconnection Facilities) connect to the Transmission System—not where the Interconnection Customer interconnects to the Transmission System."

75. NRECA–APPA asks the Commission to clarify that improvements to radial lines that serve Network Load, whether through Transmission Service or Interconnection Service, are Network Upgrades.

Commission Conclusion

76. We agree that using the phrase "at or beyond the point at which the Interconnection Customer interconnects to the Transmission Provider's Transmission System" in the definition of Network Upgrades could cause confusion. Therefore, we are revising this part of the definition to be "at or beyond the point at which the Interconnection Facilities connect to the Transmission Provider's Transmission System." We also note that the Transmission Provider's

[16] *See* Order No. 2003 at P 909.

[17] Non-jurisdictional entities should make their filings under the "NJ04–" docket heading.

[18] 16 U.S.C. 8251(a) (2003).

[19] Consumers Energy Company's request for clarification was filed on September 23, 2003 and Hydro One Networks, Inc. filed its request for rehearing on September 7, 2003. NARUC filed its second request for rehearing on October 1, 2003 and Reliant filed its on October 3, 2003.

[20] Petitioner acronyms are defined in Appendix A.

Interconnection Facilities are direct assignment facilities owned by the Transmission Provider on the Interconnection Customer's side of the Point of Interconnection whereas the Transmission Provider's Transmission System consists of facilities at or beyond the Point of Interconnection. These changes resolve the concerns raised by Reliant and EEI.[21]

77. NRECA–APPA has not provided any rationale for treating improvements to radial lines that serve Network Load as Network Upgrades in this rulemaking proceeding. Accordingly, we deny its request.

78. Point of Receipt—Point of receipt is used in LGIA Article 4.3 in the context of the Generator Balancing Service Agreement that requires the Interconnection Customer to identify the Generating Facility as the point of receipt for any delivery service. The LGIP and LGIA do not define point of receipt.

Rehearing Request

79. APS claims that LGIA Article 4.3 capitalizes the term "point of receipt," implying that it is defined, when in fact it is not. APS seeks clarification that the OATT definition for this term is the intended definition.

Commission Conclusion

80. Since the term is used only once in the LGIA, in Article 4.3, and we are deleting that article (see discussion in section II.D.2 (Interconnection Pricing Policy), the issue is moot.

81. Reasonable Efforts—The LGIP and LGIA define Reasonable Efforts (with respect to an action required to be attempted or taken by a Party under the interconnection agreement) as efforts that are timely and consistent with Good Utility Practice and are otherwise substantially equivalent to those a Party would use to protect its own interests.

Rehearing Requests

82. NYTO and National Grid argue that the "substantially equivalent" standard does not recognize that the Transmission Provider's fiduciary responsibility is to its shareholders and customers, and that it cannot be expected to apply the same standard to another Party's interests. National Grid asks that the definition incorporate "due diligence" rather than "substantially equivalent efforts."

Commission Conclusion

83. We affirm our decision in Order No. 2003 that "substantially equivalent" is the correct standard since it ensures comparable treatment for all.[22] It is a fundamental requirement of FPA Sections 205 and 206 that a public utility provide comparable service to non-Affiliates, and we do indeed expect it to provide this service.

84. Transmission Provider and Transmission Owner—The LGIP and LGIA define Transmission Provider to mean the public utility (or its designated agent) that owns, controls, or operates facilities used for the transmission of electricity in interstate commerce and provides Transmission Service under the OATT. The term includes the Transmission Owner when it is distinct from the Transmission Provider. The LGIP and LGIA define Transmission Owner to mean the entity that owns, leases, or otherwise possesses an interest in the portion of the Transmission System at the Point of Interconnection.

Rehearing Requests

85. EEI seeks clarification as to whether both the Transmission Provider and the Transmission Owner must make a compliance filing when the former is an RTO or ISO. It argues that there may be instances when the interests of the Transmission Owner and Transmission Provider diverge.

86. MSAT argues that the Commission's definitions of Transmission Owner and Transmission Provider will cause uncertainty as to which Party has the duty to fulfill the contractual obligations in the interconnection agreement. This could lead to disputes during the construction of Interconnection Facilities. MSAT asserts that in the context of an RTO or ISO, every use of the term "Transmission Provider" in the LGIP and LGIA requires a determination as to whether the provision applies to the RTO or ISO, the Transmission Owner, or to both. It also argues that even LGIP and LGIA provisions that use both terms are confusing. It is not clear how the provision is to be applied to each entity because the Commission has not clearly distinguished the rights and responsibilities of the Transmission Provider and Transmission Owner. MSAT urges the Commission to adopt an LGIP and LGIA tailored specifically for RTOs and ISOs or, at a minimum, to clearly distinguish the rights and responsibilities of the Transmission Provider and Transmission Owner in the context of an RTO or ISO. It argues for the former because the latter would require that the term "Transmission Owner" not be subsumed within the definition of the term "Transmission Provider," necessitating numerous revisions to the LGIP and LGIA.

Commission Conclusion

87. With respect to concerns raised about the rights and responsibilities of the Transmission Provider and Transmission Owner not being spelled out in the LGIA, the independent entity variation gives RTOs and ISOs broad discretion in the final design of their LGIP and LGIA, and we encourage each RTO or ISO to spell out such rights and responsibilities in its compliance filing.

88. We are addressing in section I.B (Compliance Issues and Variations From the *Pro Forma* LGIP and LGIA) the issue of whether both the Transmission Provider and the Transmission Owner must submit a compliance filing when the two entities are separate and their interests diverge.

B. Issues Related to the Standard Large Generator Interconnection Procedures (LGIP)

89. Section 2.3—Base Case Data—LGIP section 2.3 provides that the Transmission Provider shall make available (1) base power flow, (2) short circuit and stability databases (including all underlying assumptions), and (3) a listing of contingency operations used in the Interconnection Studies upon request (subject to confidentiality provisions). Such databases and lists, referred to as Base Cases, include all generation projects and transmission projects, including merchant transmission projects that are proposed for the Transmission System for which a transmission expansion plan has been submitted and approved by the applicable authority.

Rehearing Requests

90. Cinergy, MSAT, National Grid, and NYTO state that Base Case information may include Critical Energy Infrastructure Information. Notwithstanding the LGIP and LGIA provisions for the handling of Confidential Information, they argue that the scope of the data to be provided to the Interconnection Customer is overbroad, exposes the Transmission Provider to an inordinate risk of liability, and is inconsistent with its responsibilities under various Commission rules, including Order Nos. 889 and 630. They argue that the requirement to disclose Base Case data

[21] The revised definition reads as follows: "Network Upgrades shall mean the additions, modifications, and upgrades to the Transmission Provider's Transmission System required at or beyond the point at which the Interconnection Facilities connect to the Transmission Provider's Transmission System to accommodate the interconnection of the Large Generating Facility to the Transmission Provider's Transmission System."

[22] Order No. 2003 at P 68.

is inconsistent with LGIP section 13.1 and LGIA Article 22, both of which require that significant amounts of data concerning individual Interconnection Customers remain confidential and not be disclosed to other Interconnection Customers.

91. National Grid states that the data used in Interconnection Studies typically is made up of commercially sensitive information and that project developers have legitimate commercial reasons to avoid revealing specific operating characteristics of their equipment. The Commission itself has made clear recently that certain power flow data (the same data underlying short circuit calculations) routinely provided in Form 715 is Critical Energy Infrastructure Information and must be redacted from public versions of Form 715. National Grid argues that the confidentiality provisions in the LGIP and LGIA may not provide adequate protection for such sensitive data.

Commission Conclusion

92. As the Commission noted in Order No. 2003 [23] and we emphasize here, the security of energy infrastructure information is essential. We expect all Transmission Providers, market participants, and Interconnection Customers to comply with the recommendations of the National Infrastructure Protection Center, as well as any best practice recommendations or requirements that may be issued by NERC or any other electric reliability authority. In particular, the Transmission Provider is expected to meet basic standards for system infrastructure and operational security, including physical, operational, and cyber-security practices. If the Transmission Provider considers it necessary to protect commercially sensitive information or the energy infrastructure, it may require that the Interconnection Customer sign a confidentiality agreement before the release of commercially sensitive or Critical Energy Infrastructure Information contained in the Base Case data. However, all Transmission Providers are put on notice that they are not to abuse this privilege in an effort to withhold information that lacks legitimate commercial sensitivity or Critical Energy Infrastructure Information status.

93. Section 3.1—Interconnection Requests—General—LGIP section 3.1 allows the Transmission Provider and the Interconnection Customer to identify an alternative Point of Interconnection at the Scoping Meeting. It further states that the Interconnection Customer will select the Interconnection Point(s) to be studied no later than the time of execution of the Interconnection Feasibility Study Agreement.

Rehearing Requests

94. AEP argues that the Transmission Provider, who has ultimate responsibility for its Transmission System, must have the final say as to the details and configuration of the interconnection (*e.g.*, location of the Point of Interconnection).

95. Old Dominion argues that the LGIP gives the Interconnection Customer too much discretion in terms of where and how to interconnect with the Transmission Provider's Transmission System. The Commission should require RTOs to conduct forward-looking Transmission System planning studies to formulate strong regional Transmission System expansion plans, which would influence the Interconnection Customer's decisions as to where and how to interconnect.

Commission Conclusion

96. We provide the following clarification. The Interconnection Customer will select alternative Points of Interconnection to be evaluated in the Interconnection Feasibility Study. Based upon the results of that study, the Interconnection Customer, in consultation with the Transmission Provider, shall select the Point of Interconnection. In the process of conducting the Interconnection System Impact Study and the Interconnection Facilities Study, the Transmission Provider will develop the engineering design and electrical configuration of the interconnection. Before completing the Interconnection Facilities Study, the Interconnection Customer may request changes in the engineering design details of the interconnection (per LGIP sections 8.3 and 8.4), but not the location of the Point of Interconnection. No change to the LGIP is needed to reflect this clarification.

97. Regarding Old Dominion's argument, we note that the Commission encourages RTOs to conduct forward-looking Transmission System planning studies to formulate strong regional Transmission System growth plans that will inform the Interconnection Customer's decision as to where and how to interconnect. However, we will not take away any options available to the Interconnection Customer under the LGIP to select the Interconnection Points to be studied in the Interconnection Feasibility Study.

98. Section 3.3.1—Initiating an Interconnection Request—LGIP section 3.3.1 provides that the date the Interconnection Request is received by the Transmission Provider may precede the Generating Facility's In-Service Date by up to ten years, or longer where the Parties agree, such agreement not to be unreasonably withheld.

Rehearing Request

99. NYTO states that the ten year provision is unreasonably long. It argues that most new generators can be built in three to four years. It proposes that section 3.3.1 be amended to impose a limit of five years with an additional extension of up to two years for project delays.

Commission Conclusion

100. We decline to adopt NYTO's proposal. We recognize that the use of a ten year limit is a matter of judgment and that no specific number can be objectively verified as the best. However, the ten year provision was originally developed by negotiation during the Advance Notice of Proposed Rulemaking (ANOPR) process by representatives of the Interconnection Customer and Transmission Provider communities. Order No. 2003 noted that proponents of large coal fired generators and wind powered generators have argued that this period should be longer than ten years, not shorter.[24] We continue to believe that the choice of ten years fairly balances the advantages for some plant types of a longer period and the advantages for the Transmission Provider's limiting the time for completing an interconnection. Finally, NYTO has not demonstrated objectively that five years is a more appropriate time period or that ten years creates a problem for the Transmission Provider.

101. Section 3.3.4—Scoping Meeting—LGIP section 3.3.4 requires the Transmission Provider and the Interconnection Customer to hold a Scoping Meeting within 30 Calendar Days from receipt of the Interconnection Request to discuss the proposed interconnection, including (1) general facility loadings, (2) general instability issues, (3) general short circuit issues, (4) general voltage issues, (5) general reliability issues and (6) alternate Points of Interconnection.

Rehearing Request

102. Entergy asks that the Commission clarify whether the Transmission Provider would violate the Commission's Standards of Conduct or Code of Conduct if it shares technical

[23] Order No. 2003 at P 84.

[24] Order No. 2003 at P 99.

information concerning its Transmission System with an Interconnection Customer which is an Affiliate.

Commission Conclusion

103. Both the Commission's Standards of Conduct and Code of Conduct prohibit the preferential sharing of information between the Transmission Provider and its Affiliate. The Standards of Conduct were enacted in 1996[25] and revised in 2003.[26] The Standards of Conduct require that if the Transmission Provider discloses transmission or market information to its wholesale merchant function or power marketing Affiliate, it must also disclose such information simultaneously to the public.[27]

104. In contrast, the Code of Conduct is imposed on a case-by-case basis when the Commission grants market-based rate authorization. Generally, the Code of Conduct contains a provision that all market information shared between the public utility (*i.e.*, Transmission Provider) and the Affiliate is to be disclosed simultaneously to the public.[28]

105. In Order No. 2004, the Commission granted an exception to the information-sharing prohibitions of Section 358.5(b)(1) of the Commission's Regulations, which implements the Standards of Conduct. Section 358.5(b)(5) allows the Transmission Provider to share information with its Affiliate relating to its Transmission System without contemporaneously releasing that information to the public as long as the information relates solely to a specific request for Transmission Service.[29] Order No. 2004 defines Transmission Service to include Interconnection Service.[30] This addresses Entergy's concern about violating the Standards of Conduct when it holds a Scoping Meeting with an Affiliate.

106. With respect to Entergy's request for clarification concerning the Commission's Code of Conduct requirements, the Code of Conduct requires that all market information shared between the Transmission Provider and the Affiliate be disclosed simultaneously to the public. This includes any communication concerning the Transmission Provider's power or transmission business, present or future, positive or negative, concrete or potential.

107. To balance the need to treat affiliated and non-affiliated Interconnection Customers alike, adhere to the intent of the Code of Conduct and Standards of Conduct, and ensure that Critical Energy Infrastructure Information is not released to the public, we are adopting an approach here that is similar to the one taken in Order No. 2004. We will allow the Transmission Provider to share technical information related to its Transmission System with an Affiliate without having to simultaneously release the information to the public as long as the information relates solely to a valid request for Interconnection Service.[31] In addition, we will require the following additional safeguards: The Transmission Provider must (1) post an advance notice to the public on its OASIS of its intent to conduct a Scoping Meeting with its Affiliate, (2) transcribe the meeting in its entirety, and (3) retain the transcript for three years. When a request from a member of the public is made for the release of the transcript, the Transmission Provider shall release the transcript in its entirety to the requester if the Transmission Provider determines that it contains no Critical Energy Infrastructure Information or commercially sensitive information of the Affiliate that would competitively disadvantage the Affiliate. However, if the Transmission Provider believes that the transcript contains such information, the Transmission Provider must release a redacted copy of the transcript to the requester along with an explanation for the redactions (such as Critical Energy Infrastructure Information). If the requester believes that the Transmission Provider has withheld information inappropriately, it may file a complaint with the Commission, along with a notice to the Transmission Provider. Upon receipt of the notice, the Transmission Provider will file both unredacted and redacted copies of the transcript with the Commission, including a written justification to explain the redactions. The redacted copy will be available to the public; the unredacted copy will remain confidential unless and until the Commission decides otherwise. The Commission will decide the appropriateness of the redactions and, once a decision is made, direct the Transmission Provider to take any necessary action.

108. Section 3.5—Coordination with Affected Systems—LGIP section 3.5 requires the Transmission Provider to coordinate Interconnection Studies and planning meetings with Affected Systems.

Rehearing Requests

109. National Grid seeks clarification that the Transmission Provider does not have to proceed with an interconnection if an Affected System does not cooperate in performing the Interconnection Studies in a timely manner, or if the Transmission Provider believes that proceeding with the interconnection could lead to reliability or other problems. Similarly, NYTO asks that the Commission give the Transmission Provider extra time to complete Interconnection Studies when it is necessary to evaluate the proposed interconnection's effect on Affected Systems.

110. NYTO also asks that section 3.5 be amended to include the following sentence from P 121of Order No. 2003: "Neither the LGIP nor the LGIA is intended to expose the Transmission Provider to liability as a result of delays by the Affected System." Similarly, PacifiCorp points out that the Transmission Provider may not be able to obtain sufficient cooperation from non-FERC jurisdictional entities to conduct Interconnection Studies in a timely manner. Since obtaining such cooperation may take time, the Transmission Provider should be held harmless for any resulting delays in the Interconnection Study process. PacifiCorp also asks that the Commission clarify that the Transmission Provider is required only to make a good faith effort to coordinate its Interconnection Studies with Affected Systems.

111. According to PacifiCorp, the Commission should specify that the Transmission Provider is not responsible for any Breach of confidentiality by an Affected System or its representatives and that the Transmission Provider's obligation should be limited to informing the Affected System of the Commission's confidentiality procedures.

[25] Open Access Same-Time Information System (Formerly Real-Time Information Network) and Standards of Conduct, Order No. 889, 61 FR 21737 (May 10, 1996), FERC Stats. & Regs., Regulations Preambles 1991–1996 ¶ 31,035 (Apr. 24, 1996); Order No. 889–A, *order on reh'g*, 62 FR 12484 (Mar. 14, 1997), FERC Stats. & Regs., Regulations Preambles 1996–2000 ¶ 31,049 (Mar. 4, 1997); Order No. 889–B, *reh'g denied*, 62 FR 64715 (Dec. 9, 1997), FERC Stats. & Regs., Regulations Preambles 1996–2000 ¶ 31,253 (Nov. 25, 1997).

[26] Standards of Conduct for Transmission Providers, Order No. 2004, 68 FR 69134 (Dec. 11, 2003), FERC Stats. & Regs. Vol. III, Regulations Preambles ¶ 31,155 (Nov. 25, 2003), *reh'g pending*.

[27] *See* 18 CFR 37.4(3) and (4) 2003 and section 358.5 (not yet codified).

[28] *See* Northeast Utilities Service Company, 87 FERC ¶ 61,063 at 61,276 (1999).

[29] Order No. 2004 at P 143.

[30] 18 CFR 358.3—Definitions.

[31] We will deem the Code of Conduct amended to include this exception.

112. APS asks the Commission to clarify that any study of the effect of the proposed interconnection on an Affected System conducted by the Transmission Provider be included in the results of the Interconnection Studies. Section 3.5 currently provides that such results will be provided "if possible." [32]

Commission Conclusion

113. In response to reliability concerns, we reiterate that Interconnection Service is separate from the delivery component of Transmission Service and that the mere interconnection of the Generating Facility is unlikely to harm reliability on Affected Systems.[33] Also, the Transmission Provider must take the same steps to integrate the Interconnection Customer's Generating Facility into its Transmission System—including coordinating the interconnection with Affected Systems—that it would take for its own affiliated generation.

114. With regard to concerns over timing, we clarify that delays by an Affected System in performing Interconnection Studies or providing information for such studies is not an acceptable reason to deviate from the timetables established in Order No. 2003 unless the interconnection itself (as distinct from any future delivery service) will endanger reliability. The Transmission Provider may not use third party actions or inactions as an excuse for not proceeding with the design, procurement, and construction of Interconnection Facilities and any necessary upgrades. We clarify, however, that the Transmission Provider must act under Applicable Reliability Standards even if such standards require that it keep a circuit to an interconnecting Generating Facility open.[34]

115. In response to APS, we are revising section 3.5 to require that the results of any study of the effect of the interconnection on any Affected System be included in the Interconnection Study "if available." The "if available" phrase is appropriate because it recognizes that studies of the Affected System may not be completed within the time specified in the LGIP. This language allows the interconnection process to proceed, even in the face of delays or non-response by the Affected System.

116. We deny NYTO's request that the text it quotes from Order No. 2003 be added to section 3.5. However, we clarify that the sentence refers to the possibility of liquidated damages being imposed on the Transmission Provider because of delays caused by third parties. It should not be interpreted as shielding the Transmission Provider from any non-liquidated damages liability that may result from the interconnection. This is in accord with the liquidated damages provisions of the LGIA.

117. Regarding the confidentiality concerns raised by PacifiCorp, we reiterate that the confidentiality provisions in LGIA Article 22 and LGIP Section 13 lay out the standards that the Transmission Provider must employ when sharing Confidential Information with third parties, including Affected Systems.

118. Section 4.1—Queue Position—General—LGIP section 4.1 states that Queue Position determines the order of performing the Interconnection Studies and hence will determine cost responsibility for the facilities necessary to accommodate the Interconnection Request.

Rehearing Request

119. APS seeks guidance on upgrade cost allocation among Interconnection Customers and whether Queue Position must always be the determining factor for cost allocation among clustered requests. If the Transmission Provider uses clustering for studying Interconnection Requests, it can study the joint effect of several generators interconnecting to the Transmission System. APS believes that such a study also will indicate the effect of each Generating Facility separately on the Transmission System. Therefore, the Transmission Provider will have many factors to consider for cost allocation among the generating facilities, including unit size and contribution to the faults on the existing transmission facilities.

Commission Conclusion

120. We agree with APS and clarify that these additional factors may be considered in the allocation of costs to multiple Interconnection Customers when studied in a cluster. We also reiterate that we strongly encourage the use of clustering. The principal benefit of studying Interconnection Requests in clusters is that it allows the Transmission Provider to better coordinate Interconnection Requests with its overall transmission planning process, and, as a result, achieve greater efficiency in both the design of needed Network Upgrades and in the use of its planning resources. Sometimes, one generating facility interconnecting alone would not require a substantial upgrade to the Transmission System, but when clustered with others, a costly upgrade may be required. We clarify that the Transmission Provider may allocate the cost of the common upgrades for clustered Interconnection Requests and that Queue Position has no bearing on cost allocation for clustered Interconnection Requests.

121. Section 4.3—Transferability of Queue Position—LGIP section 4.3 provides that the Interconnection Customer may transfer its Queue Position to another entity only if the latter acquires the specific Generating Facility identified in the Interconnection Request and there is no change in the proposed Point of Interconnection.

Rehearing Requests

122. NYTO and National Grid ask the Commission to amend Section 4.3 to allow the Transmission Provider to use mitigation measures to offset the credit risk that can occur when a Queue Position is transferred from one Interconnection Customer to another. They argue that the acquiring Interconnection Customer must meet the same letters of credit requirements as the original Interconnection Customer.

Commission Conclusion

123. NYTO and National Grid are not correct that a transfer in Queue Position will result in a greater credit risk for the Transmission Provider. There are no provisions in the LGIP which require the Interconnection Customer to provide the Transmission Provider with letters of credit or other financial guarantees. Construction of Network Upgrades, Interconnection Facilities, and Distribution Upgrades does not commence until the Parties sign the LGIA, which does require letters of credit or other financial guarantees. The LGIP requires the Transmission Provider to bill the Interconnection Customer monthly for the cost of the Interconnection Facilities Study, thus minimizing the risk that the Transmission Provider will be unable to recoup its costs from a non-creditworthy entity.

124. Section 4.4—Queue Position—Modifications—LGIP section 4.4.1 allows the Interconnection Customer to

[32] NRECA–APPA, NYTO, and PacifiCorp request rehearing on the Commission's pricing policy for Network Upgrades on Affected Systems. These requests are addressed in section II.D.2 (Interconnection Pricing Policy).

[33] *See* Tennessee Power Company, 90 FERC ¶ 61,238 at 61,761–62 and n.5, *order denying reh'g*, 91 FERC ¶ 61,271 (2000); *accord*, Arizona Public Service Company, 96 FERC ¶ 61,055 at 61,165 (2001).

[34] *See* Tampa Electric Co., 103 FERC ¶ 61,047 (2003).

make the following modifications to its Interconnection Request without losing its Queue Position, provided that it makes them before returning the executed Interconnection System Impact Study Agreement to the Transmission Provider: (1) A reduction of up to 60 percent in the megawatt output of the proposed project, (2) modification of the technical parameters associated with the Generating Facility technology or the step-up transformer impedance characteristics, and (3) modification of the interconnection configuration.

125. Section 4.4.2 allows the Interconnection Customer to make the following modifications to its Interconnection Request provided that it makes them before it returns the executed Interconnection Facility Study Agreement to the Transmission Provider: (1) An additional 15 percent decrease in the megawatt output of the Generating Facility as evaluated in the Interconnection System Impact Study, and (2) Generating Facility technical parameters associated with modifications to Generating Facility technology and transformer impedances. However, the incremental costs to the Transmission Provider associated with those modifications are the responsibility of the Interconnection Customer.

126. Section 4.4.3 provides that any change to the Point of Interconnection is a Material Modification. A Material Modification is a change that increases the cost of or delays the schedule of a lower queued Interconnection Customer.

127. Section 4.4.5 provides that extensions of less than three cumulative years in the Commercial Operation Date of the Generating Facility are not material and should be handled through construction sequencing.

Rehearing Requests

128. Entergy and Southern argue that the modifications permitted under sections 4.4.1 and 4.4.2 could cause significant additional costs and delays for other Interconnection Customers. These provisions give the Interconnection Customer the ability to hold hostage the remainder of the interconnection queue by continually making modifications. Southern asserts that when the modifications are studied for a particular project, the lower queued Interconnection Requests will have to be restudied to identify any effects that the modification may have on them.

129. AEP seeks clarification that any incremental costs associated with any "actual" change in plant size, not just those associated with the proposed changes, should also be directly assigned to the Interconnection Customer. For example, if the Interconnection Customer projects a 15 percent reduction in plant size, thus enabling it to maintain its position in the queue, but actually builds a much smaller plant, the InterconnectionCustomer should bear all of the costs associated with building Network Upgrades that turn out to be unnecessary as a result of the smaller-than-projected plant size.

130. Duke Energy seeks clarification that, notwithstanding the sentence in section 4.4.3 stating that a change in Point of Interconnection shall constitute a Material Modification, a change in the Point of Interconnection acceptable under sections 4.4.1, 6.1, 7.2 or any other provision of the LGIP that expressly allows for some minor change in the Point of Interconnection will not result in the loss of Queue Position.

131. NYTO and Southern argue that the Commission should classify an extension of the Commercial Operation Date of the Generating Facility for three years as a Material Modification. They state that the Commission did not take into account the difficulties that may be encountered in the planning process. They argue that a generator should not be able to maintain its place in the interconnection process to the detriment of other generators for such an extended period of time.

Commission Conclusion

132. We deny Entergy's and Southern's requests because many of the modifications permitted under section 4.4.1 take place before the Interconnection Customer submits an Interconnection System Impact Study Agreement, which is early in the study process, and many Interconnection Customers drop out after the Interconnection Feasibility Study. The need for restudies for lower queued generators would not be determined until the Interconnection System Impact Study is completed. Also, the cost of restudies should discourage the Interconnection Customer from making frivolous or excessive requests for modifications. Moreover, modifications permitted under section 4.4.2 are much smaller than those under section 4.4.1.

133. Regarding AEP's concerns, if the Interconnection Customer states that it will construct a significantly smaller facility than initially proposed, the size change is a Material Modification. The Interconnection Facilities Study would then have to be redone before construction and all cost effects, including the cost incurred for facilities that have become unnecessary due to the size reduction, will be the responsibility of the Interconnection Customer.

134. With regard to NYTO's and Southern's concern about section 4.4.5, we realize that permitting extensions for a cumulative period of three years places a burden on the Transmission Provider's expansion planning process, but as the Commission stated in Order No. 2003, these extensions in most cases are well within the scope of other unforeseen changes that affect the planning process.[35] A planning process inevitably is affected by a variety of changes in circumstances. NYTO and Southern have not provided any new arguments to convince us to change our position.

135. We are adopting Duke Energy's proposal and are amending section 4.4.3 to clarify that, notwithstanding the wording elsewhere in that sentence, a change in the Point of Interconnection acceptable under sections 4.4.1, 6.1, 7.2 or any other provision of the LGIP that expressly allows for a change in the Point of Interconnection does not result in the loss of Queue Position.

136. Section 5.1.1—Queue Position for Pending Requests—LGIP section 5.1.1.2 gives an Interconnection Customer with an executed Interconnection Study agreement as of the effective date of Order No. 2003 the option of either completing further studies under the Transmission Provider's old procedures or switching to the LGIP for these studies. Section 5.1.1.3 provides that if an interconnection agreement has been submitted to the Commission for approval before the effective date of Order No. 2003, it is grandfathered.

Rehearing Requests

137. Old Dominion requests clarification that existing, executed interconnection agreements must be honored (grandfathered).

138. PacifiCorp states that the transition to the LGIP process should take place only after all Interconnection Studies are completed. If the Interconnection Customer elects to complete any Interconnection Studies under grandfathered procedures, then all the remaining studies should also be completed using grandfathered procedures.

Commission Conclusion

139. We agree with Old Dominion's interpretation. LGIP section 5.1.1.3 states that an interconnection agreement is grandfathered if it has been submitted

[35] Order No. 2003 at P 177.

to the Commission before the effective date of the LGIP.

140. We are denying PacifiCorp's request for rehearing. The only Interconnection Study completed during the transition period using the old interconnection procedures may be the Interconnection Feasibility Study. Forcing the Interconnection Customer to complete the remaining Interconnection System Impact Study and Interconnection Facilities Study under the old interconnection procedures could subject it to undue discrimination and discourage expeditious development of new generation (*e.g.*, the Interconnection Customer under the old procedures would not have the more favorable opportunities that are provided by the *pro forma* LGIP).

141. Section 5.2—Prior Interconnection Requests—New Transmission Provider—LGIP section 5.2 governs what happens if a Transmission Provider transfers control of its Transmission System to a successor Transmission Provider while an Interconnection Request is pending. The new Transmission Provider and the old Transmission Provider must coordinate their efforts to ensure completion of the interconnection in a timely manner. If the change of control takes place after the old Transmission Provider has tendered an unexecuted LGIA to the Interconnection Customer, the Interconnection Customer may complete negotiations with either the original Transmission Provider or the successor Transmission Provider.

Rehearing Request

142. NYTO argues that once control transfers, the successor Transmission Provider is the only Party with whom the Interconnection Customer should negotiate an interconnection agreement.

Commission Conclusion

143. We agree with NYTO and will grant rehearing on this issue. Allowing the Interconnection Customer to finalize negotiations with an entity that no longer has a stake in the negotiations would be unfair to the successor Transmission Provider. Once control passes to the successor Transmission Provider, any unexecuted interconnection agreements must be negotiated with it. Therefore, we modify the last sentence of section 5.2 to read: "If the Transmission Provider has tendered a draft LGIA to the Interconnection Customer, but the Interconnection Customer has not either executed the LGIA or requested the filing of an unexecuted LGIA with the Commission, any further negotiations must be conducted with the successor Transmission Provider."

144. We shall also require the two Transmission Providers to work together to ensure a smooth transition for pending Interconnection Requests by modifying the third sentence of section 5.2 to read: "The original Transmission Provider shall coordinate with the successor Transmission Provider to complete any Interconnection Request (including Interconnection Studies), as appropriate, that the original Transmission Provider has begun but has not completed."

145. Section 6—Interconnection Feasibility Study, Section 7—Interconnection System Impact Study, Section 8—Interconnection Facilities Study, and Section 10—Optional Interconnection Study—LGIP sections 6, 7, and 8 describe (1) the analyses to be conducted for each of the Interconnection Feasibility, Interconnection System Impact, and Interconnection Facilities Studies, (2) the Interconnection Customer's responsibility for the actual cost of each study and of any restudies that may be required, and (3) the right of the Interconnection Customer to maintain its Queue Position and substitute a Point of Interconnection, identified by either the Transmission Provider or the Interconnection Customer, if the Interconnection Studies yield a result that the Interconnection Customer and Transmission Provider did not contemplate during the Scoping Meeting. Section 10 provides that the Interconnection Customer may ask the Transmission Provider to perform a reasonable number of Optional Interconnection Studies. An Optional Interconnection Study is a sensitivity analysis based on assumptions provided by the Interconnection Customer. The purpose of the Optional Interconnection Study is to identify the Interconnection Facilities, Network Upgrades, and the costs that may be required to provide Transmission Service or Interconnection Service. Finally, although the Interconnection Customer pays the Transmission Provider various deposits prior to the latter performing the Interconnection Feasibility, System Impact, and Facilities Studies, the Interconnection Customer is responsible only for the actual cost of performing the studies.[36]

[36] *See* Article 6.0 of the *pro forma* Interconnection Feasibility Study Agreement, Article 6.0 of the Interconnection System Impact Study Agreement, and Article 5.0 of the Interconnection Facilities Study Agreement, all attached to the LGIP.

Rehearing Requests—General

146. National Grid, NYTO, PacifiCorp, and Southern assert that the timelines prescribed in Order No. 2003 to conduct the Interconnection Studies will lead to poor quality studies and will require more personnel to perform the studies in a timely manner. PacifiCorp recommends that the Commission let the Transmission Provider adopt a longer timeline when the number of Interconnection Requests received exceeds what it can process using normal staffing levels. NYTO and Southern assert that the requirement for restudies is unrealistic because any restudy can either invalidate other Interconnection Studies or prompt lower queued Interconnection Customers to seek restudies of their projects.

147. PacifiCorp notes that the capitalized and defined term "Generating Facilities" rather than the generic term "generating facilities" is used in LGIP sections 6.2 and 7.3. It asserts that the term as used in the Interconnection Feasibility Study and Interconnection System Impact Study refers broadly to all the generating facilities with higher Queue Positions and not the narrowly defined "Interconnection Customer's Generating Facility." The term "generating facilities" is more appropriate as applied in LGIP sections 6.2 and 7.3.

148. PacifiCorp seeks clarification as to whether the cost estimate provided in the Interconnection Study report includes the cost of Network Upgrades on Affected Systems.

149. Central Maine claims that to perform the Interconnection Feasibility Study and the Interconnection System Impact Study adequately, the Transmission Provider will require the following from the Interconnection Customer: a one line relay diagram of the proposed Interconnection Facilities, a three line relay or AC elementary diagram of the proposed Interconnection Facilities, a DC elementary and control diagram for the proposed Interconnection Facilities, technical data on all circuit interrupting devices proposed for the Interconnection Facilities, technical data and winding connections for all instrument transformers proposed for the Interconnection Facilities, and proposed types and settings of all protective relays to be installed within the Interconnection Facilities.

Commission Conclusion—General

150. We reaffirm that the timelines for the completion of the Interconnection Studies are reasonable. The LGIP

recognizes that the Transmission Provider may not be able to complete each study within the specified time.[37] In such cases, the Interconnection Customer and the Transmission Provider will come to an acceptable accommodation. This gives the Transmission Provider flexibility when it needs it.

151. We concur with PacifiCorp regarding the use of the term "generating facilities" and are amending sections 6.2 and 7.3 to reflect the change.

152. With regard to PacifiCorp's request for clarification, we conclude that it is unreasonable to expect the Transmission Provider to develop a cost estimate for Network Upgrades on an Affected System because the information required to develop the estimate is not readily available to the Transmission Provider. Accordingly, we deny PacifiCorp's request.

153. Finally, we deny Central Maine's request to revise the LGIP to require the Interconnection Customer to provide, at the time of initial application for interconnection, relay and control diagrams, technical data on interrupting devices, data on instrument transformers, and types and settings of protective relays. This information relates mostly to System Protection Facilities, with requirements set forth in LGIA Articles 9.7.4 and 9.7.5. The specifications for System Protection Facilities are not established solely by the Interconnection Customer, but are determined during the Interconnection Studies, and would not necessarily be available at the time of application. For example, Article 9.7.4.2 states: "Each Party's protection facilities shall be designed and coordinated with other systems in accordance with Good Utility Practice."

Rehearing Requests—Interconnection Feasibility Study

154. FPL Energy, PacifiCorp, and Southern ask that the Commission make the Interconnection Feasibility Study optional at the sole discretion of the Transmission Provider. FPL Energy asserts that in many cases the Transmission Provider already knows without additional study whether a particular project is feasible. Mandating this study in all circumstances increases costs both to the Transmission Provider and to the Interconnection Customer.

155. APS seeks clarification whether an Interconnection Feasibility Study is always required. It notes that while the LGIP states at several places that the study is mandatory, the *pro forma* Interconnection System Impact Study Agreement includes a footnote that indicates that the Interconnection Customer can choose to forego the study.

156. EEI seeks clarification whether it is possible to integrate the Interconnection Feasibility Study with the Interconnection System Impact Study because it believes that the two studies are similar.

157. PacifiCorp asserts that Order No. 2003 is misleading where it states that the studies will include both higher and lower queued Interconnection Requests.[38] It argues that inclusion of lower queued projects is neither contemplated by LGIP sections 6.2 and 7.3, nor is it logical, unless the study is a cluster study.

158. Ameren argues that the Interconnection Feasibility Study should include only those projects for which either an interconnection agreement or Engineering and Procurement Agreement has been signed. Otherwise, the studies will be meaningless and there will have to be a restudy every time a project drops out of the queue. Ameren claims that only 16 projects out of 130 it studied actually interconnected with its Transmission System.

Commission Conclusion—Interconnection Feasibility Study

159. Because skipping the Interconnection Feasibility Study may expedite the interconnection process and lower costs for all Parties, we will make the study optional, provided that the Interconnection Customer and the Transmission Provider agree. In response to APS, we are revising the footnote on the Interconnection System Impact Study Agreement to state: "This recital to be omitted if Transmission Provider does not require the Interconnection Feasibility Study." This also addresses EEI's concern about integrating the Interconnection Feasibility and Interconnection System Impact Studies. As to EEI's comment about the differences between the two studies, we note that the Interconnection System Impact Study is much more comprehensive than the Interconnection Feasibility Study. For example, the former includes stability analysis, whereas the latter does not.

160. We clarify that lower queued generating projects are not to be included in the Interconnection Feasibility Study. However, if the Transmission Provider clusters the Interconnection Requests and an Interconnection System Impact Study is performed for the cluster, the study should include lower queued generating projects that are in the same cluster.

161. We deny Ameren's request that the Interconnection Feasibility Study include only those generating projects for which either an interconnection agreement or an Engineering and Procurement Agreement has been signed. It would not be fair to require the Interconnection Customer to sign an interconnection agreement before the Interconnection Studies identify its requirements for Interconnection Facilities and Network Upgrades. We recognize that including all the higher queued projects will require a restudy when a higher queued projects drops out, but it is essential to include each higher queued project in the study because the Interconnection Studies will be meaningless if higher queued projects are not included.

162. Ameren overstates the number of restudies required. Because many of the proposed projects drop out early in the process, *e.g.*, after the Interconnection Feasibility Study, the number of restudies would be substantially less than Ameren suggests. Furthermore, since projects may be proposed in different geographical areas, the Network Upgrades associated with some projects may not be required for others, thus reducing the number of projects to be restudied.

Rehearing Requests—Interconnection System Impact Study

163. NYTO asserts that the $50,000 and $100,000 deposits for the Interconnection System Impact Study and the Interconnection Facilities Study, respectively, are inadequate and that such low deposit amounts expose the Transmission Provider to the risk of non-payment by the Interconnection Customer. It claims that the Commission failed to take into account the fact that the studies may cost more than the deposit and that the Transmission Provider should be paid for assuming the risk of non-payment. It recommends that the Interconnection Customer pay an estimated monthly amount toward the cost of these studies and that the Transmission Provider hold such deposits until settlement of the final invoice. Finally, NYTO argues that non-payment for the Interconnection System Impact Study should lead to loss of Queue Position.

164. National Grid asks the Commission to modify LGIP section 7.2 to permit the Transmission Provider to require the Interconnection Customer to

[37] *See* LGIP section 6.3 (Interconnection Feasibility Study Procedures), Section 7.4 (Interconnection System Impact Study Procedures), section 8.3 (Interconnection Facilities Study Procedures).

[38] Order No. 2003 at P 223.

deposit, on a monthly basis, the estimated cost of the Interconnection System Impact Study for the following month, with a true-up at the end of the study process. Failure to make monthly deposits would relieve the Transmission Provider of its obligation to continue with the study and the Interconnection Customer would lose its Queue Position.

Commission Conclusion—Interconnection System Impact Study

165. With respect to NYTO's argument that the Interconnection Customer should deposit an estimated monthly cost so that the Transmission Provider can avoid any risk of non-payment, we note that LGIP Section 8.1.1 already provides for monthly payments of invoiced amounts for the Interconnection Facilities Study. We are not persuaded that a similar deposit is also warranted for the Interconnection System Impact Study because the deposit of $50,000 will cover its costs in most instances, and because the Interconnection Customer pays the actual final study cost when it is known, getting a refund of a portion of its deposit or paying the extra cost of the actual study. Furthermore, if the Transmission Provider uses clustering to perform the Interconnection System Impact Study, the cost of the study will be much lower, because the Transmission Provider will perform essentially one study for all Interconnection Requests that fall within the queue cluster window.

166. With regard to National Grid's proposal that non-payment by the Interconnection Customer should relieve the Transmission Provider of its obligation to continue with the study, we note that LGIP section 13.3 already so provides.

167. Finally, in response to NYTO and National Grid, we note that LGIP section 3.6 already provides that failure to pay the study cost results in the loss of Queue Position.

Rehearing Requests—Interconnection Facilities Study

168. APS seeks clarification that the monthly invoice referred to in section 8.1.1 is for the estimated cost of the study, and that a true-up would be performed using the actual expenses to prevent any overpayment by the Interconnection Customer or underrecovery by the Transmission Provider.

169. National Grid urges the Commission to modify section 8.3 to prohibit any comments or questions from the Interconnection Customer when the study is in progress, since they would delay completion of the study and prejudice others in the interconnection queue.

170. National Grid asks the Commission to delete from LGIP section 8.3 the accuracy margins of +/-20 percent (for the 90 day Interconnection Facilities Study) and +/-10 percent (for the 180 day Interconnection Facilities Study) for cost estimates because of the multitude of factors that are outside the Transmission Provider's control. For example, the Transmission Provider does not have control over an equipment manufacturer. National Grid also argues that the Interconnection Customer cannot fairly assume that the costs will remain within the margin. Finally, National Grid argues that the accuracy margins serve no useful purpose and will cause disputes.

Commission Conclusion—Interconnection Facilities Study

171. We clarify that the monthly invoice addressed in section 8.1.1 is an estimate that would be trued-up against the final invoice.

172. We decline to adopt National Grid's proposal that the Interconnection Customer be prohibited from posing questions and comments while the study is in progress. We expect the Parties to act reasonably and cooperatively while the study is in progress.

173. Finally, we are not removing the accuracy margins for cost estimates. Margins are helpful because they give the Interconnection Customer some level of certainty with respect to its cost exposure. However, if factors outside the control of the Transmission Provider cause an estimate to change, and the Interconnection Customer disputes the change, the Parties may invoke Dispute Resolution.

Rehearing Requests—Optional Interconnection Study

174. Entergy and Southern assert that multiple Optional Interconnection Studies will delay the interconnection process by tying up the Transmission Provider's resources. Southern argues that the Interconnection Customer can get Optional Interconnection Studies performed by its own contractor. At a minimum, the Transmission Provider should be allowed to charge market rates to price the studies so as to discourage the Interconnection Customer from using the Transmission Provider as a low-cost consultant.

Commission Conclusion—Optional Interconnection Study

175. We will not limit the number of Optional Interconnection Studies because they may provide information useful to the Interconnection Customer. If performing Optional Interconnection Studies places too great a burden on the Transmission Provider, Order No. 2003 permits the use of a contractor at the Interconnection Customer's expense.[39]

176. Section 11.1—Tender—LGIP section 11.1 provides that when the Transmission Provider issues the draft Interconnection Facilities Study report, it shall tender to the Interconnection Customer a draft interconnection agreement and draft appendices completed to the extent practicable. Within 30 Calendar Days after the issuance of the draft Interconnection Facilities Study report, the Transmission Provider shall tender the completed draft appendices.

Rehearing Requests

177. Several petitioners argue that these deadlines are too onerous. MSAT, National Grid, and NYTO argue that LGIP section 8.3 (Interconnection Facilities Study Procedures) permits the Interconnection Customer to submit comments on the draft Interconnection Facilities Study report up to 30 days after receiving it and contemplates that additional studies and time may be required before a final Interconnection Facilities Study is issued. They argue that this results in the deadline for comments on the draft Facilities Study being the same day that the completed draft appendices are to be tendered. NYTO and National Grid request that the 30 day deadline be amended to reflect the possible delays associated with additional work prompted by comments from the Interconnection Customer. MSAT recommends that the Commission (1) retain the existing 30 day period for the Interconnection Customer to comment on the draft Interconnection Facilities Study report, (2) provide the Transmission Provider with another 30 day period after comments are submitted to tender completed draft appendices, and (3) give the Interconnection Customer an additional 30 days in which to execute and return the appendices.

Commission Conclusion

178. We agree that the comments on the draft Interconnection Facilities Study report should not be due on the same day that completed draft appendices are tendered. We, therefore, retain the existing 30 day period for the Interconnection Customer to comment on the draft Interconnection Facilities Study report and grant an additional 30 days after comments are submitted to

[39] Order No. 2003 at P 225.

tender the completed draft appendices. We will also give the Interconnection Customer an additional 30 days to execute and return the completed draft appendices.

179. Section 12.2.3—Advancing Construction of Network Upgrades that are Part of an Expansion Plan of the Transmission Provider—LGIP section 12.2.3 permits the Interconnection Customer to ask the Transmission Provider to advance construction of Network Upgrades supporting other Interconnection Customers that were assumed to be completed in time to support the Interconnection Customer's Generating Facility's In-Service Date. The Interconnection Customer must pay for reasonable expediting costs, but is entitled to transmission credits for any such payments. The issues raised concerning LGIP section 12.2.3 are discussed in section II.D.2 (Interconnection Pricing Policy).

180. Section 13.1—Confidentiality—The issues raised concerning LGIP section 13.1 are discussed under LGIA Article 22 (Confidentiality), below.

181. Appendix 1—Interconnection Request—LGIP Appendix 1 is the application form for making an Interconnection Request by the Interconnection Customer. Attachment A to the Interconnection Request provides technical information pertaining to the Generating Facility and generator step-up transformer.

Rehearing Requests

182. AEP states that page 4 of Appendix 1 of the Interconnection Request specifies that the Interconnection Customer must submit a completed General Electric Company Power Systems Load Flow data sheet with the Interconnection Request. It asks whether other formats are acceptable, since some Transmission Providers may not use the specified format.

183. Central Maine and NYTO state that the Interconnection Request requires information about two-winding generator step-up transformers. They note that a generator step-up transformer may consist of more than two windings and request that the form be revised accordingly.

184. PacifiCorp proposes various revisions to the Interconnection Request to help ensure that the Interconnection Customer does not mistakenly use this form for a generator that is not larger than 20 MW.

185. PacifiCorp states that Item 3 of the Interconnection Request appears to offer the Interconnection Customer the opportunity to select either Energy Resource Interconnection Service or Network Resource Interconnection Service, or both. It argues that offering the Interconnection Customer the opportunity to select both services is a mistake.

Commission Conclusion

186. We agree with AEP and are revising the Interconnection Request to state that the information may be submitted in other compatible formats, such as IEEE and PTI Power Flow formats.

187. We also agree with Central Maine and NYTO that a generator step-up transformer may consist of more than two windings and that information pertaining to all windings should be provided. We are revising the Interconnection Request to reflect this.

188. We are adopting the change proposed by PacifiCorp to clarify that the Interconnection Request is for a Large Generating Facility only.

189. Finally, we are revising Item 3 to state more clearly that the Interconnection Customer must request either Energy Resource Interconnection Service or Network Resource Interconnection Service, but not both. We are also revising Item 4 to make clear that the Interconnection Customer has an additional option. Specifically, if the Interconnection Customer requests Network Resource Interconnection Service, it may request that the Generating Facility also be studied for Energy Resource Interconnection Service.

C. Issues Related to the Standard Large Generator Interconnection Agreement (LGIA)

190. Article 2.2—Term of Agreement—LGIA Article 2.2 provides that the interconnection agreement will be in effect for ten years, or longer by request, and will be automatically renewed for each successive one year period thereafter, until either Party terminates it.

Rehearing Request

191. NYTO asserts that this provision does not recognize the potential for substantial changes in the regulatory and business environments over such an indefinite period. These provisions unreasonably require the Transmission Owner to have an unlimited obligation to provide Interconnection Service for a term that could be terminated by the Interconnection Customer upon 90 Calendar Days notice, or extended *ad infinitum*. Article 2.2 should provide that the interconnection agreement is limited to ten years, or longer only if the Parties mutually agree to such an extended term.

Commission Conclusion

192. Order No. 2003 addresses this issue. NYTO raises no new arguments on rehearing and we reaffirm the decision for the same reasons.[40]

193. Article 2.3.1—Written Notice—LGIA Article 2.3.1 provides that the Interconnection Customer may terminate the interconnection agreement after giving the Transmission Provider 90 Calendar Days advance written notice.

Rehearing Requests

194. Cinergy objects to the fact that the Transmission Provider has no way to terminate unless the Interconnection Customer Defaults. Allowing the Interconnection Customer to terminate on only 90 days notice allows the interconnection agreement to continue in perpetuity, even following permanent closure of the Generating Facility, unless the Transmission Provider can create some sort of Default by the Interconnection Customer. This leaves the Transmission Provider with unnecessary reporting and other requirements. To provide closure to the interconnection agreement, the Transmission Provider should be permitted to file a notice of termination with the Commission if the Generating Facility permanently ceases Commercial Operation.

195. APS states that Article 2.3.1 does not offer comparable treatment to the Transmission Provider and the Interconnection Customer. It contends that the Commission provided no justification for the inequitable treatment except to vaguely assert that such treatment is necessary to limit the Transmission Provider's market power.

196. APS further states that while the Commission justified the ten year term for the interconnection agreement as being necessary to make the agreement consistent with Internal Revenue Service (IRS) policy, Article 2.3.1 allows the Interconnection Customer to terminate the interconnection agreement after giving the Transmission Provider 90 Calendar Days advance written notice. It notes that the IRS safe harbor provisions (IRS Notices 88–129 and 2001–82) require that the interconnection agreement term be no less than ten years. The 90 day termination clause may violate the long-term agreement requirements set forth in the IRS Notices and is inconsistent with the term of agreement justification for Article 2.2, which refers to the IRS policy. Thus, the provision makes the IRS safe harbor ineffective protection.

[40] Order No. 2003 at PP 302–304.

Commission Conclusion

197. We agree with Cinergy and APS that the Interconnection Customer and the Transmission Provider should have comparable treatment for terminating the interconnection agreement after the Generating Facility permanently ceases operation. We find that allowing the Transmission Provider to terminate the interconnection agreement upon permanent closure of the Generating Facility is reasonable because it prevents the interconnection agreement from continuing in perpetuity. We are revising Article 2.3.1 accordingly.

198. We disagree with APS that the 90 day termination clause may violate the long-term agreement requirement of the IRS Notices. This issue is addressed in Order No. 2003,[41] and since no new arguments are raised on rehearing, we will not change our decision.

199. Article 2.3.2—Default—LGIA Article 2.3.2 provides that either Party may terminate the interconnection agreement under LGIA Article 17.

Rehearing Requests

200. APS seeks clarification that no notice of termination needs to be filed when the interconnection agreement has not been filed with the Commission because it was treated as a conforming agreement.

Commission Conclusion

201. Under Order No. 2001,[42] if a conforming LGIA is executed by the Parties, it need not be filed with the Commission if the public utility has a standard form of agreement on file and submits an Electronic Quarterly Report. Order No. 2001 also eliminated the requirement that parties to a conforming agreement that expires by its own terms file a notice of cancellation or a cancelled tariff sheet. In such cases, the public utility may simply remove the agreement from its Electric Quarterly Report in the quarter following the expiration of the LGIA. However any other modification to a conforming agreement (including terminations caused by something other than expiration of the agreement) must be submitted to the Commission unless the Interconnection Customer agrees to the modification.[43]

202. Article 2.4—Termination Costs—LGIA Article 2.4 requires that a Party terminating the interconnection agreement pay for all costs incurred by the other Party (including costs of canceling orders or contracts for Interconnection Facilities and equipment).

Rehearing Requests

203. Central Maine and NYTO seek clarification that, if the Transmission Owner or Transmission Provider terminates an interconnection agreement because the Interconnection Customer is in Default, all costs associated with such termination are the responsibility of the Interconnection Customer. They state that while Order No. 2003 specifies the Interconnection Customer's responsibility for termination costs when it terminates the interconnection agreement, the cost responsibility for situations in which a Transmission Owner or Transmission Provider terminates the agreement due to the Interconnection Customer's Default is not clearly specified.

204. AEP contends that while Article 2.4.1 allows the Interconnection Customer, in the case of termination, to assume payment obligations under the Transmission Provider's contracts for materials and equipment, it does not take into account the possible commercial interests of the vendor. For example, AEP states that the vendor may have pricing policies applicable to the Transmission Provider for which the Interconnection Customer is not eligible. Similarly, the terms and conditions of the vendor's contract may not permit reassignment. AEP requests that Article 2.4.1 be revised to require such rights of assumption to be subject to mutual agreement between the Parties.

Commission Conclusion

205. With respect to Central Maine's and NYTO's request for clarification, we note that LGIA Article 17.1.2 gives the non-defaulting Party the right to terminate the interconnection agreement and recover all amounts due if the Default cannot be cured. We agree that if the Transmission Owner or the Transmission Provider terminates the interconnection agreement due to the Interconnection Customer defaulting, the Interconnection Customer is responsible for any outstanding costs as if the Interconnection Customer were the terminating Party under LGIA Article 2.4. To do otherwise rewards the Interconnection Customer for choosing Default over termination. We are amending Article 17.1.2 to make this clear.

206. We are not adopting AEP's proposal that we require that the rights of assumption be subject to mutual agreement by the Parties. If, as AEP argues, the vendor contract restricts the Transmission Provider from passing on some pricing discounts it receives under the interconnection agreement or prohibits reassignment, the Transmission Provider can take ownership of the materials and equipment and deliver them to the Interconnection Customer. Alternatively, the Transmission Provider can negotiate with the vendor to eliminate the restrictive provisions. If negotiation reaches an impasse, the Transmission Provider may find a replacement.

207. Article 2.5—Disconnection—LGIA Article 2.5 provides that all costs of disconnecting the Generating Facility from the Transmission System will be borne by the terminating Party, unless the termination is the result of the non-terminating Party's Default.

Rehearing Request

208. Central Maine seeks clarification that disconnection costs include the cost of site restoration.

Commission Conclusion

209. Because Central Maine does not offer any rationale for this change, we will deny their request for rehearing. We are not convinced that site restoration should be included in disconnection costs.

210. Article 3—Regulatory Filings—LGIA Article 3 requires that the Transmission Provider file the interconnection agreement with the appropriate Governmental Authorities.

Rehearing Requests

211. NYTO and Central Maine seek confirmation that Article 3.1 is subject to the same confidentiality provisions set forth in more detail in Article 22.

212. Central Maine requests that the Commission specify that the Transmission Owner, not the Transmission Provider, is required to make the filing. Central Maine cites to *Atlantic City Elec. Co., et al.* v. *FERC*, 295 F.3d 1 (DC. Cir. 2002) (*Atlantic City*) as support for its position that the Commission cannot prevent the Transmission Owner from making a filing under section 205 of the FPA.

Commission Conclusion

213. We grant rehearing of Article 3.1 in response to NYTO's and Central Maine's concerns over confidentiality. Our intent is for the confidentiality provisions of Article 22 to govern. The discussion of confidentiality in Article 3.1 is abbreviated and only confuses the issue. Therefore, we are removing the discussion of confidentiality from Article 3.1.

[41] Order No. 2003 at P 426.

[42] Revised Public Utility Filing Requirements, Order No. 2001, 67 FR 31044 (Jul. 8, 2002), FERC Stats. & Regs. ¶ 31,127 (2002).

[43] *Id.* at P 249 ("All proposals to change the terms of an agreement without the consent of the customer must be filed with the Commission.").

214. Central Maine's concern about FPA section 205 filing rights is based on a misunderstanding of Order No. 2003. We have defined the term Transmission Provider to include the Transmission Owner when the Transmission Provider is separate from the Transmission Owner. Therefore, when Article 3.1 states that the Transmission Provider may make filings with the Commission, it applies to the Transmission Owner as well. Therefore, Order No. 2003 does not restrict the rights of either the Transmission Owner or the Transmission Provider to file with the Commission. When the Transmission Provider and the Transmission Owner are different entities, they will work together and enter into a contractual relationship governing the rights and responsibilities of each entity, including which entity is responsible for filing with the appropriate Governmental Authority.

215. Article 4.3—Generator Balancing Service Arrangements—We address requests for rehearing on Article 4.3 in section II.D.2 (Interconnection Pricing Policy).

216. Article 5.1.3—Option to Build—LGIA Article 5.1.3 provides that the Interconnection Customer may assume responsibility for the construction of the Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades if the Transmission Provider notifies the Interconnection Customer that it cannot meet the construction completion dates.

Rehearing Requests

217. SoCal Edison argues that the Interconnection Customer should bear the cost of construction oversight if the latter chooses to build. It asserts that costs associated with overseeing construction can be substantial. SoCal Edison cites construction oversight costs of $243,000 in one case and $303,000 in another. In both cases, the SoCal Edison states that it provided oversight throughout the design, procurement, and construction process to ensure that the facilities constructed complied with its standards and specifications. SoCal Edison further claims that both projects required several iterations of design review because it uncovered non-compliance with its standards and specifications.

Commission Conclusion

218. We will not require that the Transmission Provider be reimbursed for construction oversight costs. If the Transmission Provider is concerned about non-recovery of oversight costs, it can itself construct the Transmission Provider's Interconnection Facilities and the Stand Alone Network Upgrades under three of the four options outlined in Article 5.1. The Interconnection Customer may exercise its right under the "option to build" only as a last resort if the Transmission Provider is unable to meet the milestones established by the Interconnection Customer.

219. We expect the Interconnection Customer to comply with the Transmission Provider's standards and specifications for the construction of facilities. The Transmission Provider may engage in oversight activities to satisfy itself that the Interconnection Customer is, in fact, abiding by such standards and specifications. The expenses associated with such activities are part of the cost of doing business, and the Transmission Provider can avoid the expense by meeting the milestones itself.

220. Article 5.2—General Conditions Applicable to Option to Build—LGIA Article 5.2 provides that if the Interconnection Customer elects to construct the facilities under the option to build, it shall transfer control of these facilities to the Transmission Provider. However, it may continue to own the facilities.

Rehearing Requests

221. Several Transmission Owners [44] oppose allowing the Interconnection Customer to own Interconnection Facilities and Stand Alone Network Upgrades. Georgia Transmission states that to protect reliability, the Transmission Provider must own these facilities. Ownership gives the right and the responsibility to upgrade and maintain such facilities, and ownership by the Interconnection Customer (which is not subject to any reliability rules and is driven purely by profit motives) could cause reliability problems on the Transmission System.

222. MSAT argues that the Interconnection Customer should not retain ownership of these facilities because it might refuse to make alterations to such facilities to accommodate other Interconnection Requests, forcing the Transmission Provider to construct redundant or less efficient facilities, and owning such facilities could make the Interconnection Customer a utility under state law.

223. National Grid seeks clarification that this provision does not imply that the Interconnection Customer has a right to own Interconnection Facilities and Network Upgrades that are constructed by the Transmission Provider.

224. NYTO argues that the Commission should reverse itself on this issue because the ownership of transmission facilities is a matter of state, not federal law. It asserts that Transmission Owners have eminent domain authority under state law to condemn property to expand their systems and that they hold state certificates of public convenience and necessity which oblige them to maintain their facilities so that they operate in a safe and reliable manner. NYTO also argues that the August 2003 blackout underscores the importance of preserving the Transmission Owners' right to own the Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades.

225. NYTO also asserts that the Commission did not explain its departure from legal precedent and that the case relied upon [45] does not support the Commission's finding. NYTO notes that in *Arizona*, the company initially voluntarily allowed the Interconnection Customer to own the facilities, only later changing its position, and that the Commission simply held the company to its original position.

226. Finally, NYTO argues that this policy will frustrate the ability of Transmission Owners to design and maintain integrated Transmission Systems and cannot be reconciled with the Transmission Owners' right to withdraw from an ISO under certain circumstances, as held in *Atlantic City*.

227. SoCal Edison argues that allowing the Interconnection Customer to own facilities that are on the Transmission Provider's private property is a "taking" in violation of the Fifth Amendment of the Constitution. This policy will decrease the reliability and safety of the Transmission System and will create confusion about liabilities and responsibilities of the Parties.

228. TDU Systems argues that the Commission erred in requiring the Interconnection Customer to transfer control of the Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades to a non-independent Transmission Provider. An Interconnection Customer with experience in operating similar transmission facilities should be able to operate what it builds and owns, particularly when such facilities are connected to its Transmission System, unless there is a showing of harm to reliability. Moreover, the requirement to

[44] *E.g.*, Ameren, Georgia Transmission, MSAT, National Grid, NYTO, and SoCal Edison.

[45] Arizona Public Service Company, 102 FERC ¶ 61,303 (2003) (*Arizona*).

transfer operational control of the facilities to the Transmission Provider will unduly tilt the Parties' bargaining positions in favor of the Transmission Provider.

229. SoCal Edison states that Article 5.11 correctly requires the Transmission Provider to provide to the Interconnection Customer "as-built" drawings, relay diagrams, and other information related to the Transmission Provider's Interconnection Facilities. It asks that the Commission include a parallel provision in Article 5.2 requiring the Interconnection Customer to provide similar information to the Transmission Provider when the Interconnection Customer chooses to build.

Commission Conclusion

230. We agree with NYTO that requiring the Transmission Provider to cede ownership of Stand-Alone Network Upgrades and the Transmission Provider's Interconnection Facilities to the Interconnection Customer is inconsistent with existing Commission precedent. Accordingly, we grant partial rehearing on this issue. However, consistent with *Arizona*,[46] the Parties may agree that the Interconnection Customer may own these facilities.

231. Reliability concerns dictate that the Transmission Provider retain operational control over these facilities, regardless of who owns them.[47]

232. Concerns over who builds the Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades are misplaced. Order No. 2003 provides that the Transmission Provider sets the specifications governing construction (Article 5.2.1), approves the Interconnection Provider's construction plans (Article 5.2.3), has an unlimited right of inspection (Article 5.2.5), and has the right to require the Interconnection Customer to remedy any deficiencies (Article 5.2.6). These safeguards are sufficient to guarantee the reliability of these facilities. Also, the Parties must agree about which facilities are Stand Alone Network Upgrades and identify them in Appendix A to the interconnection agreement before the Interconnection Customer begins construction.

233. We clarify that the Interconnection Customer's [48] ownership or operation of any type of Network Upgrade typically makes it a public utility,[49] subject to all the requirements of the FPA [50] including the obligation to expand the facilities if necessary to provide service to other customers and the obligation to provide Interconnection Service to others.[51]

234. The *Atlantic City* case, which NYTO cites, held that a Transmission Owner in an RTO or ISO may file under section 205 of the FPA. NYTO does not explain how this case answers the question of who owns Stand Alone Network Upgrades or the Transmission Provider's Interconnection Facilities. Order No. 2003 does not limit the rights of a Transmission Provider or Transmission Owner to make a section 205 filing. However, NYTO's concern is resolved by the Commission's decision not to require that the Interconnection Customer be allowed to own facilities. The Transmission Provider is able to negotiate with the Interconnection Customer to protect its interests and its Transmission System.

235. MSAT's concern about the Interconnection Customer that owns transmission facilities refusing to make needed changes to the facilities is moot since we do not now require the Transmission Owner to grant ownership of such facilities to the Interconnection Customer.

236. We disagree with TDU Systems' concern that a Transmission Provider having operational control over the facilities unduly tilts the bargaining power in favor of the Transmission Provider. The Transmission Provider has the right to build, own, and control the facilities itself if it chooses to. The Interconnection Customer has the "option to build" only if the Transmission Provider declines to meet the construction milestones established by the Interconnection Customer. In response to TDU Systems' request that the Interconnection Customer be allowed to operate and maintain any facilities it may own, such a regime would fragment the Transmission System, thereby undermining reliability.

237. Finally, in response to SoCal Edison's proposal, we are amending Article 5.2 to require the Interconnection Customer to provide "as-built" drawings and other information to the Transmission Provider when the Interconnection Customer builds the facilities itself. Since we are granting partial rehearing on this matter, the Fifth Amendment takings argument advanced by several petitioners is moot.

238. Article 5.3—Liquidated Damages—Order No. 2003 provides for liquidated damages in situations where the Transmission Provider agrees to certain milestones for completion of various stages of the interconnection and then fails to meet them.

239. Liquidated damages come into play only if the Interconnection Customer selects LGIA Article 5.1.2 (Alternate Option) instead of Article 5.1.1 (Standard Option). Under the Alternate Option, the Interconnection Customer proposes enforceable milestones that the Transmission Provider is free to accept or reject. If the Transmission Provider accepts the proposed milestones, it faces liquidated damages if it fails to meet the milestones. If the Transmission Provider rejects the proposed milestones, the Interconnection Customer can then either build the facilities itself under Article 5.1.3 (Option to Build), or negotiate with the Transmission Provider to develop milestones agreeable to the Parties under Article 5.1.4 (Negotiated Option). Under the Negotiated Option, the Parties may include, but are not required to include, a liquidated damages provision. If the Parties, after negotiating in good faith, are unable to reach a negotiated agreement under Article 5.1.4. the Transmission Provider assumes responsibility for establishing the milestones and the interconnection proceeds under Article 5.1.1 (Standard Option).

240. Liquidated damages are limited to 0.5 percent per Calendar Day of the actual aggregate costs of the Interconnection Facilities and Network Upgrades for which the Transmission Provider remains responsible, and are not to exceed 20 percent of the Transmission Provider's actual costs. Damages are not recoverable under certain circumstances, such as when the Interconnection Customer is not ready to begin using the facilities by the date specified (unless the Interconnection Customer was not ready due to delay on the part of the Transmission Provider) or when the delay is due to a cause beyond the reasonable control of the Transmission Provider, such as a Force Majeure event.

1. How the Liquidated Damages Provision Should Work Rehearing Requests

241. NYTO explains that liquidated damages provisions are designed to establish damages for breach of contract where those damages would be difficult or impossible to quantify under

[48] *Id.*

[47] *See, e.g., Arizona* at P 12.

[48] Providing that the Interconnection Customer is not excluded by virtue of section 201(f) of the FPA (*e.g.*, municipalities and power marketing administrations).

[49] *But see* section 201(f) of the FPA.

[50] *See* section 201(e) of the FPA ("The term 'public utility' * * * means any person who owns or operates facilities subject to the jurisdiction of the Commission. * * *").

[51] *See* section 15.4 of the OATT.

traditional contract law principles. NYTO asserts that there is no basis to assume either that an Interconnection Customer will suffer any damages when a Transmission Provider misses a milestone, or that if the Interconnection Customer does suffer damages, those damages will be difficult to calculate. NYTO suggests requiring the Interconnection Customer to demonstrate that it was materially and adversely affected by the delay in construction before allowing liquidated damages.

242. Central Maine argues that the LGIA does not clearly allow the Transmission Owner to choose not to be exposed to liquidated damages. Moreover, Central Maine states that it is unclear from Article 5.1 which Party chooses whether to proceed under the Standard Option or the Alternate Option. This could delay interconnecting new generation as the Parties argue.

243. Several petitioners [52] argue that requiring the Transmission Provider to relinquish construction responsibility to the Interconnection Customer in order to avoid the liquidated damages provision may cause further fragmentation of the transmission grid and may harm reliability. According to the petitioners, this approach will likely discourage cooperation between the Transmission Provider and the Interconnection Customer, slow the interconnection process, and increase costs.

244. MSAT argues that the provision favors the Interconnection Customer and suggests that the liquidated damages provision should be made bilateral so that the Transmission Provider has comparable protection from damages resulting from the actions or inactions of the Interconnection Customer.

245. NYTO asserts that assessing liquidated damages against the Transmission Provider for failing to meet the milestones established by the Interconnection Customer gives the Interconnection Customer an incentive to propose unreasonable milestones.

246. National Grid and NYTO argue that liquidated damages should begin accruing no earlier than 15 months from the date on which all conditions triggering such damages are present. This would delay the imposition of liquidated damages until 15 months from the date of equipment procurement and construction begins, and after all regulatory approvals and real property rights have been secured. Petitioners also argue that this 15 month period should be allowed to be increased to accommodate regional or local practices.

247. National Grid and NYTO argue that, while P 885 of Order No. 2003 states that liquidated damages are the exclusive remedy for the Transmission Provider's failure to meet its schedule, no provisions appear in either the LGIP or LGIA to implement this limitation.

248. Finally, National Grid requests that the Commission adopt more reasonable construction schedules based on actual industry practice and permit the Interconnection Customer and the Transmission Provider to negotiate more aggressive schedules, but with symmetrical performance incentives.

Commission Conclusion

249. Order No. 2003 does not require liquidated damages. Rather, it offers liquidated damages only when the Parties agree.[53]

250. While we expect that the liquidated damages provision will play an important role in the Parties' negotiations, they need not agree to liquidated damages, even if the Interconnection Customer chooses to proceed under Article 5.1.2 (Alternate Option). The Transmission Provider must either agree to the liquidated damages or allow the Interconnection Customer to build the Transmission Provider's Interconnection Facilities and Stand-Alone Network Upgrades.

251. We agree with NYTO and National Grid and are including in the LGIA a provision explaining that, in keeping with P 885 of Order No. 2003, liquidated damages, when the Parties agree to them, are the exclusive remedy for the Transmission Provider's failure to meet its schedule.

252. We reject NYTO's request that the Interconnection Customer be required to demonstrate that it was materially and adversely affected by the delay in construction. The whole point of liquidated damages is that they simplify matters when it is difficult to quantify the extent of actual damages.[54] Construction delays can jeopardize the funding of an interconnection project and may make it more difficult for an Interconnection Customer to enter into long-term energy contracts. In addition, delays affecting the Generating Facility's In-Service Date would prevent the Interconnection Customer from making sales of electric energy. The types of damages the Interconnection Customer might suffer are varied and complex. Since damages are speculative and difficult to quantify, liquidated damages are appropriate in this circumstance, when the Parties agree to use them as a remedy.

253. We disagree with Central Maine's characterization of Article 5.1 as unclear. Article 5.1 explains that the Interconnection Customer may choose either the Standard or Alternate Option. The description of liquidated damages that appears in Article 5.3 refers only to its possible inclusion in Article 5.1.2 (Alternate Option) or Article 5.1.4 (Negotiated Option). However, we do agree that Article 5.1.3 (Option to Build) should state that the "dates designated by the Interconnection Customer" are those designated as part of the Alternate Option.

254. While petitioners are correct that the Transmission Provider is required to give the Interconnection Customer the opportunity to build any Stand-Alone Network Upgrades and Transmission Provider's Interconnection Facilities if the Transmission Provider rejects the Interconnection Customer's milestones proposed under the Alternate Option, we do not agree that this endangers reliability. There are safeguards built into the LGIA to ensure that any Stand-Alone Network Upgrades or Transmission Provider's Interconnection Facilities constructed by the Interconnection Customer will be reliable.[55]

255. We reject the suggestion that the Interconnection Customer should be liable for liquidated damages if it misses its construction milestones.[56] The Transmission Provider is already protected by Article 5.17 against long delays by the Interconnection Customer. Moreover, the financial effect on the Transmission Provider of a delay by the Interconnection Customer is much less than the effect on the Interconnection Customer of delay by the Transmission Provider. (Additionally, if the Interconnection Customer's delay is long enough, the Transmission Provider can terminate the LGIA.) Therefore, no further provisions are needed to protect the Transmission Provider, including the 15 month delay recommended by National Grid and NYTO.[57]

256. Regarding NYTO's concern about the selection of unrealistic construction completion dates by an Interconnection Customer, the LGIA allows the Transmission Provider to avoid unrealistic construction completion dates by notifying the Interconnection Customer that it is unable to meet the

[52] *E.g.*, Central Maine, National Grid, and NYTO.

[53] Order No. 2003 P 858.

[54] 22 Am. Jur. 2d *Damages* section 683 (1988).

[55] *See* discussion of LGIA Article 5.2, *supra*. *See also* Order 2003 at P 356.

[56] Order No. 2003 at P 885.

[57] *See* Order No. 2003 at P 360 (rejecting a request for a similar 15 month delay made by NYTO).

dates proposed by the Interconnection Customer under the Alternate Option.[58] In addition, LGIP Section 12.1 requires that the Parties negotiate in good faith to develop schedules for the construction of Network Upgrades and Interconnection Facilities.

257. Finally, we correct a misstatement in P 858 of Order No. 2003 that the Parties may immediately negotiate terms and conditions (the Negotiated Option) if the Transmission Provider rejects the schedule proposed by the Interconnection Customer under Article 5.1.2 (Alternate Option). Instead, if the Transmission Provider and the Interconnection Customer are unable to agree on a schedule under the Alternate Option, the Interconnection Customer has the right to proceed under the Option to Build before the Parties reach the Negotiated Option.

2. Legal Arguments Against a Liquidated Damages Clause Rehearing Requests

258. NYTO argues that the Commission lacks statutory authority to impose a liquidated damages provision since they violate the filed rate doctrine by altering rates after service is rendered.[59] NYTO asserts that the Commission's remedial authority under section 206 of the FPA is expressly limited and does not allow the imposition of liquidated damages.[60]

259. Moreover, according to NYTO, the Commission may not mandate that the Transmission Owner pay damages to the Interconnection Customer without a finding that the Transmission Owner acted unreasonably and that those actions caused the Interconnection Customer economic harm unless the Commission authorizes those costs to be included in rates.

Commission Conclusion

260. Order No. 2003 does not require liquidated damages. Rather, it offers liquidated damages as one of several construction options that each Party must agree to in order to make the liquidated damages provision enforceable.[61] As Order No. 2003 explains, the liquidated damages provision is within the Commission's statutory authority because the Commission under Section 205 of the FPA exercises jurisdiction over agreements under which damages may arise.[62]

261. We also disagree with the contention that the liquidated damages provision violates the filed rate doctrine. The filed rate doctrine forbids a regulated entity from charging rates for its services other than those properly filed with the Commission. Accordingly, neither the utility nor the Commission has the power to alter a rate retroactively.[63] The Commission-approved OATT, however, is a filed rate. If liquidated damages are owed, they are payable as a term of that Commission-approved OATT; they are thus part of the filed rate. Thus, there would be no retroactive rate adjustment or violation of the filed rate doctrine. The filed rate doctrine cases cited by NYTO are inapposite because they do not address the liquidated damages issue before us.

3. Calculation of Liquidated Damages and Miscellaneous IssuesRehearing Requests

262. NYTO argues that liquidated damages should not be calculated based on the cost of all of the facilities and upgrades for which the Transmission Provider has responsibility. They should be limited to the particular facilities that are not completed by the applicable milestone and that are related to the harm to the Interconnection Customer.

263. National Grid and NYTO argue that the LGIA should provide that if the Transmission Provider is unable to recover from its Transmission Customers any costs associated with the Interconnection Facilities, including any liquidated damages, the Interconnection Customer must pay those costs. Otherwise, the Transmission Provider would have no means to recover liquidated damage expenses.

264. NYTO notes that in ERCOT, where interconnection costs benefit all customers in Texas, the Transmission Owner does not incur any liability (including liquidated damages) that cannot be passed on to customers. If state regulators determine that the interconnection costs do not benefit all customers, these costs are borne entirely by the Interconnection Customer, including any liquidated damages that would have otherwise been imposed. Because the Interconnection Customer controls the site selection, the timing of the Interconnection Request, and in large part the timing of the execution of an interconnection agree nent and the payment of up-front faci'ities costs or deposits, it is unreasonable to require other Transmission Customers, Transmission Owners, or Transmission Providers to bear the economic consequences of failing to meet an In-Service Date selected unilaterally by the Interconnection Customer. The better approach would be to provide that the In-Service Date, including any related incentives or penalties, is agreed to by the Interconnection Customer and Transmission Owner. Where the Parties cannot agree, the Transmission Owner should be required simply to make good faith Reasonable Efforts, consistent with Good Utility Practice, to meet the date selected by the Interconnection Customer.

Commission Conclusion

265. We disagree with NYTO and conclude that the full cost of facilities and upgrades should be the basis for calculating liquidated damages. Allowing Transmission Providers to pay liquidated damages on only the portion of the facilities and upgrades that are not complete could lead to situations where the liquidated damages are too low to act as an effective deterrent to delay by the Transmission Provider. Since an Interconnection Customer is unlikely to be able to sell energy until all upgrades and facilities are completed, it would not be equitable to base liquidated damages on only the portion of the facilities and upgrades that had not been completed. In addition, because liquidated damages are capped at 20 percent of the total cost of upgrades and facilities, the Transmission Provider is already protected against unlimited financial risk should it miss a construction milestone and become subject to liquidated damages.

266. NYTO and National Grid propose that if the Transmission Provider cannot recover from its Transmission Customers the cost of any liquidated damages, the Interconnection Customer shall remain liable for the balance. To reiterate what the Commission stated in P 844 of Order No. 2003, because liquidated damages liability is only incurred when the Transmission Provider is at fault, such damages will not be recoverable in transmission rates since they are not prudent expenditures. NYTO and National Grid have offered no arguments that convince us to change that position. In addition, the Transmission Provider is protected against unfair imposition of liquidated damages by Article 16.1, which allows

[58] *See* Order No. 2003 at P 355 (rejecting a similar request from NYTO).

[59] NYTO cites *Southern California Edison Co.* v. *FERC*, 805 F.2d 1068, 1070 n.2 (DC. Cir. 1986) and *City of Piqua, Ohio* v. *FERC*, 610 F.2d 950, 955 (DC Cir. 1979), which discuss the filed rate doctrine.

[60] Order No. 2003 at P 857.

[61] Order No. 2003 at P 858.

[62] Order No. 2003 at P 857.

[63] *See, e.g., Associated Gas Distributors* v. *FERC*, 893 F.2d 349 (DC Cir. 1989) (finding that a Commission policy of allocating current take-or-pay expenses based on a customer's past purchasing patterns violated the filed rate doctrine).

it to declare a Force Majeure event if circumstances beyond its reasonable control prevents it from meeting the agreed upon milestones.

4. Public Power Entities and Liquidated Damages Rehearing Requests

267. Georgia Transmission and NRECA-APPA seek rehearing on the payment of liquidated damages by cooperatives and public power providers, arguing that customer-owned entities should be exempted from the liquidated damages provisions of the LGIA. Because these entities have no outside shareholders to bear the costs of liquidated damages, any liquidated damages payments made by them would ultimately be borne by their retail member-customers.

268. Georgia Transmission and NRECA–APPA argue that holding customer-owned Transmission Providers responsible for liquidated damages is inconsistent with the Commission's statement in Order No. 2003 that "because liquidated damages liability will not have to be paid unless the Transmission Provider is at fault, we conclude that these damages will not be * * * recoverable in transmission rates."[64] If a customer-owned entity is required to pay liquidated damages, Order No. 2003 does not explain where the money is to come from.

Commission Conclusion

269. The LGIA provides for liquidated damages only if the Transmission Provider so agrees. A Transmission Provider subject to the Alternate Option will have to decide whether to accept liquidated damages liability. Given the flexibility already built into the LGIA, we conclude that it is unnecessary to create a special accommodation for public power entities on this issue. If a non-public utility voluntarily adopts the Commission's OATT in order to ensure open access across the Transmission Systems of public utilities, the non-public utility may still decline to accept a construction schedule that includes liquidated damages.

5. Subcontractors and Third Party Exemption

270. Order No. 2003 says that subcontractor delays are not circumstances beyond the control of the Transmission Provider that prevent liquidated damages liability.

Rehearing Requests

271. Georgia Transmission and NRECA–APPA argue that the Transmission Provider should not be held accountable for the failure of third party suppliers, since it generally does not have control over their performance. The large manufacturers that supply transmission equipment typically do not pay liquidated damages if they can't meet delivery schedules. Under the LGIA, this would expose the Transmission Provider to risk even though it is not at fault.

272. National Grid argues that the Transmission Provider should not have to pay liquidated damages if delay is the result of the action or inaction of the Interconnection Customer or any Affected System or other person with whom either the LGIA or the Interconnection Customer requires the Transmission Provider to coordinate. National Grid states that it is not reasonable to hold the Transmission Provider liable for delays caused by entities that are outside its control. Similarly, NYTO argues that liquidated damages should not be due when the Transmission Owner fails to meet a milestone as a result of the action or inaction of the Interconnection Customer or any other Interconnection Customer. The Transmission Owner should not be exposed to liability to one Interconnection Customer as the result of the actions of another over which it has no control.

273. MSAT notes that Article 5.3 lists four instances in which the Transmission Provider may avoid liquidated damages and argues that the article should provide an exhaustive list of such instances. (MSAT does not say what should be included on the list.) Otherwise, the provision is too favorable to the Interconnection Customer because it does not adequately consider mitigating circumstances.

Commission Conclusion

274. We agree with Georgia Transmission and NRECA–APPA that third party suppliers are not generally subcontractors of the Transmission Provider for purposes of determining liability for liquidated damages. Ordinarily, the acts of suppliers would not cause the Transmission Provider to incur liquidated damages if the suppliers' actions are beyond the Transmission Provider's "reasonable control."[65]

275. In response to National Grid, delays due to Affected Systems generally would also be considered circumstances beyond the Transmission Provider's reasonable control.

276. NYTO asks the Commission to state clearly that the Transmission Provider will not be liable where the problem is caused by the Transmission Owner. Because the definition of "Transmission Provider" already includes "Transmission Owner" when the two entities are separate, the exception for actions or inactions of another Transmission Provider already applies to the Transmission Owner.

277. Finally, we reject MSAT's suggestion that the Commission provide an exhaustive list of mitigating circumstances. The exemptions contained in Order No. 2003 (mutual agreement, two exemptions related to the responsibilities of the Interconnection Customer, and one exempting acts or inactions of third parties) are sufficiently detailed to allow the Parties to assess whether liability has been incurred.

278. Article 5.4—Power System Stabilizers & Article 5.10.3—ICIF Construction—LGIA Article 5.4 provides that the Interconnection Customer shall install, maintain, and operate power system stabilizers under the guidelines and procedures established by the Applicable Reliability Council, and if the power system stabilizers are removed from service, the Interconnection Customer shall immediately notify the Transmission Provider. Article 5.10.3 provides that the Interconnection Customer shall provide the Transmission Provider with, among other things, specifications for the Generating Facility's excitation system and automatic voltage regulator.

Rehearing Request

279. FPL Energy states that although these standards are appropriate for synchronous generators, wind generators should be exempt because power system stabilizers, excitation systems, and automatic voltage regulators do not exist for wind turbines—or at least have not yet been tried. It seeks clarification that the Commission did not mean to apply these standards to non-synchronous equipment such as wind generators.

Commission Conclusion

280. We agree with FPL Energy that power system stabilizers, excitation systems, and automatic voltage regulators may not be appropriate for non-synchronous technologies such as wind generators, and are amending Articles 5.4 and 5.10.3 to state that the requirements of these provisions do not apply to wind generators.

281. Article 5.10—Interconnection Customer's Interconnection Facilities—LGIA Article 5.10.1 (Large Generating Facility Specifications) requires the Interconnection Customer to submit initial specifications for the

[64] Order no. 2003 at P 884.

[65] *See* LGIA Article 5.3.

Interconnection Customer's Interconnection Facilities (ICIF), including System Protection Facilities, to the Transmission Provider before the Initial Synchronization Date so that the Transmission Provider can review such specifications to ensure that the ICIF are compatible with the technical specifications, operational control, and safety requirements of the Transmission Provider. The specifications provided to the Transmission Provider are confidential. Article 5.10.2 (Transmission Provider's Review) requires the Interconnection Customer to make changes to the ICIF that the Transmission Provider requires, under Good Utility Practice, to ensure that the ICIF are compatible with the telemetry, communications, and safety requirements of the Transmission Provider.

Rehearing Requests

282. Cinergy argues that the title of Article 5.10.1 is misleading because it addresses the Interconnection Customer's Interconnection Facilities rather than the Generating Facility's. Cinergy also asks that the Commission delete the confidentiality provision because this type of information is required for transmission modeling purposes.

283. Southern argues that Article 5.10.1 requires ICIF specifications to be compatible with the technical specifications, operational control, and safety requirements of the Transmission Provider, whereas Article 5.10.2 requires the Transmission Provider to ensure that the ICIF specifications are compatible with its telemetry, communications, and safety requirements. Southern asks that the Commission amend Article 5.10.2 to make it compatible with Article 5.10.1 because telemetry and communications are merely a subset of overall technical specifications and operational control.

Commission Conclusion

284. We are revising the title of Article 5.10.1 to be Interconnection Customer Interconnection Facility Specifications, as requested by Cinergy. However, we are denying its request to delete the confidentiality provision because it has not explained why the Transmission Provider cannot conduct transmission modeling while keeping this information confidential. Finally, we agree with Southern's position concerning the compatibility of Articles 5.10.1 and 5.10.2 and are revising Article 5.10.2 accordingly.

285. Article 5.12—Access Rights—LGIA Article 5.12 guarantees reasonable right of access by a Party to the property and lands of the other Party, or the agents of the other Party, to construct, operate, maintain, repair, test, inspect, replace, or remove facilities and equipment in connection with the interconnection process.

Rehearing Requests

286. NYTO and Central Maine contend that Article 5.12 grants the access-seeking Party the right to enter onto lands not only owned by the access-granting party, but by the agents of the access-granting Party as well. Both question the Commission's legal authority to require their agents to grant the Interconnection Customer access to the lands of the agent.

287. NYTO requests that the Commission require the Interconnection Customer to pay for any administrative or legal expenses incurred by the Transmission Provider in arranging for access to its property. It argues that any such visit would be for the purpose of Interconnection Service and that the costs of the visit therefore should be paid by the Interconnection Customer.

288. Central Maine asks the Commission to clarify that the statement "at no cost to the other Party" does not include any legal and administrative costs associated with providing access rights.

289. AEP requests that the Commission clarify that the Transmission Provider is not required to provide free land rights that it owns in the vicinity of an interconnection project that may be necessary for the Interconnection Customer to construct, operate, and maintain its own facilities.

Commission Conclusion

290. NYTO's and Central Maine's concerns about the agency relationship are misplaced. If an agency relationship exists, then by definition the agent must act as directed by the principal, if those directions are within the scope of the agency.[66] It would be unreasonable to require the Interconnection Customer to enter into one agreement with the Transmission Provider and separate agreements with each Affiliate or agent of the Transmission Provider. This could result in undue discrimination and gaming of the process by the Transmission Provider. However, because state law varies, we are revising Article 5.12 to read: "* * * with respect to land owned or controlled by the granting Party, its agents (if allowed under the applicable agency agreement), or any Affiliate, that are necessary to enable the access Party to obtain ingress and egress * * *." The parenthetical clause responds to NYTO's and Central Maine's concerns that ordering an agent to open its lands exceeds the scope of the agency. Furthermore, adding "Affiliates" to the list clarifies that both the Transmission Provider and all entities over which it exercises control must cooperate in the interconnection process.

291. The phrase "at no cost to the other Party" is clear. The administrative and legal costs of complying with Article 5.12 are *de minimis* and are a general cost of doing business. Neither NYTO nor Central Maine has provided any cost estimates or other arguments that persuade us to allow for the recovery of administrative and legal expenses.

292. In response to AEP's concern, Article 5.12 does not require the transfer of ownership of lands, nor does it give either Party *carte blanche* to use the lands of the other Party as its own. Instead, Article 5.12 allows Parties reasonable access onto the lands of the other Parties for the purpose of facilitating the interconnection process.

293. Article 5.13—Lands of Other Property Owners—LGIA Article 5.13 requires that if any part of the Transmission Provider's Interconnection Facilities or Network Upgrades is to be installed on property owned by a third party, the Transmission Provider shall assist the Interconnection Customer in securing rights to use that land. Specifically, the Transmission Provider is required to use similar efforts to those that it typically undertakes on its own behalf to site its own generating facilities. This includes any eminent domain authority the Transmission Provider has.

Rehearing Requests

294. NYTO states that since the FPA does not give the Commission eminent domain authority, the Commission cannot do indirectly what it cannot do directly. It says that one entity cannot be required to seize property for the benefit of another. It also expresses concern that it could be required to use its eminent domain authority to interconnect the Interconnection Customer's Generating Facility, only to have the Interconnection Customer choose another Control Area. Southern makes a similar argument, stating that because eminent domain issues are governed exclusively by state law, the Commission is without jurisdiction to

[66] *See* 3 Am. Jur. 2D *Agency* section 1 (2002). *See also* Am. Jur. 2D *Agency* section 213 (2002) ("An agent has a duty to obey all reasonable instructions and directions with regard to the manner of performing a service that he or she has contracted to perform and to adhere faithfully to them in all cases where they ought properly to be applied and in which they can be obeyed * * *.").

impose requirements on the Transmission Provider with regard to how it must use its eminent domain authority.

295. Cinergy states that the Commission erred in requiring the Transmission Provider to provide assistance to the Interconnection Customer in siting the Generating Facility. Instead, Cinergy proposes that any required siting assistance should be limited to the Transmission Provider's or Transmission Owner's Interconnection Facilities or Network Upgrades and should not require the Transmission Provider to assist the Interconnection Customer in siting the Generating Facility. MSAT, National Grid, and NYTO likewise request that the Commission clarify that such "comparable assistance" applies only to transmission-related property and not generation-related property.

296. National Grid states that the comparable efforts language in P 391 of Order No. 2003 [67] overstates what is actually in Article 5.13. The Commission should clarify that the language found in the former does not supersede the language of Article 5.13. The "comparable efforts" language improperly purports to set standards for the Transmission Provider's use of its eminent domain authority and exceeds the Commission's statutory authority. National Grid also expresses concern that certain uses of eminent domain authority may not be valid under state law.

297. If the Commission declines to remove the eminent domain provision entirely, National Grid requests that Article 5.13 be altered to forbid the Transmission Provider from using its eminent domain authority in a discriminatory manner.

Commission Conclusion

298. Since the Interconnection Customer is required to demonstrate site control when it first files its Interconnection Request, the Transmission Provider would not be asked to use its eminent domain authority to assist in siting the Generating Facility. However, to avoid confusion, we will delete the last sentence of LGIA Article 5.13 which could be read as requiring a Transmission Provider to obtain land on which the Interconnection Customer could site the Generating Facility.[68] To retain the Affiliate concept in the deleted text, we modify the first sentence of Article 5.12 to read: "* * * shall at Interconnection Customer's expense use efforts, similar in nature and extent to those that it typically undertakes on its own behalf, or on behalf of its Affiliates, including use of its eminent domain authority * * *." Additionally, the Scoping Meeting provisions within the LGIP already require the Transmission Provider to assist the Interconnection Customer in planning and siting issues. Since the Scoping Meeting is one of the first steps in the Interconnection Process, these issues should be resolved long before the LGIA is signed.

299. NYTO's concern that an Interconnection Customer may choose to dynamically schedule its energy deliveries with another Control Area ignores the fact that the Interconnection Customer must still pay the Transmission Provider in whose Control Area the Generating Facility is physically located for Transmission Service. The Transmission Provider also benefits from having additional sources of VAR support in its Control Area, even if the Interconnection Customer dynamically schedules elsewhere. In addition, the Interconnection Customer is still required to initially fund the costs of the Network Upgrades associated with the interconnection of the Generating Facility to the Transmission System and the Transmission Provider will be free to recover the costs of the Network Upgrades once it has refunded the monies with interest back to the Interconnection Customer and filed for a change in rates with the appropriate regulatory Commission.

300. NYTO, National Grid, and Southern all argue that state law may not allow the Transmission Provider to seize land for the benefit of another party or may otherwise be limited by state law. The Commission modified LGIA Article 5.13 in response to similar comments to the NOPR's proposal, and now requires that (a) any use of eminent domain power must be in accordance with state law, and (b) the Transmission Provider is required to use eminent domain only to the extent it uses eminent domain to site Interconnection Facilities or Network Upgrades for its own, or affiliated, generation.

301. Article 5.14—Permits—LGIA Article 5.14 requires the Transmission Provider to assist the Interconnection Customer in obtaining all permits and licenses required to complete the interconnection. Article 5.14 requires the Transmission Provider to provide such assistance to the Interconnection Customer comparable to that provided to the Transmission Provider's own, or an Affiliate's generation.

Rehearing Request

302. Cinergy requests that Article 5.14 merely require the Transmission Provider to help the Interconnection Customer obtain permits and licenses for the Transmission Provider's Interconnection Facilities and Network Upgrades, and not for the Interconnection Customer's Generating Facility and Interconnection Facilities.

Commission Conclusion

303. We deny rehearing. Article 5.14 requires the Transmission Provider and Transmission Owner to cooperate with the Interconnection Customer, in good faith, to obtain any necessary permits, licenses and authorizations. This includes cooperating with the Interconnection Customer to obtain permits and licenses for Network Upgrades, the Transmission Provider's Interconnection Facilities, as well as the Interconnection Customer's Interconnection Facilities and Generating Facility. Specifically, the Transmission Provider is required to help the Interconnection Customer to the same extent that it assists its own generation or that of its Affiliates in obtaining all permits and authorizations. If it is disputed whether the assistance is of this sort, the Parties may invoke Dispute Resolution.

304. Article 5.16—Suspension—LGIA Article 5.16 allows the Interconnection Customer, upon written notice to the Transmission Provider, to suspend at any time all work on Interconnection Facilities or Network Upgrades, if the Transmission System is left in a safe and reliable condition under Good Utility Practice and the Transmission Provider's safety and reliability criteria. The interconnection agreement is deemed to be terminated if the Interconnection Customer has not asked the Transmission Provider to recommence work within three years from the date of the suspension request.

Rehearing Requests

305. Ameren asserts that this provision could undermine the safety and reliability of the Transmission System by postponing the construction of transmission facilities that have been planned for the Transmission System. It argues that once the interconnection agreement is executed, the

[67] "The Final Rule requires that a Transmission Provider or Transmission Owner use efforts similar to those it typically undertakes on its own behalf (or on behalf of an Affiliate) to secure land rights for the Interconnection Customer."

[68] The deleted sentence reads: "Upon receipt of a reasonable siting request, Transmission Provider shall provide siting assistance to the Interconnection Customer comparable to that provided to the Transmission Provider's own, or an Affiliate's generation."

Interconnection Customer is bound by its terms and conditions and must continue with facility construction, unless it can show that it will be significantly harmed if the construction were to continue.

306. NYTO and Entergy assert that the three year suspension of facility construction is unreasonable. NYTO contends that the three year period should begin on the date specified in the written notice submitted to the Transmission Provider, or the date of the notice if no date is specified, not "following commencement of such suspension," as provided, because the language is ambiguous and could lead to unnecessary disputes between the Parties. NYTO further states that suspension could harm other projects in the queue and that the Transmission Provider should be indemnified for any third party claims resulting from the suspension.

307. Entergy states that LGIP section 3.3.1 allows the Generating Facility's In-Service Date to be established ten years in advance of the initial request for interconnection. Thus, if the Interconnection Customer suspends construction for three years, available short circuit and stability upgrade capacity may be unused for up to 13 years. Entergy further states that the Interconnection Customer gains a property right to existing capacity on short circuit and stability-related facilities necessary for that customer's interconnection to the Transmission System. Even if capacity is physically available, a subsequent Interconnection Customer may unnecessarily be forced to construct entirely new facilities because a previous Interconnection Customer has suspended, and ultimately may cancel, the construction of the Generating Facility. Entergy argues that the three year period may force other Interconnection Customers to finance additional and unnecessary upgrades. Entergy requests that the Commission reduce the suspension period to 18 months.

308. Southern and SoCal Edison note that Article 5.16 does not set a limit on the number of times the Interconnection Customer can suspend work. Southern believes that the Interconnection Customer could request Interconnection Service to preserve its place in the queue, execute an interconnection agreement, and immediately suspend its project for an extended period of time, tying up its Queue Position without making any commitment. Accordingly, Article 5.16 should allow only a one-time right for the Interconnection Customer to suspend the project for a period of up to one year.

309. SoCal Edison requests clarification that the total amount of time that the Interconnection Customer may suspend the construction schedule (even though it is entitled to multiple suspension requests) is three years. It is unclear whether the Commission meant to provide that (1) the Interconnection Customer has the right to ask for suspension of work an unlimited number of times for three years each time, or (2) the Interconnection Customer may ask for more than one suspension period, but the total of all of the suspension periods may not be more than three years. It claims that the latter interpretation is reasonable, because the former would obviate the three year rule and allow the Interconnection Customer to game the system.

310. TDU Systems claims that assigning all of the associated Network Upgrade costs to the entity that happened to request a particular service at a particular time results in a "tag, you're it" approach to transmission facility funding. The Interconnection Customer may have to pay for substantial transmission upgrades that benefit many others. TDU Systems asks the Commission to modify Order No. 2003 to prevent a lower queued Interconnection Customer from being stuck with the Network Upgrade costs of a higher queued Interconnection Customer that suspends its project or drops out of the queue entirely.

311. Cinergy argues that the Interconnection Customer should be responsible for Network Upgrades attributable to it as a result of suspension, changes, or cancellations by higher queued Interconnection Customers. It claims that P 409 of Order No. 2003 conflicts with other aspects of the Commission's interconnection pricing policies. For example, in various parts of Order No. 2003 the Commission states that the Interconnection Customer must pay up front for the cost of Network Upgrades attributable to it, subject to refunds through transmission credits after the Generating Facility achieves Commercial Operation. An Interconnection Customer that wants construction accelerated is required to pay for early construction of the other customer's Network Upgrades until the other customer needs them.

312. Cinergy also notes that the Interconnection Customer has the flexibility to cancel its project and terminate the interconnection agreement on 90 days' notice. However, Cinergy interprets P 409 of Order No. 2003 to mean that the Interconnection Customer may not be required to pay for Network Upgrades attributable to it and to interconnect the Generating Facility to the Transmission System, as the result of suspensions or cancellations by higher queued Interconnection Customers.

313. Cinergy contends that P 399 of Order No. 2003 leaves unclear what would occur if suspension, changes, or cancellations by a higher queued Interconnection Customer affects the Network Upgrades needed for the Interconnection Customer that would affect Network Upgrades as a result of suspension.

314. Cinergy also asks: (1) What happens if the Interconnection Customer refuses to agree to the changes, (2) does the Commission intend for the Transmission Provider to interconnect the Generating Facility to the Transmission System without the necessary Network Upgrades in place, even though reliability would be harmed, or is the Transmission Provider not required to interconnect the Generating Facility until such Network Upgrades are completed, (3) if the Interconnection Customer does not pay the costs of the Network Upgrade, is it considered in Default, even though it has executed the interconnection agreement, and (4) who will pay for the needed Network Upgrades if the responsible Interconnection Customer refuses to accept the changes to the interconnection agreement? Cinergy requests that the Commission adopt a blanket contingency provision requiring, if necessary, the reevaluation of the needed Network Upgrades for the Interconnection Customer when there is a suspension, change or cancellation by a higher queued Interconnection Customer, and the resulting changes are made through an amendment to the interconnection agreement that could be protested as to the scope and cost of changes. In the event of a protest, Cinergy states that the Commission could resolve any disagreement over the scope and cost of the revised Network Upgrades. The needed upgrades would not be constructed until the Interconnection Customer agrees to pay for them. Cinergy argues that the LGIA should also provide that if the Interconnection Customer is unwilling to pay for the Network Upgrades attributable to it, the Interconnection Customer may terminate the interconnection agreement under Article 2.3.

315. AEP requests clarification that suspension costs will not be repaid through credits.

316. APS asks the Commission to clarify what happens if the Interconnection Customer elects to suspend construction or installation. It is not clear how the Parties should

proceed, and what the respective rights and obligations are to resume service under the interconnection agreement.

Commission Conclusion

317. We disagree with Ameren that Article 5.16 endangers the safety and reliability of the Transmission System. That article clearly provides that if the construction and installation of the Transmission Provider's Interconnection Facilities or Network Upgrades required under the LGIA are suspended on behalf of the Interconnection Customer, the Transmission Provider's Transmission System shall be left in a safe and reliable condition pursuant to Good Utility Practice and the regional Transmission Provider's safety and reliability criteria. This article also provides that if there is a suspension, the Interconnection Customer is responsible for all reasonable and necessary costs the Transmission Provider has incurred to ensure the safety of persons and property and the integrity of the Transmission System during the suspension.

318. We deny Entergy's request to reduce the total allowed suspension period from three years to 18 months. Entergy has not supported its claim that network capacity reserved for the Interconnection Customer may be unused for up to 13 years if the suspension period is raised from 18 months to three years. Network Upgrades should not be constructed until they are needed. If another Interconnection Customer is ready to proceed with its project, it should be allowed to use the capacity that has been earmarked for a higher queued Interconnection Customer that has suspended its project.[69] The Network Upgrades can be built when the latter customer is ready to proceed. We do, however, grant NYTO's request to begin the three year period on the date for which the suspension is requested, or the date of the written notice to the Transmission Provider, if no effective date of the suspension is specified. Since it is reasonable to have an effective date for suspensions, we are revising Article 5.16 accordingly.

319. We clarify that the Interconnection Customer has the right to ask for several suspensions of work up to a cumulative period of three years for each Interconnection Request. For example, the Interconnection Customer can make a single request for a three year suspension or can make several requests for suspensions, if the sum of the suspensions does not exceed three years. This should not allow gaming of the queue. Moreover, if a higher queued Interconnection Customer tries to tie up a Queue Position without making a commitment, other Interconnection Customers may assert a claim under LGIA Article 27 (Disputes).

320. In response to Cinergy and TDU Systems, we clarify that the Interconnection Customer is responsible (and later may receive credits) for funding the cost of (1) All Network Upgrades (other than those already in the Transmission Provider's current expansion plan) that must be constructed to support that Interconnection Customer's In-Service Date, (2) all Network Upgrades that are the ultimate responsibility of higher queued Interconnection Customers, the construction of which must be accelerated to meet the Interconnection Customer's In-Service Date, and (3) Network Upgrades that originally were the responsibility of a higher queued Interconnection Customer that then dropped out of the queue, if these Network Upgrades are necessary to support the interconnection of the Interconnection Customer's Generating Facility.[70] We therefore deny TDU Systems' request to modify Order No. 2003. We recognize that this third category creates uncertainty for the Interconnection Customer, since it may cause the Interconnection Customer's initial funding requirements to increase above initial estimates. Nevertheless, with the withdrawal of the higher queued Interconnection Customer, such costs become a legitimate component of the Interconnection Customer's initial funding requirement. This is simply a business risk that Interconnection Customers must face; the Commission cannot protect them from all uncertainty. To help the Interconnection Customer manage this uncertainty, we are directing the Transmission Provider to provide an estimate of the Interconnection Customer's maximum possible funding exposure, if higher queued generating facilities drop out when the Transmission Provider tenders the draft LGIA. The Transmission Provider shall provide an estimate of the costs of any Network Upgrades that were assumed in the Interconnection Studies for the Interconnection Customer that are an obligation of an entity other than the Interconnection Customer and that have not yet been constructed.

321. With respect to AEP's request for clarification that suspension costs should not be eligible for credits, we so clarify. However, these costs, which must be properly documented, must be incurred only to ensure the reliability and safety of the Transmission Provider's Transmission System, and must not include costs incurred before the effective date of the suspension.

322. With respect to APS's request for clarification as to how the Parties should proceed after the suspension period, we will not attempt to codify this since the circumstances underlying each request will be different. However, the Interconnection Customer's written notice must include an estimated duration for the suspension and other information related to the request. The Parties must coordinate milestones or other factors related to the suspension, including any activities and costs needed to ensure the safety and reliability of the Transmission Provider's Transmission System during the suspension period.

323. Finally, we note that the term "Transmission Provider" is used instead of "Transmission System" in the first sentence of LGIA Article 5.16. We are correcting Article 5.16 accordingly.

324. Article 5.17—Taxes—LGIA Article 5.17 addresses responsibilities related to the income tax treatment of payments the Interconnection Customer makes for the Transmission Provider's Interconnection Facilities and Network Upgrades. It treats these two types of payments the same way. IRS policy, as expressed in IRS Notice 2001–82 and IRS Notice 88–129, explains when the Interconnection Customer's payments to build these facilities do not create a current tax liability for the Transmission Provider (safe harbor provision). This "safe harbor" provision generally provides that the transaction is not a taxable transfer. To protect the Transmission Provider in case either (1) the IRS changes its policy, or (2) the transaction ceases to qualify for safe harbor protection (due, for example, to a "subsequent taxable event") and a current tax liability results, Article 5.17 states that the Interconnection Customer must indemnify (hold harmless) the Transmission Provider for any such tax liability.

325. Article 5.17.3—Indemnification for the Cost Consequences of Current Tax Liability Imposed upon the Transmission Provider—LGIA Article 5.17.3 requires that the Interconnection Customer indemnify the Transmission Provider from any income taxes that are imposed, as described above. The Transmission Provider may not charge the Interconnection Customer a tax

[69] *See* Virginia Electric and Power Company, 104 FERC ¶ 61,249 (2003) at p. 61,828.

[70] The Interconnection Customer is not responsible for the higher queued Interconnection Customer's termination costs.

gross-up [71] for income taxes unless either (1) it has made a good faith determination that the payment is subject to taxation, or (2) any Governmental Authority directs it to treat the payment or transfers as subject to taxation. Where the Transmission Provider has made a good faith determination that a payment should be reported as income subject to taxation and requires the Interconnection Customer to provide a gross-up, the Interconnection Customer may receive security from the Transmission Provider for the Interconnection Customer's gross-up payment.

326. Under Article 5.17.3, when a Transmission Provider in good faith makes a determination that a payment is not income subject to taxation, the Transmission Provider may require the Interconnection Customer to provide security in a form reasonably acceptable to the Transmission Provider and in an amount equal to the Interconnection Customer's indemnification payment. This security is intended to protect the Transmission Provider if there is a subsequent taxable event that (1) makes taxable those payments that a utility had concluded were not taxable and (2) creates a current tax liability for the Transmission Provider. In such an event, the security would cover the cost consequence of any current tax liability.

Rehearing Requests

327. APS argues that requiring the Transmission Provider to refund tax gross-up amounts as transmission credits, as required in LGIA Article 11.4.1, may result in the Transmission Provider bearing the entire incremental present value cost of including the Network Upgrades in taxable income, if the payments are deemed taxable income. It asserts that the intent of Article 5.17.3 is to make the Transmission Provider whole if it is compelled to include the Interconnection Customer's payments for Network Upgrades in taxable income (thereby achieving the same financial result as if the Network Upgrades were not taxable). The LGIA should be amended to provide that any credits paid by the Transmission Provider to the Interconnection Customer under Article 11.4.1 will exclude any income tax gross-up properly collected under Article 5.17.3. Southern likewise argues that the Interconnection Customer should not receive transmission credits for tax payments because this would require that all Transmission Customers bear tax liabilities created by the Interconnection Customer.

328. APS also argues that the Transmission Provider must be indemnified for all taxes that the Transmission Provider has to pay as a result of the Interconnection Customer's payments for Network Upgrades, not just income taxes.

329. SoCal Edison argues that it is illogical to require the Transmission Provider, under Article 5.17.5, to reduce the level of security provided by Article 5.17.3 if there is a favorable private letter ruling from the IRS. The security is intended to protect the Transmission Provider against the risk that the Interconnection Customer will not be able to meet its indemnification obligation if there is a subsequent taxable event. A private letter ruling stating that a payment is not presently income subject to taxation does nothing to mitigate the Transmission Provider's risk that a subsequent taxable event will occur and the Interconnection Customer will not meet its indemnification obligation.

330. Entergy objects to requiring the Transmission Provider to provide security to the Interconnection Customer for a tax gross-up amount that may be refunded later to the Interconnection Customer. Security is expensive, and this requirement is unreasonably burdensome on the Transmission Provider in light of the low risk that it will be unable to pass on a tax refund it receives to the Interconnection Customer. If the Commission does not eliminate this security, it should only require a parental guaranty as security, since that is less expensive. NYTO and SoCal Edison also argue that the provision requiring security from the Transmission Provider should be deleted. SoCal Edison asserts that it is inconsistent with the Commission's treatment of other costs subject to possible refund, such as Network Upgrades.

331. SoCal Edison argues that the Commission should provide the Transmission Provider and the Transmission Owner with a regulatory backstop so that if the Interconnection Customer does not meet its indemnification obligation, there would still be guaranteed recovery of these income taxes in transmission rates. It offers two ways for the Commission to ensure the Transmission Provider's cost recovery: (1) Allow it to retain complete security until the tax liability has expired, whether or not a private letter ruling is issued, or (2) allow it to retain a reduced level of security (or even an unsecured promise-to-pay from the Interconnection Customer) and provide a regulatory backstop for the Transmission Provider. This would reduce the burden on the Interconnection Customer while protecting other Transmission Customers. NYTO likewise argues that the Transmission Provider should be allowed to recover any outstanding federal tax liability balances from other Transmission Customers.

332. Southern argues that Article 5.17.3 improperly limits the indemnification obligation of the Interconnection Customer because a taxable event could occur after ten years but still fall within the statute of limitations.[72] For instance, taxes may be imposed more than ten years after the Generating Facility is placed in service if there is a "disqualification event" or the LGIA is terminated. Because the Transmission Provider faces the risk that taxes may be imposed more than ten years after the Generating Facility is placed in service, the Commission should allow the Transmission Provider to require security. Article 5.17.3 should be amended to terminate the Interconnection Customer's indemnification obligation only when the statute of limitations is over or the Interconnection Customer pays its tax obligations (because of a "subsequent taxable event," described in Article 5.17.6). This would ensure that the Transmission Provider is made whole while at the same time ensuring that the Interconnection Customer is not subject to an indefinite security obligation.

333. NYTO argues that transmission credits will jeopardize the Interconnection Customer's efforts to treat up-front funding of interconnection costs as a non-taxable event.

334. On the other hand, Calpine objects to allowing the Transmission Provider to require security in an amount up to the Transmission Provider's maximum theoretical tax liability. First, Calpine argues that the possibility of a triggering taxable event occurring is remote and does not justify a burdensome security obligation. Even if a disqualifying event occurs, the Interconnection Customer would be obligated under the LGIA to indemnify the Transmission Provider. And since the interconnection agreement is

[71] A tax gross-up for income taxes is a dollar amount calculated to determine the Interconnection Customer's payment needed to indemnify the Transmission Owner for any current tax liability associated with payments the Interconnection Customer makes for Transmission Provider's Interconnection Facilities and Network Upgrades.

[72] Southern explains that, contrary to Article 5.17.3, IRS Notice 88–129 does not limit the Transmission Provider's income tax liability to a ten year testing period. Notice 88–129 simply requires that a power purchase contract be for at least ten years in order for the safe harbor to apply.

essential to the value of a generating asset, the Interconnection Customer (or its creditors if it is bankrupt) would honor the LGIA's indemnity provisions.

335. Second, Calpine argues that unless there is a private letter ruling from the IRS finding that the payments are taxable income, allowing the Transmission Provider to require security to be posted for up to ten years is excessive. Calpine draws a distinction between payments the Interconnection Customer makes to the Transmission Provider for Network Upgrades and payments an Interconnection Customer makes for directly assignable facilities. Payments the Interconnection Customer makes for Network Upgrades must be returned to the Interconnection Customer through transmission credits. Advance payments for Network Upgrades are really loans, not taxable, irrevocable contributions. Since the Transmission Provider faces no possible tax liability for these payments, it is not just and reasonable to allow the Transmission Provider to impose a security requirement. At a minimum, the level of security required by the Transmission Provider should be reduced pro rata by the amount of the "loan" repaid through transmission credits.

336. Calpine also proposes that the Commission limit the security obligation to a percentage of the potential tax liability, and cites a settlement order that set the security obligation at 20 percent of potential liability. *See* Southern California Edison Co., Final Report of Settlement Judge, 104 FERC ¶ 63,025 (2003).

Commission Conclusion

337. On reconsideration, we conclude that Article 5.17.3 should better reflect the specific risks that the Transmission Provider faces with respect to taxation

338. Under Article 5.17.3, the Transmission Provider may require the Interconnection Customer to pay a tax gross-up only if the Transmission Provider makes a "good faith" determination that the payments or property transfers at issue should be reported as income subject to taxation. Order No. 2003 does not distinguish payments the Interconnection Customer makes to the Transmission Provider for Network Upgrades cost from the payments made for Interconnection Facilities. We are revising Article 5.17.3 to make clear that (1) the Transmission Provider is indemnified from the cost consequences associated with a taxable determination for Interconnection Facilities, and (2) with respect to the security option, the security amount will only cover the Transmission Provider's exposure to the cost consequence of any current tax liability as of January 1 of each year for Interconnection Facilities.

339. The indemnification requirement and related payment under Article 5.17.3 are not intended to reimburse the Transmission Provider for any current income tax liability that might be associated with payments the Interconnection Customer makes for the Transmission Provider's Interconnection Facilities and Network Upgrades. It is instead payment for the present value of the costs the Transmission Provider will incur (such as interest expense) to fund that current income tax payment, if required, until it is recouped by the Transmission Provider through lower tax payments in future years by virtue of tax depreciation of the Interconnection Facilities and Network Upgrades.

340. When Interconnection Facilities (which are directly assignable to the Interconnection Customer) are involved, the indemnification payment reimburses the Transmission Provider for costs it incurs related to the current tax liability. In other words, it is intended to provide for cost recovery. Should the Interconnection Customer be unable to make the indemnification payment, the Transmission Provider would be exposed to a loss since cost responsibility for Interconnection Facilities is directly assigned to the Interconnection Customer and the Transmission Provider could not recover these costs from other customers. Accordingly, a security requirement that covers the cost consequence of any current tax liability. is appropriate for the indemnification payment associated with Interconnection Facilities.

341. However, when Network Upgrades are involved, the indemnification payment is an additional amount of funding that must be provided by the Interconnection Customer related to the Network Upgrades. It is not reimbursement for costs incurred by the Transmission Provider related to Network Upgrades. In other words, it is not intended to provide for recovery of these costs. If treated as an embedded (versus incremental) cost, the cost of Network Upgrades is ultimately recovered from all Transmission Customers through transmission rates; it is included in the rate base and depreciated. Any determination that a payment for Network Upgrades is subject to current income tax would give rise to a deferred tax asset, which under Commission rate policies, would be added to the rate base. If treated as an incremental cost, the cost of all Network Upgrades is ultimately recovered from the Interconnection Customer as part of the incremental transmission rate. Therefore, the Transmission Provider's transmission rates provide for recovery of, and return on, all costs associated with Network Upgrades. Should the Interconnection Customer be unable to make the indemnification payment, the Transmission Provider would obtain the required funding for any current tax liability related to Network Upgrades from another source (such as banks or the equity capital markets, among others). The Transmission Provider, however, would be fully reimbursed for all its costs, including the cost of funding any related current tax liability, through its rates. In short, the Transmission Provider will remain whole. Under these circumstances, where Network Upgrades are involved, there is no reason to require the Interconnection Customer to maintain security for any potential indemnification payment.

342. We disagree with APS that the indemnification should apply to taxes other than income taxes. Because APS has offered no justification for why indemnification should be applied to non-income taxes, or described why non-income taxes otherwise would be unrecoverable from the Interconnection Customer, we will not expand Article 5.17.3 to apply to non-income taxes.

343. We agree with Calpine's argument that it is unreasonable to allow the Transmission Provider to require security for up to the maximum amount of the Transmission Provider's potential tax liability. Again, as discussed above, where Network Upgrades are involved, there is no reason to require the Interconnection Customer to maintain security for any potential indemnification payment. In addition, we are also clarifying Article 5.17.3 so that the security requirement for non-network, directly assigned Interconnection Facilities reflects only the Transmission Provider's exposure to the cost consequence of any current tax liability as of January 1 of each year. Our intent is for the security requirement to track the cost consequence of any current tax liability over time.

344. The security provided in Article 5.17.3 protects the Transmission Provider against the possibility that the IRS will change its policy in a manner that makes the payments taxable or that there will be a subsequent taxable event. SoCal Edison makes a valid argument regarding the inconsistency between Articles 5.17.3 and 5.17.5. We conclude that it would be inappropriate to reduce

the security amount based upon a private letter ruling from the IRS because the private letter ruling does not reduce the risk to the Transmission Provider that the IRS will change its policy in a manner that makes the payments taxable or that a subsequent taxable event will occur, which is what the security is intended to address. We therefore delete from Article 5.17.5 the requirement that a security amount be reduced as a result of a private letter ruling determining that payments are a non-taxable event. This change obviates the need to address SoCal Edison's request for a regulatory backstop.

345. Entergy, NYTO, and SoCal Edison all object to the Commission giving the Interconnection Customer the option of requiring security if the Transmission Provider requires a gross-up. Upon reconsideration, we conclude that because the gross-up will be refunded, the Interconnection Customer requires no further protection from the risk that the Transmission Provider will become insolvent. Accordingly, we will not allow the Interconnection Customer to require this security.

346. Regarding Southern's concerns about tax liability extending beyond the indemnification obligation in Article 5.17.3, we disagree. The article provides indemnification protection until the applicable IRS statute of limitations has expired. Southern's proposal is not necessary because this provision limits the indemnification obligation so that it ends when there is no further risk of new tax liability.[73] Since Southern has not convinced us that liability would extend beyond the applicable IRS statute of limitations (as extended), we reject its request.

347. In response to NYTO, whether credits indeed endanger the non-taxable treatment of these payments is a matter for the IRS to decide. Article 5.17.3 addresses the possibility that the IRS would change its policy.

348. Finally, we reject Calpine's request that we make the ten year limit on indemnification applicable to all existing interconnection agreements. Order No. 2003 does not require retroactive changes to individual interconnection agreements filed with the Commission before Order No. 2003's effective date and Calpine has provided no reason for why this particular provision should be imposed retroactively.[74]

[73] We agree with Southern that it is inappropriate to refer to IRS Notice 88–129 because that notice does not address the ten year testing period referred to in Article 5.17.3. We are deleting the reference to IRS Notice 88–129 in Article 5.17.3.

[74] Order No. 2003 at P 911.

349. Article 5.17.4—Tax Gross-Up Amount—Article 5.17.4 describes how the Parties calculate the tax gross-up amount, which is intended to reflect the cost consequence of the current tax liability on a fully grossed up basis for the interconnection related payments from the Interconnection Customer to the Transmission Provider.

Rehearing Requests

350. FP&L argues that a tax gross-up provision will cause losses to the Transmission Provider, particularly when combined with the requirement to refund the tax payments, plus interest, to the Interconnection Customer. FP&L requests that the Commission make clear how the Transmission Provider is to be made whole if the IRS decides that Network Upgrade payments are taxable.

Commission Conclusion

351. We note that the gross-up will be collectible only if the Transmission Provider makes a good faith determination that it will have to pay income taxes on the money it receives from the Interconnection Customer. Accordingly, the gross-up amount should be payable to the taxing authorities. As explained in the discussion of Article 5.17.3 above, the time value cost of Network Upgrade-related tax payments under embedded cost treatment is paid by all Transmission Customers (rolled into transmission rates) because the Transmission Provider records a deferred tax asset at the time the tax payment is made and that deferred tax asset is added to the rate base under the Commission's ratemaking policies. Under the incremental rate treatment, the time value costs would be recovered from the Interconnection Customer as part of the incremental transmission rate. The Transmission Provider is thus made whole for all prudently incurred costs related to Network Upgrades. On the other hand, we will not require the Transmission Provider to refund that portion of the tax gross-up amount intended to cover the costs related to directly assignable Interconnection Facilities because the Transmission Provider has no way of recovering these costs from other users. By excluding these costs from the tax gross-up amounts the Transmission Provider must refund to the Interconnection Customer, time value costs that otherwise may have arisen are eliminated. The exclusion of these amounts (that portion of the tax gross-up amount intended to cover the costs related to directly assigned Interconnection Facilities) is incorporated into Article 11.4.1.

352. Article 5.17.5—Private Letter Ruling or Change or Clarification of Law—LGIA Article 5.17.5 requires the Transmission Provider to ask the IRS, at the Interconnection Customer's request and expense, for a private letter ruling as to whether any property transferred or sums paid by the Interconnection Customer under the interconnection agreement are subject to federal income taxation. The point of obtaining such a ruling is to get a definitive answer regarding whether taxes will be due. If the private letter ruling concludes that such sums are not taxable, refunds would be payable in accordance with Article 5.17.8.

Rehearing Requests

353. Calpine argues that there should be no security obligation when a private letter ruling finds that these payments are not taxable. Upon the issuance of the private letter ruling, the Transmission Provider should have 30 days to release any security for the potential tax liability that the Transmission Provider required. Even if a private letter ruling contains covenants or conditions, release of security should be required. Otherwise, the purpose of securing a private letter ruling would be undermined.

354. NYTO and National Grid argue that the Commission should allow the Transmission Provider to require security even when a private letter ruling has determined that the payments are nontaxable, because changed circumstances could render the indemnity worthless.

355. Article 5.17.5 requires that the Transmission Provider execute either a privacy act waiver or a limited power of attorney authorizing the Interconnection Customer to participate in all discussions with the IRS regarding a private letter ruling request. Entergy first argues that this provision departs from Commission precedent[75] without a reasoned explanation.[76] Second, Entergy argues that there cannot be efficient communication between the Transmission Provider and the IRS if the Interconnection Customer has to be involved in every such communication. Third, a limited power of attorney would provide the Interconnection Customer the broad right to represent the Transmission Provider in a private letter ruling proceeding. Consequently, all representations by the Interconnection Customer to the IRS would be binding on the Transmission

[75] *Citing* Cambridge Electric Light Co., 96 FERC ¶61,205 at 61,875 (2001) (*Cambridge*).

[76] *Citing Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 852 (DC Cir. 1970).

Provider. Entergy claims that the Transmission Provider does not need third parties to act as its representatives before the IRS. Alternatively, the provision should apply only after the Transmission Provider has received notice from the IRS that it is entitled to a "conference of right" with the IRS because the IRS may object to the Transmission Provider's position. This revision would prevent unnecessary inefficiency and reduce the risk that the Interconnection Customer will misrepresent the facts, or the Transmission Provider's positions, without the latter's knowledge.

356. Salt River Project urges the Commission to give non-public utilities flexibility so that they do not risk losing access to tax-exempt financing. It asserts that Article 5.17.5 should not apply to a Transmission Provider that is not a public utility because the sums paid or collected in its rates are not prescribed by Order No. 2003.

Commission Conclusion

357. We disagree with Calpine that the security obligation should be extinguished when a private letter ruling states that the Transmission Provider will not have to pay income taxes. We agree with NYTO and National Grid that security is allowed even when a private letter ruling has determined that the payments are not income subject to taxation because the private letter ruling does not protect against the risks of a subsequent taxable event or a change in IRS policy occurring.

358. In response to Salt River Project, we clarify that the tax provisions in the LGIA are rate-related matters. Accordingly, a non-public utility with a safe harbor reciprocity OATT need not make Article 5.17.5 available to Interconnection Customers as long as any analogous rate provisions are comparable to those that the Transmission Provider charges itself.[77] We also reiterate that we will consider the legal and regulatory restrictions on non-public utilities' contractual rights and tax-exempt status when we evaluate any safe harbor reciprocity OATT filings.[78]

359. We do not agree with NYTO regarding the requirement that the Interconnection Customer be allowed to participate in discussions with the IRS. In *Cambridge*, the Commission denied the Interconnection Customer's request that the Transmission Provider include the Interconnection Customer in discussions with the IRS. 96 FERC ¶ 61,205 at 61,875 (2001). However, in that case the Interconnection Customer was not obligated to pay for the costs associated with a private letter ruling. Given the Interconnection Customer's potential liability and its obligation to pay for the private letter ruling, we conclude that the Interconnection Customer's interests are significant enough to warrant its participation in any IRS discussions and its inclusion in all communications with the IRS with respect to the private letter ruling request.

360. Finally, we disagree with the objection regarding the power of attorney. The power of attorney may be written to prevent the harm that Entergy fears. If the power of attorney is unsatisfactory, the Parties may sign a privacy act waiver. In either case, the Parties should be able to draft a document that allows the Interconnection Customer to participate in discussions with the IRS without affording the Interconnection Customer unnecessarily broad rights. Accordingly, we reject Entergy's request for rehearing.

361. We also reject Calpine's request that we make the required reduction in security applicable to all existing interconnection agreements. Order No. 2003 does not require retroactive changes to individual interconnection agreements filed with the Commission before the rule's effective date and Calpine has not shown that this particular provision should be imposed retroactively.[79]

362. Article 5.17.6—Subsequent Taxable Events—LGIA Article 5.17.6 explains the Parties' obligations if a "subsequent taxable event" occurs that makes the facilities payments taxable and creates a current tax liability for the Transmission Provider.

Rehearing Requests

363. NYTO argues that the Commission's reliance on cooperation among the Parties is insufficient and that the Commission should adopt Article 5.16.5 of the consensus LGIA submitted during the ANOPR process. That provision would ensure that the Transmission Owner is made whole when a contribution from the Interconnection Customer is non-taxable when made, but the IRS later imposes tax liability.

364. Article 5.17.2 contains several covenants that the Interconnection Customer must meet in order to conform to the IRS requirements for non-taxable treatment and maintain safe harbor protection. Southern argues that Article 5.17.6 should require the Interconnection Customer to pay a tax gross-up for the taxes imposed upon the Transmission Provider if the Interconnection Customer breaches any of the covenants in Article 5.17.2, not just that in Article 5.17.2(i). Because taxes may be imposed upon the Transmission Provider if the Interconnection Customer breaches Article 5.17.2(ii) and (iii) as well, Southern contends that Article 5.17.6 should be amended to refer to Article 5.17.2 in its entirety.

Commission Conclusion

365. In Order No. 2003, the Commission rejected provisions proposed by NYTO because NYTO's concerns were fully addressed in Article 5.17.[80] Moreover, Article 5.17.6 protects the Transmission Provider. Also, Article 5.17.3 requires the Interconnection Customer to indemnify the Transmission Provider from the cost consequences of any current income tax liability until the statute of limitations expires.

366. We agree with Southern that Article 5.17.6 inappropriately limits the availability of a gross-up for subsequent taxable events. Accordingly, we are amending it to refer to the "covenants contained in Article 5.17.2."

367. Article 5.17.7—Contests—LGIA Article 5.17.7 describes the obligations that apply if any Governmental Authority determines that the Transmission Provider's receipt of payments or property is income subject to taxation. At the Interconnection Customer's expense, the Transmission Provider shall appeal or oppose such a determination. Article 5.17.7 also describes the procedures for settling a contested ruling.

Rehearing Requests

368. Entergy notes that the right to appeal exists regardless of whether the IRS has already considered that particular transaction's tax treatment during an audit. The requirement elevates the Transmission Provider's contractual obligations under the interconnection agreement above its responsibilities to the taxing authorities to file accurate returns. For example, if a taxing authority determines that the corporate officer who filed an amended return did not believe it was accurate, that officer may be prosecuted for perjury. Thus, the relevant provisions in Article 5.17.7 should be removed or revised so that the Transmission Provider is not required to submit a refund claim when the Transmission Provider does not believe, in good faith,

[77] Order No. 2003 at P 843.

[78] *Id.* at P 844.

[79] Order No. 2003 at P 911.

[80] Order No. 2003 at P 422.

that such claim is true, accurate, and complete.

369. Entergy argues that Article 5.17.7 is unnecessary and unreasonably grants the Interconnection Customer the right to participate in the Transmission Provider's appeals of tax audits and other tax-related litigation. This will limit the Transmission Provider's ability to negotiate with the taxing authorities. Moreover, because Article 5.17.5 already grants the Interconnection Customer the right to require the Transmission Provider to resolve issues through the private letter ruling process, the additional rights granted in Article 5.17.7 are not needed. The private letter ruling process is better because it allows resolution of tax issues early in the interconnection process, according to Entergy.

370. NYTO argues that the Commission should oblige a Transmission Owner to contest a tax determination only if the Interconnection Customer provides an opinion by its counsel that there is a reasonable likelihood of success. The Transmission Owner should not be required to commit money and resources to contesting tax determinations if there is little chance of success.

371. If the Transmission Provider pursues a settlement to resolve the contest with a Governmental Authority, Article 5.17.7 provides that the Interconnection Customer's settlement obligation shall be the settlement amount consented to by the Interconnection Customer, or any higher settlement that is supported by written advice from a nationally-recognized tax counsel. Southern explains that the Commission in Order No. 2003 refused to require the Interconnection Customer's obligation to indemnify the Transmission Provider for a settlement to be determined on a grossed-up basis. Article 5.17.7 limits the Interconnection Customer's obligation to the settlement amount agreed to between the Transmission Provider and the Governmental Authority. Moreover, the reimbursement of the settlement by the Interconnection Customer will be considered income to the Transmission Provider in the year of payment. Under Article 5.17.7, the Interconnection Customer has no obligation to pay a tax gross-up on the amount included in the Transmission Provider's income. The Transmission Provider could include tax gross-up in the settlement calculation; however, this would simply increase the reimbursement obligation of the Interconnection Customer and the additional taxes the Transmission Provider would owe as a result of the reimbursement. Southern submits that requiring the Interconnection Customer's settlement obligation amount to be calculated on a fully grossed-up basis would ensure that the Transmission Provider is made whole.

Commission Conclusion

372. We agree with Entergy that it is appropriate to give the Transmission Provider discretion over how best to contest a Governmental Authority's determination. We are modifying Article 5.17.7 to clarify that the Transmission Provider has discretion as to whether to appeal, protest, seek abatement of, file a claim for refund, or oppose a determination. Article 5.17.7 states that the "Transmission Provider reserves the right to make all decisions with regard to prosecution of such appeal." These decisions include how best to contest the determination in a manner that does not harm the Transmission Provider's interests.

373. Also in response to Entergy, we conclude that Article 5.17.7 is necessary because it allows the Interconnection Customer to participate in contest proceedings. As with the private letter ruling discussion above, the significant financial interest of the Interconnection Customer warrants its presence at contest proceedings. Contest rights to the private letter ruling right are appropriate because the Interconnection Customer should be entitled to one appeal, if it believes such appeal is necessary and it is willing to pay for the costs.

374. We agree with Southern that in order to make the Transmission Provider whole with respect to settlement amounts, the Interconnection Customer must pay the settlement amount as calculated on a fully grossed-up basis to cover any related cost consequence of a current tax liability.

375. The Commission considered and rejected NYTO's argument in Order No. 2003 and NYTO raises no new arguments here.[81]

376. Article 5.17.8—Refund—LGIA Article 5.17.8 describes the conditions under which the Transmission Provider must pay a refund to the Interconnection Customer for any payments the Interconnection Customer made related to income tax liability. It also sets forth the formula for calculating the refund.

Rehearing Request

377. Cinergy wants to ensure that the Transmission Provider does not have to refund tax-related payments to the Interconnection Customer if the Transmission Provider has already provided transmission credits for the same items. It notes that Article 5.17.3 permits the Transmission Provider to charge a gross-up for income taxes if the Transmission Provider determines, in good faith, that the payments or property transfers made by the Interconnection Customer should be treated as income subject to taxation. Cinergy states that Article 11.4.1 requires the Transmission Provider to refund to the Interconnection Customer, through transmission credits, the total amount paid to the Transmission Provider for Network Upgrades, including tax-related payments "not refunded to Interconnection Customer pursuant to Article 5.17.8 or otherwise." Article 5.17.8 directs the Transmission Provider to return to the Interconnection Customer any refund received from a taxing authority for overpayment without limiting such refunds if transmission credits already have been provided to the Interconnection Customer for such payments. Cinergy requests that, to avoid overpayment, the Commission should clarify that Article 5.17.8 does not require the Transmission Provider to refund tax payments to the Interconnection Customer if credits already have been provided for such payments.

Commission Conclusion

378. We agree with Cinergy. We clarify here that Article 5.17.8 does not require the Transmission Provider to refund tax payments to the Interconnection Customer if credits already have been provided for such payments under Article 11.4.1.

379. Article 5.17.9—Taxes Other Than Income Taxes—LGIA Article 5.17.9 describes the Parties' obligations if taxes other than income taxes are imposed. The Interconnection Customer may be required to reimburse the Transmission Provider under the LGIA. The article requires the Transmission Provider, at the Interconnection Customer's expense, to appeal, protest or contest a non-income tax assessment against the Transmission Provider until a final, non-appealable order by a court or agency is issued. Unless the payment of such taxes is a prerequisite to an appeal or abatement or cannot be deferred, the Interconnection Customer is not required to pay the Transmission Provider until the issue is resolved on a final basis.

Rehearing Requests

380. Southern argues that although the Interconnection Customer must reimburse the Transmission Provider for the cost of the contest, the contest may

[81] Order No. 2003 at P 475.

still place an undue burden on the Transmission Provider if the contest is appealed through several levels of review. A lengthy appeal will require the Transmission Provider to devote administrative, accounting, and legal resources to a matter that may take years to resolve. Moreover, it is unclear under Article 5.17.9 to what extent these costs will be reimbursed by the Interconnection Customer. For these reasons, Article 5.17.9 should be amended to allow, but not require, the Transmission Provider to appeal or seek further reviews of tax assessments beyond one level of judicial review.

Commission Conclusion

381. We conclude that the prospect of paying all the costs of securing a final, non-appealable ruling is a sufficient incentive for the Interconnection Customer not to pursue a frivolous appeal. While Southern claims that it is unclear that all costs will be reimbursed, Article 5.17.9 states that the process will be undertaken at the Interconnection Customer's "sole expense." All reasonable costs of pursuing the appeal are recoverable. To provide greater clarity, however, we are adding to this article language that appears in Article 5.17.7 that establishes the standard for recoverable costs and arrangements for their payment.

382. Article 5.17.10—Transmission Owners Who Are Not Transmission Providers—Article 5.17.10 requires that if the Transmission Provider and Transmission Owner are not the same, (1) all references to Transmission Provider in Article 5.17 shall be deemed to include the Transmission Owner, and (2) the interconnection agreement shall not become effective until the Transmission Owner has agreed in writing to assume all duties and obligations of the Transmission Provider under Article 5.17.

Rehearing Requests

383. EEI argues that the bilateral or tripartite nature of the LGIP and LGIA raises issues. It states that while "Transmission Provider" is generally intended to include "Transmission Owner," the Commission should clarify why, under LGIA Article 5.17.10, the Transmission Owner has to explicitly assume the obligations of Article 5.16, but not under other provisions in which the Transmission Owner is separately identified, such as Articles 11.2 and 11.3.

Commission Conclusion

384. We conclude that the written statement in Article 5.17.10 (ii) is unnecessary, since the Transmission Owner will sign the interconnection agreement and will be liable, when appropriate. Accordingly, we are deleting this text from Article 5.17.10. And since the definition of "Transmission Provider" already includes the Transmission Owner if the two entities are distinct, Article 5.17.10(i) is not needed. Article 5.17.10 is therefore deleted in its entirety.

385. Article 5.18—Tax Status—LGIA Article 5.18 provides that the Parties shall cooperate with one another to maintain the Parties' tax status. It also explains that for a Transmission Provider with tax exempt status, the LGIA is not intended to endanger that status with respect to the issuance of bonds.

Rehearing Requests

386. NYTO argues that Article 5.18 should use the same language regarding compliance with local furnishing bond limitations for tax free financing that are in the OATT.

387. Order No. 2003 states that the Commission will act to ensure the continued tax-exempt status of bond funding by non-jurisdictional and jurisdictional entities.[82] NRECA–APPA asks that the Commission also act to ensure the continued tax-exempt status of cooperatives.

Commission Conclusion

388. OATT section 5 allows the Transmission Provider to deny Transmission Service if doing so would jeopardize the tax-exempt status of any local furnishing bonds used to finance the Transmission Provider's facilities that would be used for such service. We conclude that in an agreement to be signed by the Parties, it is more appropriate to include a provision that requires each of them to cooperate to maintain the other Party's tax status. To fail to cooperate is to risk Breach, which would have the same result as denying service. The OATT section 5 rights are more appropriate for a set of procedures, since the Transmission Provider's right to reject the Interconnection Customer's request for interconnection should be established (and acted upon) before the Parties sign the interconnection agreement. And since no similar rights are described in the LGIP, we will include a comparable provision there—section 13.6 (Furnishing Bonds).

389. Article 6.4—Right to Inspect—LGIA Article 6.4 provides each Party with the right to inspect the other Party's facilities and states that any information that the Transmission Provider obtains shall be confidential.

[82] Order No. 2003 at P 489.

Rehearing Request

390. NYTO argues that any information either Party obtains under the article should be confidential.

Commission Conclusion

391. We agree with NYTO and are revising the provision accordingly.

392. Article 7—Metering—LGIA Article 7 requires each Party to comply with the Applicable Reliability Council requirements regarding metering. Article 7.4 specifies standards for the testing of metering equipment.

Rehearing Request

393. SoCal Edison states that Article 7 conflicts with the California ISO Tariff and Meter Service Agreements. For example, it points out that Article 7.4 has different rules from the California ISO Tariff and Metering Protocol about meter testing. SoCal Edison seeks confirmation that, given the Commission's statements on flexibility for ISOs, its interconnection agreements can simply refer to the California ISO Tariff and Meter Service Protocol.

Commission Conclusion

394. SoCal Edison asks the Commission to rule on whether (and in what manner) it may rely on the California ISO Tariff and Metering Protocol as a justification for a regional variation for LGIA Article 7. This is a compliance issue and the Commission will, accordingly, address this issue when the compliance filing is considered.

395. Article 9.1—Operations—General—LGIA Article 9.1 requires the Interconnection Customer and the Transmission Provider to comply with the Applicable Reliability Council operations requirements. It requires each Party to provide to the other Party all information that may reasonably be required to comply with Applicable Laws and Regulations and Applicable Reliability Standards.

Rehearing Request

396. California Parties states that the Applicable Reliability Council requirements do not provide enough detail to ensure system protection and safety. It claims that the Western Electricity Coordinating Council (WECC) guidelines do not specify the types of protective relays and their tripping schemes and installation; such details are generally found in the Transmission Owner's interconnection handbook or similar documents that exist at the regional or sub-regional level. Moreover, the WECC guidelines allow the individual utility to impose additional requirements. California

Parties argues that in most cases the Transmission Provider's planning guidelines are more voluminous and restrictive than the WECC guidelines. It therefore seeks clarification as to whether the Transmission Provider's interconnection requirements related to system protection and safety that are not covered in the WECC guidelines can be incorporated into the interconnection agreement by reference if it imposes such requirements on itself and all other Interconnection Customers, including its Affiliates.

397. California Parties also argues that the Commission mistakenly omitted Appendix C from the LGIA, which was in the ANOPR, and is a blank page entitled "Interconnection Guidelines." It asserts that the page was intentionally left blank during the ANOPR consensus process so that the Transmission Provider could include its own interconnection requirements. California Parties states that the Transmission Provider must be allowed to include additional interconnection requirements to maintain the safety and reliability of the Transmission System.

398. Finally, California Parties seeks clarification that the provisions of the California ISO's approved Tariff governing technical standards for interconnections will remain in effect.

Commission Conclusion

399. We agree that the Transmission Provider should be able to impose supplemental interconnection requirements not specifically delineated in the Applicable Reliability Council requirements, particularly those related to system protection and safety. However, the Applicable Reliability Council requirements must specifically provide for the inclusion of such additional requirements and the Transmission Provider must impose such requirements on itself and all other Interconnection Customers, including its Affiliates.[83] LGIA Appendix G was omitted because most of the operational requirements are contained or referenced in the Applicable Reliability Council requirements. Nevertheless, if the Transmission Provider wishes to impose additional operational requirements, such as those related to system protection and safety that are not contained or referenced in the Applicable Reliability Council requirements, it may propose and justify such requirements in its compliance filing in the form of a separate Appendix.

400. We clarify that the California ISO's approved Tariff provisions governing technical standards for interconnections may remain in effect until the Commission acts on its compliance filing.[84]

401. Article 9.3—Transmission Provider Obligations—LGIA Article 9.3 requires that the Transmission Provider operate, maintain, and control the Transmission System and the Transmission Provider's Interconnection Facilities in a safe and reliable manner.

Rehearing Request

402. Southern asserts that it is inappropriate to impose broad obligations on the Transmission Provider's Transmission System in the interconnection agreement. It cites *Commonwealth Edison Company*, 92 FERC ¶ 61,175, p. 61,621 (2000), which held that the Transmission Provider should not be required to indemnify the Interconnection Customer for liability arising from the operation of the entire Transmission System and that the only facilities governed by an interconnection agreement are the facilities necessary for the interconnection (including Interconnection Facilities and Network Upgrades). Southern contends that the LGIA should govern only interconnection and the Interconnection Facilities necessary to achieve the interconnection, not the entire Transmission System.

Commission Conclusion

403. We deny Southern's request for rehearing because the LGIA already does what Southern wants. The LGIA's indemnification provision already limits the liability of the Transmission Provider to actions it takes on behalf of the Interconnection Customer. Indemnification is designed to protect a Party when it acts on behalf of the other Party under the LGIA. As explained in the discussion of Article 18.1, indemnification is not limited by geography or to specific types of facilities. This is consistent with the *Commonwealth Edison Company* precedent cited by Southern, which states that "the indemnification provisions of the [interconnection agreement] deal only with the interconnection components of Transmission Service."

404. Article 9.3 requires the Transmission Provider to maintain and operate its Transmission System in a safe and reliable manner and in accordance with the LGIA. This is designed to protect the Transmission Provider if it is required by the LGIP or LGIA to take an action that could endanger the safety or reliability of its Transmission System. The Transmission Provider's obligation to maintain its Transmission System trumps its obligation to perform under the LGIP and LGIA.

405. Article 9.6.1—Power Factor Design Criteria—LGIA Article 9.6.1 requires the Interconnection Customer to design the Generating Facility to maintain a power factor at the Point of Interconnection within the range of 0.95 leading to 0.95 lagging, unless the Transmission Provider establishes different requirements that apply to all generators in its Control Area on a comparable basis.

Rehearing Request

406. FPL Energy argues that wind generators for the most part cannot maintain the required power factor, simply because the necessary technology does not exist for wind generators. It states that most Transmission Providers realize this limitation and permit wind generators to maintain a power factor of unity. In fact, studies show that maintaining a power factor of 0.95 lagging at the Point of Interconnection would result in an over voltage condition that would trip the wind generator.

Commission Conclusion

407. We agree with FPL Energy and are revising Article 9.6.1 to state that the requirements of this provision shall not apply to wind generators.[85]

408. Article 9.6.3—Payment for Reactive Power—LGIA Article 9.6.3 requires the Transmission Provider to pay the Interconnection Customer for reactive power the Interconnection Customer provides or absorbs only when the Transmission Provider requests the Interconnection Customer

[83] California Parties notes that the WECC guidelines refer to additional requirements that the Transmission Provider can impose upon the Interconnection Customer.

[84] *See* Notice Clarifying Compliance Procedures (Issued Jan. 8, 2004).

[85] We recognize that the LGIA and LGIP are designed around the needs of large synchronous generators and that many generators relying on newer technologies may find that either a specific requirement is inapplicable or that it calls for a slightly different approach. We are granting clarifications regarding wind generators in our LGIA Article 5.4 (Power System Stabilizers), LGIA Article 5.10.3 (ICIF Construction), and LGIA Article 9.6.1 (Power Factor Design Criteria). We realize that there may be other areas of the LGIP and LGIA that may call for a slightly different approach for a generator relying on newer technology because it may have unique electrical characteristics. Accordingly, we are adding a new Appendix G (Requirements of Generators Relying on Newer Technologies) to the LGIA as a placeholder for inclusion of requirements specific to newer technologies.

to operate the Generating Facility outside a specified power factor range. Payments by the Transmission Provider are to be under the Interconnection Customer's rate schedule unless service is under a Commission-approved RTO or ISO rate schedule. If no rate schedule is in effect, the Interconnection Customer is to file one within 60 days of when reactive power service begins. The TransmissionProvider must pay the Interconnection Customer the amount that would have been due if the rate schedule had been in effect when service began.

Rehearing Requests

409. TDU Systems seeks clarification as to whether a non-jurisdictional generation and transmission (G&T) cooperative is required to file a rate schedule with the Commission in order to be paid for providing reactive power to the Transmission Provider.

410. Calpine asks the Commission to clarify the following statement from P 544 of Order No. 2003: "[T]he Interconnection Customer should not be compensated for reactive power when operating its Generating Facility within the established power factor range, since it is only meeting its obligation." Calpine interprets this statement to mean that the Transmission Provider may require the Interconnection Customer to run the Generating Facility solely for the purpose of providing reactive power and to operate it within the prescribed power factor range so that the Transmission Provider will not have to pay the Interconnection Customer for the service. It seeks clarification that absent a capacity purchase or a true emergency, the Interconnection Customer need not bring the Generating Facility on line to provide reactive power simply because it has an interconnection agreement with the Transmission Provider.

411. Calpine also argues that comparability requires that the Interconnection Customer be paid for providing reactive power even within the established range if the Transmission Provider pays its own or affiliated generators for such service. It explains that a Transmission Provider may be paid for providing reactive power within the established range when it includes such costs in its revenue requirement.

412. Similarly, Duke Energy and Reliant state that the LGIA should provide for compensation to the Interconnection Customer for reactive power provided within the established power factor range. It argues that the compensation for reactive power within the established power factor range should be decided (along with the compensation for reactive power provided outside the power factor range) when the Interconnection Customer submits its rate schedule for reactive power service.

413. Reliant argues that Order No. 2003 conflicts with the approach for generator compensation for reactive power service adopted by PJM, and if not overturned on rehearing will lead to numerous disputes in PJM and elsewhere.

Commission Conclusion

414. In response to TDU systems, we clarify that we are not requiring a non-public utility to file a rate schedule in order to be compensated for reactive power.

415. With respect to Calpine's request for clarification, there is nothing in Article 9.6.3 requiring the Interconnection Customer to run the Generating Facility solely to provide reactive power to the Transmission Provider simply because it has an interconnection agreement with the Transmission Provider.

416. We agree with Calpine that if the Transmission Provider pays its own or its affiliated generators for reactive power within the established range, it must also pay the Interconnection Customer. This also addresses Duke Energy's and Reliant's concerns. We are revising Article 9.6.3 accordingly.

417. Article 9.7.1.2—Outage Schedules—LGIA Article 9.7.1.2 requires the Transmission Provider to post transmission facility outages on its Open Access Same-Time Information System (OASIS) and requires the Interconnection Customer to schedule its maintenance on a rolling 24 month basis. The Transmission Provider may ask the Interconnection Customer to reschedule its maintenance as necessary to maintain the reliability of the Transmission System, but that adequacy of generation supply shall not be a criterion in determining Transmission System reliability. The Transmission Provider must pay the Interconnection Customer for any direct costs that the Interconnection Customer incurs as a result of having to reschedule maintenance.

Rehearing Requests

418. Central Maine asserts that RTOs and ISOs should be allowed to request rescheduling of certain outages for any reliability reasons, including the adequacy of supply.

419. NYTO observes that there does not appear to be a reciprocal requirement for the Interconnection Customer to pay the Transmission Provider for modifications to the Transmission Provider's maintenance schedule. Since the ISO is responsible for reliability it, not the Transmission Owner, should be required to pay the Interconnection Customer for any costs of rescheduling maintenance that is required for reliability. Payments under this provision should be made according to the ISO's Tariff.

Commission Conclusion

420. We agree with Central Maine that an RTO or ISO may have greater flexibility in rescheduling certain outages. Order No. 2003 states that an independent RTO or ISO may adopt provisions different from those in the LGIP and LGIA because they are much less likely to engage in undue discrimination. An RTO or ISO may file to reschedule outages for reliability reasons in its compliance filing and the Commission will consider the proposal at that time. The Commission will also consider proposals from an RTO or ISO as to who should compensate the Interconnection Customer for rescheduling maintenance. However, we deny NYTO's request for reciprocal compensation because we are not persuaded that it is warranted.

421. Article 10.5—Operating and Maintenance Expenses—LGIA Article 10.5 provides that, except for operation and maintenance expenses associated with modifications made to provide interconnection or Transmission Service to a third party, the Interconnection Customer shall be responsible for all reasonable expenses, including overheads, associated with (1) owning, operating, maintaining, repairing, and replacing the Interconnection Customer's Interconnection Facilities, and (2) operating, maintaining, repairing, and replacing the Transmission Provider's Interconnection Facilities.

Rehearing Requests

422. Southern argues that the Interconnection Customer should also be responsible for expenses related to Network Upgrades that are required solely to accommodate the interconnection. Otherwise, the Transmission Provider and its Transmission Customers would subsidize the cost of facilities that may provide them no benefit.

423. Central Maine states that in regions where Interconnection Customers do not pay for Transmission Service, such as New York and New England, not requiring them to pay expenses associated with Network Upgrades allows them to use the entire Transmission System without making

any contribution towards its associated costs. Central Maine emphasizes that it is not suggesting that the Interconnection Customer pay expenses for the entire Transmission System, just those associated with the specific Network Upgrades necessitated by its interconnection.

Commission Conclusion

424. We deny Central Maine's and Southern's requests for rehearing. Since Network Upgrades provide a system-wide benefit, expenses associated with owning, maintaining, repairing, and replacing them shall be recovered from all Transmission Customers rather than being directly assigned to the Interconnection Customer.[86] However, the Commission will entertain proposals of the type described by Central Maine and Southern from an RTO or ISO.

425. Article 11.5—Provision of Security—LGIA Article 11.5 requires that at least 30 days before the start of procurement, installation, or construction of a discrete portion of the Transmission Provider's Interconnection Facilities, Network Upgrades, or Distribution Upgrades, the Interconnection Customer must provide the Transmission Provider with (at the Interconnection Customer's option) a guarantee, a surety bond, a letter of credit, or another form of security, sufficient to cover the costs of the procurement, installation, or construction of that facility. The security required is then reduced on a dollar-for-dollar basis as the Interconnection Customer pays off its bill. Articles 11.5.1–11.5.3 govern the nature of the security and requires that the security provided be reasonably acceptable to the Transmission Provider.

Rehearing Requests

426. NYTO states that it is unreasonable to allow the Interconnection Customer to dictate the terms and conditions of the security instrument and that the Transmission Owner should have the right to request a specific type of security.

427. NYTO also argues that the Commission should require the Interconnection Customer's security deposit to cover the full cost of the Network Upgrades.

428. Southern asserts that requiring the amount of security to be reduced on a dollar-for-dollar basis as the Interconnection Customer makes payments to the Transmission Provider ignores the risks imposed upon the Transmission Provider under bankruptcy and fraudulent conveyance law. For example, payments made by the Interconnection Customer could be set aside or required to be refunded in a bankruptcy or insolvency action. If the security has been reduced by the amount of such payments, the Transmission Provider would have no reasonable prospect of being repaid for any payments required to be returned or set aside. Southern argues that the security should not be reduced until the expiration of any possible bankruptcy preference periods, during which time the Interconnection Customer's payments may be subject to being set aside.

429. Southern also states that the credit support for Network Upgrades for the Transmission Provider's Interconnection Facilities should not be reduced by payments the Interconnection Customer makes to the Transmission Provider that are unrelated to such upgrades or the construction, procurement, and installation of the Transmission Provider's Interconnection Facilities.

Commission Conclusion

430. In response to NYTO, we note that Article 11.5 already adequately protects the Transmission Provider. Article 11.5.1 requires that any guarantee meet the Transmission Provider's credit worthiness standards; Article 11.5.2 requires that any letter of credit be issued by a financial institution reasonable acceptable to the Transmission Provider; and Article 11.5.3 requires that any surety bond be issued by an insurer reasonable acceptable to the Transmission Provider.

431. In response to Southern's concerns that the bankruptcy of the Interconnection Customer might create a financial hardship for the Transmission Provider, we recognize that reducing the security as the Interconnection Customer pays its bills may cause a small increase in exposure to the Transmission Provider. However, the chilling effect of requiring the Interconnection Customer to maintain the full security during the length of the interconnection process would seriously discourage new generation.

432. We agree with Southern that the reduction in security as the Interconnection Provider pays its bills applies only to payments associated with the upgrade, construction, procurement, and installation of the Transmission Provider's Interconnection Facilities for which the security was provided. We are amending Article 11.5 accordingly.

433. Article 12.3—Invoice—Payment—LGIA Article12.3 provides that payment of invoices by the Interconnection Customer is not a waiver of any rights or claims it may have under the interconnection agreement.

Rehearing Requests

434. Central Maine and NYTO assert that this article should be made reciprocal so that payment of an invoice by either Party will not waive any rights or claims such Party may have under the interconnection agreement.

Commission Conclusion

435. We agree and are revising Article 12.3 accordingly.

436. Article 13.1—Emergencies—Definition—LGIA Article 13.1 defines Emergency Condition as a situation that (1) in the judgment of the Party making the claim, is imminently likely to endanger life or property, or (2) in the case of the Transmission Provider making the claim, is imminently likely (as determined in a non-discriminatory manner) to damage or cause a material adverse effect on the security of the Transmission System, the Transmission Provider's Interconnection Facilities, or the Transmission Systems of others to which the Transmission Provider is directly connected, or (3) in the case of the Interconnection Customer making the claim, is imminently likely (as determined in a non-discriminatory manner) to cause a material adverse effect on the security of, or damage to, the Generating Facility or its Interconnection Facilities.

Rehearing Requests

437. Calpine states that the LGIA should provide that any situation caused by a lack of sufficient generating capacity to meet load requirements that results solely from economic conditions shall not, on its own, be an Emergency Condition. Otherwise, the Transmission Provider will be able to lean on others in the Control Area to meet load requirements instead of building new capacity to meet these needs. Alternatively, the Commission should provide for a capacity payment to the Interconnection Customer for making its generating capacity available to the Transmission Provider during Emergency Conditions.

Commission Conclusion

438. In Order No. 2003, the Commission was concerned about the harm to the Transmission System if the Transmission Provider does not have the flexibility to respond during Emergency Conditions. We are not

[86] Order No. 2003 at P 694.

adopting Calpine's proposal because it would take away the tools needed by the Transmission Provider in an Emergency Condition when the safety and reliability of the Transmission System are at risk.

439. With respect to Calpine's alternative request that the Interconnection Customer should receive a capacity payment for making its generating capacity available during an Emergency Condition, Article 11.6.1 already provides that the Transmission Provider shall pay the Interconnection Customer for providing real power or other services during an Emergency Condition. Payment is to be made under the Interconnection Customer's rate schedule. Calpine may propose a charge for the real power and other services provided during an Emergency Condition when it files its rate schedule for such services.

440. Article 13.6—Emergencies—Interconnection Customer Authority—LGIA Article 13.6 discusses Interconnection Customer authority during Emergency Conditions to take actions consistent with Good Utility Practice.

Rehearing Requests

441. Central Maine and NYTO claim that it appears that the Commission intended to delete the following two sentences from the NOPR Article 13.6: "Interconnection Customer shall not be obligated to follow Transmission Provider's instructions to the extent the instruction would have a material adverse impact on the safe and reliable operation of Interconnection Customer's Generating Facility. Upon request, Interconnection Customer shall provide Transmission Provider with documentation of any such alleged material adverse impact." They argue that the Transmission Provider must have the exclusive authority to provide directives and to ensure enforcement thereof in an Emergency Condition.

Commission Conclusion

442. Article 13.6 provides that the "* * * Interconnection Customer may take actions or inactions with regard to the Large Generating Facility or Interconnection Customer's Interconnection Facilities during an Emergency Condition in order to * * * (ii) preserve the reliability of the Large Generating Facility or Interconnection Customer's Interconnection Facilities, (iii) limit or prevent damage * * *." NERC proposed this language in its comments and the Commission adopted it in Order No. 2003. The Commission also intended to delete the two sentences that Central Maine and NYTO want removed, and we do so now on rehearing.

443. Article 14.1—Regulatory Requirements—LGIA Article 14.1 provides that a Party's obligation to perform under the LGIA begins only after any necessary governmental licenses or approvals are obtained. It also states that nothing in the interconnection agreement shall require the Interconnection Customer to take any action that could result in its inability to obtain, or its loss of, special status or exemptions under the FPA or the Public Utility Holding Company Act (PUHCA) of 1935, as amended.

Rehearing Request

444. NYTO asks that the Commission amend Article 14.1 to state that if the Interconnection Customer's non-compliance with the interconnection agreement has a material and adverse effect on the Transmission Provider, they are to negotiate in good faith on an appropriate amendment to the interconnection agreement.

Commission Conclusion

445. NYTO gives no examples of the type of problem it envisions. If there is a serious problem caused by the Interconnection Customer's special status under PUHCA or the FPA and corresponding inability to abide by the interconnection agreement, the Parties are free to come to the Commission, explain the problem, and provide alternative language that would be consistent with or superior to the present Tariff language.

446. Finally, we note that the Commission inadvertently excluded the Public Utility Regulatory Policies Act of 1978 (PURPA)[87] from the referenced laws. We are revising Article 14.1 to reference PURPA.

447. Article 16—Force Majeure—LGIA Article 16 sets forth the conditions and procedures for declaring a Force Majeure event which excuses the Party declaring the Force Majeure event from performing its obligations under the LGIP and LGIA during the event. Economic hardship is not a Force Majeure.

Rehearing Request

448. NYTO states that Order No. 2003 allows an act of negligence or intentional wrongdoing committed by an entity other than the Party claiming Force Majeure to qualify as a Force Majeure event. It asks the Commission to incorporate this determination into Article 16, as well as the definitions in the LGIP and LGIA.

Commission Conclusion

449. We agree and are correcting the definition of "Force Majeure;" however, no change is needed in Article 16.1.

450. Article 17.1—Default—LGIA Article 17 allows a defaulting Party 30 days in which to cure (or to begin to cure) the Default after being notified by the non-defaulting Party that there is a problem. Article 17.1.1 also states that no Default shall exist where the Breach is caused by Force Majeure or an act or omission of the non-defaulting party. If the Default is not cured within the time allowed under Article 17.1.1, Article 17.1.2 sets forth the rights of the non-defaulting party, including, if it desires, termination of the interconnection agreement.

Rehearing Requests

451. Central Maine and NYTO point out that the term "Default" in Article 17 is inconsistent with the definitions of "Default" and "Breach" in Article 1. They request clarification that the sequence of events giving rise to termination under Article 17 is a "Breach," which, if uncured, results in a "Default," which may allow termination of the interconnection agreement.

Commission Conclusion

452. We agree and are amending Article 17.1 accordingly.

453. Article 18.2—Consequential Damages—LGIA Article 18.2 states that neither Party will be liable to the other for special, indirect, incidental, consequential, or punitive damages as a result of the interconnection agreement. It does, however, contain an exception for liquidated damages, which is discussed in section II.C—Article 5.3 (Liquidated Damages).

Rehearing Request

454. Central Maine requests that the Commission prohibit consequential damages from being paid as part of an indemnity claim. Central Maine suggests removing the portion of Article 18.2 that exempts indemnity payments from the general rule that no consequential damages are allowed under the LGIA.

Commission Conclusion

455. We reject Central Maine's request for rehearing. The indemnification of one Party by another must be comprehensive and must include any liability the indemnified Party faces as a result of the indemnifying Party's misdeeds. While Article 18.2 prevents one Party from seeking consequential damages against another Party, the purpose of the indemnification

[87] *See* 16 U.S.C. 2601 *et seq.* (2000).

provision is different; it protects the Party not at fault from liability to third parties (those who are not Parties to the interconnection agreement). Requiring the indemnifying Party to reimburse the indemnified Party only for, say, compensatory damages and not for punitive damages that may be assessed against the indemnified Party would weaken the LGIA's protections and shield the indemnifying Party from full liability.

456. Article 18.3—Insurance—LGIA Article 18.3 requires that each Party, at its own expense, maintain minimum insurance coverage as spelled out in Articles 18.3.1'18.3.9, or may self-insure subject to certain creditworthiness requirements.

Rehearing Requests

457. Southern argues that all Parties, even those that self-insure, should have to comply with the minimum insurance requirements in Articles 18.3.1–18.3.9.

458. NRECA–APPA requests that the Commission eliminate the requirement that the Transmission Provider maintain insurance coverage similar to that of the Interconnection Customer. It points out that many Transmission Providers already have coverage that exceeds the requirements of Article 18. In the alternative, the Commission should clarify that the Transmission Provider need not acquire additional insurance just to apply to the interconnection arrangement if it already has adequate coverage.

459. Avista requests that Parties to the interconnection agreement be permitted to negotiate alternative self-insurance arrangements and that the Commission remove the creditworthiness requirements for self-insurers. It notes that even in bankruptcy, a utility still can seek rate increases to cover its self-insurance obligations. Furthermore, mandating that the Interconnection Customer be entitled to "named additional insured" status on the utility's general liability policy could increase the cost of insurance. According to Avista, the number of Interconnection Customers potentially involved makes this requirement cumbersome and expensive. Avista also comments that it is not clear if the Commission intends that the other Party be entitled to "additional insured" status or "named additional insured" status. This may impose different standards under state law, particularly with respect to notice of cancellation. Avista finally notes that workers' compensation requirements vary significantly by state; the Commission should not attempt to federally preempt these long-standing practices. Some states require third party insurance and have systems and carriers for that statutory framework. In other states, such as Washington, self-insurance is the primary program, with varying requirements for administration. According to Avista, the interconnection agreement should simply require compliance by each Party with the applicable state workers compensation laws.

Commission Conclusion

460. We concur with Southern that self-insuring entities should be required to maintain the minimum insurance levels specified in Article 18, and we are modifying Article 18 accordingly. Additionally, we clarify that self-insuring Parties must follow the notification requirements of Article 18.3.9.

461. In response to NRECA-APPA's comment, we clarify that the Transmission Provider is not required to get additional insurance to cover the interconnection if its existing policies satisfy the requirements of Article 18.3.6 and if it complies with the notification requirements in Article 18.3.9.

462. We agree with Avista that the relevant state law should govern the amount of worker's compensation coverage the Parties are required to maintain. Therefore, we will modify Article 18.3.1 to remove the minimum insurance amounts.

463. Regarding whether the Transmission Provider is required to list the other Parties as an "additional insured" or as a "named additional insured," we clarify that the other Party must be at least an "additional insured." This will limit the administrative burden on the Parties while still adequately protecting them.

464. Finally, we reject Avista's request that self-insurance (except where otherwise allowed by stated law in Article 18.3.1) be allowed without meeting credit rating requirements. Many public utilities sell power under state, not federal, oversight, and there is no guarantee that a rate increase to cover increased insurance costs would be approved by a state commission in a timely manner. We conclude that the credit requirements are a reasonable safeguard that protects all Parties.

465. Article 19.1 "Assignment " LGIA Article 19.1 provides that the written consent of the non-assigning Party is ordinarily required to assign the interconnection agreement. However, the consent of the non-assigning Party is not required if the assignee is an Affiliate of the assignor and meets certain qualifications, such as a higher credit rating. No consent is required if the Interconnection Customer assigns the interconnection agreement for collateral security purposes to seek financing.

Rehearing Requests

466. Southern is concerned that an assignee of the Interconnection Customer would receive preferential treatment under Article 19.1. The Interconnection Customer's assignee may not be equipped to follow through on the LGIA. The LGIA should ensure that the assignee agrees to pay and perform all obligations of the Interconnection Customer under the LGIA, including providing letters of credit or other guarantees sufficient to protect the Transmission Provider to the same extent as the Interconnection Customer.

467. Additionally, Southern believes that the Interconnection Customer should not be allowed to assign the interconnection agreement to any person, including an Affiliate, without the consent of the Transmission Provider. This subjects the Transmission Provider to unnecessary risk. Among other things, assignment may undermine the Transmission Provider's billing and collection procedures and the ability of the Transmission Provider to collect under any outstanding guarantee or letter of credit. Southern also argues that the Interconnection Customer should not be able to assign the interconnection agreement for securitization purposes. It argues that this prevents the Transmission Provider from exercising any control over the assignment. Therefore, Southern requests that the Commission revise Article 19.1 to provide that the Interconnection Customer may not assign the interconnection agreement to any third party, including an Affiliate, for any purpose, including as collateral, without the written consent of the Transmission Provider.

468. Southern also states that the Interconnection Customer, not the assignee, should notify the Transmission Provider of the assignment. The "secured party, trustee or mortgagee" is not in contractual privity with the Transmission Provider, cannot be required to notify the Transmission Provider of the assignment, and may not be subject to Commission jurisdiction.

469. Additionally, Southern argues that it is unreasonable to allow the Interconnection Customer to assign the LGIA as collateral, subject only to very limited notice requirements, while not allowing the Transmission Provider to do the same.

Commission Conclusion

470. We agree with Southern that an entity exercising its assignment rights should be subject to the same security and insurance requirements as the original Interconnection Customer. While Article 19.1 already suggests that by requiring the entity exercising its right of assignment to "step into the shoes" of the assigning party, we are granting rehearing and modifying Article 19.1 to make this clear. The revised provision now requires that an assignee exercising its right of assignment notify the Transmission Provider of the date and particulars of any such exercise of assignment right(s), including providing the Transmission Provider with proof that it meets the requirements of Articles 11.5 and 18.3.

471. We also agree with Southern that the Interconnection Customer, not the assignee, should inform the Transmission Provider of any assignment for collateral purposes and are amending Article 19.1 accordingly.

472. However, Southern's concern that an assignee may not be equipped to proceed with the interconnection is misplaced. Article 19.1 already requires that the assigned party have the "legal authority and operational ability to satisfy the obligations of the assigning Party." Additionally, Article 19.1 specifies that assignment does not expand or relieve the obligations of either Party, which protects the Parties from potential abuse.

473. We disagree with Southern's assertion that the Interconnection Customer should be required to receive the written consent of the Transmission Provider before assigning the interconnection agreement to an Affiliate. The Transmission Provider is protected by the requirement that the Affiliate have a higher credit rating and the legal authority and operational abilities to meet its obligations under the agreement. If the Transmission Provider is concerned about the Affiliate's ability to meet these criteria, it may invoke Dispute Resolution.

474. We also deny Southern's request that the Interconnection Customer be required to receive the Transmission Provider's permission before it assigns the interconnection agreement for financing purposes. In many instances, the Interconnection Customer's rights under the interconnection agreement are one of its most valuable assets and it is appropriate to allow it to pledge that asset in order to secure funds without first seeking the approval of a non-independent Transmission Provider.

475. We also deny Southern's request that Transmission Providers also be given the right to collaterally assign the interconnection agreement without permission of the other Party. While the Interconnection Customer's ability to build a new Generating Facility is often dependent on its being able to raise substantial amounts of capital and to obtain outside financing, the Transmission Provider is not subject to similar constraints. Therefore, we are unwilling to make an exception in this instance from the general rule that a Party must seek permission of the other Party before assigning its rights under the LGIA.

476. Finally, we will not require an entity, exercising its right to assignment, to be responsible for debts of the assigning Party as Southern requests. The Transmission Provider already is protected against an Interconnection Customer's default by the security provisions of Article 11.5. Additionally, a Transmission Provider is not harmed by allowing the interconnection process to go forward with a new entity; either way, the new entity is responsible for any new debts, while the original Interconnection Customer is responsible for debts up until the right of assignment is exercised.

477. Article 21—Comparability—LGIA Article 21 requires that the Parties comply with all applicable comparability requirements and code of conduct laws, rules and regulations, as amended from time to time.

Rehearing Requests

478. Avista asserts that this provision is too broad and does not specify which jurisdiction's rules and regulation the Parties are required to follow. It states that "code of conduct" and "comparability" are not capitalized, but appear to be intended as a reference to a Commission requirement. Avista requests that this article refer to specific codes and rules. It further states that Parties should be given an opportunity to comment on the specific codes and rules proposed to be referenced.

Commission Conclusion

479. Article 21 simply requires that the Parties comply with all applicable laws, rules and regulations relating to comparability and code of conduct.

480. Article 22—Confidentiality—Article 22 describes what constitutes Confidential Information and the protection to be given such information when shared between the Parties. It sets forth procedures for the release of Confidential Information and guidelines about how Confidential Information should be treated when it is subject to a request from the Commission as part of an investigation. The information of the Parties is protected by this article provided the information is identified as Confidential Information.

Rehearing Requests

481. Avista asks that Article 22.1.10 allow either Party to provide information to state regulatory staffs without providing notice to the other Party. The utility should not have to obtain a legal opinion as to whether state regulatory staff has the right to receive the same information that Commission staff may obtain to provide the information under other confidentiality provisions of the LGIA.

482. Central Maine and NYTO request clarification that all information asserted or deemed to be confidential under the LGIA will be treated under Article 22. They also seek clarification that the Commission intends to treat the Parties' Confidential Information the same rather than to give more protection to the Interconnection Customer's Confidential Information.

483. Central Maine is also concerned about Article 6.4, which states that "[a]ny information a Transmission Provider obtains through the exercise of any of its rights under this Article 6.4 shall be deemed to be confidential hereunder." Given that Article 22 governs confidentiality, Central Maine maintains that information "asserted by the Interconnection Customer" to be confidential, under various sections of the LGIA, should instead be deemed "Confidential Information" per Article 22. Furthermore, to prevent disparate treatment, any Transmission Owner or Transmission Provider information obtained through the exercise of a right under the LGIA must be treated as "Confidential Information" under Article 22.

484. NYTO and Southern argue that Articles 22.1.11 and 22.1.12 are redundant and should be deleted to avoid confusion, since most of the terms are covered elsewhere in Article 22.

485. Southern states that Section 22.1.3 should allow the Transmission Provider to disclose information to an Affiliate and subcontractors, employees, and consultants on a need-to-know basis, if they agree to be bound by confidentiality requirements. These entities are essential to interconnection work.

Commission Conclusion

486. In response to Avista's request, we clarify that, if state regulators have the authority to request Confidential Information, the exception in Article 22.1.11 permits disclosure. But Article 22.1.11, unlike Article 22.1.10, requires either Party to notify the other once it

receives a request for Confidential Information. If a state is conducting an investigation, it should be able to request information from one Party without that Party notifying the other. We are revising Articles 22.1.10 and Article 22.1.11 accordingly. We also agree with Central Maine that all information asserted to be Confidential Information should be treated per Article 22. To this end, we are also removing the discussion of confidentiality from Article 3.1.

487. We likewise are revising Article 6.4, as Central Maine requests, to clarify that the information obtained by exercising the rights under Article 6.4 is Confidential Information under Article 22. We are not amending the provision to expressly include "Transmission Owners," since the definition of Transmission Provider includes the Transmission Owner.

488. Article 22.1.11, while it contains some provisions that are repeated elsewhere within Article 22, also provides a list of exceptions to the confidentiality rules that do not appear elsewhere in Article 22. For this reason, Article 22.1.11 shall remain in the LGIA. As for Article 22.1.12, we agree with NYTO that it is redundant because Article 22.1.2 covers the same exception and are therefore deleting Article 22.1.12.

489. We are also making conforming changes to Section 13.1 of the LGIP.

490. Finally, we are granting Southern's request and are revising Article 22.1.3 to allow the Transmission Provider to share Confidential Information with an Affiliate and subcontractors, employees, and consultants under Article 22.1.3 on a need-to-know basis. We are also clarifying that this extension of rights to Affiliates is limited by the Standards of Conduct to information necessary to effect the interconnection.

491. Article 25.3 "Audit Rights " LGIA Article 25 provides that each Party shall have the right, during normal business hours, and upon prior reasonable notice to the other Party, to audit at its own expense the other Party's accounts and records pertaining to either Party's performance or either Party's satisfaction of obligations under the interconnection agreement.

Rehearing Requests

492. NYTO and Central Maine argue that the auditing Party should be responsible for the costs incurred to supervise and cooperate with the audit.

493. NYTO and Central Maine also request that certain limitations, such as the number of audits allowed per year and the duration of each audit, be added to the provision. Central Maine proposes that the following new provision be added as Article 25.4.3:

> Audit Parameters—The Party seeking to audit pursuant to section 25.4 (the "Auditing Party") shall provide the other Party fifteen (15) days prior written notice of a request to audit. Any data collection for such audit shall be performed continuously until complete and the Auditing Party shall utilize commercially reasonable efforts to complete the data collection for such audit within thirty (30) days, however, in no event shall any data collection for such audit continue for more that sixty (60) days. Each Party reserves the right to assess a reasonable fee to compensate for the use of its personnel in assisting any inspection or audit of its books, records or accounts by the Auditing Party.

Commission Conclusion

494. We deny Central Maine's and NYTO's requests. Article 25.3 clearly states that the Party requesting the audit is responsible for the audit costs. Given that the Party requesting the audit has to pay for it, we are not convinced that audit limitations are necessary.

495. Article 29—Joint Operating Committee—LGIA Article 29 requires the Transmission Provider to establish a Joint Operating Committee to coordinate operating and technical considerations of Interconnection Service for all of its Interconnection Customers. It also requires that any decisions or agreements made by the Joint Operating Committee shall be in writing.

Rehearing Request

496. California Parties states that the duties of the Joint Operating Committee are unclear. P 523 of Order No. 2003 states that the Parties are expected to comply with the procedures established by the Joint Operating Committee. But, the list of prescribed duties in Articles 29.1.1—29.1.6 does not include the adoption of detailed technical and operational requirements. California Parties is concerned that the Joint Operating Committee, rather than the Transmission Provider, may be establishing the interconnection requirements.

Commission Conclusion

497. California Parties misunderstands the purpose of the Joint Operating Committee, which is to provide an opportunity for Interconnection Customers to discuss practical difficulties faced by them in implementing the technical and operational requirements of the Transmission Provider and to seek resolution of those matters. The duties of the Joint Operating Committee are clearly laid out in Articles 29.1.1—29.1.6. They do not include the adoption of detailed technical and operational requirements for interconnection.

D. Other Significant Policy Issues

1. Interconnection Products and Scope of Service

498. The LGIA provides for two Interconnection Service products from which the Interconnection Customer may choose: Energy Resource Interconnection Service, which is a basic or minimal Interconnection Service, and Network Resource Interconnection Service, which is a more flexible and comprehensive Interconnection Service. Neither is for the delivery component of Transmission Service, and neither requires the Interconnection Customer to identify a specific buyer (or sink) until it seeks to obtain delivery service under the Transmission Provider's OATT. LGIA Article 4 (Scope of Service) defines these products and sets forth specific Interconnection Study requirements for each. This article also describes the relationship between delivery service and Interconnection Services, as well as the rights and responsibilities that each Interconnection Service entails. In addition, LGIP Section 3.2 sets forth the procedure that the Interconnection Customer must use to select an Interconnection Service. In particular, the Interconnection Customer requesting Network Resource Interconnection Service may also request that it be concurrently studied for Energy Resource Interconnection Service, up to the point when an Interconnection Facility Study Agreement is executed. The Interconnection Customer may then elect to proceed with Network Resource Interconnection Service or with a lower level of Interconnection Service (under which only certain upgrades will be completed).

499. Energy Resource Interconnection Service allows the Interconnection Customer to connect the Generating Facility to the Transmission System and be eligible to deliver its output using the existing firm or non-firm capacity of the Transmission System on an "as available" basis. In an area with a bid-based energy market, Energy Resource Interconnection Service allows the Interconnection Customer to place a bid to sell into the market where the Generating Facility would be dispatched if the bid is accepted. No customer specific transmission delivery service is assured, but the Interconnection Customer may obtain point to point Transmission Service or gain access to secondary network Transmission

Service, under the Transmission Provider's OATT. Firm Point to Point Transmission Service may require the construction of additional upgrades. The Interconnection Studies to be performed for Energy Resource Interconnection Service must identify the Interconnection Facilities required as well as the Network Upgrades needed to allow the Generating Facility to operate at full output. In addition, the Interconnection Studies must identify the maximum allowed output of the Generating Facility without Network Upgrades.

500. In contrast, Network Resource Interconnection Service is much broader. It requires the Transmission Provider to undertake the Interconnection Studies and Network Upgrades needed to integrate the Generating Facility into the Transmission System in a manner comparable to that in which the Transmission Provider integrates its own generating facilities to serve native load customers. If the Transmission Provider is an RTO or ISO with market-based congestion management, it must integrate the Generating Facility as if it were a Network Resource. The Transmission Provider must study the Transmission System at peak load, under a variety of severely stressed conditions, to determine whether, with the Generating Facility at full output, the aggregate of generation in the local area can be delivered to the aggregate of load, consistent with the Transmission Provider's reliability criteria and procedures. Under this approach, the Transmission Provider must assume that some portion of the capacity of existing Network Resources is displaced by the output of the new Generating Facility. However, Network Resource Interconnection Service does not necessarily provide the Interconnection Customer with the capability to physically deliver the output of its Generating Facility to any particular load without incurring congestion costs. Nor does Network Resource Interconnection Service convey a right to deliver the output of the Generating Facility to any particular customer.[88]

501. Under Network Resource Interconnection Service, the Transmission Provider builds all the Network Upgrades needed to allow the Interconnection Customer to designate the Generating Facility as a Network Resource and obtain Network Integration Transmission Service. Thus, once the Interconnection Customer has obtained Network Resource Interconnection Service, requests for Network Integration Transmission Service from the Generating Facility to points inside the Transmission Provider's Transmission System will not require additional Interconnection Studies or additional upgrades.

502. Under Network Resource Interconnection Service, requests for long-term Transmission Service for delivery service to points outside the Transmission Provider's Transmission System may require additional studies and upgrades. Also, requests for delivery service inside the Transmission Provider's Transmission System may require additional studies and upgrades if the latter are necessary to reduce congestion to acceptable levels. Network Resource Interconnection Service allows the Generating Facility to provide Ancillary Services. However, if the Generating Facility has not been designated as a Network Resource by any load, it is not required to provide Ancillary Services under this rule (although it may be by other requirements) unless all generating facilities that are similarly situated are required to provide them. Also, should the Transmission System become congested, the Generating Facility is subject to non-discriminatory congestion management procedures.

503. LGIA Article 4.3 provides for generator balancing service arrangements. We address requests for rehearing on this article in section II.D.2.k (Interconnection Pricing Policy—Generator Balancing Service Arrangements).

Rehearing Requests

a. Requests To Clarify or Eliminate Network Resource Interconnection Service

504. A number of petitioners state that Network Resource Interconnection Service is confusing and that the Commission should either clarify the nature of this service or eliminate it altogether.[89] The Georgia PSC contends that the Commission should clearly identify the rights that the Interconnection Customer receives with Network Resource Interconnection Service. Entergy complains that Order No. 2003 provides virtually no guidance as to how the Transmission Provider is to evaluate a Network Resource Interconnection Service request. EEI recommends that the Commission clarify the Interconnection Customer's rights when it takes Network Resource Interconnection Service and the obligations that the service imposes on the Transmission Provider. Southern claims that because Network Resource Interconnection Service is so unclear and contains numerous inconsistencies, it may be impossible for the Transmission Provider to know how to plan the Transmission System reliably to provide this service and still be assured that it is complying with the requirements of Order No. 2003.[90] Furthermore, Southern and the Mississippi PSC contend that the inconsistencies in the Network Resource Interconnection Service requirements violate due process. Southern argues that the inconsistencies violate the Administrative Procedure Act and will lead to numerous disputes with Interconnection Customers that have differing interpretations of Network Resource Interconnection Service.

505. Georgia Transmission and Southern argue that Network Resource Interconnection Service undermines rational system planning. Southern claims that, because Network Resource Interconnection Service requires upgrades to be constructed before the designation of the Generating Facility as a Network Resource, the valuable economic analysis of whether the Generating Facility, including the required transmission upgrades, is a prudent option would essentially be eliminated. This will lead to inefficient siting of new generation and transmission upgrades. Georgia Transmission interprets Order No. 2003 as requiring the Transmission Provider to expand its Transmission System so that the Generating Facility has sufficient capacity to perform as a Network Resource while maintaining the reliability of the Transmission System, while not requiring a demonstration of need by customers for the additional facilities.

Commission Conclusion

506. We are not eliminating Network Resource Interconnection Service. Although the minimal Energy Resource Interconnection Service meets the needs of many Interconnection Customers, the more comprehensive Network Resource

[88] However, as discussed more fully below, when an Interconnection customer wants to deliver the output of the Generating Facility to a particular load (or set of loads), it may simultaneously request Network Interconnection Transmission Service under the OATT.

[89] *E.g.*, Alabama PSC, EEI, Entergy, Georgia PSC, Mississippi PSC, Southern, and TAPS.

[90] The inconsistencies that Southern refers to are in language in Order No. 2003 that, according to Southern, can be interpreted as contradicting the Commission's statements that Network Resource Interconnection Service does not provide the Interconnection Customer with a reservation of transmission capacity. Requests for rehearing or clarification of matters concerning the capacity reservation issue and other delivery service implications of Energy Resource Interconnection Service and Network Resource Interconnection Service are discussed below.

Interconnection Service is also needed to provide the Interconnection Customer with the quality of transmission access needed to compete in the energy marketplace. This is especially important in markets that continue to be dominated by a Transmission Provider that has a vested interest in market outcomes.

507. We disagree that Network Resource Interconnection Service undermines rational system planning. It is true that requiring the Transmission Provider to provide Network Resource Interconnection Service to any Interconnection Customer that requests it could result in a different pattern of generation and transmission investments than would occur under a traditional process by which a vertically integrated utility plans both generation and transmission expansions simultaneously. However, in the long run, customers are more likely to experience lower overall costs if the industry relies on robust wholesale competition to determine the appropriate level of generation and related transmission development than if it continues to rely on traditional integrated planning processes. That is, we fully expect the benefits of robust competition in wholesale generation to outweigh any short-term inefficiencies in the siting of new facilities that may result from the movement away from traditional planning approaches.

508. We are nevertheless concerned that a number of petitioners believe that the description of Network Resource Interconnection Service in Order No. 2003 is unclear or that the service contains inconsistencies. Obviously, Order No. 2003 cannot achieve its purposes unless all market participants are able to understand the Interconnection Services that the rule prescribes. Therefore, to eliminate confusion and uncertainty, we provide several clarifications as discussed below.

b. Delivery Service Implications of Energy Resource Interconnection Service and Network Resource Interconnection Service

509. Several petitioners argue that Energy Resource Interconnection Service and Network Resource Interconnection Service, as they are defined in Order No. 2003, effectively reserve delivery service for the Interconnection Customer, even though Order No. 2003 says that Interconnection Service does not include transmission delivery service.[91] They ask the Commission to either remove the elements of delivery service from Interconnection Service or to require the Interconnection Customer to pay a reservation fee. For example, Ameren notes that Interconnection Service is defined in Order No. 2003 as a service that enables the Transmission Provider to "receive electric energy and capacity from the Generating Facility at the Point of Interconnection." It contends that allowable Generating Facility output and upgrades related to output are not relevant to Interconnection Service and that Interconnection Service should not require the Transmission Provider to receive the output of the Generating Facility. The North Carolina Commission states that, if Interconnection Service does not include delivery service, then it is not clear that Interconnection Service is within the Commission's jurisdiction.

510. PacifiCorp argues that, if the Transmission Provider must define the maximum amount of power that can be delivered on an "as available" basis without Network Upgrades (beyond the Point of Interconnection), as well as the Network Upgrades for full delivery of the Generating Facility output, the Interconnection Customer should be required to identify one delivery point for the power delivery. The Commission should also require the customer to identify delivery parameters to be used for these studies. PacifiCorp contends that Network Upgrades, except modifications at the Point of Interconnection itself, should not be assigned to the Energy Resource Interconnection Service Interconnection Customer, since deliveries that occur only on an "as-available" basis will not affect the Transmission System. It also asks the Commission to clarify whether Network Upgrades for Energy Resource Interconnection Service should include only upgrades at the Point of Interconnection, for purposes of the Interconnection Feasibility and Interconnection System Impact Studies. Alternatively, the Commission should set forth procedures or guidance for determining the costs necessary to implement Energy Resource Interconnection Service.

511. EEI, the Mississippi PSC, and Southern state that, because Order No. 2003 assumes that a Generating Facility with Network Resource Interconnection Service will be designated as a Network Resource, a transmission reservation is also necessary so that service can be taken from the Generating Facility if it is ever so designated. Southern and EEI say that the Commission's assertions that Network Resource Interconnection Service does not provide a transmission capacity reservation are inconsistent with the language of LGIA Article 4.1.2.2, which strongly indicates that a reservation is required. In addition, Southern asserts that the Commission previously had required the "socialization" only of facilities required for interconnection. With Network Resource Interconnection Service, however, the required upgrades could be quite costly because, Southern claims, they are needed also to ensure the delivery of the Generating Facility's output.

512. Progress Energy believes that an Interconnection Customer taking Network Resource Interconnection Service should pay a fee for reserved, but unused, transmission capacity until the Interconnection Customer is designated as a Network Resource by a native load or Network Customer.

513. FP&L states that the general industry understanding of what it means to study and construct transmission facilities necessary to "integrate" generation is that the Generating Facility has firm delivery service to the load. It claims that, without clarification, that understood usage conflicts with the statement that "Network Resource Interconnection Service in and of itself does not convey any transmission delivery service."

514. Georgia Transmission claims that when the Interconnection Customer requests Network Resource Interconnection Service, upgrades must be built for Network Integration Transmission Service and that the Transmission Provider must then reserve that capacity for the benefit of the Interconnection Customer, to be called upon at a future time, if ever. Therefore, Network Resource Interconnection Service provides the Interconnection Customer with delivery rights that properly belong to customers. The fact that the Interconnection Customer is not using those delivery rights because it has not yet executed a Network Integration Transmission Service agreement or been designated by a Network Customer as a Network Resource elevates form over substance. Georgia Transmission also seeks clarification of the Commission's statement that capacity created by Network Upgrades constructed to meet the Interconnection Customer's Network Resource Interconnection Service request will be available for use by all customers on an "equal basis." Because Network Resource Interconnection Service gives the Interconnection

[91] *E.g.*, Alabama PSC, Ameren, EEI, Entergy, FP&L, Georgia PSC, Georgia Transmission, Mississippi PSC, North Carolina Commission, PacifiCorp, Progress Energy, and Southern.

Customer the right to have the Generating Facility designated as a Network Resource and obtain Network Integration Transmission Service, other customers on the Transmission System would be able to use that capacity only on a non-firm basis, unless additional upgrades are made.

Commission Conclusion

515. LGIP sections 3.2.1.1 (regarding Energy Resource Interconnection Service) and 3.2.2.2 (regarding Network Resource Interconnection Service) state that these Interconnection Services do not in and of themselves convey any right to the delivery component of Transmission Service. LGIA Article 4.4 (formerly Article 4.5) says the same.

516. Some petitioners argue that in spite of this clear language, Interconnection Services do provide for transmission delivery service. We do agree that Energy Resource Interconnection Service and Network Resource Interconnection Service both provide the Interconnection Customer with the technical capability to inject the output of the Generating Facility onto the Transmission System at the Point of Interconnection, and Network Resource Interconnection Service makes it possible for the Generating Facility to be designated as a Network Resource. Thus, both services include a capability to move power onto the system. However, actual delivery service, which is provided as Point to Point Transmission Service or Network Integration Transmission Service under the OATT, requires the Transmission Customer to specify one or more Points of Delivery on the Transmission System at which the injected output will be withdrawn. Because the Interconnection Services do not provide the Interconnection Customer with the right to withdraw power at any particular Point of Delivery, they are not delivery services, per se. To eliminate confusion on this point, we are amending the LGIP and LGIA language cited above to state that Energy Resource Interconnection Service and Network Resource Interconnection Service do not "convey any right to deliver electricity to any specific customer or Point of Delivery."

517. We recognize that, to provide these Interconnection Services, the Transmission Provider often must construct Network Upgrades to provide the Transmission System with the capacity to receive the output of the Generating Facility.[92] Including this capability with Interconnection Services is appropriate because it allows the Interconnection Customer to obtain a minimal capability of delivery service under the Transmission Provider's OATT without the need to construct additional upgrades. The Interconnection Customer must arrange separately for delivery service. Once the Interconnection Customer has made the necessary arrangements, including the designation of a point or points of delivery, the Transmission Provider may charge a delivery service reservation fee. However, we will not allow the Transmission Provider to charge an additional reservation fee for the limited delivery capability that is included with the Interconnection Services.

518. Finally, Georgia Transmission seeks clarification of the statement in Order No. 2003 that the capacity created by Network Upgrades constructed to meet a Network Resource Interconnection Service request will be available for use by all customers on an "equal basis." This statement means that all customers must have equal access to any available (*i.e.*, unused) capacity on the Transmission System for the period during which that capacity is available.

c. Conflicts With Network Integration Transmission Service

519. Several petitioners contend that Network Resource Interconnection Service conflicts with the requirements of Network Integration Transmission Service under the OATT, or that it provides the Interconnection Customer with a service that is superior to that which the Transmission Provider provides for its own generating facilities.[93] Ameren and Entergy note that a generating facility that is designated as a Network Resource is modeled to serve only the load that has designated it for the provision of Network Integration Transmission Service. They argue that Network Resource Interconnection Service may require the Interconnection Customer to be modeled and interconnected as if it is serving any, or all, load within a particular Control Area at any given time. Ameren asks the Commission to require the Interconnection Customer to designate the load it will serve and to separately obtain Transmission Service to such load. PacifiCorp asks that the Interconnection Request require an applicant for Network Resource Interconnection Service to indicate on the Interconnection Request which network load its resource should be assumed to serve. PacifiCorp claims that it has a number of Network Customers that are dispersed across a broad geographic territory, and that study assumptions may change depending on which of those Network Customers the resource intends to serve. It states that without information on the load delivery parameters for the study, Interconnection Feasibility and Interconnection System Impact studies cannot begin.

520. Entergy notes that Network Resource Interconnection Service does not require the Interconnection Customer to serve the Transmission Provider's native load and does not require the Generating Facility to be designated as a Network Resource by any Network Customer. Network Resource Interconnection Service creates interconnection rights that are superior to any Transmission Service under the OATT. Entergy asks that Network Resource Interconnection Service be made comparable with existing Transmission Services or delayed until a market structure that includes locational marginal pricing, financial transmission rights, and participant funding is in place. Similarly, Southern argues that a merchant Generating Facility that has not been designated by any Network Customer is not similarly situated to the Transmission Provider's (or any other) Network Resources. Designated Network Resources and generating facilities which are not Network Resources should be subject to different requirements (which are already in the OATT). Southern also claims that an Interconnection Customer taking Network Resource Interconnection Service receives an unfair advantage under LGIA Article 4.1.2.2. Under that provision, if the Interconnection Customer taking Network Resource Interconnection Service has not been designated as a Network Resource, it is not required to provide Ancillary Services, whereas other Network Resources are.

521. Some petitioners are concerned that Network Resource Interconnection Service does not necessarily provide the capability to deliver the output of the Generating Facility to any particular network load on the Transmission System without incurring congestion costs.[94] Georgia Transmission claims that Network Resource Interconnection Service allows the Generating Facility to

[92] Because these Network Upgrades may be required anywhere on the Transmission System, we deny PacifiCorp's request for clarification that Network Upgrades for Energy Resource Interconnection Service should include only transmission modifications at the Point of Interconnection.

[93] *E.g.*, Alabama PSC, Ameren, Entergy, Georgia Transmission, PacifiCorp, Southern, and TAPS.

[94] *E.g.*, Alabama PSC, Georgia Transmission, Mississippi PSC, and TAPS.

create congestion on the Transmission System that is then "socialized" to the detriment of existing customers, either through Transmission Line Loading Relief (TLR), which can endanger reliability of service, or through congestion charges. Georgia Transmission states that Network Resource Interconnection Service leaves other transmission customers with the choice of either (1) paying for expansion of the Transmission System so that the Generating Facility can sell power to any customer anywhere in the Transmission Provider's service area without congestion, or (2) paying congestion charges caused by the addition of the new Generating Facility to the system without Network Upgrades. It claims that this approach is discriminatory.

522. The Alabama PSC notes that the OATT does not include an LMP-based congestion management system and that redispatch costs are borne pro rata on the basis of load by the Transmission Provider and its Network Customers. It and the Mississippi PSC argue that Network Resource Interconnection Service forces all of a Transmission Provider's customers to subsidize a Generating Facility that is designated as a Network Resource. The Alabama PSC states that this violates basic principles of cost causation, the Energy Policy Act of 1992 ("EPAct")[95], and the Commission's Transmission Pricing Policy Statement. If Network Resource Interconnection Service requires the imposition of congestion or redispatch costs in lieu of building upgrades, the Commission must clarify that in a non-LMP system, the Transmission Provider may directly assign such costs to the Interconnection Customer or Network Customer.

523. TAPS claims that Order No. 2003 improperly eliminates the OATT's specific deliverability requirement for Network Integration Transmission Service, allowing a Generating Facility that satisfies only an aggregate deliverability test to pre-qualify for designation as a Network Resource by any network load, while exposing load serving entities to crushing congestion charges. TAPS states that Order No. 2003 undermines the delivered price certainty that load serving entities need to (1) finance the new generation essential to making Standard Market Design work, and (2) allow load serving entities to continue to provide reliable, affordable service to their customers. Order No. 2003 would substitute congestion management procedures for meaningful resource and transmission planning, and encourage market participants and Transmission Providers to abdicate responsibility for assuring that resources can be reliably delivered to loads. TAPS asks that the Interconnection Service products, particularly Network Resource Interconnection Service, be defined so that they are compatible with a model in which a load serving entity can designate Network Resources much as it does under OATT Network Integration Transmission Service.

524. TAPS continues that Order No. 2003's "aggregate" deliverability test for qualifying for Network Resource Interconnection Service unduly favors market participants with the largest loads, such as large investor-owned utilities. Where a single load serving entity is the vast majority of load, TAPS interprets the test as requiring all new generating facilities seeking Network Resource status to satisfy the existing OATT standard for Network Resource designation by the dominant load serving entity. For example, a transmission dependent utility that builds a Generating Facility to serve its loads might be required to fund Network Upgrades to deliver the output of the Generating Facility to the surrounding investor-owned utility in order for the transmission dependent utility to designate the Generating Facility as a Network Resource, even if those upgrades are not necessary to assure firm delivery to the transmission dependent utility's loads. With Network Resource Interconnection Service, the transmission dependent utility could face (1) a requirement that it fund the Network Upgrades necessary to deliver the output of the Generating Facility to the loads of the surrounding investor-owned utility, and (2) hefty congestion charges (or perhaps the requirement that it fund additional, entirely different upgrades) to deliver the output of the Generating Facility to its loads.

525. TAPS claims that Network Resource Interconnection Service appears to be modeled on the "Capacity Resource" concept developed by PJM to determine whether the Generating Facility can be used to meet the PJM capacity obligations of load serving entities and to participate in the PJM capacity credit and Ancillary Service markets. TAPS states that PJM imposes a two part deliverability requirement on generating facilities that seek capacity resource status. First, energy must be deliverable from the aggregate of resources available to the Control Area to load in portions of the Control Area experiencing a localized capacity or deficiency. Second, capacity resources within a given electrical area must, in aggregate, be exportable to other areas of the Control Area within some bounds that separate the reliability requirements of the Control Area from the reasonable economic function of the marketplace. TAPS argues that this standard does not assure the ability of a capacity resource to deliver non-interruptible service to any particular network load. It believes that an additional form of Interconnection Service beyond Energy Resource Interconnection Service may have value, but this service would be different from Network Resource Interconnection Service. Although TAPS believes that PJM's deliverability standard could provide one such approach, it recommends that the Commission not lock in a capacity resource market framework in this proceeding. Further, TAPS argues that such a capacity resource Interconnection Service should not be called "Network Resource Interconnection Service" and should not override the OATT process for designation of Network Resources.

526. In summary, TAPS states that the Commission should modify Order No. 2003 either to eliminate Network Resource Interconnection Service, restrict its role (*e.g.*, "pre-qualifying" generating facilities to be capacity resources under a PJM-type capacity market), or define it in a manner that is friendly to load serving entities consistent with proposals TAPS has made in the Standard Market Design proceeding, so that it does not undermine the delivered price certainty that TAPS says is needed to make Standard Market Design work for customers.

527. Some petitioners, including FP&L, PacifiCorp, and Southern, offer interpretations of how Network Resource Interconnection Service should be implemented, and ask the Commission to clarify which, if any, of the possible interpretations is correct. For example, Southern proposes that Network Resource Interconnection Service be implemented based on three different assumptions: (1) That no ongoing reservation is provided (at least not until the Generating Facility is actually designated as a Network Resource), but that studies and upgrades can be performed if the Generating Facility is actually designated as a Network Resource, and that instead of charging the Interconnection Customer for such studies and upgrades, the Network Customer bears any such charges, (2) that no ongoing transmission reservation is provided and, once the Generating Facility is designated as a Network Resource,

[95] Energy Policy Act of 1992 (EPAct) section 722 (codified at 16 U.S.C. 824k(a)).

whatever inefficiencies that result are treated as redispatch/congestion costs or through Curtailment, which can be directly assigned to the Interconnection Customer or the Network Customer, or (3) that Network Resource Interconnection Service really does provide a reservation of transmission capacity, which would require the Interconnection Customer to pay a charge.

528. FP&L states that outside a centrally dispatched RTO or ISO, one interpretation of LGIA Article 4.1.2.2 is that the Generating Facility must be studied so it may be designated at its full output by any Network Customer under the Transmission Provider's OATT. For example, assume that the Generating Facility is rated at 900 MW and there are three possible Network Customers, A, B, and C, with loads at three different locations. FP&L asks whether the Commission intends for the Transmission Provider to build sufficient transmission facilities so that any of the three Network Customers may designate all 900 MW, or whether the Transmission Provider should wait until one of the three Network Customers has designated all or a portion of the Generating Facility as a Network Resource and then build the transmission facilities necessary to provide firm network service from the Generating Facility to that Network Customer. This creates a quandary because, under the Network Service (delivery service) part of the OATT, multiple Network Customers cannot designate the same Generating Facility as a Network Resource for its full output, and thus cannot request the Transmission Provider to construct overlapping and unnecessary Network Upgrades. Instead of the Transmission Provider planning the Transmission System for the possibility of integrating 900 MW three times to three different Network Customer's loads, FP&L asks the Commission to clarify that the Transmission Provider should plan to integrate only 900 MW in the aggregate to the sum of the loads at A, B, and C.

529. FP&L proposes two ways to accomplish this. First, the Interconnection Customer could request specific amounts of output to go to each Network Customer load of A, B, and C (*e.g.*, 300 MW to each load) for a total of 900 MW. Second, the Commission could clarify that the Transmission Provider is required to study the Interconnection Customer's Generating Facility as if it would be designated for any Network Customer, but the Transmission Provider will do a final study only after a specific Network Customer has, under the OATT, designated the Generating Facility as a Network Resource (for delivery service) and will construct only those Network Upgrades that result from this final study. FP&L states that it does not have a preference regarding which solution the Commission selects, but unless one is chosen, it is unclear how a Transmission Provider not in a centrally dispatched RTO or ISO is to model the Network Resource Interconnection Service study required in LGIA Articles 4.1.2.1 (2) and 4.1.2.2. FL&L further requests clarification that the study under LGIA Article 4.1.2.1(2) is appropriate only for an RTO or ISO that centrally dispatches Network Resources to an aggregate network load.

Commission Conclusion

530. Petitioners raise a number of important questions about the relationship between Network Resource Interconnection Service and Network Integration Transmission Service. Some believe that Network Resource Interconnection Service is incompatible with Network Integration Transmission Service or that it provides the Interconnection Customer with a service that is superior to that which the Transmission Provider provides for its own generating facilities, or those of an Affiliate. Others object to the fact that Network Resource Interconnection Service does not ensure that the output of the Generating Facility can be delivered to a network load without incurring congestion costs. Some, including TAPS and Georgia Transmission, may have misconstrued Network Resource Interconnection Service as a replacement for Network Integration Transmission Service under the OATT.

531. We first clarify the study requirements for Network Resource Interconnection Service. The purpose of Network Resource Interconnection Service is to provide for only those Network Upgrades needed to allow the aggregate of generation in the Generating Facility's local area to be delivered to the aggregate of load on the Transmission Provider's Transmission System, consistent with the Transmission Provider's reliability criteria and procedures. Network Resource Interconnection Service does not ensure physical delivery to specific loads or locations, and it does not provide delivery service rights to specific loads or locations. TAPS is correct that Network Resource Interconnection Service is similar to the procedures used by PJM and other ISOs to identify the Network Upgrades that are needed for the Generating Facility to qualify as a "capacity resource." Network Resource Interconnection Service ensures that the Generating Facility, as well as other generating facilities in the same electrical area, can be operated simultaneously at peak load and that any output produced above peak load requirements can be transmitted to other electrical areas within the Transmission Provider's Transmission System. Thus, Network Resource Interconnection Service ensures that the output of the Generating Facility will not be "bottled up" during peak load conditions.

532. We recognize that not all Transmission Providers apply the same procedures or reliability criteria in their studies to ensure that the aggregate of generation in any particular area can be delivered to the aggregate of load, and we do not intend to require any Transmission Provider to use a procedure that is not compatible with accepted regional practice. Therefore, subject to Commission approval under the "consistent with or superior to" standard, each Transmission Provider may tailor Network Resource Interconnection Service by adopting reasonable procedures and criteria that are generally accepted in the region and consistently adhered to by the Transmission Provider. Accordingly, each Transmission Provider must include in a subsequent compliance filing a general description and justification of its proposed approach to Network Resource Interconnection Service.

533. In response to TAPS and Georgia Transmission, we clarify that Network Resource Interconnection Service (which is an Interconnection Service) is not a replacement for Network Integration Transmission Service (which is a delivery service). Although LGIP section 3.2.2.1 states that Network Resource Interconnection Service allows the Generating Facility to be designated as a Network Resource "on the same basis as all other Network Resources interconnected to the Transmission Provider's Transmission System," our intent is merely to establish general requirements for Network Resource Interconnection Service, not to ensure physical delivery to specific network loads. Although Network Resource Interconnection Service may allow the Generating Facility to serve some loads without redispatching other generators or incurring congestion costs, it does not ensure that any particular Network Customer can designate the Generating Facility as a Network Resource and use the output of that Generating Facility to serve a particular Network Load without incurring congestion (or redispatch) costs. The Interconnection Customer or

Network Customer seeking to designate the Generating Facility as a Network Resource must do so under the requirements for Network Integration Transmission Service under the OATT. In response to the Alabama PSC, we clarify that we will consider proposals to allocate redispatch costs among Network Customers on a basis other than *pro rata* provided the proposal is shown to be just and reasonable and non-discriminatory.

534. In response to TAPS's concern that the Interconnection Customer may be required to fund Network Upgrades that allow the Generating Facility to serve loads other than those that the Network Customer wishes to serve, we note first that LGIP Section 3.2 makes it possible for the Interconnection Customer to obtain Network Integration Transmission Service without having to fund all of the Network Upgrades needed for full Network Resource Interconnection Service. This section provides that an Interconnection Customer that elects to be studied for Network Resource Interconnection Service has the option also to be studied for Energy Resource Interconnection Service and proceed with Network Resource Interconnection Service or a lower level Interconnection Service whereby only certain Network Upgrades will be completed. This option thus allows the Interconnection Customer to avoid having to fund Network Upgrades that it does not need. We emphasize, however, that the Interconnection Customer that declines to fund certain Network Upgrades should understand that this action may limit its opportunity to be designated in the future as a Network Resource for certain network loads.

535. As a further clarification, we emphasize that this rule should not be construed as taking away any option that a Network Customer, or any other Transmission Customer, now has with respect to interconnecting a new Generating Facility and obtaining firm transmission service to load. Although obtaining Interconnection Service under this rule and obtaining transmission delivery service under the OATT is a two-step process, the Interconnection Customer has every right to request the two services at the same time, just as it did in the past. For example, a Network Customer that does not need all of the features of Network Resource Interconnection Service may determine that the most economical and practical approach to interconnecting a new Network Resource is to request Energy Resource Interconnection Service and at the same time request Network Integration Transmission Service under the Transmission Provider's OATT. This process would be completely analogous to the approach that a Network Customer now uses when it constructs a new Network Resource to serve its Network Load. The fact that Energy Resource Interconnection Service, by itself, allows access to the existing capacity of the Transmission System only on an "as available" basis should be of no concern to the Network Customer. The Network Customer can simultaneously obtain firm deliverability to its Network Loads by requesting the Transmission Provider to construct, under the terms of the Network Integration Transmission Service provisions of the OATT, any additional upgrades that may be necessary to ensure deliverability of the Network Resource to serve Network Load.

536. Entergy, Southern and others claim that, because Network Resource Interconnection Service does not require the Interconnection Customer to serve native load or to have the Generating Facility designated as a Network Resource, Network Resource Interconnection Service is superior to other services under the OATT. This comparison to existing services is not appropriate. First, prior to Order No. 2003, the OATT did not include specific provisions for Interconnection Service in any form, and comparisons between Interconnection Services and the OATT's delivery services are inapposite. Second, Network Resource Interconnection Service is available to all customers taking service under the OATT, including the Transmission Provider and its Affiliates. Third, in that Network Resource Interconnection Service allows the Interconnection Customer to defer to a future time the designation of the Generating Facility as a Network Resource, this Interconnection Service is similar to the service that the Transmission Provider provides for its own generating facilities when they are constructed in anticipation of serving future, uncertain loads.

537. Southern also claims that the Generating Facility receives an undue advantage with respect to the requirement to provide Ancillary Services. We disagree. LGIA Article 4.1.2.2 states that if the Generating Facility has not been designated as a Network Resource, it cannot be required to provide Ancillary Services. However, LGIA Article 4.1.2.2 also states that the Generating Facility can be required to provide Ancillary Services if that requirement applies to all generating facilities that are similarly situated. This provision allows for fully comparable treatment of the Generating Facility with respect to the requirement to provide Ancillary Services.

d. Coordinating the Network Resource Interconnection Service Queue With the Transmission Delivery Service Queue

538. FL&L, Southern, and TAPS ask the Commission to clarify how the Transmission Provider should coordinate the queue for Network Resource Interconnection Service with the queue for transmission delivery service. TAPS asks the Commission to revise or clarify Order No. 2003 to eliminate any provisions that conflict with the OATT.

539. Southern asserts that, if Order No. 2003 provides rights to the Transmission System through Network Resource Interconnection Service, Interconnection Studies for Network Resource Interconnection Service must consider higher queued transmission delivery service requests. In addition, Southern states that changes in the transmission delivery service queue would also delay and cause frequent restudies of Network Resource Interconnection Service requests. Therefore, if Network Resource Interconnection Service is to provide transmission rights, Southern requests that the Commission address these issues and provide a workable manner in which Network Resource Interconnection Service queuing issues can be merged into transmission delivery service queuing issues and vice versa.

540. FP&L states that Order No. 2003 is unclear as to whether an Interconnection Customer seeking Network Resource Interconnection Service or a Transmission Customer seeking Network Integration Transmission Service is entitled to existing transmission capability, and notes that the issue of priority is not addressed. It is also unclear as to how the queue for Network Resource Interconnection Service requests is to work in conjunction with the queue for network service requests under the OATT. One possible solution is to have the Interconnection Customer enter the network service queue when it applies for Network Resource Interconnection Service. According to FP&L, this would resolve many of the queue coordination issues.

Commission Conclusion

541. Although interconnection and delivery are separate services, we agree that the queues for the two services must be closely coordinated. This means that in general, Interconnection Customers and transmission delivery

service customers should have equal access to available transmission capacity, with priority being established on a first come, first served basis according to the date on which service is requested. Furthermore, Interconnection Studies for Interconnection Services should be coordinated with the facilities studies performed for transmission delivery services. This ensures that all required upgrades are planned and designed in a least cost manner.

e. Responsibility for Additional Studies and Network Upgrades

542. LGIA Article 4.1.2.2 states that once the Interconnection Customer satisfies the requirements for obtaining Network Resource Interconnection Service, any future Transmission Service request for delivery from the Generating Facility within the Transmission Provider's Transmission System up to the amount of capacity or energy initially studied will not require that any additional studies be performed or that any further upgrades be undertaken. Some petitioners find this provision confusing.[96] NYTO believes that the provision is confusing because Network Resource Interconnection Service itself does not convey any right to delivery service. Alternatively, NYTO asks that the provision be deleted. The Alabama PSC states that the provision seems to indicate that even when upgrades are needed, the Interconnection Customer gets a "free ride." It objects to such cost socialization policies. In addition, the Alabama PSC, the Mississippi PSC, and Southern argue that the provision threatens reliability by limiting the Transmission Provider's ability to perform transmission studies and to construct upgrades needed both to integrate the Generating Facility as a Network Resource and to maintain the reliability of the Transmission System once the Generating Facility is designated as a Network Resource.

543. Reliant asks the Commission to clarify that a Interconnection Customer that requests Network Resource Interconnection Service and funds the construction of Network Upgrades necessary to accommodate that request, has a right to be designated as a Network Resource by a Network Customer on the Transmission Provider's Transmission System, and that the Transmission Provider cannot then require the Interconnection Customer to bear the cost of additional studies or Network Upgrades.

Commission Conclusion

544. We agree that LGIA Article 4.1.2.2 needs clarification. The intent of this portion of Article 4.1.2.2 is to state that the Interconnection Customer cannot be charged for additional studies or Network Upgrades merely by requesting to have the Generating Facility designated as a Network Resource by a Network Customer. This should satisfy Reliant's concern.

545. However, we note that this provision is not intended to prevent the Transmission Provider from performing any additional studies or constructing any additional upgrades when necessary. For example, additional studies and upgrades may be needed to reduce the incidence of redispatch or congestion costs that may be incurred when the Generating Facility is designated as a Network Resource by a Network Customer and delivery service begins. Thus, we are adding the following sentence to Article 4.1.2.2: "The provision of Network Integration Transmission Service or firm Point to Point Transmission Service may require additional studies and the construction of additional upgrades." We note, however, that because such studies and upgrades would be associated with a request for delivery service under the OATT, cost responsibility for the studies and upgrades would be determined in accordance with the Commission's policy for pricing delivery services.

f. Miscellaneous Requests Regarding Energy Resource Interconnection Service and Network Resource Interconnection Service

546. TDU Systems notes that the Commission states in Order No. 2003 that when the Transmission Provider is an independent entity, it "may determine, subject to Commission approval, that the designation of Network Resources is not necessary." It argues that the Commission should not permit RTOs and ISOs to decide that designation of Network Resources is not necessary. Questions as to the continued need for designation of Network Resources have ramifications far beyond the realm of generator interconnections, and it is unreasonable for the Commission to determine in this proceeding that an RTO or ISO may declare such designation unnecessary.

547. TAPS claims that the treatment of RTOs with multiple Control Areas is arbitrary and discriminatory.[97] It argues that using Control Area borders to trigger extra deliverability requirements for Network Resource designation or Network Upgrade payment obligations is arbitrary, and will unduly favor certain market participants.

548. Calpine notes that P 785 of Order No. 2003, which states that the Commission "will allow an RTO or ISO to seek an 'independent entity variation' from the Final Rule LGIP if it wants to adopt a different study requirement," does not track the ANOPR negotiations. It asks the Commission to clarify that RTOs and ISOs not be required to make their Network Resource interconnection criteria more stringent as a result of Order No. 2003.

549. PacifiCorp asks for clarification with respect to Article 4.1.1.2 that an RTO need not automatically grant an Interconnection Customer taking Energy Resource Interconnection Service the right to bid amounts to RTO markets above the megawatt cap applicable to that Generating Facility without conducting additional studies and determining if additional upgrades are needed to move additional plant output above the cap without exposing the Transmission Provider's other customers to possible congestion costs in excess of what they otherwise would experience. The RTO should be permitted to require the Energy Resource Interconnection Service Interconnection Customer to bear the cost of additional Network Upgrades before giving it the right to sell output beyond the capped amount into the RTO markets.

550. EEI notes that LGIP Section 3.2.2.2 describes in general terms the Interconnection Study for Network Resource Interconnection Service. It requests clarification of the scope of the Interconnection Feasibility Study for Network Resource Interconnection Service. Specifically, EEI asks whether transmission contingencies or generation redispatch are to be considered.

551. Calpine asks for clarification as to how Qualifying Facilities (QFs) under the Public Utility Regulatory Policies Act of 1978 (PURPA)[98] are to obtain Network Resource Interconnection Service. At P 815 of Order No. 2003, the Commission states that "we conclude that the owner of a QF need not submit an Interconnection Request if it represents that the output of the facility will be substantially the same as before" and further states that "it would be unreasonable for the Transmission Provider to require the former QF to join the interconnection queue." Calpine recommends that the Transmission Provider be required to include in its

[96] *E.g.*, Alabama PSC, FP&L, Mississippi PSC, NYTO, Reliant, and Southern.

[97] Order No. 2003 at P 771.

[98] *See* 16 U.S.C. 2601 *et seq.* (2000).

compliance filing a list of all of the QFs that automatically receive Network Resource Interconnection Service status by virtue of their current or prior status as a QF.

552. Reliant notes that Network Resource Interconnection Service conveys the right for the Generating Facility to be designated as a Network Resource in the same manner as the Transmission Provider would designate its own resources. It proposes that the Commission limit the time that the Transmission Provider is required to hold this right for the Network Resource Interconnection Service Interconnection Customer. For example, if the resource is not designated as a Network Resource by a Network Customer within the Transmission Provider's planning period from the Commercial Operation Date of the Generating Facility, the Network Resource Interconnection Service Interconnection Customer might lose the right, but the right should not be lost before that time expires.

553. Southern asserts that the conflicting requirements in Order No. 2003 about Network Resource Interconnection Service were not presented for comment in either the ANOPR or the NOPR, so the Commission's adoption of these provisions violates fundamental rulemaking requirements.

Commission Conclusion

554. In response to TDU Systems, we clarify that we are not deciding in this Final Rule whether any particular RTO or ISO may adopt a policy that makes the designation of Network Resources unnecessary. We note that we have allowed existing ISOs to adopt different policies, and we will continue to allow ISOs and RTOs to present proposals for our consideration on a case-by-case basis.

555. In response to Calpine, we clarify that Order No. 2003 does not necessarily require an RTO or ISO to adopt Network Resource interconnection criteria more stringent than those it currently uses, but such issues will be decided case-by-case on compliance.

556. In response to PacifiCorp's request for clarification, we are not determining here what procedures an RTO must follow when the Interconnection Customer seeks to sell into the market an amount of energy that exceeds the Generating Facility's approved output. We will make such determinations on a case-by-case basis.

557. In response to TAPS, we clarify that we are not establishing in this Final Rule any new policy about the way the Transmission Provider may use Control Area boundaries to determine deliverability requirements for Network Resources. We note, however, that we will not permit the Transmission Provider to adopt any requirements or procedures for Network Resources that are not comparable to those that the Transmission Provider uses for its own generating facilities.

558. In response to EEI, we clarify that the Interconnection Feasibility Study must consider transmission contingencies, but not generation redispatch. Generation redispatch refers to decisions the system operator makes to manage congestion. These decisions take into account the relative running costs of the available generating facilities. LGIP section 3.2.2.2 states that the approach used to study Network Resource Interconnection Service assumes that some portion of existing Network Resources is displaced by the output of the Generating Facility. However, because the purpose of the Network Resource Interconnection Service study is only to determine whether the aggregate of generation in the local area can be delivered to the aggregate of load on the Transmission System, consistent with the Transmission Provider's reliability criteria and procedures, the generation that is displaced for study purposes is selected on the basis of its impact on Transmission System operation, not on the basis of the generating facilities' relative costs of producing energy.

559. Regarding Calpine's request for clarification about the process by which a QF may obtain Network Resource Interconnection Service, the Interconnection Service available to an existing QF is that which is specified in its existing interconnection agreement. We are not requiring the Transmission Provider to identify QFs that would automatically receive Network Resource Interconnection Service status.

560. In response to Reliant, we consider it reasonable for the Interconnection Customer to hold, through the life of the interconnection agreement, the right to use the Network Upgrade capacity that allows the Generating Facility to be designated as a Network Resource.

561. Finally, in response to Southern, we note that all of the significant features of Network Resource Interconnection Service adopted in Order No. 2003 were also included in the NOPR that was presented for public comment. The Commission carefully reviewed the comments and drafted provisions for Network Resource Interconnection Service in Order No. 2003 that differ in only minor ways from the original proposal. The Commission has met the scope of notice requirement applicable to rulemakings.

2. Interconnection Pricing Policy

a. Summary of the Principal Determinations in Order No. 2003

562. In Order No. 2003, the Commission adopted, for a non-independent Transmission Provider, an interconnection pricing policy that generally reflects the Commission's existing policy for such entities. For an independent Transmission Provider, Order No. 2003 continued the Commission's policy of allowing flexibility regarding the specific pricing approach that each such entity chooses, subject to Commission approval.

563. The relevant pricing provisions of Order No. 2003 for the non-independent Transmission Provider were included in LGIA Articles 4, 9, and 11 and LGIP Section 12.[99] LGIA Articles 11.1 and 11.2 stated that the Interconnection Customer is solely responsible for the costs of all Interconnection Facilities and Article 11.3 stated that the Interconnection Customer is responsible for the costs of Distribution Upgrades. Article 11.3 stated that the Interconnection Customer must initially fund the Network Upgrades associated with the interconnection, and will be reimbursed by the Transmission Provider, unless the Transmission Provider chooses to pay for them itself. In addition, the Interconnection Customer is solely responsible for the costs of any Stand-Alone Network Upgrades that the Transmission Provider allows it to own. If the Transmission Provider owns them, the Interconnection Customer must fund them initially but is entitled to reimbursement by the Transmission Provider.

564. LGIA Article 11.4 provided that the Interconnection Customer is entitled to a refund equal to the total amount paid to the Transmission Provider and the Affected System Operator,[100] if any, for Network Upgrades, including any tax-related payments. The refunds were to be paid to the Interconnection Customer, with interest, as credits on a dollar-for-dollar basis for the non-usage

[99] In Article 11, the word "refund" was used throughout to describe the repayment of the amounts paid upfront by the Interconnection Customer for Network Upgrades. However, the use of "refund" in this context is not consistent with the meaning of the term as it is used elsewhere in the Commission's Regulations. Therefore, in this order we are revising Article 11 to remove "refund" and substituting other terms that preserve the meaning of the original language.

[100] An Affected System is an electric system other than the Transmission Provider's Transmission System that may be affected by a proposed interconnection.

sensitive portion [101] of transmission charges, as payments are made under the Transmission Provider's Tariff and the Affected System's Tariff for any Transmission Services taken by the Interconnection Customer on the respective systems, whether or not the Generating Facility is the source of the power being transmitted. The Interconnection Customer, Transmission Provider, and Affected System Operator were permitted to adopt any alternative payment schedule that is mutually agreeable provided all amounts paid by the Interconnection Customer for Network Upgrades were refunded, with interest, within five years of the Commercial Operation Date of the Generating Facility. Article 11.4 permitted the Interconnection Customer to assign its refund rights to any person.

565. Order No. 2003 provided that, when Network Upgrades are constructed on an Affected System, the Interconnection Customer and Affected System Operator must enter into an agreement that provides for the Interconnection Customer's payments to the Affected System Operator, and the repayment of the Interconnection Customer's upfront payment by the Affected System Operator. Article 11.4.2 stated that refunds were to be paid whether or not the Interconnection Customer contracts for Transmission Service on the Affected System. All refunds were to be paid within five years of the Commercial Operation Date.

Rehearing Requests

566. Many petitioners ask for clarification or rehearing of Order No. 2003's interconnection pricing policy, particularly as it applies to a non-independent Transmission Provider.

b. Fairness of the Order No. 2003 Pricing Policy: Applicability of the Commission's "Higher of" Ratemaking Policy

567. Several petitioners argue that the Commission's interconnection pricing policy for a non-independent Transmission Provider inappropriately subsidizes the interconnection of a new Generating Facility, particularly when it is used to serve off-system customers. Some claim that the policy violates the Commission's "higher of" ratemaking policy for transmission services, and one petitioner argues that the policy is inconsistent with the Commission's policy for pricing natural gas pipeline expansions.[102]

568. The South Carolina PSC states that requiring "rolled-in" pricing for Network Upgrades violates the principle of cost causation. The Kentucky PSC argues that the pricing policy subsidizes an unregulated supplier that has no apparent reciprocal obligation. Entergy and Southern assert that the Commission did not explain its abrupt departure from previous policies, particularly the system-wide benefit test, and that this is arbitrary and capricious.

569. Entergy also asserts that Order No. 2003 eliminates the prior distinction between Interconnection Facilities and Network Upgrades and does not conform to the Commission's OATT. It claims that the OATT provides that interconnection switchyard facilities should be directly assigned to the Interconnection Customer requiring the construction of, and solely benefiting from, such facilities. Similarly, Southern and the Mississippi PSC ask the Commission to allow direct assignment to the Interconnection Customer of the costs of substations. circuit breakers, and stability modifications that are necessary to implement the interconnection but provide no benefit to other customers. Southern also claims that the Network Upgrades that would be required to provide Network Resource Interconnection Service would not necessarily benefit other Transmission Customers. The construction of such upgrades would be required before the Interconnection Customer even knows if it will have a Network Customer or if it would even make use of the upgrades constructed.

570. Idaho Power argues that assigning the costs of Network Upgrades to Transmission Customers is discriminatory because, while they are held responsible for costs they cause, the Interconnection Customer is not being made responsible for the costs it causes. The Commission seems to assume that all Network Upgrades benefit all Transmission Customers. However, at the same time, the Commission suggests that this is not necessarily the case by allowing participant funding for an Independent Transmission Provider. When the Network Upgrades do not benefit all Transmission Customers, there is no basis for assigning the costs of the Network Upgrades to all Transmission Customers. Accordingly, Idaho Power requests that the Commission not limit the availability of the participant funding option to RTOs, ISOs, and Transmission Owners preparing to join an RTO or ISO.

571. The Alabama PSC and Old Dominion support transmission credits for the cost of Network Upgrades that provide a system-wide benefit, but not for facilities that benefit only the Interconnection Customer. Old Dominion requests that the Commission require the Interconnection Customer to bear the costs of Network Upgrades unless it can affirmatively show that the Network Upgrades will benefit all users of the Transmission System or that the Generating Facility will serve load in the Transmission Provider's area. It also supports a policy that distinguishes between required and optional Network Upgrades. Required Network Upgrades would be those that the Transmission Provider determines are necessary to maintain the reliability and stability of the Transmission System and benefit all users of the Transmission System and, therefore, should be rolled into the rates paid by all Transmission Customers. Optional Network Upgrades would include any facilities beyond those required by the Transmission Provider and would be paid for by the Interconnection Customer.

572. Various petitioners [103] complain that Order No. 2003 includes no requirement that the Interconnection Customer demonstrate that any portion of the output of the Generating Facility will be used to serve load on the Transmission Provider's Transmission System. Consequently, Transmission Customers could be unfairly burdened with the costs of Network Upgrades from which they will receive no benefit. The North Carolina Commission and the South Carolina PSC are concerned that the pricing policy will unfairly burden native load customers when Interconnection Customers locating in a state intend to sell power out of state (where, for example, the Generating Facility is located closer to a low-cost fuel supply than to its intended distant load).

573. NRECA–APPA contends that a merchant generator that has not committed in a long-term agreement to serve network and native load customers in the Transmission Provider's service area is not comparable to the Transmission Provider's own generating facilities.

[101] Non-usage sensitive transmission charges include all transmission charges except those for items such as congestion charges, line losses and Ancillary Services.

[102] Petitioners that raise fairness issues include Alabama PSC, Ameren, Entergy, Georgia PSC, Georgia Transmission, Kentucky PSC, Mississippi PSC, North Carolina Commission, NRECA–APPA, NYTO, Old Dominion, Salt River Project, South Carolina PSC, Southern, and TDU Systems.

[103] *E.g.*, Georgia Transmission, North Carolina Commission, NRECA–APPA, Old Dominion, South Carolina PSC, and TDU Systems.

NRECA–APPA asks the Commission to clarify that such a discriminatory approach was not intended. Nevertheless, it contends that Network Upgrades needed to interconnect a Generating Facility that will serve Network Load on the Transmission System should be rolled into the Transmission Provider's transmission rates. TDU Systems states that the Interconnection Customer should be required to designate the Generating Facility as a Network Resource or to undertake a long-term firm commitment to share in the fixed costs of the Transmission System to offset the subsidy effect of the pricing policy that would otherwise lead to excessive amounts of upgrades. It notes that NRECA–APPA has set out a compromise participant funding proposal that would call for the rolling-in of Network Upgrades costs if the Generating Facility in question will serve loads in the Transmission Provider's region as evidenced through long-term contractual arrangements.

574. A number of petitioners argue that the Commission is abandoning in Order No. 2003 its "higher of" transmission pricing policy.[104] AEP, PacifiCorp, and others argue that, although the Commission bases its pricing policy in part on its policy forbidding "and" pricing, an Interconnection Customer that receives a refund of Network Upgrade costs but whose Generating Facility does not use a commensurate amount of Transmission Service pays neither the incremental cost of the Network Upgrades nor the embedded cost of the system.

575. Idaho Power claims that Order No. 2003 contradicts "higher of" pricing by requiring that the Interconnection Customer be refunded the costs of Network Upgrades after five years regardless of how much Transmission Service it has taken from the Generating Facility. There is no guarantee that the Transmission Provider will have an opportunity to recover from the Interconnection Customer the higher of the incremental costs of Network Upgrades or the embedded costs of the Transmission System via Transmission Service. Idaho Power believes that the policy, in effect, imposes on the Transmission Owner the potential for embedded-costs-only pricing.

576. Southern states that the Commission's previous policy of allowing transmission credits only as service is taken from a particular Generating Facility, without a requirement that refunds be completed within five years, was arguably consistent with "or pricing." However, if a full refund of upgrade costs is always required within five years, "or pricing" would be violated if insufficient Transmission Service is taken so that there is a remaining balance of credits.

577. PacifiCorp contends that, even if the Interconnection Customer uses all its credits during the five years, to the extent those credits are for services not needed to deliver the output of the Generating Facility, the Transmission Provider has not recovered the contribution contemplated by the Commission's "higher of" pricing. Thus, the Order No. 2003 pricing provisions will likely result in cost shifts away from the Interconnection Customer to the customers or shareholders of the Transmission Provider. It asserts that this is both discriminatory and bad public policy. PacifiCorp and Idaho Power assert that the Commission's alleged departure from its "higher of" pricing policy was neither adequately explained nor justified in Order No. 2003.

578. Finally, the Kentucky PSC states that the pricing policy is inconsistent with the Commission's policy for pricing natural gas pipeline upgrades. It is unreasonable to require customers that do not need upgrades to subsidize upgrades for an electric Transmission System but not for a natural gas pipeline. The Commission's statement that transmission-owning utilities unduly discriminate against other Transmission System users lacks evidentiary support and is insufficient to justify different pricing policies for electric utilities and natural gas pipelines.

Commission Conclusion

579. As we stated in Order No. 2003, we adopted our interconnection pricing policy in order to achieve certain important goals. First, the policy enhances competition in bulk power markets by removing barriers to the construction of new generation, and by promoting the development of a robust and reliable transmission system through grid enhancements, particularly in areas where entry barriers due to unduly discriminatory transmission practices may still be significant. Second, the policy helps to ensure that all new generating facility interconnections are treated comparably. Third, the policy upholds our traditional restriction on "and" pricing by ensuring that the Interconnection Customer will not have to pay both an incremental cost rate and an average embedded cost rate for using the Transmission System.

580. In Order No. 2003, the Commission did not intend to abandon any of the fundamental principles that have long guided our transmission pricing policy.[105] In particular, the Commission had no intention to adopt a policy that is inconsistent with its "higher of" pricing standard for non-independent transmission providers. Thus, we clarify that under our interconnection pricing policy, the Transmission Provider continues to have the option to charge a transmission rate that is the higher of the incremental cost rate for network upgrades required to interconnect its generating facility or an embedded cost rate for the entire transmission system (including the cost of the Network Upgrades).[106] This clarification applies to both Energy Resource Interconnection Service and to Network Resource Interconnection Service. Allowing transmission providers to charge the higher of an incremental cost rate or an embedded cost rate ensures that other transmission customers, including the Transmission Provider's native load, will not subsidize Network Upgrades required to interconnect merchant generation.

581. Our experience indicates that the incremental rate associated with network upgrades required to

[104] When, to meet a request for Transmission Service, a Transmission Provider must construct Network Upgrades, Commission policy has been to allow the Transmission Provider to charge customers the higher of embedded cost of transmission service (with the cost of the Network Upgrades rolled in) or the incremental cost of the Network Upgrades, but not the sum of the two. *See* American Electric Power Service Corporation, 91 FERC ¶ 61,308 (2000) and Consumers Energy Company, 95 FERC ¶ 61,233 (2001).

[105] *See* Inquiry Concerning the Commission's Pricing Policy for Transmission Services Provided by Public Utilities Under the Federal Act, Policy Statement, FERC Stats. And Reg. Preambles par. 31,005.

[106] Where rolling in the costs of network upgrades incurred for an interconnection would have the effect of raising the average embedded cost rate paid by existing customers, the Transmission Provider may elect to charge an incremental cost rate to the interconnection customer and thereby fully insulate existing customers from the costs of any necessary system upgrades. However, under no circumstances may a non-independent Transmission Provider charge an Interconnection Customer both an incremental cost rate and an embedded cost rate associated with existing network transmission facilities. *See* Northeast Utilities Service Company (Re: Public Service Company of New Hampshire), Opinion No. 364–A, 58 FERC ¶ 61,070 (1992), *reh'g denied*, Opinion No. 364–B, 59 FERC ¶ 61,042, order granting motion to vacate and dismissing request for rehearing, 59 FERC ¶ 61,089, *aff'd* in part and remanded in part *sub nom. Northeast Utilities Service Company* v. *FERC*, 993 F.2d 937 (1st Cir. 1993), order on remand, 66 FERC ¶ 61,332, *reh'g denied*, 68 FERC ¶ 61,041 (1994) *pet. denied*; Pennsylvania Electric Company, 58 FERC ¶ 61,278, *reh'g denied* and pricing policy clarified, 60 FERC ¶ 61,034, *reh'g denied*, 60 FERC ¶ 61,244 (1992), *aff'd sub nom. Pennsylvania Electric Co.* v. *FERC*, 11 F.3d 207 (DC Cir. 1993) (Penelec).

interconnect a new generator (dividing the costs of any necessary network upgrades by the projected transmission usage by the new generator) will generally be less that the embedded average cost rate (including the costs of the new facilities in the numerator and the additional usage of the system in the denominator). In other words, in most instances, the additional usage of the transmission system by a new Interconnection Customer will generally cause the average embedded cost transmission rate to decline for all remaining customers. Accordingly, we would expect that the Transmission Provider would want to roll-in the costs of any Network Upgrades necessary to interconnect the new generator to enable its existing transmission customers to benefit from this overall lower average embedded cost rate.[107] This, in turn, is dependent upon an appropriate mechanism for returning any money contributed by the Interconnection Customer related to the initial financing of the necessary upgrades.

582. In this regard, we note that many of the petitioners' criticisms of the crediting and reimbursement provisions of Order No. 2003 are misplaced. The Interconnection Customer's upfront payment, with the associated credits and reimbursements, serves simply as a financing mechanism that is designed to facilitate the construction of the Network Upgrades. This mechanism in no way undermines the Commission's fundamental ratemaking policy of allowing the Transmission Provider to charge the higher of an incremental or an average embedded cost rate for the services it provides. Nevertheless, we agree with petitioners that certain of the crediting and reimbursement provisions should be modified, and we are granting rehearing in two specific areas. We discuss these matters in greater detail below in the section on Rules Governing the Interconnection Customer's Upfront Payment and the Payment of Credits and Reimbursements.

583. A number of petitioners argue that only the Interconnection Customer benefits from the Network Upgrades needed to interconnect the Generating Facility and, as a result, the Interconnection Customer should receive no credits toward the cost of the Network Upgrades. Rather, the petitioners assert that the cost of the Network Upgrades should be directly assigned to the Interconnection Customer. Petitioners argue that this is especially true when the Interconnection Customer sells the output of the Generating Facility off-system, and when the Interconnection Customer requests Network Resource Interconnection Service without making a commitment to be a Network Resource for any network load. Also, Southern and Entergy contend that the interconnection pricing policy, including the "at or beyond" test for separating Network Upgrades from sole-use facilities, departs from the policy of applying a system-wide benefit test.

584. We disagree with these petitioners. In response to Southern and Entergy, we note that, in assessing the benefits of the Network Upgrades needed to interconnect new generating capacity, the Commission's approach to interconnection pricing looks beyond the direct usage related benefits usually associated with transmission system enhancements. That is, our approach also recognizes the reliability benefits of a stronger transmission infrastructure and more competitive power markets that result from a policy that facilitates the interconnection of new generating facilities. This approach was fully supported by the court in *Entergy Services*, which said "[t]he Commission's rationale for crediting network upgrades, based on a less cramped view of what constitutes a 'benefit,' reflects its policy determination that a competitive transmission system, with barriers to entry removed or reduced, is in the public interest." [108]

585. In response to the petitioners that want the cost of the Network Upgrades to be directly assigned to the Interconnection Customer, we note that the Commission has long held that the Transmission System is a cohesive, integrated network that operates as a single piece of equipment, and that network facilities are not "sole use" facilities but facilities that benefit all Transmission Customers.[109] The Commission has reasoned that, even if a customer can be said to have caused the addition of a grid facility, the addition represents a system expansion used by and benefiting all users due to the integrated nature of the grid.[110] For this reason, the Commission has consistently priced the transmission service of a non-independent Transmission Provider based on the cost of the grid as a whole, and has rejected proposals to directly assign the cost of Network Upgrades.

586. This does not mean, however, that native load customers must subsidize the cost of the Network Upgrades. When rolling in the cost of Network Upgrades would cause the embedded cost rate paid by existing transmission customers to increase, we permit the non-independent Transmission Provider to charge an incremental rate (*i.e.*, the rate associated with the costs of the Network Upgrades divided by the Interconnection Customer's units of service) to the Interconnection Customer. This will fully insulate existing customers from the cost of the Network Upgrades. We emphasize, however, that an incremental rate is not the same as direct assignment; the Interconnection Customer that pays an incremental rate is paying for Transmission Service over the entire Transmission System. Charging both the incremental cost of the Network Upgrades and an embedded cost transmission rate would be charging twice for the same service, *i.e.*, "and" pricing, and we do not permit such pricing for the Transmission Services of a non-independent Transmission Provider.

587. As we explained in Order No. 2003, the Commission has made exceptions to its policy of prohibiting the direct assignment of Network Upgrade costs in cases where the Transmission Provider is independent of market participants. The Commission noted that, unlike a non-independent Transmission Provider, a Transmission Provider that is independent would have no incentive to use the cost determination and allocation process to unfairly advantage its own generation. This independence allows the Transmission Provider to utilize a more creative and flexible approach to competitive energy markets. For example, we have permitted the direct assignment of Network Upgrade costs by an independent Transmission Provider

[107] In those instances where a Transmission Provider elects to charge an Interconnection Customer an incremental transmission rate for interconnection-related Network Upgrades because it results in a rate that is higher than the average embedded cost rate, the issue of whether crediting results in native load or other Transmission Customers ultimately bearing the cost of the Network Upgrades becomes somewhat irrelevant. This is because the incremental rate approach ensures that the costs associated with those Network Upgrades will not be included in the transmission rates charged to other customers. However, we emphasize that a non-independent Transmission Provider may not, under any circumstances, charge the Interconnection Customer both an incremental cost rate and an embedded cost rate for interconnecting to (or using) the integrated network.

[108] *Entergy Services, Inc.* v. *FERC*, 319 F.3d 536 (DC Cir. 2003) at 543–44.

[109] *See, e.g.*, Public Service Company of Colorado, 59 FERC ¶ 61,311 (1992), *reh'g denied*, 62 FERC ¶ 61,013 (1993).

[110] *Id.* at 61,061.

when the Interconnection Customer receives well-defined congestion rights in return. Where the customer receives these rights in exchange for a direct cost assignment, and at the same time obtains access to the network in exchange for an embedded cost access fee, the Commission has found that the customer is paying separate charges for separate services.[111] This issue is discussed more fully below.

588. We also deny requests to directly assign the cost of Network Upgrades to the Interconnection Customer in cases where the customer sells off-system. When the Interconnection Customer chooses to sell the output of the Generating Facility off-system, other transmission customers are protected because the Transmission Customer has the assurance that it can recover from the Interconnection Customer the higher of incremental or embedded costs.

589. We disagree with the Kentucky PSC's assertion that the interconnection pricing policy is inconsistent with the Commission's policy for pricing interstate natural gas pipeline facilities. The Commission's policy for pricing transmission services does not differ in any fundamental way from the pricing policy for natural gas pipeline expansions as set forth in our Statement of Policy.[112] There the Commission adopted a threshold requirement of no financial subsidies for pipeline expansions in order to ensure that existing customers of the pipeline do not subsidize service to a new customer. In this order, we are clarifying that the Transmission Provider has the opportunity to charge the Interconnection Customer the higher of an incremental cost rate or embedded cost rate under all circumstances. Accordingly, our interconnection pricing policy is entirely consistent with our pricing policy for pipeline expansions.

590. In conclusion, we believe that our interconnection pricing policy is reasonable because it provides efficient incentives for new generation and transmission expansion, while our "higher of" ratemaking standard prevents subsidization of merchant generation and prevents undue discrimination by native load or other Transmission Customers. The policy ensures that all Transmission Customers (including the Interconnection Customer when it takes transmission delivery service) will bear a fair share of the cost of the Transmission System, reflecting the fact that all customers benefit from having a Transmission System that provides reliable service and supports new, competitive generation options.

c. Legal Challenges to the Interconnection Pricing Policy

591. Southern and Entergy argue that the Commission's pricing policy violates Section 212 of the FPA. First, they argue that Section 212 applies even though the Commission is acting under Section 205 of the FPA; Southern states that "the directives of Section 212 apply regardless of the provision of the FPA under which the Commission chooses to require service to be provided. The Commission itself recognized this to be the case when it adopted its Transmission Pricing Policy * * *"[113]

592. Southern goes on to argue that the pricing policy the Commission adopted for a non-independent Transmission Provider violates the standards of Section 212. It states that Section 722 of EPAct amended Section 212 of the FPA to impose the following restrictions when the Commission requires wholesale Transmission Service (including Interconnection Service) to be provided. Southern quotes section 212, with an omission, as follows:

> Rates, charges, terms, and conditions for transmission services provided pursuant to an order under section 211 shall ensure that, to the extent practicable, costs incurred in providing the wholesale transmission services * * * are recovered from the applicant for such order and not from a transmitting utility's existing wholesale, retail, and transmission customers.[114]

Southern characterizes section 212 as providing that when the Commission orders a utility to provide Transmission Service, other Transmission Customers must not be required to bear the cost of providing that service. It claims that the Commission's pricing policy violates section 212 because it forces other Transmission Customers to help pay for upgrades that benefit only the new Interconnection Customer.

593. As further support for its claim that section 212 does not allow the pricing policy the Commission adopted for a non-independent Transmission Provider, Southern claims that the legislative history of section 212 shows that Congress intended to ensure that retail and other Transmission Customers are not required to bear the cost of facilities required to provide Interconnection Service to an Interconnection Customer. It cites various statements of Senator Wallop during the debates on the Energy Policy Act.

594. NYTO argues that, unless facilities are voluntarily constructed by the Transmission Owner, Sections 210–212 of the FPA apply to expansion and interconnection activities. NYTO further argues that the Commission's decision in *Nevada Power*[115] cannot be reconciled with Sections 210–212 of the FPA or the legislative history of those sections. NYTO states that Sections 210–212 also require the Commission to find that (1) the proposed activities are in the public interest, and (2) in accordance with Section 210 (interconnection) and Section 211 (mandatory wheeling/enlargement of facilities), that the cost recovery requirements of Section 212 have been met.

595. Entergy, Georgia Transmission, and Southern contend that the Commission's statement in Order No. 2003 that its interconnection pricing policy has "withstood judicial review" is overly broad.[116] They argue that *Entergy Services* involved only the provision of transmission credits for short circuit and stability-related upgrades. The payment of transmission credits with interest for what Entergy describes as direct-connection interconnection facilities, as well as Order No. 2003's policies with respect to the use and ultimate payback of transmission credits in five years, have not yet been reviewed in court. Also, Southern claims that *Entergy Services* could not have addressed the "at or beyond test" because that test had not been used when the Commission's orders underlying that case were issued. The "at or beyond test" did not appear until January 11, 2002 in the

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[111] See Pennsylvania-New Jersey-Maryland Interconnection, 81 FERC ¶ 61,257 at 62,259–60 (1997), *order on reh'g. and clarification*, 92 FERC ¶ 61,282 at 61,955–56 (2000), *remanded on other grounds sub nom. Atlantic City Elec. Co.* v. *FERC*, 295 F.3d 1 (DC Cir. 2002).

[112] See, e.g., Certification of New Interstate Natural Gas Pipeline Facilities (Statement of Policy), 88 FERC ¶ 61,227 (1999) and Order Clarifying Statement of Policy, 90 FERC ¶ 61,128 (2000).

[113] Southern Request for Rehearing at 49, citing Inquiry Concerning the Commission's Pricing Policy for Transmission Services Provided by Public Utilities Under the Federal Power Act; Policy Statement, FERC Stats. & Regs., Reg. Preambles ¶ 31,005, at p. 31,143 (1994).

[114] Southern's Request for Rehearing at 49.

[115] Nevada Power Co., 97 FERC ¶ 61,227 (2001), *reh'g denied*, 99 FERC ¶ 61,347 (2002) (*Nevada Power*). ("To hold new interconnecting generators responsible in the interconnection agreement * * * for upgrades on all interconnected systems, including not only the system to which the generator interconnects but other, more distant, systems as well, would create substantial obstacles to the construction of new generation at the very time that the Commission is trying to encourage the building of new generation.")

[116] In support of the pricing policy, the Commission cites the case of *Entergy Services, Inc.* v. *FERC*, 319 F.3d 536 (DC Cir. 2003) (*Entergy Services*).

Commission's decision in *Entergy Gulf States, Inc.*, 98 FERC ¶ 61,014 (2002). Furthermore, the rationale for *Entergy Services* is not applicable to the expansive costs that are proposed to be subsidized under Order No. 2003. Claiming that Network Resource Interconnection Service requires transmission delivery upgrades, Southern asserts that Order No. 2003 is the first time that the Commission has required the socialization of such upgrades without a showing that they are needed to provide service to Network Customers.

Commission Conclusion

596. We do not agree with petitioners who argue that the Commission's pricing policy violates FPA Section 212. First, Section 212 applies only to Transmission Service that is ordered under Section 211, and we are acting under Section 206 here, not Section 211. The Commission's Transmission Pricing Policy Statement does not state that Section 212 applies to service under Sections 205 or 206 or that the two provisions are identical. What the Commission said was:

> As a general matter, transmission pricing should be fair and equitable. This has two important implications. First, EPAct requires that, to the extent practicable, existing wholesale, retail and transmission customers should not pay for the costs incurred in providing wholesale transmission services ordered under Section 211. Similarly, we do not believe that third-party transmission customers should subsidize existing customers. We believe this principle should apply equally to transmission services under both Section 211 and Sections 205 and 206.[117]

597. Second, as we explained above, under our "higher of" policy for transmission ratemaking, existing wholesale, retail and transmission customers are fully insulated from the costs incurred in providing transmission service, including Interconnection Service, to other customers. In the case of Interconnection Service, the Transmission Provider always has the option to charge the Interconnection Customer an incremental rate when rolling in the cost of Network Upgrades would otherwise cause the embedded cost rate paid by existing transmission customers to increase.

598. We note, however, that even if section 212 did apply to this rulemaking, we do not agree that it forbids rolled-in pricing of an upgrade to the transmission grid simply because the immediate impetus for that upgrade is the interconnection of a new Generating Facility. When Southern quotes section 212, it omits an important phrase, underlined below:

> Rates, charges, terms, and conditions for transmission services provided pursuant to an order under section 211 shall ensure that, to the extent practicable, costs incurred in providing the wholesale transmission services, and properly allocable to the provision of such services, are recovered from the applicant for such order and not from a transmitting utility's existing wholesale, retail, and transmission customers.

599. As the Commission explained in the Transmission Pricing Policy Statement, the prohibition against improper subsidization forbids both improper subsidization by existing customers and improper subsidization by third parties. This basic pricing principle is consistent with the just and reasonable standard of FPA Sections 205, 206 and 212. With respect to the specific portion of Section 212 quoted above, we do not believe that the costs of Network Upgrades required to interconnect a Generating Facility to the Transmission System of a non-independent Transmission Provider are properly allocable to the Interconnection Customer through direct assignment because upgrades to the transmission grid benefit all customers, as we explained above. In addition to leaving out the statutory reference to "properly allocable" costs, Southern does not mention several other standards set forth in Section 212(a); that provision also states that the rates for transmission service ordered under Section 211 "shall promote the economically efficient transmission and generation of electricity and shall be just and reasonable, and not unduly discriminatory or preferential." As explained above, the Commission's pricing policy for interconnection to the Transmission System of a non-independent Transmission Provider promotes economic efficiency, is just and reasonable, and is needed to prevent the Transmission Provider that has an incentive to discourage competitors from unduly discriminating against those competitors. Thus, the Commission's pricing policy would not violate Section 212, even if that provision applied here.

600. Southern's discussion of the legislative history of EPAct does not support a conclusion that Section 212 was intended to require a particular type of transmission pricing. There is ample evidence in the legislative history that Congress carefully decided not to either endorse or reverse the Commission's transmission pricing policies, although several representatives wished it to do so.[118]

601. Some petitioners argue that the Commission's statement in Order No. 2003 that the interconnection pricing policy has withstood judicial review is overly broad. We disagree. Most importantly, the finding of the court in *Entergy Services* is not limited to short circuit and stability-related upgrades. Indeed, *Entergy Services* went beyond the narrow question of these specific upgrades to look at the broader issue of the Commission's "standard policy that requires credits for customer-funded network upgrades."[119] The analysis was not restricted to the narrow question of whether specific "evidence that the reliability upgrades are crucial to protect generation and other equipment,"[120] had been found, but took a broader view that benefits from all Network Upgrades would enhance network expansion and encourage competition by reducing barriers to entry.[121] Thus, *Entergy Services* is consistent with our conclusion that the crediting policy is appropriate for all customer-funded Network Upgrades.

602. Rolling in the costs of other types of Network Upgrades, such as those required for Network Resource Interconnection Service, is well within the scope of the policy objectives that were upheld by the court in *Entergy Services*. Indeed, the Network Upgrades needed for Network Resource Interconnection Service are likely to provide Transmission Customers with even greater benefits than do short circuit and stability-related Network Upgrades, because the former are more likely to reinforce the backbone facilities of the Transmission System. The court clearly affirmed the Commission's reasoning underlying rolled-in transmission rates and its view that all Transmission Customers benefit from an expanded, and thus more reliable, Transmission System.

d. Rules Governing the Interconnection Customer's Upfront Payment and the Payment of Credits and Reimbursements

603. Many petitioners object to various details of how the Interconnection Customer is to be reimbursed for its upfront payment. In particular, petitioners object to the payment of interest on unpaid credits, Order No. 2003's five year repayment period, and the ability of the Interconnection Customer to receive

[117] Transmission Pricing Policy Statement at 31,143–44.

[118] 138 Cong. Rec. S17613 (daily ed. October 8, 1992); 138 Cong Rec. H11400 (daily ed. October 5, 1992).

[119] 319 F.3d at 543.

[120] *Id.*

[121] *Id.* at 543–44.

credits for Transmission Service taken anywhere on the Transmission Provider's Transmission System, even if the GeneratingFacility is not the source of power.[122] Many argue that, because of these features, the policy provides a subsidy to merchant generation at the expense of retail and other transmission customers.

604. Various petitioners claim that crediting should be limited to the provision of Transmission Service with the Generating Facility as the Point of Receipt for the Transmission Service.[123] Georgia Transmission asks how the pricing policy satisfies the "used and useful test"[124] if the Interconnection Customer is not required to move power from the Generating Facility across the facilities for which credits are being paid. It claims that the rate of crediting can be inappropriately accelerated if it is tied to other transmission transactions that greatly exceed the output capacity of the Generating Facility. Idaho Power and Central Maine would award credits only to an Interconnection Customer or its assignee taking Transmission Service with the Generating Facility as the source of the power. The Alabama PSC states that providing transmission credits in this manner avoids the socialization of upgrade costs in instances where the upgrades are of little or no benefit to the system.

605. Entergy insists that requiring credits to be awarded against the rates for Transmission Service taken anywhere on the Transmission Provider's Transmission System will likely lead to unneeded construction of Network Upgrades because it removes any financial discipline that the Interconnection Customer might otherwise have regarding the facilities necessary to complete its interconnection. Cinergy argues that basing the amount of credits in a given billing period on the amount of charges for Transmission Service from the Generating Facility will preserve the theoretical underpinnings of the pricing policy and restore and stabilize cash flows for the Transmission Provider.

606. Duke Energy and Progress Energy note an inconsistency between the Order No. 2003 preamble and LGIA Article 11.4.1. The latter ties credits to payments made "for Transmission Services with respect to the Large Generating Facility." Duke Energy states that this phrase should be eliminated. However, Progress Energy recommends revising Article 11.4.1 to provide that credits will be paid only from the Commercial Operation Date of the Generating Facility and for Transmission Service that is provided for power from that specific Generating Facility.

607. Some petitioners contend that the reimbursement of unused credits to the Interconnection Customer at the end of five years is unreasonable.[125] Entergy and others argue that uncoupling the repayment of transmission credits from the facility with which they are associated exacerbates the arbitrariness of the five year credit payback period. This requirement shifts investment risk from the entity in control of such investment (the Interconnection Customer) to the Transmission Provider's retail customers and is contrary to the Commission's longstanding ratemaking principles. NRECA–APPA views this as a form of incentive rate policy, the application of which the Commission previously would consider only on a case-by-case basis.

608. Georgia Transmission and NRECA–APPA contend that the crediting period should, at a minimum, be determined by the length of time it takes for the Interconnection Customer to use the credits properly applicable to its Transmission Service, whether the period is shorter or longer than five years. NRECA–APPA and others suggest that crediting over a period coterminous with the depreciation schedule of the Network Upgrades is more appropriate.

609. AEP and others are concerned that the Interconnection Customer could declare Commercial Operation of the Generating Facility but produce only token amounts of electricity during the five year period and still be eligible for a full refund. Progress Energy seeks clarification of the requirement that the Generating Facility "continue to operate." It asks whether the Generating Facility must actually put power on the Transmission System in order for the Interconnection Customer to receive credits, and asks the Commission to clarify that the LGIA allows crediting to be interrupted or terminated when the Generating Facility is not in Commercial Operation. It asks for the following clarifications: (1) That the Interconnection Customer is not entitled to transmission credits when Commercial Operation of the Generating Facility is suspended or terminated, (2) that if Commercial Operation of the Generating Facility is suspended or terminated, this will suspend the five year repayment period required in LGIA Article 11.4.1 (Refunds of Amounts Advanced for Network Upgrades), and (3) that the five year repayment period may restart only after Commercial Operation has resumed. AEP proposes that limiting the credit to actual transmission usage by the Generating Facility solves the problem of determining whether the Generating Facility is in Commercial Operation, because transmission usage is easily verified.

610. Regarding interest on unpaid credits, NYTO claims that basing the interest on Section 35.19a(a)(2)(ii) of the Commission's Regulations is excessive and not consistent with commercial bank interest rates. Southern asserts that the Interconnection Customer should not be entitled to receive interest. It claims that the third paragraph of LGIA Article 11.4 (Transmission Credits) is particularly inequitable because it requires interest to be accrued even when the upgrades are not being used. Southern adds that it should not be required to pay interest because neither the Transmission Provider nor its customers would be able to earn interest on the payments for the Network Upgrades received from the Interconnection Customer. Southern explains that the Interconnection Customer generally pays for Network Upgrades when costs for materials and labor are incurred and, consequently, the Transmission Provider is unable to utilize the funds for any other purpose and cannot earn any return on these monies.

611. SoCal Edison notes that, when the Transmission System has some available capacity, certain Network Upgrades that would otherwise be the cost responsibility of the Interconnection Customer may not ever be needed if the Interconnection Customer is able to use the available capacity as a result of a higher queued customer dropping out of the queue. SoCal Edison recommends a specific revision to the crediting provisions of LGIA Article 11 that addresses this possibility.

Commission Conclusion

612. Petitioners raise numerous objections to the provisions of Order No. 2003 concerning the Interconnection Customer's upfront payment and the mechanism for providing credits and reimbursements. However, as we

[122] *E.g.*, AEP, Alabama PSC, Ameren, Central Maine, Cinergy, Duke Energy, Entergy, Georgia Transmission, Idaho Power, NRECA–APPA, NYTO, PacifiCorp, Progress Energy, and Southern.

[123] *E.g.*, AEP, Alabama PSC, Central Maine, Cinergy, Entergy, Georgia Transmission, Idaho Power and Progress Energy.

[124] The Commission generally requires a showing that the Transmission Provider's assets are "used and useful" in providing Transmission Service before their costs can be included in transmission rates. *See* NEPCO Municipal Rate Committee v. FERC, 668 F.2d 1327, 1333 (D.C. Cir. 1981).

[125] *E.g.*, Ameren, Entergy, Georgia Transmission, NRECA–APPA, and Progress Energy.

explained above, their concerns that these provisions will lead to improper subsidies are misplaced. This is because petitioners fail to recognize that the Interconnection Customer's upfront payment, with provisions for the payment of interest, credits and reimbursements, serves not as a rate for interconnection or transmission service, but simply as a financing mechanism that is designed to facilitate the efficient construction of Network Upgrades.

613. The purpose of the upfront financial payment is twofold. First, by providing the Transmission Provider with a source of funds to construct the Network Upgrades, the upfront payment by the Interconnection Customer alleviates any delay that might result if the Transmission Provider were forced to secure funding elsewhere. Second, by placing the Interconnection Customer initially at risk for the full cost of the Network Upgrades, the upfront payment provides the Interconnection Customer with a strong incentive to make efficient siting decisions and, in general, to make good faith requests for Interconnection Service. However, the upfront payment is not a rate for service, and thus is not intended to be the means by which the Transmission Provider recovers the cost of the Network Upgrades. Rather, the Transmission Provider's right to charge for transmission service at the higher of an embedded cost rate, or an incremental rate designed to recover the cost of the Network Upgrades, provides the Transmission Provider with a cost recovery mechanism that ensures that native load and other transmission customers will not subsidize service to the Interconnection Customer.

614. Nevertheless, we find merit in the arguments of petitioners that object to certain features of the crediting and reimbursement mechanisms. These features are the right of the Interconnection Customer to receive credits for transmission service that does not include the Generating Facility as the source of the power transmitted, and the right of the Interconnection Customer to receive a full reimbursement of the outstanding balance of its upfront payment after only five years. The Commission agrees that, in both instances, these features may serve to insulate the Interconnection Customer from the consequences of its siting decision, as well as other factors that can significantly affect the cost of the interconnection, because if the Interconnection Customer continues to be a Transmission Customer (and receives credits unrelated to service from the Generating Facility at issue), it does not bear an appropriate level of risk that the Network Upgrades may be rendered unnecessary should its facility become commercially infeasible. We note that, while all Transmission Customers benefit generally from upgrades to the transmission network, all customers do not necessarily benefit equally from upgrades that may be required for a particular interconnection. To help ensure that the Interconnection Customer makes efficient and cost-effective siting decisions, we conclude that it is appropriate that credits be given only for transmission service that includes the Generating Facility as the source of the power transmitted. We therefore grant rehearing with regard to these two features as described below.

615. First, we will no longer require the Transmission Provider to provide credits to the Interconnection Customer for all of the transmission services that it takes on the system, but instead will limit credits to transmission service taken with respect to the Generating Facility. As petitioners have noted, allowing the Interconnection Customer to receive credits for services unrelated to the Generating Facility tends to shift risk from the entity in control of the investment to native load and other Transmission Customers. This shifting of risk may cause the construction of unneeded or more costly Network Upgrades. In addition, it may result in native load or other Transmission Customers having to bear the cost of the Network Upgrades in cases where the Interconnection Customer takes little additional transmission service that is associated with the new Generating Facility, or where the Interconnection Customer elects to retire the Generating Facility early. Therefore, we are restoring to Article 11.4.1 language from the NOPR LGIA that required the Transmission Provider to provide the Interconnection Customer with dollar-for-dollar credits only for the payments that are made for transmission services taken with respect to the Generating Facility.[126]

616. Second, we are allowing the Transmission Provider to choose, five years from the Commercial Operation Date of the Generating Facility, one of the following two options: (1) Reimburse to the Interconnection Customer the remaining balance of the Interconnection Customer's upfront payment plus accrued interest, or (2) continue to provide credits to the Interconnection Customer until the total of all credits equals the Interconnection Customer's initial payment for the Network Upgrades, plus interest. As discussed above, this ensures that the Interconnection Customer bears the risk associated with Network Upgrades that were built to accommodate its interconnection request and provides an incentive for efficient and cost effective siting decisions. More importantly, this modification also helps to ensure that other Transmission Customers, including the Transmission Provider's native load, will not have to bear the cost of the Network Upgrades if the Interconnection Customer ceases operation of the Generating Facility prematurely.

617. However, this revision also gives the Transmission Provider the option to credit the full amount of any customer contributed funds if it so chooses. By electing that option, the Transmission Provider can avoid the further accumulation of interest on the Interconnection Customer's upfront payment, and can charge, without credits, for the embedded cost of all transmission services taken with respect to the Generating Facility. We are substantially revising Article 11.4 to effect these changes.

618. With respect to the payment of interest, the Commission continues to believe that the Interconnection Customer is entitled to be reimbursed for all of the costs that it incurs in financing the Network Upgrades, including a reasonable estimate of the carrying cost of the upfront payment. We conclude that using Section 35.19a(a)(2)(ii) of the Commission's Regulations as the basis for the interest calculation is appropriate because it ensures that the Interconnection Customer is fully and fairly compensated for the time value of its upfront payment for the Network Upgrades that it is required to finance. Arguments that the Section 35.19a(a)(2)(ii) interest rate is not compensatory with respect to the financing that could be obtained by the Transmission Provider are not relevant here. We note, however, that if the Transmission Provider believes it can obtain financing for the Network Upgrades at a more favorable rate, it always has the option to finance the Network Upgrades itself and immediately include the associated costs in rates. In so doing, the Transmission Provider avoids having to provide credits to the Interconnection Customer and can immediately seek to

[126] Duke Energy and Progress Energy point out an inconsistency between P 730 of Order No. 2003 and the first paragraph of LGIA Article 11.4.1, and state that the phrase "for Transmission Services with respect to the Large Generating Facility" should be deleted from Article 11.4.1. However, with the change to Article 11.4.1. that we are requiring here, this phrase is now consistent with our pricing policy as revised. Therefore, we are allowing it to remain.

recover its investment costs through transmission rates.

619. On other matters, Progress Energy states that Order No. 2003 does not clearly articulate what the phrase "continue to operate" means or how it should be applied. We agree and are defining Commercial Operation in the LGIP and LGIA as "the status of a Generating Facility that has commenced generating electricity for sale, excluding electricity generated during Trial Operation." Also, we clarify that, once it achieves Commercial Operation, a generating Facility is deemed to "continue to operate" if the Interconnection Agreement between the Interconnection Customer and the Transmission Provider remains in full force and effect.

620. Progress Energy also states that Order No. 2003 does not address what happens if the Generating Facility suspends or terminates Commercial Operation before it has been completely reimbursed through transmission credits. With the changes we are making to the crediting and reimbursement provisions of Article 11.4, this issue is moot. As AEP notes, tying credits to payments for transmission services taken with respect to the Generating Facility solves the problem of determining whether the Generating Facility is in Commercial Operation, because transmission usage is easily verified. Also, the payment of a lump sum reimbursement is now at the option of the Transmission Provider whether or not the Generating Facility continues to operate after five years.

621. SoCal Edison requests clarification about credits for certain Network Upgrades that are the responsibility of a lower queued Interconnection Customer that become unneeded if a higher queued Interconnection Customer drops out of the queue. Such a situation can occur, for example, if the Transmission System has sufficient capacity to accommodate the higher queued Interconnection Customer's Generating Facility, but not enough to accommodate the lower queued Interconnection Customer's Generating Facility.[127]

622. We clarify as follows. If the lower queued Interconnection Customer chooses an In-Service Date for the Generating Facility that precedes that of the higher queued Interconnection Customer, the lower queued Interconnection Customer must be allowed to proceed using the capacity earmarked for the higher queued Interconnection Customer, to the extent possible. When the higher queued Interconnection Customer is ready to proceed, the Network Upgrades originally required for the lower queued Interconnection Customer would have to be built. Once those Network Upgrades are placed in service, the lower queued Interconnection Customer would be required to pay the associated cost. At the same time, the period would begin for crediting the amount that the lower queued Interconnection Customer has paid. However, if the higher queued Interconnection Customer ultimately drops out of the queue, then some or all of the Network Upgrades would not have to be built, eliminating at least in part the need for funding by the lower queued Interconnection Customer and for subsequent payment of credits. To address this situation, we are revising Article 11.4 to state that the crediting period begins on the later of the Commercial Operation Date or the date that the Network Upgrades are placed in service.

e. Economic Efficiency Implications of the Order No. 2003 Pricing Policy for a Non-Independent Transmission Provider

623. A number of petitioners seeking rehearing of the interconnection pricing policy claim that it provides the Interconnection Customer with poor incentives to choose an efficient location for the Generating Facility. Some petitioners also are convinced the policy will lead to inefficient expansion of the Transmission System [128] and create reliability risks.[129]

624. For example, the South Carolina PSC and some other state commissions say that inefficiencies can occur because the costs of interconnection-related Network Upgrades must be passed on to other Transmission Customers regardless of whether they actually benefit from the Generating Facility or the related Network Upgrades. The Kentucky PSC argues that the policy will shield a merchant generator from the real costs of Network Upgrades and remove incentives to locate near load to minimize the costs of upgrades. However, Old Dominion argues that the Interconnection Customer should not be expected to bear the burden of determining the least cost, most efficient approach to generator interconnections. Rather, the Commission should require the Transmission Provider and RTOs to take the lead in assisting Interconnection Customers making decisions on where and how to interconnect by developing forward-looking studies of the most efficient interconnection voltage levels and locations for new generating facilities.

625. Georgia Transmission complains that Network Resource Interconnection Service gives the Interconnection Customer little incentive to accommodate Transmission Provider planning and reliability activity because it does not require it to bear the costs of mitigating transmission-related problems that arise from its site selection. Georgia Transmission says that large numbers of alternate generation scenarios could arise from uncommitted potential Network Resources under Network Resource Interconnection Service. Georgia Transmission claims that the uncertainty created by many possible generation patterns complicates planning considerations and creates reliability risks in the operation of the Transmission System.

626. Salt River Project contends that the Commission's decision to require the Transmission Provider to refund payments made for Network Upgrades is a disincentive to upgrade transmission facilities in response to an Interconnection Request. This can result in a decrease in reliability, according to Salt River Project. Southern maintains that it is questionable whether encouraging new generation is currently a legitimate goal, given the oversupply of capacity that exists in some areas of the country, or whether the five year refund period will actually promote the development of new generation.

Commission Conclusion

627. Petitioners argue that the interconnection pricing policy will cause the Interconnection Customer to make inefficient siting decisions and require the Transmission Provider to expand and operate its Transmission System in an inefficient mannér. We disagree. With regard to the Interconnection Customer's incentives, we note that the Interconnection Customer is required to provide the up front funding to finance the cost of the Interconnection Facilities required for its interconnection. We believe this will provide the Interconnection Customer with a strong incentive to make efficient siting decisions. We note, moreover, that a number of the factors that influence siting decisions are beyond the control of both the Interconnection Customer and the Commission. Most importantly, the approval and siting of new generating facilities is ultimately under the control of state authorities.

[127] *See, e.g.*, Virginia Electric and Power Company, 104 FERC ¶ 61,249 (2003).

[128] *E.g.*, Ameren, Georgia Transmission, Kentucky PSC, Mississippi PSC, Old Dominion, Salt River Project, South Carolina PSC, and Southern.

[129] *E.g.*, Georgia Transmission and Salt River Project.

628. With regard to the implications of the pricing policy for Transmission System expansion and operation, we disagree with Georgia Transmission that the pricing policy will give rise to large numbers of uncommitted potential Network Resources that will create a reliability risk. Georgia Transmission has not cited any provisions of the LGIP, LGIA or its tariff that support its claim that the pricing policy will create a reliability risk. Network Resource Interconnection Service is intended to be comparable to the service that the Transmission Provider provides to its own generating facilities. Moreover, the operation of these generating facilities, and all Transmission Services, must be scheduled with the Transmission Provider in accordance with the Transmission Provider's established procedures. Order No. 2003 does not require a Transmission Provider to either construct or operate its Transmission System in any way that departs from its established reliability criteria and operating protocols.

629. We also disagree with Salt River Project's claim that the pricing policy will create an incentive for a Transmission Provider not to construct Network Upgrades needed for reliability. While we are not permitting the direct assignment of Network Upgrade costs by a non-independent Transmission Provider, we are providing the Transmission Provider with the opportunity to recover the higher of incremental or embedded costs. This fully protects the Transmission Provider and its other customers from having to bear the cost of Network Upgrades needed to interconnect a new Generating Facility. Thus, the "higher of" policy removes any pricing incentive for a Transmission Provider to decide, contrary to its public service obligation, not to construct Network Upgrades when necessary to maintain reliability.

630. We agree with Old Dominion that information about the most efficient locations and interconnection voltage levels for new generating facilities on the Transmission Provider's Transmission System would be useful. Although we are not requiring the Transmission Provider to develop the forward-looking studies that Old Dominion recommends, we support and encourage the Transmission Provider to make such information available to potential Interconnection Customers.

f. Credits for Network Upgrades on Affected Systems [130]

631. Numerous petitioners object to the Commission's decision to apply the pricing policy to Affected Systems.[131] They state that it is arbitrary and capricious to require the Affected System and its customers to pay for facilities needed to mitigate the harm of interconnecting the Generating Facility with a neighboring Transmission System. They note that the ANOPR and NOPR did not address this matter. NRECA–APPA protest that since the Commission's pre-Order No. 2003 policy did not address how costs are to be allocated between the Transmission Provider, the Interconnection Customer, and the Affected System Operator, there is also no precedent for the approach adopted in Order No. 2003. The Georgia PSC and others argue that reasoned decision making requires that the Interconnection Customer, not the Affected System's customers, should bear these costs. They allege that Affected System's customers will not benefit from the upgrades unless the Interconnection Customer sells the output of the Generating Facility into the Affected System's market.

632. Salt River Project asserts that the rationale to support the payment of credits when the Interconnection Customer connects directly to a Transmission Provider's system does not apply to an Affected System. It maintains that, because the Interconnection Customer is not actually requesting interconnection to the Affected System, credits are not needed to prevent the Interconnection Customer from being treated in an unduly discriminatory manner vis-à-vis the Transmission Provider's own generating facilities. Salt River Project also contends that since there are legitimate factors justifying different treatment of costs of Network Upgrades on the Affected System and those on the Transmission System to which the Interconnection Customer actually interconnects, *Entergy Services* is factually distinguishable because here the Commission requires refunds to third party systems.

633. Idaho Power, PacifiCorp, and others are concerned that an Affected System must refund the cost of any Network Upgrades to the Interconnection Customer within five years regardless of whether the Interconnection Customer pays anything toward the embedded costs of the Affected System through Transmission Service charges. NYTO and Central Maine argue that the Interconnection Customer should not receive transmission credits for Network Upgrades it funds on an Affected System if it does not take service on the Affected System.

634. APS seeks revision of LGIA Article 11.4.1 so that there is no ambiguity as to which entity is responsible for crediting the Interconnection Customer for amounts it pays to the Affected System Operator, and to make the article consistent with provisions stating that the Affected System Operator should credit the Interconnection Customer directly. APS contends this matter would be of particular concern where the Affected System Operator is non-jurisdictional.

635. Finally, Central Maine recommends that policies for Network Upgrades to Affected Systems be covered in a separate agreement rather than in the interconnection agreement.

Commission Conclusion

636. With regard to the pricing of Network Upgrades on Affected Systems, the Commission concludes, as it did in Order No. 2003, that our interconnection pricing policy as it applies to an Affected System Operator that is not independent should be consistent with the policy we adopt for the non-independent Transmission Provider. That is, the Interconnection Customer must pay upfront for any Network Upgrades needed on the Affected System, but is entitled to credits for transmission service taken on the Affected System. As we explained in Order No. 2003, our pricing policy is designed in part to promote competition in markets that may still be dominated by non-independent Transmission Providers. If the Affected System Operator is not independent, it has the same incentives that the non-independent Transmission Provider has to frustrate development of new, competitive generation.[132]

637. We note, however, that revised Article 11 now requires the Affected System Operator to provide credits to the Interconnection Customer only to the extent that the Interconnection Customer takes transmission service on the Affected System. This should alleviate the concerns, expressed by

[130] The *pro forma* LGIP and LGIA define an Affected System as an electric system other than the Transmission Provider's Transmission system that may be affected by the proposed interconnection.

[131] *E.g.*, APS, Georgia PSC, Central Maine, Georgia Transmission, Idaho Power, NRECA–APPA, NYTO, PacifiCorp, Salt River Project, and Southern.

[132] If the Affected System Operator is an independent Transmission Provider, we are allowing flexibility regarding the interconnection pricing policy (including participant funding) that the Affected System Operator may propose.

PacifiCorp, Idaho Power, NYTO, Central Maine and others, that the Interconnection Customer must be provided with credits or reimbursement even when it takes no transmission service on the Affected System and, as a result, the Affected System's customers allegedly receive no benefit from the Network Upgrades.

638. We are not revising the first sentence of LGIA Article 11.4.1, as APS requests, because it is not necessary. When read in its entirety, Article 11.4 makes clear that the Transmission Provider and the Affected System Operator are each responsible for reimbursing only the amounts that each receives from the Interconnection Customer toward the cost of Network Upgrades.

639. In response to Central Maine, Article 11.4.1 already provides that the Interconnection Customer shall enter into a separate agreement with the Affected System Operator unless, through coordination with the Affected System Operator, the Transmission Provider chooses to make separate arrangements associated with the Network Upgrades constructed on the Affected System on behalf of the Interconnection Customer.

g. Credits for the Costs of Expediting Construction

640. LGIP section 12.2 allows the Interconnection Customer to request that the Transmission Provider advance the construction of Network Upgrades that the Transmission Provider already planned to build if the Network Upgrades are needed to support the Generating Facility's In-Service Date and would not otherwise be completed in time. The Transmission Provider must use Reasonable Efforts to advance the construction of the Network Upgrades, provided the Interconnection Customer agrees to finance any associated expediting costs. The Interconnection Customer is entitled to transmission credits for any expediting costs that it finances. However, the Interconnection Customer is not responsible for financing the original cost of the Network Upgrades that the Transmission Provider was already planning to build.

641. A few petitioners [133] oppose giving the Interconnection Customer the right to have the Transmission Provider construct upgrades contained in its expansion plan before the scheduled construction date. NRECA–APPA contends that Order No. 2003 should not have included the provision that allows the Interconnection Customer to seek expedited construction because the NOPR gave no opportunity for commenters to address this issue, and because all costs, including the additional cost of expediting construction, will be borne by the customers of the Transmission Provider. Ameren and Entergy object to providing credits for the costs of expediting construction because the Interconnection Customer is the only entity that benefits from the early construction. Entergy argues that the Interconnection Customer's right to request acceleration should be limited because an expansion plan changes as system conditions change, and because an expansion might not be constructed but for the Interconnection Customer's request for acceleration of its construction. Ameren asks the Commission to clarify that the right to acceleration is only for projects for which the Transmission Provider has received final approval and has funding.

Commission Conclusion

642. In response to NRECA–APPA, we note that all of the substantive provisions in Order No. 2003 that concern the Interconnection Customer's right to accelerate the construction of Network Upgrades and the treatment of expediting costs were included in the NOPR.

643. In response to Ameren and Entergy, we conclude that it is unreasonable to require the Interconnection Customer to finance Network Upgrades that the Transmission Provider intends to construct anyway. The Transmission Provider may from time to time adjust its expansion plan. However, for purposes of this rule, we assume that any project included in the expansion plan at the time the Interconnection Facilities Study is undertaken is a project that the Transmission Provider intends to construct. Otherwise, the Transmission Provider could always claim that it did not intend to construct a project in its expansion plan. If such a project is required to meet the In-Service Date for the Interconnection Customer's Generating Facility, the Transmission Provider may require the Interconnection Customer to finance the expediting of the construction schedule for the project, but it may not require the Interconnection Customer to finance Network Upgrades that the Transmission Provider was planning to build.

h. Compensation for Line Outage Costs and Rescheduled Maintenance

644. Order No. 2003 does not permit the Transmission Provider to charge the Interconnection Customer the costs, such as increased energy costs, that the former incurs when a transmission line must be taken out of service to complete an interconnection. However, LGIA Article 9.7 provides that the Transmission Provider may direct the Interconnection Customer to reschedule Generating Facility maintenance as necessary to maintain the reliability of the Transmission System. The Transmission Provider must pay the Interconnection Customer for any direct costs that the Interconnection Customer incurs as a result of having to reschedule maintenance, including any additional overtime, breaking of maintenance contracts, and other costs above the cost the Interconnection Customer would have incurred absent the Transmission Provider's request to reschedule maintenance. However, the Interconnection Customer is not entitled to compensation if, during the twelve months before the scheduled maintenance, the Interconnection Customer modified its schedule of maintenance activities.

645. A number of petitioners argue that the Transmission Provider should be able to assign interconnection-related line outage costs to the Interconnection Customer, since the Transmission Provider must reimburse the Interconnection Customer for the costs the Interconnection Customer incurs when it must reschedule maintenance activities at the Transmission Provider's request.[134] The Alabama PSC maintains that this is a subsidy. Southern asserts that it is arbitrary and capricious and violates EPAct to require all Transmission Customers to share in these costs without considering a method of accurately quantifying them. AEP asks the Commission to consider using the cost of replacement energy as a proxy for the cost of a line outage. Even though the value of the replacement energy may not exactly match that of the displaced energy, it is a reasonable proxy and is certainly better than no compensation. The Mississippi PSC contends that these costs should be directly assigned to the Interconnection Customer because it causes them.

646. NYTO and Entergy argue that the LGIA does not provide for comparable treatment of the Interconnection Customer and the Transmission Provider. They state that it is

[133] *E.g.*, Ameren, APS, Entergy, and NRECA–APPA.

[134] *E.g.*, AEP, Alabama PSC, Entergy, Mississippi PSC, NYTO, and Southern.

unreasonable to require the Transmission Provider (or its Transmission Customers) to pay the Interconnection Customer for costs associated with rescheduling maintenance of the Generating Facility, including maintenance required to sustain reliability of the Transmission System, without the reciprocal requirement for the Interconnection Customer to pay the Transmission Provider for modifying the Transmission Provider's scheduled maintenance to accommodate the Interconnection Customer. Entergy asks the Commission to amend or remove the obligation. NYTO also asks that the Commission revise LGIA Article 9.7.1.2 (Outage Schedules) to say that the ISO, not the Transmission Owner, must pay the Interconnection Customer under an ISO Tariff.

Commission Conclusion

647. We note that, in a recent decision, the United States Court of Appeals for the DC Circuit ruled that Southern is not entitled to recover outage costs from certain Interconnection Customers because Southern's Interconnection Agreements with these customers do not specifically authorize such recovery.[135] However, the court left open the possibility that recovery of outage costs may be permissible in cases where the Interconnection Agreement specifically authorizes it. We agree that, if authorized contractually, recovery may be justified on a case-by-case basis, depending on the facts of individual cases, and will grant rehearing to allow the Transmission Provider to propose to recover line outage costs on a case-by-case basis.

648. With regard to compensation for rescheduled maintenance, we note that Order No. 2003 requires the Transmission Provider to pay the Interconnection Customer only for the nominal, direct costs of rescheduling maintenance, and only when the Interconnection Customer has not modified its schedule of maintenance activities during the year before the date of the originally scheduled maintenance. Without such a compensation requirement, the Transmission Provider could gain an undue competitive advantage over the Interconnection Customer by manipulating the maintenance scheduling process.

649. In response to NYTO's request that we modify LGIA Article 9.7.1.2 to make the ISO responsible for compensating the Interconnection Customer, we note that each RTO and ISO is free to propose such a compensation arrangement. In the interest of providing flexibility for RTOs and ISOs, we are not mandating such an approach here.

i. Transmission Provider's Recovery of Costs of Network Upgrades

650. A number of Transmission Providers are concerned that they will not have a chance to recover through transmission rates the costs of Network Upgrades.[136] Idaho Power argues that Transmission Owners should not be required to provide service for free or at a loss. The pricing policy forces the Transmission Provider or the Affected System Operator to pass the cost of transmission credits on to its native load customers to be made whole, even where the Network Upgrades may hardly be used by the Interconnection Customer. Idaho Power therefore requests that the five year payback period be eliminated.

651. Ameren argues that, due to regulatory lag, the Transmission Provider may have to pay credits for several years until the cost can be included in rates. PacifiCorp recommends that the Commission redesign the crediting provisions to prevent "trapped costs" that the Transmission Provider may never be able to recover from its retail customers. Because the Commission has left to the States the setting of bundled transmission rates, which could lead to "trapped costs" for the shareholders of integrated utilities, PacifiCorp states that it may challenge the application of Order No. 2003 to any action that it believes unlawfully imposes costs without providing a recovery mechanism.

652. NYTO contends that, at a minimum, the Commission should allow the Transmission Provider to accrue the costs of credits with interest and include them in jurisdictional rate base along with the cost of the relevant facilities when it next files with the Commission to adjust its transmission rates. This should be under the Commission's Regulations at 18 CFR 35.19a (2003), with the deferred amounts recorded in Account No. 186. NYTO also asks: (1) When would any facility costs be included in transmission rates, and would related rate revisions be required each time a new Generating Facility interconnects, and (2) why or how would a Transmission Provider provide a credit for costs that are not yet reflected in its rate base due to the imposition of a periodic rate adjustment procedure or a rate freeze?

653. SoCal Edison requests that the Commission clarify that its interconnection pricing policy is not intended to refund to the Interconnection Customer "one-time costs" that may not be allowed in rates. According to SoCal Edison, one-time costs ordinarily must be expensed as they occur. They are ineligible for recording in the plant accounts and may not otherwise be eligible for recovery in rates because they are non-recurring. If the Commission intends that one-time costs be subject to transmission credits, SoCal Edison requests that the Commission authorize a mechanism by which the Transmission Provider will be permitted to recover all prudently incurred one-time costs in future transmission rates. Otherwise, SoCal Edison seeks rehearing because such action is an unconstitutional taking in violation of the Fifth Amendment of the Constitution.

654. Duke Energy seeks clarification that Order No. 2003 does not preclude a Transmission Provider from submitting proposals with selective rate treatment options, with the understanding that the Commission has not preauthorized this type of rate treatment and that the Transmission Provider would be required to justify its proposal and address any departures from the Commission's usual practices.

655. Southern is concerned that rating agencies might view the balance of costs yet to be refunded through credits as a debt of the Transmission Provider. Southern argues that, if they do, this could cause the Transmission Provider's cost of capital to increase.

Commission Conclusion

656. The concerns raised by Ameren, Idaho Power and PacifiCorp are addressed in Order No. 2003 and they have raised no new arguments on rehearing. In response to SoCal Edison, we note that the costs that are eligible for credits are those associated with investments in long-lived facilities, which typically create one or more units of property. The prudently incurred costs of such investments are recoverable in transmission rates. For other costs that create no unit of property but are of a recurring nature, the Commission allows a representative test year expense projection for cost recovery purposes.[137] Most one-time costs, such as the costs of

[135] *Southern Company Services, Inc.* v. *FERC*, 353 F.3d 29 (DC Cir. 2003).

[136] *E.g.*, Ameren, Duke Energy, Idaho Power, NYTO, PacifiCorp, and SoCal Edison.

[137] *See, e.g.*, Southern California Edison Company, 105 FERC ¶ 61,080 (2003).

interconnection studies, are properly charged directly to the Interconnection Customer, therefore the Transmission Provider will be reimbursed for any out-of-pocket costs. The Commission's interconnection pricing policy should create few problems with regard to the recovery of one-time costs.

657. In response to NYTO, we note that the Commission has explained the process by which the cost of Network Upgrades financed by the Interconnection Customer may be included in the Transmission Provider's cost of service.[138] When the Interconnection Customer initially bears the entire cost of the Network Upgrades, the Transmission Provider, which initially bears none of the cost, clearly cannot include such cost in its rates. As we explained, the Transmission Provider cannot include the cost of the Network Upgrades in its transmission rates until it has provided credits to the Interconnection Customer, and as long as any part of the cost of the Network Upgrades remains the responsibility of the Interconnection Customer, that part of the cost cannot be recovered in transmission rates. This means that while all other transmission customers have access to the network, which includes the new Network Upgrades, they do not have to bear a full share of the cost responsibility until the crediting process is complete. In this regard, the accrual of interest is comparable to an Allowance for Funds Used During Construction, which recognizes a time value of funds used by the Transmission Provider for expansion prior to their inclusion in rate base.

658. In response to Southern, we do not believe rating agencies will interpret the obligation to provide transmission credits as creating significant risk exposure for the Transmission Provider. Having granted rehearing regarding certain features of the crediting mechanism, the Transmission Provider now is under no obligation to provide credits or a reimbursement to the Interconnection Customer except to the extent that it takes Transmission Service with respect to the Generating Facility. In addition, the Transmission Provider always has the option to finance the Network Upgrades itself and immediately seek to recover the associated costs through its transmission rates.

659. In response to Duke Energy, we will continue to require non-independent Transmission Providers to adhere to the Commission's "higher of" pricing policy.

j. Transmission Provider's Recovery of Its Costs of Interconnection Facilities[139]

660. In Order No. 2003, the Commission ordered Transmission Providers in the future to remove from transmission rates the costs of Interconnection Facilities that were constructed after March 15, 2000 to interconnect generating facilities that the Transmission Providers owned on the effective date of the order.

661. TDU Systems and TAPS object to the Commission's decision to allow the Transmission Provider to continue to recover through transmission rates the costs of certain Interconnection Facilities constructed before March 15, 2000. TDU Systems asserts that Order No. 2003 does not require comparable rate treatment of the costs of the Transmission Provider's own Interconnection Facilities and those of unaffiliated Interconnection Customers in a timely manner. The Commission should require the Transmission Provider in its compliance filing to explain its past interconnection-related cost allocation and rate design practices and, if necessary, submit a separate compliance filing to remedy any non-comparability by a date certain. TDU Systems further proposes that, if the costs at issue are not substantial, then a single rate readjustment should suffice, but if the costs are large, a phase-in period might be necessary.

662. TAPS objects to continued rate base treatment (grandfathering) for the Transmission Provider's Interconnection Facilities constructed before March 15, 2000, along with Interconnection Facilities associated with generation the Transmission Provider has divested. It claims that some generating facilities have been divested without their Interconnection Facilities, which remain in rate base. Some utilities may have maintained records that make it difficult to isolate costs associated with Interconnection Facilities. TAPS therefore urges the Commission to require each Transmission Provider to demonstrate that removal of its Interconnection Facilities from rate base would be unjust and unreasonable. TAPS also urges the Commission to reject arguments that the lack of separate bookkeeping records for such facilities excuses noncompliance. Utilities can make estimates, as they do routinely in their ratemaking processes.

Commission Conclusion

663. The arguments presented by TAPS and TDU Systems are not persuasive. First, with respect to the Transmission Provider's recovery of Interconnection Facility costs, the Commission's pricing policy treats the Transmission Provider and the Interconnection Customer in a fully comparable manner. Second, any Interconnection Facility costs that the Transmission Provider incurred before March 15, 2000, and that remain in the Transmission Provider's rate base on the effective date of Order No. 2003, could be hard to identify (because they are not recorded in separate accounts) and are likely to be small (*i.e.*, largely depreciated). Also, the complexity of the rate adjustments does not end with the identification of plant balances. The rate adjustments would require adjustments to income taxes as well as allocation of operation and maintenance expenses, all of which require subjective assumptions. Our experience with such cost of service calculations indicates that the benefits of adjusting transmission rates to remove these costs are outweighed by the administrative burden that such adjustments would entail. Finally, petitioners may raise in appropriate rate proceedings the claim that some Transmission Providers retain in rate base interconnection facilities associated with divested generation facilities.

k. Generator Balancing Service Arrangements

664. LGIA Article 4.3 requires the Interconnection Customer to make appropriate generator balancing service arrangements before submitting any schedules for delivery service that identify the Generating Facility as the point of receipt for the scheduled delivery. The Interconnection Customer is responsible for ensuring that the Generating Facility output matches the scheduled delivery, consistent with applicable scheduling requirements. It must also arrange for the supply of energy when there is a difference between the actual output and the scheduled delivery. Article 4.3 allows the Interconnection Customer to make generator balancing service arrangements in a variety of ways.

665. Some petitioners object to the LGIA requirement that the Interconnection Customer arrange for balancing service before submitting a

[138] *See* Southern Company Services, 98 FERC ¶ 61,328 (2002).

[139] *The pro forma* LGIP and LGIA define Interconnection Facilities as all facilities and equipment between the Generating Facility and the Point of Interconnection, including any modification, addition or upgrades that are necessary to physically and electrically interconnect the Generating Facility to the Transmission Provider's Transmission System. Interconnection Facilities are sole use facilities and shall not include Distribution Upgrades, Stand Alone Network Upgrades or Network Upgrades.

schedule for delivery service.[140] American Wind Energy and TAPS state that, in effect, the provision requires a new Ancillary Service under the OATT. TAPS argues that this should be considered in the Standard Market Design rulemaking, in which the Commission is proposing a new Transmission Service Tariff.[141] TAPS further states that, while the Commission on occasion has approved generator balancing services as additions to some Transmission Providers' OATTs, this has been the exception.[142] American Wind Energy asks why the Commission has decided to reverse its decision to allow RTOs the flexibility to determine Ancillary Service requirements. It also asserts that Order No. 2003 does not address whether the new requirement's "point of receipt for such scheduled energy" is consistent with Network Integration Transmission Service under the OATT or with existing bandwidth exceptions and intermittent scheduling rules the Commission has approved. The requirement will have a discriminatory effect on wind and other intermittent resources and thus will thwart the Commission's objective of eliminating bias against new market entrants. Accordingly, the Commission should delete LGIA Articles 4.3 (Generator Balancing Service Arrangements) and 4.3.1.

666. TAPS alleges that the Commission has failed to consider the effect of the balancing requirement on the Interconnection Customer. TAPS offers the example of an Interconnection Customer in an RTO with an out-of-Control Area Generating Facility that will be required to pay both the generator balancing service arrangements charge to the Control Area in which the facility is located and an energy imbalance charge for mismatches between generation and load within the Control Area(s) where the load is located. TAPS further questions why the generator balancing service arrangements requirement is imposed only on a new Generating Facility. If TDU Systems objects to having to adhere to the new requirement whether or not there is a net imbalance on the Transmission Provider's Transmission System claiming that this could unjustly enrich the Transmission Provider.

[140] *E.g.*, American Wind Energy, TAPS, and TDU Systems.

[141] Remedying Undue Discrimination Through Open Access Transmission Service and Standard Electricity Market Design, Notice of Proposed Rulemaking, 67 FR 55542 (Aug. 29, 2002), FERC Stats. & Regs. ¶ 32,563 (2002).

[142] TAPS cites Florida Power Corp., 89 FERC ¶ 61,263 (1999) as one example.

Commission Conclusion

667. The petitioners' objections to the balancing service requirement of Article 4.3 are well taken. Therefore, we are granting American Wind Energy's request for rehearing and are deleting Article 4.3 (and Article 4.3.1) from the LGIA. We note that the purpose of this article was not to establish a new requirement for balancing service or to preclude any options currently available to the Interconnection Customer. However, we now recognize that this requirement is more closely related to delivery service than to Interconnection Service. Because delivery service requirements are addressed elsewhere in the OATT, the balancing service requirement, and requirements related to Ancillary Services generally, should not appear in the LGIA.

l. Miscellaneous Issues Regarding Interconnection Pricing for the Non-Independent Transmission Provider

668. Cinergy seeks clarification that LGIA Article 5.19.3 (Modification Costs) does not eliminate the ability of the Transmission Provider to charge the Interconnection Customer for the cost of upgrades needed to provide Transmission Service. It requests modification of the following language in Article 5.19.3: "Interconnection Customer shall not be directly assigned the costs of any additions, modifications, or replacements that Transmission Provider makes to the Transmission Provider's Interconnection Facilities or the Transmission System to facilitate the interconnection of a third party to Transmission Provider's Interconnection Facilities or the Transmission System, or to provide Transmission Service to a third party under the Transmission Provider's Tariff." Cinergy states that this language could be read to eliminate the application of the Commission's "higher of" policy to transmission delivery service.

669. Southern requests that LGIA Article 5.19.3 be clarified to state: "Interconnection Customer shall be responsible for the costs of any such additions, modifications, or replacements to the Transmission Provider's Interconnection Facilities or the Transmission System to the extent they are necessitated by Interconnection Customer's additions, modifications, or replacements to Interconnection Customer's Interconnection Facilities."

670. Cinergy argues that the LGIA contemplates the possibility of the Generating Facility failing to achieve Commercial Operation ten years or more in the future. However, it would be practically impossible to do the analyses necessary to retroactively determine which other generating facilities made use of the upgrades that were funded by the Interconnection Customer with the failed project. It claims that this would not be the case with Stand Alone Network Upgrades, such as new switchyard facilities constructed for the Interconnection Customer, because they would be easy to track. Cinergy asks the Commission to provide for refunds to a canceling Interconnection Customer if Stand Alone Network Upgrades are later used by another Interconnection Customer.

671. Duke Energy and EEI contend that Order No. 2003 is not clear about the provision of credits for the non-usage sensitive portion of transmission charges. Duke Energy is concerned that the language in Order No. 2003 and in the LGIA does not clearly delineate the crediting options the Commission has approved, and that this will lead to controversy. It recommends that the Commission clarify that credits are to be applied in full to reservation charges set forth in OATT Schedule 7—Long-Term Firm and Short-Term Firm Point to point Transmission Service, Schedule 8—Non-Firm Point to point Transmission Service, and to the basic transmission charges based on Attachment H-Annual Transmission Revenue Requirement for Network Integration Transmission Service. However, credits should not be applied to other transmission-related charges (*e.g.*, line losses, Ancillary Services) in other provisions of the OATT. Duke Energy claims that this will ensure that the phrase "usage sensitive charges" does not refer to selective cost components of the transmission revenue requirement that underlies the basic transmission charge.

672. Idaho Power asserts that the Commission does not justify departing from its prior policy of making credits payable only to the Transmission Customer taking service from the Generating Facility and instead has made credits a fungible commodity that may be assigned to anyone.

Commission Conclusion

673. Cinergy states that Article 5.19.3 could be read to eliminate the application of the Commission's "higher of" policy to the delivery component of transmission service. The Commission's intent was to ensure that the Interconnection Customer is not directly assigned the costs of any additions, modifications or replacements that a Transmission Provider makes to its Interconnection Facilities or

Transmission System to facilitate the interconnection to the Transmission Provider's Interconnection Facilities or Transmission System or to provide delivery service to a third party. To eliminate confusion, we are adding the words "to a third party" before the phrase "under the Transmission Provider's Tariff" in Article 5.19.3. Southern's requested modification of Article 5.19.3 is a broad statement of cost responsibility with implications that are more appropriately addressed on a case-by-case basis.

674. Cinergy argues that if the Interconnection Customer's Generating Facility does not achieve Commercial Operation, the Interconnection Customer should be entitled to a credit for only the cost of Stand Alone Network Upgrades constructed for that Generating Facility, when the Stand Alone Network Upgrades are later used by it or another Generating Facility. Cinergy argues that it is difficult to determine retroactively which Generating Facility, if any, made use of Network Upgrades that were constructed, perhaps several years earlier, for an Interconnection Customer that subsequently cancelled its Generating Facility. We do not agree. We recognize that such determinations may require judgment. However, the Transmission Provider should be able to estimate any savings in Network Upgrade costs that may accrue to a subsequent Generating Facility due to the presence of the earlier Network Upgrades. When such savings can be demonstrated, the original Interconnection Customer is entitled to a credit.

675. Duke Energy makes a valid point with regard to credits for the non-usage sensitive portion of transmission charges, and we so clarify. That is, credits are to be applied in full to reservation charges set forth in OATT Schedule 7—Long-Term Firm and Short-Term Firm Point to Point Transmission Service, Schedule 8—Non-Firm Point to Point Transmission Service, and to the basic transmission charges based on Attachment H—Annual Transmission Revenue Requirement for Network Integration Transmission Service.

676. We disagree with Idaho Power, however. The LGIA explicitly allows the Interconnection Customer to assign its rights to credits to any person. These are valuable rights whose value is maximized when they are assignable. Moreover, the Interconnection Customer, as owner of the Generating Facility, is rarely the customer that takes transmission delivery service. For this reason, effective implementation of the crediting provision requires that the credit rights be assignable.

m. Interconnection Pricing Policy for the Independent Transmission Provider

677. The Commission stated in Order No. 2003 that it is continuing to allow flexibility, including participant funding, regarding the interconnection pricing policy that an independent Transmission Provider may propose. In addition, the Commission stated that it will permit an "independent administrator" to implement, for a one year transition period before the start of RTO or ISO operations, a participant funding policy for the Network Upgrades needed for generator interconnections. Any such independent administrator must first be approved by the Commission and the affected states, and it must perform transmission planning and related cost allocation for the regional Transmission System. The Commission invited a Regional State Committee to establish criteria that an independent entity would use to determine which Transmission System upgrades should be subject to a participant funding requirement.

678. Numerous petitioners contend that allowing pricing flexibility for an independent Transmission Provider, but not a non-independent Transmission Provider, is unduly discriminatory.[143] Others object to allowing an independent Transmission Provider to use participant funding.[144] Some raise issues about the Commission's decision to allow an independent administrator to implement participant funding during a transition period.[145]

679. Some petitioners argue that allowing flexibility only for an independent Transmission Provider causes a similarly situated customer not to be treated in a comparable manner. They claim that retail customers of the non-RTO or non-ISO Transmission Provider must pay for the costs of Network Upgrades, while retail customers of an independent Transmission Provider do not. Idaho Power asserts that while the Commission recognizes that participant funding is just and reasonable, it ignores this determination for some public utilities based solely on their identity as non-independent Transmission Providers. This contravenes the FPA requirement that all public utilities are entitled to the same just and reasonable standard. Entergy recommends the continued use of the system-wide benefits test to mitigate inequitable cost-shifting until the Commission authorizes the Transmission Provider to implement participant funding or such other funding as may be requested by an RTO or ISO.

680. Old Dominion complains that participant funding for independent Transmission Providers is discriminatory because it creates a disincentive for the Generating Facility to be located in an RTO that opts for participant funding, since participant funding is more favorable to Transmission Providers. Participant funding limits the Interconnection Customer's compensation to Firm Transmission Rights for the amount of increased transfer capability that results from the Network Upgrades the Interconnection Customer pays for. In contrast, an Interconnection Customer locating its Generating Facility in a non-RTO region would recover the full costs of the Network Upgrades through credits.

681. The Georgia PSC and other petitioners contend that the interconnection pricing policy is unnecessary to prevent undue discrimination, which has not been shown to exist in the Southeast. The North Carolina Commission and the Alabama PSC view Order No. 2003 as an improper attempt to coerce by indirect means participation in an independent transmission organization when the Commission cannot impose such a requirement directly.[146] Salt River Project asserts that requiring participation in an RTO should not be the Commission's answer to Order No. 2003's inefficiencies in siting and unfair cost subsidization.

682. Entergy and others argue that mere administrative convenience does not warrant adopting a generic pricing approach that imposes a penalty on customers outside an RTO, when the justness and reasonableness of the facilities at issue can be evaluated by the Commission on a case-by-case basis under the FPA. The North Carolina Commission asserts that the Commission should modify its transmission pricing policy to provide that the cost of upgrades will be borne by those causing the upgrades or expansions if an independent review of those cost allocations is conducted by a third party, such as the Commission,

[143] *E.g.*, Arkansas PSC, Entergy, Georgia PSC, Kentucky PSC, Idaho Power, Mississippi PSC, North Carolina Commission, NYTO, Old Dominion, Progress Energy, Salt River Project, South Carolina PSC, and Southern.

[144] *E.g.*, TAPS and TDU Systems.

[145] *E.g.*, Arkansas PSC, EEI, TAPS, and TDU Systems.

[146] The Alabama PSC cites *National Fuel Gas Supply Corp.* v. *FERC*, 909 F.2d 1519, 1522 (DC Cir. 1990).

upon request. Progress Energy proposes that an independent, impartial entity such as the state regulatory body or state-appointed administrator could review the criteria for participant funding and related cost allocations.

683. The Arkansas PSC maintains that the Commission should allow participant funding whenever there is an independent administrator to implement transmission planning, cost determination and beneficiary assessment procedures. It therefore requests that the Commission eliminate the fixed time frame for transition to RTO approval, as well as the ultimate requirement of RTO implementation as the *quid pro quo* for use of participant funding. This will mitigate any detrimental effect on retail customers. EEI seeks clarification as to whether the Commission intends to allow participant funding for a transition period beginning on the effective date of Order No. 2003 or after approval of an independent administrator by the Commission and the affected states, or after the start of RTO or ISO operations.

684. TAPS and TDU Systems oppose reliance on an independent administrator. It would likely be working based on the existing Transmission Provider's plans and would be too susceptible to the Transmission Provider's influence, since it would not be involved in the day-to-day operation of the Transmission System or have first-hand experience with the transmission facilities. This could also reduce the incentive for a Transmission Owner to join an RTO or ISO. In the alternative, the Commission should clarify that the one year transition deadline will be strictly enforced with retroactive transmission crediting where necessary.

685. TAPS and other petitioners assert that participant funding for an independent Transmission Provider lacks a proven track record or a solid theoretical foundation and is inconsistent with the Commission's April 28, 2003 White Paper.[147] TAPS urges instead that the costs of Network Upgrades be rolled in, leaving room for a form of participant funding where the upgrade to integrate new generation is outside the scope of the plan devised to meet regional needs. Old Dominion requests that, even in RTO regions, the cost of upgrades be rolled in only if the new generation and transmission facilities will actually benefit all customers. Firm Transmission Rights associated with increased transfer capability should be allocated to load if the Transmission Provider allocates the costs of the upgrades to load, or allocated to the Interconnection Customer if the Transmission Provider associates the costs of the upgrades with the Generating Facility.

686. NRECA–APPA asks that the Commission state clearly that RTOs and ISOs have the obligation to plan Network Upgrades to meet both the reliability and economic needs of their customers and that they must provide rolled-in treatment for both kinds of transmission upgrades. If an RTO or ISO plans only reliability upgrades, and thus leaves it to the market to develop all Network Upgrades required to relieve congestion, Order No. 2003 is arbitrary and capricious.

687. TDU Systems asserts that allowing RTOs and ISOs to adopt participant funding violates the FPA by effectively delegating to Regional State Committees (RSC) determinations of when participant funding would be acceptable unless an RSC's role in setting criteria for the allocation of costs of Network Upgrades is advisory only.]

688. NRECA–APPA asks the Commission to clarify that Order No. 2003 does not prematurely establish a role for RSCs. NRECA–APPA states that the role of RSCs, if any, should be determined in the Commission's SMD rulemaking. If the Commission does give the RSCs a role in this rulemaking, NRECA–APPA asks that the Commission clarify that any criteria for participant funding to be established by the RSCs may not be inconsistent with NRECA–APPA's position on transmission cost allocation.

689. NYTO states that the failure to grandfather existing Commission-approved ISO interconnection policies could result in a waste of the tremendous efforts undertaken to resolve interconnection issues within an ISO service area.

690. Duke Energy seeks clarification that the Commission does not intend to prejudge the pricing mechanisms that a Transmission Provider may submit to the Commission as alternatives to the participant funding approach discussed in Order No. 2003.

Commission Conclusion

691. We disagree that it is unduly discriminatory to allow an independent Transmission Provider to propose innovative cost recovery methods, including participant funding, while requiring a non-independent Transmission Provider to continue to use more traditional pricing required by Order No. 2003 for new interconnections. This different treatment is fair because the two types of Transmission Providers are not similarly situated. As we have explained, when implemented by an independent Transmission Provider which does not have an incentive to discourage new generation by competitors, new cost recovery methods including participant funding can yield efficient competitive results. However, because of their inherent subjectivity, new approaches such as participant funding could allow a non-independent Transmission Provider to propose methods that frustrate the development of new generating facilities that will compete with its own. For example, because RTOs and ISOs are independent, and neither own nor have affiliates that own generating facilities, we have less concern that existing utility-owned generating facilities will be favored over new generating facilities or that utilities will "gold plate" their systems at the Interconnection Customer's expense. The Commission gives some deference to RTOs and ISOs in many areas, not just interconnection, because they have no incentive to administer the Transmission System in a discriminatory manner.

692. In addition, as we explained above, an independent Transmission Provider is in a position to implement a policy of direct assignment for Network Upgrades without violating our prohibition on "and" pricing. For example, we have permitted the direct assignment of Network Upgrade costs by an independent Transmission Provider when the Interconnection Customer receives well-defined congestion rights in return.[148] In this case, the customer is not paying twice for the same service but rather is paying separate charges for separate services.

693. We do not view our policy as penalizing the utility that does not join an RTO or ISO. The purpose of the policy is to ensure a level playing field. Indeed, Order No. 2003 pricing for new interconnections benefit the Transmission Customers of such a utility by increasing the supply of competitively priced power that might not otherwise be available and by enhancing Transmission System reliability.

694. Continued reliance on the use of evidentiary proceedings, case-by-case adjudication of Interconnection Requests, or other third party review procedures will not ensure that new

[147] White Paper: Wholesale Power Market Platform, Docket No. RM01–12–000 (Apr. 28, 2003)(*White Paper*).

[148] *See* Pennsylvania-New Jersey-Maryland Interconnection, 81 FERC ¶ 61,257 at 62,259–60 (1997), *order on reh'g. and clarification*, 92 FERC ¶ 61,282 at 61,955–56 (2000), *remanded on other grounds sub nom. Atlantic City elec. Co.* v. *FERC*, 295 F.3d 1 (DC Cir. 2002).

interconnections are completed in a timely manner by the non-independent Transmission Provider. Speeding up the interconnection process is a primary goal of this proceeding. Administrative review of complex technical matters is costly and time consuming. In today's competitive power market environment, allowing a Transmission Provider that is also a competitor in the wholesale power market to delay competitive entry or to propose subjective and potentially discriminatory pricing policies is unacceptable. Therefore, we continue to require the non-independent Transmission Provider to adhere to the Commission's "higher of" pricing policy.

695. Contrary to the views of TAPS, TDU Systems, NRECA-APPA, and others, Order No. 2003 does not prescribe specific policies for RTOs and ISOs. In particular, we are not determining which types of transmission expansion projects should be participant funded or how any Firm Transmission Rights might be allocated to the Interconnection Customer. Order No. 2003 does not require an RTO or ISO to adopt a traditional pricing policy for projects that provide a system-wide benefit. The Commission has stated that it is allowing flexibility for an independent Transmission Provider to adopt policies of its choosing, subject to Commission approval. This is reasonable in light of the RTO's or ISO's independence and representative governance structure. If entities wish to object to specific RTO or ISO proposals, including the role of RSCs in setting criteria for the allocation of costs of Network Upgrades, they may do so in the compliance filing proceeding.

696. With respect to the implementation of participant funding by an independent administrator, we deny the Arkansas PSC's request that the Commission eliminate the maximum one year transition period to an RTO or ISO. In addition, we will continue to permit an "independent administrator" to implement, for a one year transition period before the start of RTO or ISO operations, a participant funding policy for the Network Upgrades needed for generator interconnections. Any such independent administrator must first be approved by the Commission and the affected states, and it must perform transmission planning and related cost allocation for the regional Transmission System. Although an independent administrator alleviates many of our concerns about undue discrimination, we do not believe that an independent administrator provides an effective long-term solution to the problem of transmission planning and cost allocation, given its limited authority and what is likely to be an ongoing need to obtain and verify information from the Transmission Provider. However, we do not agree with TAPS and TDU Systems that an independent administrator would be so susceptible to Transmission Provider influence that its decisions would be compromised.

697. Finally, in response to EEI, the one year transition period for an independent administrator begins on the effective date of the Commission's order approving the independent administrator or the effective date of this order, whichever is later.

3. Commission Jurisdiction Under the Federal Power Act

698. Sections 205 and 206 of the FPA require the Commission to address and remedy undue discrimination by public utilities. The record underlying Order No. 888 showed that public utilities owning or controlling jurisdictional transmission facilities had the incentive to engage in, and had engaged in, unduly discriminatory transmission practices. Because interconnection is an essential element of Transmission Service that is required to be provided under the OATT, the Commission concluded in Order No. 2003 that it may order generic interconnection terms and procedures under its authority to remedy undue discrimination and preferences under Sections 205 and 206 of the FPA.[149]

699. It is evident that the Commission did not state clearly enough its intention with regard to jurisdiction and the applicability of Order No. 2003 and, as a result, many of the petitions for rehearing are based on a misunderstanding. The jurisdiction asserted by the Commission in Order No. 2003 is identical to that asserted in Order No. 888 and affirmed by the Supreme Court in *New York* v. *FERC*.[150] Further, it is consistent with the recent *Detroit Edison Co.* v. *FERC* case, which interpreted *New York* v. *FERC*.[151]

700. There is no intent to expand the jurisdiction of the Commission in any way; if a facility is not already subject to Commission jurisdiction at the time interconnection is requested, the Final Rule will not apply. Thus, only facilities that already are subject to the Transmission Provider's OATT are covered by this rule. The Commission is not encroaching on the States' jurisdiction and is not improperly asserting jurisdiction over "local distribution" facilities. This should address most, if not all, of the arguments that the Commission is overreaching its jurisdiction.

a. The Detroit Edison Case Precedent

Rehearing Requests

701. Several petitioners cite the recent *Detroit Edison Co.* v. *FERC* case for the proposition that the Commission lacks the jurisdiction to make Order No. 2003 applicable in the manner set forth in the order.[152]

702. Specifically, NYTO argues that *Detroit Edison* "exhaustively considered the scope of the Commission's authority with respect to distribution facilities." It says that the court rejected the proposition that a state cedes jurisdiction over unbundled retail distribution if it unbundles retail service or if a public utility voluntarily provides such unbundled service. *Detroit Edison*, NYTO continues, made clear that "there are no FERC jurisdictional distribution facilities." As a result, states have jurisdiction over the terms, conditions, and cost allocations related to distribution-level interconnections.

703. The North Carolina Commission says the Commission's jurisdictional claims are untenable in light of the ruling in *Detroit Edison*. There the court held that "when a local distribution facility is used in a wholesale transaction, FERC has jurisdiction over that transaction pursuant to its wholesale jurisdiction under FPA § 201(b)(1)."[153] When such a facility is used to deliver energy to a bundled or unbundled retail customer, however, the Commission lacks any authority over such a facility and the state has sole jurisdiction over that transaction.[154] The North Carolina Commission concludes that because Order No. 2003 is a generic pronouncement based on Commission jurisdiction over Transmission Service, and is not limited to wholesale transactions, it exceeds the Commission's statutory jurisdiction.

704. In addition, LPPC and the New York PSC argue that the Commission's assertion of jurisdiction for "dual use" facilities is inconsistent with *Detroit Edison*, which rejected the idea that the Commission may exercise jurisdiction over local distribution facilities because part of those facilities are used in an otherwise Commission-jurisdictional manner. Avista argues that, in light of the holding in *Detroit Edison*, the

[149] Order No. 2003 at PP 18–20.

[150] *TAPS* v. *FERC*, 225 F.3d at 696. (affirming the Commission's assertion of jurisdiction in Order No. 888).

[151] 334 F.3d 48 (DC Cir. 2003) (*Detroit Edison*).

[152] *Id.*

[153] *Id.* at 51.

[154] *Id.*

Commission should recognize that the States have jurisdiction with respect to new interconnections to dual use "distribution" facilities and that, if such interconnection is with respect to unbundled retail distribution service, the state's jurisdiction is exclusive.

Commission Conclusion

705. Contrary to arguments made by petitioners, *Detroit Edison* does not prohibit the Commission from exercising jurisdiction in the manner intended in Order No. 2003. That case did not overrule *TAPS*, where the Supreme Court affirmed the Commission's jurisdiction, and since the Commission is asserting no jurisdiction beyond what it asserted in Order No. 888, Order No. 2003 cannot violate *Detroit Edison*.

706. In *Detroit Edison*, the court prohibited the Commission from asserting *exclusive* jurisdiction over local distribution facilities used to provide unbundled retail distribution. In fact, the court in *Detroit Edison* contrasted the Commission's lack of jurisdiction over local distribution facilities used to deliver energy to an unbundled retail customer with the Commission's jurisdiction over the use of a local distribution facility for wholesale sales, and stated that "when a local distribution facility is used in a wholesale transaction, FERC has jurisdiction over that transaction pursuant to its wholesale jurisdiction under FPA section 201(b)(1)."[155] With respect to "distribution" facilities, Order No. 2003 applies when the facilities are subject to a Commission-approved OATT and the purpose of the interconnection is to make wholesale sales.[156] We thus conclude that the "distribution" interconnections to which Order No. 2003 applies are within the Commission's statutory authority.

b. Transmission Provider Facilities Subject to Order No. 2003

Rehearing Requests

707. The North Carolina Commission challenges the Commission's statement that it is not extending its jurisdiction to any facility not already under its jurisdiction under a Commission-filed OATT.

708. LPPC asks how one determines whether a particular facility is under the OATT. It argues that the Commission should use the seven-factor test set forth in Order No. 888 to determine whether facilities used to deliver electric energy directly to an end user are under its jurisdiction or are "local distribution" facilities under state jurisdiction.

709. NARUC argues that it may not be easy to determine whether a given distribution line is Commission-jurisdictional. The Transmission Owner's uniform system of accounts may not clearly indicate whether a given distribution line is under the OATT. Accordingly, the Commission should provide a method for determining when specific distribution facilities are covered by an OATT. NARUC's members are concerned that "in cases where distribution facilities are known to be included in an OATT, but it is difficult or impossible to identify whether specific facilities are covered by an OATT, some Parties may assert and the Commission may conclude that all the Transmission Owner's distribution facilities are covered by the OATT because distribution costs are recovered under the OATT on a rolled in basis." Accordingly, the Commission must clarify that unless distribution facilities are clearly identified as being subject to the OATT, all interconnections to those facilities are within state jurisdiction.

Commission Conclusion

710. Order No. 2003 applies to interconnections to the facilities of a public utility's Transmission System that are subject to the public utility's OATT at the time the interconnection is requested. Facilities subject to the OATT are: Transmission facilities used to transmit electric energy in interstate commerce either at wholesale or for unbundled retail sales; and "distribution" facilities that are used for wholesale sales in interstate commerce.[157] Order No. 2003 thus applies to a request to interconnect to a public utility's "distribution" facilities only if those facilities are used to deliver electric energy in interstate commerce to accommodate wholesale sales pursuant to a Commission-filed OATT. An Interconnection Customer is entitled to use the LGIP and LGIA to request interconnection to "distribution" facilities owned, controlled, or operated by the Transmission Provider or the Transmission Owner, or both, but only if those distribution facilities are used to provide Transmission Service under an OATT that is on file at the Commission at the time of the Interconnection Request and the interconnection is for the purpose of facilitating a jurisdictional wholesale sale of electricity.

711. LPPC requests that the Commission apply the seven-factor test to distinguish "local distribution" and transmission facilities. As explained above, since we are asserting jurisdiction only over facilities that are already subject to an OATT, the availability of the facilities under a Commission-approved OATT, and not their nominal classification, determines eligibility for Commission-jurisdictional interconnection.[158]

712. In response to NARUC's request that there be a readily discernible method for determining which facilities are subject to an OATT, we note first that in most cases there will be no controversy about whether a facility is under the OATT. When there is, however, there is no simple method of deciding what facilities are under an OATT. Even if the Interconnection Customer consults the Transmission Provider's rate filings, it might be unable to determine whether a facility to which it seeks interconnection is subject to the OATT. We conclude that the only reasonable method for identifying which facilities are subject to a Transmission Provider's OATT is to rely on the Transmission Provider in the first instance to make this information available to the Interconnection Customer during the Scoping Meeting or earlier. If the Interconnection Customer disagrees with the Transmission Provider's conclusion that the facility in

[155] *Detroit Edison*, 334 F.3d at 51 (citing Order No. 888 and *TAPS* v. *FERC*). *See also TAPS* v. *FERC*, 225 F.3d at 696 (explaining that Section 201(a) of the FPA "makes clear that all aspects of wholesale sales are subject to federal regulation, regardless of the facilities used").

[156] Order No. 2003 at P 804.

[157] As explained in Order No. 2003 at P 803, the term "distribution" is usually used to refer to lower voltage lines that are not networked and that carry power in one direction. The term "local distribution" is a legal term, and under Section 201(b)(1) of the FPA, the Commission lacks jurisdiction over "local distribution" facilities. The court in Detroit Edison used the terms "distribution" and "local distribution" interchangeably. The court recognized that certain "distribution" facilities serve a dual use function (*i.e.*, they are used for both wholesale and retail sales) and that there could be Commission-jurisdictional uses of "local distribution" facilities; in such case, the court viewed the Commission's jurisdiction as extending only to the use of the facilities for purposes of the wholesale transaction. Detroit Edison, 334 F.3d at 51. Consistent with Detroit Edison, the Final Rule applies to a dual use facility only if the facility is already part of a Commission-filed OATT and the interconnection is for the purpose of making a jurisdictional sale of electric energy for resale in interstate commerce.

We note that some facilities labeled by a utility as "distribution" may actually carry out a transmission rather than a local distribution function and thus would be subject to Commission jurisdiction for accommodating wholesale as well as unbundled retail transactions. In this circumstance, we do not view the label as controlling.

[158] Pursuant to Order No. 888, the seven-factor test may be used to determine what facilities are jurisdictional to states and what facilities are or are not subject the Commission's open-access requirements. Order No. 888 at p. 31,770–71.

question lies within or outsidethe Transmission Provider's OATT, it should bring the issue to the attention of the Commission.

c. Interconnections to Low-Voltage Facilities for the Purpose of Making Wholesale Sales

Rehearing Requests

713. NARUC argues that Order No. 2003 violates the "bright line" distinguishing jurisdictional transmission from nonjurisdictional local distribution. It claims that Order No. 2003 adopts a murkier "dual use" theory that will hinder the development of a distributed generation market. NARUC asserts that the Commission has created the inaccurate impression that there is a significant amount of "distribution" facilities over which it has authority. While the Commission concedes that Order No. 2003 does not apply to any facility not already under its jurisdiction under an OATT at the time the interconnection request is made, NARUC believes this is insufficient. Instead, NARUC believes that the Commission should admit that because the States are best situated to secure the safe, efficient, and reliable interconnection of generators to state-jurisdictional distribution systems, they should continue to have that authority.

714. NRECA–APPA and Salt River argue that the Commission should disclaim jurisdiction over distribution-level interconnections as a matter of policy and that the LGIP and LGIA are designed with the high voltage system in mind and are inappropriate for distribution-level interconnections and smaller distribution companies with fewer resources. Additionally, NRECA–APPA argues that Order No. 2003 does not adequately address commenters' concerns that the Commission lacks the staff, experience, or expertise to oversee distribution-level interconnections.

715. NRECA–APPA also argues that the Commission's regulation of distribution-level interconnections will not encourage the development of new distribution-level generation. The exception for distribution-only facilities is extremely limited and "is in fact a one-shot deal." For example, once a generator interconnects, if a non-public utility agrees to provide wheeling service over a theretofore distribution-only facility, it becomes a public utility subject to full Commission jurisdiction, including the obligation to file an OATT. If a second generator seeks interconnection to the Transmission Provider's system, then the LGIP and LGIA would apply, because at that time the Transmission Provider does have facilities subject to Commission jurisdiction, under an OATT. This creates a "huge disincentive for Transmission Providers to interconnect the first generator, and even more so, to provide wheeling service to the interconnecting generator." On the other hand, the Commission would not slow interconnections by disclaiming jurisdiction over distribution-level interconnections, since states are filling any gap that the Commission may perceive in distribution interconnection rules. To this end, both NARUC and NRECA–APPA offer model interconnection documents that they argue will aid the states in exercising their regulatory responsibilities.

716. NRECA–APPA further argues that if the Commission does not disclaim jurisdiction over all dual-use distribution facilities, including those owned by public utilities, it should create a safe harbor for non-public utilities that want to interconnect, but want to maintain their non-jurisdictional status under the FPA. It points to several examples of "limited jurisdiction certificates" from the Commission's experience regulating natural gas. The fact that the Commission lacks certificate authority under the FPA makes this goal easier to accomplish. The Commission could state that the safe harbor does not apply to entities that are already jurisdictional because they offer Commission-jurisdictional Transmission Services under an OATT on file with the Commission. If a non-public utility interconnects with a generator under a mutually satisfactory contract, that interconnection should not change the jurisdictional status of the entity.

717. NRECA–APPA also argues that a similar result could be achieved through FPA Section 211. The Commission could permit non-public utilities to submit to the Commission agreements in the form of Section 211 settlements stating that the non-public utility will provide wheeling service to the generators under agreed upon terms. This approach would permit the Commission and the Parties to bypass the extended dispute and hearing process required by Section 211. This is a "permissive policy choice" about how and when to assert jurisdiction that the Commission should exercise.[159]

718. The North Carolina Commission concludes that because Order No. 2003 is a generic pronouncement based on Commission jurisdiction over Transmission Service, and is not limited to wholesale transactions, it exceeds the Commission's statutory jurisdiction.

719. Avista and the Washington UTC argue that the Commission should further clarify that a utility's past decision to allow an interconnection to distribution facilities does not convert such facilities to exclusive Commission jurisdiction. If this was indeed the Commission's intent, then Avista requests rehearing. It wants the rule to say that the States retain authority over new interconnections to dual use distribution facilities, unless there is an OATT on file by the owner of the facilities that makes available new Commission-jurisdictional service over those facilities.

720. The New York PSC asks the Commission to clarify what it means by "distribution." The Commission should clarify whether it intends to refer to low voltage lines that could be subject to the Commission's jurisdiction as transmission lines, or to "local distribution" facilities that are not subject to the Commission's jurisdiction under the FPA. In the Commission's description of "dual use" facilities in particular, it is unclear whether the Commission seeks to assert jurisdiction over low voltage transmission lines or over "local distribution" facilities. Furthermore, even if sales for resale occur on a local distribution system, such sales would not support Commission jurisdiction over generator interconnection. Sales for resale would not affect Commission jurisdiction over the underlying facilities, which remain distribution facilities. The interconnection of such lines would be a purely "local distribution" function that remains exempt from Commission regulation.

721. NRECA–APPA argues that even if the Commission and the courts ultimately conclude that any facility carrying a wholesale electron, including a local distribution facility, is under Commission jurisdiction, the Commission still will not have jurisdiction to regulate most distribution-level interconnections. In most distribution-level interconnections, no electrons from the generator will ever cross state lines and generators seldom, if ever, export power beyond the customer's meter. While the wholesale sale transaction may be in interstate commerce and subject to Commission jurisdiction, the transmission itself and the distribution facilities used for that purpose are not.

722. NARUC argues that the intention of the Interconnection Customer to sell power to a wholesale buyer at some time in the future does not provide the Commission with jurisdiction over the

[159] NRECA–APPA cites *New York* v. *FERC*, 535 U.S. 1, 28 (2002).

interconnection itself, although the wholesale power sale may be Commission-jurisdictional when made. The Commission should remove ambiguity by clearly disclaiming jurisdiction over interconnections to distribution facilities not covered by an OATT.

723. LPPC seeks clarification that an interconnection request for the purpose of making sales in interstate commerce will not be under the LGIP and LGIA for facilities that are not otherwise under the Commission's jurisdiction at the time that the request is made. To do otherwise would impermissibly expand the Commission's jurisdiction to cover "local distribution." NRECA–APPA seeks clarification that no OATT would be required when an entity voluntarily interconnects a generator to non-jurisdictional facilities and that customer then seeks wheeling service.

724. The North Carolina Commission and PacifiCorp argue that because only Commission-jurisdictional service can be taken under an OATT, Commission jurisdiction over interconnection to a distribution facility must be determined on a case-by-case basis and must be solely for the purpose of regulating actual wholesale sales. The Commission has overreached its statutory authority, since Order No. 2003 requires neither an agreement for the delivery component of Transmission Service, nor a contract for the sale of the Generating Facility's output at the time of interconnection. The North Carolina Commission argues that because retail service in North Carolina is bundled, the Commission lacks authority over local distribution facilities except when they are actually being used to effectuate a wholesale sale. These facilities cannot be made subject to an OATT. The North Carolina Commission also argues that because the transmission component of bundled retail service is not provided under the OATT, it follows that interconnections or Network Upgrades related to the provision of bundled retail service are not subject to the OATT, the LGIP, or the LGIA. While Order No. 2003 refers to this issue, the LGIP and LGIA do not clearly make this distinction.

725. PacifiCorp asks that the LGIP be amended to allow the Transmission Provider or state agency to have an opportunity to challenge the Interconnection Customer's plan to provide wholesale service.

726. SoCal Edison asks if the Commission intends that a wholesale generator interconnecting to a local distribution facility currently used exclusively for retail would not be subject to SoCal Edison's Commission-approved wholesale distribution access tariff (WDAT), that SoCal Edison be permitted to continue to process all wholesale distribution interconnection requests under its WDAT.

727. The South Carolina PSC argues that, absent express legislative authority, it cannot abdicate its responsibilities for the regulation of electric utilities in South Carolina. Resource and facility planning are matters subject to the jurisdiction of the individual states. The Commission should not attempt to stretch the boundaries of its limited statutory authority to conquer those areas over which the States are exercising regulatory authority. The Commission should revise Order No. 2003 to remove any portion that invades a state's jurisdictional province. The Washington UTC makes a similar argument.

728. SoCal Edison argues that Order No. 2003 would be clearer if the Commission recognized that facilities that deliver energy fall into only two categories—transmission facilities and local distribution facilities—and that the Commission has jurisdiction over wholesale transactions and services provided to wholesale customers over both sets of facilities.

729. Finally, the Georgia PSC states that the Commission erred by determining that these rules are necessary to prevent undue discrimination. It argues that since it has not been shown that such undue discrimination exists in the Southeast, these rules are unnecessary in the Southeast.

Commission Conclusion

730. Order No. 2003 provides that if a "distribution" facility is used for both wholesale and bundled retail sales, *i.e.*, it has a dual use, "the Final Rule applies to interconnections to these facilities *only for the purpose of making sales of electric energy for resale in interstate commerce.*"[160] Thus, we are not ousting the States' jurisdiction. Several petitioners challenge this assertion, arguing that *Detroit Edison* prohibits this jurisdiction. We disagree. Because *Detroit Edison* does not prohibit the Commission from asserting jurisdiction over "distribution" facilities to the extent they are used for wholesale sales,[161] we do not interpret it as prohibiting the Commission from exercising jurisdiction over an interconnection to dual use facilities if the interconnection is intended to facilitate a wholesale sale. And because the Commission has the authority to regulate all aspects of wholesale transactions in interstate commerce,[162] it will exercise jurisdiction over interconnections to a "distribution" facility when the facility is included in a public utility's Commission-filed OATT and the interconnection is for the purpose of facilitating a jurisdictional wholesale sale of electric energy. If the Interconnection Customer seeks interconnection to a "distribution" facility that is already subject to the OATT, but does not intend to engage in a Commission-jurisdictional wholesale sale, then the Commission will not assert jurisdiction over the interconnection to the "distribution" facility.[163]

731. Regarding dual-use facilities, the Commission in Order No. 888 stated that "[t]here are, of course, facilities that are used to provide delivery to both wholesale purchasers and end users. In those situations, we believe that the Commission and the States have jurisdiction to set rates for the services that are within their respective jurisdictions."[164] Order No. 2003 retains the same jurisdiction over dual-use facilities that the Commission exercised in Order No. 888.

732. Some petitioners argue that there are practical considerations that make the Commission's exercise of jurisdiction over certain distribution-level interconnections inadvisable as a policy matter. They argue that states are best situated to regulate interconnections to "distribution" facilities. As noted above, we recognize that almost all interconnections to lower-voltage or "distribution" facilities will be under state jurisdiction.

733. The New York PSC seeks clarification about the Commission's use of the term "distribution." Order No. 2003 explains that "distribution" is an imprecise term that is "usually used to refer to lower-voltage lines that are not networked and that carry power in one

[160] Order No. 2003 at P 804 (emphasis in original).

[161] *See Detroit Edison*, 334 F.3d at 51.

[162] *See also TAPS* v. *FERC*, 225 F.3d at 696 ("FPA § 201(a) makes clear that all aspects of wholesale sales are subject to federal regulation, regardless of the facilities used."); *Duke Power Co.* v. *FPC*, 401 F.2d 930, 935–36 (DC Cir. 1968) (noting that the FPC regulates public utility facilities used in wholesale transmission or sales in interstate commerce); *Arkansas Power & Light Co.* v. *FPC*, 368 F.2d 376, 383 (8th Cir. 1966) (stating that the functional use of lines—wholesale versus retail—control); Wisconsin-*Michigan Power Co.*, v. *FPC*, 197 F.2d 472, 477 (7th Cir. 1952) (finding that facilities used at wholesale are not "local distribution facilities").

[163] The cases that SoCal Edison cites to support its position that the Commission should make interconnections for wholesale sales to all "local distribution" facilities subject to Order No. 2003 rely on the authority granted by PURPA, which is not the source of Commission authority in Order No. 2003.

[164] Order No. 888 at n.13.

direction."[165] The New York PSC asks for clarification whether the Commission uses "distribution" to refer to low voltage lines that could be subject to Commission jurisdiction as transmission, or to "local distribution" facilities not subject to the Commission's jurisdiction. We clarify that Order No. 2003 applies to all facilities subject to a Commission-approved OATT, regardless of how the facilities may be labeled by the Transmission Provider.[166] Far from creating jurisdictional uncertainty, as NARUC contends, this approach sets forth a method for determining Commission jurisdiction that is consistent with statutory and judicial precedent and straightforward in its application.

734. In response to SoCal Edison's concern about its wholesale distribution access tariff (WDAT), this is a matter of specific applicability that is better suited to SoCal Edison's compliance filing.

735. In response to Avista's and the Washington UTC's comments, we clarify that a public utility's past decision to allow an interconnection to distribution facilities does not convert such facilities to exclusive Commission jurisdiction. Order No. 2003 states that when any facility, including a "distribution" facility, is used to facilitate a jurisdictional wholesale sale, only the use of the facility for Commission-jurisdictional service is subject to Commission jurisdiction.[167] All state-jurisdictional uses remain subject to state jurisdiction. States will retain jurisdiction over interconnection to dual use facilities when either (1) the interconnection to a facility subject to a Commission-approved OATT is not for a wholesale sale, or (2) the facility is not subject to a Commission-approved OATT at the time the Interconnection Request is made, even if the Interconnection Customer intends to make a jurisdictional wholesale sale.[168]

736. In response to the North Carolina Commission's request for clarification about bundled retail transmission, Order No. 2003 states that it applies to facilities subject to a Commission-filed OATT. If the facilities in question were used exclusively for bundled retail transmission facilities, the OATT would not apply. However, in practice, these facilities are likely to be used for wholesale sales and purchases as well as bundled retail sales. Further, as we have previously clarified in this order, if "distribution" facilities, at the time an interconnection to such facilities is requested, are being used for bundled retail sales as well as wholesale sales, Order No. 2003 will apply only if the interconnection is to facilitate wholesale sales.

737. NARUC, the North Carolina Commission, and PacifiCorp argue that intent to sell at wholesale is insufficient for providing the Commission with jurisdiction over the interconnection transaction. We will not require an Interconnection Customer seeking interconnection to facilities subject to a Commission-approved OATT to tender proof of a wholesale sale to secure Interconnection Service. That would be unduly burdensome for the Interconnection Customer and would serve no purpose. Given the potential for a long delay between the Interconnection Request and the Commercial Operation Date, it is unreasonable to expect that the Interconnection Customer will already have a contract for the sale of its power when it submits its Interconnection Request. Furthermore, if the Interconnection Customer decides that it will not sell its power at wholesale it would then be subject to state jurisdiction and state jurisdictional charges.

738. NRECA–APPA and Salt River Project argue that the LGIP and LGIA are not appropriate for low-voltage interconnections. NRECA–APPA further argues that the Commission's willingness to accept modified Interconnection Studies in the unlikely event that such a request is received is not reasoned decisionmaking. We disagree. Order No. 2003 explains that under most circumstances, generators larger than 20 MW are interconnected to high voltage facilities. Order No. 2003 also permits Transmission Providers to offer revised studies tailored to examine the effects that a generator larger than 20 MW would have on a low voltage facility. We conclude that the Interconnection Customer will be best served by a process that remains standardized to the extent practicable, even if the studies themselves will change. This will bring greater certainty to all.

739. We disagree with NRECA–APPA's argument that Order No. 2003 will do nothing to encourage the development of new generation interconnection to lower-voltage facilities. We recognize that Order No. 2003 does not apply to most distributed generation, since these facilities almost always interconnect to facilities that are not subject to an OATT. However, Order No. 2003 may be a useful model for states and others that are considering actively encouraging such generation.

740. As we understand it, NRECA–APPA is primarily concerned with distribution cooperatives that do not receive Rural Utilities Service financing and, as a result, are not necessarily exempt from Commission jurisdiction. The concern appears to be that Order No. 2003 could allow an Interconnection Customer to force these otherwise nonjurisdictional entities into jurisdictional status. This is an incorrect understanding of Order No. 2003. While such an entity may voluntarily provide jurisdictional wheeling service, and thereby become Commission-jurisdictional, Order No. 2003 in no way forces it to do so. If a non-public utility offers jurisdictional service, then it—like all other public utilities—would be required to file an OATT and provide open access service, including Interconnection Service, unless it qualified for a waiver of Order No. 888 and 889 requirements.[169] In deciding whether to wheel power, the entity would have to consider whether it wishes to become a public utility subject to the FPA. Order No. 2003 does not substantially increase any burdens associated with public utility status.

741. Accordingly, we do not believe that an additional standardized element of Transmission Service will deter development of distributed generation. We expect that in most instances in which the Transmission Provider has an OATT in effect, the additional obligation of applying the LGIP and LGIA to "distribution" facilities already subject to an OATT will not create a significant burden.

742. NRECA–APPA asks the Commission to create a safe harbor for non-public utilities that want to interconnect generation, but wish to do so without becoming jurisdictional under the FPA. There is no need. Order No. 2003 applies only to public utilities. The authority underlying this rule is the Commission's authority over public utilities under Sections 205 and 206 of the FPA. If a non-public utility does not wish to voluntarily provide Interconnection Service for fear of losing its non-public utility status, persons seeking an interconnection from

[165] Order No. 2003 at P 803.

[166] *See New York* v. *FERC*, 535 U.S. at 12. *See also* Puget Sound Energy, 104 FERC ¶ 61,272 at P 16–18 (2003).

[167] Order No. 2003 at P 804 n.129.

[168] If a QF seeks interconnection to a non-OATT "distribution" facility to make jurisdictional wholesale sales, the Commission exercises jurisdiction over these interconnections, even though Order No. 2003 does not apply *See Western Massachusetts Electric Co.* v. *FERC*, 165 F.3d 922, 926 (DC Cir. 1999) (noting that the Commission exercises jurisdiction over a QF's interconnection when it transmits power in interstate commerce).

[169] Non-jurisdictional entities faced this same scenario prior to adoption of Order No. 2003.

the non-public utility may file an application under Sections 210, 211, and 212 of the FPA. While interconnections ordered by the Commission pursuant to Sections 210, 211, and 212 make the non-public utility jurisdictional, they do so only for the purpose of carrying out those provisions and enforcing those provisions.[170]

743. Lastly, in response to the Georgia PSC, on appeal of Order No. 888, the court concluded that the Commission acted within its authority when it based Order No. 888 on general findings of systemic monopoly conditions and the resulting potential for anticompetitive behavior.[171] The Commission in Order No. 2003 acted under the same undue discrimination findings that formed the basis for Order No. 888. Moreover, the Commission does not have to make region-specific findings of undue discrimination.

d. Net Metering Issues

744. Net metering allows a retail electric customer to produce and sell power onto the Transmission System without being subject to the Commission's jurisdiction. A participant in a net metering program must be a net consumer of electricity—but for portions of the day or portions of the billing cycle, it may produce more electricity than it can use itself. This electricity is sent back onto the Transmission System to be consumed by other end-users. Since the program participant is still a net consumer of electricity, it receives an electric bill at the end of the billing cycle that is reduced by the amount of energy it sold back to the utility. Essentially, the electric meter "runs backwards" during the portion of the billing cycle when the load produces more power that it needs, and runs normally when the load takes electricity off the system.

Rehearing Requests

745. NARUC argues that the Commission should clarify that a Generating Facility covered by a state's net metering policy will not be interconnected under Order No. 2003. The Commission has held that power flowing from a generator participating in a state-established net metering program back to its interconnecting electric utility (for which the generator receives a credit against its retail power purchases from the utility) is not a wholesale sale subject to Commission jurisdiction. The Commission should clarify that in cases of net metering, interconnection is state-jurisdictional, even when a net-metered generator produces more power in a given time period than it consumes from its serving utility.

746. The New York PSC argues that the Commission should not treat net metering by a generator on a distribution system as equivalent to a sale of electric energy for resale in interstate commerce. The Commission has recognized that it does not have jurisdiction over net energy metering by a small producer.[172] Only when a generator actually produces energy resold to another entity would there be a jurisdictional sale under Section 201(d) of the FPA.

Commission Conclusion

747. In response to NARUC's and the New York PSC's arguments about net metering, under most circumstances the Commission does not exert jurisdiction over a net energy metering arrangement when the owner of the generator receives a credit against its retail power purchases from the selling utility.[173] Only if the Generating Facility produces more energy than it needs and makes a net sale of energy to a utility over the applicable billing period would the Commission assert jurisdiction.[174] In either event, the same rules about the applicability of Order No. 2003 apply to these scenarios. In order for the LGIP and LGIA to apply, the net metering customer at the time it requests interconnection has to both seek interconnection to a facility subject to a Commission-approved OATT and intend to make net sales of energy to a utility.

e. Non-Public Utilities and Order No. 2003

Rehearing Requests

748. NYTO argues that, "despite the Commission's stated goal to standardize the interconnection process nationwide," Order No. 2003 "is devoid of any discussion as to what extent it will apply the Final rule to ERCOT, and, if not, why not."

749. Order No. 2003 requires a jurisdictional public utility that owns facilities jointly with a non-public utility to apply the LGIP and LGIA to Interconnection Service provided by the public utility on its portion of a jointly owned facility. APS argues that this ignores the difference between use of transmission facilities, which can be dealt with through a joint owner's use rights associated with its undivided share of facilities, and interconnection, which inherently involves a physical connection between the facilities of the generator and all of the undivided ownership interests in the facilities in question, not just a portion thereof. Order No. 2003 does not acknowledge that for Interconnection Service, unlike Transmission Service, the ownership interests of the facilities are inseparable and a generator must interconnect with the whole facility or not interconnect at all. If a public utility is successful in convincing the non-public utility to adopt the requirements of Order No. 2003 in a reciprocity tariff, there may not be a problem. But should such negotiations be unsuccessful, it is unclear how the jurisdictional public utility can permit interconnection only to the public utility's "portion" of the facilities. APS asks that the Commission ensure that jurisdictional Transmission Providers are not held accountable for the non-compliance of non-public utilities that jointly own the facilities.

750. APS also recommends that the Commission clarify that when there is joint ownership of a transmission facility with a non-public utility, the Interconnection Request should go to the participant with operational control over the facilities in question, who can coordinate with other owners and facilities as necessary.

Commission Conclusion

751. NYTO argues that Order No. 2003 does not state whether it applies within the Electric Reliability Council of Texas (ERCOT). Because Commission jurisdiction under Sections 205 and 206 of the FPA, which we rely on here, is limited to transmission and wholesale sales of electric energy in interstate commerce,[175] and there is no such interstate commerce in ERCOT, or Alaska and Hawaii for that matter, this rule does not apply in these regions.

752. APS argues that when a jurisdictional entity owns transmission facilities jointly with a non-public utility, the jurisdictional entity may not be able to interconnect, since the non-public utility may be uncooperative. Following the same principle described in Order No. 888, Order No. 2003 states that joint ownership does not affect the Commission's authority to regulate the

[170] 16 U.S.C. 824(b)(2) (2000).

[171] *TAPS* v. *FERC*, 225 F.3d at 688.

[172] The New York PSC cites to *MidAmerican Energy Co.*, 94 FERC ¶ 61,340 (2001).

[173] *See* MidAmerican Energy Co., 94 FERC ¶ 61,340 at 62,263 (2001) (Commission would not assert jurisdiction when an individual home owner or farmer or similar entity installs generation and accounts for its dealings with the utility through netting).

[174] *See id.* (if there is a net sale of energy to a utility, and the generator is not a QF, the generator's owner must comply with the requirements of the FPA).

[175] Section 201(b)(1) of the FPA, 16 U.S.C. 824(b)(1) (2000).

public utility. Accordingly, the LGIP and LGIA apply to Interconnection Service provided by the public utility on its portion of a jointly owned facility.

753. As the Commission explained in Order No. 888, each public utility that owns interstate transmission facilities jointly with a non-public utility must offer OATT service over its share of joint facilities.[176] If a portion of a facility is owned by a jurisdictional public utility, the Interconnection Customer seeking interconnection for a Commission-jurisdictional purpose will be able to secure interconnection to that facility under the terms of Order No. 2003 through the jurisdictional co-owner of the facility.

754. As the Commission required in Order No. 888, should the joint ownership agreement prohibit or restrict the right of the public utility to offer interconnection service to third parties, the public utility must make a section 206 compliance filing containing proposed revisions (mutually agreeable or unilateral) to its contracts with the non-jurisdictional co-owners to remove those restrictions.[177]

755. If the non-public utility provides transmission and interconnection under a reciprocity "safe harbor" tariff, and the tariff applies to the Interconnection Customer, then the jurisdictional and non-jurisdictional co-owners should decide which one should receive and study the Interconnection Request. If the non-jurisdictional co-owner does not have a reciprocity tariff, then the Interconnection Request should go to the Commission-jurisdictional co-owner, who must then work with its non-jurisdictional co-owner to coordinate the study process.

4. Variations From the Final Rule

756. In Order No. 2003, the Commission states that, on compliance, if a non-RTO or non-ISO (or other non-independent) Transmission Provider offers a variation from the LGIP and LGIA and the variation is necessary to meet established reliability requirements (*i.e.*, approved by the Applicable Reliability Council), then it may seek to justify its variation using the regional difference rationale. If the variation is for any other reason, the non-RTO or ISO Transmission Provider must justify the variation using the "consistent with or superior to" rationale that the Commission applies to variations from the OATT in Order No. 888. The Commission will afford an RTO or ISO greater flexibility in its compliance filing to seek "independent entity variations" from the provisions of Order No. 2003.

Rehearing Requests

757. Salt River Project urges the Commission to give all Transmission Providers flexibility to adopt variations for purposes of preserving reliability. The Commission's decision to grant independent Transmission Providers greater flexibility is not supported by substantial evidence, is arbitrary and capricious, and is unduly preferential in violation of the FPA, according to Salt River Project. It concludes that the Commission's decision coerces those non-independent Transmission Providers to join RTOs to avoid the rigid requirements of Order No. 2003, which some petitioners believe endanger reliability.

758. The South Carolina PSC likewise claims that Order No. 2003 is discriminatory because it favors one group of generators and customers over another. By allowing independent Transmission Providers greater flexibility than non-independent Transmission Providers, the Commission is encouraging, rather than preventing, undue discrimination. Despite differences in compliance requirements, in the end all Tariff rates, terms, and conditions for both independent and non-independent Transmission Providers must be approved by the Commission.

Commission Conclusion

759. We conclude that there is a rational basis for giving RTOs and ISOs more flexibility than non-independents, as discussed above. The foremost reason for different treatment is the fact that an RTO or ISO is independent and is less likely to act in an unduly discriminatory manner than is a Transmission Provider that is a market participant. The RTO or ISO also may have operating characteristics, such as a more complex market design, that are different from non-independents and that require more flexibility than provided by the "regional differences" justification.

5. OATT Reciprocity Requirements

760. The reciprocity requirement permits a public utility to require, as a condition of providing open access service to another utility (including a non-public utility) that owns, controls, or operates transmission facilities to deny Transmission Service to the non-public utility unless that non-public utility provides reciprocal Transmission Service. In Order No. 2003, the Commission explains that the reciprocity provision applies to Interconnection Service in a manner consistent with the reciprocity provision in the OATT.

761. A non-public utility may satisfy the reciprocity requirement in one of three ways. First, it may provide service under a Commission-approved "safe harbor" Tariff—a Tariff that the Commission has determined offers truly open access service. Second, the non-public utility may provide service to a public utility under a bilateral agreement that satisfies its reciprocity obligation. Third, the non-public utility may ask the public utility to waive the reciprocity condition.[178] A non-public utility that has a "safe harbor" Tariff must add to that Tariff an interconnection agreement and interconnection procedures that substantially conform to or are superior to the LGIP and LGIA if it wishes to continue to qualify for "safe harbor" treatment. A non-public utility that owns, controls, or operates transmission, has not filed with the Commission a "safe harbor" Tariff, and seeks Transmission Service from a public utility that invokes the reciprocity provision must either satisfy its reciprocity obligation under a bilateral agreement or ask the public utility to waive the OATT reciprocity condition.

762. Order No. 2003 does not require that a non-public utility also provide transmission credits for Network Upgrade costs to satisfy the Commission's reciprocity condition. With respect to a Tariff filed under the "safe harbor" provision, the Commission's reciprocity policy requires that it contain rates comparable to the rates the non-public utility charges itself. As for rates contained in a bilateral agreement, they will be subject to case-by-case review.

Rehearing Requests

763. LPPC contends that there are inconsistent statements in Order No. 2003 as to the terms and conditions of service that a non-public utility must provide to satisfy the reciprocity requirement. Specifically, the Commission states: "With the addition of the Final Rule LGIP and Final Rule LGIA to the OATT, in order to meet its reciprocity obligations, a non-public utility would have to provide Interconnection Service to the Transmission Provider and the Transmission Provider's Affiliates *under the same terms and conditions under which it receives service.*"[179] Later, the Commission notes that "we shall limit reciprocity compliance to those services

[176] Order No. 888 at p. 31,692.

[177] *Id.*

[178] Order No. 2003 at P 841.

[179] Order No. 2003 at P 832 (emphasis added).

a non-public utility is capable of providing on its system."[180] LPPC argues that in some cases, the service a non-public utility is capable of providing may be quite different from the service the non-public utility receives from a public utility. To be consistent with Order No. 888's reciprocity requirement, LPPC seeks clarification that the Commission requires a non-public utility to provide Transmission Service in a manner comparable to the way it provides service to itself as a condition of obtaining Transmission Service from a jurisdictional public utility.

764. Salt River makes a similar argument, suggesting that the Commission intended to require a non-public utility to provide Interconnection Service under "comparable" terms and conditions (*i.e.*, not unduly discriminatory), but did not intend to require it to adopt the "same" tariff provisions adopted by the public utility from whom the non-public utility receives service. Additionally, Salt River seeks clarification that offering Interconnection Service to its own or affiliated generation that it offers to all other Interconnection Customers would meet the reciprocity requirements.

765. LPPC also cites the Commission's statement that a non-public utility would have to provide reciprocal service not only to the utility from which it takes Transmission Service, but also to all of that utility's Affiliates.[181] It says this is contrary to the assurance that the Commission is not changing the reciprocity policy adopted in Order No. 888[182] and that it would inhibit voluntary participation of public power in restructured markets.

766. LPPC and Salt River Project ask the Commission to clarify a non-public utility need not refund to the Interconnection Customer the payments the Interconnection Customer made for Network Upgrades over a five year period. Instead, the non-public utility should simply have to charge rates for interconnection comparable to what it charges itself to satisfy the reciprocity provision. According to LPPC, this is consistent with the Commission's intent not to expand the reciprocity provision of Order No. 888, which requires that a non-public utility use rates, terms and conditions comparable to what it charges itself.

767. LIPA argues that a municipal utility participating in an RTO or ISO, should be allowed to depart from the Commission's standard cost recovery mechanisms, as long as it meets the Commission's comparability standard. So long as all Interconnection Customers—those affiliated with the non-public utility as well as other non-affiliated Interconnection Customers—recover costs in a comparable manner, LIPA argues that the Commission should not interfere with the cost recovery mechanism chosen by the non-public utility.

768. APS argues that a non-public utility should be required to provide transmission credits to satisfy the reciprocity condition. This disparate treatment will provide perverse incentives for generators to interconnect with a jurisdictional rather than a non-jurisdictional Transmission Provider solely to obtain the credits or payments required by Order No. 2003. Hydro One understands from Order No. 2003 that non-public utilities are not required to refund transmission upgrade costs, and seeks clarification that this is the Commission's position.

769. LPPC requests clarification that an Affected System, that is not a public utility, need not provide transmission credits to Interconnection Customers to satisfy the reciprocity provisions of Order No. 2003.

770. NRECA–APPA applauds the statement at P 840 of Order No. 2003 "that this Final Rule in no way alters the applicability of the reciprocity provision in the OATT and the reciprocity policy articulated in Order No. 888 and its progeny." NRECA–APPA also notes that, while Order No. 2003 reiterates Order No. 888's statement that reciprocal service will not be required if such service would endanger a cooperative's bond status, the rule does not include a similar statement that reciprocal service is not required from a tax-exempt entity[183] if providing such service would jeopardize its tax status.[184]

Commission Conclusion

771. The Commission's reciprocity policy says that any non-public utility may gain access to a public utility's Transmission System under the public utility's OATT so long as the utility seeking the access agrees to offer comparable (not unduly discriminatory) service in return.[185] Order No. 2003 does not alter the Commission's current reciprocity policy.

772. The requirement that a non-public utility offer comparable service may be satisfied in one of three ways. First, the utility may provide service under a Commission-approved "safe harbor" Tariff—a Tariff that the Commission has determined offers truly open access service. Second, the utility may provide service under a bilateral agreement that satisfies its reciprocity obligation. Third, the non-public utility may ask the public utility to waive the reciprocity condition.[186]

773. Under Order No. 2003, a non-public utility that has a "safe harbor" Tariff must add to that Tariff an interconnection agreement and interconnection procedures that substantially conform to or are superior to the *pro forma* LGIP and LGIA if it wishes to continue to qualify for "safe harbor" treatment. A non-public utility that owns, controls, or operates transmission facilities that does not have a "safe harbor" Tariff and that seeks Transmission Service from a public utility that invokes the reciprocity provision, must either satisfy its reciprocity obligation under a bilateral agreement or ask the public utility to waive the reciprocity condition.

774. The Commission's reciprocity policy requires that a "safe harbor" Tariff contain rates, terms and conditions comparable to the rates, terms and conditions the non-public utility applies to its own or affiliated generation. The easiest way for a non-public utility to satisfy the "safe harbor" Tariff condition is to adopt Order No. 888's *pro forma* OATT. Rates, terms and conditions contained in a bilateral agreement are subject to case-by-case review.

775. LPPC, LIPA, and Salt River are correct that a non-public utility need only offer comparable service in order to satisfy the reciprocity condition.[187] The rates, terms and conditions of the reciprocal service are not required to be identical to those offered by the public utility. Offering Interconnection Service to all Interconnection Customers identical to that offered to its own or affiliated generation, as Salt River proposes, would be one way for a non-public utility to meet the reciprocity condition. In addition, LPPC and Salt River are correct that reciprocity is satisfied if the non-public utility offers to provide to the public utility all services that the non-public utility provides, or is capable of providing, on its Transmission System.[188]

[180] Order No. 2003 at P 844.

[181] Order No. 2003 at P 832.

[182] Order No. 2003 at P 840.

[183] *See* the Internal Revenue Service Code at 26 U.S.C. 501(c)(12) (2002).

[184] Order No. 888 at P 31,762, n.499.

[185] Order No. 888–A at ¶ 30,285.

[186] Order No. 2003 at P 841.

[187] LPPC and others appear to have confused P 832 of Order No. 2003, which summarizes the NOPR discussion of reciprocity, with the Commission Conclusion.

[188] *See* Order No. 888–A at ¶ 30,286.

776. The Commission caused confusion when it discussed LADWP's comment on P 722 of Order No. 2003 regarding the crediting of Network Upgrade costs. While P 722 is correct for a public utility, a non-public utility seeking to satisfy reciprocity must provide services it already provides, or is capable of providing, on a non-discriminatory and comparable basis.

777. We agree with LIPA that a non-public utility must apply interconnection cost recovery and other terms and conditions of Interconnection Service to third parties in a manner comparable to the process it applies to itself in order to satisfy the reciprocity condition. This includes the ten year repayment period that applies to all non-independent public utilities.

778. APS's concern that this will discourage Interconnection Customers from interconnecting with non-public utilities is misplaced, since reciprocity requires only that costs be recovered for third-party interconnections in a manner consistent with the way costs are recovered for interconnections of the non-public utility's own or affiliated generation. Since those costs must be recovered, only the method of funding those costs will vary. Similarly, in response to LPPC, we clarify that if an Affected System is a non-public utility, Order No. 2003 does not require that it provide refunds to the Interconnection Customer to satisfy the reciprocity condition. To satisfy reciprocity, the non-public utility must treat the upgrade payments in a manner comparable to how it treats its own upgrade costs.

779. In response to LIPA's concerns regarding cost recovery for non-public utility facilities under the control of an independent Transmission Provider, we clarify that Transmission Systems operated by the independent Transmission Provider (regardless of whether those facilities are owned by a public or non-public utility) are subject to its Tariff. In such cases the "safe harbor" reciprocity Tariff is not applicable.

780. In response to Hydro One, we clarify that a non-public utility will be required to refund transmission upgrade costs only if it affords itself comparable treatment. Otherwise, the non-public utility would not be required to refund transmission upgrade costs.

781. Regarding Affiliates, we are not deviating from the approach taken in Order No. 888. LPPC is correct that Order No. 2003 does not require a non-public utility (that has not voluntarily filed a "safe harbor" tariff) to provide reciprocal service to all of the Affiliates of the public utility from which it takes Transmission Service. As described in Order No. 888 and 888–A, a non-public utility subject to a reciprocity condition must extend reciprocity rights only to the public utility from which it receives open access service and not to that public utility's Affiliates.[189]

782. Finally, as NRECA–APPA suggests, we clarify that, as in Order No. 888, reciprocal service will not be required if providing such service would jeopardize the tax-exempt status of the non-public utility or the bond status of the non-public utility.[190]

6. Two vs. Three Party Agreements

783. Order No. 2003 requires that both the Transmission Provider and the Transmission Owner sign the LGIA, if they are not the same entity.

Rehearing Requests

784. Old Dominion expresses concern that, in regions where RTOs exist, Order No. 2003 could let the Transmission Owner exert influence over the interconnection process, with potentially anticompetitive effects. It cites to the Commission's statement in PJM Interconnection, LLC, 96 FERC ¶ 61,061, 61,234 (2001) that "efficient decision-making on investment in transmission facilities requires that the entire interconnection process must be under the decisional control of the RTO." Old Dominion fears that, while an independent RTO may be willing to negotiate in good faith with the Interconnection Customer, a self-interested Transmission Owner may not be as flexible. However, Old Dominion does not categorically object to a three-party agreement, and requests clarification that, if three-party agreements are required, (1) the RTO has sole authority over the interconnection process and will not be unduly influenced by the Transmission Owner, and (2) the RTO must ensure that the interconnection standards for individual Transmission Owners are consistently applied to all Interconnection Customers.

Commission Conclusion

785. In requiring three-party agreements in Order No. 2003, our intent was to allow "one-stop shopping" for Interconnection Customers interconnecting to a facility under the operational control of an RTO or ISO and to speed the sometimes lengthy interconnection process. It is our intent that, while the Transmission Owner is a necessary part of interconnecting to a facility under the operational control of an RTO or ISO, its role in negotiating the agreement will be a limited one. Interconnection Studies and transmission planning remain the providence of the Transmission Provider. However, construction scheduling and other construction-related matters must involve and be negotiated by all three Parties.

786. In response to Old Dominion's concern that generating facilities associated with a Transmission Owner could receive preferential treatment, the independent oversight exercised by the RTO or ISO will guard against this sort of discrimination. If the Interconnection Customer believes that it has been treated unfairly, it may invoke Dispute Resolution or bring the matter to the attention of the Commission.

III. Information Collection Statement

787. Order No. 2003 contains information collection requirements for which the Commission obtained approval from the Office of Management and Budget (OMB).[191] Given that this Order on Rehearing makes only minor changes to Order No. 2003, OMB approval for this order is not necessary. However, the Commission will send a copy of this order to OMB for informational purposes.

IV. Regulatory Flexibility Act Certification

788. The Regulatory Flexibility Act (RFA)[192] requires rulemakings either to contain (1) a description and analysis of the effect that the proposed or Final Rule will have on small entities or (2) a certification that the rule will not have a significant economic effect on a substantial number of small entities. In Order No. 2003, the Commission certifies that the Final Rule would not have a significant economic effect on a substantial number of small entities.[193]

Rehearing Request

789. NRECA–APPA challenges this certification. According to NRECA–APPA, there are nearly 40 rural electric cooperatives that are public utilities and that are "small businesses" as defined by the Small Business Administration. Further, the Commission identifies 176 public utilities that would have to modify their OATTs to incorporate the requirements of Order No. 2003. Of this number, the Commission estimates that ten percent of the respondents are small entities. NRECA–APPA contends that

[189] *See* Order No. 888, OATT section 6; *see also* Order No. 888–A at ¶ 30,286.

[190] Order No. 888 at P 312,762, n. 499.

[191] The OMB Control Number for this collection is 19021–0096.

[192] 5 U.S.C. 601–612.

[193] Order No. 2003 at P 924.

the number is actually closer to 25 percent.

790. NRECA–APPA also states that while the Commission indicated in Order No. 2003 that small entities would be eligible for a waiver, the Commission has not taken into consideration the burden and costs for applying for a waiver.[194] Furthermore, small entities have no guarantee that upon filing for a waiver, they will ever receive one.

791. NRECA–APPA recommends that the Commission (1) provide a blanket waiver of the Final Rule requirements to all currently FPA-jurisdictional utilities that qualify as "small" public utilities under the SBA utility size standards, and (2) provide a safe harbor for all "small" non-jurisdictional providers that want to work with customers to interconnect generation, but want to maintain their non-jurisdictional status.

Commission Conclusion

792. We disagree with NRECA–APPA. The question is whether Order No. 2003 has a significant economic effect on a substantial number of small entities. Order No. 2003 applies only to interconnections to facilities already subject to an OATT. Accordingly, the affected entities are only those entities that have OATTs at the time interconnection is requested. The number of such entities is not substantial. Moreover, because Order No. 2003 applies only to entities that already have OATTs, the amendment of these OATTs to add the LGIP and LGIA will not impose a significant economic burden.

793. Regarding distribution cooperatives not currently offering wheeling, they are not relevant to this analysis because they are not required to adopt the provisions of Order No. 2003.

794. As to the waiver option, securing a waiver should not pose a burden for two reasons. First, small entities that already have secured a waiver from compliance with Order No. 888 need not seek an additional waiver for Order No. 2003. Second, the cost of applying for a waiver is minimal. The blanket waiver NRECA–APPA requests is unnecessary and, as described in the discussion of "distribution" interconnections above, the Commission rejects NRECA–APPA's requested safe harbor.

V. Document Availability

795. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to obtain this document from the Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern Time) at 888 First Street, NE., Room 2A, Washington, DC The full text of this document is also available electronically from the Commission's eLibrary system (formerly called FERRIS) in PDF and Microsoft Word format for viewing, printing, and downloading. eLibrary may be accessed through the Commission's Home Page (*http://www.ferc.gov*) . To access this document in eLibrary, type "RM02–1–" in the docket number field and specify a date range that includes this document's issuance date.

796. User assistance is available for eLibrary and the Commission's Web site during normal business hours from our Help line at 202–502–8222 or the Public Reference Room at 202–502–8371 Press 0, TTY 202–502–8659. E–Mail the Public Reference Room at *public.referenceroom@ferc.gov*.

VI. Effective Date

797. Changes to Order No. 2003 made in this order on rehearing will become effective on April 26, 2004.

List of Subjects in 18 CFR Part 35

Electric power rates, Electric utilities, Reporting and recordkeeping requirements.

By the Commission.

Magalie R. Salas,

Secretary.

The Appendices will not be published in the Code of Federal Regulations.

Appendix A—Petitioner Acronyms

AEP—American Electric Power System
Alabama PSC—Alabama Public Service Commission
American Wind Energy—American Wind Energy Association
APS—Arizona Public Service Company
Arkansas PSC—Arkansas Public Service Commission
Avista—Avista Corporation
California Parties—California Independent System Operator Corporation, Public Utilities Commission of the State of California, Pacific Gas and Electric Company, San Diego Gas & Electric Company, and Southern California Edison Company
Calpine—Calpine Corporation
Central Maine—Central Maine Power Company, New York State Electric & Gas Corporation, and Rochester Gas & Electric CorporationCinergy—Cinergy Services, Inc.
CPUC—California Public Utilities Commission
Duke Energy—Duke Energy Corporation
Dynegy—Dynegy Power Corporation
EEI—Edison Electric Institute, Alliance of Energy Suppliers, EEI Transmission Group, EEI Distributed Generation Task Force and Tax Analysis Research Subcommittee
Entergy—Entergy Services, Inc.
FPL Energy—FPL Energy, LLC
FP&L—Florida Power & Light Company
Georgia Transmission—Georgia Transmission Corporation
Georgia PSC—Georgia Public Service Commission
Hydro One—Hydro One Networks Inc.
Idaho Power—Idaho Power Company
Kentucky PSC—Public Service Commission of the Commonwealth of Kentucky
LIPA—Long Island Power Authority
LPPC—Large Public Power Council
Louisiana PSC—Louisiana Public Service Commission
Midwest ISO TO—Midwest ISO Transmission Owners
Mississippi PSC—Mississippi Public Service Commission
MSAT—Midwest Stand Alone Transmission Companies (American Transmission Company LLC, GridAmerica LLC, International Transmission Company, and Michigan Electric Transmission Company, LLC)
NARUC—National Association of Regulatory Utility Commissioners
National Grid—National Grid USA
New York PSC—New York State Public Service Commission
North Carolina Commission—North Carolina Utilities Commission
NRECA–APPA—National Rural Electric Cooperative Association and the American Public Power Association
NYTO—New York Transmission Owners
Old Dominion—Old Dominion Electric Cooperative
PacifiCorp—PacifiCorp
Progress Energy—Progress Energy, Inc.
PSEG—The PSEG Companies
Reliant—Reliant Resources, Inc.
Salt River Project—Salt River Project Agricultural Improvement and Power District
SoCal Edison—Southern California Edison Company
South Carolina PSC—South Carolina Public Service Commission
Southern— Southern Company Services, Inc.
TAPS—Transmission Access Policy Study Group
TDU Systems—Transmission Dependent Utility Systems
Washington UTC—Washington Utilities and Transportation Commission

Appendix B—Standard Large Generator Interconnection Procedures (LGIP) Including Standard Large Generator Interconnection Agreement (LGIA); Standard Large Generator Interconnection Procedures (LGIP) (Applicable to Generating Facilities That Exceed 20 MW)

Table of Contents

[194] The issue of waiver availability for small entities is discussed in Order No. 2003 at PP 828–831.

Section 1. Definitions

Adverse System Impact shall mean the negative effects due to technical or operational limits on conductors or equipment being exceeded that may compromise the safety and reliability of the electric system.

Affected System shall mean an electric system other than the Transmission Provider's Transmission System that may be affected by the proposed interconnection.

Affected System Operator shall mean the entity that operates an Affected System.

Affiliate shall mean, with respect to a corporation, partnership or other entity, each such other corporation, partnership or other entity that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such corporation, partnership or other entity.

Ancillary Services shall mean those services that are necessary to support the transmission of capacity and energy from resources to loads while maintaining reliable operation of the Transmission Provider's Transmission System in accordance with Good Utility Practice.

Applicable Laws and Regulations shall mean all duly promulgated applicable federal, state and local laws, regulations, rules, ordinances, codes, decrees, judgments, directives, or judicial or administrative orders, permits and other duly authorized actions of any Governmental Authority.

Applicable Reliability Council shall mean the reliability council applicable to the Transmission System to which the Generating Facility is directly interconnected.

Applicable Reliability Standards shall mean the requirements and guidelines of NERC, the Applicable Reliability Council, and the Control Area of the Transmission System to which the Generating Facility is directly interconnected.

Base Case shall mean the base case power flow, short circuit, and stability data bases used for the Interconnection Studies by the Transmission Provider or Interconnection Customer.

Breach shall mean the failure of a Party to perform or observe any material term or condition of the Standard Large Generator Interconnection Agreement.

Breaching Party shall mean a Party that is in Breach of the Standard Large Generator Interconnection Agreement.

Business Day shall mean Monday through Friday, excluding Federal Holidays.

Calendar Day shall mean any day including Saturday, Sunday or a Federal Holiday.

Clustering shall mean the process whereby a group of Interconnection Requests is studied together, instead of serially, for the purpose of conducting the Interconnection System Impact Study.

Commercial Operation shall mean the status of a Generating Facility that has commenced generating electricity for sale, excluding electricity generated during Trial Operation.

Commercial Operation Date of a unit shall mean the date on which the Generating Facility commences Commercial Operation as agreed to by the Parties pursuant to Appendix E to

the Standard Large Generator Interconnection Agreement.

Confidential Information shall mean any confidential, proprietary or trade secret information of a plan, specification, pattern, procedure, design, device, list, concept, policy or compilation relating to the present or planned business of a Party, which is designated as confidential by the Party supplying the information, whether conveyed orally, electronically, in writing, through inspection, or otherwise.

Control Area shall mean an electrical system or systems bounded by interconnection metering and telemetry, capable of controlling generation to maintain its interchange schedule with other Control Areas and contributing to frequency regulation of the interconnection. A Control Area must be certified by an Applicable Reliability Council.

Default shall mean the failure of a Breaching Party to cure its Breach in accordance with Article 17 of the Standard Large Generator Interconnection Agreement.

Dispute Resolution shall mean the procedure for resolution of a dispute between the Parties in which they will first attempt to resolve the dispute on an informal basis.

Distribution System shall mean the Transmission Provider's facilities and equipment used to transmit electricity to ultimate usage points such as homes and industries directly from nearby generators or from interchanges with higher voltage transmission networks which transport bulk power over longer distances. The voltage levels at which distribution systems operate differ among areas.

Distribution Upgrades shall mean the additions, modifications, and upgrades to the Transmission Provider's Distribution System at or beyond the Point of Interconnection to facilitate interconnection of the Generating Facility and render the transmission service necessary to effect Interconnection Customer's wholesale sale of electricity in interstate commerce. Distribution Upgrades do not include Interconnection Facilities.

Effective Date shall mean the date on which the Standard Large Generator Interconnection Agreement becomes effective upon execution by the Parties subject to acceptance by FERC, or if filed unexecuted, upon the date specified by FERC.

Emergency Condition shall mean a condition or situation: (1) That in the judgment of the Party making the claim is imminently likely to endanger life or property; or (2) that, in the case of a Transmission Provider, is imminently likely (as determined in a non-discriminatory manner) to cause a material adverse effect on the security of, or damage to Transmission Provider's Transmission System, Transmission Provider's Interconnection Facilities or the electric systems of others to which the Transmission Provider's Transmission System is directly connected; or (3) that, in the case of Interconnection Customer, is imminently likely (as determined in a non-discriminatory manner) to cause a material adverse effect on the security of, or damage to, the Generating Facility or Interconnection Customer's Interconnection Facilities. System restoration and black start shall be considered Emergency Conditions; provided that Interconnection Customer is not obligated by the Standard Large Generator Interconnection Agreement to possess black start capability.

Energy Resource Interconnection Service shall mean an Interconnection Service that allows the Interconnection Customer to connect its Generating Facility to the Transmission Provider's Transmission System to be eligible to deliver the Generating Facility's electric output using the existing firm or nonfirm capacity of the Transmission Provider's Transmission System on an as available basis. Energy Resource Interconnection Service in and of itself does not convey transmission service.

Engineering & Procurement (E&P) Agreement shall mean an agreement that authorizes the Transmission Provider to begin engineering and procurement of long lead-time items necessary for the establishment of the interconnection in order to advance the implementation of the Interconnection Request.

Environmental Law shall mean Applicable Laws or Regulations relating to pollution or protection of the environment or natural resources.

Federal Power Act shall mean the Federal Power Act, as amended, 16 U.S.C. 791a *et seq.*

FERC shall mean the Federal Energy Regulatory Commission (Commission) or its successor.

Force Majeure shall mean any act of God, labor disturbance, act of the public enemy, war, insurrection, riot, fire, storm or flood, explosion, breakage or accident to machinery or equipment, any order, regulation or restriction imposed by governmental, military or lawfully established civilian authorities, or any other cause beyond a Party's control. A Force Majeure event does not include acts of negligence or intentional wrongdoing by the Party claiming Force Majeure.

Generating Facility shall mean Interconnection Customer's device for the production of electricity identified in the Interconnection Request, but shall not include the Interconnection Customer's Interconnection Facilities.

Generating Facility Capacity shall mean the net capacity of the Generating Facility and the aggregate net capacity of the Generating Facility where it includes multiple energy production devices.

Good Utility Practice shall mean any of the practices, methods and acts engaged in or approved by a significant portion of the electric industry during the relevant time period, or any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Good Utility Practice is not intended to be limited to the optimum practice, method, or act to the exclusion of all others, but rather to be acceptable practices, methods, or acts generally accepted in the region.

Governmental Authority shall mean any federal, state, local or other governmental regulatory or administrative agency, court, commission, department, board, or other governmental subdivision, legislature, rulemaking board, tribunal, or other governmental authority having jurisdiction over the Parties, their respective facilities, or the respective services they provide, and exercising or entitled to exercise any administrative, executive, police, or taxing authority or power; provided, however, that such term does not include Interconnection Customer, Transmission Provider, or any Affiliate thereof.

Hazardous Substances shall mean any chemicals, materials or substances defined as or included in the definition of "hazardous substances," "hazardous wastes," "hazardous materials," "hazardous constituents," "restricted hazardous materials," "extremely hazardous substances," "toxic substances," "radioactive substances," "contaminants," "pollutants," "toxic pollutants" or words of similar meaning and regulatory effect under any applicable Environmental Law, or any other chemical, material or substance, exposure to which is prohibited, limited or regulated by any applicable Environmental Law.

Initial Synchronization Date shall mean the date upon which the Generating Facility is initially synchronized and upon which Trial Operation begins.

In-Service Date shall mean the date upon which the Interconnection Customer reasonably expects it will be ready to begin use of the Transmission Provider's Interconnection Facilities to obtain back feed power.

Interconnection Customer shall mean any entity, including the Transmission Provider, Transmission Owner or any of the Affiliates or subsidiaries of either, that proposes to interconnect its Generating Facility with the Transmission Provider's Transmission System.

Interconnection Customer's Interconnection Facilities shall mean all facilities and equipment, as identified in Appendix A of the Standard Large Generator Interconnection Agreement, that are located between the Generating Facility and the Point of Change of Ownership, including any modification, addition, or upgrades to such facilities and equipment necessary to physically and electrically interconnect the Generating Facility to the Transmission Provider's Transmission System. Interconnection Customer's Interconnection Facilities are sole use facilities.

Interconnection Facilities shall mean the Transmission Provider's Interconnection Facilities and the Interconnection Customer's Interconnection Facilities. Collectively, Interconnection Facilities include all facilities and equipment between the Generating Facility and the Point of Interconnection, including any modification, additions or upgrades that are necessary to physically and electrically interconnect the Generating Facility to the Transmission Provider's Transmission System. Interconnection Facilities are sole use facilities and shall not include Distribution Upgrades, Stand Alone Network Upgrades or Network Upgrades.

Interconnection Facilities Study shall mean a study conducted by the Transmission Provider or a third party consultant for the Interconnection Customer to determine a list of facilities (including Transmission Provider's Interconnection Facilities and Network Upgrades as identified in the Interconnection System Impact Study), the cost of those facilities, and the time required to interconnect the Generating Facility with the Transmission Provider's Transmission System. The scope of the study is defined in Section 8 of the Standard Large Generator Interconnection Procedures.

Interconnection Facilities Study Agreement shall mean the form of agreement contained in Appendix 4 of the Standard Large Generator Interconnection Procedures for conducting the Interconnection Facilities Study.

Interconnection Feasibility Study shall mean a preliminary evaluation of the system impact and cost of interconnecting the Generating Facility to the Transmission Provider's Transmission System, the scope of which is described in Section 6 of the Standard Large Generator Interconnection Procedures.

Interconnection Feasibility Study Agreement shall mean the form of agreement contained in Appendix 2 of the Standard Large Generator Interconnection Procedures for conducting the Interconnection Feasibility Study.

Interconnection Request shall mean an Interconnection Customer's request, in the form of Appendix 1 to the Standard Large Generator Interconnection Procedures, in accordance with the Tariff, to interconnect a new Generating Facility, or to increase the capacity of, or make a Material Modification to the operating characteristics of, an existing Generating Facility that is interconnected with the Transmission Provider's Transmission System.

Interconnection Service shall mean the service provided by the Transmission Provider associated with interconnecting the Interconnection Customer's Generating Facility to the Transmission Provider's Transmission System and enabling it to receive electric energy and capacity from the Generating Facility at the Point of Interconnection, pursuant to the terms of the Standard Large Generator Interconnection Agreement and, if applicable, the Transmission Provider's Tariff.

Interconnection Study shall mean any of the following studies: The Interconnection Feasibility Study, the Interconnection System Impact Study, and the Interconnection Facilities Study described in the Standard Large Generator Interconnection Procedures.

Interconnection System Impact Study shall mean an engineering study that evaluates the impact of the proposed interconnection on the safety and reliability of Transmission Provider's Transmission System and, if applicable, an Affected System. The study shall identify and detail the system impacts that would result if the Generating Facility were interconnected without project modifications or system modifications, focusing on the Adverse System Impacts identified in the Interconnection Feasibility Study, or to study potential impacts, including but not limited to those identified in the Scoping Meeting as described in the Standard Large Generator Interconnection Procedures.

Interconnection System Impact Study Agreement shall mean the form of agreement contained in Appendix 3 of the Standard Large Generator Interconnection Procedures for conducting the Interconnection System Impact Study.

IRS shall mean the Internal Revenue Service.

Joint Operating Committee shall be a group made up of representatives from Interconnection Customers and the Transmission Provider to coordinate operating and technical considerations of Interconnection Service.

Large Generating Facility shall mean a Generating Facility having a Generating Facility Capacity of more than 20 MW.

Loss shall mean any and all losses relating to injury to or death of any person or damage to property, demand, suits, recoveries, costs and expenses, court costs, attorney fees, and all other obligations by or to third parties, arising out of or resulting from the other Party's performance, or non-performance of its obligations under the Standard Large Generator Interconnection Agreement on behalf of the indemnifying Party, except in cases of gross negligence or intentional wrongdoing by the indemnifying Party.

Material Modification shall mean those modifications that have a material impact on the cost or timing of any Interconnection Request with a later queue priority date.

Metering Equipment shall mean all metering equipment installed or to be installed at the Generating Facility pursuant to the Standard Large Generator Interconnection Agreement at the metering points, including but not limited to instrument transformers, MWh-meters, data acquisition equipment, transducers, remote terminal unit, communications equipment, phone lines, and fiber optics.

NERC shall mean the North American Electric Reliability Council or its successor organization.

Network Resource shall mean any designated generating resource owned, purchased, or leased by a Network Customer under the Network Integration Transmission Service Tariff. Network Resources do not include any resource, or any portion thereof, that is committed for sale to third parties or otherwise cannot be called upon to meet the Network Customer's Network Load on a non-interruptible basis.

Network Resource Interconnection Service shall mean an Interconnection Service that allows the Interconnection

Customer to integrate its Large Generating Facility with the Transmission Provider's Transmission System (1) in a manner comparable to that in which the Transmission Provider integrates its generating facilities to serve native load customers; or (2) in an RTO or ISO with market based congestion management, in the same manner as all other Network Resources. Network Resource Interconnection Service in and of itself does not convey transmission service.

Network Upgrades shall mean the additions, modifications, and upgrades to the Transmission Provider's Transmission System required at or beyond the point at which the Interconnection Facilities connect to the Transmission Provider's Transmission System to accommodate the interconnection of the Large Generating Facility to the Transmission Provider's Transmission System.

Notice of Dispute shall mean a written notice of a dispute or claim that arises out of or in connection with the Standard Large Generator Interconnection Agreement or its performance.

Optional Interconnection Study shall mean a sensitivity analysis based on assumptions specified by the Interconnection Customer in the Optional Interconnection Study Agreement.

Optional Interconnection Study Agreement shall mean the form of agreement contained in Appendix 5 of the Standard Large Generator Interconnection Procedures for conducting the Optional Interconnection Study.

Party or Parties shall mean Transmission Provider, Transmission Owner, Interconnection Customer or any combination of the above.

Point of Change of Ownership shall mean the point, as set forth in Appendix A to the Standard Large Generator Interconnection Agreement, where the Interconnection Customer's Interconnection Facilities connect to the Transmission Provider's Interconnection Facilities.

Point of Interconnection shall mean the point, as set forth in Appendix A to the Standard Large Generator Interconnection Agreement, where the Interconnection Facilities connect to the Transmission Provider's Transmission System.

Queue Position shall mean the order of a valid Interconnection Request, relative to all other pending valid Interconnection Requests, that is established based upon the date and time of receipt of the valid Interconnection Request by the Transmission Provider.

Reasonable Efforts shall mean, with respect to an action required to be attempted or taken by a Party under the Standard Large Generator Interconnection Agreement, efforts that are timely and consistent with Good Utility Practice and are otherwise substantially equivalent to those a Party would use to protect its own interests.

Scoping Meeting shall mean the meeting between representatives of the Interconnection Customer and Transmission Provider conducted for the purpose of discussing alternative interconnection options, to exchange information including any transmission data and earlier study evaluations that would be reasonably expected to impact such interconnection options, to analyze such information, and to determine the potential feasible Points of Interconnection.

Site Control shall mean documentation reasonably demonstrating: (1) Ownership of, a leasehold interest in, or a right to develop a site for the purpose of constructing the Generating Facility; (2) an option to purchase or acquire a leasehold site for such purpose; or (3) an exclusivity or other business relationship between Interconnection Customer and the entity having the right to sell, lease or grant Interconnection Customer the right to possess or occupy a site for such purpose.

Small Generating Facility shall mean a Generating Facility that has a Generating Facility Capacity of no more than 20 MW.

Stand Alone Network Upgrades shall mean Network Upgrades that an Interconnection Customer may construct without affecting day-to-day operations of the Transmission System during their construction. Both the Transmission Provider and the Interconnection Customer must agree as to what constitutes Stand Alone Network Upgrades and identify them in Appendix A to the Standard Large Generator Interconnection Agreement.

Standard Large Generator Interconnection Agreement (LGIA) shall mean the form of interconnection agreement applicable to an Interconnection Request pertaining to a Large Generating Facility that is included in the Transmission Provider's Tariff.

Standard Large Generator Interconnection Procedures (LGIP) shall mean the interconnection procedures applicable to an Interconnection Request pertaining to a Large Generating Facility that are included in the Transmission Provider's Tariff.

System Protection Facilities shall mean the equipment, including necessary protection signal communications equipment, required to protect (1) The Transmission Provider's Transmission System from faults or other electrical disturbances occurring at the Generating Facility and (2) The Generating Facility from faults or other electrical system disturbances occurring on the Transmission Provider's Transmission System or on other delivery systems or other generating systems to which the Transmission Provider's Transmission System is directly connected.

Tariff shall mean the Transmission Provider's Tariff through which open access transmission service and Interconnection Service are offered, as filed with FERC, and as amended or supplemented from time to time, or any successor tariff.

Transmission Owner shall mean an entity that owns, leases or otherwise possesses an interest in the portion of the Transmission System at the Point of Interconnection and may be a Party to the Standard Large Generator Interconnection Agreement to the extent necessary.

Transmission Provider shall mean the public utility (or its designated agent) that owns, controls, or operates transmission or distribution facilities used for the transmission of electricity in interstate commerce and provides transmission service under the Tariff. The term Transmission Provider should be read to include the Transmission Owner when the Transmission Owner is separate from the Transmission Provider.

Transmission Provider's Interconnection Facilities shall mean all facilities and equipment owned, controlled, or operated by the Transmission Provider from the Point of Change of Ownership to the Point of Interconnection as identified in Appendix A to the Standard Large Generator Interconnection Agreement, including any modifications, additions or upgrades to such facilities and equipment. Transmission Provider's Interconnection Facilities are sole use facilities and shall not include Distribution Upgrades, Stand Alone Network Upgrades or Network Upgrades.

Transmission System shall mean the facilities owned, controlled or operated by the Transmission Provider or Transmission Owner that are used to provide transmission service under the Tariff.

Trial Operation shall mean the period during which Interconnection Customer is engaged in on-site test operations and

commissioning of the Generating Facility prior to Commercial Operation.

Section 2. Scope and Application

2.1 Application of Standard Large Generator Interconnection Procedures

Sections 2 through 13 apply to processing an Interconnection Request pertaining to a Large Generating Facility.

2.2 Comparability

Transmission Provider shall receive, process and analyze all Interconnection Requests in a timely manner as set forth in this LGIP. Transmission Provider will use the same Reasonable Efforts in processing and analyzing Interconnection Requests from all Interconnection Customers, whether the Generating Facilities are owned by Transmission Provider, its subsidiaries or Affiliates or others.

2.3 Base Case Data

Transmission Provider shall provide base power flow, short circuit and stability databases, including all underlying assumptions, and contingency list upon request subject to confidentiality provisions in LGIP Section 13.1. Transmission Provider is permitted to require that Interconnection Customer sign a confidentiality agreement before the release of commercially sensitive information or Critical Energy Infrastructure Information in the Base Case data. Such databases and lists, hereinafter referred to as Base Cases, shall include all (1) generation projects and (ii) transmission projects, including merchant transmission projects that are proposed for the Transmission System for which a transmission expansion plan has been submitted and approved by the applicable authority.

2.4 No Applicability to Transmission Service

Nothing in this LGIP shall constitute a request for transmission service or confer upon an Interconnection Customer any right to receive transmission service.

Section 3. Interconnection Requests

3.1 General

An Interconnection Customer shall submit to Transmission Provider an Interconnection Request in the form of Appendix 1 to this LGIP and a refundable deposit of $10,000. Transmission Provider shall apply the deposit toward the cost of an Interconnection Feasibility Study. Interconnection Customer shall submit a separate Interconnection Request for each site and may submit multiple Interconnection Requests for a single site. Interconnection Customer must submit a deposit with each Interconnection Request even when more than one request is submitted for a single site. An Interconnection Request to evaluate one site at two different voltage levels shall be treated as two Interconnection Requests. At Interconnection Customer's option, Transmission Provider and Interconnection Customer will identify alternative Point(s) of Interconnection and configurations at the Scoping Meeting to evaluate in this process and attempt to eliminate alternatives in a reasonable fashion given resources and information available. Interconnection Customer will select the definitive Point(s) of Interconnection to be studied no later than the execution of the Interconnection Feasibility Study Agreement.

3.2 Identification of Types of Interconnection Services

At the time the Interconnection Request is submitted, Interconnection Customer must request either Energy Resource Interconnection Service or Network Resource Interconnection Service, as described; provided, however, any Interconnection Customer requesting Network Resource Interconnection Service may also request that it be concurrently studied for Energy Resource Interconnection Service, up to the point when an Interconnection Facility Study Agreement is executed. Interconnection Customer may then elect to proceed with Network Resource Interconnection Service or to proceed under a lower level of interconnection service to the extent that only certain upgrades will be completed.

3.2.1 Energy Resource Interconnection Service

3.2.1.1 *The Product.* Energy Resource Interconnection Service allows Interconnection Customer to connect the Large Generating Facility to the Transmission System and be eligible to deliver the Large Generating Facility's output using the existing firm or non-firm capacity of the Transmission System on an "as available" basis. Energy Resource Interconnection Service does not in and of itself convey any right to deliver electricity to any specific customer or Point of Delivery.

3.2.1.2 *The Study.* The study consists of short circuit/fault duty, steady state (thermal and voltage) and stability analyses. The short circuit/fault duty analysis would identify direct Interconnection Facilities required and the Network Upgrades necessary to address short circuit issues associated with the Interconnection Facilities. The stability and steady state studies would identify necessary upgrades to allow full output of the proposed Large Generating Facility and would also identify the maximum allowed output, at the time the study is performed, of the interconnecting Large Generating Facility without requiring additional Network Upgrades.

3.2.2 Network Resource Interconnection Service

3.2.2.1 *The Product.* Transmission Provider must conduct the necessary studies and construct the Network Upgrades needed to integrate the Large Generating Facility (1) in a manner comparable to that in which Transmission Provider integrates its generating facilities to serve native load customers; or (2) in an ISO or RTO with market based congestion management, in the same manner as all other Network Resources. Network Resource Interconnection Service Allows Interconnection Customer's Large Generating Facility to be designated as a Network Resource, up to the Large Generating Facility's full output, on the same basis as all other existing Network Resources interconnected to Transmission Provider's Transmission System, and to be studied as a Network Resource on the assumption that such a designation will occur.

3.2.2.2 *The Study.* The Interconnection Study for Network Resource Interconnection Service shall assure that Interconnection Customer's Large Generating Facility meets the requirements for Network Resource Interconnection Service and as a general matter, that such Large Generating Facility's interconnection is also studied with Transmission Provider's Transmission System at peak load, under a variety of severely stressed conditions, to determine whether, with the Large Generating Facility at full output, the aggregate of generation in the local area can be delivered to the aggregate of load on Transmission Provider's Transmission System, consistent with Transmission Provider's reliability criteria and procedures. This approach assumes that some portion of existing Network Resources are displaced by the output of Interconnection Customer's Large Generating Facility. Network Resource Interconnection Service in and of itself does not convey any right to deliver electricity to any specific customer or Point of Delivery.

3.3 Valid Interconnection Request

3.3.1 Initiating an Interconnection Request

To initiate an Interconnection Request, Interconnection Customer must submit all of the following: (i) A $10,000 deposit, (ii) a completed application in the form of Appendix 1, and (iii) demonstration of Site Control or a posting of an additional deposit of $10,000. Such deposits shall be applied toward any Interconnection Studies pursuant to the Interconnection Request. If Interconnection Customer demonstrates Site Control within the cure period specified in Section 3.3.3 after submitting its Interconnection Request, the additional deposit shall be refundable; otherwise, all such deposit(s), additional and initial, become non-refundable.

The expected In-Service Date of the new Large Generating Facility or increase in capacity of the existing Generating Facility shall be no more than the process window for the regional expansion planning period (or in the absence of a regional planning process, the process window for Transmission Provider's expansion planning period) not to exceed seven years from the date the Interconnection Request is received by Transmission Provider, unless Interconnection Customer demonstrates that engineering, permitting and construction of the new Large Generating Facility or increase in capacity of the existing Generating Facility will take longer than the regional expansion planning period. The In-Service Date may succeed the date the Interconnection Request is received by Transmission Provider by a period up to ten years, or longer where Interconnection Customer and Transmission Provider agree, such agreement not to be unreasonably withheld.

3.3.2 Acknowledgment of Interconnection Request

Transmission Provider shall acknowledge receipt of the Interconnection Request within five (5) Business Days of receipt of the request and attach a copy of the received Interconnection Request to the acknowledgement.

3.3.3 Deficiencies in Interconnection Request

An Interconnection Request will not be considered to be a valid request until all items in Section 3.3.1 have been received by Transmission Provider. If an Interconnection Request fails to meet the requirements set forth in Section 3.3.1, Transmission Provider shall notify Interconnection Customer within five (5) Business Days of receipt of the initial Interconnection Request of the reasons for such failure and that the Interconnection Request does not constitute a valid request. Interconnection Customer shall provide Transmission Provider the additional requested information needed to constitute a valid request within ten (10) Business Days after receipt of such notice. Failure by Interconnection Customer to comply with this Section 3.3.3 shall be treated in accordance with Section 3.6.

3.3.4 Scoping Meeting

Within ten (10) Business Days after receipt of a valid Interconnection Request, Transmission Provider shall establish a date agreeable to Interconnection Customer for the Scoping Meeting, and such date shall be no later than thirty (30) Calendar Days from receipt of the valid Interconnection Request, unless otherwise mutually agreed upon by the Parties.

The purpose of the Scoping Meeting shall be to discuss alternative interconnection options, to exchange information including any transmission data that would reasonably be expected to impact such interconnection options, to analyze such information and to determine the potential feasible Points of Interconnection. Transmission Provider and Interconnection Customer will bring to the meeting such technical data, including, but not limited to: (i) General facility loadings, (ii) general instability issues, (iii) general short circuit issues, (iv) general voltage issues, and (v) general reliability issues as may be reasonably required to accomplish the purpose of the meeting. Transmission Provider and Interconnection Customer will also bring to the meeting personnel and other resources as may be reasonably required to accomplish the purpose of the meeting in the time allocated for the meeting. On the basis of the meeting, Interconnection Customer shall designate its Point of Interconnection, pursuant to Section 6.1, and one or more available alternative Point(s) of Interconnection. The duration of the meeting shall be sufficient to accomplish its purpose.

3.4 OASIS Posting

Transmission Provider will maintain on its OASIS a list of all Interconnection Requests. The list will identify, for each Interconnection Request: (i) The maximum summer and winter megawatt electrical output; (ii) the location by county and state; (iii) the station or transmission line or lines where the interconnection will be made; (iv) the projected In-Service Date; (v) the status of the Interconnection Request, including Queue Position; (vi) the type of Interconnection Service being requested; and (vii) the availability of any studies related to the Interconnection Request; (viii) the date of the Interconnection Request; (ix) the type of Generating Facility to be constructed (combined cycle, base load or combustion turbine and fuel type); and (x) for Interconnection Requests that have not resulted in a completed interconnection, an explanation as to why it was not completed. The list will not disclose the identity of Interconnection Customer until Interconnection Customer executes an LGIA or requests that Transmission Provider file an unexecuted LGIA with FERC. Before holding a Scoping Meeting with its Affiliate, Transmission Provider shall post on OASIS an advance notice of its intent to do so. Transmission Provider shall post to its OASIS site any deviations from the study timelines set forth herein. Interconnection Study reports and Optional Interconnection Study reports shall be posted to Transmission Provider's OASIS site subsequent to the meeting between Interconnection Customer and Transmission Provider to discuss the applicable study results. Transmission Provider shall also post any known deviations in the Large Generating Facility's In-Service Date.

3.5 Coordination With Affected Systems

Transmission Provider will coordinate the conduct of any studies required to determine the impact of the Interconnection Request on Affected Systems with Affected System Operators and, if possible, include those results (if available) in its applicable Interconnection Study within the time frame specified in this LGIP. Transmission Provider will include such Affected System Operators in all meetings held with Interconnection Customer as required by this LGIP. Interconnection Customer will cooperate with Transmission Provider in all matters related to the conduct of studies and the determination of modifications to Affected Systems. A Transmission Provider which may be an Affected System shall cooperate with Transmission Provider with whom interconnection has been requested in all matters related to the conduct of studies and the determination of modifications to Affected Systems.

3.6 Withdrawal

Interconnection Customer may withdraw its Interconnection Request at any time by written notice of such withdrawal to Transmission Provider. In addition, if Interconnection Customer fails to adhere to all requirements of this LGIP, except as provided in Section 13.5 (Disputes), Transmission Provider shall deem the Interconnection Request to be withdrawn and shall provide written notice to Interconnection Customer of the deemed withdrawal and an explanation of the reasons for such deemed withdrawal. Upon receipt of such written notice, Interconnection Customer shall have fifteen (15) Business Days in which to either respond with information or actions that cures the deficiency or to notify Transmission Provider of its intent to pursue Dispute Resolution.

Withdrawal shall result in the loss of Interconnection Customer's Queue Position. If an Interconnection Customer disputes the withdrawal and loss of its Queue Position, then during Dispute Resolution, Interconnection Customer's Interconnection Request is eliminated from the queue until such time that the outcome of Dispute Resolution would restore its Queue Position. An Interconnection Customer that withdraws or is deemed to have withdrawn its Interconnection Request shall pay to Transmission Provider all costs that Transmission Provider prudently incurs with respect to that Interconnection Request prior to Transmission Provider's receipt of notice described above. Interconnection Customer must pay all monies due to Transmission Provider before it is allowed to obtain any Interconnection Study data or results.

Transmission Provider shall (i) update the OASIS Queue Position posting and (ii) refund to Interconnection Customer any portion of Interconnection Customer's deposit or study payments that exceeds the costs that Transmission Provider has incurred, including interest calculated in accordance with section 35.19a(a)(2) of FERC's regulations. In the event of such withdrawal, Transmission Provider, subject to the confidentiality provisions of Section 13.1, shall provide, at Interconnection Customer's request, all information that Transmission Provider developed for any completed study conducted up to the date of withdrawal of the Interconnection Request.

Section 4. Queue Position

4.1 General

Transmission Provider shall assign a Queue Position based upon the date and time of receipt of the valid Interconnection Request; provided that, if the sole reason an Interconnection Request is not valid is the lack of required information on the application form, and Interconnection Customer provides such information in accordance with Section 3.3.3, then Transmission Provider shall assign Interconnection Customer a Queue Position based on the date the application form was originally filed. Moving a Point of Interconnection shall result in a lowering of Queue Position if it is deemed a Material Modification under Section 4.4.3. The Queue Position of each Interconnection Request will be used to determine the order of performing the Interconnection Studies and determination of cost responsibility for the facilities necessary to accommodate the Interconnection Request. A higher queued Interconnection Request is one that has been placed "earlier" in the queue in relation to another Interconnection Request that is lower queued. Transmission Provider may allocate the cost of the common upgrades for clustered Interconnection Requests without regard to Queue Position.

4.2 Clustering

At Transmission Provider's option, Interconnection Requests may be studied serially or in clusters for the purpose of the Interconnection System Impact Study.

Clustering shall be implemented on the basis of Queue Position. If Transmission Provider elects to study Interconnection Requests using Clustering, all Interconnection Requests received within a period not to exceed one hundred and eighty (180) Calendar Days, hereinafter referred to as the "Queue Cluster Window" shall be studied together without regard to the nature of the underlying Interconnection Service, whether Energy Resource Interconnection Service or Network Resource Interconnection Service. The deadline for completing all Interconnection System Impact Studies for which an Interconnection System Impact Study Agreement has been executed during a Queue Cluster Window shall be in accordance with Section 7.4, for all Interconnection Requests assigned to the same Queue Cluster Window. Transmission Provider may study an Interconnection Request separately to the extent warranted by Good Utility Practice based upon the electrical remoteness of the proposed Large Generating Facility. Clustering Interconnection System Impact Studies shall be conducted in such a manner to ensure the efficient implementation of the applicable regional transmission expansion plan in light of the Transmission System's capabilities at the time of each study.

The Queue Cluster Window shall have a fixed time interval based on fixed annual opening and closing dates. Any changes to the established Queue Cluster Window interval and opening or closing dates shall be announced with a posting on Transmission Provider's OASIS beginning at least one hundred and eighty (180) Calendar Days in advance of the change and continuing thereafter through the end date of the first Queue Cluster Window that is to be modified.

4.3 Transferability of Queue Position

An Interconnection Customer may transfer its Queue Position to another entity only if such entity acquires the specific Generating Facility identified in the Interconnection Request and the Point of Interconnection does not change.

4.4 Modifications

Interconnection Customer shall submit to Transmission Provider, in writing, modifications to any information provided in the Interconnection Request. Interconnection Customer shall retain its Queue Position if the modifications are in accordance with Sections 4.4.1, 4.4.2 or 4.4.5, or are determined not to be Material Modifications pursuant to Section 4.4.3. Notwithstanding the above, during the course of the Interconnection Studies, either Interconnection Customer or Transmission Provider may identify changes to the planned interconnection that may improve the costs and benefits (including reliability) of the interconnection, and the ability of the proposed change to accommodate the Interconnection Request. To the extent the identified changes are acceptable to Transmission Provider and Interconnection Customer, such acceptance not to be unreasonably withheld, Transmission Provider shall modify the Point of Interconnection and/or configuration in accordance with such changes and proceed with any re-studies necessary to do so in accordance with Section 6.4, Section 7.6 and Section 8.5 as applicable and Interconnection Customer shall retain its Queue Position.

4.4.1 Prior to the return of the executed Interconnection System Impact Study Agreement to Transmission Provider, modifications permitted under this Section shall include specifically: (a) A decrease of

up to 60 percent of electrical output (MW) of the proposed project; (b) modifying the technical parameters associated with the Large Generating Facility technology or the Large Generating Facility step-up transformer impedance characteristics; and (c) modifying the interconnection configuration. For plant increases, the incremental increase in plant output will go to the end of the queue for the purposes of cost allocation and study analysis.

4.4.2 Prior to the return of the executed Interconnection Facility Study Agreement to Transmission Provider, the modifications permitted under this Section shall include specifically: (a) Additional 15 percent decrease of electrical output (MW), and (b) Large Generating Facility technical parameters associated with modifications to Large Generating Facility technology and transformer impedances; provided, however, the incremental costs associated with those modifications are the responsibility of the requesting Interconnection Customer.

4.4.3 Prior to making any modification other than those specifically permitted by Sections 4.4.1, 4.4.2, and 4.4.5, Interconnection Customer may first request that Transmission Provider evaluate whether such modification is a Material Modification. In response to Interconnection Customer's request, Transmission Provider shall evaluate the proposed modifications prior to making them and inform Interconnection Customer in writing of whether the modifications would constitute a Material Modification. Any change to the Point of Interconnection, except those deemed acceptable under Sections 4.4.1, 6.1, 7.2 or so allowed elsewhere, shall constitute a Material Modification. Interconnection Customer may then withdraw the proposed modification or proceed with a new Interconnection Request for such modification.

4.4.4 Upon receipt of Interconnection Customer's request for modification permitted under this Section 4.4, Transmission Provider shall commence and perform any necessary additional studies as soon as practicable, but in no event shall Transmission Provider commence such studies later than thirty (30) Calendar Days after receiving notice of Interconnection Customer's request. Any additional studies resulting from such modification shall be done at Interconnection Customer's cost.

4.4.5 Extensions of less than three (3) cumulative years in the Commercial Operation Date of the Large Generating Facility to which the Interconnection Request relates are not material and should be handled through construction sequencing.

Section 5. Procedures for Interconnection Requests Submitted Prior to Effective Date of Standard Large Generator Interconnection Procedures

5.1 Queue Position for Pending Requests

5.1.1 Any Interconnection Customer assigned a Queue Position prior to the effective date of this LGIP shall retain that Queue Position.

5.1.1.1 If an Interconnection Study Agreement has not been executed as of the effective date of this LGIP, then such Interconnection Study, and any subsequent Interconnection Studies, shall be processed in accordance with this LGIP.

5.1.1.2 If an Interconnection Study Agreement has been executed prior to the effective date of this LGIP, such Interconnection Study shall be completed in accordance with the terms of such agreement. With respect to any remaining studies for which an Interconnection Customer has not signed an Interconnection Study Agreement prior to the effective date of the LGIP, Transmission Provider must offer Interconnection Customer the option of either continuing under Transmission Provider's existing interconnection study process or going forward with the completion of the necessary Interconnection Studies (for which it does not have a signed Interconnection Studies Agreement) in accordance with this LGIP.

5.1.1.3 If an LGIA has been submitted to FERC for approval before the effective date of the LGIP, then the LGIA would be grandfathered.

5.1.2 Transition Period

To the extent necessary, Transmission Provider and Interconnection Customers with an outstanding request (*i.e.*, an Interconnection Request for which an LGIA has not been submitted to FERC for approval as of the effective date of this LGIP) shall transition to this LGIP within a reasonable period of time not to exceed sixty (60) Calendar Days. The use of the term "outstanding request" herein shall mean any Interconnection Request, on the effective date of this LGIP: (i) That has been submitted but not yet accepted by Transmission Provider; (ii) where the related interconnection agreement has not yet been submitted to FERC for approval in executed or unexecuted form, (iii) where the relevant Interconnection Study Agreements have not yet been executed, or (iv) where any of the relevant Interconnection Studies are in process but not yet completed. Any Interconnection Customer with an outstanding request as of the effective date of this LGIP may request a reasonable extension of any deadline, otherwise applicable, if necessary to avoid undue hardship or prejudice to its Interconnection Request. A reasonable extension shall be granted by Transmission Provider to the extent consistent with the intent and process provided for under this LGIP.

5.2 New Transmission Provider

If Transmission Provider transfers control of its Transmission System to a successor Transmission Provider during the period when an Interconnection Request is pending, the original Transmission Provider shall transfer to the successor Transmission Provider any amount of the deposit or payment with interest thereon that exceeds the cost that it incurred to evaluate the request for interconnection. Any difference between such net amount and the deposit or payment required by this LGIP shall be paid by or refunded to the Interconnection, as appropriate. The original Transmission Provider shall coordinate with the successor Transmission Provider to complete any Interconnection Study, as appropriate, that the original Transmission Provider has begun but has not completed. If Transmission Provider has tendered a draft LGIA to Interconnection Customer but Interconnection Customer has not either executed the LGIA or requested the filing of an unexecuted LGIA with FERC, unless otherwise provided, Interconnection Customer must complete negotiations with the successor Transmission Provider.

Section 6. Interconnection Feasibility Study

6.1 Interconnection Feasibility Study Agreement

Simultaneously with the acknowledgement of a valid Interconnection Request Transmission Provider shall provide to Interconnection Customer an Interconnection Feasibility Study Agreement in the form of Appendix 2. The Interconnection Feasibility Study Agreement shall specify that Interconnection Customer is responsible for the actual cost of the Interconnection Feasibility Study. Within five (5) Business Days following the Scoping Meeting Interconnection Customer shall specify for inclusion in the attachment to the Interconnection Feasibility Study

Agreement the Point(s) of Interconnection and any reasonable alternative Point(s) of Interconnection. Within five (5) Business Days following Transmission Provider's receipt of such designation, Transmission Provider shall tender to Interconnection Customer the Interconnection Feasibility Study Agreement signed by Transmission Provider, which includes a good faith estimate of the cost for completing the Interconnection Feasibility Study. Interconnection Customer shall execute and deliver to Transmission Provider the Interconnection Feasibility Study Agreement along with a $10,000 deposit no later than thirty (30) Calendar Days after its receipt. On or before the return of the executed Interconnection Feasibility Study Agreement to Transmission Provider, Interconnection Customer shall provide the technical data called for in Appendix 1, Attachment A. If the Interconnection Feasibility Study uncovers any unexpected result(s) not contemplated during the Scoping Meeting, a substitute Point of Interconnection identified by either Interconnection Customer or Transmission Provider, and acceptable to the other, such acceptance not to be unreasonably withheld, will be substituted for the designated Point of Interconnection specified above without loss of Queue Position, and Re-studies shall be completed pursuant to Section 6.4 as applicable. For the purpose of this Section 6.1, if Transmission Provider and InterconnectionCustomer cannot agree on the substituted Point of Interconnection, then Interconnection Customer may direct that one of the alternatives as specified in the Interconnection Feasibility Study Agreement, as specified pursuant to Section 3.3.4, shall be the substitute.

If Interconnection Customer and Transmission Provider agree to forgo the Interconnection Feasibility Study, Transmission Provider will initiate an Interconnection System Impact Study under Section 7 of this LGIP and apply the $10,000 deposit towards the Interconnection System Impact Study.

6.2 Scope of Interconnection Feasibility Study

The Interconnection Feasibility Study shall preliminarily evaluate the feasibility of the proposed interconnection to the Transmission System.The Interconnection Feasibility Study will consider the Base Case as well as all generating facilities (and with respect to (iii), any identified Network Upgrades) that, on the date the Interconnection Feasibility Study is commenced: (i) Are directly interconnected to the Transmission System; (ii) are interconnected to Affected Systems and may have an impact on the Interconnection Request; (iii) have a pending higher queued Interconnection Request to interconnect to the Transmission System; and (iv) have no Queue Position but have executed an LGIA or requested that an unexecuted LGIA be filed with FERC. The Interconnection Feasibility Study will consist of a power flow and short circuit analysis. The Interconnection Feasibility Study will provide a list of facilities and a non-binding good faith estimate of cost responsibility and a non-binding good faith estimated time to construct.

6.3 Interconnection Feasibility Study Procedures

Transmission Provider shall utilize existing studies to the extent practicable when it performs the study. Transmission Provider shall use Reasonable Efforts to complete the Interconnection Feasibility Study no later than forty-five (45) Calendar Days after Transmission Provider receives the fully executed Interconnection Feasibility Study Agreement. At the request of Interconnection Customer or at any time Transmission Provider determines that it will not meet the required time frame for completing the Interconnection Feasibility Study, Transmission Provider shall notify Interconnection Customer as to the schedule status of the Interconnection Feasibility Study. If Transmission Provider is unable to complete the Interconnection Feasibility Study within that time period, it shall notify Interconnection Customer and provide an estimated completion date with an explanation of the reasons why additional time is required. Upon request, Transmission Provider shall provide Interconnection Customer supporting documentation, workpapers and relevant power flow, short circuit and stability databases for the Interconnection Feasibility Study, subject to confidentiality arrangements consistent with Section 13.1.

6.3.1 Meeting with Transmission Provider

Within ten (10) Business Days of providing an Interconnection Feasibility Study report to Interconnection Customer, Transmission Provider and Interconnection Customer shall meet to discuss the results of the Interconnection Feasibility Study.

6.4 Re-Study

If Re-Study of the Interconnection Feasibility Study is required due to a higher queued project dropping out of the queue, or a modification of a higher queued project subject to Section 4.4, or re-designation of the Point of Interconnection pursuant to Section 6.1 Transmission Provider shall notify Interconnection Customer in writing. Such Re-Study shall take not longer than forty-five (45) Calendar Days from the date of the notice. Any cost of Re-Study shall be borne by the Interconnection Customer being re-studied.

Section 7. Interconnection System Impact Study

7.1 Interconnection System Impact Study Agreement

Unless otherwise agreed, pursuant to the Scoping Meeting provided in Section 3.3.4, simultaneously with the delivery of the Interconnection Feasibility Study to Interconnection Customer, Transmission Provider shall provide to Interconnection Customer an Interconnection System Impact Study Agreement in the form of Appendix 3 to this LGIP. The Interconnection System Impact Study Agreement shall provide that Interconnection Customer shall compensate Transmission Provider for the actual cost of the Interconnection System Impact Study. Within three (3) Business Days following the Interconnection Feasibility Study results meeting, Transmission Provider shall provide to Interconnection Customer a non-binding good faith estimate of the cost and timeframe for completing the Interconnection System Impact Study.

7.2 Execution of Interconnection System Impact Study Agreement

Interconnection Customer shall execute the Interconnection System Impact Study Agreement and deliver the executed Interconnection System Impact Study Agreement to Transmission Provider no later than thirty (30) Calendar Days after its receipt along with demonstration of Site Control, and a $50,000 deposit.

If Interconnection Customer does not provide all such technical data when it delivers the Interconnection System Impact Study Agreement, Transmission Provider shall notify Interconnection Customer of the deficiency within five (5) Business Days of the receipt of the executed Interconnection System Impact Study Agreement and Interconnection Customer shall cure the deficiency within ten (10) Business Days of receipt of the notice, provided, however, such deficiency does not include failure to deliver the executed

Interconnection System Impact Study Agreement or deposit.

If the Interconnection System Impact Study uncovers any unexpected result(s) not contemplated during the Scoping Meeting and the Interconnection Feasibility Study, a substitute Point of Interconnection identified by either Interconnection Customer or Transmission Provider, and acceptable to the other, such acceptance not to be unreasonably withheld, will be substituted for the designated Point of Interconnection specified above without loss of Queue Position, and restudies shall be completed pursuant to Section 7.6 as applicable. For the purpose of this Section 7.6, if Transmission Provider and Interconnection Customer cannot agree on the substituted Point of Interconnection, then Interconnection Customer may direct that one of the alternatives as specified in the Interconnection Feasibility Study Agreement, as specified pursuant to Section 3.3.4, shall be the substitute.

7.3 Scope of Interconnection System Impact Study

The Interconnection System Impact Study shall evaluate the impact of the proposed interconnection on the reliability of the Transmission System. The Interconnection System Impact Study will consider the Base Case as well as all generating facilities (and with respect to (iii) below, any identified Network Upgrades associated with such higher queued interconnection) that, on the date the Interconnection System Impact Study is commenced: (i) Are directly interconnected to the Transmission System; (ii) are interconnected to Affected Systems and may have an impact on the Interconnection Request; (iii) have a pending higher queued Interconnection Request to interconnect to the Transmission System; and (iv) have no Queue Position but have executed an LGIA or requested that an unexecuted LGIA be filed with FERC.

The Interconnection System Impact Study will consist of a short circuit analysis, a stability analysis, and a power flow analysis. The Interconnection System Impact Study will state the assumptions upon which it is based; state the results of the analyses; and provide the requirements or potential impediments to providing the requested interconnection service, including a preliminary indication of the cost and length of time that would be necessary to correct any problems identified in those analyses and implement the interconnection. The Interconnection System Impact Study will provide a list of facilities that are required as a result of the Interconnection Request and a non-binding good faith estimate of cost responsibility and a non-binding good faith estimated time to construct.

7.4 Interconnection System Impact Study Procedures

Transmission Provider shall coordinate the Interconnection System Impact Study with any Affected System that is affected by the Interconnection Request pursuant to Section 3.5 above. Transmission Provider shall utilize existing studies to the extent practicable when it performs the study. Transmission Provider shall use Reasonable Efforts to complete the Interconnection System Impact Study within ninety (90) Calendar Days after the receipt of the Interconnection System Impact Study Agreement or notification to proceed, study payment, and technical data. If Transmission Provider uses Clustering, Transmission Provider shall use Reasonable Efforts to deliver a completed Interconnection System Impact Study within ninety (90) Calendar Days after the close of the Queue Cluster Window. At the request of Interconnection Customer or at any time Transmission Provider determines that it will not meet the required time frame for completing the Interconnection System Impact Study, Transmission Provider shall notify Interconnection Customer as to the schedule status of the Interconnection System Impact Study. If Transmission Provider is unable to complete the Interconnection System Impact Study within the time period, it shall notify Interconnection Customer and provide an estimated completion date with an explanation of the reasons why additional time is required. Upon request, Transmission Provider shall provide Interconnection Customer all supporting documentation, workpapers and relevant pre-Interconnection Request and post-Interconnection Request power flow, short circuit and stability databases for the Interconnection System Impact Study, subject to confidentiality arrangements consistent with Section 13.1.

7.5 Meeting with Transmission Provider

Within ten (10) Business Days of providing an Interconnection System Impact Study report to Interconnection Customer, Transmission Provider and Interconnection Customer shall meet to discuss the results of the Interconnection System Impact Study.

7.6 Re-Study

If Re-Study of the Interconnection System Impact Study is required due to a higher queued project dropping out of the queue, a modification of a higher queued project subject to 4.4, or re-designation of the Point of Interconnection pursuant to Section 6.1 Transmission Provider shall notify Interconnection Customer in writing. Such Re-Study shall take no longer than sixty (60) Calendar Days from the date of notice. Any cost of Re-Study shall be borne by the Interconnection Customer being re-studied.

Section 8. Interconnection Facilities Study

8.1 Interconnection Facilities Study Agreement

Simultaneously with the delivery of the Interconnection System Impact Study to Interconnection Customer, Transmission Provider shall provide to Interconnection Customer an Interconnection Facilities Study Agreement in the form of Appendix 4 to this LGIP. The Interconnection Facilities Study Agreement shall provide that Interconnection Customer shall compensate Transmission Provider for the actual cost of the Interconnection Facilities Study. Within three (3) Business Days following the Interconnection System Impact Study results meeting, Transmission Provider shall provide to Interconnection Customer a non-binding good faith estimate of the cost and timeframe for completing the Interconnection Facilities Study. Interconnection Customer shall execute the Interconnection Facilities Study Agreement and deliver the executed Interconnection Facilities Study Agreement to Transmission Provider within thirty (30) Calendar Days after its receipt, together with the required technical data and the greater of $100,000 or Interconnection Customer's portion of the estimated monthly cost of conducting the Interconnection Facilities Study.

8.1.1 Transmission Provider shall invoice Interconnection Customer on a monthly basis for the work to be conducted on the Interconnection Facilities Study each month. Interconnection Customer shall pay invoiced amounts within thirty (30) Calendar Days of receipt of invoice. Transmission Provider shall continue to hold the amounts on deposit until settlement of the final invoice.

8.2 Scope of Interconnection Facilities Study

The Interconnection Facilities Study shall specify and estimate the cost of the equipment, engineering, procurement and construction work needed to implement the conclusions of the Interconnection System Impact Study in accordance with Good Utility Practice to physically and electrically connect the Interconnection Facility to the Transmission System. The Interconnection Facilities Study shall also identify the electrical switching configuration of the connection equipment, including, without limitation: The transformer, switchgear, meters, and other station equipment; the nature and estimated cost of any Transmission Provider's Interconnection Facilities and Network Upgrades necessary to accomplish the interconnection; and an estimate of the time required to complete the construction and installation of such facilities.

8.3 Interconnection Facilities Study Procedures

Transmission Provider shall coordinate the Interconnection Facilities Study with any Affected System pursuant to Section 3.5 above. Transmission Provider shall utilize existing studies to the extent practicable in performing the Interconnection Facilities Study. Transmission Provider shall use Reasonable Efforts to complete the study and issue a draft Interconnection Facilities Study report to Interconnection Customer within the following number of days after receipt of an executed Interconnection Facilities Study Agreement: Ninety (90) Calendar Days, with no more than a +/−20 percent cost estimate contained in the report; or one hundred eighty (180) Calendar Days, if Interconnection Customer requests a +/−10 percent cost estimate.

At the request of Interconnection Customer or at any time Transmission Provider determines that it will not meet the required time frame for completing the Interconnection Facilities Study, Transmission Provider shall notify Interconnection Customer as to the schedule status of the Interconnection Facilities Study. If Transmission Provider is unable to complete the Interconnection Facilities Study and issue a draft Interconnection Facilities Study report within the time required, it shall notify Interconnection Customer and provide an estimated completion date and an explanation of the reasons why additional time is required.

Interconnection Customer may, within thirty (30) Calendar Days after receipt of the draft report, provide written comments to Transmission Provider, which Transmission Provider shall include in the final report. Transmission Provider shall issue the final Interconnection Facilities Study report within fifteen (15) Business Days of receiving Interconnection Customer's comments or promptly upon receiving Interconnection Customer's statement that it will not provide comments. Transmission Provider may reasonably extend such fifteen-day period upon notice to Interconnection Customer if Interconnection Customer's comments require Transmission Provider to perform additional analyses or make other significant modifications prior to the issuance of the final Interconnection Facilities Report. Upon request, Transmission Provider shall provide Interconnection Customer supporting documentation, workpapers, and databases or data developed in the preparation of the Interconnection Facilities Study, subject to confidentiality arrangements consistent with Section 13.1.

8.4 Meeting With Transmission Provider

Within ten (10) Business Days of providing a draft Interconnection Facilities Study report to Interconnection Customer, Transmission Provider and Interconnection Customer shall meet to discuss the results of the Interconnection Facilities Study.

8.5 Re-Study

If Re-Study of the Interconnection Facilities Study is required due to a higher queued project dropping out of the queue or a modification of a higher queued project pursuant to Section 4.4, Transmission Provider shall so notify Interconnection Customer in writing. Such Re-Study shall take no longer than sixty (60) Calendar Days from the date of notice. Any cost of Re-Study shall be borne by the Interconnection Customer being re-studied.

Section 9. Engineering & Procurement ('E&P') Agreement

Prior to executing an LGIA, an Interconnection Customer may, in order to advance the implementation of its interconnection, request and Transmission Provider shall offer the Interconnection Customer, an E&P Agreement that authorizes Transmission Provider to begin engineering and procurement of long lead-time items necessary for the establishment of the interconnection. However, Transmission Provider shall not be obligated to offer an E&P Agreement if Interconnection Customer is in Dispute Resolution as a result of an allegation that Interconnection Customer has failed to meet any milestones or comply with any prerequisites specified in other parts of the LGIP. The E&P Agreement is an optional procedure and it will not alter the Interconnection Customer's Queue Position or In-Service Date. The E&P Agreement shall provide for Interconnection Customer to pay the cost of all activities authorized by Interconnection Customer and to make advance payments or provide other satisfactory security for such costs.

Interconnection Customer shall pay the cost of such authorized activities and any cancellation costs for equipment that is already ordered for its interconnection, which cannot be mitigated as hereafter described, whether or not such items or equipment later become unnecessary. If Interconnection Customer withdraws its application for interconnection or either party terminates the E&P Agreement, to the extent the equipment ordered can be canceled under reasonable terms, Interconnection Customer shall be obligated to pay the associated cancellation costs. To the extent that the equipment cannot be reasonably canceled, Transmission Provider may elect: (i) To take title to the equipment, in which event Transmission Provider shall refund Interconnection Customer any amounts paid by Interconnection Customer for such equipment and shall pay the cost of delivery of such equipment, or (ii) to transfer title to and deliver such equipment to Interconnection Customer, in which event Interconnection Customer shall pay any unpaid balance and cost of delivery of such equipment.

Section 10. Optional Interconnection Study

10.1 Optional Interconnection Study Agreement

On or after the date when Interconnection Customer receives Interconnection System Impact Study results, Interconnection Customer may request, and Transmission Provider shall perform a reasonable number of Optional Studies. The request shall describe the assumptions that Interconnection Customer wishes Transmission Provider to study within the scope described in Section 10.2. Within five (5) Business Days after receipt of a request for an Optional Interconnection Study, Transmission Provider shall provide to Interconnection Customer an Optional

Interconnection Study Agreement in the form of Appendix 5. The Optional Interconnection Study Agreement shall: (i) Specify the technical data that Interconnection Customer must provide for each phase of the Optional Interconnection Study, (ii) specify Interconnection Customer's assumptions as to which Interconnection Requests with earlier queue priority dates will be excluded from the Optional Interconnection Study case and assumptions as to the type of interconnection service for Interconnection Requests remaining in the Optional Interconnection Study case, and (iii) Transmission Provider's estimate of the cost of the Optional Interconnection Study. To the extent known by Transmission Provider, such estimate shall include any costs expected to be incurred by any Affected System whose participation is necessary to complete the Optional Interconnection Study. Notwithstanding the above, Transmission Provider shall not be required as a result of an Optional Interconnection Study request to conduct any additional Interconnection Studies with respect to any other Interconnection Request.

Interconnection Customer shall execute the Optional Interconnection Study Agreement within ten (10) Business Days of receipt and deliver the Optional Interconnection Study Agreement, the technical data and a $10,000 deposit to Transmission Provider.

10.2 Scope of Optional Interconnection Study

The Optional Interconnection Study will consist of a sensitivity analysis based on the assumptions specified by Interconnection Customer in the Optional Interconnection Study Agreement. The Optional Interconnection Study will also identify Transmission Provider's Interconnection Facilities and the Network Upgrades, and the estimated cost thereof, that may be required to provide transmission service or Interconnection Service based upon the results of the Optional Interconnection Study. The Optional Interconnection Study shall be performed solely for informational purposes. Transmission Provider shall use Reasonable Efforts to coordinate the study with any Affected Systems that may be affected by the types of Interconnection Services that are being studied. Transmission Provider shall utilize existing studies to the extent practicable in conducting the Optional Interconnection Study.

10.3 Optional Interconnection Study Procedures

The executed Optional Interconnection Study Agreement, the prepayment, and technical and other data called for therein must be provided to Transmission Provider within ten (10) Business Days of Interconnection Customer receipt of the Optional Interconnection Study Agreement. Transmission Provider shall use Reasonable Efforts to complete the Optional Interconnection Study within a mutually agreed upon time period specified within the Optional Interconnection Study Agreement. If Transmission Provider is unable to complete the Optional Interconnection Study within such time period, it shall notify Interconnection Customer and provide an estimated completion date and an explanation of the reasons why additional time is required. Any difference between the study payment and the actual cost of the study shall be paid to Transmission Provider or refunded to Interconnection Customer, as appropriate. Upon request, Transmission Provider shall provide Interconnection Customer supporting documentation and workpapers and databases or data developed in the preparation of the Optional Interconnection Study, subject to confidentiality arrangements consistent with Section 13.1.

Section 11. Standard Large Generator Interconnection Agreement (LGIA)

11.1 Tender

Interconnection Customer shall tender comments on the draft Interconnection Facilities Study Report within thirty (30) Calendar Days of receipt of the report. Within thirty (30) Calendar Days after the comments are submitted, Interconnection Customer shall tender a draft LGIA, together with draft appendices completed to the extent practicable. The draft LGIA shall be in the form of Transmission Provider's FERC-approved standard form LGIA, which is in Appendix 6. Interconnection Customer shall execute and return the completed draft appendices within thirty (30) Calendar Days.

11.2 Negotiation

Notwithstanding Section 11.1, at the request of Interconnection Customer Transmission Provider shall begin negotiations with Interconnection Customer concerning the appendices to the LGIA at any time after Interconnection Customer executes the Interconnection Facilities Study Agreement. Transmission Provider and Interconnection Customer shall negotiate concerning any disputed provisions of the appendices to the draft LGIA for not more than sixty (60) Calendar Days after tender of the final Interconnection Facilities Study Report. If Interconnection Customer determines that negotiations are at an impasse, it may request termination of the negotiations at any time after tender of the LGIA pursuant to Section 11.1 and request submission of the unexecuted LGIA with FERC or initiate Dispute Resolution procedures pursuant to Section 13.5. If Interconnection Customer requests termination of the negotiations, but within sixty (60) Calendar Days thereafter fails to request either the filing of the unexecuted LGIA or initiate Dispute Resolution, it shall be deemed to have withdrawn its Interconnection Request. Unless otherwise agreed by the Parties, if Interconnection Customer has not executed the LGIA, requested filing of an unexecuted LGIA, or initiated Dispute Resolution procedures pursuant to Section 13.5 within sixty days of tender of completed draft of the LGIA appendices, it shall be deemed to have withdrawn its Interconnection Request. Transmission Provider shall provide to Interconnection Customer a final LGIA within fifteen (15) Business Days after the completion of the negotiation process.

11.3 Execution and Filing

Within fifteen (15) Business Days after receipt of the final LGIA, Interconnection Customer shall provide Transmission Provider (A) reasonable evidence that continued Site Control or (B) posting of $250,000, non-refundable additional security, which shall be applied toward future construction costs. At the same time, Interconnection Customer also shall provide reasonable evidence that one or more of the following milestones in the development of the Large Generating Facility, at Interconnection Customer election, has been achieved: (i) The execution of a contract for the supply or transportation of fuel to the Large Generating Facility; (ii) the execution of a contract for the supply of cooling water to the Large Generating Facility; (iii) execution of a contract for the engineering for, procurement of major equipment for, or construction of, the Large Generating Facility; (iv) execution of a contract for the sale of electric energy or capacity from the Large Generating Facility; or (v) application for an air, water, or land use permit.

Interconnection Customer shall either: (i) Execute two originals of the tendered LGIA and return them to Transmission

Provider; or (ii) request in writing that Transmission Provider file with FERC an LGIA in unexecuted form. As soon as practicable, but not later than ten (10) Business Days after receiving either the two executed originals of the tendered LGIA (if it does not conform with a FERC-approved standard form of interconnection agreement) or the request to file an unexecuted LGIA, Transmission Provider shall file the LGIA with FERC, together with its explanation of any matters as to which Interconnection Customer and Transmission Provider disagree and support for the costs that Transmission Provider proposes to charge to Interconnection Customer under the LGIA. An unexecuted LGIA should contain terms and conditions deemed appropriate by Transmission Provider for the Interconnection Request. If the Parties agree to proceed with design, procurement, and construction of facilities and upgrades under the agreed-upon terms of the unexecuted LGIA, they may proceed pending FERC action.

11.4 Commencement of Interconnection Activities

If Interconnection Customer executes the final LGIA, Transmission Provider and Interconnection Customer shall perform their respective obligations in accordance with the terms of the LGIA, subject to modification by FERC. Upon submission of an unexecuted LGIA, Interconnection Customer and Transmission Provider shall promptly comply with the unexecuted LGIA, subject to modification by FERC.

Section 12. Construction of Transmission Provider's Interconnection Facilities and Network Upgrades

12.1 Schedule

Transmission Provider and Interconnection Customer shall negotiate in good faith concerning a schedule for the construction of Transmission Provider's Interconnection Facilities and the Network Upgrades.

12.2 Construction Sequencing

12.2.1 General

In general, the In-Service Date of an Interconnection Customer seeking interconnection to the Transmission System will determine the sequence of construction of Network Upgrades.

12.2.2 Advance Construction of Network Upgrades That Are an Obligation of an Entity Other Than Interconnection Customer

An Interconnection Customer with an LGIA, in order to maintain its In-Service Date, may request that Transmission Provider advance to the extent necessary the completion of Network Upgrades that: (i) Were assumed in the Interconnection Studies for such Interconnection Customer, (ii) are necessary to support such In-Service Date, and (iii) would otherwise not be completed, pursuant to a contractual obligation of an entity other than Interconnection Customer that is seeking interconnection to the Transmission System, in time to support such In-Service Date. Upon such request, Transmission Provider will use Reasonable Efforts to advance the construction of such Network Upgrades to accommodate such request; provided that Interconnection Customer commits to pay Transmission Provider: (i) Any associated expediting costs and (ii) the cost of such Network Upgrades. Transmission Provider will refund to Interconnection Customer both the expediting costs and the cost of Network Upgrades, in accordance with Article 11.4 of the LGIA. Consequently, the entity with a contractual obligation to construct such Network Upgrades shall be obligated to pay only that portion of the costs of the Network Upgrades that Transmission Provider has not refunded to Interconnection Customer. Payment by that entity shall be due on the date that it would have been due had there been no request for advance construction. Transmission Provider shall forward to Interconnection Customer the amount paid by the entity with a contractual obligation to construct the Network Upgrades as payment in full for the outstanding balance owed to Interconnection Customer. Transmission Provider then shall refund to that entity the amount that it paid for the Network Upgrades, in accordance with Article 11.4 of the LGIA.

12.2.3 Advancing Construction of Network Upgrades That Are Part of an Expansion Plan of the Transmission Provider

An Interconnection Customer with an LGIA, in order to maintain its In-Service Date, may request that Transmission Provider advance to the extent necessary the completion of Network Upgrades that: (i) Are necessary to support such In-Service Date and (ii) would otherwise not be completed, pursuant to an expansion plan of Transmission Provider, in time to support such In-Service Date. Upon such request, Transmission Provider will use Reasonable Efforts to advance the construction of such Network Upgrades to accommodate such request; provided that Interconnection Customer commits to pay Transmission Provider any associated expediting costs. Interconnection Customer shall be entitled to transmission credits, if any, for any expediting costs paid.

12.2.4 Amended Interconnection System Impact Study

An Interconnection System Impact Study will be amended to determine the facilities necessary to support the requested In-Service Date. This amended study will include those transmission and Large Generating Facilities that are expected to be in service on or before the requested In-Service Date.

Section 13. Miscellaneous

13.1 Confidentiality

Confidential Information shall include, without limitation, all information relating to a Party's technology, research and development, business affairs, and pricing, and any information supplied by either of the Parties to the other prior to the execution of an LGIA.

Information is Confidential Information only if it is clearly designated or marked in writing as confidential on the face of the document, or, if the information is conveyed orally or by inspection, if the Party providing the information orally informs the Party receiving the information that the information is confidential.

If requested by either Party, the other Party shall provide in writing, the basis for asserting that the information referred to in this Article warrants confidential treatment, and the requesting Party may disclose such writing to the appropriate Governmental Authority. Each Party shall be responsible for the costs associated with affording confidential treatment to its information.

13.1.1 Scope

Confidential Information shall not include information that the receiving Party can demonstrate: (1) Is generally available to the public other than as a result of a disclosure by the receiving Party; (2) was in the lawful possession of the receiving Party on a non-confidential basis before receiving it from the disclosing Party; (3) was supplied to the receiving Party without

restriction by a third party, who, to the knowledge of the receiving Party after due inquiry, was under no obligation to the disclosing Party to keep such information confidential; (4) was independently developed by the receiving Party without reference to Confidential Information of the disclosing Party; (5) is, or becomes, publicly known, through no wrongful act or omission of the receiving Party or Breach of the LGIA; or (6) is required, in accordance with Section 13.1.6, Order of Disclosure, to be disclosed by any Governmental Authority or is otherwise required to be disclosed by law or subpoena, or is necessary in any legal proceeding establishing rights and obligations under the LGIA. Information designated as Confidential Information will no longer be deemed confidential if the Party that designated the information as confidential notifies the other Party that it no longer is confidential.

13.1.2 Release of Confidential Information

Neither Party shall release or disclose Confidential Information to any other person, except to its Affiliates (limited by the Standards of Conduct requirements), employees, consultants, or to parties who may be or considering providing financing to or equity participation with Interconnection Customer, or to potential purchasers or assignees of Interconnection Customer, on a need-to-know basis in connection with these procedures, unless such person has first been advised of the confidentiality provisions of this Section 13.1 and has agreed to comply with such provisions. Notwithstanding the foregoing, a Party providing Confidential Information to any person shall remain primarily responsible for any release of Confidential Information in contravention of this Section 13.1.

13.1.3 Rights

Each Party retains all rights, title, and interest in the Confidential Information that each Party discloses to the other Party. The disclosure by each Party to the other Party of Confidential Information shall not be deemed a waiver by either Party or any other person or entity of the right to protect the Confidential Information from public disclosure.

13.1.4 No Warranties

By providing Confidential Information, neither Party makes any warranties or representations as to its accuracy or completeness. In addition, by supplying Confidential Information, neither Party obligates itself to provide any particular information or Confidential Information to the other Party nor to enter into any further agreements or proceed with any other relationship or joint venture.

13.1.5 Standard of Care

Each Party shall use at least the same standard of care to protect Confidential Information it receives as it uses to protect its own Confidential Information from unauthorized disclosure, publication or dissemination. Each Party may use Confidential Information solely to fulfill its obligations to the other Party under these procedures or its regulatory requirements.

13.1.6 Order of Disclosure

If a court or a Government Authority or entity with the right, power, and apparent authority to do so requests or requires either Party, by subpoena, oral deposition, interrogatories, requests for production of documents, administrative order, or otherwise, to disclose Confidential Information, that Party shall provide the other Party with prompt notice of such request(s) or requirement(s) so that the other Party may seek an appropriate protective order or waive compliance with the terms of the LGIA. Notwithstanding the absence of a protective order or waiver, the Party may disclose such Confidential Information which, in the opinion of its counsel, the Party is legally compelled to disclose. Each Party will use Reasonable Efforts to obtain reliable assurance that confidential treatment will be accorded any Confidential Information so furnished.

13.1.7 Remedies

The Parties agree that monetary damages would be inadequate to compensate a Party for the other Party's Breach of its obligations under this Section 13.1. Each Party accordingly agrees that the other Party shall be entitled to equitable relief, by way of injunction or otherwise, if the first Party Breaches or threatens to Breach its obligations under this Section 13.1, which equitable relief shall be granted without bond or proof of damages, and the receiving Party shall not plead in defense that there would be an adequate remedy at law. Such remedy shall not be deemed an exclusive remedy for the Breach of this Section 13.1, but shall be in addition to all other remedies available at law or in equity. The Parties further acknowledge and agree that the covenants contained herein are necessary for the protection of legitimate business interests and are reasonable in scope. No Party, however, shall be liable for indirect, incidental, or consequential or punitive damages of any nature or kind resulting from or arising in connection with this Section 13.1.

13.1.8 Disclosure to FERC, Its Staff, or a State

Notwithstanding anything in this Section 13.1 to the contrary, and pursuant to 18 CFR 1b.20, if FERC or its staff, during the course of an investigation or otherwise, requests information from one of the Parties that is otherwise required to be maintained in confidence pursuant to the LGIP, the Party shall provide the requested information to FERC or its staff, within the time provided for in the request for information. In providing the information to FERC or its staff, the Party must, consistent with 18 CFR 388.112, request that the information be treated as confidential and non-public by FERC and its staff and that the information be withheld from public disclosure. Parties are prohibited from notifying the other Party prior to the release of the Confidential Information to FERC or its staff. The Party shall notify the other Party to the LGIA when its is notified by FERC or its staff that a request to release Confidential Information has been received by FERC, at which time either of the Parties may respond before such information would be made public, pursuant to 18 CFR 388.112. Requests from a state regulatory body conducting a confidential investigation shall be treated in a similar manner, consistent with applicable state rules and regulations.

13.1.9

Subject to the exception in Section 13.1.8, any information that a Party claims is competitively sensitive, commercial or financial information ("Confidential Information") shall not be disclosed by the other Party to any person not employed or retained by the other Party, except to the extent disclosure is (i) required by law; (ii) reasonably deemed by the disclosing Party to be required to be disclosed in connection with a dispute between or among the Parties, or the defense of litigation or dispute; (iii) otherwise permitted by consent of the other Party, such consent not to be unreasonably withheld; or (iv) necessary to fulfill its obligations under this LGIP or as a transmission service provider or a Control Area operator including disclosing the Confidential Information to an RTO or ISO or to a subregional, regional or national reliability organization or planning group. The

Party asserting confidentiality shall notify the other Party in writing of the information it claims is confidential. Prior to any disclosures of the other Party's Confidential Information under this subparagraph, or if any third party or Governmental Authority makes any request or demand for any of the information described in this subparagraph, the disclosing Party agrees to promptly notify the other Party in writing and agrees to assert confidentiality and cooperate with the other Party in seeking to protect the Confidential Information from public disclosure by confidentiality agreement, protective order or other reasonable measures.

13.1.10

This provision shall not apply to any information that was or is hereafter in the public domain (except as a result of a Breach of this provision).

13.1.11

Transmission Provider shall, at Interconnection Customer's election, destroy, in a confidential manner, or return the Confidential Information provided at the time of Confidential Information is no longer needed.

13.2 Delegation of Responsibility

Transmission Provider may use the services of subcontractors as it deems appropriate to perform its obligations under this LGIP. Transmission Provider shall remain primarily liable to Interconnection Customer for the performance of such subcontractors and compliance with its obligations of this LGIP. The subcontractor shall keep all information provided confidential and shall use such information solely for the performance of such obligation for which it was provided and no other purpose.

13.3 Obligation for Study Costs

Transmission Provider shall charge and Interconnection Customer shall pay the actual costs of the Interconnection Studies. Any difference between the study deposit and the actual cost of the applicable Interconnection Study shall be paid by or refunded, except as otherwise provided herein, to Interconnection Customer or offset against the cost of any future Interconnection Studies associated with the applicable Interconnection Request prior to beginning of any such future Interconnection Studies. Any invoices for Interconnection Studies shall include a detailed and itemized accounting of the cost of each Interconnection Study. Interconnection Customer shall pay any such undisputed costs within thirty (30) Calendar Days of receipt of an invoice therefor. Transmission Provider shall not be obligated to perform or continue to perform any studies unless Interconnection Customer has paid all undisputed amounts in compliance herewith.

13.4 Third Parties Conducting Studies

If (i) at the time of the signing of an Interconnection Study Agreement there is disagreement as to the estimated time to complete an Interconnection Study, (ii) Interconnection Customer receives notice pursuant to Sections 6.3, 7.4 or 8.3 that Transmission Provider will not complete an Interconnection Study within the applicable timeframe for such Interconnection Study, or (iii) Interconnection Customer receives neither the Interconnection Study nor a notice under Sections 6.3, 7.4 or 8.3 within the applicable timeframe for such Interconnection Study, then Interconnection Customer may require Transmission Provider to utilize a third party consultant reasonably acceptable to Interconnection Customer and Transmission Provider to perform such Interconnection Study under the direction of Transmission Provider. At other times, Transmission Provider may also utilize a third party consultant to perform such Interconnection Study, either in response to a general request of Interconnection Customer, or on its own volition.

In all cases, use of a third party consultant shall be in accord with Article 26 of the LGIA (Subcontractors) and limited to situations where Transmission Provider determines that doing so will help maintain or accelerate the study process for Interconnection Customer's pending Interconnection Request and not interfere with Transmission Provider's progress on Interconnection Studies for other pending Interconnection Requests. In cases where Interconnection Customer requests use of a third party consultant to perform such Interconnection Study, Interconnection Customer and Transmission Provider shall negotiate all of the pertinent terms and conditions, including reimbursement arrangements and the estimated study completion date and study review deadline. Transmission Provider shall convey all workpapers, data bases, study results and all other supporting documentation prepared to date with respect to the Interconnection Request as soon as practicable upon Interconnection Customer's request subject to the confidentiality provision in Section 13.1. In any case, such third party contract may be entered into with either Interconnection Customer or Transmission Provider at Transmission Provider's discretion.

In the case of (iii) Interconnection Customer maintains its right to submit a claim to Dispute Resolution to recover the costs of such third party study. Such third party consultant shall be required to comply with this LGIP, Article 26 of the LGIA (Subcontractors), and the relevant OATT procedures and protocols as would apply if Transmission Provider were to conduct the Interconnection Study and shall use the information provided to it solely for purposes of performing such services and for no other purposes. Transmission Provider shall cooperate with such third party consultant and Interconnection Customer to complete and issue the Interconnection Study in the shortest reasonable time.

13.5 Disputes

13.5.1 Submission

In the event either Party has a dispute, or asserts a claim, that arises out of or in connection with the LGIA, the LGIP, or their performance, such Party (the "disputing Party") shall provide the other Party with written notice of the dispute or claim ("Notice of Dispute"). Such dispute or claim shall be referred to a designated senior representative of each Party for resolution on an informal basis as promptly as practicable after receipt of the Notice of Dispute by the other Party. In the event the designated representatives are unable to resolve the claim or dispute through unassisted or assisted negotiations within thirty (30) Calendar Days of the other Party's receipt of the Notice of Dispute, such claim or dispute may, upon mutual agreement of the Parties, be submitted to arbitration and resolved in accordance with the arbitration procedures set forth below. In the event the Parties do not agree to submit such claim or dispute to arbitration, each Party may exercise whatever rights and remedies it may have in equity or at law consistent with the terms of this LGIA.

13.5.2 External Arbitration Procedures

Any arbitration initiated under these procedures shall be conducted before a single neutral arbitrator appointed by the Parties. If the Parties fail to agree upon a single arbitrator within ten (10) Calendar Days of the submission of the dispute to arbitration, each Party shall choose one arbitrator who shall sit on a three-member arbitration panel. The two arbitrators so chosen shall within twenty (20) Calendar Days select a third arbitrator to chair the arbitration panel. In either case, the arbitrators shall be

knowledgeable in electric utility matters, including electric transmission and bulk power issues, and shall not have any current or past substantial business or financial relationships with any party to the arbitration (except prior arbitration). The arbitrator(s) shall provide each of the Parties an opportunity to be heard and, except as otherwise provided herein, shall conduct the arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("Arbitration Rules") and any applicable FERC regulations or RTO rules; provided, however, in the event of a conflict between the Arbitration Rules and the terms of this Section 13, the terms of this Section 13 shall prevail.

13.5.3 Arbitration Decisions

Unless otherwise agreed by the Parties, the arbitrator(s) shall render a decision within ninety (90) Calendar Days of appointment and shall notify the Parties in writing of such decision and the reasons therefor. The arbitrator(s) shall be authorized only to interpret and apply the provisions of the LGIA and LGIP and shall have no power to modify or change any provision of the LGIA and LGIP in any manner. The decision of the arbitrator(s) shall be final and binding upon the Parties, and judgment on the award may be entered in any court having jurisdiction. The decision of the arbitrator(s) may be appealed solely on the grounds that the conduct of the arbitrator(s), or the decision itself, violated the standards set forth in the Federal Arbitration Act or the Administrative Dispute Resolution Act. The final decision of the arbitrator must also be filed with FERC if it affects jurisdictional rates, terms and conditions of service, Interconnection Facilities, or Network Upgrades.

13.5.4 Costs

Each Party shall be responsible for its own costs incurred during the arbitration process and for the following costs, if applicable: (1) The cost of the arbitrator chosen by the Party to sit on the three member panel and one half of the cost of the third arbitrator chosen; or (2) one half the cost of the single arbitrator jointly chosen by the Parties.

13.6 Local Furnishing Bonds

13.6.1 Transmission Providers That Own Facilities Financed by Local Furnishing Bonds

This provision is applicable only to a Transmission Provider that has financed facilities for the local furnishing of electric energy with tax-exempt bonds, as described in Section 142(f) of the Internal Revenue Code ("local furnishing bonds"). Notwithstanding any other provision of this LGIA and LGIP, Transmission Provider shall not be required to provide Interconnection Service to Interconnection Customer pursuant to this LGIA and LGIP if the provision of such Transmission Service would jeopardize the tax-exempt status of any local furnishing bond(s) used to finance Transmission Provider's facilities that would be used in providing such Interconnection Service.

13.6.2 Alternative Procedures for Requesting Interconnection Service

If Transmission Provider determines that the provision of Interconnection Service requested by Interconnection Customer would jeopardize the tax-exempt status of any local furnishing bond(s) used to finance its facilities that would be used in providing such Interconnection Service, it shall advise the Interconnection Customer within thirty (30) days of receipt of the Interconnection Request.

Interconnection Customer thereafter may renew its request for interconnection using the process specified in Article 5.2(ii) of the Transmission Provider's OATT.

Appendix 1 to LGIP—Interconnection Request for a Large Generating Facility

1. The undersigned Interconnection Customer submits this request to interconnect its Large Generating Facility with Transmission Provider's Transmission System pursuant to a Tariff.

2. This Interconnection Request is for (check one):

____ A proposed new Large Generating Facility

____ An increase in the generating capacity or a Material Modification of an existing Generating Facility

3. The type of interconnection service requested (check one):

____ Energy Resource Interconnection Service

____ Network Resource Interconnection Service

4. ____ Check here only if Interconnection Customer requesting Network Resource Interconnection Service also seeks to have its Generating Facility studied for Energy Resource Interconnection Service

5. Interconnection Customer provides the following information:

a. Address or location or the proposed new Large Generating Facility site (to the extent known) or, in the case of an existing Generating Facility, the name and specific location of the existing Generating Facility;

b. Maximum summer at ____ degrees C and winter at ____ degrees C megawatt electrical output of the proposed new Large Generating Facility or the amount of megawatt increase in the generating capacity of an existing Generating Facility;

c. General description of the equipment configuration;

d. Commercial Operation Date (Day, Month, and Year);

e. Name, address, telephone number, and e-mail address of Interconnection Customer's contact person;

f. Approximate location of the proposed Point of Interconnection (optional); and

g. Interconnection Customer Data (set forth in Attachment A)

6. Applicable deposit amount as specified in the LGIP.

7. Evidence of Site Control as specified in the LGIP (check one)

____ Is attached to this Interconnection Request

____ Will be provided at a later date in accordance with this LGIP

8. This Interconnection Request shall be submitted to the representative indicated below: [To be completed by Transmission Provider]

9. Representative of Interconnection Customer to contact: [To be completed by Interconnection Customer]

10. This Interconnection Request is submitted by:

Name of Interconnection Customer: _____

By (signature): _____

Name (type or print): _____

Title: _____

Date: _____

Attachment A to Appendix 1—Interconnection Request

Large Generating Facility Data Unit Ratings

kVA _____

°F _____

Voltage _____

Power Factor _____

Speed (RPM) _____

Connection (*e.g.* Wye) _____

Short Circuit Ratio _____

Frequency, Hertz _____

Stator Amperes at Rated kVA _____

Field Volts _____

Max Turbine MW ____ °F __ _____

Combined Turbine-Generator-Exciter Inertia Data

Inertia Constant,
H = _____ kW sec/kVA

Moment-of-Inertia,
WR^2 = _____ lb. ft.^{2}

REACTANCE DATA (PER UNIT-RATED kVA)

	Direct axis	Quadrature axis
Synchronous—saturated	X_{dv} _____	X_{qv} _____
Synchronous—unsaturated	X_{di} _____	X_{qi} _____
Transient—saturated	X'_{dv} _____	X'_{qv} _____
Transient—unsaturated	X'_{di} _____	X'_{qi} _____
Subtransient—saturated	X''_{dv} _____	X''_{qv} _____
Subtransient—unsaturated	X''_{di} _____	X''_{qi} _____
Negative Sequence—saturated	$X2_v$ _____	
Negative Sequence—unsaturated	$X2_i$ _____	
Zero Sequence—saturated	$X0_v$ _____	
Zero Sequence—unsaturated	$X0_i$ _____	
Leakage Reactance	Xl_m _____	

Field Time Constant Data (SEC)

Open Circuit	T'_{do} _____	T'_{qo} _____
Three-Phase Short Circuit Transient	T'_{d3} _____	T'_{q} _____
Line to Line Short Circuit Transient	T'_{d2} _____	
Line to Neutral Short Circuit Transient	T'_{dl} _____	
Short Circuit Subtransient	T''_{d} _____	T''_{q} _____
Open Circuit Subtransient	T''_{do} _____	T''_{qo} _____

Armature Time Constant Data (SEC)

Three Phase Short Circuit—
T_{a3} _____
Line to Line Short Circuit—
T_{a2} _____
Line to Neutral Short Circuit—
T_{a1} _____

Note: If requested information is not applicable, indicate by marking "N/A."

MW Capability and Plant Configuration
Large Generating Facility Data
Armature Winding Resistance Data (Per Unit)

Positive—R_1 _____
Negative—R_2 _____
Zero—R_0 _____
Rotor Short Time Thermal Capacity I_2^2t = _____
Field Current at Rated kVA, Armature Voltage and PF = _____ amps
Field Current at Rated kVA and Armature Voltage, 0 PF = _____ amps
Three Phase Armature Winding Capacitance = _____ microfarad
Field Winding Resistance = _____ ohms _____ °C
Armature Winding Resistance (Per Phase) = _____ ohms _____ °C

Curves

Provide Saturation, Vee, Reactive Capability, Capacity Temperature Correction curves.
Designate normal and emergency Hydrogen Pressure operating range for multiple curves.

Generator Step-Up Transformer Data Ratings

Capacity; Self-cooled/Maximum Nameplate
_____/_____/_____ kVA
Voltage Ratio (Generator Side/System side/Tertiary)
_____/_____/_____ kV
Winding Connections (Low V/High V/ Tertiary V (Delta or Wye))
_____/_____/_____
Fixed Taps Available _____
Present Tap Setting _____

Impedance

Positive: Z_1 (on self-cooled kVA rating) _____% _____ X/R
Zero: Z_0 (on self-cooled kVA rating) _____% _____ X/R

Excitation System Data

Identify appropriate IEEE model block diagram of excitation system and power system stabilizer (PSS) for computer representation in power system stability simulations and the corresponding excitation system and PSS constants for use in the model.

Governor System Data

Identify appropriate IEEE model block diagram of governor system for computer representation in power system stability simulations and the corresponding governor system constants for use in the model.

Wind Generators

Number of generators to be interconnected pursuant to this Interconnection Request: _____
Elevation: _____
____ Single Phase
____ Three Phase
Inverter manufacturer, model name, number, and version: _____

List of adjustable setpoints for the protective equipment or software: _____

Note: A completed General Electric Company Power Systems Load Flow (PSLF) data sheet or other compatible formats, such as IEEE and PTI power flow models, must be supplied with the Interconnection Request. If other data sheets are more appropriate to the proposed device, then they shall be provided and discussed at Scoping Meeting.

Induction Generators

(*) Field Volts: _____
(*) Field Amperes: _____
(*) Motoring Power (kW): _____
(*) Neutral Grounding Resistor (If Applicable): _____
(*) I_2^2t or K (Heating Time Constant): _____
(*) Rotor Resistance: _____
(*) Stator Resistance: _____
(*) Stator Reactance: _____
(*) Rotor Reactance: _____
(*) Magnetizing Reactance: _____
(*) Short Circuit Reactance: _____
(*) Exciting Current: _____
(*) Temperature Rise: _____
(*) Frame Size: _____
(*) Design Letter: _____
(*) Reactive Power Required In Vars (No Load): _____
(*) Reactive Power Required In Vars (Full Load): _____
(*) Total Rotating Inertia, H: _____ Per Unit on KVA Base

Note: Please consult Transmission Provider prior to submitting the Interconnection Request to determine if the information designated by (*) is required.

Appendix 2 to LGIP—Interconnection Feasibility Study Agreement

This agreement is made and entered into this ____ day of _____, 20 ____ by and between _____, a _____ organized and existing under the laws of the State of _____, ("Interconnection Customer,") and _____ a _____ existing under the laws of the State of _____, ("Transmission Provider"). Interconnection Customer and Transmission Provider each may be referred to as a "Party," or collectively as the "Parties."

Recitals

Whereas, Interconnection Customer is proposing to develop a Large Generating Facility or generating capacity addition to an existing Generating Facility consistent with the Interconnection Request submitted by Interconnection Customer dated _____; and

Whereas, Interconnection Customer desires to interconnect the Large Generating Facility with the Transmission System; and

Whereas, Interconnection Customer has requested Transmission Provider to perform an Interconnection Feasibility Study to assess the feasibility of interconnecting the proposed Large Generating Facility to the Transmission System, and of any Affected Systems;

Now, therefore, in consideration of and subject to the mutual covenants contained herein the Parties agreed as follows:

1.0 When used in this Agreement, with initial capitalization, the terms specified shall have the meanings indicated in Transmission Provider's FERC-approved LGIP.

2.0 Interconnection Customer elects and Transmission Provider shall cause to be performed an Interconnection Feasibility Study consistent with Section 6.0 of this LGIP in accordance with the Tariff.

3.0 The scope of the Interconnection Feasibility Study shall be subject to the assumptions set forth in Attachment A to this Agreement.

4.0 The Interconnection Feasibility Study shall be based on the technical information provided by Interconnection Customer in the Interconnection Request, as may be modified as the result of the Scoping Meeting. Transmission Provider reserves the right to request additional technical information from Interconnection Customer as may reasonably become necessary consistent with Good Utility Practice during the course of the Interconnection Feasibility Study and as designated in accordance with Section 3.3.4 of the LGIP. If, after the designation of the Point of Interconnection pursuant to Section 3.3.4 of the LGIP, Interconnection Customer modifies its Interconnection Request pursuant to Section 4.4, the time to complete the Interconnection Feasibility Study may be extended.

5.0 The Interconnection Feasibility Study report shall provide the following information:

- Preliminary identification of any circuit breaker short circuit capability limits exceeded as a result of the interconnection;
- Preliminary identification of any thermal overload or voltage limit violations resulting from the interconnection; and
- Preliminary description and non-bonding estimated cost of facilities required to interconnect the Large Generating Facility to the Transmission System and to address the identified short circuit and power flow issues.

6.0 Interconnection Customer shall provide a deposit of $10,000 for the performance of the Interconnection Feasibility Study.

Upon receipt of the Interconnection Feasibility Study Transmission Provider shall charge and Interconnection Customer shall pay the actual costs of the Interconnection Feasibility Study.

Any difference between the deposit and the actual cost of the study shall be paid by or refunded to Interconnection Customer, as appropriate.

7.0 Miscellaneous. The Interconnection Feasibility Study Agreement shall include standard miscellaneous terms including, but not limited to, indemnities, representations, disclaimers, warranties, governing law, amendment, execution, waiver, enforceability and assignment, that reflect best practices in the electric industry, and that are consistent with regional practices, Applicable Laws and Regulations, and the organizational nature of each Party. All of these provisions, to the extent practicable, shall be consistent with the provisions of the LGIP and the LGIA.

In witness whereof, the Parties have caused this Agreement to be duly executed by their duly authorized officers or agents on the day and year first above written.

[Insert name of Transmission Provider or Transmission Owner, if applicable.]

By: _____

Title: _____

Date: _____

By: _____

Title: _____

Date: _____

[Insert name of Interconnection Customer.]

By: _____

Title: _____

Date: _____

Attachment A to Appendix 2—Interconnection Feasibility Study Agreement

Assumptions Used in Conducting the Interconnection Feasibility Study

The Interconnection Feasibility Study will be based upon the information set forth in the Interconnection Request and agreed upon in the Scoping Meeting held on _____:

Designation of Point of Interconnection and configuration to be studied.

Designation of alternative Point(s) of Interconnection and configuration.

[Above assumptions to be completed by Interconnection Customer and other assumptions to be provided by Interconnection Customer and Transmission Provider]

Appendix 3 to LGIP—Interconnection System Impact Study Agreement

This agreement is made and entered into this ____ day of _____, 20 ____ by and between _____, a _____ organized and existing under the laws of the State of _____, ("Interconnection Customer,") and _____ a _____ existing under the laws of the State of _____, ("Transmission Provider"). Interconnection Customer and Transmission Provider each may be referred to as a "Party," or collectively as the "Parties."

Recitals

Whereas, Interconnection Customer is proposing to develop a Large Generating Facility or generating capacity addition to an existing Generating Facility consistent with the Interconnection Request submitted by Interconnection Customer dated _____; and

Whereas, Interconnection Customer desires to interconnect the Large Generating Facility with the Transmission System:

Whereas, Transmission Provider has completed an Interconnection Feasibility Study (the "Feasibility Study") and provided the results of said study to Interconnection Customer (This recital to be omitted if Transmission Provider does not require the Interconnection Feasibility Study.); and

Whereas, Interconnection Customer has requested Transmission Provider to perform an Interconnection System Impact Study to assess the impact of interconnecting the Large Generating

Facility to the Transmission System, and of any Affected Systems;

Now, therefore, in consideration of and subject to the mutual covenants contained herein the Parties agreed as follows:

1.0 When used in this Agreement, with initial capitalization, the terms specified shall have the meanings indicated in Transmission Provider's FERC-approved LGIP.

2.0 Interconnection Customer elects and Transmission Provider shall cause to be performed an Interconnection System Impact Study consistent with Section 7.0 of this LGIP in accordance with the Tariff.

3.0 The scope of the Interconnection System Impact Study shall be subject to the assumptions set forth in Attachment A to this Agreement.

4.0 The Interconnection System Impact Study will be based upon the results of the Interconnection Feasibility Study and the technical information provided by Interconnection Customer in the Interconnection Request, subject to any modifications in accordance with Section 4.4 of the LGIP. Transmission Provider reserves the right to request additional technical information from Interconnection Customer as may reasonably become necessary consistent with Good Utility Practice during the course of the Interconnection Customer System Impact Study. If Interconnection Customer modifies its designated Point of Interconnection, Interconnection Request, or the technical information provided therein is modified, the time to complete the Interconnection System Impact Study may be extended.

5.0 The Interconnection System Impact Study report shall provide the following information:

—Identification of any circuit breaker short circuit capability limits exceeded as a result of the interconnection;

—Identification of any thermal overload or voltage limit violations resulting from the interconnection;

—Identification of any instability or inadequately damped response to system disturbances resulting from the interconnection and

—Description and non-binding, good faith estimated cost of facilities required to interconnect the Large Generating Facility to the Transmission System and to address the identified short circuit, instability, and power flow issues.

6.0 Interconnection Customer shall provide a deposit of $50,000 for the performance of the Interconnection System Impact Study. Transmission Provider's good faith estimate for the time of completion of the Interconnection System Impact Study is [insert date].

Upon receipt of the Interconnection System Impact Study, Transmission Provider shall charge and Interconnection Customer shall pay the actual costs of the Interconnection System Impact Study.

Any difference between the deposit and the actual cost of the study shall be paid by or refunded to Interconnection Customer, as appropriate.

7.0 Miscellaneous. The Interconnection System Impact Study Agreement shall include standard miscellaneous terms including, but not limited to, indemnities, representations, disclaimers, warranties, governing law, amendment, execution, waiver, enforceability and assignment, that reflect best practices in the electric industry, that are consistent with regional practices, Applicable Laws and Regulations and the organizational nature of each Party. All of these provisions, to the extent practicable, shall be consistent with the provisions of the LGIP and the LGIA.]

In witness thereof, the Parties have caused this Agreement to be duly executed by their duly authorized officers or agents on the day and year first above written.

[Insert name of Transmission Provider or Transmission Owner, if applicable.]

By: _____

Title: _____

Date: _____

By: _____

Title: _____

Date: _____

[Insert name of Interconnection Customer.]

By: _____

Title: _____

Date: _____

Attachment A To Appendix 3—Interconnection System Impact Study Agreement

Assumptions Used in Conducting the Interconnection System Impact Study

The Interconnection System Impact Study will be based upon the results of the Interconnection Feasibility Study, subject to any modifications in accordance with Section 4.4 of the LGIP, and the following assumptions:

Designation of Point of Interconnection and configuration to be studied.

Designation of alternative Point(s) of Interconnection and configuration.

[Above assumptions to be completed by Interconnection Customer and other assumptions to be provided by Interconnection Customer and Transmission Provider]

Appendix 4 to LGIP—Interconnection Facilities Study Agreement

This Agreement is made and entered into this ____ day of _____, 20 ____ by and between _____, a _____ organized and existing under the laws of the State of _____, ("Interconnection Customer,") and _____ a _____ existing under the laws of the State of _____, ("Transmission Provider"). Interconnection Customer and Transmission Provider each may be referred to as a "Party," or collectively as the "Parties."

Recitals

Whereas, Interconnection Customer is proposing to develop a Large Generating Facility or generating capacity addition to an existing Generating Facility consistent with the Interconnection Request submitted by Interconnection Customer dated _____; and

Whereas, Interconnection Customer desires to interconnect the Large Generating Facility with the Transmission System;

Whereas, Transmission Provider has completed an Interconnection System Impact Study (the "System Impact Study") and provided the results of said study to Interconnection Customer; and

Whereas, Interconnection Customer has requested Transmission Provider to perform an Interconnection Facilities Study to specify and estimate the cost of the equipment, engineering, procurement and construction work needed to implement the conclusions of the Interconnection System Impact Study in accordance with Good Utility Practice to physically and electrically connect the Large Generating Facility to the Transmission System.

Now, therefore, in consideration of and subject to the mutual covenants contained herein the Parties agreed as follows:

1.0 When used in this Agreement, with initial capitalization, the terms specified shall have the meanings indicated in Transmission Provider's FERC-approved LGIP.

2.0 Interconnection Customer elects and Transmission Provider shall cause an Interconnection Facilities Study consistent with Section 8.0 of this LGIP to be performed in accordance with the Tariff.

3.0 The scope of the Interconnection Facilities Study shall be subject to the assumptions set forth in Attachment A and the data provided in Attachment B to this Agreement.

4.0 The Interconnection Facilities Study report (i) shall provide a description, estimated cost of (consistent with Attachment A), schedule for required facilities to interconnect the Large Generating Facility to the Transmission System and (ii) shall address the short circuit, instability, and power flow issues identified in the Interconnection System Impact Study.

5.0 Interconnection Customer shall provide a deposit of $100,000 for the performance of the Interconnection Facilities Study. The time for completion of the Interconnection Facilities Study is specified in Attachment A.

Transmission Provider shall invoice Interconnection Customer on a monthly basis for the work to be conducted on the Interconnection Facilities Study each month. Interconnection Customer shall pay invoiced amounts within thirty (30) Calendar Days of receipt of invoice. Transmission Provider shall continue to hold the amounts on deposit until settlement of the final invoice.

6.0 Miscellaneous. The Interconnection Facility Study Agreement shall include standard miscellaneous terms including, but not limited to, indemnities, representations, disclaimers, warranties, governing law, amendment, execution, waiver, enforceability and assignment, that reflect best practices in the electric industry, and that are consistent with regional practices, Applicable Laws and Regulations, and the organizational nature of each Party. All of these provisions, to the extent practicable, shall be consistent with the provisions of the LGIP and the LGIA.

In witness whereof, the Parties have caused this Agreement to be duly executed by their duly authorized officers or agents on the day and year first above written.

[Insert name of Transmission Provider or Transmission Owner, if applicable]

By: _____

Title: _____

Date: _____

By: _____

Title: _____

Date: _____

[Insert name of Interconnection Customer]

By: _____

Title: _____

Date: _____

Attachment A To Appendix 4—Interconnection Facilities Study Agreement

Interconnection Customer Schedule Election for Conducting the Interconnection Facilities Study

Transmission Provider shall use Reasonable Efforts to complete the study and issue a draft Interconnection Facilities Study report to Interconnection Customer within the following number of days after of receipt of an executed copy of this Interconnection Facilities Study Agreement:

—Ninety (90) Calendar Days with no more than a +/ − 20 percent cost estimate contained in the report, or

—one hundred eighty (180) Calendar Days with no more than a +/ − 10 percent cost estimate contained in the report.

Attachment B to Appendix 4—Interconnection Facilities Study Agreement

Data Form To Be Provided by Interconnection Customer With the Interconnection Facilities Study Agreement

Provide location plan and simplified one-line diagram of the plant and station facilities. For staged projects, please indicate future generation, transmission circuits, etc.

One set of metering is required for each generation connection to the new ring bus or existing Transmission Provider station. Number of generation connections:

On the one line diagram indicate the generation capacity attached at each metering location. (Maximum load on CT/PT)

On the one line diagram indicate the location of auxiliary power. (Minimum load on CT/PT) Amps

Will an alternate source of auxiliary power be available during CT/PT maintenance?

____Yes ____No

Will a transfer bus on the generation side of the metering require that each meter set be designed for the total plant generation?

____Yes ____No

(Please indicate on one line diagram).

What type of control system or PLC will be located at Interconnection Customer's Large Generating Facility?

_____

What protocol does the control system or PLC use?

_____

Please provide a 7.5-minute quadrangle of the site. Sketch the plant, station, transmission line, and property line.

Physical dimensions of the proposed interconnection station:

_____

Bus length from generation to interconnection station:

_____

Line length from interconnection station to Transmission Provider's transmission line.

_____

Tower number observed in the field. (Painted on tower leg)*

_____

Number of third party easements required for transmission lines*:

_____

*To be completed in coordination with Transmission Provider.

Is the Large Generating Facility in the Transmission Provider's service area?

____Yes ____No

Local provider: _____

Please provide proposed schedule dates:

Begin Construction Date: _____

Generator step-up transformer receives back feed power Date: _____

Generation Testing Date: _____

Commercial Operation Date: _____

Appendix 5 to LGIP—Optional Interconnection Study Agreement

This Agreement is made and entered into this ____ day of _____, 20 ____ by and between _____, a _____ organized and existing under the laws of the State of _____, ("Interconnection Customer,") and _____ a existing under the laws of the State of _____, ("Transmission Provider "). Interconnection Customer and Transmission Provider each may be referred to as a "Party," or collectively as the "Parties."

Recitals

Whereas, Interconnection Customer is proposing to develop a Large Generating Facility or generating capacity addition to an existing Generating Facility consistent with the Interconnection Request submitted by Interconnection Customer dated _____;

Whereas, Interconnection Customer is proposing to establish an interconnection with the Transmission System; and

Whereas, Interconnection Customer has submitted to Transmission Provider an Interconnection Request; and

Whereas, on or after the date when Interconnection Customer receives the Interconnection System Impact Study

results, Interconnection Customer has further requested that Transmission Provider prepare an Optional Interconnection Study;

Now, therefore, in consideration of and subject to the mutual covenants contained herein the Parties agree as follows:

1.0 When used in this Agreement, with initial capitalization, the terms specified shall have the meanings indicated in Transmission Provider's FERC-approved LGIP.

2.0 Interconnection Customer elects and Transmission Provider shall cause an Optional Interconnection Study consistent with Section 10.0 of this LGIP to be performed in accordance with the Tariff.

3.0 The scope of the Optional Interconnection Study shall be subject to the assumptions set forth in Attachment A to this Agreement.

4.0 The Optional Interconnection Study shall be performed solely for informational purposes.

5.0 The Optional Interconnection Study report shall provide a sensitivity analysis based on the assumptions specified by Interconnection Customer in Attachment A to this Agreement. The Optional Interconnection Study will identify Transmission Provider's Interconnection Facilities and the Network Upgrades, and the estimated cost thereof, that may be required to provide transmission service or interconnection service based upon the assumptions specified by Interconnection Customer in Attachment A.

6.0 Interconnection Customer shall provide a deposit of $10,000 for the performance of the Optional Interconnection Study. Transmission Provider's good faith estimate for the time of completion of the Optional Interconnection Study is [insert date].

Upon receipt of the Optional Interconnection Study, Transmission Provider shall charge and Interconnection Customer shall pay the actual costs of the Optional Study.

Any difference between the initial payment and the actual cost of the study shall be paid by or refunded to Interconnection Customer, as appropriate.

7.0 Miscellaneous. The Optional Interconnection Study Agreement shall include standard miscellaneous terms including, but not limited to, indemnities, representations, disclaimers, warranties, governing law, amendment, execution, waiver, enforceability and assignment, that reflect best practices in the electric industry, and that are consistent with regional practices, Applicable Laws and Regulations, and the organizational nature of each Party. All of these provisions, to the extent practicable, shall be consistent with the provisions of the LGIP and the LGIA.

In witness whereof, the Parties have caused this Agreement to be duly executed by their duly authorized officers or agents on the day and year first above written.

[Insert name of Transmission Provider or Transmission Owner, if applicable]

By: _____

Title: _____

Date: _____

By: _____

Title: _____

Date: _____

[Insert name of Interconnection Customer]

By: _____

Title: _____

Date: _____

Appendix 6 to the Standard Large Generator Interconnection Procedures

Standard Large Generator Interconnection Agreement (LGIA)

Table of Contents

Standard Large Generator Interconnection Agreement

This Standard Large Generator Interconnection Agreement ("Agreement") is made and entered into this __ day of ____ 20__, by and between _____, a _____ organized and existing under the laws of the State/Commonwealth of _____ ("Interconnection Customer" with a Large Generating Facility), and _____, a _____ organized and existing under the laws of the State/Commonwealth of _____ ("Transmission Provider and/or Transmission Owner"). Interconnection Customer and Transmission Provider each may be referred to as a "Party" or collectively as the "Parties."

Recitals

Whereas, Transmission Provider operates the Transmission System; and

Whereas, Interconnection Customer intends to own, lease and/or control and operate the Generating Facility identified as a Large Generating Facility in Appendix C to this Agreement; and,

Whereas, Interconnection Customer and Transmission Provider have agreed to enter into this Agreement for the purpose of interconnecting the Large Generating Facility with the Transmission System;

Now, therefore, in consideration of and subject to the mutual covenants contained herein, it is agreed:

When used in this Standard Large Generator Interconnection Agreement, terms with initial capitalization that are not defined in Article 1 shall have the meanings specified in the Article in which they are used or the Open Access Transmission Tariff (OATT).

Article 1. Definitions

Adverse System Impact shall mean the negative effects due to technical or operational limits on conductors or equipment being exceeded that may compromise the safety and reliability of the electric system.

Affected System shall mean an electric system other than the Transmission Provider's Transmission System that may be affected by the proposed interconnection.

Affected System Operator shall mean the entity that operates an Affected System.

Affiliate shall mean, with respect to a corporation, partnership or other entity, each such other corporation, partnership or other entity that directly or indirectly, through one or more

intermediaries, controls, is controlled by, or is under common control with, such corporation, partnership or other entity.

Ancillary Services shall mean those services that are necessary to support the transmission of capacity and energy from resources to loads while maintaining reliable operation of the Transmission Provider's Transmission System in accordance with Good Utility Practice.

Applicable Laws and Regulations shall mean all duly promulgated applicable federal, state and local laws, regulations, rules, ordinances, codes, decrees, judgments, directives, or judicial or administrative orders, permits and other duly authorized actions of any Governmental Authority.

Applicable Reliability Council shall mean the reliability council applicable to the Transmission System to which the Generating Facility is directly interconnected.

Applicable Reliability Standards shall mean the requirements and guidelines of NERC, the Applicable Reliability Council, and the Control Area of the Transmission System to which the Generating Facility is directly interconnected.

Base Case shall mean the base case power flow, short circuit, and stability data bases used for the Interconnection Studies by the Transmission Provider or Interconnection Customer.

Breach shall mean the failure of a Party to perform or observe any material term or condition of the Standard Large Generator Interconnection Agreement.

Breaching Party shall mean a Party that is in Breach of the Standard Large Generator Interconnection Agreement.

Business Day shall mean Monday through Friday, excluding Federal Holidays.

Calendar Day shall mean any day including Saturday, Sunday or a Federal Holiday.

Clustering shall mean the process whereby a group of Interconnection Requests is studied together, instead of serially, for the purpose of conducting the Interconnection System Impact Study.

Commercial Operation shall mean the status of a Generating Facility that has commenced generating electricity for sale, excluding electricity generated during Trial Operation.

Commercial Operation Date of a unit shall mean the date on which the Generating Facility commences Commercial Operation as agreed to by the Parties pursuant to Appendix E to the Standard Large Generator Interconnection Agreement.

Confidential Information shall mean any confidential, proprietary or trade secret information of a plan, specification, pattern, procedure, design, device, list, concept, policy or compilation relating to the present or planned business of a Party, which is designated as confidential by the Party supplying the information, whether conveyed orally, electronically, in writing, through inspection, or otherwise.

Control Area shall mean an electrical system or systems bounded by interconnection metering and telemetry, capable of controlling generation to maintain its interchange schedule with other Control Areas and contributing to frequency regulation of the interconnection. A Control Area must be certified by the Applicable Reliability Council.

Default shall mean the failure of a Breaching Party to cure its Breach in accordance with Article 17 of the Standard Large Generator Interconnection Agreement.

Dispute Resolution shall mean the procedure for resolution of a dispute between the Parties in which they will first attempt to resolve the dispute on an informal basis.

Distribution System shall mean the Transmission Provider's facilities and equipment used to transmit electricity to ultimate usage points such as homes and industries directly from nearby generators or from interchanges with higher voltage transmission networks which transport bulk power over longer distances. The voltage levels at which distribution systems operate differ among areas.

Distribution Upgrades shall mean the additions, modifications, and upgrades to the Transmission Provider's Distribution System at or beyond the Point of Interconnection to facilitate interconnection of the Generating Facility and render the transmission service necessary to effect Interconnection Customer's wholesale sale of electricity in interstate commerce. Distribution Upgrades do not include Interconnection Facilities.

Effective Date shall mean the date on which the Standard Large Generator Interconnection Agreement becomes effective upon execution by the Parties subject to acceptance by FERC, or if filed unexecuted, upon the date specified by FERC.

Emergency Condition shall mean a condition or situation: (1) That in the judgment of the Party making the claim is imminently likely to endanger life or property; or (2) that, in the case of a Transmission Provider, is imminently likely (as determined in a non-discriminatory manner) to cause a material adverse effect on the security of, or damage to Transmission Provider's Transmission System, Transmission Provider's Interconnection Facilities or the electric systems of others to which the Transmission Provider's Transmission System is directly connected; or (3) that, in the case of Interconnection Customer, is imminently likely (as determined in a non-discriminatory manner) to cause a material adverse effect on the security of, or damage to, the Generating Facility or Interconnection Customer's Interconnection Facilities. System restoration and black start shall be considered Emergency Conditions; provided, that Interconnection Customer is not obligated by the Standard Large Generator Interconnection Agreement to possess black start capability.

Energy Resource Interconnection Service shall mean an Interconnection Service that allows the Interconnection Customer to connect its Generating Facility to the Transmission Provider's Transmission System to be eligible to deliver the Generating Facility's electric output using the existing firm or nonfirm capacity of the Transmission Provider's Transmission System on an as available basis. Energy Resource Interconnection Service in and of itself does not convey transmission service.

Engineering & Procurement (E&P) Agreement shall mean an agreement that authorizes the Transmission Provider to begin engineering and procurement of long lead-time items necessary for the establishment of the interconnection in order to advance the implementation of the Interconnection Request.

Environmental Law shall mean Applicable Laws or Regulations relating to pollution or protection of the environment or natural resources.

Federal Power Act shall mean the Federal Power Act, as amended, 16 U.S.C. 791a et seq.

FERC shall mean the Federal Energy Regulatory Commission (Commission) or its successor.

Force Majeure shall mean any act of God, labor disturbance, act of the public enemy, war, insurrection, riot, fire, storm or flood, explosion, breakage or accident to machinery or equipment, any order, regulation or restriction imposed by governmental, military or lawfully established civilian authorities, or any other caused beyond a Party's control. A Force Majeure event does not include acts of negligence or intentional wrongdoing by the Party claiming Force Majeure.

Generating Facility shall mean Interconnection Customer's device for the production of electricity identified in the Interconnection Request, but shall not include the Interconnection Customer's Interconnection Facilities.

Generating Facility Capacity shall mean the net capacity of the Generating Facility and the aggregate net capacity of the Generating Facility where it includes multiple energy production devices.

Good Utility Practice shall mean any of the practices, methods and acts engaged in or approved by a significant portion of the electric industry during the relevant time period, or any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Good Utility Practice is not intended to be limited to the optimum practice, method, or act to the exclusion of all others, but rather to be acceptable practices, methods, or acts generally accepted in the region.

Governmental Authority shall mean any federal, state, local or other governmental regulatory or administrative agency, court, commission, department, board, or other governmental subdivision, legislature, rulemaking board, tribunal, or other governmental authority having jurisdiction over the Parties, their respective facilities, or the respective services they provide, and exercising or entitled to exercise any administrative, executive, police, or taxing authority or power; provided, however, that such term does not include Interconnection Customer, Transmission Provider, or any Affiliate thereof.

Hazardous Substances shall mean any chemicals, materials or substances defined as or included in the definition of "hazardous substances," "hazardous wastes," "hazardous materials," "hazardous constituents," "restricted hazardous materials," "extremely hazardous substances," "toxic substances," "radioactive substances," "contaminants," "pollutants," "toxic pollutants" or words of similar meaning and regulatory effect under any applicable Environmental Law, or any other chemical, material or substance, exposure to which is prohibited, limited or regulated by any applicable Environmental Law.

Initial Synchronization Date shall mean the date upon which the Generating Facility is initially synchronized and upon which Trial Operation begins.

In-Service Date shall mean the date upon which the Interconnection Customer reasonably expects it will be ready to begin use of the Transmission Provider's Interconnection Facilities to obtain back feed power.

Interconnection Customer shall mean any entity, including the Transmission Provider, Transmission Owner or any of the Affiliates or subsidiaries of either, that proposes to interconnect its Generating Facility with the Transmission Provider's Transmission System.

Interconnection Customer's Interconnection Facilities shall mean all facilities and equipment, as identified in Appendix A of the Standard Large Generator Interconnection Agreement, that are located between the Generating Facility and the Point of Change of Ownership, including any modification, addition, or upgrades to such facilities and equipment necessary to physically and electrically interconnect the Generating Facility to the Transmission Provider's Transmission System.Interconnection Customer's Interconnection Facilities are sole use facilities.

Interconnection Facilities shall mean the Transmission Provider's Interconnection Facilities and the Interconnection Customer's Interconnection Facilities. Collectively, Interconnection Facilities include all facilities and equipment between the Generating Facility and the Point of Interconnection, including any modification, additions or upgrades that are necessary to physically and electrically interconnect the Generating Facility to the Transmission Provider's Transmission System.

Interconnection Facilities are sole use facilities and shall not include Distribution Upgrades, Stand Alone Network Upgrades or Network Upgrades.

Interconnection Facilities Study shall mean a study conducted by the Transmission Provider or a third party consultant for the Interconnection Customer to determine a list of facilities (including Transmission Provider's Interconnection Facilities and Network Upgrades as identified in the Interconnection System Impact Study), the cost of those facilities, and the time required to interconnect the Generating Facility with the Transmission Provider's Transmission System. The scope of the study is defined in Section 8 of the Standard Large Generator Interconnection Procedures.

Interconnection Facilities Study Agreement shall mean the form of agreement contained in Appendix 4 of the Standard Large Generator Interconnection Procedures for conducting the Interconnection Facilities Study.

Interconnection Feasibility Study shall mean a preliminary evaluation of the system impact and cost of interconnecting the Generating Facility to the Transmission Provider's Transmission System, the scope of which is described in Section 6 of the Standard Large Generator Interconnection Procedures.

Interconnection Feasibility Study Agreement shall mean the form of agreement contained in Appendix 2 of the Standard Large Generator Interconnection Procedures for conducting the Interconnection Feasibility Study.

Interconnection Request shall mean an Interconnection Customer's request, in the form of Appendix 1 to the Standard Large Generator Interconnection Procedures, in accordance with the Tariff, to interconnect a new Generating Facility, or to increase the capacity of, or make a Material Modification to the operating characteristics of, an existing Generating Facility that is interconnected with the Transmission Provider's Transmission System.

Interconnection Service shall mean the service provided by the Transmission Provider associated with interconnecting the Interconnection Customer's Generating Facility to the Transmission Provider's Transmission System and enabling it to receive electric energy and capacity from the Generating Facility at the Point of Interconnection, pursuant to the terms of the Standard Large Generator Interconnection Agreement and, if applicable, the Transmission Provider's Tariff.

Interconnection Study shall mean any of the following studies: The Interconnection Feasibility Study, the Interconnection System Impact Study, and the Interconnection Facilities Study described in the Standard Large Generator Interconnection Procedures.

Interconnection System Impact Study shall mean an engineering study that evaluates the impact of the proposed interconnection on the safety and reliability of Transmission Provider's Transmission System and, if applicable, an Affected System. The study shall identify and detail the system impacts that would result if the Generating Facility were interconnected without project modifications or system modifications, focusing on the Adverse System Impacts identified in the Interconnection Feasibility Study, or to study potential impacts, including but not limited to those identified in the

Scoping Meeting as described in the Standard Large Generator Interconnection Procedures.

Interconnection System Impact Study Agreement shall mean the form of agreement contained in Appendix 3 of the Standard Large Generator Interconnection Procedures for conducting the Interconnection System Impact Study.

SAIRS shall mean the Internal Revenue Service.

Joint Operating Committee shall be a group made up of representatives from Interconnection Customers and the Transmission Provider to coordinate operating and technical considerations of Interconnection Service.

Large Generating Facility shall mean a Generating Facility having a Generating Facility Capacity of more than 20 MW.

Loss shall mean any and all losses relating to injury to or death of any person or damage to property, demand, suits, recoveries, costs and expenses, court costs, attorney fees, and all other obligations by or to third parties, arising out of or resulting from the other Party's performance, or non-performance of its obligations under the Standard Large Generator Interconnection Agreement on behalf of the indemnifying Party, except in cases of gross negligence or intentional wrongdoing by the indemnifying Party.

Material Modification shall mean those modifications that have a material impact on the cost or timing of any Interconnection Request with a later queue priority date.

Metering Equipment shall mean all metering equipment installed or to be installed at the Generating Facility pursuant to the Standard Large Generator Interconnection Agreement at the metering points, including but not limited to instrument transformers, MWh-meters, data acquisition equipment, transducers, remote terminal unit, communications equipment, phone lines, and fiber optics.

NERC shall mean the North American Electric Reliability Council or its successor organization.

Network Resource shall mean any designated generating resource owned, purchased, or leased by a Network Customer under the Network Integration Transmission Service Tariff. Network Resources do not include any resource, or any portion thereof, that is committed for sale to third parties or otherwise cannot be called upon to meet the Network Customer's Network Load on a non-interruptible basis.

Network Resource Interconnection Service shall mean an Interconnection Service that allows the Interconnection Customer to integrate its Large Generating Facility with the Transmission Provider's Transmission System (1) in a manner comparable to that in which the Transmission Provider integrates its generating facilities to serve native load customers; or (2) in an RTO or ISO with market based congestion management, in the same manner as all other Network Resources. Network Resource Interconnection Service in and of itself does not convey transmission service.

Network Upgrades shall mean the additions, modifications, and upgrades to the Transmission Provider's Transmission System required at or beyond the point at which the Interconnection Facilities connect to the Transmission Provider's Transmission System to accommodate the interconnection of the Large Generating Facility to the Transmission Provider's Transmission System.

Notice of Dispute shall mean a written notice of a dispute or claim that arises out of or in connection with the Standard Large Generator Interconnection Agreement or its performance.

Optional Interconnection Study shall mean a sensitivity analysis based on assumptions specified by the Interconnection Customer in the Optional Interconnection Study Agreement.

Optional Interconnection Study Agreement shall mean the form of agreement contained in Appendix 5 of the Standard Large Generator Interconnection Procedures for conducting the Optional Interconnection Study.

Party or Parties shall mean Transmission Provider, Transmission Owner, Interconnection Customer or any combination of the above.

Point of Change of Ownership shall mean the point, as set forth in Appendix A to the Standard Large Generator Interconnection Agreement, where the Interconnection Customer's Interconnection Facilities connect to the Transmission Provider's Interconnection Facilities.

Point of Interconnection shall mean the point, as set forth in Appendix A to the Standard Large Generator Interconnection Agreement, where the Interconnection Facilities connect to the Transmission Provider's Transmission System.

Queue Position shall mean the order of a valid Interconnection Request, relative to all other pending valid Interconnection Requests, that is established based upon the date and time of receipt of the valid Interconnection Request by the Transmission Provider.

Reasonable Efforts shall mean, with respect to an action required to be attempted or taken by a Party under the Standard Large Generator Interconnection Agreement, efforts that are timely and consistent with Good Utility Practice and are otherwise substantially equivalent to those a Party would use to protect its own interests.

Scoping Meeting shall mean the meeting between representatives of the Interconnection Customer and Transmission Provider conducted for the purpose of discussing alternative interconnection options, to exchange information including any transmission data and earlier study evaluations that would be reasonably expected to impact such interconnection options, to analyze such information, and to determine the potential feasible Points of Interconnection.

Site Control shall mean documentation reasonably demonstrating: (1) Ownership of, a leasehold interest in, or a right to develop a site for the purpose of constructing the Generating Facility; (2) an option to purchase or acquire a leasehold site for such purpose; or (3) an exclusivity or other business relationship between Interconnection Customer and the entity having the right to sell, lease or grant Interconnection Customer the right to possess or occupy a site for such purpose.

Small Generating Facility shall mean a Generating Facility that has a Generating Facility Capacity of no more than 20 MW.

Stand Alone Network Upgrades shall mean Network Upgrades that an Interconnection Customer may construct without affecting day-to-day operations of the Transmission System during their construction. Both the Transmission Provider and the Interconnection Customer must agree as to what constitutes Stand Alone Network Upgrades and identify them in Appendix A to the Standard Large Generator Interconnection Agreement.

Standard Large Generator Interconnection Agreement (LGIA) shall mean the form of interconnection agreement applicable to an Interconnection Request pertaining to a Large Generating Facility that is included in the Transmission Provider's Tariff.

Standard Large Generator Interconnection Procedures (LGIP) shall mean the interconnection procedures applicable to an Interconnection Request pertaining to a Large Generating Facility that are included in the Transmission Provider's Tariff.

System Protection Facilities shall mean the equipment, including necessary protection signal communications equipment, required to protect (1) the Transmission Provider's Transmission System from faults or other electrical disturbances occurring at the Generating Facility and (2) the Generating Facility from faults or other electrical system disturbances occurring on the Transmission Provider's Transmission System or on other delivery systems or other generating systems to which the Transmission Provider's Transmission System is directly connected.

Tariff shall mean the Transmission Provider's Tariff through which open access transmission service and Interconnection Service are offered, as filed with FERC, and as amended or supplemented from time to time, or any successor tariff.

Transmission Owner shall mean an entity that owns, leases or otherwise possesses an interest in the portion of the Transmission System at the Point of Interconnection and may be a Party to the Standard Large Generator Interconnection Agreement to the extent necessary.

Transmission Provider shall mean the public utility (or its designated agent) that owns, controls, or operates transmission or distribution facilities used for the transmission of electricity in interstate commerce and provides transmission service under the Tariff. The term Transmission Provider should be read to include the Transmission Owner when the Transmission Owner is separate from the Transmission Provider.

Transmission Provider's Interconnection Facilities shall mean all facilities and equipment owned, controlled or operated by the Transmission Provider from the Point of Change of Ownership to the Point of Interconnection as identified in Appendix A to the Standard Large Generator Interconnection Agreement, including any modifications, additions or upgrades to such facilities and equipment. Transmission Provider's Interconnection Facilities are sole use facilities and shall not include Distribution Upgrades, Stand Alone Network Upgrades or Network Upgrades.

Transmission System shall mean the facilities owned, controlled or operated by the Transmission Provider or Transmission Owner that are used to provide transmission service under the Tariff.

Trial Operation shall mean the period during which Interconnection Customer is engaged in on-site test operations and commissioning of the Generating Facility prior to Commercial Operation.

Article 2. Effective Date, Term, and Termination

2.1 Effective Date

This LGIA shall become effective upon execution by the Parties subject to acceptance by FERC (if applicable), or if filed unexecuted, upon the date specified by FERC. Transmission Provider shall promptly file this LGIA with FERC upon execution in accordance with Article 3.1, if required.

2.2 Term of Agreement

Subject to the provisions of Article 2.3, this LGIA shall remain in effect for a period of ten (10) years from the Effective Date or such other longer period as Interconnection Customer may request (Term to be specified in individual agreements) and shall be automatically renewed for each successive one-year period thereafter.

2.3 Termination Procedures

2.3.1 *Written Notice.* This LGIA may be terminated by Interconnection Customer after giving Transmission Provider ninety (90) Calendar Days advance written notice, or by Transmission Provider notifying FERC after the Generating Facility permanently ceases Commercial Operation.

2.3.2 *Default.* Either Party may terminate this LGIA in accordance with Article 17.

2.3.3 Notwithstanding Articles 2.3.1 and 2.3.2, no termination shall become effective until the Parties have complied with all Applicable Laws and Regulations applicable to such termination, including the filing with FERC of a notice of termination of this LGIA, which notice has been accepted for filing by FERC.

2.4 Termination Costs

If a Party elects to terminate this Agreement pursuant to Article 2.3 above, each Party shall pay all costs incurred (including any cancellation costs relating to orders or contracts for Interconnection Facilities and equipment) or charges assessed by the other Party, as of the date of the other Party's receipt of such notice of termination, that are the responsibility of the Terminating Party under this LGIA. In the event of termination by a Party, the Parties shall use commercially Reasonable Efforts to mitigate the costs, damages and charges arising as a consequence of termination. Upon termination of this LGIA, unless otherwise ordered or approved by FERC:

2.4.1 With respect to any portion of Transmission Provider's Interconnection Facilities that have not yet been constructed or installed, Transmission Provider shall to the extent possible and with Interconnection Customer's authorization cancel any pending orders of, or return, any materials or equipment for, or contracts for construction of, such facilities; provided that in the event Interconnection Customer elects not to authorize such cancellation, Interconnection Customer shall assume all payment obligations with respect to such materials, equipment, and contracts, and Transmission Provider shall deliver such material and equipment, and, if necessary, assign such contracts, to Interconnection Customer as soon as practicable, at Interconnection Customer's expense. To the extent that Interconnection Customer has already paid Transmission Provider for any or all such costs of materials or equipment not taken by Interconnection Customer, Transmission Provider shall promptly refund such amounts to Interconnection Customer, less any costs, including penalties incurred by Transmission Provider to cancel any pending orders of or return such materials, equipment, or contracts.

If an Interconnection Customer terminates this LGIA, it shall be responsible for all costs incurred in association with that Interconnection Customer's interconnection, including any cancellation costs relating to orders or contracts for Interconnection Facilities and equipment, and other expenses including any Network Upgrades for which Transmission Provider has incurred expenses and has not been reimbursed by Interconnection Customer.

2.4.2 Transmission Provider may, at its option, retain any portion of such materials, equipment, or facilities that Interconnection Customer chooses not to accept delivery of, in which case Transmission Provider shall be responsible for all costs associated with procuring such materials, equipment, or facilities.

2.4.3 With respect to any portion of the Interconnection Facilities, and any other facilities already installed or constructed pursuant to the terms of this LGIA, Interconnection Customer shall be responsible for all costs associated with the removal, relocation or other disposition or retirement of such materials, equipment, or facilities.

2.5 Disconnection

Upon termination of this LGIA, the Parties will take all appropriate steps to

disconnect the Large Generating Facility from the Transmission System. All costs required to effectuate such disconnection shall be borne by the terminating Party, unless such termination resulted from the non-terminating Party's Default of this LGIA or such non-terminating Party otherwise is responsible for these costs under this LGIA.

2.6 Survival

This LGIA shall continue in effect after termination to the extent necessary to provide for final billings and payments and for costs incurred hereunder, including billings and payments pursuant to this LGIA; to permit the determination and enforcement of liability and indemnification obligations arising from acts or events that occurred while this LGIA was in effect; and to permit each Party to have access to the lands of the other Party pursuant to this LGIA or other applicable agreements, to disconnect, remove or salvage its own facilities and equipment.

Article 3. Regulatory Filings

3.1 Filing

Transmission Provider shall file this LGIA (and any amendment hereto) with the appropriate Governmental Authority, if required. Interconnection Customer may request that any information so provided be subject to the confidentiality provisions of Article 22. If Interconnection Customer has executed this LGIA, or any amendment thereto, Interconnection Customer shall reasonably cooperate with Transmission Provider with respect to such filing and to provide any information reasonably requested by Transmission Provider needed to comply with applicable regulatory requirements.

Article 4. Scope of Service

4.1 Interconnection Product Options

Interconnection Customer has selected the following (checked) type of Interconnection Service:

4.1.1 Energy Resource Interconnection Service

4.1.1.1 *The Product.* Energy Resource Interconnection Service allows Interconnection Customer to connect the Large Generating Facility to the Transmission System and be eligible to deliver the Large Generating Facility's output using the existing firm or non-firm capacity of the Transmission System on an "as available" basis. To the extent Interconnection Customer wants to receive Energy Resource Interconnection Service, Transmission Provider shall construct facilities identified in Attachment A.

4.1.1.2 *Transmission Delivery Service Implications.* Under Energy Resource Interconnection Service, Interconnection Customer will be eligible to inject power from the Large Generating Facility into and deliver power across the interconnecting Transmission Provider's Transmission System on an "as available" basis up to the amount of MWs identified in the applicable stability and steady state studies to the extent the upgrades initially required to qualify for Energy Resource Interconnection Service have been constructed. Where eligible to do so (*e.g.*, PJM, ISO–NE, NYISO), Interconnection Customer may place a bid to sell into the market up to the maximum identified Large Generating Facility output, subject to any conditions specified in the interconnection service approval, and the Large Generating Facility will be dispatched to the extent Interconnection Customer's bid clears. In all other instances, no transmission delivery service from the Large Generating Facility is assured, but Interconnection Customer may obtain Point-to-Point Transmission Service, Network Integration Transmission Service, or be used for secondary network transmission service, pursuant to Transmission Provider's Tariff, up to the maximum output identified in the stability and steady state studies. In those instances, in order for Interconnection Customer to obtain the right to deliver or inject energy beyond the Large Generating Facility Point of Interconnection or to improve its ability to do so, transmission delivery service must be obtained pursuant to the provisions of Transmission Provider's Tariff. The Interconnection Customer's ability to inject its Large Generating Facility output beyond the Point of Interconnection, therefore, will depend on the existing capacity of Transmission Provider's Transmission System at such time as a transmission service request is made that would accommodate such delivery. The provision of firm Point-to-Point Transmission Service or Network Integration Transmission Service may require the construction of additional Network Upgrades.

4.1.2 Network Resource Interconnection Service

4.1.2.1 *The Product.* Transmission Provider must conduct the necessary studies and construct the Network Upgrades needed to integrate the Large Generating Facility (1) in a manner comparable to that in which Transmission Provider integrates its generating facilities to serve native load customers; or (2).in an ISO or RTO with market based congestion management, in the same manner as all Network Resources. To the extent Interconnection Customer wants to receive Network Resource Interconnection Service, Transmission Provider shall construct the facilities identified in Attachment A to this LGIA.

4.1.2.2 *Transmission Delivery Service Implications.* Network Resource Interconnection Service allows Interconnection Customer's Large Generating Facility to be designated by any Network Customer under the Tariff on Transmission Provider's Transmission System as a Network Resource, up to the Large Generating Facility's full output, on the same basis as existing Network Resources interconnected to Transmission Provider's Transmission System, and to be studied as a Network Resource on the assumption that such a designation will occur. Although Network Resource Interconnection Service does not convey a reservation of transmission service, any Network Customer under the Tariff can utilize its network service under the Tariff to obtain delivery of energy from the interconnected Interconnection Customer's Large Generating Facility in the same manner as it accesses other Network Resources. A Large Generating Facility receiving Network Resource Interconnection Service may also be used to provide Ancillary Services after technical studies and/or periodic analyses are performed with respect to the Large Generating Facility's ability to provide any applicable Ancillary Services, provided that such studies and analyses have been or would be required in connection with the provision of such Ancillary Services by any existing Network Resource. However, if an Interconnection Customer's Large Generating Facility has not been designated as a Network Resource by any load, it cannot be required to provide Ancillary Services except to the extent such requirements extend to all generating facilities that are similarly situated. The provision of Network Integration Transmission Service or firm Point-to-Point Transmission Service may require additional studies and the construction of additional upgrades. Because such studies and upgrades would be associated with a request for delivery service under the Tariff, cost responsibility for the studies and upgrades would be in accordance with FERC's policy for pricing transmission delivery services.

Network Resource Interconnection Service does not necessarily provide

Interconnection Customer with the capability to physically deliver the output of its Large Generating Facility to any particular load on Transmission Provider's Transmission System without incurring congestion costs. In the event of transmission constraints on Transmission Provider's Transmission System, Interconnection Customer's Large Generating Facility shall be subject to the applicable congestion management procedures in Transmission Provider's Transmission System in the same manner as all other Network Resources.

There is no requirement either at the time of study or interconnection, or at any point in the future, that Interconnection Customer's Large Generating Facility be designated as a Network Resource by a Network Service Customer under the Tariff or that Interconnection Customer identify a specific buyer (or sink). To the extent a Network Customer does designate the Large Generating Facility as a Network Resource, it must do so pursuant to Transmission Provider's Tariff.

Once an Interconnection Customer satisfies the requirements for obtaining Network Resource Interconnection Service, any future transmission service request for delivery from the Large Generating Facility within Transmission Provider's Transmission System of any amount of capacity and/or energy, up to the amount initially studied, will not require that any additional studies be performed or that any further upgrades associated with such Large Generating Facility be undertaken, regardless of whether or not such Large Generating Facility is ever designated by a Network Customer as a Network Resource and regardless of changes in ownership of the Large Generating Facility. However, the reduction or elimination of congestion or redispatch costs may require additional studies and the construction of additional upgrades.

To the extent Interconnection Customer enters into an arrangement for long term transmission service for deliveries from the Large Generating Facility outside Transmission Provider's Transmission System, such request may require additional studies and upgrades in order for Transmission Provider to grant such request.

4.2 Provision of Service

Transmission Provider shall provide Interconnection Service for the Large Generating Facility at the Point of Interconnection.

4.3 Performance Standards

Each Party shall perform all of its obligations under this LGIA in accordance with Applicable Laws and Regulations, Applicable Reliability Standards, and Good Utility Practice, and to the extent a Party is required or prevented or limited in taking any action by such regulations and standards, such Party shall not be deemed to be in Breach of this LGIA for its compliance therewith. If such Party is a Transmission Provider or Transmission Owner, then that Party shall amend the LGIA and submit the amendment to FERC for approval.

4.4 No Transmission Delivery Service

The execution of this LGIA does not constitute a request for, nor the provision of, any transmission delivery service under Transmission Provider's Tariff, and does not convey any right to deliver electricity to any specific customer or Point of Delivery.

4.5 Interconnection Customer Provided Services

The services provided by Interconnection Customer under this LGIA are set forth in Article 9.6 and Article 13.5.1. Interconnection Customer shall be paid for such services in accordance with Article 11.6.

Article 5. Interconnection Facilities Engineering, Procurement, and Construction

5.1 Options

Unless otherwise mutually agreed to between the Parties, Interconnection Customer shall select the In-Service Date, Initial Synchronization Date, and Commercial Operation Date; and either Standard Option or Alternate Option set forth below for completion of Transmission Provider's Interconnection Facilities and Network Upgrades as set forth in Appendix A, Interconnection Facilities and Network Upgrades, and such dates and selected option shall be set forth in Appendix B, Milestones.

5.1.1 *Standard Option.* Transmission Provider shall design, procure, and construct Transmission Provider's Interconnection Facilities and Network Upgrades, using Reasonable Efforts to complete Transmission Provider's Interconnection Facilities and Network Upgrades by the dates set forth in Appendix B, Milestones. Transmission Provider shall not be required to undertake any action which is inconsistent with its standard safety practices, its material and equipment specifications, its design criteria and construction procedures, its labor agreements, and Applicable Laws and Regulations. In the event Transmission Provider reasonably expects that it will not be able to complete Transmission Provider's Interconnection Facilities and Network Upgrades by the specified dates, Transmission Provider shall promptly provide written notice to Interconnection Customer and shall undertake Reasonable Efforts to meet the earliest dates thereafter.

5.1.2 *Alternate Option.* If the dates designated by Interconnection Customer are acceptable to Transmission Provider, Transmission Provider shall so notify Interconnection Customer within thirty (30) Calendar Days, and shall assume responsibility for the design, procurement and construction of Transmission Provider's Interconnection Facilities by the designated dates. If Transmission Provider subsequently fails to complete Transmission Provider's Interconnection Facilities by the In-Service Date, to the extent necessary to provide back feed power; or fails to complete Network Upgrades by the Initial Synchronization Date to the extent necessary to allow for Trial Operation at full power output, unless other arrangements are made by the Parties for such Trial Operation; or fails to complete the Network Upgrades by the Commercial Operation Date, as such dates are reflected in Appendix B, Milestones; Transmission Provider shall pay Interconnection Customer liquidated damages in accordance with Article 5.3, Liquidated Damages, provided, however, the dates designated by Interconnection Customer shall be extended day for day for each day that the applicable RTO or ISO refuses to grant clearances to install equipment.

5.1.3 *Option to Build.* If the dates designated by Interconnection Customer are not acceptable to Transmission Provider, Transmission Provider shall so notify Interconnection Customer within thirty (30) Calendar Days, and unless the Parties agree otherwise, Interconnection Customer shall have the option to assume responsibility for the design, procurement and construction of Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades on the dates specified in Article 5.1.2. Transmission Provider and Interconnection Customer must agree as to what constitutes Stand Alone Network Upgrades and identify such Stand Alone Network Upgrades in Appendix A. Except for Stand Alone Network Upgrades, Interconnection Customer shall have no right to construct Network Upgrades under this option.

5.1.4 *Negotiated Option.* If Interconnection Customer elects not to exercise its option under Article 5.1.3,

Option to Build, Interconnection Customer shall so notify Transmission Provider within thirty (30) Calendar Days, and the Parties shall in good faith attempt to negotiate terms and conditions (including revision of the specified dates and liquidated damages, the provision of incentives or the procurement and construction of a portion of Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades by Interconnection Customer) pursuant to which Transmission Provider is responsible for the design, procurement and construction of Transmission Provider's Interconnection Facilities and Network Upgrades. If the Parties are unable to reach agreement on such terms and conditions, Transmission Provider shall assume responsibility for the design, procurement and construction of Transmission Provider's Interconnection Facilities and Network Upgrades pursuant to 5.1.1, Standard Option.

5.2 General Conditions Applicable to Option to Build

If Interconnection Customer assumes responsibility for the design, procurement and construction of Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades,

(1) Interconnection Customer shall engineer, procure equipment, and construct Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades (or portions thereof) using Good Utility Practice and using standards and specifications provided in advance by Transmission Provider;

(2) Interconnection Customer's engineering, procurement and construction of Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades shall comply with all requirements of law to which Transmission Provider would be subject in the engineering, procurement or construction of Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades;

(3) Transmission Provider shall review and approve the engineering design, equipment acceptance tests, and the construction of Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades;

(4) prior to commencement of construction, Interconnection Customer shall provide to Transmission Provider a schedule for construction of Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades, and shall promptly respond to requests for information from Transmission Provider;

(5) at any time during construction, Transmission Provider shall have the right to gain unrestricted access to Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades and to conduct inspections of the same;

(6) At any time during construction, should any phase of the engineering, equipment procurement, or construction of Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades not meet the standards and specifications provided by Transmission Provider, Interconnection Customer shall be obligated to remedy deficiencies in that portion of Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades;

(7) Interconnection Customer shall indemnify Transmission Provider for claims arising from Interconnection Customer's construction of Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades under the terms and procedures applicable to Article 18.1 Indemnity;

(8) Interconnection Customer shall transfer control of Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades to Transmission Provider;

(9) Unless Parties otherwise agree, Interconnection Customer shall transfer ownership of Transmission Provider's Interconnection Facilities and Stand-Alone Network Upgrades to Transmission Provider;

(10) Transmission Provider shall approve and accept for operation and maintenance Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades to the extent engineered, procured, and constructed in accordance with this Article 5.2; and

(11) Interconnection Customer shall deliver to Transmission Provider "as-built" drawings, information, and any other documents that are reasonably required by Transmission Provider to assure that the Interconnection Facilities and Stand-Alone Network Upgrades are built to the standards and specifications required by Transmission Provider.

5.3 Liquidated Damages

The actual damages to Interconnection Customer, in the event Transmission Provider's Interconnection Facilities or Network Upgrades are not completed by the dates designated by Interconnection Customer and accepted by Transmission Provider pursuant to subparagraphs 5.1.2 or 5.1.4, above, may include Interconnection Customer's fixed operation and maintenance costs and lost opportunity costs. Such actual damages are uncertain and impossible to determine at this time. Because of such uncertainty, any liquidated damages paid by Transmission Provider to Interconnection Customer in the event that Transmission Provider does not complete any portion of Transmission Provider's Interconnection Facilities or Network Upgrades by the applicable dates, shall be an amount equal to ½ of 1 percent per day of the actual cost of Transmission Provider's Interconnection Facilities and Network Upgrades, in the aggregate, for which Transmission Provider has assumed responsibility to design, procure and construct.

However, in no event shall the total liquidated damages exceed 20 percent of the actual cost of Transmission Provider's Interconnection Facilities and Network Upgrades for which Transmission Provider has assumed responsibility to design, procure, and construct. The foregoing payments will be made by Transmission Provider to Interconnection Customer as just compensation for the damages caused to Interconnection Customer, which actual damages are uncertain and impossible to determine at this time, and as reasonable liquidated damages, but not as a penalty or a method to secure performance of this LGIA. Liquidated damages, when the Parties agree to them, are the exclusive remedy for the Transmission Provider's failure to meet its schedule.

No liquidated damages shall be paid to Interconnection Customer if: (1) Interconnection Customer is not ready to commence use of Transmission Provider's Interconnection Facilities or Network Upgrades to take the delivery of power for the Large Generating Facility's Trial Operation or to export power from the Large Generating Facility on the specified dates, unless Interconnection Customer would have been able to commence use of Transmission Provider's Interconnection Facilities or Network Upgrades to take the delivery of power for Large Generating Facility's Trial Operation or to export power from the Large Generating Facility, but for Transmission Provider's delay; (2) Transmission Provider's failure to meet the specified dates is the result of the action or inaction of Interconnection Customer or any other Interconnection Customer who has entered into an LGIA with Transmission Provider or any cause beyond Transmission Provider's

reasonable control or reasonable ability to cure; (3) the interconnection Customer has assumed responsibility for the design, procurement and construction of Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades; or (4) the Parties have otherwise agreed.

5.4 Power System Stabilizers

The Interconnection Customer shall procure, install, maintain and operate Power System Stabilizers in accordance with the guidelines and procedures established by the Applicable Reliability Council. Transmission Provider reserves the right to reasonably establish minimum acceptable settings for any installed Power System Stabilizers, subject to the design and operating limitations of the Large Generating Facility. If the Large Generating Facility's Power System Stabilizers are removed from service or not capable of automatic operation, Interconnection Customer shall immediately notify Transmission Provider's system operator, or its designated representative. The requirements of this paragraph shall not apply to wind generators.

5.5 Equipment Procurement

If responsibility for construction of Transmission Provider's Interconnection Facilities or Network Upgrades is to be borne by Transmission Provider, then Transmission Provider shall commence design of Transmission Provider's Interconnection Facilities or Network Upgrades and procure necessary equipment as soon as practicable after all of the following conditions are satisfied, unless the Parties otherwise agree in writing:

5.5.1 Transmission Provider has completed the Facilities Study pursuant to the Facilities Study Agreement;

5.5.2 Transmission Provider has received written authorization to proceed with design and procurement from Interconnection Customer by the date specified in Appendix B, Milestones; and

5.5.3 Interconnection Customer has provided security to Transmission Provider in accordance with Article 11.5 by the dates specified in Appendix B, Milestones.

5.6 Construction Commencement

Transmission Provider shall commence construction of Transmission Provider's Interconnection Facilities and Network Upgrades for which it is responsible as soon as practicable after the following additional conditions are satisfied:

5.6.1 Approval of the appropriate Governmental Authority has been obtained for any facilities requiring regulatory approval;

5.6.2 Necessary real property rights and rights-of-way have been obtained, to the extent required for the construction of a discrete aspect of Transmission Provider's Interconnection Facilities and Network Upgrades;

5.6.3 Transmission Provider has received written authorization to proceed with construction from Interconnection Customer by the date specified in Appendix B, Milestones; and

5.6.4 Interconnection Customer has provided security to Transmission Provider in accordance with Article 11.5 by the dates specified in Appendix B, Milestones.

5.7 Work Progress

The Parties will keep each other advised periodically as to the progress of their respective design, procurement and construction efforts. Either Party may, at any time, request a progress report from the other Party. If, at any time, Interconnection Customer determines that the completion of Transmission Provider's Interconnection Facilities will not be required until after the specified In-Service Date, Interconnection Customer will provide written notice to Transmission Provider of such later date upon which the completion of Transmission Provider's Interconnection Facilities will be required.

5.8 Information Exchange

As soon as reasonably practicable after the Effective Date, the Parties shall exchange information regarding the design and compatibility of the Parties' Interconnection Facilities and compatibility of the Interconnection Facilities with Transmission Provider's Transmission System, and shall work diligently and in good faith to make any necessary design changes.

5.9 Limited Operation

If any of Transmission Provider's Interconnection Facilities or Network Upgrades are not reasonably expected to be completed prior to the Commercial Operation Date of the Large Generating Facility, Transmission Provider shall, upon the request and at the expense of Interconnection Customer, perform operating studies on a timely basis to determine the extent to which the Large Generating Facility and Interconnection Customer's Interconnection Facilities may operate prior to the completion of Transmission Provider's Interconnection Facilities or Network Upgrades consistent with Applicable Laws and Regulations, Applicable Reliability Standards, Good Utility Practice, and this LGIA. Transmission Provider shall permit Interconnection Customer to operate the Large Generating Facility and Interconnection Customer's Interconnection Facilities in accordance with the results of such studies.

5.10 Interconnection Customer's Interconnection Facilities ("ICIF") Interconnection Customer shall, at its expense, design, procure, construct, own and install the ICIF, as set forth in Appendix A, Interconnection Facilities, Network Upgrades and Distribution Upgrades.

5.10.1 *Interconnection Customer's Interconnection Facility Specifications.* Interconnection Customer shall submit initial specifications for the ICIF, including System Protection Facilities, to Transmission Provider at least one hundred eighty (180) Calendar Days prior to the Initial Synchronization Date; and final specifications for review and comment at least ninety (90) Calendar Days prior to the Initial Synchronization Date. Transmission Provider shall review such specifications to ensure that the ICIF are compatible with the technical specifications, operational control, and safety requirements of Transmission Provider and comment on such specifications within thirty (30) Calendar Days of Interconnection Customer's submission. All specifications provided hereunder shall be deemed confidential.

5.10.2 *Transmission Provider's Review.* Transmission Provider's review of Interconnection Customer's final specifications shall not be construed as confirming, endorsing, or providing a warranty as to the design, fitness, safety, durability or reliability of the Large Generating Facility, or the ICIF. Interconnection Customer shall make such changes to the ICIF as may reasonably be required by Transmission Provider, in accordance with Good Utility Practice, to ensure that the ICIF are compatible with the technical specifications, operational control, and safety requirements of Transmission Provider.

5.10.3 *ICIF Construction.* The ICIF shall be designed and constructed in accordance with Good Utility Practice. Within one hundred twenty (120) Calendar Days after the Commercial Operation Date, unless the Parties agree on another mutually acceptable deadline, Interconnection Customer shall deliver to Transmission Provider

"as-built" drawings, information and documents for the ICIF, such as: A one-line diagram, a site plan showing the Large Generating Facility and the ICIF, plan and elevation drawings showing the layout of the ICIF, a relay functional diagram, relaying AC and DC schematic wiring diagrams and relay settings for all facilities associated with Interconnection Customer's step-up transformers, the facilities connecting the Large Generating Facility to the step-up transformers and the ICIF, and the impedances (determined by factory tests) for the associated step-up transformers and the Large Generating Facility. The Interconnection Customer shall provide Transmission Provider specifications for the excitation system, automatic voltage regulator, Large Generating Facility control and protection settings, transformer tap settings, and communications, if applicable.

5.11 Transmission Provider's Interconnection Facilities Construction

Transmission Provider's Interconnection Facilities shall be designed and constructed in accordance with Good Utility Practice. Upon request, within one hundred twenty (120) Calendar Days after the Commercial Operation Date, unless the Parties agree on another mutually acceptable deadline, Transmission Provider shall deliver to Interconnection Customer the following "as-built" drawings, information and documents for Transmission Provider's Interconnection Facilities [include appropriate drawings and relay diagrams].

Transmission Provider will obtain control of Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades upon completion of such facilities.

5.12 Access Rights

Upon reasonable notice and supervision by a Party, and subject to any required or necessary regulatory approvals, a Party ("Granting Party") shall furnish at no cost to the other Party ("Access Party") any rights of use, licenses, rights of way and easements with respect to lands owned or controlled by the Granting Party, its agents (if allowed under the applicable agency agreement), or any Affiliate, that are necessary to enable the Access Party to obtain ingress and egress to construct, operate, maintain, repair, test (or witness testing), inspect, replace or remove facilities and equipment to: (i) Interconnect the Large Generating Facility with the Transmission System; (ii) operate and maintain the Large Generating Facility, the Interconnection Facilities and the Transmission System; and (iii) disconnect or remove the Access Party's facilities and equipment upon termination of this LGIA. In exercising such licenses, rights of way and easements, the Access Party shall not unreasonably disrupt or interfere with normal operation of the Granting Party's business and shall adhere to the safety rules and procedures established in advance, as may be changed from time to time, by the Granting Party and provided to the Access Party.

5.13 Lands of Other Property Owners

If any part of Transmission Provider or Transmission Owner's Interconnection Facilities and/or Network Upgrades is to be installed on property owned by persons other than Interconnection Customer or Transmission Provider or Transmission Owner, Transmission Provider or Transmission Owner shall at Interconnection Customer's expense use efforts, similar in nature and extent to those that it typically undertakes on its own behalf or on behalf of its Affiliates, including use of its eminent domain authority, and to the extent consistent with state law, to procure from such persons any rights of use, licenses, rights of way and easements that are necessary to construct, operate, maintain, test, inspect, replace or remove Transmission Provider or Transmission Owner's Interconnection Facilities and/or Network Upgrades upon such property.

5.14 Permits

The LGIA shall specify the allocation of the responsibilities of Transmission Provider or Transmission Owner and Interconnection Customer to obtain all permits, licenses and authorizations that are necessary to accomplish the interconnection in compliance with Applicable Laws and Regulations. Transmission Provider or Transmission Owner and Interconnection Customer shall cooperate with each other in good faith in obtaining any such permits, licenses and authorizations. With respect to this paragraph, Transmission Provider or Transmission Owner shall provide permitting assistance to Interconnection Customer comparable to that provided to Transmission Provider's own, or an Affiliate's generation.

5.15 Early Construction of Base Case Facilities

Interconnection Customer may request Transmission Provider to construct, and Transmission Provider shall construct, using Reasonable Efforts to accommodate Interconnection Customer's In-Service Date, all or any portion of any Network Upgrades required for Interconnection Customer to be interconnected to the Transmission System which are included in the Base Case of the Facilities Study for Interconnection Customer, and which also are required to be constructed for another Interconnection Customer, but where such construction is not scheduled to be completed in time to achieve Interconnection Customer's In-Service Date.

5.16 Suspension

Interconnection Customer reserves the right, upon written notice to Transmission Provider, to suspend at any time all work by Transmission Provider associated with the construction and installation of Transmission Provider's Interconnection Facilities and/or Network Upgrades required under this LGIA with the condition that Transmission System shall be left in a safe and reliable condition in accordance with Good Utility Practice and Transmission Provider's safety and reliability criteria. In such event, Interconnection Customer shall be responsible for all reasonable and necessary costs which Transmission Provider (i) has incurred pursuant to this LGIA prior to the suspension and (ii) incurs in suspending such work, including any costs incurred to perform such work as may be necessary to ensure the safety of persons and property and the integrity of the Transmission System during such suspension and, if applicable, any costs incurred in connection with the cancellation or suspension of material, equipment and labor contracts which Transmission Provider cannot reasonably avoid; provided, however, that prior to canceling or suspending any such material, equipment or labor contract, Transmission Provider shall obtain Interconnection Customer's authorization to do so.

Transmission Provider shall invoice Interconnection Customer for such costs pursuant to Article 12 and shall use due diligence to minimize its costs. In the event Interconnection Customer suspends work by Transmission Provider required under this LGIA pursuant to this Article 5.16, and has not requested Transmission Provider to recommence the work required under this LGIA on or before the expiration of three (3) years following commencement of such suspension, this LGIA shall be deemed terminated. The three-year period shall begin on the date

the suspension is requested, or the date of the written notice to Transmission Provider, if no effective date is specified.

5.17 Taxes

5.17.1 *Interconnection Customer Payments Not Taxable.* The Parties intend that all payments or property transfers made by Interconnection Customer to Transmission Provider for the installation of Transmission Provider's Interconnection Facilities and the Network Upgrades shall be non-taxable, either as contributions to capital, or as an advance, in accordance with the Internal Revenue Code and any applicable state income tax laws and shall not be taxable as contributions in aid of construction or otherwise under the Internal Revenue Code and any applicable state income tax laws.

5.17.2 *Representations and Covenants.* In accordance with IRS Notice 2001–82 and IRS Notice 88–129, Interconnection Customer represents and covenants that (i) ownership of the electricity generated at the Large Generating Facility will pass to another party prior to the transmission of the electricity on the Transmission System, (ii) for income tax purposes, the amount of any payments and the cost of any property transferred to Transmission Provider for Transmission Provider's Interconnection Facilities will be capitalized by Interconnection Customer as an intangible asset and recovered using the straight-line method over a useful life of twenty (20) years, and (iii) any portion of Transmission Provider's Interconnection Facilities that is a "dual-use intertie," within the meaning of IRS Notice 88–129, is reasonably expected to carry only a *de minimis* amount of electricity in the direction of the Large Generating Facility. For this purpose, "*de minimis* amount" means no more than 5 percent of the total power flows in both directions, calculated in accordance with the "5 percent test" set forth in IRS Notice 88–129. This is not intended to be an exclusive list of the relevant conditions that must be met to conform to IRS requirements for non-taxable treatment.

At Transmission Provider's request, Interconnection Customer shall provide Transmission Provider with a report from an independent engineer confirming its representation in clause (iii), above. Transmission Provider represents and covenants that the cost of Transmission Provider's Interconnection Facilities paid for by Interconnection Customer will have no net effect on the base upon which rates are determined.

5.17.3 *Indemnification for the Cost Consequences of Current Tax Liability Imposed Upon the Transmission Provider.* Notwithstanding Article 5.17.1, Interconnection Customer shall protect, indemnify and hold harmless Transmission Provider from the cost consequences of any current tax liability imposed against Transmission Provider as the result of payments or property transfers made by Interconnection Customer to Transmission Provider under this LGIA for Interconnection Facilities, as well as any interest and penalties, other than interest and penalties attributable to any delay caused by Transmission Provider.

Transmission Provider shall not include a gross-up for the cost consequences of any current tax liability in the amounts it charges Interconnection Customer under this LGIA unless (i) Transmission Provider has determined, in good faith, that the payments or property transfers made by Interconnection Customer to Transmission Provider should be reported as income subject to taxation or (ii) any Governmental Authority directs Transmission Provider to report payments or property as income subject to taxation; *provided, however,* that Transmission Provider may require Interconnection Customer to provide security for Interconnection Facilities, in a form reasonably acceptable to Transmission Provider (such as a parental guarantee or a letter of credit), in an amount equal to the cost consequences of any current tax liability under this Article 5.17. Interconnection Customer shall reimburse Transmission Provider for such costs on a fully grossed-up basis, in accordance with Article 5.17.4, within thirty (30) Calendar Days of receiving written notification from Transmission Provider of the amount due, including detail about how the amount was calculated. The indemnification obligation shall terminate at the earlier of (1) the expiration of the ten year testing period and the applicable statute of limitation, as it may be extended by Transmission Provider upon request of the IRS, to keep these years open for audit or adjustment, or (2) the occurrence of a subsequent taxable event and the payment of any related indemnification obligations as contemplated by this Article 5.17.

5.17.4 *Tax Gross-Up Amount.* Interconnection Customer's liability for the cost consequences of any current tax liability under this Article 5.17 shall be calculated on a fully grossed-up basis. Except as may otherwise be agreed to by the parties, this means that Interconnection Customer will pay Transmission Provider, in addition to the amount paid for the Interconnection Facilities and Network Upgrades, an amount equal to (1) the current taxes imposed on Transmission Provider ("Current Taxes") on the excess of (a) the gross income realized by Transmission Provider as a result of payments or property transfers made by Interconnection Customer to Transmission Provider under this LGIA (without regard to any payments under this Article 5.17) (the "Gross Income Amount") over (b) the present value of future tax deductions for depreciation that will be available as a result of such payments or property transfers (the "Present Value Depreciation Amount"), plus (2) an additional amount sufficient to permit Transmission Provider to receive and retain, after the payment of all Current Taxes, an amount equal to the net amount described in clause (1).

For this purpose, (i) Current Taxes shall be computed based on Transmission Provider's composite federal and state tax rates at the time the payments or property transfers are received and Transmission Provider will be treated as being subject to tax at the highest marginal rates in effect at that time (the "Current Tax Rate"), and (ii) the Present Value Depreciation Amount shall be computed by discounting Transmission Provider's anticipated tax depreciation deductions as a result of such payments or property transfers by Transmission Provider's current weighted average cost of capital. Thus, the formula for calculating Interconnection Customer's liability to Transmission Owner pursuant to this Article 5.17.4 can be expressed as follows: (Current Tax Rate × (Gross Income Amount − Present Value of Tax Depreciation))/(1 − Current Tax Rate). Interconnection Customer's estimated tax liability in the event taxes are imposed shall be stated in Appendix A, Interconnection Facilities, Network Upgrades and Distribution Upgrades.

5.17.5 *Private Letter Ruling or Change or Clarification of Law.* At Interconnection Customer's request and expense, Transmission Provider shall file with the IRS a request for a private letter ruling as to whether any property transferred or sums paid, or to be paid, by Interconnection Customer to Transmission Provider under this LGIA are subject to federal income taxation. Interconnection Customer will prepare the initial draft of the request for a private letter ruling, and will certify under penalties of perjury that all facts represented in such request are true and accurate to the best of Interconnection Customer's knowledge. Transmission Provider and Interconnection Customer

shall cooperate in good faith with respect to the submission of such request.

Transmission Provider shall keep Interconnection Customer fully informed of the status of such request for a private letter ruling and shall execute either a privacy act waiver or a limited power of attorney, in a form acceptable to the IRS, that authorizes Interconnection Customer to participate in all discussions with the IRS regarding such request for a private letter ruling. Transmission Provider shall allow Interconnection Customer to attend all meetings with IRS officials about the request and shall permit Interconnection Customer to prepare the initial drafts of any follow-up letters in connection with the request.

5.17.6 *Subsequent Taxable Events.* If, within 10 years from the date on which the relevant Transmission Provider's Interconnection Facilities are placed in service, (i) Interconnection Customer Breaches the covenants contained in Article 5.17.2, (ii) a "disqualification event" occurs within the meaning of IRS Notice 88–129, or (iii) this LGIA terminates and Transmission Provider retains ownership of the Interconnection Facilities and Network Upgrades, Interconnection Customer shall pay a tax gross-up for the cost consequences of any current tax liability imposed on Transmission Provider, calculated using the methodology described in Article 5.17.4 and in accordance with IRS Notice 90–60.

5.17.7 *Contests.* In the event any Governmental Authority determines that Transmission Provider's receipt of payments or property constitutes income that is subject to taxation, Transmission Provider shall notify Interconnection Customer, in writing, within thirty (30) Calendar Days of receiving notification of such determination by a Governmental Authority. Upon the timely written request by Interconnection Customer and at Interconnection Customer's sole expense, Transmission Provider may appeal, protest, seek abatement of, or otherwise oppose such determination. Upon Interconnection Customer's written request and sole expense, Transmission Provider may file a claim for refund with respect to any taxes paid under this Article 5.17, whether or not it has received such a determination. Transmission Provider reserves the right to make all decisions with regard to the prosecution of such appeal, protest, abatement or other contest, including the selection of counsel and compromise or settlement of the claim, but Transmission Provider shall keep Interconnection Customer informed, shall consider in good faith suggestions from Interconnection Customer about the conduct of the contest, and shall reasonably permit Interconnection Customer or an Interconnection Customer representative to attend contest proceedings.

Interconnection Customer shall pay to Transmission Provider on a periodic basis, as invoiced by Transmission Provider, Transmission Provider's documented reasonable costs of prosecuting such appeal, protest, abatement or other contest. At any time during the contest, Transmission Provider may agree to a settlement either with Interconnection Customer's consent or after obtaining written advice from nationally-recognized tax counsel, selected by Transmission Provider, but reasonably acceptable to Interconnection Customer, that the proposed settlement represents a reasonable settlement given the hazards of litigation. Interconnection Customer's obligation shall be based on the amount of the settlement agreed to by Interconnection Customer, or if a higher amount, so much of the settlement that is supported by the written advice from nationally-recognized tax counsel selected under the terms of the preceding sentence. Any settlement without Interconnection Customer's consent or such written advice will relieve Interconnection Customer from any obligation to indemnify Transmission Provider for the tax at issue in the contest.

5.17.8 *Refund.* In the event that (a) a private letter ruling is issued to Transmission Provider which holds that any amount paid or the value of any property transferred by Interconnection Customer to Transmission Provider under the terms of this LGIA is not subject to federal income taxation, (b) any legislative change or administrative announcement, notice, ruling or other determination makes it reasonably clear to Transmission Provider in good faith that any amount paid or the value of any property transferred by Interconnection Customer to Transmission Provider under the terms of this LGIA is not taxable to Transmission Provider, (c) any abatement, appeal, protest, or other contest results in a determination that any payments or transfers made by Interconnection Customer to Transmission Provider are not subject to federal income tax, or (d) if Transmission Provider receives a refund from any taxing authority for any overpayment of tax attributable to any payment or property transfer made by Interconnection Customer to Transmission Provider pursuant to this LGIA, Transmission Provider shall promptly refund to Interconnection Customer the following:

(i) Any payment made by Interconnection Customer under this Article 5.17 for taxes that is attributable to the amount determined to be non-taxable, together with interest thereon,

(ii) On any amounts paid by Interconnection Customer to Transmission Provider for such taxes which Transmission Provider did not submit to the taxing authority, calculated in accordance with the methodology set forth in FERC's regulations at 18 CFR 35.19a(a)(2)(ii) from the date payment was made by Interconnection Customer to the date Transmission Provider refunds such payment to Interconnection Customer, and

(iii) With respect to any such taxes paid by Transmission Provider, any refund or credit Transmission Provider receives or to which it may be entitled from any Governmental Authority, interest (or that portion thereof attributable to the payment described in clause (i), above) owed to Transmission Provider for such overpayment of taxes (including any reduction in interest otherwise payable by Transmission Provider to any Governmental Authority resulting from an offset or credit); *provided, however,* that Transmission Provider will remit such amount promptly to Interconnection Customer only after and to the extent that Transmission Provider has received a tax refund, credit or offset from any Governmental Authority for any applicable overpayment of income tax related to Transmission Provider's Interconnection Facilities.

The intent of this provision is to leave the Parties, to the extent practicable, in the event that no taxes are due with respect to any payment for Interconnection Facilities and Network Upgrades hereunder, in the same position they would have been in had no such tax payments been made.

5.17.9 *Taxes Other Than Income Taxes.* Upon the timely request by Interconnection Customer, and at Interconnection Customer's sole expense, Transmission Provider may appeal, protest, seek abatement of, or otherwise contest any tax (other than federal or state income tax) asserted or assessed against Transmission Provider for which Interconnection Customer may be required to reimburse Transmission Provider under the terms of this LGIA.

Interconnection Customer shall pay to Transmission Provider on a periodic basis, as invoiced by Transmission Provider, Transmission Provider's

documented reasonable costs of prosecuting such appeal, protest, abatement, or other contest. Interconnection Customer and Transmission Provider shall cooperate in good faith with respect to any such contest. Unless the payment of such taxes is a prerequisite to an appeal or abatement or cannot be deferred, no amount shall be payable by Interconnection Customer to Transmission Provider for such taxes until they are assessed by a final, non-appealable order by any court or agency of competent jurisdiction. In the event that a tax payment is withheld and ultimately due and payable after appeal, Interconnection Customer will be responsible for all taxes, interest and penalties, other than penalties attributable to any delay caused by Transmission Provider.

5.17.10 *Transmission Owners Who Are Not Transmission Providers.* If Transmission Provider is not the same entity as the Transmission Owner, then (i) all references in this Article 5.17 to Transmission Provider shall be deemed also to refer to and to include the Transmission Owner, as appropriate, and (ii) this LGIA shall not become effective until such Transmission Owner shall have agreed in writing to assume all of the duties and obligations of Transmission Provider under this Article 5.17 of this LGIA.

5.18 Tax Status

Each Party shall cooperate with the other to maintain the other Party's tax status. Nothing in this LGIA is intended to adversely affect any Transmission Provider's tax exempt status with respect to the issuance of bonds including, but not limited to, Local Furnishing Bonds.

5.19 Modification

5.19.1 *General.* Either Party may undertake modifications to its facilities. If a Party plans to undertake a modification that reasonably may be expected to affect the other Party's facilities, that Party shall provide to the other Party sufficient information regarding such modification so that the other Party may evaluate the potential impact of such modification prior to commencement of the work. Such information shall be deemed to be confidential hereunder and shall include information concerning the timing of such modifications and whether such modifications are expected to interrupt the flow of electricity from the Large Generating Facility. The Party desiring to perform such work shall provide the relevant drawings, plans, and specifications to the other Party at least ninety (90) Calendar Days in advance of the commencement of the work or such shorter period upon which the Parties may agree, which agreement shall not unreasonably be withheld, conditioned or delayed.

In the case of Large Generating Facility modifications that do not require Interconnection Customer to submit an Interconnection Request, Transmission Provider shall provide, within thirty (30) Calendar Days (or such other time as the Parties may agree), an estimate of any additional modifications to the Transmission System, Transmission Provider's Interconnection Facilities or Network Upgrades necessitated by such Interconnection Customer modification and a good faith estimate of the costs thereof.

5.19.2 *Standards.* Any additions, modifications, or replacements made to a Party's facilities shall be designed, constructed and operated in accordance with this LGIA and Good Utility Practice.

5.19.3 *Modification Costs.* Interconnection Customer shall not be directly assigned for the costs of any additions, modifications, or replacements that Transmission Provider makes to Transmission Provider's Interconnection Facilities or the Transmission System to facilitate the interconnection of a third party to Transmission Provider's Interconnection Facilities or the Transmission System, or to provide transmission service to a third party under Transmission Provider's Tariff. Interconnection Customer shall be responsible for the costs of any additions, modifications, or replacements to Interconnection Customer's Interconnection Facilities that may be necessary to maintain or upgrade such Interconnection Customer's Interconnection Facilities consistent with Applicable Laws and Regulations, Applicable Reliability Standards or Good Utility Practice.

Article 6. Testing and Inspection

6.1 Pre-Commercial Operation Date Testing and Modifications

Prior to the Commercial Operation Date, Transmission Provider shall test Transmission Provider's Interconnection Facilities and Network Upgrades and Interconnection Customer shall test the Large Generating Facility and Interconnection Customer's Interconnection Facilities to ensure their safe and reliable operation. Similar testing may be required after initial operation. Each Party shall make any modifications to its facilities that are found to be necessary as a result of such testing. Interconnection Customer shall bear the cost of all such testing and modifications. Interconnection Customer shall generate test energy at the Large Generating Facility only if it has arranged for the delivery of such test energy.

6.2 Post-Commercial Operation Date Testing and Modifications

Each Party shall at its own expense perform routine inspection and testing of its facilities and equipment in accordance with Good Utility Practice as may be necessary to ensure the continued interconnection of the Large Generating Facility with the Transmission System in a safe and reliable manner. Each Party shall have the right, upon advance written notice, to require reasonable additional testing of the other Party's facilities, at the requesting Party's expense, as may be in accordance with Good Utility Practice.

6.3 Right to Observe Testing

Each Party shall notify the other Party in advance of its performance of tests of its Interconnection Facilities. The other Party has the right, at its own expense, to observe such testing.

6.4 Right to Inspect

Each Party shall have the right, but shall have no obligation to: (i) Observe the other Party's tests and/or inspection of any of its System Protection Facilities and other protective equipment, including Power System Stabilizers; (ii) review the settings of the other Party's System Protection Facilities and other protective equipment; and (iii) review the other Party's maintenance records relative to the Interconnection Facilities, the System Protection Facilities and other protective equipment. A Party may exercise these rights from time to time as it deems necessary upon reasonable notice to the other Party. The exercise or non-exercise by a Party of any such rights shall not be construed as an endorsement or confirmation of any element or condition of the Interconnection Facilities or the System Protection Facilities or other protective equipment or the operation thereof, or as a warranty as to the fitness, safety, desirability, or reliability of same. Any information that a Party obtains through the exercise of any of its rights under this Article 6.4 shall be deemed to be Confidential Information and treated pursuant to Article 22 of this LGIA.

Article 7. Metering

7.1 General

Each Party shall comply with the Applicable Reliability Council requirements. Unless otherwise agreed by the Parties, Transmission Provider shall install Metering Equipment at the Point of Interconnection prior to any operation of the Large Generating Facility and shall own, operate, test and maintain such Metering Equipment. Power flows to and from the Large Generating Facility shall be measured at or, at Transmission Provider's option, compensated to, the Point of Interconnection. Transmission Provider shall provide metering quantities, in analog and/or digital form, to Interconnection Customer upon request. Interconnection Customer shall bear all reasonable documented costs associated with the purchase, installation, operation, testing and maintenance of the Metering Equipment.

7.2 Check Meters

Interconnection Customer, at its option and expense, may install and operate, on its premises and on its side of the Point of Interconnection, one or more check meters to check Transmission Provider's meters. Such check meters shall be for check purposes only and shall not be used for the measurement of power flows for purposes of this LGIA, except as provided in Article 7.4 below. The check meters shall be subject at all reasonable times to inspection and examination by Transmission Provider or its designee. The installation, operation and maintenance thereof shall be performed entirely by Interconnection Customer in accordance with Good Utility Practice.

7.3 Standards

Transmission Provider shall install, calibrate, and test revenue quality Metering Equipment in accordance with applicable ANSI standards.

7.4 Testing of Metering Equipment

Transmission Provider shall inspect and test all Transmission Provider-owned Metering Equipment upon installation and at least once every two (2) years thereafter. If requested to do so by Interconnection Customer, Transmission Provider shall, at Interconnection Customer's expense, inspect or test Metering Equipment more frequently than every two (2) years. Transmission Provider shall give reasonable notice of the time when any inspection or test shall take place, and Interconnection Customer may have representatives present at the test or inspection. If at any time Metering Equipment is found to be inaccurate or defective, it shall be adjusted, repaired or replaced at Interconnection Customer's expense, in order to provide accurate metering, unless the inaccuracy or defect is due to Transmission Provider's failure to maintain, then Transmission Provider shall pay. If Metering Equipment fails to register, or if the measurement made by Metering Equipment during a test varies by more than two percent from the measurement made by the standard meter used in the test, Transmission Provider shall adjust the measurements by correcting all measurements for the period during which Metering Equipment was in error by using Interconnection Customer's check meters, if installed. If no such check meters are installed or if the period cannot be reasonably ascertained, the adjustment shall be for the period immediately preceding the test of the Metering Equipment equal to one-half the time from the date of the last previous test of the Metering Equipment.

7.5 Metering Data

At Interconnection Customer's expense, the metered data shall be telemetered to one or more locations designated by Transmission Provider and one or more locations designated by Interconnection Customer. Such telemetered data shall be used, under normal operating conditions, as the official measurement of the amount of energy delivered from the Large Generating Facility to the Point of Interconnection.

Article 8. Communications

8.1 Interconnection Customer Obligations

Interconnection Customer shall maintain satisfactory operating communications with Transmission Provider's Transmission System dispatcher or representative designated by Transmission Provider. Interconnection Customer shall provide standard voice line, dedicated voice line and facsimile communications at its Large Generating Facility control room or central dispatch facility through use of either the public telephone system, or a voice communications system that does not rely on the public telephone system. Interconnection Customer shall also provide the dedicated data circuit(s) necessary to provide Interconnection Customer data to Transmission Provider as set forth in Appendix D, Security Arrangements Details. The data circuit(s) shall extend from the Large Generating Facility to the location(s) specified by Transmission Provider. Any required maintenance of such communications equipment shall be performed by Interconnection Customer. Operational communications shall be activated and maintained under, but not be limited to, the following events: System paralleling or separation, scheduled and unscheduled shutdowns, equipment clearances, and hourly and daily load data.

8.2 Remote Terminal Unit

Prior to the Initial Synchronization Date of the Large Generating Facility, a Remote Terminal Unit, or equivalent data collection and transfer equipment acceptable to the Parties, shall be installed by Interconnection Customer, or by Transmission Provider at Interconnection Customer's expense, to gather accumulated and instantaneous data to be telemetered to the location(s) designated by Transmission Provider through use of a dedicated point-to-point data circuit(s) as indicated in Article 8.1. The communication protocol for the data circuit(s) shall be specified by Transmission Provider. Instantaneous bi-directional analog real power and reactive power flow information must be telemetered directly to the location(s) specified by Transmission Provider.

Each Party will promptly advise the other Party if it detects or otherwise learns of any metering, telemetry or communications equipment errors or malfunctions that require the attention and/or correction by the other Party. The Party owning such equipment shall correct such error or malfunction as soon as reasonably feasible.

8.3 No Annexation

Any and all equipment placed on the premises of a Party shall be and remain the property of the Party providing such equipment regardless of the mode and manner of annexation or attachment to real property, unless otherwise mutually agreed by the Parties.

Article 9. Operations

9.1 General

Each Party shall comply with the Applicable Reliability Council requirements. Each Party shall provide to the other Party all information that may reasonably be required by the other Party to comply with Applicable Laws and Regulations and Applicable Reliability Standards.

9.2 Control Area Notification

At least three months before Initial Synchronization Date, Interconnection Customer shall notify Transmission Provider in writing of the Control Area

in which the Large Generating Facility will be located. If Interconnection Customer elects to locate the Large Generating Facility in a Control Area other than the Control Area in which the Large Generating Facility is physically located, and if permitted to do so by the relevant transmission tariffs, all necessary arrangements, including but not limited to those set forth in Article 7 and Article 8 of this LGIA, and remote Control Area generator interchange agreements, if applicable, and the appropriate measures under such agreements, shall be executed and implemented prior to the placement of the Large Generating Facility in the other Control Area.

9.3 Transmission Provider Obligations

Transmission Provider shall cause the Transmission System and Transmission Provider's Interconnection Facilities to be operated, maintained and controlled in a safe and reliable manner and in accordance with this LGIA. Transmission Provider may provide operating instructions to Interconnection Customer consistent with this LGIA and Transmission Provider's operating protocols and procedures as they may change from time to time. Transmission Provider will consider changes to its operating protocols and procedures proposed by Interconnection Customer.

9.4 Interconnection Customer Obligations

Interconnection Customer shall at its own expense operate, maintain and control the Large Generating Facility and Interconnection Customer's Interconnection Facilities in a safe and reliable manner and in accordance with this LGIA. Interconnection Customer shall operate the Large Generating Facility and Interconnection Customer's Interconnection Facilities in accordance with all applicable requirements of the Control Area of which it is part, as such requirements are set forth in Appendix C, Interconnection Details, of this LGIA. Appendix C, Interconnection Details, will be modified to reflect changes to the requirements as they may change from time to time. Either Party may request that the other Party provide copies of the requirements set forth in Appendix C, Interconnection Details, of this LGIA.

9.5 Start-Up and Synchronization

Consistent with the Parties' mutually acceptable procedures, Interconnection Customer is responsible for the proper synchronization of the Large Generating Facility to Transmission Provider's Transmission System.

9.6 Reactive Power

9.6.1 *Power Factor Design Criteria.* Interconnection Customer shall design the Large Generating Facility to maintain a composite power delivery at continuous rated power output at the Point of Interconnection at a power factor within the range of 0.95 leading to 0.95 lagging, unless Transmission Provider has established different requirements that apply to all generators in the Control Area on a comparable basis. The requirements of this paragraph shall not apply to wind generators.

9.6.2 *Voltage Schedules.* Once Interconnection Customer has synchronized the Large Generating Facility with the Transmission System, Transmission Provider shall require Interconnection Customer to operate the Large Generating Facility to produce or absorb reactive power within the design limitations of the Large Generating Facility set forth in Article 9.6.1 (Power Factor Design Criteria). Transmission Provider's voltage schedules shall treat all sources of reactive power in the Control Area in an equitable and not unduly discriminatory manner. Transmission Provider shall exercise Reasonable Efforts to provide Interconnection Customer with such schedules at least one (1) day in advance, and may make changes to such schedules as necessary to maintain the reliability of the Transmission System. Interconnection Customer shall operate the Large Generating Facility to maintain the specified output voltage or power factor at the Point of Interconnection within the design limitations of the Large Generating Facility set forth in Article 9.6.1 (Power Factor Design Criteria). If Interconnection Customer is unable to maintain the specified voltage or power factor, it shall promptly notify the System Operator.

9.6.2.1 *Governors and Regulators.* Whenever the Large Generating Facility is operated in parallel with the Transmission System and the speed governors (if installed on the generating unit pursuant to Good Utility Practice) and voltage regulators are capable of operation, Interconnection Customer shall operate the Large Generating Facility with its speed governors and voltage regulators in automatic operation. If the Large Generating Facility's speed governors and voltage regulators are not capable of such automatic operation, Interconnection Customer shall immediately notify Transmission Provider's system operator, or its designated representative, and ensure that such Large Generating Facility's reactive power production or absorption (measured in MVARs) are within the design capability of the Large Generating Facility's generating unit(s) and steady state stability limits. Interconnection Customer shall not cause its Large Generating Facility to disconnect automatically or instantaneously from the Transmission System or trip any generating unit comprising the Large Generating Facility for an under or over frequency condition unless the abnormal frequency condition persists for a time period beyond the limits set forth in ANSI/IEEE Standard C37.106, or such other standard as applied to other generators in the Control Area on a comparable basis.

9.6.3 *Payment for Reactive Power.* Transmission Provider is required to pay Interconnection Customer for reactive power that Interconnection Customer provides or absorbs from the Large Generating Facility when Transmission Provider requests Interconnection Customer to operate its Large Generating Facility outside the range specified in Article 9.6.1, provided that if Transmission Provider pays its own or affiliated generators for reactive power service within the specified range, it must also pay Interconnection Customer. Payments shall be pursuant to Article 11.6 or such other agreement to which the Parties have otherwise agreed.

9.7 Outages and Interruptions

9.7.1 Outages

9.7.1.1 *Outage Authority and Coordination.* Each Party may in accordance with Good Utility Practice in coordination with the other Party remove from service any of its respective Interconnection Facilities or Network Upgrades that may impact the other Party's facilities as necessary to perform maintenance or testing or to install or replace equipment. Absent an Emergency Condition, the Party scheduling a removal of such facility(ies) from service will use Reasonable Efforts to schedule such removal on a date and time mutually acceptable to the Parties. In all circumstances, any Party planning to remove such facility(ies) from service shall use Reasonable Efforts to minimize the effect on the other Party of such removal.

9.7.1.2 *Outage Schedules.* Transmission Provider shall post scheduled outages of its transmission facilities on the OASIS. Interconnection Customer shall submit its planned maintenance schedules for the Large

Generating Facility to Transmission Provider for a minimum of a rolling twenty-four month period. Interconnection Customer shall update its planned maintenance schedules as necessary. Transmission Provider may request Interconnection Customer to reschedule its maintenance as necessary to maintain the reliability of the Transmission System; provided, however, adequacy of generation supply shall not be a criterion in determining Transmission System reliability. Transmission Provider shall compensate Interconnection Customer for any additional direct costs that Interconnection Customer incurs as a result of having to reschedule maintenance, including any additional overtime, breaking of maintenance contracts or other costs above and beyond the cost Interconnection Customer would have incurred absent Transmission Provider's request to reschedule maintenance. Interconnection Customer will not be eligible to receive compensation, if during the twelve (12) months prior to the date of the scheduled maintenance, Interconnection Customer had modified its schedule of maintenance activities.

9.7.1.3 *Outage Restoration.* If an outage on a Party's Interconnection Facilities or Network Upgrades adversely affects the other Party's operations or facilities, the Party that owns or controls the facility that is out of service shall use Reasonable Efforts to promptly restore such facility(ies) to a normal operating condition consistent with the nature of the outage. The Party that owns or controls the facility that is out of service shall provide the other Party, to the extent such information is known, information on the nature of the Emergency Condition, an estimated time of restoration, and any corrective actions required. Initial verbal notice shall be followed up as soon as practicable with written notice explaining the nature of the outage.

9.7.2 *Interruption of Service.* If required by Good Utility Practice to do so, Transmission Provider may require Interconnection Customer to interrupt or reduce deliveries of electricity if such delivery of electricity could adversely affect Transmission Provider's ability to perform such activities as are necessary to safely and reliably operate and maintain the Transmission System. The following provisions shall apply to any interruption or reduction permitted under this Article 9.7.2:

9.7.2.1 The interruption or reduction shall continue only for so long as reasonably necessary under Good Utility Practice;

9.7.2.2 Any such interruption or reduction shall be made on an equitable, non-discriminatory basis with respect to all generating facilities directly connected to the Transmission System;

9.7.2.3 When the interruption or reduction must be made under circumstances which do not allow for advance notice, Transmission Provider shall notify Interconnection Customer by telephone as soon as practicable of the reasons for the curtailment, interruption, or reduction, and, if known, its expected duration. Telephone notification shall be followed by written notification as soon as practicable;

9.7.2.4 Except during the existence of an Emergency Condition, when the interruption or reduction can be scheduled without advance notice, Transmission Provider shall notify Interconnection Customer in advance regarding the timing of such scheduling and further notify Interconnection Customer of the expected duration. Transmission Provider shall coordinate with Interconnection Customer using Good Utility Practice to schedule the interruption or reduction during periods of least impact to Interconnection Customer and Transmission Provider;

9.7.2.5 The Parties shall cooperate and coordinate with each other to the extent necessary in order to restore the Large Generating Facility, Interconnection Facilities, and the Transmission System to their normal operating state, consistent with system conditions and Good Utility Practice.

9.7.3 *Under-Frequency and Over Frequency Conditions.* The Transmission System is designed to automatically activate a load-shed program as required by the Applicable Reliability Council in the event of an under-frequency system disturbance. Interconnection Customer shall implement under-frequency and over-frequency relay set points for the Large Generating Facility as required by the Applicable Reliability Council to ensure "ride through" capability of the Transmission System. Large Generating Facility response to frequency deviations of pre-determined magnitudes, both under-frequency and over-frequency deviations, shall be studied and coordinated with Transmission Provider in accordance with Good Utility Practice. The term "ride through" as used herein shall mean the ability of a Generating Facility to stay connected to and synchronized with the Transmission System during system disturbances within a range of under-frequency and over-frequency conditions, in accordance with Good Utility Practice.

9.7.4 System Protection and Other Control Requirements.

9.7.4.1 *System Protection Facilities.* Interconnection Customer shall, at its expense, install, operate and maintain System Protection Facilities as a part of the Large Generating Facility or Interconnection Customer's Interconnection Facilities. Transmission Provider shall install at Interconnection Customer's expense any System Protection Facilities that may be required on Transmission Provider's Interconnection Facilities or the Transmission System as a result of the interconnection of the Large Generating Facility and Interconnection Customer's Interconnection Facilities.

9.7.4.2 Each Party's protection facilities shall be designed and coordinated with other systems in accordance with Good Utility Practice.

9.7.4.3 Each Party shall be responsible for protection of its facilities consistent with Good Utility Practice.

9.7.4.4 Each Party's protective relay design shall incorporate the necessary test switches to perform the tests required in Article 6. The required test switches will be placed such that they allow operation of lockout relays while preventing breaker failure schemes from operating and causing unnecessary breaker operations and/or the tripping of Interconnection Customer's units.

9.7.4.5 Each Party will test, operate and maintain System Protection Facilities in accordance with Good Utility Practice.

9.7.4.6 Prior to the In-Service Date, and again prior to the Commercial Operation Date, each Party or its agent shall perform a complete calibration test and functional trip test of the System Protection Facilities. At intervals suggested by Good Utility Practice and following any apparent malfunction of the System Protection Facilities, each Party shall perform both calibration and functional trip tests of its System Protection Facilities. These tests do not require the tripping of any in-service generation unit. These tests do, however, require that all protective relays and lockout contacts be activated.

9.7.5 *Requirements for Protection.* In compliance with Good Utility Practice, Interconnection Customer shall provide, install, own, and maintain relays, circuit breakers and all other devices necessary to remove any fault contribution of the Large Generating Facility to any short circuit occurring on the Transmission System not otherwise isolated by Transmission Provider's equipment, such that the removal of the fault contribution shall be coordinated with the protective requirements of the

Transmission System. Such protective equipment shall include, without limitation, a disconnecting device or switch with load-interrupting capability located between the Large Generating Facility and the Transmission System at a site selected upon mutual agreement (not to be unreasonably withheld, conditioned or delayed) of the Parties. Interconnection Customer shall be responsible for protection of the Large Generating Facility and Interconnection Customer's other equipment from such conditions as negative sequence currents, over-or under-frequency, sudden load rejection, over-or under-voltage, and generator loss-of-field. Interconnection Customer shall be solely responsible to disconnect the Large Generating Facility and Interconnection Customer's other equipment if conditions on the Transmission System could adversely affect the Large Generating Facility.

9.7.6 *Power Quality.* Neither Party's facilities shall cause excessive voltage flicker nor introduce excessive distortion to the sinusoidal voltage or current waves as defined by ANSI Standard C84.1–1989, in accordance with IEEE Standard 519, or any applicable superseding electric industry standard. In the event of a conflict between ANSI Standard C84.1–1989, or any applicable superseding electric industry standard, ANSI Standard C84.1–1989, or the applicable superseding electric industry standard, shall control.

9.8 Switching and Tagging Rules

Each Party shall provide the other Party a copy of its switching and tagging rules that are applicable to the other Party's activities. Such switching and tagging rules shall be developed on a non-discriminatory basis. The Parties shall comply with applicable switching and tagging rules, as amended from time to time, in obtaining clearances for work or for switching operations on equipment.

9.9 Use of Interconnection Facilities by Third Parties

9.9.1 *Purpose of Interconnection Facilities.* Except as may be required by Applicable Laws and Regulations, or as otherwise agreed to among the Parties, the Interconnection Facilities shall be constructed for the sole purpose of interconnecting the Large Generating Facility to the Transmission System and shall be used for no other purpose.

9.9.2 *Third Party Users.* If required by Applicable Laws and Regulations or if the Parties mutually agree, such agreement not to be unreasonably withheld, to allow one or more third parties to use Transmission Provider's Interconnection Facilities, or any part thereof, Interconnection Customer will be entitled to compensation for the capital expenses it incurred in connection with the Interconnection Facilities based upon the pro rata use of the Interconnection Facilities by Transmission Provider, all third party users, and Interconnection Customer, in accordance with Applicable Laws and Regulations or upon some other mutually-agreed upon methodology. In addition, cost responsibility for ongoing costs, including operation and maintenance costs associated with the Interconnection Facilities, will be allocated between Interconnection Customer and any third party users based upon the pro rata use of the Interconnection Facilities by Transmission Provider, all third party users, and Interconnection Customer, in accordance with Applicable Laws and Regulations or upon some other mutually agreed upon methodology. If the issue of such compensation or allocation cannot be resolved through such negotiations, it shall be submitted to FERC for resolution.

9.10 Disturbance Analysis Data Exchange

The Parties will cooperate with one another in the analysis of disturbances to either the Large Generating Facility or Transmission Provider's Transmission System by gathering and providing access to any information relating to any disturbance, including information from oscillography, protective relay targets, breaker operations and sequence of events records, and any disturbance information required by Good Utility Practice.

Article 10. Maintenance

10.1 Transmission Provider Obligations

Transmission Provider shall maintain the Transmission System and Transmission Provider's Interconnection Facilities in a safe and reliable manner and in accordance with this LGIA.

10.2 Interconnection Customer Obligations

Interconnection Customer shall maintain the Large Generating Facility and Interconnection Customer's Interconnection Facilities in a safe and reliable manner and in accordance with this LGIA.

10.3 Coordination

The Parties shall confer regularly to coordinate the planning, scheduling and performance of preventive and corrective maintenance on the Large Generating Facility and the Interconnection Facilities.

10.4 Secondary Systems

Each Party shall cooperate with the other in the inspection, maintenance, and testing of control or power circuits that operate below 600 volts, AC or DC, including, but not limited to, any hardware, control or protective devices, cables, conductors, electric raceways, secondary equipment panels, transducers, batteries, chargers, and voltage and current transformers that directly affect the operation of a Party's facilities and equipment which may reasonably be expected to impact the other Party. Each Party shall provide advance notice to the other Party before undertaking any work on such circuits, especially on electrical circuits involving circuit breaker trip and close contacts, current transformers, or potential transformers.

10.5 Operating and Maintenance Expenses

Subject to the provisions herein addressing the use of facilities by others, and except for operations and maintenance expenses associated with modifications made for providing interconnection or transmission service to a third party and such third party pays for such expenses, Interconnection Customer shall be responsible for all reasonable expenses including overheads, associated with: (1) Owning, operating, maintaining, repairing, and replacing Interconnection Customer's Interconnection Facilities; and (2) operation, maintenance, repair and replacement of Transmission Provider's Interconnection Facilities.

Article 11. Performance Obligation

11.1 Interconnection Customer Interconnection Facilities

Interconnection Customer shall design, procure, construct, install, own and/or control Interconnection Customer Interconnection Facilities described in Appendix A, Interconnection Facilities, Network Upgrades and Distribution Upgrades, at its sole expense.

11.2 Transmission Provider's Interconnection Facilities.

Transmission Provider or Transmission Owner shall design, procure, construct, install, own and/or control the Transmission Provider's Interconnection Facilities described in Appendix A, Interconnection Facilities, Network Upgrades and Distribution Upgrades, at the sole expense of the Interconnection Customer.

11.3 Network Upgrades and Distribution Upgrades

Transmission Provider or Transmission Owner shall design, procure, construct, install, and own the Network Upgrades and Distribution Upgrades described in Appendix A, Interconnection Facilities, Network Upgrades and Distribution Upgrades. The Interconnection Customer shall be responsible for all costs related to Distribution Upgrades. Unless Transmission Provider or Transmission Owner elects to fund the capital for the Network Upgrades, they shall be solely funded by Interconnection Customer.

11.4 Transmission Credits

11.4.1 *Repayment of Amounts Advanced for Network Upgrades.* Interconnection Customer shall be entitled to a cash repayment, equal to the total amount paid to Transmission Provider and Affected System Operator, if any, for the Network Upgrades, including any tax gross-up or other tax-related payments associated with Network Upgrades, and not refunded to Interconnection Customer pursuant to Article 5.17.8 or otherwise, to be paid to Interconnection Customer on a dollar-for-dollar basis for the non-usage sensitive portion of transmission charges, as payments are made under Transmission Provider's Tariff and Affected System's Tariff for transmission services with respect to the Large Generating Facility. Any repayment shall include interest calculated in accordance with the methodology set forth in FERC's regulations at 18 CFR 35.19a(a)(2)(ii) from the date of any payment for Network Upgrades through the date on which the Interconnection Customer receives a repayment of such payment pursuant to this subparagraph. Interconnection Customer may assign such repayment rights to any person.

Notwithstanding the foregoing, Interconnection Customer, Transmission Provider, and Affected System Operator may adopt any alternative payment schedule that is mutually agreeable so long as Transmission Provider and Affected System Operator take one of the following actions no later than five years from the Commercial Operation Date: (1) Return to Interconnection Customer any amounts advanced for Network Upgrades not previously repaid, or (2) declare in writing that Transmission Provider or Affected System Operator will continue to provide payments to Interconnection Customer pursuant to this subparagraph until all amounts advanced for Network Upgrades have been repaid.

If the Large Generating Facility fails to achieve commercial operation, but it or another Generating Facility is later constructed and makes use of the Network Upgrades, Transmission Provider and Affected System Operator shall at that time reimburse Interconnection Customer for the amounts advanced for the Network Upgrades.

11.4.2 *Special Provisions for Affected Systems.* Unless Transmission Provider provides, under the LGIA, for the repayment of amounts advanced to Affected System Operator for Network Upgrades, Interconnection Customer and Affected System Operator shall enter into an agreement that provides for such repayment. The agreement shall specify the terms governing payments to be made by Interconnection Customer to the Affected System Operator as well as the repayment by the Affected System Operator.

11.4.3 Notwithstanding any other provision of this LGIA, nothing herein shall be construed as relinquishing or foreclosing any rights, including but not limited to firm transmission rights, capacity rights, transmission congestion rights, or transmission credits, that Interconnection Customer, shall be entitled to, now or in the future under any other agreement or tariff as a result of, or otherwise associated with, the transmission capacity, if any, created by the Network Upgrades, including the right to obtain cash reimbursements or transmission credits for transmission service that is not associated with the Large Generating Facility.

11.5 Provision of Security

At least thirty (30) Calendar Days prior to the commencement of the procurement, installation, or construction of a discrete portion of a Transmission Provider's Interconnection Facilities, Network Upgrades, or Distribution Upgrades, Interconnection Customer shall provide Transmission Provider, at Interconnection Customer's option, a guarantee, a surety bond, letter of credit or other form of security that is reasonably acceptable to Transmission Provider and is consistent with the Uniform Commercial Code of the jurisdiction identified in Article 14.2.1. Such security for payment shall be in an amount sufficient to cover the costs for constructing, procuring and installing the applicable portion of Transmission Provider's Interconnection Facilities, Network Upgrades, or Distribution Upgrades and shall be reduced on a dollar-for-dollar basis for payments made to Transmission Provider for these purposes.

In addition:

11.5.1 The guarantee must be made by an entity that meets the creditworthiness requirements of Transmission Provider, and contain terms and conditions that guarantee payment of any amount that may be due from Interconnection Customer, up to an agreed-to maximum amount.

11.5.2 The letter of credit must be issued by a financial institution reasonably acceptable to Transmission Provider and must specify a reasonable expiration date.

11.5.3 The surety bond must be issued by an insurer reasonably acceptable to Transmission Provider and must specify a reasonable expiration date.

11.6 Interconnection Customer Compensation

If Transmission Provider requests or directs Interconnection Customer to provide a service pursuant to Articles 9.6.3 (Payment for Reactive Power), or 13.5.1 of this LGIA, Transmission Provider shall compensate Interconnection Customer in accordance with Interconnection Customer's applicable rate schedule then in effect unless the provision of such service(s) is subject to an RTO or ISO FERC-approved rate schedule. Interconnection Customer shall serve Transmission Provider or RTO or ISO with any filing of a proposed rate schedule at the time of such filing with FERC. To the extent that no rate schedule is in effect at the time the Interconnection Customer is required to provide or absorb any Reactive Power under this LGIA, Transmission Provider agrees to compensate Interconnection Customer in such amount as would have been due Interconnection Customer had the rate schedule been in effect at the time service commenced; provided, however, that such rate schedule must be filed at FERC or other appropriate Governmental Authority within sixty (60) Calendar Days of the commencement of service.

11.6.1 *Interconnection Customer Compensation for Actions During Emergency Condition.* Transmission Provider or RTO or ISO shall compensate Interconnection Customer for its provision of real and reactive power and other Emergency Condition services that Interconnection Customer provides to support the Transmission System during an Emergency Condition in accordance with Article 11.6.

Article 12. Invoice

12.1 General

Each Party shall submit to the other Party, on a monthly basis, invoices of amounts due for the preceding month. Each invoice shall state the month to which the invoice applies and fully describe the services and equipment provided. The Parties may discharge mutual debts and payment obligations due and owing to each other on the same date through netting, in which case all amounts a Party owes to the other Party under this LGIA, including interest payments or credits, shall be netted so that only the net amount remaining due shall be paid by the owing Party.

12.2 Final Invoice

Within six months after completion of the construction of Transmission Provider's Interconnection Facilities and the Network Upgrades, Transmission Provider shall provide an invoice of the final cost of the construction of Transmission Provider's Interconnection Facilities and the Network Upgrades and shall set forth such costs in sufficient detail to enable Interconnection Customer to compare the actual costs with the estimates and to ascertain deviations, if any, from the cost estimates. Transmission Provider shall refund to Interconnection Customer any amount by which the actual payment by Interconnection Customer for estimated costs exceeds the actual costs of construction within thirty (30) Calendar Days of the issuance of such final construction invoice.

12.3 Payment

Invoices shall be rendered to the paying Party at the address specified in Appendix F. The Party receiving the invoice shall pay the invoice within thirty (30) Calendar Days of receipt. All payments shall be made in immediately available funds payable to the other Party, or by wire transfer to a bank named and account designated by the invoicing Party. Payment of invoices by either Party will not constitute a waiver of any rights or claims either Party may have under this LGIA.

12.4 Disputes

In the event of a billing dispute between Transmission Provider and Interconnection Customer, Transmission Provider shall continue to provide Interconnection Service under this LGIA as long as Interconnection Customer: (i) Continues to make all payments not in dispute; and (ii) pays to Transmission Provider or into an independent escrow account the portion of the invoice in dispute, pending resolution of such dispute. If Interconnection Customer fails to meet these two requirements for continuation of service, then Transmission Provider may provide notice to Interconnection Customer of a Default pursuant to Article 17. Within thirty (30) Calendar Days after the resolution of the dispute, the Party that owes money to the other Party shall pay the amount due with interest calculated in accord with the methodology set forth in FERC's regulations at 18 CFR 35.19a(a)(2)(ii).

Article 13. Emergencies

13.1 Definition

"Emergency Condition" shall mean a condition or situation: (i) That in the judgment of the Party making the claim is imminently likely to endanger life or property; or (ii) that, in the case of Transmission Provider, is imminently likely (as determined in a non-discriminatory manner) to cause a material adverse effect on the security of, or damage to the Transmission System, Transmission Provider's Interconnection Facilities or the Transmission Systems of others to which the Transmission System is directly connected; or (iii) that, in the case of Interconnection Customer, is imminently likely (as determined in a non-discriminatory manner) to cause a material adverse effect on the security of, or damage to, the Large Generating Facility or Interconnection Customer's Interconnection Facilities' System restoration and black start shall be considered Emergency Conditions; provided, that Interconnection Customer is not obligated by this LGIA to possess black start capability.

13.2 Obligations

Each Party shall comply with the Emergency Condition procedures of the applicable ISO/RTO, NERC, the Applicable Reliability Council, Applicable Laws and Regulations, and any emergency procedures agreed to by the Joint Operating Committee.

13.3 Notice

Transmission Provider shall notify Interconnection Customer promptly when it becomes aware of an Emergency Condition that affects Transmission Provider's Interconnection Facilities or the Transmission System that may reasonably be expected to affect Interconnection Customer's operation of the Large Generating Facility or Interconnection Customer's Interconnection Facilities. Interconnection Customer shall notify Transmission Provider promptly when it becomes aware of an Emergency Condition that affects the Large Generating Facility or Interconnection Customer's Interconnection Facilities that may reasonably be expected to affect the Transmission System or Transmission Provider's Interconnection Facilities. To the extent information is known, the notification shall describe the Emergency Condition, the extent of the damage or deficiency, the expected effect on the operation of Interconnection Customer's or Transmission Provider's facilities and operations, its anticipated duration and the corrective action taken and/or to be taken. The initial notice shall be followed as soon as practicable with written notice.

13.4 Immediate Action

Unless, in Interconnection Customer's reasonable judgment, immediate action is required, Interconnection Customer shall obtain the consent of Transmission Provider, such consent to not be unreasonably withheld, prior to performing any manual switching operations at the Large Generating Facility or Interconnection Customer's Interconnection Facilities in response to an Emergency Condition either declared by Transmission Provider or otherwise regarding the Transmission System.

13.5 Transmission Provider Authority

13.5.1 *General.* Transmission Provider may take whatever actions or inactions with regard to the Transmission System or Transmission Provider's Interconnection Facilities it deems necessary during an Emergency Condition in order to (i) preserve public health and safety, (ii) preserve the reliability of the Transmission System or Transmission Provider's Interconnection Facilities, (iii) limit or prevent damage, and (iv) expedite restoration of service. Transmission Provider shall use Reasonable Efforts to minimize the effect of such actions or inactions on the Large Generating Facility or Interconnection Customer's Interconnection Facilities. Transmission Provider may, on the basis of technical considerations, require the Large Generating Facility to mitigate an Emergency Condition by taking actions necessary and limited in scope to remedy the Emergency Condition, including, but not limited to, directing Interconnection Customer to shut-down, start-up, increase or decrease the real or reactive power output of the Large Generating Facility; implementing a reduction or disconnection pursuant to Article 13.5.2; directing Interconnection Customer to assist with blackstart (if available) or restoration efforts; or

altering the outage schedules of the Large Generating Facility and Interconnection Customer's Interconnection Facilities. Interconnection Customer shall comply with all of Transmission Provider's operating instructions concerning Large Generating Facility real power and reactive power output within the manufacturer's design limitations of the Large Generating Facility's equipment that is in service and physically available for operation at the time, in compliance with Applicable Laws and Regulations.

13.5.2 *Reduction and Disconnection.* Transmission Provider may reduce Interconnection Service or disconnect the Large Generating Facility or Interconnection Customer's Interconnection Facilities, when such, reduction or disconnection is necessary under Good Utility Practice due to Emergency Conditions. These rights are separate and distinct from any right of curtailment of Transmission Provider pursuant to Transmission Provider's Tariff. When Transmission Provider can schedule the reduction or disconnection in advance, Transmission Provider shall notify Interconnection Customer of the reasons, timing and expected duration of the reduction or disconnection. Transmission Provider shall coordinate with Interconnection Customer using Good Utility Practice to schedule the reduction or disconnection during periods of least impact to Interconnection Customer and Transmission Provider. Any reduction or disconnection shall continue only for so long as reasonably necessary under Good Utility Practice. The Parties shall cooperate with each other to restore the Large Generating Facility, the Interconnection Facilities, and the Transmission System to their normal operating state as soon as practicable consistent with Good Utility Practice.

13.6 Interconnection Customer Authority

Consistent with Good Utility Practice and the LGIA and the LGIP, Interconnection Customer may take actions or inactions with regard to the Large Generating Facility or Interconnection Customer's Interconnection Facilities during an Emergency Condition in order to (i) preserve public health and safety, (ii) preserve the reliability of the Large Generating Facility or Interconnection Customer's Interconnection Facilities, (iii) limit or prevent damage, and (iv) expedite restoration of service. Interconnection Customer shall use Reasonable Efforts to minimize the effect of such actions or inactions on the Transmission System and Transmission Provider's Interconnection Facilities. Transmission Provider shall use Reasonable Efforts to assist Interconnection Customer in such actions.

13.7 Limited Liability

Except as otherwise provided in Article 11.6.1 of this LGIA, neither Party shall be liable to the other for any action it takes in responding to an Emergency Condition so long as such action is made in good faith and is consistent with Good Utility Practice.

Article 14. Regulatory Requirements and Governing Law

14.1 Regulatory Requirements

Each Party's obligations under this LGIA shall be subject to its receipt of any required approval or certificate from one or more Governmental Authorities in the form and substance satisfactory to the applying Party, or the Party making any required filings with, or providing notice to, such Governmental Authorities, and the expiration of any time period associated therewith. Each Party shall in good faith seek and use its Reasonable Efforts to obtain such other approvals. Nothing in this LGIA shall require Interconnection Customer to take any action that could result in its inability to obtain, or its loss of, status or exemption under the Federal Power Act, the Public Utility Holding Company Act of 1935, as amended, or the Public Utility Regulatory Policies Act of 1978.

14.2 Governing Law

14.2.1 The validity, interpretation and performance of this LGIA and each of its provisions shall be governed by the laws of the state where the Point of Interconnection is located, without regard to its conflicts of law principles.

14.2.2 This LGIA is subject to all Applicable Laws and Regulations.

14.2.3 Each Party expressly reserves the right to seek changes in, appeal, or otherwise contest any laws, orders, rules, or regulations of a Governmental Authority.

Article 15. Notices.

15.1 General

Unless otherwise provided in this LGIA, any notice, demand or request required or permitted to be given by either Party to the other and any instrument required or permitted to be tendered or delivered by either Party in writing to the other shall be effective when delivered and may be so given, tendered or delivered, by recognized national courier, or by depositing the same with the United States Postal Service with postage prepaid, for delivery by certified or registered mail, addressed to the Party, or personally delivered to the Party, at the address set out in Appendix F, Addresses for Delivery of Notices and Billings. Either Party may change the notice information in this LGIA by giving five (5) Business Days written notice prior to the effective date of the change.

15.2 Billings and Payments

Billings and payments shall be sent to the addresses set out in Appendix F.

15.3 Alternative Forms of Notice

Any notice or request required or permitted to be given by a Party to the other and not required by this Agreement to be given in writing may be so given by telephone, facsimile or email to the telephone numbers and email addresses set out in Appendix F.

15.4 Operations and Maintenance Notice

Each Party shall notify the other Party in writing of the identity of the person(s) that it designates as the point(s) of contact with respect to the implementation of Articles 9 and 10.

Article 16. Force Majeure

16.1 Force Majeure

16.1.1 Economic hardship is not considered a Force Majeure event.

16.1.2 Neither Party shall be considered to be in Default with respect to any obligation hereunder, (including obligations under Article 4), other than the obligation to pay money when due, if prevented from fulfilling such obligation by Force Majeure. A Party unable to fulfill any obligation hereunder (other than an obligation to pay money when due) by reason of Force Majeure shall give notice and the full particulars of such Force Majeure to the other Party in writing or by telephone as soon as reasonably possible after the occurrence of the cause relied upon. Telephone notices given pursuant to this article shall be confirmed in writing as soon as reasonably possible and shall specifically state full particulars of the Force Majeure, the time and date when the Force Majeure occurred and when the Force Majeure is reasonably expected to cease. The Party affected shall exercise due diligence to remove such disability with reasonable dispatch, but shall not be required to accede or agree to any provision not satisfactory to it in order to settle and terminate a strike or other labor disturbance.

Article 17. Default

17.1 Default

17.1.1 *General.* No Default shall exist where such failure to discharge an obligation (other than the payment of money) is the result of Force Majeure as defined in this LGIA or the result of an act of omission of the other Party. Upon a Breach, the non-breaching Party shall give written notice of such Breach to the breaching Party. Except as provided in Article 17.1.2, the breaching Party shall have thirty (30) Calendar Days from receipt of the Default notice within which to cure such Breach; provided however, if such Breach is not capable of cure within thirty (30) Calendar Days, the breaching Party shall commence such cure within thirty (30) Calendar Days after notice and continuously and diligently complete such cure within ninety (90) Calendar Days from receipt of the Default notice; and, if cured within such time, the Breach specified in such notice shall cease to exist.

17.1.2 *Right to Terminate.* If a Breach is not cured as provided in this article, or if a Breach is not capable of being cured within the period provided for herein, the non-breaching Party shall have the right to declare a Default and terminate this LGIA by written notice at any time until cure occurs, and be relieved of any further obligation hereunder and, whether or not that Party terminates this LGIA, to recover from the breaching Party all amounts due hereunder, plus all other damages and remedies to which it is entitled at law or in equity. The provisions of this article will survive termination of this LGIA.

Article 18. Indemnity, Consequential Damages and Insurance

18.1 Indemnity

The Parties shall at all times indemnify, defend, and hold the other Party harmless from, any and all damages, losses, claims, including claims and actions relating to injury to or death of any person or damage to property, demand, suits, recoveries, costs and expenses, court costs, attorney fees, and all other obligations by or to third parties, arising out of or resulting from the other Party's action or inactions of its obligations under this LGIA on behalf of the indemnifying Party, except in cases of gross negligence or intentional wrongdoing by the indemnified Party.

18.1.1 *Indemnified Person.* If an Indemnified Person is entitled to indemnification under this Article 18 as a result of a claim by a third party, and the indemnifying Party fails, after notice and reasonable opportunity to proceed under Article 18.1, to assume the defense of such claim, such Indemnified Person may at the expense of the indemnifying Party contest, settle or consent to the entry of any judgment with respect to, or pay in full, such claim.

18.1.2 *Indemnifying Party.* If an Indemnifying Party is obligated to indemnify and hold any Indemnified Person harmless under this Article 18, the amount owing to the Indemnified Person shall be the amount of such Indemnified Person's actual Loss, net of any insurance or other recovery.

18.1.3 *Indemnity Procedures.* Promptly after receipt by an Indemnified Person of any claim or notice of the commencement of any action or administrative or legal proceeding or investigation as to which the indemnity provided for in Article 18.1 may apply, the Indemnified Person shall notify the Indemnifying Party of such fact. Any failure of or delay in such notification shall not affect a Party's indemnification obligation unless such failure or delay is materially prejudicial to the indemnifying Party.

The Indemnifying Party shall have the right to assume the defense thereof with counsel designated by such Indemnifying Party and reasonably satisfactory to the Indemnified Person. If the defendants in any such action include one or more Indemnified Persons and the Indemnifying Party and if the Indemnified Person reasonably concludes that there may be legal defenses available to it and/or other Indemnified Persons which are different from or additional to those available to the Indemnifying Party, the Indemnified Person shall have the right to select separate counsel to assert such legal defenses and to otherwise participate in the defense of such action on its own behalf. In such instances, the Indemnifying Party shall only be required to pay the fees and expenses of one additional attorney to represent an Indemnified Person or Indemnified Persons having such differing or additional legal defenses.

The Indemnified Person shall be entitled, at its expense, to participate in any such action, suit or proceeding, the defense of which has been assumed by the Indemnifying Party.

Notwithstanding the foregoing, the Indemnifying Party (i) shall not be entitled to assume and control the defense of any such action, suit or proceedings if and to the extent that, in the opinion of the Indemnified Person and its counsel, such action, suit or proceeding involves the potential imposition of criminal liability on the Indemnified Person, or there exists a conflict or adversity of interest between the Indemnified Person and the Indemnifying Party, in such event the Indemnifying Party shall pay the reasonable expenses of the Indemnified Person, and (ii) shall not settle or consent to the entry of any judgment in any action, suit or proceeding without the consent of the Indemnified Person, which shall not be reasonably withheld, conditioned or delayed.

18.2 Consequential Damages

Other than the Liquidated Damages heretofore described, in no event shall either Party be liable under any provision of this LGIA for any losses, damages, costs or expenses for any special, indirect, incidental, consequential, or punitive damages, including but not limited to loss of profit or revenue, loss of the use of equipment, cost of capital, cost of temporary equipment or services, whether based in whole or in part in contract, in tort, including negligence, strict liability, or any other theory of liability; provided, however, that damages for which a Party may be liable to the other Party under another agreement will not be considered to be special, indirect, incidental, or consequential damages hereunder.

18.3 Insurance

Each party shall, at its own expense, maintain in force throughout the period of this LGIA, and until released by the other Party, the following minimum insurance coverages, with insurers authorized to do business in the state where the Point of Interconnection is located:

18.3.1 Employers' Liability and Workers' Compensation Insurance providing statutory benefits in accordance with the laws and regulations of the state in which the Point of Interconnection is located.

18.3.2 Commercial General Liability Insurance including premises and operations, personal injury, broad form property damage, broad form blanket contractual liability coverage (including coverage for the contractual indemnification) products and completed operations coverage, coverage for explosion, collapse and underground hazards, independent contractors coverage, coverage for pollution to the extent normally available and punitive damages to the extent normally available and a cross liability endorsement, with minimum limits of One Million Dollars ($1,000,000) per occurrence/One Million Dollars ($1,000,000) aggregate combined single limit for personal

injury, bodily injury, including death and property damage.

18.3.3 Comprehensive Automobile Liability Insurance for coverage of owned and non-owned and hired vehicles, trailers or semi-trailers designed for travel on public roads, with a minimum, combined single limit of One Million Dollars ($1,000,000) per occurrence for bodily injury, including death, and property damage.

18.3.4 Excess Public Liability Insurance over and above the Employers' Liability Commercial General Liability and Comprehensive Automobile Liability Insurance coverage, with a minimum combined single limit of Twenty Million Dollars ($20,000,000) per occurrence/Twenty Million Dollars ($20,000,000) aggregate.

18.3.5 The Commercial General Liability Insurance, Comprehensive Automobile Insurance and Excess Public Liability Insurance policies shall name the other Party, its parent, associated and Affiliate companies and their respective directors, officers, agents, servants and employees ("Other Party Group") as additional insured. All policies shall contain provisions whereby the insurers waive all rights of subrogation in accordance with the provisions of this LGIA against the Other Party Group and provide thirty (30) days advance written notice to the Other Party Group prior to anniversary date of cancellation or any material change in coverage or condition.

18.3.6 The Commercial General Liability Insurance, Comprehensive Automobile Liability Insurance and Excess Public Liability Insurance policies shall contain provisions that specify that the polices are primary and shall apply to such extent without consideration for other policies separately carried and shall state that each insured is provided coverage as though a separate policy had been issues to each, except the insurer's liability shall not be increased beyond the amount for which the insurer would have been liable had only one insured been covered. Each Party shall be responsible for its respective deductibles or retentions.

18.3.7 The Commercial General Liability Insurance, Comprehensive Automobile Liability Insurance and Excess Public Liability Insurance policies, if written on a Claims First Made Basis, shall be maintained in full force and effect for two (2) years after termination of this LGIA, which coverage may be in the form of tail coverage or extended reporting period coverage if agreed by the Parties.

18.3.8 The requirements contained herein as to the types and limits of all insurance to be maintained by the Parties are not intended to and shall not in any manner, limit or qualify the liabilities and obligations assumed by the Parties under this LGIA.

18.3.9 Within ten (10) days following execution of this LGIA, and as soon as practicable after the end of each fiscal year or at the renewal of the insurance policy and in any event within ninety (90) days thereafter, each Party shall provide certification of all insurance required in this LGIA, executed by each insurer or by an authorized representative of each insurer.

18.3.10 Notwithstanding the foregoing, each Party may self-insure to meet the minimum insurance requirements of Articles 18.3.2 through 18.3.8 to the extent it maintains a self-insurance program; provided that, such Party's senior secured debt is rated at investment grade or better by Standard & Poor's and that its self-insurance program meets the minimum insurance requirements of Articles 18.3.2 through 18.3.8. For any period of time that a Party's senior secured debt is unrated by Standard & Poor's or is rated at less than investment grade by Standard & Poor's, such Party shall comply with the insurance requirements applicable to it under Articles 18.3.2 through 18.3.9. In the event that a Party is permitted to self-insure pursuant to this article, it shall notify the other Party that it meets the requirements to self-insure and that its self-insurance program meets the minimum insurance requirements in a manner consistent with that specified in Article 18.3.9.

18.3.11 The Parties agree to report to each other in writing as soon as practical all accidents or occurrences resulting in injuries to any person, including death, and any property damage arising out of this LGIA.

Article 19. Assignment

19.1 Assignment

This LGIA may be assigned by either Party only with the written consent of the other; provided that either Party may assign this LGIA without the consent of the other Party to any Affiliate of the assigning Party with an equal or greater credit rating and with the legal authority and operational ability to satisfy the obligations of the assigning Party under this LGIA; and provided further that Interconnection Customer shall have the right to assign this LGIA, without the consent of Transmission Provider, for collateral security purposes to aid in providing financing for the Large Generating Facility, provided that Interconnection Customer will promptly notify Transmission Provider of any such assignment. Any financing arrangement entered into by Interconnection Customer pursuant to this article will provide that prior to or upon the exercise of the secured party's, trustee's or mortgagee's assignment rights pursuant to said arrangement, the secured creditor, the trustee or mortgagee will notify Transmission Provider of the date and particulars of any such exercise of assignment right(s), including providing the Transmission Provider with proof that it meets the requirements of Articles 11.5 and 18.3. Any attempted assignment that violates this article is void and ineffective. Any assignment under this LGIA shall not relieve a Party of its obligations, nor shall a Party's obligations be enlarged, in whole or in part, by reason thereof. Where required, consent to assignment will not be unreasonably withheld, conditioned or delayed.

Article 20. Severability

20.1 Severability

If any provision in this LGIA is finally determined to be invalid, void or unenforceable by any court or other Governmental Authority having jurisdiction, such determination shall not invalidate, void or make unenforceable any other provision, agreement or covenant of this LGIA; provided that if Interconnection Customer (or any third party, but only if such third party is not acting at the direction of Transmission Provider) seeks and obtains such a final determination with respect to any provision of the Alternate Option (Article 5.1.2), or the Negotiated Option (Article 5.1.4), then none of these provisions shall thereafter have any force or effect and the Parties' rights and obligations shall be governed solely by the Standard Option (Article 5.1.1).

Article 21. Comparability

21.1 Comparability

The Parties will comply with all applicable comparability and code of conduct laws, rules and regulations, as amended from time to time.

Article 22. Confidentiality

22.1 Confidentiality

Confidential Information shall include, without limitation, all information relating to a Party's technology, research and development, business affairs, and pricing, and any information supplied by either of the Parties to the other prior to the execution of this LGIA. Information is

Confidential Information only if it is clearly designated or marked in writing as confidential on the face of the document, or, if the information is conveyed orally or by inspection, if the Party providing the information orally informs the Party receiving the information that the information is confidential. If requested by either Party, the other Party shall provide in writing, the basis for asserting that the information referred to in this Article 22 warrants confidential treatment, and the requesting Party may disclose such writing to the appropriate Governmental Authority. Each Party shall be responsible for the costs associated with affording confidential treatment to its information.

22.1.1 *Term.* During the term of this LGIA, and for a period of three (3) years after the expiration or termination of this LGIA, except as otherwise provided in this Article 22, each Party shall hold in confidence and shall not disclose to any person Confidential Information.

22.1.2 *Scope.* Confidential Information shall not include information that the receiving Party can demonstrate: (1) Is generally available to the public other than as a result of a disclosure by the receiving Party; (2) was in the lawful possession of the receiving Party on a non-confidential basis before receiving it from the disclosing Party; (3) was supplied to the receiving Party without restriction by a third party, who, to the knowledge of the receiving Party after due inquiry, was under no obligation to the disclosing Party to keep such information confidential; (4) was independently developed by the receiving Party without reference to Confidential Information of the disclosing Party; (5) is, or becomes, publicly known, through no wrongful act or omission of the receiving Party or Breach of this LGIA; or (6) is required, in accordance with Article 22.1.7 of the LGIA, Order of Disclosure, to be disclosed by any Governmental Authority or is otherwise required to be disclosed by law or subpoena, or is necessary in any legal proceeding establishing rights and obligations under this LGIA. Information designated as Confidential Information will no longer be deemed confidential if the Party that designated the information as confidential notifies the other Party that it no longer is confidential.

22.1.3 *Release of Confidential Information.* Neither Party shall release or disclose Confidential Information to any other person, except to its Affiliates (limited by the Standards of Conduct requirements), subcontractors, employees, consultants, or to parties who may be or considering providing financing to or equity participation with Interconnection Customer, or to potential purchasers or assignees of Interconnection Customer, on a need-to-know basis in connection with this LGIA, unless such person has first been advised of the confidentiality provisions of this Article 22 and has agreed to comply with such provisions. Notwithstanding the foregoing, a Party providing Confidential Information to any person shall remain primarily responsible for any release of Confidential Information in contravention of this Article 22.

22.1.4 *Rights.* Each Party retains all rights, title, and interest in the Confidential Information that each Party discloses to the other Party. The disclosure by each Party to the other Party of Confidential Information shall not be deemed a waiver by either Party or any other person or entity of the right to protect the Confidential Information from public disclosure.

22.1.5 *No Warranties.* By providing Confidential Information, neither Party makes any warranties or representations as to its accuracy or completeness. In addition, by supplying Confidential Information, neither Party obligates itself to provide any particular information or Confidential Information to the other Party nor to enter into any further agreements or proceed with any other relationship or joint venture.

22.1.6 *Standard of Care.* Each Party shall use at least the same standard of care to protect Confidential Information it receives as it uses to protect its own Confidential Information from unauthorized disclosure, publication or dissemination. Each Party may use Confidential Information solely to fulfill its obligations to the other Party under this LGIA or its regulatory requirements.

22.1.7 *Order of Disclosure.* If a court or a Government Authority or entity with the right, power, and apparent authority to do so requests or requires either Party, by subpoena, oral deposition, interrogatories, requests for production of documents, administrative order, or otherwise, to disclose Confidential Information, that Party shall provide the other Party with prompt.notice of such request(s) or requirement(s) so that the other Party may seek an appropriate protective order or waive compliance with the terms of this LGIA.

Notwithstanding the absence of a protective order or waiver, the Party may disclose such Confidential Information which, in the opinion of its counsel, the Party is legally compelled to disclose. Each Party will use Reasonable Efforts to obtain reliable assurance that confidential treatment will be accorded any Confidential Information so furnished.

22.1.8 *Termination of Agreement.* Upon termination of this LGIA for any reason, each Party shall, within ten (10) Calendar Days of receipt of a written request from the other Party, use Reasonable Efforts to destroy, erase, or delete (with such destruction, erasure, and deletion certified in writing to the other Party) or return to the other Party, without retaining copies thereof, any and all written or electronic Confidential Information received from the other Party.

22.1.9 *Remedies.* The Parties agree that monetary damages would be inadequate to compensate a Party for the other Party's Breach of its obligations under this Article 22. Each Party accordingly agrees that the other Party shall be entitled to equitable relief, by way of injunction or otherwise, if the first Party Breaches or threatens to Breach its obligations under this Article 22, which equitable relief shall be granted without bond or proof of damages, and the receiving Party shall not plead in defense that there would be an adequate remedy at law. Such remedy shall not be deemed an exclusive remedy for the Breach of this Article 22, but shall be in addition to all other remedies available at law or in equity. The Parties further acknowledge and agree that the covenants contained herein are necessary for the protection of legitimate business interests and are reasonable in scope. No Party, however, shall be liable for indirect, incidental, or consequential or punitive damages of any nature or kind resulting from or arising in connection with this Article 22.

22.1.10 *Disclosure to FERC, its Staff, or a State.* Notwithstanding anything in this Article 22 to the contrary, and pursuant to 18 CFR 1b.20, if FERC or its staff, during the course of an investigation or otherwise, requests information from one of the Parties that is otherwise required to be maintained in confidence pursuant to this LGIA, the Party shall provide the requested information to FERC or its staff, within the time provided for in the request for information. In providing the information to FERC or its staff, the Party must, consistent with 18 CFR 388.112, request that the information be treated as confidential and non-public by FERC and its staff and that the information be withheld from public disclosure. Parties are prohibited from notifying the other Party to this LGIA prior to the release of the Confidential Information to FERC or its staff. The Party shall notify the other Party to the

LGIA when it is notified by FERC or its staff that a request to release Confidential Information has been received by FERC, at which time either of the Parties may respond before such information would be made public, pursuant to 18 CFR 388.112. Requests from a state regulatory body conducting a confidential investigation shall be treated in a similar manner, consistent with the applicable state rules and regulations.

22.1.11 Subject to the exception in Article 22.1.10, any information that a Party claims is competitively sensitive, commercial or financial information under this LGIA ("Confidential Information") shall not be disclosed by the other Party to any person not employed or retained by the other Party, except to the extent disclosure is (i) required by law; (ii) reasonably deemed by the disclosing Party to be required to be disclosed in connection with a dispute between or among the Parties, or the defense of litigation or dispute; (iii) otherwise permitted by consent of the other Party, such consent not to be unreasonably withheld; or (iv) necessary to fulfill its obligations under this LGIA or as a transmission service provider or a Control Area operator including disclosing the Confidential Information to an RTO or ISO or to a regional or national reliability organization. The Party asserting confidentiality shall notify the other Party in writing of the information it claims is confidential. Prior to any disclosures of the other Party's Confidential Information under this subparagraph, or if any third party or Governmental Authority makes any request or demand for any of the information described in this subparagraph, the disclosing Party agrees to promptly notify the other Party in writing and agrees to assert confidentiality and cooperate with the other Party in seeking to protect the Confidential Information from public disclosure by confidentiality agreement, protective order or other reasonable measures.

Article 23. Environmental Releases

23.1

Each Party shall notify the other Party, first orally and then in writing, of the release of any Hazardous Substances, any asbestos or lead abatement activities, or any type of remediation activities related to the Large Generating Facility or the Interconnection Facilities, each of which may reasonably be expected to affect the other Party. The notifying Party shall: (i) Provide the notice as soon as practicable, provided such Party makes a good faith effort to provide the notice no later than twenty-four hours after such Party becomes aware of the occurrence; and (ii) promptly furnish to the other Party copies of any publicly available reports filed with any Governmental Authorities addressing such events.

Article 24. Information Requirements

24.1 Information Acquisition

Transmission Provider and Interconnection Customer shall submit specific information regarding the electrical characteristics of their respective facilities to each other as described below and in accordance with Applicable Reliability Standards.

24.2 Information Submission by Transmission Provider

The initial information submission by Transmission Provider shall occur no later than one hundred eighty (180) Calendar Days prior to Trial Operation and shall include Transmission System information necessary to allow Interconnection Customer to select equipment and meet any system protection and stability requirements, unless otherwise agreed to by the Parties. On a monthly basis Transmission Provider shall provide Interconnection Customer a status report on the construction and installation of Transmission Provider's Interconnection Facilities and Network Upgrades, including, but not limited to, the following information: (1) Progress to date; (2) a description of the activities since the last report" (3) a description of the action items for the next period; and (4) the delivery status of equipment ordered.

24.3 Updated Information Submission by Interconnection Customer

The updated information submission by Interconnection Customer, including manufacturer information, shall occur no later than one hundred eighty (180) Calendar Days prior to the Trial Operation. Interconnection Customer shall submit a completed copy of the Large Generating Facility data requirements contained in Appendix 1 to the LGIP. It shall also include any additional information provided to Transmission Provider for the Feasibility and Facilities Study. Information in this submission shall be the most current Large Generating Facility design or expected performance data. Information submitted for stability models shall be compatible with Transmission Provider standard models. If there is no compatible model, Interconnection Customer will work with a consultant mutually agreed to by the Parties to develop and supply a standard model and associated information. If Interconnection Customer's data is materially different from what was originally provided to Transmission Provider pursuant to the Interconnection Study Agreement between Transmission Provider and Interconnection Customer, then Transmission Provider will conduct appropriate studies to determine the impact on Transmission Provider Transmission System based on the actual data submitted pursuant to this Article 24.3. The Interconnection Customer shall not begin Trial Operation until such studies are completed.

24.4 Information Supplementation

Prior to the Operation Date, the Parties shall supplement their information submissions described above in this Article 24 with any and all "as-built" Large Generating Facility information or "as-tested" performance information that differs from the initial submissions or, alternatively, written confirmation that no such differences exist. The Interconnection Customer shall conduct tests on the Large Generating Facility as required by Good Utility Practice such as an open circuit "step voltage" test on the Large Generating Facility to verify proper operation of the Large Generating Facility's automatic voltage regulator.

Unless otherwise agreed, the test conditions shall include: (1) Large Generating Facility at synchronous speed; (2) automatic voltage regulator on and in voltage control mode; and (3) a five percent change in Large Generating Facility terminal voltage initiated by a change in the voltage regulators reference voltage. Interconnection Customer shall provide validated test recordings showing the responses of Large Generating Facility terminal and field voltages. In the event that direct recordings of these voltages is impractical, recordings of other voltages or currents that mirror the response of the Large Generating Facility's terminal or field voltage are acceptable if information necessary to translate these alternate quantities to actual Large Generating Facility terminal or field voltages is provided. Large Generating Facility testing shall be conducted and results provided to Transmission Provider for each individual generating unit in a station. Subsequent to the Operation Date, Interconnection Customer shall provide Transmission Provider any information changes due to equipment replacement, repair, or adjustment. Transmission Provider shall

provide Interconnection Customer any information changes due to equipment replacement, repair or adjustment in the directly connected substation or any adjacent Transmission Provider-owned substation that may affect Interconnection Customer's Interconnection Facilities equipment ratings, protection or operating requirements. The Parties shall provide such information no later than thirty (30) Calendar Days after the date of the equipment replacement, repair or adjustment.

Article 25. Information Access and Audit Rights

25.1 Information Access

Each Party (the "disclosing Party") shall make available to the other Party information that is in the possession of the disclosing Party and is necessary in order for the other Party to: (i) Verify the costs incurred by the disclosing Party for which the other Party is responsible under this LGIA; and (ii) carry out its obligations and responsibilities under this LGIA. The Parties shall not use such information for purposes other than those set forth in this Article 25.1 and to enforce their rights under this LGIA.

25.2 Reporting of Non-Force Majeure Events

Each Party (the "notifying Party") shall notify the other Party when the notifying Party becomes aware of its inability to comply with the provisions of this LGIA for a reason other than a Force Majeure event. The Parties agree to cooperate with each other and provide necessary information regarding such inability to comply, including the date, duration, reason for the inability to comply, and corrective actions taken or planned to be taken with respect to such inability to comply. Notwithstanding the foregoing, notification, cooperation or information provided under this article shall not entitle the Party receiving such notification to allege a cause for anticipatory breach of this LGIA.

25.3 Audit Rights

Subject to the requirements of confidentiality under Article 22 of this LGIA, each Party shall have the right, during normal business hours, and upon prior reasonable notice to the other Party, to audit at its own expense the other Party's accounts and records pertaining to either Party's performance or either Party's satisfaction of obligations under this LGIA. Such audit rights shall include audits of the other Party's costs, calculation of invoiced amounts, Transmission Provider's efforts to allocate responsibility for the provision of reactive support to the Transmission System, Transmission Provider's efforts to allocate responsibility for interruption or reduction of generation on the Transmission System, and each Party's actions in an Emergency Condition. Any audit authorized by this article shall be performed at the offices where such accounts and records are maintained and shall be limited to those portions of such accounts and records that relate to each Party's performance and satisfaction of obligations under this LGIA. Each Party shall keep such accounts and records for a period equivalent to the audit rights periods described in Article 25.4.

25.4 Audit Rights Periods

25.4.1 *Audit Rights Period for Construction-Related Accounts and Records.* Accounts and records related to the design, engineering, procurement, and construction of Transmission Provider's Interconnection Facilities and Network Upgrades shall be subject to audit for a period of twenty-four months following Transmission Provider's issuance of a final invoice in accordance with Article 12.2.

25.4.2 *Audit Rights Period for All Other Accounts and Records.* Accounts and records related to either Party's performance or satisfaction of all obligations under this LGIA other than those described in Article 25.4.1 shall be subject to audit as follows: (i) For an audit relating to cost obligations, the applicable audit rights period shall be twenty-four months after the auditing Party's receipt of an invoice giving rise to such cost obligations; and (ii) for an audit relating to all other obligations, the applicable audit rights period shall be twenty-four months after the event for which the audit is sought.

25.5 Audit Results

If an audit by a Party determines that an overpayment or an underpayment has occurred, a notice of such overpayment or underpayment shall be given to the other Party together with those records from the audit which support such determination.

Article 26. Subcontractors

26.1 General

Nothing in this LGIA shall prevent a Party from utilizing the services of any subcontractor as it deems appropriate to perform its obligations under this LGIA; provided, however, that each Party shall require its subcontractors to comply with all applicable terms and conditions of this LGIA in providing such services and each Party shall remain primarily liable to the other Party for the performance of such subcontractor.

26.2 Responsibility of Principal

The creation of any subcontract relationship shall not relieve the hiring Party of any of its obligations under this LGIA. The hiring Party shall be fully responsible to the other Party for the acts or omissions of any subcontractor the hiring Party hires as if no subcontract had been made; provided, however, that in no event shall Transmission Provider be liable for the actions or inactions of Interconnection Customer or its subcontractors with respect to obligations of Interconnection Customer under Article 5 of this LGIA. Any applicable obligation imposed by this LGIA upon the hiring Party shall be equally binding upon, and shall be construed as having application to, any subcontractor of such Party.

26.3 No Limitation by Insurance

The obligations under this Article 26 will not be limited in any way by any limitation of subcontractor's insurance.

Article 27. Disputes

27.1 Submission

In the event either Party has a dispute, or asserts a claim, that arises out of or in connection with this LGIA or its performance, such Party (the "disputing Party") shall provide the other Party with written notice of the dispute or claim ("Notice of Dispute"). Such dispute or claim shall be referred to a designated senior representative of each Party for resolution on an informal basis as promptly as practicable after receipt of the Notice of Dispute by the other Party. In the event the designated representatives are unable to resolve the claim or dispute through unassisted or assisted negotiations within thirty (30) Calendar Days of the other Party's receipt of the Notice of Dispute, such claim or dispute may, upon mutual agreement of the Parties, be submitted to arbitration and resolved in accordance with the arbitration procedures set forth below. In the event the Parties do not agree to submit such claim or dispute to arbitration, each Party may exercise whatever rights and remedies it may have in equity or at law consistent with the terms of this LGIA.

27.2 External Arbitration Procedures

Any arbitration initiated under this LGIA shall be conducted before a single neutral arbitrator appointed by the Parties. If the Parties fail to agree upon a single arbitrator within ten (10) Calendar Days of the submission of the

dispute to arbitration, each Party shall choose one arbitrator who shall sit on a three-member arbitration panel. The two arbitrators so chosen shall within twenty (20) Calendar Days select a third arbitrator to chair the arbitration panel. In either case, the arbitrators shall be knowledgeable in electric utility matters, including electric transmission and bulk power issues, and shall not have any current or past substantial business or financial relationships with any party to the arbitration (except prior arbitration). The arbitrator(s) shall provide each of the Parties an opportunity to be heard and, except as otherwise provided herein, shall conduct the arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("Arbitration Rules") and any applicable FERC regulations or RTO rules; provided, however, in the event of a conflict between the Arbitration Rules and the terms of this Article 27, the terms of this Article 27 shall prevail.

27.3 Arbitration Decisions

Unless otherwise agreed by the Parties, the arbitrator(s) shall render a decision within ninety (90) Calendar Days of appointment and shall notify the Parties in writing of such decision and the reasons therefor. The arbitrator(s) shall be authorized only to interpret and apply the provisions of this LGIA and shall have no power to modify or change any provision of this Agreement in any manner. The decision of the arbitrator(s) shall be final and binding upon the Parties, and judgment on the award may be entered in any court having jurisdiction. The decision of the arbitrator(s) may be appealed solely on the grounds that the conduct of the arbitrator(s), or the decision itself, violated the standards set forth in the Federal Arbitration Act or the Administrative Dispute Resolution Act. The final decision of the arbitrator must also be filed with FERC if it affects jurisdictional rates, terms and conditions of service, Interconnection Facilities, or Network Upgrades.

27.4 Costs

Each Party shall be responsible for its own costs incurred during the arbitration process and for the following costs, if applicable: (1) The cost of the arbitrator chosen by the Party to sit on the three member panel and one half of the cost of the third arbitrator chosen; or (2) one half the cost of the single arbitrator jointly chosen by the Parties.

Article 28. Representations, Warranties, and Covenants

28.1 General

Each Party makes the following representations, warranties and covenants:

28.1.1 *Good Standing.* Such Party is duly organized, validly existing and in good standing under the laws of the state in which it is organized, formed, or incorporated, as applicable; that it is qualified to do business in the state or states in which the Large Generating Facility, Interconnection Facilities and Network Upgrades owned by such Party, as applicable, are located; and that it has the corporate power and authority to own its properties, to carry on its business as now being conducted and to enter into this LGIA and carry out the transactions contemplated hereby and perform and carry out all covenants and obligations on its part to be performed under and pursuant to this LGIA.

28.1.2 *Authority.* Such Party has the right, power and authority to enter into this LGIA, to become a party hereto and to perform its obligations hereunder. This LGIA is a legal, valid and binding obligation of such Party, enforceable against such Party in accordance with its terms, except as the enforceability thereof may be limited by applicable bankruptcy, insolvency, reorganization or other similar laws affecting creditors' rights generally and by general equitable principles (regardless of whether enforceability is sought in a proceeding in equity or at law).

28.1.3 *No Conflict.* The execution, delivery and performance of this LGIA does not violate or conflict with the organizational or formation documents, or bylaws or operating agreement, of such Party, or any judgment, license, permit, order, material agreement or instrument applicable to or binding upon such Party or any of its assets.

28.1.4 *Consent and Approval.* Such Party has sought or obtained, or, in accordance with this LGIA will seek or obtain, each consent, approval, authorization, order, or acceptance by any Governmental Authority in connection with the execution, delivery and performance of this LGIA, and it will provide to any Governmental Authority notice of any actions under this LGIA that are required by Applicable Laws and Regulations.

Article 29. Joint Operating Committee

29.1 Joint Operating Committee

Except in the case of ISOs and RTOs, Transmission Provider shall constitute a Joint Operating Committee to coordinate operating and technical considerations of Interconnection Service. At least six (6) months prior to the expected Initial Synchronization Date, Interconnection Customer and Transmission Provider shall each appoint one representative and one alternate to the Joint Operating Committee. Each Interconnection Customer shall notify Transmission Provider of its appointment in writing. Such appointments may be changed at any time by similar notice. The Joint Operating Committee shall meet as necessary, but not less than once each calendar year, to carry out the duties set forth herein. The Joint Operating Committee shall hold a meeting at the request of either Party, at a time and place agreed upon by the representatives. The Joint Operating Committee shall perform all of its duties consistent with the provisions of this LGIA. Each Party shall cooperate in providing to the Joint Operating Committee all information required in the performance of the Joint Operating Committee's duties. All decisions and agreements, if any, made by the Joint Operating Committee, shall be evidenced in writing. The duties of the Joint Operating Committee shall include the following:

29.1.1 Establish data requirements and operating record requirements.

29.1.2 Review the requirements, standards, and procedures for data acquisition equipment, protective equipment, and any other equipment or software.

29.1.3 Annually review the one (1) year forecast of maintenance and planned outage schedules of Transmission Provider's and Interconnection Customer's facilities at the Point of Interconnection.

29.1.4 Coordinate the scheduling of maintenance and planned outages on the Interconnection Facilities, the Large Generating Facility and other facilities that impact the normal operation of the interconnection of the Large Generating Facility to the Transmission System.

29.1.5 Ensure that information is being provided by each Party regarding equipment availability.

29.1.6 Perform such other duties as may be conferred upon it by mutual agreement of the Parties.

Article 30. Miscellaneous

30.1 *Binding Effect.* This LGIA and the rights and obligations hereof, shall be binding upon and shall inure to the benefit of the successors and assigns of the Parties hereto.

30.2 *Conflicts.* In the event of a conflict between the body of this LGIA and any attachment, appendices or exhibits hereto, the terms and

provisions of the body of this LGIA shall prevail and be deemed the final intent of the Parties.

30.3 *Rules of Interpretation.* This LGIA, unless a clear contrary intention appears, shall be construed and interpreted as follows: (1) The singular number includes the plural number and vice versa; (2) reference to any person includes such person's successors and assigns but, in the case of a Party, only if such successors and assigns are permitted by this LGIA, and reference to a person in a particular capacity excludes such person in any other capacity or individually; (3) reference to any agreement (including this LGIA), document, instrument or tariff means such agreement, document, instrument, or tariff as amended or modified and in effect from time to time in accordance with the terms thereof and, if applicable, the terms hereof; (4) reference to any Applicable Laws and Regulations means such Applicable Laws and Regulations as amended, modified, codified, or reenacted, in whole or in part, and in effect from time to time, including, if applicable, rules and regulations promulgated thereunder; (5) unless expressly stated otherwise, reference to any Article, Section or Appendix means such Article of this LGIA or such Appendix to this LGIA, or such Section to the LGIP or such Appendix to the LGIP, as the case may be; (6) "hereunder", "hereof", "herein", "hereto" and words of similar import shall be deemed references to this LGIA as a whole and not to any particular Article or other provision hereof or thereof; (7) "including" (and with correlative meaning "include") means including without limiting the generality of any description preceding such term; and (8) relative to the determination of any period of time, "from" means "from and including", "to" means "to but excluding" and "through" means "through and including".

30.4 *Entire Agreement.* This LGIA, including all Appendices and Schedules attached hereto, constitutes the entire agreement between the Parties with reference to the subject matter hereof, and supersedes all prior and contemporaneous understandings or agreements, oral or written, between the Parties with respect to the subject matter of this LGIA. There are no other agreements, representations, warranties, or covenants which constitute any part of the consideration for, or any condition to, either Party's compliance with its obligations under this LGIA.

30.5 *No Third Party Beneficiaries.* This LGIA is not intended to and does not create rights, remedies, or benefits of any character whatsoever in favor of any persons, corporations, associations, or entities other than the Parties, and the obligations herein assumed are solely for the use and benefit of the Parties, their successors in interest and, where permitted, their assigns.

30.6 *Waiver.* The failure of a Party to this LGIA to insist, on any occasion, upon strict performance of any provision of this LGIA will not be considered a waiver of any obligation, right, or duty of, or imposed upon, such Party.

Any waiver at any time by either Party of its rights with respect to this LGIA shall not be deemed a continuing waiver or a waiver with respect to any other failure to comply with any other obligation, right, duty of this LGIA. Termination or Default of this LGIA for any reason by Interconnection Customer shall not constitute a waiver of Interconnection Customer's legal rights to obtain an interconnection from Transmission Provider. Any waiver of this LGIA shall, if requested, be provided in writing.

30.7 *Headings.* The descriptive headings of the various Articles of this LGIA have been inserted for convenience of reference only and are of no significance in the interpretation or construction of this LGIA.

30.8 *Multiple Counterparts.* This LGIA may be executed in two or more counterparts, each of which is deemed an original but all constitute one and the same instrument.

30.9 *Amendment.* The Parties may by mutual agreement amend this LGIA by a written instrument duly executed by the Parties.

30.10 *Modification by the Parties.* The Parties may by mutual agreement amend the Appendices to this LGIA by a written instrument duly executed by the Parties. Such amendment shall become effective and a part of this LGIA upon satisfaction of all Applicable Laws and Regulations.

30.11 *Reservation of Rights.* Transmission Provider shall have the right to make a unilateral filing with FERC to modify this LGIA with respect to any rates, terms and conditions, charges, classifications of service, rule or regulation under section 205 or any other applicable provision of the Federal Power Act and FERC's rules and regulations thereunder, and Interconnection Customer shall have the right to make a unilateral filing with FERC to modify this LGIA pursuant to section 206 or any other applicable provision of the Federal Power Act and FERC's rules and regulations thereunder; provided that each Party shall have the right to protest any such filing by the other Party and to participate fully in any proceeding before FERC in which such modifications may be considered. Nothing in this LGIA shall limit the rights of the Parties or of FERC under sections 205 or 206 of the Federal Power Act and FERC's rules and regulations thereunder, except to the extent that the Parties otherwise mutually agree as provided herein.

30.12 *No Partnership.* This LGIA shall not be interpreted or construed to create an association, joint venture, agency relationship, or partnership between the Parties or to impose any partnership obligation or partnership liability upon either Party. Neither Party shall have any right, power or authority to enter into any agreement or undertaking for, or act on behalf of, or to act as or be an agent or representative of, or to otherwise bind, the other Party.

In witness whereof, the Parties have executed this LGIA in duplicate originals, each of which shall constitute and be an original effective Agreement between the Parties.

[Insert name of Transmission Provider or Transmission Owner, if applicable]

By: _____

Title: _____

Date: _____

By: _____

Title: _____

Date: _____

[Insert name of Interconnection Customer]

By: _____

Title: _____

Date: _____

Appendix A to LGIA

Interconnection Facilities, Network Upgrades and Distribution Upgrades

1. Interconnection Facilities:

(a) [insert Interconnection Customer's Interconnection Facilities]:

(b) [insert Transmission Provider's Interconnection Facilities]:

2. Network Upgrades:

(a) [insert Stand Alone Network Upgrades]:

(b) [insert Other Network Upgrades]:

3. Distribution Upgrades:

Appendix B to LGIA—Milestones

Appendix C to LGIA—Interconnection Details

Appendix D to LGIA—Security Arrangements Details

Infrastructure security of Transmission System equipment and operations and control hardware and

software is essential to ensure day-to-day Transmission System reliability and operational security. FERC will expect all Transmission Providers, market participants, and Interconnection Customers interconnected to the Transmission System to comply with the recommendations offered by the President's Critical Infrastructure Protection Board and, eventually, best practice recommendations from the electric reliability authority. All public utilities will be expected to meet basic standards for system infrastructure and operational security, including physical, operational, and cyber-security practices.

Appendix E to LGIA—Commercial Operation Date

This Appendix E is a part of the LGIA between Transmission Provider and Interconnection Customer.

[Date]
[Transmission Provider Address]
Re: _____ Large Generating Facility
Dear _____:
On [Date] [Interconnection Customer] has completed Trial Operation of Unit No. __. This letter confirms that [Interconnection Customer] commenced Commercial Operation of Unit No. __ at the Large Generating Facility, effective as of [Date plus one day].
Thank you.
[Signature]
[Interconnection Customer Representative]

Appendix F to LGIA—Addresses for Delivery of Notices and Billings

Notices:
Transmission Provider:
[To be supplied.]
Interconnection Customer:
[To be supplied.]

Billings and Payments:
Transmission Provider:
[To be supplied.]
Interconnection Customer:
[To be supplied.]

Alternative Forms of Delivery of Notices (telephone, facsimile or email):
Transmission Provider:
[To be supplied.]
Interconnection Customer:
[To be supplied.]

Appendix G to LGIA—Requirements of Generators Relying on Newer Technologies

[FR Doc. 04–5989 Filed 3–25–04; 8:45 am]
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Federal Register

Friday,
March 26, 2004

Part III

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Parts 411 and 424

Medicare Program; Physicians' Referrals to Health Care Entities With Which They Have Financial Relationships (Phase II); Interim Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 411 and 424

[CMS–1810–IFC]

RIN 0938–AK67

Medicare Program; Physicians' Referrals to Health Care Entities With Which They Have Financial Relationships (Phase II)

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

ACTION: Interim final rule with comment period.

SUMMARY: This interim final rule with comment period (Phase II of this rulemaking) incorporates into regulations the provisions concerning ownership and investment exceptions in paragraphs (c) and (d) and the compensation exceptions in paragraph (e) of section 1877 of the Social Security Act (the Act). Phase II also addresses comments concerning the reporting requirements in section 1877(f) of the Act.

Phase I (as defined below) addressed the majority of issues in implementing section 1877 of the Act. Phase II both addresses the remaining issues not addressed in Phase I and responds to public comments. In general, in response to public comments, the Department has attempted to reduce regulatory burden by broadening exceptions using the Secretary's discretionary authority under the statute to create exceptions that pose no risk of fraud or abuse. For the convenience of affected parties, we have set out the entire rule as previously promulgated, including the changes made by this rulemaking.

DATES: *Effective date:* This interim final rule is effective on July 26, 2004.

Comment date: We will consider comments on Phase II issues if we receive them at the appropriate address, as provided below, no later than 5 p.m. on June 24, 2004. Late filed comments will be considered to the extent practicable.

ADDRESSES: In commenting, please refer to file code CMS–1810–IFC. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

Submit electronic comments to *http://www.cms.hhs.gov/regulations/ecomments* or to *www.regulations.gov*. 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–1810–IFC, P.O. Box 8013, Baltimore, MD 21244–8013.

Please allow sufficient time for mailed comments to be timely received in the event of delivery delays.

If you prefer, you may deliver (by hand or courier) your written comments (one original and two copies) to one of the following addresses: Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, or Room C5–14–03, 7500 Security Boulevard, Baltimore, MD 21244–1850.

(Because access to the interior of the HHH Building is not readily available to persons without Federal Government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and could be considered late.

All comments received before the close of the comment period are available for viewing by the public. After the close of the comment period, CMS posts all electronic comments received before the close of the comment period on its public Web site. To protect an individual's privacy and identity, a commenter may wish to omit his or her full name and address from the comment. We request that the commenter identify only his or her zip code. For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Joanne Sinsheimer, (410) 786–4620.

SUPPLEMENTARY INFORMATION:

Submitting Comments: We welcome comments from the public on all issues set forth in this rule to assist us in fully considering issues and developing policies. You can assist us by referencing the file code CMS–1810–IFC and the specific "issue identifier" that precedes the section on which you choose to comment.

Inspection of Public Comments: Comments received timely will be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone (410) 786–7197.

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 help readers locate information in this interim final rule, we are providing the following Table of Contents. The Table of Contents also indicates whether a subject was previously addressed in Phase I or is a Phase II issue.

I. Background

Section 1877 of the Social Security Act (the Act), also known as the physician self-referral law: (1) Prohibits a physician from making referrals for certain "designated health services" (DHS) payable by Medicare to an entity with which he or she (or an immediate family member) has a financial relationship (ownership or compensation) unless an exception applies; and (2) prohibits the entity from filing claims with Medicare for those referred services, unless an exception applies. The statute establishes a number of specific exceptions and grants the Secretary the authority to create regulatory exceptions for financial relationships that pose no risk of fraud or abuse.

In reviewing the public comments received, the Department has endeavored to reduce the burden and prescriptive nature of the rule while applying the statute and maintaining the integrity of the regulatory framework. The Phase II rule exercises the Secretary's authority to create exceptions to accomplish this goal. In particular, the Phase II rule creates a new exception for community-wide health information systems. It also creates limited exceptions to allow physicians to refer to immediate family members in rural areas in certain circumstances when no other physician is available, and to exempt hospital payments to retain a physician who would otherwise leave a health professional shortage area.

This is Phase II of a bifurcated final rulemaking under section 1877 of the Act. The current version of section 1877, which applies to referrals for eleven DHS, has been in effect and subject to enforcement since January 1, 1995. Proposed regulations were published in 1998 at 63 FR 1659 (January 9, 1998) (the "January 1998 proposed rule"). Phase I of the final rulemaking was published in the **Federal Register** on January 4, 2001 (66 FR 856) ("Phase I") as a final rule with comment period.

The reasons for bifurcation of the rulemaking are explained in the Phase I preamble (66 FR 859–860). With two exceptions, the regulations published in Phase I became effective on January 4, 2002. Section 424.22(d), relating to home health services, became effective on April 6, 2001 (see our **Federal Register** notice dated February 2, 2001 (66 FR 8771)). We delayed the effective date of the final sentence of § 411.354(d)(1) relating to the definition of "set in advance" for one year from January 4, 2002 to January 6, 2003, in a **Federal Register** document published on December 3, 2001 (66 FR 60154). We further delayed the effective date of this sentence for an additional 6 months, until July 7, 2003, in a **Federal Register** document published on November 22, 2002 (67 FR 70322), and for an additional 6 months, until January 7, 2004, in a **Federal Register** document published on April 25, 2003 (68 FR 20347). We published another delay notice on December 24, 2003 (68 FR 74491), delaying that effective date until July 7, 2004.

Phase I covered—

- Sections 1877(a) and 1877(b) of the Act (the general prohibition and the exceptions applicable to both ownership and compensation arrangements);
- The statutory definitions at section 1877(h) of the Act;
- Certain additional regulatory definitions; and
- A number of new regulatory exceptions promulgated under section 1877(b)(4) of the Act.

Phase II covers—

- The remaining provisions of section 1877 of the Act;
- Additional regulatory definitions;
- Additional new regulatory exceptions promulgated under section 1877(b)(4) of the Act; and
- Responses to the public comments on the Phase I regulations.

We had intended to address in this Phase II rulemaking section 1903(s) of the Act, which applies section 1877 of the Act to referrals for Medicaid covered services and which we interpreted in the proposed rule at § 435.1012 and § 455.109. However, in the interest of expediting publication of these rules. we are reserving the Medicaid issue for a future rulemaking with one exception. In this rulemaking, we are amending the prepaid plans exception at § 411.356(c) to cover Medicaid managed care plans.

Phase II has a 90-day comment period and will become effective 120 days after the date of publication. Comments received on the Phase II rulemaking will be addressed in a separate **Federal Register** notice.

Phase I and Phase II of this rulemaking are intended to be read together as a unified whole. Among other things, Phase I contains a complete legislative and regulatory history (66 FR 857–859), which is not repeated here. Modifications or revisions to Phase I are clearly indicated in this Phase II preamble and corresponding regulations text. Unless otherwise expressly noted, to the extent the preamble in Phase II uses different language to describe a concept addressed in Phase I, our intent is to better explain or clarify a Phase I discussion, not to change its scope or meaning. For clarity and ease of access of the general public to the entire set of issues raised by the statute, we are republishing the regulatory text in its entirety. This Department has consistently worked to clarify and simplify the Phase I rules in response to comments, as well as to reduce the burden of the entire set of rules by exercising the Secretary's authority to create additional exceptions for financial relationships that pose no risk of fraud and abuse when all of the conditions of an exception are met. The Phase I and the Phase II rules, together, supersede the 1995 final rule (60 FR 41914), which has been applicable to referrals for clinical laboratory services.

As with Phase I, in developing Phase II of this rulemaking, we have carefully reconsidered the January 1998 proposed rule (63 FR 1659), given both the history and structure of section 1877 of the Act and the extensive comments we received to the January 1998 proposed rule, as well as the considerably smaller number of comments to the Phase I final rule. As with Phase I, we believe that Phase II of this rulemaking addresses many of the industry's primary concerns with the January 1998 proposed rule, is consistent with the statute's goals and directives, and protects beneficiaries of Federal health care programs. In particular, we have attempted to preserve the core statutory prohibition while providing sufficient flexibility to minimize the impact of the rule on many common business arrangements. For more detailed discussion of the criteria we have applied in evaluating regulatory options for Phase II, see 66 FR 859–863 of the Phase I rule.

This Phase II preamble is generally organized to track the statute. We first address the general prohibition, then the exceptions, then the definitions (although certain key definitions, such as "group practice" and "isolated transaction" are addressed in the discussions of the exceptions to which they mainly relate). Discussion of new regulatory exceptions follows (except that regulatory exceptions closely related to a statutory provision are discussed together with the statutory provision). Topics previously covered by Phase I are clearly indicated, along with cross-references to the relevant Phase I preamble pages and regulatory text. Topics new to Phase II are also clearly indicated, and, as in Phase I, each Phase II issue begins with summaries of the existing law, the January 1998 proposed rule, and the final rule. These summaries are intended to aid the reader in understanding the regulations. More detailed discussions of particular points are included in the responses to public comments for each topic.

II. The General Prohibition Under Section 1877 of the Act

(Section 1877(a) of the Act; Phase I—66 FR 863–875; § 411.353 and § 411.351)

Overall, the commenters to the Phase I rulemaking welcomed the additional clarity provided with respect to the general statutory prohibition, particularly with respect to the treatment of indirect compensation arrangements. However, we received a number of comments with respect to various aspects of the general prohibition. As in Phase I, the summaries of the public comments and our responses are divided into four parts:

A. General comments.

B. Comments related to whether a financial relationship exists between a referring physician and a designated health services entity ("DHS entity").

C. Comments related to whether there has been a referral from a referring physician to a DHS entity.

D. Comments regarding the definition of "consultation."

A. General Comments

Comment: Many commenters praised the new regulations, particularly their clarity, flexibility, and focus on "bright line" rules. However, several stated that the regulations are still overly complex, lengthy, and burdensome. A physician organization asserted that the complexity discourages physicians from participating in the Medicare program.

Response: A certain amount of regulatory complexity is inevitable under a statutory scheme that encompasses the full panoply of physician financial arrangements with providers of eleven different types of health care services. The Phase I preamble attempted to provide clear explanations of the rules and to respond to approximately 13,000 public comments. Accordingly, it is somewhat lengthy. However, the Phase I regulations themselves constitute only 13 of the 108 pages published in the **Federal Register**. Moreover, while certain aspects of the statute and regulations involve detailed tests or standards, the overall statutory and regulatory scheme is straightforward. Most physician ownership in DHS entities is prohibited. Most physician compensation must be fair market value. We believe that the rule, like the statute, provides clear guidance for providers to comply demonstrably with the law.

Comment: The basic sanction under section 1877 of the Act is nonpayment for DHS referred by a physician with an improper financial relationship with the DHS entity. A home health agency commented that payment denial was not a sufficient deterrent to improper referrals and that referring physicians and hospitals that own or operate their own home health services need to be penalized.

Response: Section 1877(g) of the Act provides for two types of sanctions: nonpayment of claims for all violations and civil monetary penalties (CMPs) for knowing violations. Nonpayment applies to any DHS furnished to any Medicare patient under a prohibited referral. We believe the combination of nonpayment and CMPs is a strong deterrent.

Comment: A practicing physician objected to physicians being denied the right to own businesses to which they refer. The physician complained that the law compels referrals to businesses owned by persons who are not physicians and who do not have the skills or expertise to run them.

Response: As we explained in Phase I (66 FR 859), in enacting section 1877 of the Act, the Congress responded in part to a number of studies showing that physician ownership of certain types of facilities resulted in significantly higher utilization of those facilities by the physician-owners. While in some cases physician-owners may have been actively involved in the businesses, in others they were merely passive investors. The Congress created exceptions for certain physician-owned DHS entities, including providers in rural areas (section 1877(d)(2) of the Act), and for DHS provided within a physician's own office practice to the physician's patients (the in-office ancillary services exception in section 1877(b)(2) of the Act and § 411.355(b) of the regulations).

Comment: Several commenters requested that we enact various "grace" periods under the exceptions to accommodate situations in which parties to an arrangement: (1) Fall out of compliance with aspects of an exception

through events outside their control; or (2) are unable to comply with an exception for temporary periods of time.

Response: We are persuaded that a specified and limited exception for certain arrangements that have unavoidably and temporarily fallen out of compliance with other exceptions is warranted and consistent with the overall statutory scheme and the obligations the statute imposes on providers. Accordingly, using our authority at section 1877(b)(4) of the Act, we have incorporated into these regulations an exception at § 411.353(f) for certain arrangements that have fully satisfied another exception for at least 180 consecutive days, but have fallen out of compliance with the exception for reasons beyond the control of the DHS entity. Parties must take steps to rectify their noncompliance or otherwise comply with the statute as expeditiously as possible under the circumstances. The § 411.353(f) exception lasts up to 90 days and applies to DHS furnished during the exception period. By the end of the 90-day exception period, parties must either comply with another exception or have terminated their otherwise prohibited arrangement. It is in the provider's interest to document contemporaneously the reasons for the temporary noncompliance and the steps taken to rectify it. For example, this exception will allow rural providers that fall out of compliance with § 411.356(C)(2) through re-designation of a rural area as a non-rural area time to finish patients' existing courses of treatment or refer patients to other providers.

This new exception, at § 411.353(f), does not apply to arrangements that previously complied with the exceptions for non-monetary compensation up to $300 or incidental medical staff benefits. To provide otherwise would effectively negate the limits set in those exceptions. (In the case of non-monetary compensation, it is, of course, possible to be compliant in the next year, since the exception permits non-monetary compensation up to $300 annually.)

The new exception is *not* intended to allow DHS entities to file otherwise prohibited claims or bills when they purposefully take or omit to take actions or engage in conduct that causes their financial relationship to be noncompliant with an exception. The exception period is limited to 90 calendar days following the date of the initial event resulting in noncompliance with an exception and applies to DHS furnished during the exception period. The exception is intended to be used sparingly and may not be used by a DHS entity more often than once every three years with respect to referrals from the same referring physician. We believe this exception should address a number of situations that present special and temporary compliance problems, including conversion of publicly-traded companies to private ownership; loss of rural or health professional shortage areas (HPSA) designations; or delays in obtaining fully-signed copies of renewal agreements. As noted in section V.C below, we have also modified the group practice definition at § 411.352(d)(5) to address problems faced by group practices that fall out of compliance with elements of the definition when they add new members to the group. We have also interpreted the lease exceptions to permit holdover month-to-month leases for up to six months.

Comment: A commenter commended the Phase I regulations regarding referrals between physicians and their spouses, but submitted that the regulations did not go far enough in permitting certain cross-referrals between physicians who are family members. In the commenter's view, these referrals should be allowed whenever the referral arrangement would be permitted between non-family member physicians. For example, the commenter believed that if a physician could himself perform a designated health service under the in-office ancillary services exception, he should be permitted to refer to his spouse if she could also otherwise provide that service under the in-office ancillary services exception. According to the commenter, a physician would have no greater incentive to refer to his or her spouse if the physician could otherwise provide the designated health service under an exception. Thus, the commenter believes prohibiting cross-referrals unfairly penalizes two-physician families.

Response: The statute clearly provides that a physician may not make a referral to a DHS entity with which the physician (or an immediate family member) has a financial relationship, unless an exception applies. The change suggested by the commenter would contradict this clear statutory directive. However, as discussed in section V.B below, we are creating a new regulatory exception for some intra-family referrals that meet specific conditions.

B. When Is There a Financial Relationship Between the Referring Physician and the DHS Entity? (Phase I—66 FR 864; § 411.351, § 411.354, and § 411.357(p))

[If you choose to comment on issues in this section, please include the caption "Financial Relationship Definition" at the beginning of your comments.]

The existence of a financial relationship between the referring physician (or an immediate family member) and the entity furnishing DHS is the factual predicate triggering the application of section 1877 of the Act. Section 1877(a)(2) defines a financial relationship as: (1) An ownership or investment interest of a referring physician (or an immediate family member) in the DHS entity; or (2) a compensation arrangement between the referring physician (or an immediate family member) and the DHS entity. Any financial relationship between the referring physician and the DHS entity implicates the statute, even if the financial relationship is wholly unrelated to a designated health service payable by Medicare (for example, a financial relationship involving only private pay business). Unless the financial relationship fits into a statutory or regulatory exception, referrals and corresponding claims for DHS are prohibited. Section 411.354 addresses the circumstances under which a financial relationship exists.

The statute expressly contemplates that "financial relationships" include both direct and indirect ownership and investment interests and direct and indirect compensation arrangements between referring physicians and DHS entities (sections 1877(a)(2) and 1877(h)(1) of the Act, respectively). We consider a "direct" financial relationship to be an arrangement between the entity furnishing DHS and a referring physician (or an immediate family member) with no person or entity interposed between them (§ 411.354(a)(1)(2)). "Indirect" financial relationships—whether ownership or investment or compensation—exist where one or more persons or entities are interposed between the referring physician and the DHS entity. For indirect compensation arrangements, Phase I established a three part, "bright line" test that incorporated a knowledge element to protect DHS entities not in a position to know about or suspect an otherwise prohibited compensation arrangement with the referring physician. Phase I also established a corresponding new exception for indirect compensation arrangements. By

(1) defining the universe of "indirect compensation arrangements" that potentially triggers disallowance of claims and penalties; and (2) creating an exception for the subset of "indirect compensation arrangements" that will *not* trigger disallowance or penalties, we have structured the treatment of indirect compensation arrangements under section 1877 of the Act to parallel the treatment of direct compensation arrangements.

Most commenters were pleased with the specificity of § 411.354, which sets out rules for determining whether a financial relationship exists, and the accompanying discussion in the Phase I preamble (66 FR 864). While § 411.354 establishes rules for both direct and indirect financial relationships, very few comments addressed the rules for direct financial relationships. Rather, most comments addressed the definition of an indirect compensation arrangement at § 411.354(c)(2) and the interplay between that definition and the exception at § 411.357(p).

As discussed below, we are modifying the language of § 411.354 to address some of the concerns expressed by the commenters. These modifications include—

- Clarifying the meaning of direct and indirect *ownership* and affirming that common ownership of an entity does not create an *ownership* interest by one common investor in another;
- Clarifying the relationship between the "indirect *compensation* arrangements" definition and the "volume or value" and "other business generated" standards;
- Clarifying that a referring physician may be treated as "standing in the shoes" of his or her wholly-owned professional corporation (PC).

Summaries of the comments and our responses follow.

Comment: One commenter asked us to clarify that remuneration received as a result of an arrangement that does not fit in the definition of a "financial relationship" under § 411.354(a) does not implicate section 1877 of the Act.

Response: The commenter did not provide any specific examples of remuneration that would not result in a financial relationship. As a matter of law, section 1877 of the Act does not apply in the absence of a financial relationship as defined in § 411.354(a), but in the absence of specific examples, we find it difficult to identify any remuneration not covered by that definition.

Comment: A number of commenters found the definition of "indirect compensation arrangement" at § 411.354(c)(2) to be very complicated. One commenter stated that the definition was too broad and covered many arrangements that had not previously been subject to the statute. A national physician association emphasized that the physician community would need education as to the scope and application of the definition.

Response: The definition of "indirect compensation arrangement" at § 411.354(c)(2) requires three elements:

- Paragraph (c)(2)(i)—an unbroken chain of financial relationships (ownership or compensation) linking the referring physician to the DHS entity;
- Paragraph (c)(2)(ii)—aggregate compensation paid to the referring physician that varies with, or otherwise takes into account, the volume or value of referrals to, or other business generated for, the DHS entity; and
- Paragraph (c)(2)(iii)—knowledge by the DHS entity that the physician receives aggregate compensation that varies with, or otherwise takes into account, the volume or value of referrals to, or other business generated for, the DHS entity (using the same knowledge standard that applies under the False Claims Act (31 U.S.C. § 3729) and the Civil Monetary Penalties Law (section 1128A of the Act)).

With education and experience, we think DHS entities and referring physicians will be able to apply the test without difficulty. (We discuss further the application of the various elements in response to specific comments below.) We have made several technical revisions to clarify the intent of the exception.

We agree that the definition encompasses many arrangements that physicians and DHS entities claim not to have thought were covered by the statute. As we discussed in the Phase I preamble (66 FR 864), we believe that the knowledge element sufficiently and equitably sets the boundaries for the potential universe of prohibited arrangements.

Comment: Many commenters expressed confusion at the interplay between (1) the definition of "indirect compensation arrangement" at § 411.354(c)(2), which looks at whether the referring physician's aggregate compensation varies with, or otherwise takes into account "the volume or value of referrals" generated by the referring physician, and (2) § 411.354(d)(2), which describes when certain compensation (such as time-based and unit-of-service based payments) will be deemed not to take into account "the volume or value of referrals," even though aggregate per unit compensation will always vary with the volume or value of referrals. (We received similar comments regarding § 411.354(d)(3) with respect to when compensation does not take into account "other business generated between the parties.") These provisions were discussed in the Phase I preamble (66 FR 876).

Specifically, under § 411.354(d)(2) and § 411.354(d)(3), time-based and unit-of-service based compensation is deemed not to take into account the volume or value of referrals or other business generated if the unit-based compensation: (i) Is fair market value for items or services actually provided; and (ii) does not vary over the term of the agreement in any manner that takes into account DHS referrals or other business generated by the referring physician. Some commenters questioned whether an indirect compensation arrangement exists at all if a referring physician receives time-based or unit-of-service based compensation that is fair market value and does not vary over the term of the agreement, that is, compensation that, by definition, does not take into account the volume or value of referrals or other business generated according to § 411.354(d)(2) and § 411.354(d)(3).

Similarly, the new exception for indirect compensation arrangements at § 411.357(p), like § 411.354(d)(2) and § 411.354(d)(3), does not look to aggregate compensation and incorporates a fair market value test. Given this, several commenters pointed out that the ultimate result would be the same whether time and unit-of-service based compensation arrangements are initially excluded from the definition of "indirect compensation arrangement" in § 411.354(c)(2) or included in the definition and then excepted by the new exception. One commenter proposed three options: (1) Retaining the indirect compensation arrangement definition in the final regulation and deleting the indirect compensation exception; (2) revising the indirect compensation arrangement definition by deleting the volume and value language; or (3) revising § 411.354(d)(2) and § 411.354(d)(3) to make clear that those provisions do not apply to the indirect compensation arrangements definition.

Response: An "indirect compensation arrangement" exists under § 411.354(c)(2) if the referring physician's aggregate compensation varies with, or otherwise takes into account, the volume or value of referrals or other business generated by the referring physician. Since time-based or unit-of-service based compensation will always vary with the volume or value of services when considered in the

aggregate, these compensation arrangements can constitute "indirect compensation arrangements" under § 411.354(c)(2), even if the individual time or unit-of-service based compensation is fair market value and otherwise complies with the language of § 411.354(d)(2) and § 411.354(d)(3).

We agree that the close similarity in the regulatory language between § 411.354(c)(2) and § 411.354(d)(2) and § 411.354(d)(3) can be clarified. We are modifying § 411.354(c)(2)(ii) to do so. Our intent is two-fold. First, we intend to include in the definition of "indirect compensation arrangement" any compensation arrangements (including time-based or unit-of-service based compensation arrangements) where the aggregate compensation received by the referring physician varies with, or otherwise takes into account, the volume or value of referrals or other business generated between the parties, regardless of whether the individual unit of compensation qualifies under § 411.354(d)(2) and § 411.354(d)(3). Second, we intend to exclude under the indirect compensation arrangement exception at § 411.357(p) that subset of indirect compensation arrangements where the compensation is fair market value and does not reflect the volume or value of referrals or other business generated and the other conditions of the exception are satisfied. Per unit compensation will meet this test if it complies with § 411.354(d)(2) and § 411.354(d)(3). While we agree that the ultimate result may be the same—time, unit-of-service, or other "per click" based arrangements are generally permitted if they are at fair market value without reference to referrals—we believe this construct more closely corresponds to the statutory treatment of direct compensation arrangements. Accordingly, we are clarifying § 411.354(c)(2)(ii).

It is important to bear in mind that, depending on the circumstances, fixed aggregate compensation can form the basis for a prohibited direct or indirect compensation arrangement. This will be the case if such fixed aggregate compensation takes into account the volume or value of referrals (for example, the fixed compensation exceeds fair market value for the items or services provided or is inflated to reflect the volume or value of a physician's referrals or other business generated). Section 411.354(d)(2) and § 411.354(d)(3) were not intended to remove the existing prohibition on fixed compensation arrangements that take into account the volume or value of referrals or other business generated between the parties. We have clarified the language in these sections to reflect the distinction.

Comment: The first element of an "indirect compensation arrangement" is an unbroken chain of financial relationships between the DHS entity and the referring physician. In Phase I, we explained that the links in the chain could be any form of financial relationship, whether excepted or not. Several commenters believe that there should be no indirect compensation arrangement if any financial relationship in the chain qualifies for an exception. One commenter pointed out that under section 1877(a)(2) of the Act, the definition of "financial relationship" excludes any financial relationship that fits in an exception. Thus, according to this commenter, the inclusion of an excepted financial relationship in a chain of financial relationships necessarily "breaks" the chain and precludes an indirect compensation arrangement. The commenter explained further that this result would make the application of the indirect compensation rules easier for DHS entities, especially hospitals, that have arrangements with group practices that employ, or contract with, referring physicians using compensation arrangements that fit in the employment, personal services contracts, or fair market value exceptions. Finally, the commenter suggested that, at a minimum, there should be no indirect financial relationship if every link in the chain qualifies for an exception.

Response: Section 1877(a)(2) of the Act excludes from the definition of "financial relationship" any ownership or compensation arrangement that fits in an exception. While the regulations are structured somewhat differently, they achieve the same result. The regulations define "financial relationship" in § 411.354(a) without limiting the term to unexcepted financial relationships. Exceptions are set forth in separate provisions of the regulations. Thus, the reference in the definition of "indirect compensation arrangement" to an unbroken chain of "financial relationships" as defined in § 411.354(a) includes both excepted and unexcepted relationships. A direct financial relationship can form a link in a chain of financial arrangements that creates an indirect compensation arrangement, even if the direct financial relationship qualifies for an exception. While it is very unlikely, we believe that a chain consisting entirely of excepted financial relationships could theoretically create an indirect compensation arrangement, if the remuneration paid to the referring physician is not fair market value or varies with, or otherwise takes into account, the volume or value of referrals or other business generated for the DHS entity by the referring physician. A more likely scenario is that the chain would either involve fair market value compensation that would qualify the relationship under the indirect compensation arrangement exception. We address the special issue of contracts with group practices in a subsequent response below.

Comment: A commenter asserted that "indirect" compensation under section 1877 of the Act means only non-monetary benefits that are incidental to a direct financial relationship, and that the Secretary exceeded his statutory authority by extending the regulations to other indirect compensation arrangements.

Response: The commenter provided no statutory support for its interpretation of section 1877 of the Act. Nor does the plain meaning of the term "indirect" support the commenter's view. The interpretation offered by the commenter would permit wholesale circumvention of section 1877 of the Act through the formal interposition of another person or entity between the referring physician and the DHS entity. The Congress clearly intended to prevent such schemes by including indirect compensation in the definition of remuneration in section 1877(b)(1)(B) of the Act. The Secretary has broad authority under sections 1102 and 1871 of the Act to promulgate regulations implementing any provision of the Act.

Comment: One commenter asked how far an indirect compensation arrangement could be traced along a chain of financial relationships created through common ownership.

Response: As with any indirect compensation arrangement, the chain of financial relationships can be of any length. As we discussed in the preamble to the Phase I rule (66 FR 864), the knowledge element in § 411.354(c)(2)(iii) limits the potential liability of a DHS entity involved in a distant, indirect compensation arrangement.

Comment: A number of commenters expressed the view that an indirect compensation arrangement should be excepted if any link in the chain fits in one of the exceptions for direct compensation arrangements. This issue was raised by group practices that contract to provide services to hospitals (or other DHS entities) or to lease space or equipment from DHS entities. For example, in the case of a services agreement between a hospital and a group practice, an indirect compensation arrangement is created

between the hospital and the contracting group practice's employee or investor physicians (that is, the referring physicians). Instead of looking to the indirect compensation exception in such circumstances, commenters proposed that the test be whether the compensation arrangement between the hospital and the group practice fits in a direct compensation exception. Commenters suggested that we use a similar rule for other indirect compensation arrangements involving referring physicians who are members of group practices, where the link in the chain closest to the referring physician is his or her compensation arrangement with his or her group practice. Commenters requested comparable relief with respect to physician-owned PCs. In the commenter's view, the fact that a physician practices through a wholly-owned PC should not convert a direct financial relationship with a DHS entity into an indirect relationship (that is, physician—PC—DHS entity).

Response: We do not agree that an indirect compensation arrangement should be excepted if any link in the chain complies with a direct compensation exception. As we explained in the Phase I preamble (66 FR 867), we are concerned that, in some situations, such a test would permit a middle entity to redirect compensation to referring physicians based upon the volume or value of referrals or other business generated by the physicians to the DHS entity (which is not the middle entity).

We recognize that it is not necessary to treat a referring physician as separate from his or her wholly-owned PC. We have revised the definition of referring physician in § 411.351 to reflect this clarification.

By way of example, under the Phase I regulations, if a hospital contracted with a referring physician's PC for the provision of services, the hospital would potentially have an indirect compensation arrangement with the referring physician for which the only available exception would be the indirect compensation arrangements exception. Under the revised regulations, the contract would create a direct compensation arrangement between the hospital and the referring physician.

We believe the revised regulations should make it simpler for physicians and others to evaluate their financial relationships and the application of exceptions under section 1877 of the Act.

We are not making any changes to the Phase I rule with respect to the issue of indirect compensation arrangements that are created when a group practice is an intervening entity in the chain between the DHS entity and referring physicians who are members of the group (for example, a hospital contracts with a group practice for services). The commenters' proposal that the regulations permit physicians to stand in the shoes of their group practices, thereby converting indirect arrangements to direct arrangements, is inconsistent with the compensation exceptions as drafted. We believe that the knowledge standard in the indirect compensation arrangements definition and exception adequately protects DHS entities. We solicit comments on this issue.

Comment: One commenter asked us to clarify the application of the indirect compensation arrangement rules to the situation in which a referring physician owns an interest in a hospital and the hospital contracts for services with a clinical laboratory to which the physician refers. In the preamble to the Phase I rule (66 FR 866), we indicated that there would be a chain of entities (referring physician—hospital—clinical lab). The commenter asked us whether that arrangement would fit in the indirect compensation arrangement definition and, if necessary, the indirect compensation exception.

Response: As commonly structured, the example would not create an indirect compensation arrangement. There would be an unbroken chain of financial relationships between the referring physician and the clinical laboratory (the DHS entity) via the hospital. However, an unbroken chain is only one of three elements required under the definition of indirect compensation arrangement. Section 411.354(c)(2)(ii) requires that the referring physician receives aggregate compensation that varies with, or otherwise takes into account, the volume or value of DHS referrals or other business generated by the referring physician for the DHS entity. Under § 411.354(c)(2)(ii), we look to the non-ownership or non-investment interest closest to the referring physician in the unbroken chain. That means that in the commenter's scenario, we would look to the contractual relationship between the hospital and the clinical laboratory. Absent unusual circumstances, the hospital would not receive *aggregate* compensation that reflects the volume or value of referrals, since the hospital would not be receiving any compensation from the clinical laboratory (assuming the contracted charges for laboratory services are fair market value). If, however, the contracted laboratory charges were less than fair market value, the arrangement could qualify as an indirect compensation arrangement between the referring physician and the clinical laboratory, provided the laboratory knew of, or had reason to suspect, the referring physician's ownership interest in the hospital. Because the payments would not be fair market value, the arrangement could not fit in the indirect compensation arrangements exception.

Comment: A commenter questioned whether the payment of a royalty by an equipment manufacturer to a physician inventor for a device implanted during surgeries performed by the physician inventor is permitted or whether that arrangement would create an indirect compensation relationship with the hospital that purchased the device. The commenter did not think that parties would be able to establish a fair market value for a unique invention.

Response: In the scenario described, the physician inventor would have an indirect compensation arrangement with the hospital in which the surgeries are performed (that is, the DHS entity (hospital) buys the invention from the manufacturer (the intermediary link in the chain), which pays the referring physician a royalty). However, as long as the royalty payment (the compensation link in the chain nearest the physician) is fair market value, the relationship should satisfy the indirect compensation exception at § 411.357(p). We see no reason that one cannot establish a fair market value for royalties, even on unique inventions.

Comment: A number of commenters questioned the discussion in the Phase I preamble that relates to ownership interests and indirect compensation arrangements (66 FR 867 and 870). Specifically, commenters questioned the statement that common ownership of an entity may create an indirect financial relationship between or among the common owners (66 FR 867). One commenter asked us to explain what type of financial relationship was created and when. Other commenters complained that the statement was inconsistent with other statements that common ownership did not create an indirect ownership interest in the common owners (66 FR 870). Several commenters stated that co-ownership of a non-DHS entity should not create any financial relationship between the owners.

Many commenters objected to the statement in the Phase I preamble that the direct compensation exceptions in section 1877 of the Act did not apply to indirect compensation arrangements. According to the commenters, all exceptions should be available,

regardless of whether the financial relationship is direct or indirect, and a DHS entity should be able to take advantage of any exception. A commenter asked whether a prohibited indirect *ownership* arrangement could be excepted if it satisfied the indirect *compensation* arrangement exception.

Response: An ownership or investment interest in an entity creates a financial relationship between the investor and the entity (if the entity has an ownership or investment interest in another entity, the investor may have an indirect ownership or investment interest in that further entity, and so on). Absent unusual circumstances, common owners of an entity will not, by virtue of their common ownership, have ownership or investment interests in each other. However, an indirect compensation arrangement may arise from their common ownership. Since an indirect compensation arrangement requires an unbroken chain of any financial relationships between the referring physician and the DHS entity, ownership or investment interests in a common entity count as links. In other words, common ownership does not itself create an indirect compensation arrangement as defined in § 411.354(c)(2) between co-owners; rather, the ownership or investment interests of the individual investors can satisfy the unbroken chain element of the three-part indirect compensation arrangement definition at § 411.354(c)(2). For example, if a DHS entity and a referring physician jointly own an entity, such co-ownership creates a chain of financial relationships linking the DHS entity to the referring physician: DHS entity—[ownership relationship]—owned entity—[ownership relationship]—referring physician. This chain is created regardless of the nature of the jointly owned entity.

However, even if an unbroken chain exists, the other elements of the definition at § 411.354(c)(2) still need to be satisfied to establish an indirect compensation arrangement (which could then be excepted under the indirect compensation exception, if applicable). In the preceding example, as long as the physician's *aggregate* return on his investment in the co-owned entity (including capital appreciation) did not vary or otherwise take into account the volume or value of referrals to, or other business generated for, the DHS entity (not the common venture), there would be no indirect compensation arrangement. We would expect this to be the case for most joint ownership of non-DHS entities. However, if the jointly owned entity is, for example, an imaging equipment leasing company co-owned by a hospital (the DHS entity) and a referring physician, the co-ownership may create an indirect compensation arrangement, since the physician's aggregate payout from the leasing company may vary with, or otherwise take into account, the volume of imaging business he or she generates for the hospital, assuming that the hospital contracts with the leasing company. Sufficient knowledge of the co-ownership is likely to exist in this circumstance to satisfy the knowledge standard at § 411.354(c)(2)(iii). If an indirect compensation arrangement exists, the relevant inquiry is whether the arrangement fits in the indirect compensation exception. In general, if the rental payment (frequently a "per click" payment) by the hospital to the leasing company is fair market value (and the "per click" fee does not vary over the term of the agreement) and does not otherwise reflect the volume or value of referrals, the indirect compensation arrangement would be excepted. Such arrangements could still violate the anti-kickback statute.

To address the commenters' concern, we are modifying § 411.354(b)(5)(i) and establishing new § 411.354(b)(5)(iii) and (b)(5)(iv) to make clear that common ownership does not establish an ownership or investment interest by one common investor in another common investor. An indirect ownership or investment interest requires an unbroken chain of direct ownership interests between the referring physician and the DHS entity such that the referring physician can be said to have an indirect ownership or investment interest in the DHS entity. In the preceding example, the referring physician has an ownership interest in the leasing company, but not in the hospital. (If, however, the leasing company owned an interest in a DHS entity, the physician would have an indirect ownership interest in that DHS entity).

If an indirect ownership or investment interest exists, it cannot be excepted under the indirect compensation exception in § 411.357(p). The Phase I preamble may have inadvertently suggested otherwise. We created a new exception for indirect compensation arrangements because none of the statutory compensation exceptions apply by their terms to these arrangements, and we believe that the Congress did not intend a wholesale prohibition on indirect compensation arrangements. The new indirect compensation arrangements exception conceptually follows the statutory exceptions applicable to direct compensation arrangements; in other words, we attempted to make the indirect compensation exception analogous to the existing exceptions. By contrast, the Congress clearly included indirect ownership or investment interests in the definition of ownership or investment interests to which the statute applies (section 1877(a)(2) of the Act) and created exceptions that can apply to those indirect interests. Thus, we have not created a separate exception for indirect ownership or investment interests. However, the definition of an "indirect ownership or investment interest" in § 411.354(b)(5)(i)(B) incorporates a knowledge element that should sufficiently limit the universe of prohibited ownership and investment interests so that most remote ownership or investment interests should not trigger the prohibition.

Comment: The indirect compensation exception includes a requirement that the compensation arrangement not violate the anti-kickback statute, section 1128B(b) of the Act (§ 411.357(p)(3)). One commenter wanted clarification as to which arrangement in the indirect compensation arrangement chain this provision referred.

Response: The relevant subject of the inquiry would be the entire arrangement, including all sources of remuneration, between the DHS entity and the referring physician (or group practice where applicable). This would include each link in the chain as well as the overall arrangement viewed as a whole.

Comment: One commenter asked us to clarify that compensation need not be "set in advance" under the indirect compensation exception.

Response: The indirect compensation exception does not include a "set in advance" requirement.

Comment: One commenter asked that the regulatory text be modified to expressly state that a DHS entity can rely on a certification from a physician that a known indirect compensation arrangement between the physician and another entity is at fair market value not taking into account the volume or value of referrals.

Response: While obtaining a certification may be an appropriate practice in some circumstances, we are not prepared to provide a blanket exception for reliance on certifications.

Comment: While most commenters welcomed the knowledge requirement in the definition of an indirect compensation arrangement in § 411.354(c)(2)(iii), a number of commenters had questions about the conditions under which a DHS entity

has a duty to inquire as to the existence of an indirect compensation arrangement with a referring physician (66 FR 865, 868). One commenter asserted that the knowledge element in the False Claims Act, 31 U.S.C. 3729, did not impose any duty to inquire. According to that same commenter, the preamble discussion seemed to impose a simple negligence standard. Others believed that the "reason to suspect" language was inconsistent with other statements that there was no duty to inquire on the part of the DHS entity (66 FR 865).

Response: The knowledge element used in § 411.354(c)(2)(iii) is the same as in the False Claims Act and the Civil Monetary Penalty Law (section 1128A of the Act): actual knowledge or reckless disregard or deliberate ignorance. As we explained in the Phase I preamble (66 FR 864), the phrase "reason to suspect" was simply intended as a convention to avoid repetition of the wordier "actual knowledge or reckless disregard or deliberate ignorance" standard. There is extensive case law applying the standard in the context of False Claims Act and the Civil Monetary Penalties Law. As stated in the Phase I preamble (66 FR 865), a DHS entity has no duty to inquire whether a referring physician receives aggregate compensation that varies with, or otherwise takes into account, referrals to, or other business generated for, the DHS entity unless facts or circumstances exist such that a failure to follow up with an inquiry would constitute deliberate ignorance or reckless disregard.

Comment: One commenter asked how the knowledge element in the definition of indirect compensation arrangements in § 411.354(c)(2)(iii) relates to the knowledge element in the sanctions sections 1877(g)(3) and (g)(4) of the Act (civil money penalties and exclusions).

Response: The standards are identical. However, the standard would be applied separately for each inquiry. In other words, whether an indirect compensation arrangement exists is a separate inquiry from whether a person has knowingly presented or caused to be presented an improper claim or bill for services or has knowingly entered into a circumvention arrangement. It is likely, however, that some facts would be relevant to both inquiries.

Comment: Several commenters, including a national physician professional association, questioned why the regulations only consider the DHS entity's knowledge. These commenters urged that physicians be protected under section 1877 of the Act if they do not have knowledge of the existence of a prohibited financial relationship.

Response: The statutory scheme already protects physicians from any liability in the absence of actual knowledge, reckless disregard, or deliberate ignorance. The basic statutory sanction is disallowance of claims or bills, which affects the DHS entity, not the referring physician. The new knowledge standards in § 411.354(c)(2)(iii) and § 411.354(b)(5)(i)(B) protect against this otherwise strict liability aspect of section 1877 of the Act. Under section 1877 of the Act, physicians are only subject to sanction under the civil monetary provisions of section 1877(g) of the Act. Those provisions already contain a comparable knowledge element.

Comment: One commenter asked that we clarify the statement in the Phase I preamble at 66 FR 866 that a distribution from an excepted ownership or investment interest is also excepted (and thus does not require recourse to a compensation exception), unless the distribution is a "sham". As an example, we posited a limited liability company that was losing money, but nonetheless made a distribution to physician investors after borrowing funds from a bank. The commenter suggested that the appropriate test should be whether the borrowing and distribution were lawful under applicable State law.

Response: We do not believe it is possible to establish a "bright line" test for determining whether a particular distribution is a "sham" in all cases. Rather, it will depend on the circumstances. The reference to possible "sham" distributions was intended to make clear that an excepted ownership or investment interest may not be used to shield payments that are not legitimately related to the ownership or investment interest (such as funneling additional remuneration to physicians as ostensible "returns" from an investment entity).

Comment: A physician organization questioned why a referring physician's investment interest in a subsidiary company should be considered an indirect ownership interest in the parent company if the subsidiary has any investment interest in the parent. The commenter thought the test should also require that the referring physician know that the investment interest exists.

Response: Our treatment of investment interests in subsidiaries that, in turn, have investment interests in parent companies is consistent with the general definition of indirect ownership and investment interests, described above. In short, in those circumstances, a physician investor in the subsidiary has an indirect investment interest in the parent. If the parent is a DHS entity, the physician may not refer patients to the parent for DHS and the parent may not file claims for those DHS, unless an exception applies. With respect to indirect ownership or investment interests, however, § 411.354(b)(5)(B) limits liability to those DHS entities that have actual knowledge of, or act in reckless disregard or deliberate ignorance of, the existence of an indirect ownership or investment interest by the referring physician in the DHS entity. In other words, although the physician need not have knowledge to trigger the prohibition, the DHS entity must have some reason to suspect the existence of the indirect ownership or investment interest. This regulatory scheme does not adversely impact physicians who do not have knowledge; non-payment of claims affects only the DHS entity, and imposition of CMPs (the sanction applicable to physicians under section 1877 of the Act) only applies to *knowing* violations.

Comment: One commenter asked us to clarify that, if a referring physician's direct ownership or investment interest in a DHS entity would be protected under an exception, then a similar indirect ownership or investment interest of the physician in that same DHS entity would be excepted.

Response: The commenter is correct. For example, if a physician has an investment interest in a company that, in turn, owns an interest in a hospital in Puerto Rico, the physician's indirect investment interest in the Puerto Rico hospital is excepted under § 411.356(c)(3).

Comment: One commenter questioned our conclusion that stock options and convertible securities create a compensation arrangement, rather than an ownership or investment interest (§ 411.354(b)(3)(ii)). The commenter pointed out that options and securities can be purchased on the open market and are not just received pursuant to employment.

Response: We are persuaded that the commenter is correct and are modifying the definition of ownership or investment interest. The determination as to whether stock options and convertible securities create ownership or investment interests or compensation arrangements depends on the method of acquisition. If the options or securities are originally purchased or received for money or in return for a capital contribution in whole or in part, they will be considered ownership or investment interests. If they are received

as compensation for services, they will be considered compensation until the time that they are exercised, at which time they become an ownership or investment interest.

Comment: One commenter objected to treating loans secured by the property of an entity as an ownership interest in the entity (§ 411.354(b)(1)).

Response: Section 1877(a)(2) of the Act states that an ownership or investment interest may be through equity, debt, or other means. The rule adopted in Phase I for secured loans accommodated the industry's desire for a "bright line" rule in this area. However, we agree with the commenter that loans or bonds that are secured by, or otherwise linked to, a particular piece of equipment or the revenue of a department or other discrete hospital operations should not be considered an ownership interest in the whole hospital, but only in a part or subdivision of the hospital. Therefore, the whole hospital exception would not apply.

C. When Does a Physician Make a Referral? (Section 1877(h)(5) of the Act; Phase I—66 FR 871; § 411.351)

As defined by section 1877(h)(5) of the Act, a "referral" means a request by a physician for an item or service for which payment may be made under Medicare Part B, including a request for a consultation (including any tests or procedures ordered or performed by the consulting physician or under the supervision of the consulting physician), and the request or establishment of a plan of care by a physician that includes the furnishing of DHS, with certain exceptions for consultations by pathologists, diagnostic radiologists, and radiation oncologists. The regulations define "referral" in § 411.351.

In Phase I, we excluded from the definition of "referral" services performed personally by the referring physician, but included services provided by a physician's employees, co-workers, or independent contractors. We made clear that referrals can occur in a wide variety of formats—written, oral, or electronic—depending on the particular service. Moreover, referrals can be direct or indirect. Phase I also added a new regulatory exception at § 411.353(e) for certain referrals of DHS to an entity with which the referring physician has a prohibited financial relationship that are "indirect" referrals (for example, when a physician has caused a referral to be made by someone else or has directed or routed a referral through an intermediary) or are oral referrals (that is, no written request or other documentation that would identify the referring physician is required). Under this exception, a claim by a DHS entity may be paid for purposes of section 1877 of the Act if the entity did not know of, or have reason to suspect, the identity of the physician making the indirect or oral referral.

Comments to the Phase I rule on referrals and our responses follow. We are making no major changes to the final rule in this area.

Comment: A number of commenters urged that the definition of referral exclude services that are performed "incident to" a physician's personally performed services or that are performed by a physician's employees. According to the commenters, such services are integral to the physician's services. Another commenter suggested that services by licensed professionals that are separately billable should be considered referrals, but services that are only billable as part of a physician's service should not be considered referrals. One commenter suggested the appropriate test should be whether there is significant physician involvement in the provision of a service.

Response: This is an issue about which we specifically solicited comments in the Phase I rulemaking. After careful consideration of the comments and the issues raised, we are adhering to our original determination that "incident to" services performed by others, as well as services performed by a physician's employees, are referrals within the meaning of section 1877 of the Act. As discussed in the Phase I preamble (66 FR 871–872), this interpretation is consistent with the statute as a whole. A blanket exclusion for services that are "incident to" a physician's services or are performed by a physician's employees would, for example, substantially swallow the in-office ancillary services exception. As a practical matter, although "incident to" services and employee services are included in the definition of "referrals" for purposes of section 1877 of the Act, many of those referrals will fit in the in-office ancillary services or another exception. This approach to the definition of "referral" is consistent with the statutory scheme, which allows productivity bonuses for "incident to" services under the in-office ancillary services exception, but not under other exceptions. A "substantial involvement" test would be vague and impracticable.

Comment: A group representing allergists and immunologists requested clarification that no referral occurs when a physician prepares an antigen and furnishes it to a patient. Another commenter requested clarification that there is no referral if a physician personally refills an implantable pump. Yet another commenter requested clarification that there is no referral if a physician personally provides durable medical equipment (DME) to a patient.

Response: The commenters are correct. There is no "referral" if a physician personally performs a designated health service. However, as noted above, there is a referral if the designated health service is provided by someone else. In many cases, these referrals will qualify for an exception.

Comment: A commenter sought clarification that no referral occurs when a physician personally performs services in a hospital, even if the hospital bills for the services pursuant to an assignment.

Response: If a physician personally performs the services, there is no referral, regardless of whether the physician bills the program directly or another entity bills pursuant to an assignment. However, technical components associated with a physician's personally performed services in a hospital are referrals to which section 1877 of the Act applies (66 FR 871).

Comment: One commenter suggested that the application of section 1877 of the Act to referrals within a physician's medical practice is inconsistent with the Office of the Inspector General's interpretation of the anti-kickback statute, section 1128B(b) of the Act. The commenter suggested that there exists a blanket exception for such referrals under the anti-kickback statute.

Response: As we discussed more thoroughly in the Phase I preamble (66 FR 863), section 1877 of the Act is a separate statute from the anti-kickback statute and must be applied separately. We do not perceive any inconsistency, however, in the treatment of referrals within a physician's medical practice. Like section 1877 of the Act, the anti-kickback statute contains no blanket exception for such referrals (contrary to the commenter's suggestion). Some arrangements may be protected by a statutory or regulatory safe harbor under the anti-kickback statute. (42 CFR 1001.952)

Comment: One commenter requested clarification as to whether services ordered by a nurse practitioner or other licensed professional will be considered to have been referred by a physician in the same group practice.

Response: In determining whether an independent health professional's referral to a DHS entity should be attributed to the physician, all the facts

and circumstances surrounding the referral and the relationship of the independent health professional and the physician must be considered. As we indicated in the Phase I preamble (66 FR 872), our concern is that physicians could attempt to circumvent section 1877 of the Act by funneling referrals through nonphysician practitioners. The relevant inquiry is whether the physician has controlled or influenced the nonphysician's referral such that the referral should properly be considered the physician's referral. We are changing the regulation text accordingly to reflect Phase I preamble language.

Comment: An imaging center commented that physicians do not refer patients to imaging centers, but only order tests. The commenter also stated that many radiology procedures have similar sounding names, and a patient may not know the difference between procedures if he or she is given an oral referral and may unwittingly request a designated health service rather than a service that is not a designated health service. The commenter also stated that, if a patient self-referred to an imaging center, a report would usually be sent to the patient's physician, whether the physician made the referral or not.

Response: Contrary to the commenter's assertion, in many instances physicians do refer patients to entities that furnish imaging services. The determination whether a particular patient has been referred by a particular physician for a designated health service within the meaning of section 1877 of the Act would depend on the facts and circumstances. While we are unclear about the commenter's statement concerning patients, we note that imaging centers are in a position to ensure compliance with section 1877 of the Act by structuring any financial arrangement with a referring physician or immediate family member (or potential referring physician or immediate family member) to fit in an exception.

Comment: A commenter objected to the application of section 1877 of the Act to referrals for hospital and other Medicare Part A services. According to the commenter, the statutory definition of "referral" in section 1877 of the Act only applies to items or services "for which payment may be made under Part B."

Response: As we discussed in the January 1998 proposed rule (63 FR 1691–1692), section 1877(h)(5) of the Act contains two parts defining "referral". The first part, section 1877(h)(5)(A) of the Act, defines a referral to include the request by a physician for an item or service for which payment may be made under Part B, including the request for a consultation with another physician (and any test or procedure ordered by, or to be performed by, or under the supervision of, that other physician). The second part, section 1877(h)(5)(B) of the Act, covers the request or establishment of a plan of care by a physician that includes the provision of a designated health service. Although this second part is not drafted in Medicare-specific terms and could be interpreted to include any designated health service, we interpreted it to cover only DHS that may be covered under Medicare. This would include DHS, such as hospital and home health care services, that are covered under Medicare Part A. We noted in 1998 that we were aware of no rationale for the broader reach of "referral" under the first part (a request for any Part B item or service) than the second (a request for a designated health service). We therefore took the position—which we affirm here—that the first part relating to Part B items and services should be limited to referrals for DHS.

Comment: An association for nursing facilities objected to the concept of imputed or oral referrals. According to the association, the regulations will inhibit communications between physicians and patients by restricting a physician's ability to share information about DHS entities freely with patients. The association suggested that the regulations protect any physician who provides patients with accurate information about all appropriate DHS entities and discloses his or her financial relationships with any of those DHS entities.

Response: Section 1877 of the Act embodies a congressional determination to discourage physicians from having financial relationships with DHS entities to which they refer Medicare patients. Neither the statute nor the regulations burdens any physician-patient communications except those communications in which the physician refers to those DHS entities with which the physician has a prohibited financial relationship. Although disclosure of financial interests to patients informs patients of the potential conflict of interest, we do not believe, nor does the statute contemplate, that such disclosure adequately protects against improper referrals or overutilization. If DHS entities and physicians insist on entering into financial relationships, they can protect themselves by structuring the relationships to fit in one of the exceptions. The commenter's proposed exception would swallow the statute and inhibit enforcement.

Comment: A hospital association requested that the "innocent entity" exception at § 411.353(e), which protects DHS entities that do not have knowledge of the identity of the referring physician, be expanded to protect DHS entities that do not have knowledge of the existence of a financial relationship with the referring physician. In particular, the commenter was concerned that it may be difficult for DHS entities to know if they have financial relationships with immediate family members of referring physicians.

Response: Knowledge of the existence of a financial relationship is an element of the definition of an "indirect compensation arrangement". (66 FR 864) Absent the requisite knowledge, no indirect compensation arrangement is established. This aspect of the definition should address many of the commenter's concerns. We recognize that no comparable knowledge limitation applies to direct financial relationships, including direct financial relationships with referring physicians' family members. The statute clearly contemplates a strict liability bar on direct financial relationships with immediate family members. The exception proposed by the commenter would effectively negate the statutory prohibition.

Comment: A number of commenters asked that we expand the protection of the "innocent entity" exception at § 411.353(e) to referring physicians.

Response: As discussed above, referring physicians have no liability under section 1877 of the Act unless they knowingly cause an improper claim or bill to be submitted or knowingly engage in a circumvention scheme.

D. Definition of "Consultation" (Section 1877(h)(5) of the Act; Phase I—66 FR 873; § 411.351)

The definition of a "referral" at section 1877(h)(5) of the Act includes DHS provided in accordance with a consultation with another physician, including DHS performed or supervised by the consulting physician or any DHS ordered by the consulting physician. Section 1877(h)(5)(c) of the Act creates a narrow exception for a small subset of services provided or ordered by certain specialists in accordance with a consultation requested by another physician. These include requests by a pathologist for clinical laboratory services or pathological examination services; a radiologist for diagnostic radiology services; or a radiation oncologist for radiation therapy. To qualify, the services must be furnished by, or under the supervision of, the

pathologist, radiologist, or radiation oncologist in accordance with a consultation requested by another physician.

In Phase I, we broadly interpreted a "consultation" for purposes of determining when an entity with which a pathologist, diagnostic radiologist, or radiation oncologist has an otherwise prohibited financial relationship will be permitted to submit a claim to Medicare for DHS ordered by those physicians (66 FR 873). The "consultation" definition in this rule is not intended to, nor does it, apply to other Medicare coverage or payment rules relating to consultations. Moreover, neither section 1877(h)(5)(C) of the Act, nor the definition of "consultation" at § 411.351, protects referrals from the physician requesting the consultation to a DHS entity with which the requesting physician has a prohibited financial relationship (66 FR 875 of Phase I preamble).

The Phase I rule adopted the following criteria to identify a consultation for purposes of section 1877 of the Act:

- A consultation is provided by a physician whose opinion or advice regarding evaluation and/or management of a specific medical problem is requested by another physician.
- The request and need for the consultation is documented in the patient's medical record.
- After the consultation is provided, the consulting physician prepares a written report of his or her findings, which is provided to the physician who requested the consultation.
- With respect to radiation therapy services provided by a radiation oncologist, a course of radiation treatments over a period of time will be considered to be furnished pursuant to a consultation, provided the radiation oncologist communicates with the referring physician on a regular basis about the patient's course of treatment and progress.

We have modified the final rule slightly to accommodate concerns raised by consulting physicians in group practices and by radiation oncologists who furnish services that are ancillary and integral to radiation therapy services. Otherwise, we have made no major changes to the Phase I rule. Comments to the Phase I definition of "consultation" and our responses are related below.

Comment: Several commenters questioned the level of supervision required for radiological procedures. Another asked us to affirm that it is sufficient to provide the level of supervision required by the Clinical Laboratory Improvement Amendments of 1988 (CLIA) (Pub. L. 100–578, October 31, 1988). One professional association asked us to clarify that the services need not be supervised by the consulting radiologist, but could be supervised by another physician in the consulting radiologist's group practice.

Response: Nothing in this rulemaking establishes any particular level of supervision for any particular services. The supervision necessary to come within the various exceptions that include a supervision requirement, as well as the definition of "consultation" in section 1877(h)(5)(C) of the Act, is the level of supervision otherwise required by the applicable Medicare payment and coverage rules for the specific service (66 FR 872). In § 411.351, the definition of "referral" in paragraph (2)(ii) provides that the DHS must be furnished "by or under the supervision of the pathologist, radiologist, or radiation oncologist." We agree that supervision by a pathologist, radiologist, or radiation oncologist in the same group practice as the consulting pathologist, radiologist, or radiation oncologist, respectively, would be appropriate and consistent with the overall statutory scheme and structure. We have modified the regulation accordingly. Where applicable Medicare payment and coverage rules permit, the supervision required under section 1877(h)(5)(C) of the Act may be provided by a physician in the same group practice.

Comment: Section 1877(h)(5)(C) of the Act applies to requests by radiation oncologists for "radiation therapy." Several professional associations representing radiologists and imaging centers requested that we interpret "radiation therapy" to include other DHS performed as part of the radiation therapy treatment. According to the commenters, computerized axial tomography (CT), magnetic resonance imaging (MRI) and ultrasound services are often integral and necessary to the provision of radiation therapy. The commenters indicated that in many cases the in-office ancillary services exception at section 1877(b)(2) of the Act and § 411.355(b) will not cover these ancillary services.

Response: We agree with the commenters that the exception for radiation oncologists who request radiation therapy services would fail its intended purpose if it did not also protect necessary and integral ancillary services requested, and appropriately supervised, by the radiation oncologist. We have modified the regulations accordingly. We believe this interpretation effectuates the statutory intent. Moreover, it is consistent with the existing exception in section 1877(h)(5)(C) of the Act for diagnostic radiology services (including CT, MRI, and ultrasound) requested by a radiologist.

Comment: One commenter objected that the consultation definition at § 411.351 requires the consulting physician to produce a written report. According to the commenter, most consulting physicians do not prepare written reports.

Response: Current Medicare rules governing payment and coverage for consultation services require a written report. Moreover, no other commenter, including the many physician associations, objected to the requirement. Since we believe that preparation of a written report is the general practice and consistent with Medicare program rules, and the commenter provided no evidence to support his assertion, we are retaining the written report requirement.

Comment: One commenter requested that we expand section 1877(h)(5)(C) of the Act to cover cardiologists who interpret echocardiograms under financial arrangements that are comparable to those that exist when a radiologist interprets a radiological ultrasound.

Response: An echocardiogram ordered and read by a cardiologist is not a service integral to a consultation by a specialist within the meaning of section 1877(h)(5)(C) of the Act. Under section 1877(h)(5)(C) of the Act, the Congress specifically excepted three narrow categories of physicians who provide specific services pursuant to consultations. The statutory language is very specific and reflects congressional intent that the exception be narrow. We do not have the authority to extend this exception to other specialists. Moreover, there is a substantial difference between a radiologist ordering diagnostic radiology tests pursuant to a request for a consultation and a cardiologist ordering an echocardiogram. In the former situation, the ordering and interpretation of the procedure is the physician's primary specialty; in the latter, the echocardiogram is ancillary to the cardiologist's primary medical practice, the treatment of the heart. In other words, an echocardiogram ordered by a cardiologist is no different from any other designated health service test ordered by other physicians who are not pathologists, radiologists, and radiation oncologists; if the physician has a financial interest in the furnishing of the test, section 1877 of the Act is implicated.

Comment: One commenter stated that some patients self-refer to radiation oncologists for brachytherapy, which is then provided by an entity with which the radiation oncologist has a financial relationship. Since there is no referral from another physician, the consultation exception in section 1877(5)(C) of the Act is not available. Moreover, according to the commenters, the in-office ancillary services exception in section 1877(b)(2) of the Act and § 411.355(b) is often unavailable for these referred services, because patients primarily come to the radiation oncologist or his or her entity only for radiation therapy services. Thus, the services cannot meet § 411.355(b)(2)(i) of the in-office ancillary services exception in Phase I, which required that excepted services be provided in a building where the referring physician (or another member of the referring physician's group practice) furnishes substantial physician services unrelated to the furnishing of DHS or in a centralized building owned or operated by the physician's group practice on a full-time basis. The commenter wondered whether, in these circumstances, it would be appropriate for the radiation oncologist to refer the patient to a urologist who might then refer the patient back to the radiation oncologist.

Response: While we recognize the problem identified by the commenter, the proposed solution would be an inappropriate circumvention. Rather, we believe the changes to the in-office ancillary services exception described in this Phase II preamble in section V.B.4 address the commenter's concerns. These changes should enable most radiation oncologists to provide radiation therapy services to self-referred patients under the in-office ancillary services exception.

III. Physician Compensation Under Section 1877 of the Act (Phase I—66 FR 875)

Section 1877 of the Act provides different exceptions for core physician compensation based on whether the physicians are physicians in a group practice (in connection with the in-office ancillary services and physician services exceptions), employees, or independent contractors. The terms of the statutory exceptions vary. In addition, the Phase I regulations implemented new regulatory exceptions for fair market value compensation paid to employees or independent contractors and compensation for certain academic physicians.

Many comments addressed the issue of physician compensation under section 1877 of the Act. We have provided detailed responses to these comments in the relevant sections of this preamble. However, some issues relate to more than one exception. We summarize those aspects of physician compensation here. This discussion supplements the discussion of physician compensation in section IV of the Phase I preamble (66 FR 875).

A common thread in many of the comments was the observation that physician compensation arrangements are structured in various ways for legitimate reasons and that the form of the arrangement (for example, employment or personal services contract) should not constrain the structure of the compensation (for example, percentage-based compensation, productivity bonuses, or physician incentive plans). In short, many commenters thought that there should be only one set of conditions applicable to physician compensation, and that the same rules should apply to group practices, employees, and independent contractors, as well as under the fair market value and academic medical center exceptions. As explained below, we have tried to minimize the differences, consistent with the statute.

First, the statute permits group practices to divide revenues among their physicians in ways that are very different from the ways other DHS entities are permitted to share revenues with employed or independent contractor physicians. The statute recognizes the differences between physicians in a group dividing income derived from their own joint practice and a hospital (or other entity) paying a physician employee or contractor who generates substantial income for the facility that would not ordinarily be available to a physician group. In effect, group practices receive favored treatment with respect to physician compensation: they are permitted to compensate physicians in the group, regardless of status as owner, employee, or independent contractor, for "incident to" services and indirectly for other DHS referrals. This preference is statutory.

Second, outside of the group practice/in-office ancillary services context, we have tried to equalize the most important conditions in the other main physician compensation exceptions (employment, personal services, fair market value, and academic medical centers). Under these exceptions in the regulations, physicians can be paid on a percentage of revenues or collections for personally performed services; receive a productivity bonus on any personally performed services; and participate in a physician incentive plan related to health plan enrollees. These issues are explained in more detail below and in the discussions of the relevant exceptions.

- Percentage compensation arrangements. Commenters representing independent contractors argued that the statute and regulations unfairly restrict the kinds of compensation that independent contractor physicians can receive when compared to the compensation permitted for group practice physicians and employed physicians. In particular, the personal service arrangements and the fair market value exceptions (key exceptions for independent contractors) both contain a "set in advance" requirement not present in the statutory group practice definition or employment exception.

In Phase I, we interpreted "set in advance" to preclude most percentage compensation arrangements. As discussed below in section IV, we have modified our interpretation of "set in advance" to permit some percentage compensation if the methodology for calculating the compensation is set in advance and does not change over the course of the arrangement in any manner that reflects the volume or value of referrals or other business generated by the referring physician. As a result, like their group practice and employee counterparts, independent contractor physicians can receive certain limited forms of percentage compensation under section 1877 of the Act. The same is true for academic physicians under the academic medical centers exception, which also contains the "set in advance" requirement.

- Productivity bonuses. A second concern for independent contractors is the availability of productivity bonuses under section 1877 of the Act. While the personal service arrangements, employment, fair market value, and academic medical centers exceptions all restrict compensation that is determined based on the volume or value of DHS referrals, the personal service arrangements, fair market value, and academic medical centers exceptions further restrict compensation that is determined based on the volume or value of "other business generated." Moreover, the employment exception contains a provision that expressly permits productivity bonuses to be paid to employed physicians for services they personally perform. Independent contractor physicians have noted that the statute and regulations make no comparable provision for productivity bonuses for work personally performed by independent contractors.

We partially addressed this issue in the Phase I rulemaking. There, we defined "referral" under the statute to include only DHS referrals and to *exclude* personally performed DHS. In short, personally performed work -DHS or otherwise—is not considered a "referral" under section 1877 of the Act. (*See* § 411.351.) Thus, a productivity bonus based on personally performed work would not be based on the volume or value of "referrals."

The personal service arrangements, fair market value, and academic medical centers exceptions bar compensation that takes into account "other business generated" by the referring physician. (In the January 1998 proposed rule, we had proposed adding by regulation a similar restriction to the employment exception, but we are not adopting that proposal.) In Phase I, we interpreted "other business generated" to include any health care business, including private pay business (*See* § 411.354(d)(3)). Many commenters construed this definition to encompass personally performed services, including a physician's professional services. That was not our intent, nor do we believe it to have been the intent of the Congress. We have clarified the regulations at § 411.354(d)(3) to reflect that "other business generated" does not include personally performed services. It does, however, include any corresponding technical component of a service that is billed by the DHS entity.

The result of these interpretations is that all physicians, whether employees, independent contractors, or academic medical center physicians, can be paid productivity bonuses based on work they personally perform. As discussed above, consistent with the statutory scheme, group practices also may pay physicians in the group, whether independent contractors or employees, productivity bonuses based on "incident to" services, as well as indirect bonuses and profit shares that may include DHS revenues, provided the distribution methodology meets certain conditions. As noted above, this additional latitude for group practices is statutory.

• Physician incentive plans and other risk-sharing arrangements. A further perceived inconsistency raised by some commenters involves payments to physicians under risk-sharing arrangements. The statutory personal service arrangements exception contains an express provision allowing independent contractor physicians to be compensated under a physician incentive plan with respect to services provided to individuals enrolled with the entity making the payments. The group practice, employee, fair market value, and academic medical center exceptions do not contain comparable language. Notwithstanding, in Phase I, we established a new regulatory exception at § 411.357(n) for compensation under a risk-sharing arrangement for services furnished to enrollees of a commercial or employer-provided health plan. The new exception applies to payments made directly or through a subcontractor. The new exception is available for all qualifying risk-sharing arrangements, whether the physician is a member of a group practice, employed, an independent contractor physician, or an academic medical center physician. (The prepaid plans exception at § 411.355(c) protects referrals of DHS furnished to enrollees of Medicare and Medicaid managed care plans.) The risk sharing arrangements exception is discussed in Phase I at 66 FR 912 through 914. Also, in this Phase II, we have clarified that payments made by downstream subcontractors may be protected under the physician incentive plan provision of the personal service arrangements exception.

In sum, we have modified the regulations to clarify that independent contractor and academic medical center physicians, like their group practice and employed counterparts, can be paid using certain forms of percentage compensation and can receive productivity bonuses based on personally performed services. Moreover, the regulations permit group practice, employed, and academic medical center physicians, like independent contractors, to be paid under risk-sharing arrangements. We believe these changes substantially address the concerns raised by the commenters.

Despite these modifications, the terms and conditions of the statutory and regulatory exceptions differ with respect to physician compensation. For the convenience of the public, we are providing the following chart briefly summarizing key provisions. Readers are cautioned that the exceptions contain additional conditions not summarized here. (In the chart below, those sections referred to as 1877 refer to section 1877 of the Social Security Act; those sections referred to as 411 refer to § 411 of the Code of Federal Regulations.)

Terms of exception	Group practice physicians [1877(h)(4); 411.352]	Bona Fide employment [1877(e)(2); 411.357(c)]	Personal service arrangements [1877(e)(3); 411.357(d)]	Fair market value [411.357(1)]	Academic medical centers [411.355(e)]
Must compensation be "fair market value"?	No	Yes—1877(e)(2)(B)(i)	Yes—1877(e)(3)(A)(v).	Yes—411.357(1)(3)	Yes—411.355(e)(1)(ii).
Must compensation be "set in advance"?	No	No	Yes—1877(e)(3)(A)(v).	Yes—411.357(1)(3)	Yes—411.355(e)(1)(ii).
Scope of "volume or value" restriction.	DHS referrals—1877(h)(4)(A)(iv).	DHS referrals—1877(e)(2)(B)(ii).	DHS referrals or other business—1877(e)(3)(A)(v).	DHS referrals or other business—411.357(1)(3).	DHS referrals or other business—411.355(e)(1)(ii).
Scope of productivity bonuses allowed.	Personally performed services and "incident to", plus indirect—1877(h)(4)(B)(i).	Personally performed services—1877(e)(2).	Personally performed services—411.351 ("referral") and 411.354(d)(3).	Personally performed services—411.351 ("referral") and 411.354(d)(3).	Personally performed services—411.351 ("referral") and 411.354(d)(3).
Are overall profit shares allowed?	Yes—1877(h)(4)(B)(i)	No	No	No	No.
Written agreement required?	No	No	Yes, minimum 1 year term.	Yes (except for employment), no minimum term.	Yes, written agreement(s) or other document(s).

Terms of exception	Group practice physicians [1877(h)(4); 411.352]	Bona Fide employment [1877(e)(2); 411.357(c)]	Personal service arrangements [1877(e)(3); 411.357(d)]	Fair market value [411.357(1)]	Academic medical centers [411.355(e)]
Physician incentive plan (PIP) exception for services to plan enrollees?	No, but risk-sharing arrangement exception at 411.357(n) may apply.	No, but risk-sharing arrangement exception at 411.357(n) may apply.	Yes, and risk-sharing arrangement exception at 411.357 may also apply.	No, but risk-sharing arrangement exception at 411.357(n) may apply.	No, but risk sharing arrangement exception at 411.357(n) may apply.

General comments on physician compensation and our responses follow.

Comment: Several commenters asked whether a physician's personally performed services would be included as "other business generated between the parties."

Response: Personally performed services are not considered "other business generated" for purposes of these regulations. This interpretation is consistent with the exclusion of personally performed services from the definition of "referral" at § 411.351. The regulations have been revised to clarify that personally performed services do not count as other business generated for the DHS entity. However, the technical component corresponding to a physician's personally performed service would be considered other business generated for the entity.

Comment: A number of exceptions, including the personal service arrangements, office and equipment rental, fair market value, and academic medical center exceptions, require that compensation be "set in advance." Many commenters urged us to abandon our position that percentage compensation arrangements based on fluctuating or indeterminate measures or which result in the seller receiving different payment amounts for the same services from the same purchaser are not "set in advance" for purposes of section 1877 of the Act. This was of particular concern to academic medical centers and hospitals, which argued that percentage compensation is commonplace in their physician compensation arrangements. They also pointed out that, under the statute, group practices are not subject to the "set in advance" restriction when paying profit shares or productivity bonuses to group practice physicians, nor are employers so restricted in their payments to employed physicians under the employee exception.

Response: As noted in section I above, we delayed until January 7, 2004, the effective date of the last sentence of § 411.354(d)(1), which contained the percentage compensation limitation, so we could reconsider our position without unduly upsetting existing percentage compensation arrangements. Upon further consideration, we are persuaded that our original position was overly restrictive. We are deleting the last sentence of § 411.354(d)(1) as promulgated in the Phase I final rule. Instead, we are modifying the "set in advance" definition at § 411.354(d)(1) to clarify that the formula for calculating percentage compensation must be established with specificity prospectively, must be objectively verifiable, and may not be changed over the course of the agreement between the parties based on the volume or value of referrals or other business generated by the referring physician. We are clarifying the regulations text to make clear that compensation is "set in advance" if it is set in an agreement before the services for which payment is being made are rendered. As explained above, the different treatment of group practice physicians is part of the statutory scheme. We address the specific circumstances of academic medical centers further in section XII.A below.

Comment: One commenter requested clarification that the set in advance and fair market value tests in § 411.354(d)(1) are separate tests.

Response: The commenter is correct. Compensation must be both "set in advance" and "fair market value." We have clarified the regulation by deleting the second sentence of § 411.354(d)(1), which states that a "set in advance" payment must be fair market value not taking referrals or other business into account. This concept is already contained in § 411.354(d)(2) and (d)(3), as well as in the individual exceptions.

IV. The "Volume or Value" Standards Under Section 1877 of the Act (Phase I—66 FR 876; § 411.354)

Many of the exceptions in section 1877 of the Act include a requirement that compensation not take into account the volume or value of any referrals and, in some of the exceptions, the further requirement that the compensation not take into account other business generated between the parties. In Phase I (66 FR 876), we interpreted the statute as permitting time-based or unit-of-service based payments, even when the physician receiving the payment has generated the payment through a DHS referral, as long as the individual payment is set at fair market value at the inception of the arrangement and does not subsequently change during the term of the arrangement in any manner that takes into account DHS referrals. For those exceptions that also restrict payments that take into account "other business generated between the parties," we interpreted the language to mean that the payments also may not take into account any other business, including non-Federal health care business, generated by the referring physician. We interpreted the phrase "generated between the parties" to mean business generated by the referring physician. As discussed in the preceding section, we have interpreted "other business generated" to make clear that it excludes personally performed services (but includes corresponding technical components).

In short, we interpreted section 1877 of the Act to establish a straightforward test that compensation arrangements should be at fair market value for the work or service performed or the equipment or space leased. We indicated that we would apply our interpretation of the volume or value standard uniformly to all provisions under section 1877 of the Act and part 411 where the language appears. The "other business generated" restriction applies only to those exceptions in which it expressly appears.

In Phase I, we also concluded that, in certain situations, compensation arrangements that require physicians to refer to particular DHS entities would be permitted under section 1877 of the Act, if the compensation is set in advance, is consistent with fair market value (without regard to anticipated or required referrals), otherwise complies with an applicable exception, and complies with certain conditions ensuring patient choice, insurer choice, and a physician's independent medical judgement. In response to comments, we are clarifying that this provision, codified at § 411.354(d)(4), applies only to employment, managed care, and

personal services arrangements and only if (i) the required referrals relate solely to the physician's services covered under the arrangement; and (ii) the referral requirement is reasonably necessary to effectuate the legitimate purposes of the compensation relationship.

Comments to the Phase I rule on the "volume or value" standards and our responses follow.

Comment: Two commenters requested that we clarify that per-use or per unit-of-service based payment methodologies do not vary with the volume or value of referrals or other business generated within the meaning of the regulations. One of the commenters asked that the regulatory text be modified to make this clear.

Response: Section 411.354(d)(2) and § 411.354(d)(3) clearly state that time-based and unit-of-service based compensation will be deemed not to take into account the volume or value of referrals or other business generated between the parties *as long as* the time-based or unit-of-service based compensation is fair market value for services or items actually provided and the compensation does not vary during the course of the compensation agreement in any manner that takes into account referrals of DHS (or, in the case of § 411.354(d)(3), other business generated by the referring physician, including private pay health care business). We consider per-use payments (also known as "per click") payments to be unit-of-service based compensation. When viewed in the aggregate (for example, for purposes of the indirect compensation arrangement definition at § 411.354(c)(2)), unit-of-service based compensation is likely to vary or otherwise reflect the volume or value of DHS referrals or other business generated, as applicable.

In reviewing the regulatory text, we discovered that the language "for services or items actually provided" appears in § 411.354(d)(2), but not correspondingly in § 411.354(d)(3); this was a technical oversight and has been corrected. We are also clarifying § 411.354(d)(3) by changing the phrase "during the term of the agreement" to "during the course of the compensation agreement" to conform to the language used in § 411.354(d)(2). We intended these provisions to be comparable.

Comment: A number of commenters questioned the discussion of the "volume or value" standard as applied in the context of the indirect compensation arrangement definition at § 411.354(c) and the indirect compensation arrangements exception at § 411.357(p).

Response: As discussed above at section II.B, the use of very similar language in the indirect compensation arrangement definition, indirect compensation arrangments exception, and the explanations of the "volume or value" and "other business generated" standards at § 411.354(d)(2) and § 411.354(d)(3) raised unnecessary questions, and we have revised the regulations. For purposes of determining whether an indirect compensation arrangement exists under the definition at § 411.354(c), the inquiry is whether the aggregate compensation to the referring physician reflects the volume or value of DHS referrals or other business generated by the referring physician, even if individual time-based or unit-of-service based payments would otherwise be permissible (that is, the payments are fair market value at inception and do not vary over the term of the agreement). In short, many time-based or unit-of-service based fee arrangements will involve aggregate compensation that varies based on volume or value of services and thus will be "indirect compensation arrangements" under § 411.354(c). However, in determining whether these arrangements fit into the indirect compensation arrangements exception at § 411.357(p), which does not include an aggregate requirement, the relevant inquiry is whether the individual payments are fair market value not taking into account the volume or value of referrals or other business generated by the referring physician (and do not change after inception). In other words, the issue is whether the time-based or unit-of-service based fee is fair market value and not inflated to compensate for the generation of business. As noted above, we have revised § 411.354(c)(2)(ii) to clarify the application of the "volume or value" standards in § 411.354(d) to indirect compensation arrangements.

Comment: A commenter asked whether a per-use or per unit-of-service based methodology that incorporated decreasing payments as volume increased would be permitted. According to the commenter, these payment methodologies often more accurately reflect fair market value for equipment leases because they spread fixed costs over the term of the lease.

Response: Payments of the sort described by the commenter would be reviewed on a case-by-case basis. There may be circumstances, particularly in the context of equipment leases, in which payments that decrease as volume increases most accurately reflect fair market value and do not take into account the volume or value of referrals or other business generated for purposes of section 1877 of the Act. For example, to the extent the declining payments are fair market value and based on costs, rather than volume, they would be permitted. It is our understanding that these declining payment arrangements primarily occur in the context of equipment leases, where the costs allocable to the equipment decline over time.

Comment: In Phase I, we determined that the volume or value standard would not be implicated by an otherwise acceptable compensation arrangement solely because the arrangement required the physician to refer to a particular provider as a condition of payment, as long as certain conditions were satisfied (66 FR 878). Several commenters objected to permitting employers to require employees to refer to specific DHS entities, notwithstanding the conditions imposed under § 411.354(d)(4). Commenters representing competitor entities that are not part of integrated health systems objected to our position on required referrals, believing themselves to be competitively disadvantaged by our rule.

Response: In limited circumstances, required referrals are a reasonable and appropriate aspect of certain health care business arrangements that should not, in and of themselves, implicate section 1877 of the Act. Notwithstanding, we are persuaded by the commenters that § 411.354(d)(4) is overly broad and could permit required referrals beyond those that are reasonable and appropriate. We are modifying § 411.354(d)(4) to permit only those required referrals that are related to the services a physician performs while acting under his or her arrangement with an entity, such as when an employer requires its employees, when working in their capacity as employees, to refer to employer-affiliated entities or when a managed care organization requires its network providers, when treating enrollees, to refer to other network providers. Thus, § 411.354(d)(4) will apply to employment, managed care, and other contractual arrangements that include required referrals only to the extent those referrals relate to the physician's services that are covered under the contractual arrangement and the referral requirement is reasonably necessary to effectuate the legitimate purposes of the compensation relationship. For example, an entity that employs or contracts with a physician on a part-time basis to provide services to the entity cannot condition the employment or contract—or any compensation under

the employment or contract-on referrals of the physician's private practice business (for example, patients seen by the physician when he or she is not working part-time for the entity). As we cautioned in Phase I, mandatory referral arrangements could still implicate the anti-kickback statute, depending on the facts and circumstances.

Comment: Several commenters asked us to clarify whether the rules set out in § 411.354(d) are requirements or simply "safe harbors." One commenter sought confirmation of the following interpretation: a promotional item offered free of charge to referring and non-referring physicians alike would not violate the "volume or value of referrals" standard, even though it would not qualify under § 411.354(d) because it was not sold at fair market value.

Response: The provisions at § 411.354(d) are intended to be "deeming" or "safe harbor" provisions. In other words, there may be some situations not described in § 411.354(d) where an arrangement does not take into account the volume or value of referrals. The promotional giveaway arrangement described by the commenter might not take the volume or value of referrals into account if the promotional item were offered to all physicians in a community (but not, for example, if the giveaway were limited to all members of a particular medical staff in the community). The arrangement still creates a financial relationship with the referring physicians that would need to comply with an exception. Apart from the non-monetary compensation up to $300 or hospital medical staff incidental benefits exceptions, other potentially applicable exceptions require that compensation be fair market value.

V. Exceptions Applicable to Ownership and Compensation Arrangements (Section 1877(b) of the Act; Phase I—66 FR 879; § 411.355)

A. Physician Services Exception (Section 1877(b)(1) of the Act; Phase I—66 FR 879; § 411.355(a))

Section 1877(b)(1) of the Act specifies that the general prohibition does not apply to services furnished on a referral basis, if the services are physician services, as defined in section 1861(q) of the Act, and are furnished: (1) Personally by another physician in the same group practice as the referring physician; or (2) under the personal supervision of another physician in the same group practice as the referring physician. We are making no modifications to the Phase I rule for this exception.

Comment: We received one comment on this provision. A group practice of allergists objected to the inclusion of antigens as an outpatient prescription drug in the final rule. According to the commenter, the provision of antigens is paid as a physician service and is defined as a physician service in the Act. The group asked that we clarify that the provision of antigens is a physician service covered by § 411.355(a) or, in the alternative, that the furnishing of such antigens by a physician in his office is not a referral when he or she personally furnishes the antigens to the patient.

Response: The commenter is correct that providing antigens is a physician service and that the provision of antigens may qualify under the physician services exception at § 411.355(a). Moreover, under the final rule, personally performed services are not considered referrals to an entity. Finally, we note that the provision of antigens will frequently qualify under the in-office ancillary services exception, which also covers physician services that are DHS.

B. In-Office Ancillary Services Exception (Section 1877(b)(2) of the Act; Phase I—66 FR 880; § 411.355(b))

[If you choose to comment on issues in this section, please include the caption "In-Office Ancillary Services Exception" at the beginning of your comments.]

A detailed discussion of the in-office ancillary services exception appears in the Phase I preamble. In general, the exception regulates physicians' ordering of DHS in the context of their own practices. The exception is designed to protect the in-office provision of certain DHS that are truly ancillary to the medical services being provided by the physician practice.

The Phase I rule made significant changes to the January 1998 proposed rule, which was generally criticized as overly restrictive. In response to a large volume of comments to the January 1998 proposed rule, we modified the types of services that could qualify for protection under the exception, the level of physician supervision required to qualify, the kinds of physicians that could provide the requisite supervision, and the locations where the services could be provided. While the overwhelming majority of the comments to the Phase I rule strongly supported the changes, some commenters raised concerns about aspects of the Phase I rule, particularly the building requirements. We have simplified the building tests as described in section V.B.4 of this preamble. We have made a number of other minor changes.

As in Phase I, comments and responses to the in-office ancillary services exception are divided into five sections: general comments, covered DHS, supervision requirements, building requirements, and billing requirements.

1. General Comments (§ 411.355(b))

Several commenters objected to the easing of the requirements for meeting the in-office ancillary services exception. In particular, a number of physical and occupational therapy organizations complained that physicians would use the exception to expand the scope of the services they provide within their practices and thus capture additional revenues from their own referrals. These commenters suggested tightening various elements of § 411.355(b).

As we explained more fully in the Phase I preamble (66 FR 880), we believe the final rule reflects the balance that the Congress sought between regulating physician financial relationships and not unduly interfering with the practice of medicine.

2. Covered Designated Health Services (Phase I—66 FR 881; § 411.355(b))

The in-office ancillary services exception in section 1877(b)(2) of the Act covers all DHS except durable medical equipment (DME) (other than infusion pumps) and parenteral and enteral nutrients, equipment, and supplies. In Phase I, we used the statutory authority at section 1877(b)(4) of the Act to expand the scope of DHS potentially included in the in-office ancillary services exception by—

(1) Clarifying that outpatient prescription drugs may be "furnished" in the office, even if they are used by the patient at home;

(2) Permitting external ambulatory infusion pumps that are DME to be provided under the in-office ancillary services exception;

(3) Clarifying that chemotherapy infusion drugs may be provided under the in-office ancillary services exception through the administration or dispensing of the drugs to patients in the physician's office; and

(4) Creating a new exception for certain items of DME furnished in a physician's office for the convenience of the physician's patients.

We are making no further changes to the DHS covered by the in-office ancillary services exception in Phase II.

Comment: Many commenters approved of the modification made in § 411.355(b)(4) to permit physicians to

furnish crutches, canes, walkers, and manual folding wheelchairs to patients who need assistance in ambulating in order to depart from the physician's office. Several physician organizations commended the modifications, but suggested that the regulatory language should not be specific as to the items covered. An association for DME suppliers expressed concern that the provision of folding manual wheelchairs might discourage patients from receiving more appropriate chairs and suggested we only permit physicians to loan wheelchairs.

Response: It is unlikely that the provision of a folding wheelchair will deter a patient from receiving a more appropriate wheelchair on a long-term basis. In general, with the exception of infusion pumps, the statute expressly excludes DME from the in-office ancillary services exception. Given this statutory directive, we think a specific and limited list of permitted items is appropriate. While we recognize that specificity limits future flexibility, we do not anticipate significant changes in the equipment that might be permitted in the future.

Comment: A DME supplier association asked us to clarify the provision in § 411.355(b)(4)(iv) that physicians or group practices that furnish DME under the in-office ancillary services exception must meet all DME supplier standards in § 424.57(c). Specifically, the commenter asked whether physicians must apply for a supplier number from the National Supplier Clearinghouse. If not, the commenter asked how the DME will be billed to ensure that payment is made at the DME regional carrier (DMERC) rates.

Response: Certification of a physician or physician group as a provider of Medicare services does not authorize that physician or group to bill Medicare for DME. Rather, the physician or physician group must obtain a Medicare certification as a DME Prosthethic, Orthotics and Supplies (DMEPOS) supplier under the DMEPOS fee schedule. Given this payment rule, if a physician or group intends to furnish and bill Medicare for DME under the in-office ancillary services exception, the physician or group would need to obtain a supplier number.

3. Direct Supervision (Section 1877(b)(2)(A)(i) of the Act; Phase I—66 FR 885; § 411.355(b)(1))

The in-office ancillary services exception includes a requirement that the DHS be provided personally by: (i) The referring physician; (ii) a physician who is a member of the same group practice as the referring physician; or (iii) individuals "directly supervised" by the physician or another physician "in the group practice" (section 1877(b)(2)(A)(i) of the Act). In the Phase I final rule, we interpreted "directly supervised" to mean that the supervision meets the physician supervision requirements under applicable Medicare payment or coverage rules for the specific service at issue. We interpreted physicians "in the group practice" to include owners of the group practice, employees of the group practice, and independent contractors who, while not "members of the group," contract to provide services to the group's patients in the group's facilities pursuant to an arrangement that complies with the reassignment rules in § 424.80(b)(3) of these regulations and in section 3060.3, "Payment to Health Care Delivery System," of the Medicare Carriers Manual (CMS Pub. 14–3), Part 3—Claims Process.

Commenters were generally pleased with the Phase I interpretation of the "supervision" requirement, and we are making no significant changes to the rule. Comments to the Phase I rule and our responses follow.

Comment: In the Phase I final rule, we interpreted the "direct supervision" requirement in section 1877(b)(1) of the Act to mean that supervision must be provided at the level necessary to meet the Medicare program payment and coverage rules applicable to the particular designated health service being furnished. (See § 411.355(b)(1)(iii)). While several commenters approved of this general approach, they objected to various aspects of the current supervision standards in the payment and coverage rules. For example, several commenters objected to the fact that "incident to" services require a very high level of supervision.

Response: This regulation is not the appropriate vehicle for addressing concerns with the supervision requirements in current coverage and payment rules and policies. This regulation addresses supervision of services only insofar as it is relevant to determining whether there is a prohibited financial relationship or a prohibited referral. In that regard, we have simply tied this regulatory scheme to the payment and coverage supervision standards. If those rules change in the future, those changes would similarly apply, prospectively, under these regulations.

Comment: A physician organization asked that we modify the language of § 411.355(b)(1)(iii) from "*another* physician in the group practice" (emphasis added) to "*a* physician in the group practice." According to the commenter, the proposed change more clearly reflects that a solo practitioner can furnish DHS through a shared facility in the same building. In the commenter's view, the current language implies that the referring physician must be in a group practice.

Response: The regulatory language cited by the commenter is identical to the statutory language. However, to forestall any confusion, we have clarified the regulatory text to make clear that the language "another physician in the group practice" is not intended to mean that the referring physician must be in a group practice. Under the regulations, a solo practitioner may provide DHS through a shared facility, as long as the supervision, location, and billing requirements of the in-office ancillary services exception are satisfied. The supervision requirement referenced by the commenter requires that the services be furnished personally by an individual supervised by:

(1) The referring physician *or*, in the alternative if applicable; (2) another physician in the referring physician's group practice. (Under other sections of the regulation, in-office ancillary services may also be furnished personally by the referring physician or a member of his or her same group practice (§ 411.355(b)(1)(i) and § 411.355(b)(1)(ii))). Thus, a solo practitioner can satisfy the first alternative and provide the necessary supervision himself or herself. (The level of supervision that the practitioner must provide is dictated by the applicable Medicare coverage and payment rules for the service.)

Comment: Several physical therapists and a professional association representing physical and occupational therapists urged us to require personal supervision under § 411.355(b)(1). The professional association specifically requested clarification of the following issues:

- When physical therapists work in a physician office, is the physician required to bill "incident to" for those services? Would the standards of Medicare Carrier's Manual 2050 apply?
- Does the level of supervision required in the physician's office differ depending on whether a physical therapist has his or her own provider number?
- Can a group practice own a rehabilitation agency and bill through it? What is the supervision requirement?
- If a group practice owns a comprehensive outpatient rehabilitation facility (CORF), and the physicians who own the practice refer patients for

physical therapy, what are the supervision requirements?

According to the commenter, if physicians can own these kinds of facilities without providing direct supervision, the intent of section 1877 of the Act would be circumvented.

Response: As explained in the Phase I preamble (66 FR 885–886), we have concluded that section 1877 of the Act should not subject physicians to supervision standards that differ from the standards for Medicare payment and coverage for the services provided. Thus, for example, services billed "incident to" will require the level of supervision applicable under the "incident to" rules. Services that require only low-level general supervision are subject to that lower level of supervision for purposes of section 1877 of the Act. As noted above, these regulations under section 1877 of the Act do not, in the first instance, establish the supervision requirements applicable to particular services, nor are they an appropriate vehicle for doing so.

Similarly, group practices must comply with all existing billing and claims submission rules. These regulations do not change any of those existing rules, nor is this an appropriate place to address other rules. Strictly for purposes of meeting the in-office ancillary services exception, the referred DHS must be billed in a manner that satisfies § 411.355(b)(3) (discussed below).

4. The Building Requirements (Section 1877(b)(2)(A)(ii) of the Act; Phase I—66 FR 887; § 411.355(b)(2))

Under the in-office ancillary services exception, DHS must be furnished to patients in the same building where the referring physicians provide their regular medical services, *or*, in the case of a group practice, in a central building, provided certain conditions are satisfied (section 1877(b)(2)(A)(ii) of the Act). As the Phase I preamble notes, the building requirements help ensure that the DHS qualifying for the exception are truly ancillary to the physician's core medical office practice and are not provided as part of a separate business enterprise.

In the Phase I final rule, we adopted the suggestion of some commenters and defined a "building" as a structure with, or combination of structures that share, a single street address as assigned by the U.S. Postal Service, excluding all exterior spaces and interior parking garages. Under this test, a building can include a skilled nursing or other facility or a patient's private home, provided all other conditions of the in-office ancillary services exception are satisfied. A mobile van or trailer is not considered a building or a part of a building for purposes of section 1877 of the Act (*see* § 411.351). We are retaining the Phase I definition.

We are also retaining without substantive change the Phase I "centralized building" test for group practices under the in-office ancillary services exception. To prevent abuse of off-site DHS arrangements, such as part-time MRI or CAT scan rentals, Phase I provided that the group practice must have full-time, exclusive ownership or occupancy of the centralized space. While many commenters objected to this requirement, we are not changing the rule.

We are, however, substantially revising the "same building" test under the in-office ancillary services exception to provide greater flexibility and a clearer rule. The same building test in the statute requires that the building be one in which the referring physician (or a member of his or group practice) furnishes physician services unrelated to the furnishing of DHS. In the Phase I rule, we interpreted this standard as requiring the referring physician (or another physician who is a member of the same group practice) to furnish in the same building "substantial" physician services unrelated to the furnishing of DHS.

We defined the phrase "physician services unrelated to the furnishing of DHS" using a three-part test (the "Phase I three-part test"). First, "physician services unrelated to the furnishing of DHS" was defined to mean physician services that are neither Federal nor private pay DHS, even if the physician services lead to the ordering of a designated health service. Second, we required that the physician services unrelated to the furnishing of DHS that are furnished in the building represent substantially the full range of physician services unrelated to the furnishing of DHS that the physician routinely provides (or, in the case of a member of a group practice, the full range of physician services that the physician routinely provides for the group practice). Third, we added a requirement that the DHS furnished in the building must be furnished to patients whose primary reason for coming in contact with the referring physician (or his or her group practice) is the receipt of physician services unrelated to the furnishing of DHS. The Phase I three-part test was intended so that parties could not use the same building test to circumvent the intent of the statute that the in-office ancillary services exception be limited to services that are truly "in-office" and related to the physician's core medical services to his or her patients.

A number of commenters raised concerns about the Phase I three-part test. Some found it unclear or insufficiently "bright line". For example, some commenters wanted further guidance on the meaning of the "substantial physician services" and "primary reason" elements. Commenters representing practitioners in specialty groups that primarily provide DHS, such as radiology or oncology, suggested that the Phase I three-part test was unduly restrictive and precluded them from using the in-office ancillary services exception.

In addition, since publication of the Phase I final rule, we have become concerned that the Phase I three-part test might be susceptible to abuse. In particular, we are concerned that the test would allow physicians to implement arrangements in which DHS are insufficiently tied to the referring physician's core medical practice and are, in essence, separate business enterprises. For example, under the Phase I three-part test, a group practice might lease space at an off-site imaging facility, provide physician services there one day a week, and then provide nothing but imaging services the remainder of the week without any involvement or presence of the group practice physicians at the site. These types of arrangements would not be consistent with the intent of the "same building" requirement in the statute, and we had not intended to permit them.

For all of these reasons, we have developed three new, alternative tests that are more straightforward, afford physicians greater flexibility, and are less susceptible to abuse. Only one of the three tests needs to be satisfied to meet the "same building" requirement. All three tests are available to solo practitioners, as well as group practices. These new tests replace the Phase I three-part test in its entirety. We believe that virtually all legitimate arrangements that complied with the Phase I three-part test should qualify under one of the new tests, as will many arrangements that had difficulty meeting the Phase I three-part test. Arrangements that may have complied with the Phase I three-part test, but do not meet any of the new tests, should be restructured (or unwound) prior to the effective date of this regulation.

Under the first new test, at § 411.355(b)(2)(i)(A), a designated health service is furnished in the "same building" if the building is one in which the referring physician or his or her group practice (if applicable) has an

office that is normally open to their patients at least 35 hours per week, and the referring physician or one or more members of his or her group regularly practices medicine and furnishes physician services to patients in that office at least 30 hours per week. Some of the services must be physician services that are unrelated to the furnishing of DHS, whether Federal or private pay, although the unrelated physician services may lead to the ordering of DHS. This new test should address the concerns expressed by radiologists, oncologists, and others whose practices primarily consist of furnishing DHS. Conceptually, this test generally describes buildings that are the principal place of practice for physicians or their groups.

Under the second new test, at § 411.355(b)(2)(i)(B), a designated health service is furnished in the "same building" if the building is one in which the referring physician or his or her group practice has an office that is normally open to their patients at least 8 hours per week, and the referring physician regularly practices medicine and furnishes physician services to his or her patients in that office at least 6 hours per week (including some physician services unrelated to the furnishing of DHS). In this test, services provided by members of the referring physician's group practice do not count toward the 6-hour threshold. In addition, the building must be one in which the patient receiving the designated health service usually sees the referring physician or other members of his or her group practice (if the physician practices in a group practice). Conceptually, this test generally describes a building where a referring physician practices medicine at least 1 day per week and that is the principal place in which the physician's patients receive physician services.

Under the third new test, at § 411.355(b)(2)(i)(C), a designated health service is furnished in the "same building" if the building is one in which the referring physician or his or her group practice has an office that is normally open to their patients at least 8 hours per week, and the referring physician or a member of his or her group practice (if any) regularly practices medicine and furnishes physician services to patients at least 6 hours per week in that office (including some physician services unrelated to the furnishing of DHS). In addition, the referring physician must be present and order the designated health service in connection with a patient visit during the time the office is open in the building or the referring physician or a member of his or her group practice (if any) must be present while the designated health service is furnished during the time the office is open in the building. This test requires presence in the building, but not necessarily in the same space or part of the building. Conceptually, this test generally describes buildings in which referring physicians (or group practice members, if any) provide physician services to patients at least 1 day per week and the DHS are ordered during a patient visit or the physicians are present during the furnishing of the designated health service.

Under all of these tests, referring physicians or group practices must have offices in the building that are normally open to their patients a requisite number of hours per week. This standard is not intended to preclude occasional weeks in which the office is open fewer hours (for example, during vacation periods). In addition, under all three tests, referring physicians (or for § 411.355(b)(2)(i)(A) and § 411.355(b)(2)(i)(C), their group practice members) must regularly practice medicine and furnish physician services for a minimum number of hours per week in that office. This standard is not intended to preclude use of the in-office ancillary services exception by physicians or group practices that have unfilled appointment slots, cancellations, or other occasional gaps in the furnishing of services such that they do not actually provide the requisite number of hours of physician services in particular weeks. Rather, they must regularly (that is, in the customary, usual, and normal course) practice medicine and furnish physician services in the building for the minimum number of hours. In addition, consistent with the statute, the tests require that "some" of the physician services be unrelated to the furnishing of DHS. We are not requiring any particular threshold amount of physician services unrelated to the furnishing of DHS—"some" should be interpreted in its common sense meaning. For purposes of establishing compliance with the "same building" test, we do not interpret the statute to mean that the physician services must be entirely disconnected from subsequent furnishing of DHS. A stricter interpretation would be inconsistent with the Congress' intent to create an exception that allows physicians to conduct their medical practices in their own offices for their own patients. Moreover, in the context of this exception, we are concerned that a stricter interpretation could potentially adversely impact the delivery of patient care. Therefore, as in Phase I, we are defining "physicians' services unrelated to the furnishing of DHS" to mean physician services that are neither Federal nor private pay DHS, even if the physician services lead to the ordering of a designated health service (for example, a physical examination that leads to the ordering of a clinical laboratory test or an x-ray). The provision of interpretations and reads of diagnostic or other tests will not be considered physicians' services unrelated to the furnishing of DHS for purposes of this rule.

Finally, we are making several minor modifications to the building requirements described in the responses to comments below. Moreover, we are revising the regulations to make clear that physicians and group practices may purchase the technical components of mobile services (which are not buildings for purposes of the in-office ancillary services exception) and bill for them pursuant to § 414.50 and the purchased diagnostic testing rules at section 3060 of the Medicare Carriers Manual (as amended or replaced from time to time).

Comments to the Phase I building requirements follow, along with our responses.

Comment: A number of commenters objected to using the post office street address to determine whether DHS are being provided in the same building as the physician's practice. Some commenters suggested various alternative tests, including same "strip mall", same "campus", "adjacent buildings", and several others. One commenter said that the decision as to location of the DHS was frequently controlled by the landlord, not the physician.

Response: Any bright line test in this area will produce aberrant results in some circumstances. Nevertheless, a bright line test for "same building" is essential given the significance of the in-office ancillary services exception and, in particular, the significance of the building tests. The post office address test was proposed by commenters to the January 1998 proposed rule (66 FR 888). None of the tests proffered by the Phase I commenters, nor any other test proposed in comments to the January 1998 proposed rule, is sufficiently definite to establish a "bright line" test. Any specific listing of types of building configurations would invariably cover some situations but omit others. The postal address test, while imperfect, provides a clear, fair, easily-applied standard. Moreover, as we explained in Phase I (66 FR 889), the easing of the supervision standards under the

exception elevates the importance of meaningful building requirements in ensuring that the in-office ancillary services exception protects those DHS that are truly ancillary to the physician's office practice and not those that are essentially a separate business enterprise.

Comment: A number of commenters objected to the exclusion of services furnished in mobile vans or other facilities not permanently affixed to the building. These commenters stated that mobile equipment was cost-efficient and offered convenience to patients, especially in rural areas. One commenter asked why we were prohibiting physicians from purchasing the technical component of these mobile services. Another commenter asked that we clarify that mobile equipment that can be moved into a building can qualify for the in-office ancillary exception.

Response: As we stated in the Phase I preamble (66 FR 891), part-time rentals of DHS equipment are precisely the arrangements that section 1877 of the Act was designed to restrict. Mobile equipment that is placed inside a building qualifies for the exception if it is located and used inside the "same building" (that is, not in the garage or an internal loading dock or parking garage). (In this regard, we have modified the rule consistent with our original intent in Phase I, to clarify that internal loading docks are not considered the "same building".) The special circumstances of rural area providers are addressed by the rural exception at section 1877(d)(2) of the Act (§ 411.356(c)(1)), discussed in more detail below at VII.B.

It was not our intent to prohibit physicians and group practices from purchasing diagnostic tests under the purchased diagnostic testing rules § 414.50 and in section 3060 of the Medicare Carriers Manual (Reassignment) (as amended or replaced from time to time). Upon further review, however, we have concluded that the Phase I rule did not adequately provide for the furnishing of those services. The purchased diagnostic tests rules permit physicians or groups to bill Medicare for purchased diagnostic tests, as long as they do not mark up the charge for the test, and they accept the lowest of the physician fee schedule, the physician's actual charge, or the supplier's net charge to the physician or group as payment in full for the test, even if assignment is not accepted. Having considered various options for addressing this issue in this interim final rule with comment period, we have determined that the best approach would be to exclude physicians (or group practices) who bill for purchased diagnostic tests in accordance with Medicare rules from the definition of "entity" under § 411.351, which otherwise defines an "entity" as the party that bills Medicare for the DHS. Conceptually, this approach reflects the substance of a purchased diagnostic test transaction, in which another entity actually furnishes the test, but passes the responsibility for billing Medicare on to the physician, who is precluded from profiting.

Comment: In response to comments to the January 1998 proposed rule, the Phase I rule included a special provision under the in-office ancillary services exception for services provided by physicians (including services provided by qualified persons accompanying those physicians) whose principal medical practice involves treating patients in their private residences (§ 411.355(b)(6)). Under § 411.355(b)(6), the "same building" test is met if DHS are provided in a private home contemporaneously with a physician service that is not a designated health service. A private home does not include a nursing, long-term care, or other facility or institution. We solicited comments as to whether additional special rules might be appropriate. Two commenters urged us to expand the exception to cover more locations and to ease the other restrictions so that more physicians could qualify. One commenter objected to the requirement that the physician's principal medical practice consist of home care; the commenter stated that the requirement was unnecessary and limited the applicability of the exception. The commenter suggested that a physician should qualify if his or her medical group spent more than 50 percent of the group's practice time outside of the office setting, including travel time, preparation, and follow up. The same commenter asked us to clarify that the requirement that the services be contemporaneous does not require the physician's presence during the furnishing of the designated health service.

Response: While we understand that relaxing the standards would result in more physicians qualifying under the special rule for home care physicians, the commenters apparently misunderstood our intent. Simply put, we intended to create a narrow rule for a particular group of specialty physicians who otherwise would generally be precluded from using the in-office ancillary services exception because they would have no "building" that could qualify as the place in which they furnish DHS under the exception. Restricting the special rule to physicians who principally practice in the home care field is designed to insure that the patient's home is, in fact, the physician's real locus of practice. The special rule is specifically limited to private residences, not nursing or other facilities.

The commenter is correct that the contemporaneous requirement does not require the physician to be present throughout the furnishing of the designated health service. However, the physician must be present in the patient's private residence at the inception of the designated health service. This presence requirement is necessary to limit the exception to services truly furnished as part of the referring physician's "office" medical practice.

Comment: One commenter asked us to clarify that residences in independent living facilities and assisted living facilities qualify as private homes. The commenter observed that some assisted living facilities have examination rooms that physicians use to treat residents. The commenter asked whether DHS furnished in such rooms would qualify as services furnished in the patient's residence.

Response: We agree that private residences in independent living facilities and assisted living facilities should qualify as private homes for purposes of the special rule. We will consider a residence in an independent living facility or assisted living facility to be "private" if the patient occupies the premises as his or her residence, through ownership or lease (by the patient or a relative or friend on the patient's behalf), and has the right to exclude others from the premises. The use of common examination rooms in those facilities is more problematic. For example, in some cases, assisted living facilities are conjoined with nursing facilities, and a case-by-case evaluation would be required to determine whether a shared examination room is part of the nursing facility or the assisted living facility. On balance, we prefer a clear rule in this area, and thus would not consider a common examination room to be a private residence.

Comment: Many commenters objected to the requirements in the "same building" test that (i) the referring physician (or another physician in his or her group practice) furnish substantial physician services unrelated to the furnishing of DHS in the same building (§ 411.355(b)(2)(i)(A)); and (ii) those unrelated services represent the full range of services that the referring physician routinely provides (or, for a

referring physician in a group practice, the full range of services that the physician routinely provides for the group practice) (§ 411.355(b)(2)(i)(B)).

These commenters described these requirements as vague, both with respect to the quantity of services that are not DHS that must be performed in the building and the kinds of services that are not DHS that qualify. Moreover, the commenters objected to the requirement in § 411.355(b)(2)(i)(C) that the receipt of DHS not be the primary reason the patient comes into contact with the referring physician or the group practice. Commenters pointed out that the latter requirement was particularly problematic for physicians in certain specialties, such as radiology and oncology, where much of their practice consists of furnishing DHS. Commenters suggested a number of replacements for the term "substantial," including "any," "more than incidental," "10 percent," and "significant," and requested clarification as to the application of the "primary reason" test to oncology and radiology practices.

Response: The statute requires that the DHS be furnished in the "same building" where the referring physician (or a member of his or her group practice) furnishes "physicians" services unrelated to the furnishing of DHS." The requirements referenced by the commenters were intended to ensure that DHS furnished under the in-office ancillary services exception are truly ancillary to the delivery of physician services and that the exception is sufficiently circumscribed to prevent abuse, particularly since the exception, as revised in the Phase I rule, permits certain shared facilities.

As explained in detail above, we agree that the Phase I three-part test did not adequately take into account the nature of certain speciality practices, such as oncology and radiology, that inherently involve the furnishing of substantial DHS and relatively limited physician services unrelated to the furnishing of DHS. We have addressed those concerns, among others, by replacing the Phase I three part test with three new tests, one of which applies to any building in which a physician's practice (whether solo or group) is normally open for business 35 hours per week and in which the physician (or, if applicable, members of his or her group) regularly practices medicine and furnishes physician services to patients at least 30 hours per week. Some part of the physician services must be physician services unrelated to the furnishing of DHS, even if the physician services lead to the ordering or furnishing of DHS. We are no longer requiring that the physician services unrelated to the furnishing of DHS be "substantial." We believe that radiology, oncology, and other specialty practices that primarily provide DHS to their patients will be able to meet the lower threshold of providing "some" unrelated services in the revised regulations.

We note that interpretations or reads of tests are generally DHS and will not count as physician services unrelated to the furnishing of DHS.

Comment: One commenter asked us to clarify that, in § 411.355(b)(2)(i)(B) of Phase I, the physician services unrelated to the furnishing of DHS can be provided by the referring physician or by another physician who is a member of the same group practice.

Response: The commenter is correct, although the test will be superseded as of the effective date of these regulations by the new building tests described above. However, for referrals and claims filed during the period between the effective date of Phase I (January 4, 2002) and the effective date of Phase II, the Phase I building test would apply.

Comment: Several commenters suggested that the Phase I three part test in § 411.355(b)(2) should count only DHS payable by Medicare or Medicaid.

Response: We disagree. The purpose of the same building test is to determine the location where the physician or group practice is practicing medicine so as to ascertain whether the DHS are truly ancillary to the referring physician's core medical practice and furnished in the same building as the referring physician's (or his or her group's) core medical practice. Consistent with this purpose, physicians should be providing in the building that is the subject of the inquiry at least some physician services that are unrelated to the furnishing of any DHS, whether Federal or private pay. In other words, the fact that a physician or group provides private pay x-rays in a building is insufficient to establish that the provision of DHS is ancillary to the physician's or group's core office medical practice. We have incorporated this concept in the three new same building tests described above.

Comment: Several commenters asked us to clarify that the primary purpose element of the Phase I three-part test does not preclude a referral of a patient to a group practice or to a physician for DHS from a physician who is not in the group.

Response: Unless the outside physician has a financial relationship with the group or physician to whom the patient is referred, a referral for a designated health service to a physician or group practice by an outside physician would not implicate section 1877 of the Act. As noted previously, we are eliminating the primary purpose element in the new Phase II regulations.

Comment: Many commenters commended our decision to permit shared facilities in the same building provided the parties comply with the supervision, location, and billing requirements of the in-office ancillary services exception. Several commenters urged us to permit shared facilities that are not located in the same building. Many commenters objected to the requirement in the centralized building test (66 FR 889) that the building be owned or leased by the group practice on a full-time basis and used exclusively by the group practice, thus excluding shared off-site facilities under the centralized building test. Some commenters observed that the full-time, exclusive use requirement unduly favored large group practices over small ones.

Response: We are not persuaded to change the regulations regarding shared off-site facilities. As discussed in greater detail in the Phase I preamble (66 FR 888), we believe that section 1877 of the Act is directed at arrangements that enable physicians to profit from referrals to free-standing DHS that are not ancillary to their medical practices. For the reasons given in the Phase I preamble (66 FR 888–893), we believe the final Phase I regulation strikes the proper balance with respect to shared facilities.

Comment: Several commenters objected to our decision to permit group practices to have more than one centralized facility.

Response: We discern no reason to restrict group practices to a single centralized building, nor does the statutory language compel that result. We believe the requirement that any centralized building must be owned or leased 24 hours per day, 7 days per week, for at least six months, and used exclusively by the group practice should adequately protect against abuse.

5. The Billing Requirement (Section 1877(b)(2)(B) of the Act; Phase I—66 FR 893; § 411.355(b)(3))

To qualify for the in-office ancillary services exception under the statute, the DHS must be billed by one of the following: The physician performing or supervising the service; the group practice of which that physician is a member under that group practice's billing number; or an entity that is wholly owned by the referring or

supervising physician or the referring or supervising physician's group practice. In addition, under the Phase I rule, the group practice may bill if the physician is a "physician in the group practice" under the group practice's billing number. (This interpretation corrected a statutory anomaly and conformed the billing requirement to the corresponding statutory supervision requirements.) As with the other requirements in the in-office ancillary services exception, the billing requirements serve to directly associate the ancillary services for which self-referrals will be permitted with the physician's core medical practice. The billing requirement is a threshold rule for determining whether a designated health service furnished by a physician practice may be billed or claimed. The bill or claim itself must still comply with all other applicable billing and claims submission laws, regulations, and policies.

Comment: One commenter asked that we interpret the billing requirement to permit a shared facility to bill under its own billing number.

Response: We decline to adopt the commenter's suggestion. The billing arrangement proposed by the commenter clearly falls outside of the statutory requirement. Moreover, the proposal would undermine the role of the billing requirement in ensuring that the excepted furnishing of DHS closely relates to a physician's core medical practice.

Comment: The same commenter interpreted the final regulations as permitting physicians to bill "incident to" for DHS that only require general supervision, even though the "incident to" billing rules require "direct supervision". Another commenter asked whether physical therapy services had to be directly supervised by a physician if the services are billed by a physician or a group practice.

Response: The commenter misapprehends the scope of these regulations. The regulations under section 1877 of the Act do not establish or authorize any billing practice that is not in full compliance with other applicable Medicare coverage and payment rules. The billing requirement set forth in these regulations is for the purpose of determining whether a designated health service fits within the in-office ancillary services exception such that, as a threshold matter, a claim or bill for the service may be submitted at all by a physician or group practice. If a claim or bill may be submitted, it must still comply with all applicable Medicare payment and coverage rules (including, for example, the "incident to" rules).

Comment: A professional association for physical therapists asked the following questions:

- If a physical therapist employed by a physician practice furnishes services, bills using the physical therapy provider number, and then reassigns payment to the group practice, are the billing requirements met?
- Would a rehabilitation agency, which is owned by physicians, and has its own billing number, be considered a wholly owned entity for billing purposes?
- Can physicians own a physical therapy private practice office and bill through the provider number of that office?
- When a designated health service is billed by an entity wholly owned by a group practice, do the Medicare conditions of participation applicable to the wholly owned entity determine the applicable level of supervision or do the supervision requirements related to group practice billing apply?

Response: With respect to the first question, we assume it is directed at services provided after March 1, 2003, as prior to that date, services by an employed physical therapist had to be billed as "incident to" services. Billing by a physical therapist under his or her own billing number does not satisfy the billing requirement of section 1877(b)(2)(B) of the Act, which requires that the service be billed by the performing physician, the supervising physician, the group practice *using a number assigned to the group*, or an entity wholly owned by the performing or supervising physician or the group practice. However, if the physical therapist reassigns his or her right to payment to the group, and the group bills using its own billing number (with the physical therapist's number indicated on the bill), then the billing requirement would be met. As to the second and third questions, the rehabilitation facility or physical therapy practice would be considered wholly owned if it is owned 100 percent by the physician group practice; 100 percent by the performing physician; or 100 percent by the supervising physician. A wholly owned entity can bill using its own billing number (*See* § 411.355(b)(3)(iv)). With respect to the last question, the supervision must meet the requirements applicable to the billing submitted to the Medicare program.

C. Group Practice Definition (Section 1877(h)(4)) of the Act; Phase I—66 FR 894; § 411.352)

[If you choose to comment on issues in this section, please include the caption "Group Practice Definition" at the beginning of your comments.]

The Phase I rulemaking addressed the definition of a "group practice" under section 1877(h)(4) of the Act (the regulatory definition appears at § 411.352). Most commenters commended the changes made in Phase I. In particular, the final rule incorporated significant additional flexibility for group practices. We are making no major changes to that definition in Phase II. We have modified the "primary purpose" test to make clear that the relevant inquiry is the current operation of the group practice and have eliminated the requirement for centralized utilization review under the "unified business" test. We have revised the special rules on profit shares and productivity bonuses to make clear that the "safe harbors" are deeming provisions. We have also made certain modifications to address particular concerns raised by group practices operating across State lines, group practices employing part-time physicians, and existing group practices adding new members.

Comments on the Phase I group practice definition and our responses follow.

Comment: Two commenters asked us to clarify the application of the single legal entity rule in § 411.352(a) to a group practice that has offices in more than one contiguous State and thus operates through "mirror" entities with identical ownership and governance.

Response: As long as both entities are absolutely identical as to ownership, governance, and operation, the States in which the group is operating are contiguous, and the group uses multiple legal entities solely to comply with jurisdictional licensing laws, we will consider the two entities to be a single legal entity. We have modified the regulation accordingly. We note that, as a whole, the States in which the group operates need to be contiguous, but each State need not be contiguous with every other State.

Comment: A number of commenters objected to the requirement in § 411.352(a) that the single legal entity must be formed primarily for the purpose of being a physician group practice. According to the commenters, the purpose at the time of formation is irrelevant, as long as the entity is currently operated primarily as a physician group practice.

Response: We agree with the commenters that the relevant inquiry should be whether the group currently is operating primarily for the purpose of being a physician practice. We have

revised the rule accordingly. We want to iterate, however, that an entity that has a substantial purpose other than operating a physician group practice, such as operating a hospital, will not qualify. Thus, hospitals that employ two or more physicians are not physician "group practices" for purposes of section 1877(h)(4) of the Act and are not eligible under the in-office ancillary services exception. A hospital may own or acquire a separate physician group practice that qualifies under section 1877(h)(4) of the Act and would be eligible under the in-office ancillary services exception.

Comment: One commenter asked us to clarify that a group practice can meet the definition at § 411.352 if it is owned by a medical group, as long as the medical group that owns it no longer provides medical services. Some commenters asked us to reconsider our position that the single legal entity requirement is not met if a group practice is owned by another functioning medical group.

Response: Under § 411.352(a), defunct medical groups no longer providing medical services can own or operate a medical practice that qualifies as a "group practice" for purposes of section 1877(h)(4) of the Act. In this regard, we have clarified the third sentence in § 411.352(a) to read: "The single legal entity may be organized or owned (in whole or in part) by another medical practice, provided that the other medical practice is not an operating physician practice (and regardless of whether the medical practice meets the conditions for a group practice under this section)." We stand by our determination that a group practice owned by other functioning medical groups cannot meet the single legal entity requirement; to conclude otherwise would insufficiently protect against sham group practice arrangements or physicians forming groups substantially for the purpose of profiting from DHS referrals.

Comment: Several commenters objected to our determination that, for purposes of section 1877(h)(4) of the Act, a hospital cannot form a group practice of its employed physicians without organizing them into a separate entity.

Response: As we explained in the Phase I preamble (66 FR 898–899), treating a "group" of hospital-employed physicians as a "group practice" for purposes of section 1877(h)(4) of the Act would stretch the meaning of a "group practice" too far. It would enable hospitals that employ two or more physicians to use the in-office ancillary services exception inappropriately to protect virtually all inpatient and outpatient hospital services. We do not believe that the Congress intended the in-office ancillary services exception, which focuses on services provided by physician practices, to be used to exempt hospital services from the scope of section 1877 of the Act. Under the "group practice" definition, a hospital may legally organize, own, or operate a group practice that is a separate legal entity; however, the hospital itself (or other facility or entity the primary purpose of which is something other than the operation of a physician group practice) cannot be a group practice for purposes of section 1877(h)(4) of the Act. Hospitals that employ physicians can appropriately structure their arrangements with physicians to fit in the employment exception.

Comment: Some commenters urged that a foundation-model physician practice should be allowed to qualify as a "group practice" under section 1877(h)(4) of the Act.

Response: It is our understanding that "foundation-model" physician practices exist in a variety of forms, depending on jurisdiction and other factors (including, for example, whether a particular State bars the corporate practice of medicine). Given the variety of foundation-model arrangements, it would be difficult to craft a uniform definition of a foundation-model group. Moreover, the personal services arrangements exception corresponds more closely to the contractual arrangements that typically establish foundation-model physician practices. Indeed, the legislative history reflects congressional intent to apply the personal services exception to foundations. (H.R. Conf. Report No. 103–213 at 814 (1993) ("The conferees intend that this exception would apply to payments made by a non-profit Medical Foundation under a contract with physicians to provide health care services and which conducts medical research [sic]."')) Thus, as explained in Phase I (66 FR 897), foundation-model practices should use the personal service arrangements exception. We believe the modifications we are making to that exception in this Phase II will address the commenters' concerns and offer adequate protection for DHS referrals within most foundation-model group structures. This determination does not preclude particular foundations or foundation-model practices that, in fact, meet the single legal entity test from qualifying as a group practice and using the in-office ancillary services exception.

Comment: Section 1877(h)(4) of the Act requires that a "group practice" consist of "2 or more physicians." Several commenters asked that we clarify whether the "2 or more physicians" test is met if a group consists of one full-time physician and one part-time employed physician or independent contractor physician. The commenters interpreted the Phase I preamble as requiring that the second physician be a full-time, rather than part-time, employee. The commenters viewed this requirement as conflicting with § 411.352(b), which requires that the group have two physicians who are "members of the group" (as defined in § 411.351), whether as employees or direct or indirect owners. The commenters pointed out that, under the "members of the group" test, a physician with only token ownership in the group could qualify as a member of the group. Given this relatively expansive test for "members of the group," the commenters discerned no reason for the "2 or more physicians" test to require that the second physician be a full-time employee.

Response: The list of examples of acceptable group practice structures in the Phase I preamble (66 FR 897) is illustrative, not exhaustive, of the kinds of arrangements that could qualify under the group practice definition. We agree with the commenters' interpretation that the physicians counted for the "2 or more physicians" test can be part-time employed physicians. The group practice would still need to satisfy the remaining conditions of § 411.352. This interpretation is consistent with the language of § 411.352(b), and we are therefore making no textual change.

However, with respect to independent contractor physicians, we are not expanding § 411.352(b) to permit them to fulfill the "2 or more physicians" test. Independent contractors are not group practice "members" under § 411.351. A large number of commenters to the January 1998 proposed rule, as well as commenters to the Phase I rule, opposed including independent contractors in the definition of "member of the group" because of concerns about meeting certain of the statutory group practice tests (66 FR 900). Accordingly, we excluded those physicians from being group practice members, but included them in the definition of "physicians in the group practice," a resolution consistent with the comment letters and the statutory language. To count non-member physicians in the "2 or more physicians" test would effectively expand the group practice definition to groups with *no* physician members (that is, groups with 2 or more independent contractors), a result inconsistent with the statute. That expansion would

enable physicians to nullify the various tests in section 1877(h)(4) of the Act related specifically to group practice members. For example, the "75 percent physician-patient encounters" test in section 1877(h)(4)(A)(v) of the Act, which requires that members of the group conduct at least 75 percent of the group practice's physician-patient encounters, would be meaningless.

Comment: One commenter asked that we reconsider permitting group practices to elect to treat independent contractors as members for purposes of determining compliance with §§ 411.352(d) and (h) (the 75 percent "substantially all" and "75 percent physician-patient encounters" tests, respectively).

Response: We are not persuaded that a change is warranted or feasible. As we indicated in the Phase I preamble (66 FR 900), an election process would impose an administrative burden on groups without significant corresponding benefit, given the overall design of the final "group practice" definition and in-office ancillary services exception. Moreover, no mechanism currently exists to administer or monitor that election, and we do not believe most physician groups would favor creation of an election reporting requirement. Given the lack of an election reporting mechanism, any election provision would have to be an alternative to the existing test, making enforcement difficult. In short, an election procedure is impracticable. A single "bright line" test is preferable.

The "substantially all" and "75 percent physician-patient encounters" tests are intended to measure whether a group practice functions as an integrated whole. If a group is unable to take advantage of the benefits afforded group practices under the statute because of the use of independent contractor physicians, it can integrate the physicians into the group as employees or owners or restructure to comply with another exception. As noted above, a substantial number of commenters to the January 1998 proposed rule (as well as commenters to the Phase I rule) asked that independent contractors *not* be considered members of the group to ease compliance with the group practice definition. In response to those original comments, we excluded independent contractors as members of the group, while including them as "physicians in the group practice" where that term is relevant.

Comment: Section 411.352(d)(5) establishes a 12-month "grace period" for start-up groups to come into compliance with the group practice definition. The grace period does not apply when an existing group adds a new member (for example, a new employed physician) or reorganizes. Several physician professional associations commented that application of this rule could cause group practices that add new physician members to lose their group practice designations for a period of time after the new physician joins, because the new physician could skew the "substantially all" test (which requires that at least 75 percent of patient care services provided by group members be provided through the group and billed under a number assigned to the group, with the amounts received treated as revenues of the group). According to the associations, there are frequently delays in obtaining Medicare billing numbers for newly employed physicians. Moreover, the associations believe that the current rule discourages bringing younger physicians into existing practices.

Response: Our intent in excluding existing group practices that add new members from the broad grace period under § 411.352(d)(5) was to ensure that groups would not, in essence, secure perpetual grace periods through the continuing addition of new physicians. In many cases, the addition of new physicians, such as physicians with established medical practices, to an existing group practice will not impair the group's ability to meet the group practice definition. We concur with the commenters, however, that some accommodation should be made for group practices that add new members, as long as the group practice otherwise continues to fit squarely in the definition. We are therefore creating § 411.352(d)(6) to provide that, if the addition of a new member who has relocated his or her practice to an existing group practice would cause the group practice to fall out of compliance with the requirements of the "substantially all" test at § 411.352(d)(1), the group practice will have 12 months to come back into full compliance, provided that—

(i) For the 12-month period, the group practice is fully compliant with the "substantially all" test if the new member is not counted as a member of the group for purposes of § 411.352; and

(ii) The new physician's employment with, or ownership or investment interest in, the group practice is documented in writing before commencement of the new employment or ownership.

We have limited this rule to new members who have relocated their medical practices (as defined in the revised physician recruitment exception) to prevent abuse by groups that add new members through mergers with other groups. We are retaining the portion of the current rule that precludes group practices that reorganize from taking advantage of the startup or new member grace periods; if a group practice wants to use the exceptions available to group practices, the group should reorganize in accordance with the group practice definition.

Comment: One commenter asked that we clarify whether leased physician employees can be considered employees (that is, members) of a group practice. A commenter noted that the new rules for coverage of "incident to" services treat leased employees as employees and suggested that the same treatment should extend to determining whether a leased physician employee is a member of a group practice.

Response: To the extent that a leased employee is a *bona fide* employee of the group under IRS rules, that leased employee physician would be considered an employee of the group practice, and therefore a member of the group. Group practices bear the burden of establishing the necessary criteria for employment. We have clarified the definition of "member of the group" accordingly.

Comment: The definition of "physician in the group practice" in § 411.351 provides that referrals from an independent contractor who is a physician in the group practice are subject to the prohibition on referrals under section 1877 of the Act and that the group practice is subject to the limitation on billing for referred services. A commenter asked us to clarify that this provision means that independent contractor referrals for DHS within the group implicate section 1877 of the Act to the same extent that the group member's referrals are implicated and not that DHS referrals cannot be made.

Response: The commenter is generally correct. Like group practice members, an independent contractor who is a physician in the group practice can make referrals of DHS to the group practice. as long as an exception applies to those referrals. There is no group practice exception as such. In general, group practices rely on the in-office ancillary services exception for referrals within a group. Referrals from a "physician in the group practice" can be covered by this exception if all of the conditions in the exception are met. Alternatively, referrals from an independent contractor to a group practice for DHS could be excepted

under the personal service arrangements or fair market value exceptions.

Comment: A commenter representing free clinics requested modifications to the "substantially all" and "full range of services" tests to accommodate the special circumstances of volunteer physicians providing free patient care services at free clinics. The commenter suggested that these services be treated comparably to services provided in Health Professional Shortage Areas (HPSAs) under § 411.352(d)(4). The commenter explained that the modifications are necessary to prevent section 1877 of the Act from acting as a disincentive to providing free clinic services. Specifically, the commenter recommended that § 411.352(c) be amended to exclude volunteer patient services provided by physicians in HPSAs from the "full range of services" test and that a new subparagraph be added to § 411.352 to create a special rule for volunteer patient services provided at a clinic operated by a governmental entity or agency or by a tax-exempt entity.

Response: We do not believe, nor was it our intent, that donating volunteer services to patients at free clinics or similar facilities should adversely impact a group practice's ability to qualify as a "group practice" within the meaning of § 411.352. The "full range of services" test at § 411.352(c) measures whether a member of a group practice provides substantially the same scope of patient care services within the group context as he or she provides outside the group context. The test does not require absolute identity of services. To the extent a physician donates the same scope of patient care services at a free clinic (that is, outside the group) as he or she provides as part of the group practice (that is, inside the group), there should be no problem meeting the "full range of services" test. To the extent the physician donates patient care services in a free clinic that are different from those he or she provides for the group, we would not expect that the donated patient care services would prevent the group from meeting the "substantially all" requirement. To the extent our reference in the Phase I preamble (66 FR 903) to volunteer activities involving treating indigent patients suggested otherwise, we withdraw the reference.

With respect to the "substantially all" test at § 411.352(d), a group practice member's donation of volunteer services to a free clinic generally should not impair the group's ability to meet the 75 percent threshold. In those situations where it may, we see no reason that arrangements for the donated services could not be structured such that the services are donated to the free clinic through the group. So structured, we would consider donated patient care services to a free clinic (or comparable charitable enterprise) to be "billed" through the group, notwithstanding that no actual bills are sent or collected.

Comment: A commenter representing physicians in group practices with members who provide substantial academic medical services sought relief similar to the preceding comment for time spent by physicians providing academic patient care services. The commenter explained that a medical school physician group would have difficulty meeting the "substantially all" test because its members provide substantial academic medical services to clinics and foundations at the medical school. One commenter gave an example of a medical school group in which physicians spend over 25 percent of their time supervising residents and providing care at a university-affiliated clinic, hospital, and foundation, primarily for Medicaid patients. Since these services count as "patient care" services under the definition of that term in § 411.351, and the physicians do not bill for these services under their arrangement with the academic medical center, the physician group cannot meet the "substantially all" test. The commenter urged that academic patient care services provided by academic physicians to university hospitals, clinics, and foundations as part of the university's faculty practice plan be excluded from the "substantially all" test.

Response: As with the donated volunteer services described above, we see no reason that, in situations in which the 75 percent threshold will not otherwise be met, arrangements for the provision of academic patient care services could not be structured such that the services are billed through the group and treated as receipts of the group (66 FR 905).

Comment: A commenter sought clarification that a medical school group practice can use the in-office ancillary services exception, even though it and its physicians are part of a faculty practice plan of an academic medical center.

Response: If the medical school group practice meets the definition of a "group practice" in § 411.352, and all of the criteria of the exception are satisfied, it can use the in-office ancillary services exception to protect referrals within the group practice (but not referrals to other components of the academic medical center, such as the teaching hospital).

Comment: A commenter representing several entities described as "independent practice associations" (IPAs) expressed concern that physicians in group practices who participate in an IPA representing a significant revenue source for the group practice may forfeit their group practice eligibility because they will not meet the "substantially all" test. That test requires that 75 percent of the total patient care services of the group practice members be furnished through the group practice and billed under a billing number assigned to the group practice, and that the amounts received be treated as receipts of the group practice. According to the commenter, IPAs often employ or contract with group practice physicians directly and bill for the provision of their services under managed care contracts. According to the commenter, if a large portion of group members' patient care services are provided and billed under these contracts, they will not meet the 75 percent "substantially all" test. The commenter proposed two solutions. First, we could count as "patient care services" only "fee for service" services, excluding managed care services. Alternatively, we could count only Medicare and Medicaid services.

Response: We are somewhat unclear as to the nature of the particular entities represented by the commenter. They do not appear to be typical IPAs, which generally do not employ physicians. Nevertheless, we understand the commenter to be asking about the treatment of managed care contract services under the "substantially all" test. In Phase I, a commenter posed a similar situation: a group member physician contracts with a hospital to provide professional services and reassigns his or her payments for those services to the hospital. Thus, the hospital, not the group, bills Medicare for the services. In response, we affirmed that a group should be able to count professional services provided by the group member under a global payment when calculating the "75 percent of patient care services" requirement for purposes of the "substantially all" test. As we explained, the "substantially all" test is intended to guarantee that group practice members are providing a substantial amount of their services through the group practice (66 FR 905). Thus, "if the group's business includes providing professional services to another entity, which, in turn, pays the group for those services, it is our view that these are services that should count as services a physician provides through the group" (66 FR 905). We indicated our intent to interpret the requirement

that "substantially all" of a physician's patient care services be provided through the group and billed "under a billing number assigned to the group" to include any physicians' professional services billed by a group under any group billing number regardless of the payer of the services, provided the receipts are treated as receipts of the group.

Applied to the commenter's managed care contracts example, this interpretation means that the group practice could count patient care services provided under managed care contracts that are part of the group practice's business (for example, where the group practice contracts with the IPA to provide the services or where an individual physician member contracts to provide the services, but assigns his or her right to payment to the group). However, services provided by physicians pursuant to outside employment or contractual arrangements that are not tied to the group cannot meaningfully be said to be provided "through the group practice." Accordingly, such services would not be counted as patient care services provided through the group practice. Thus, services provided by physicians during the course of employment with an IPA would count against a group practice under the "substantially all" test.

We are not adopting either of the two alternative tests suggested by the commenter. We believe they are too narrow to achieve the purpose of the "substantially all" test in measuring the *bona fides* of a group practice.

Comment: Section 411.352(d)(2) requires that data used to calculate compliance with the "substantially all" test in § 411.352(d)(1) and supportive documentation must be made available to the Secretary upon request. One commenter asked that we delete this requirement, calling it simply a back-door attestation requirement.

Response: The commenter misapprehends the legal distinction between an attestation, a document created to make mandatory representations, and a documentation requirement, which merely requires that a group retain records of its own activities. The documentation provision, which mandates production of documentation only upon the Secretary's request, enables the government to ascertain whether the "substantially all" test has been satisfied. Group practices that choose to take advantage of the special treatment afforded groups under the statute should be prepared to demonstrate compliance with relevant statutory and regulatory standards.

Comment: Section 411.352(f) sets forth a three-part test for determining whether a group practice is a "unified business." Section 411.352(f)(1)(i) requires centralized decision-making by a body representative of the group practice that maintains effective control over the group's assets and liabilities, including, but not limited to, budgets, compensation, and salaries. Section 411.352(f)(1)(ii) requires consolidated billing, accounting, and financial reporting. One commenter asked us to clarify the meaning of these provisions. Specifically, the commenter asked whether the test is met if individual group practice locations devise their own budgets, including salary and compensation, and submit them for approval by the group's governing board.

Response: The "unified business" test is intended to be flexible and to accommodate a wide variety of group practice arrangements, while ensuring that a group practice for purposes of section 1877 of the Act is organized and operated on a *bona fide* basis as a single integrated business enterprise with legal and organizational integration. The "unified business" test sets general parameters indicative of integration, but does not dictate specific practices. (For further discussion of the "unified business" test, see the Phase I preamble (66 FR 905).) With respect to the centralized decision-making aspect, we believe there must be substantial "group level" management and operation. While, in the interest of flexibility, we are not prescribing any particular process for managing budgets or determining compensation and salaries, the centralized management of the group practice must exercise substantial control over the process and output of these activities and not simply rubber stamp decisions by the various cost centers or locations.

Comment: The third part of the "unified business" test, § 411.352(f)(1)(iii), provides that the group must have "centralized utilization review." Several commenters asked that we delete or modify this requirement because many group practices do not perform utilization review.

Response: We agree and are deleting § 411.352(f)(1)(iii).

Comment: A number of commenters asked that we clarify that physicians in the group practice can be paid a productivity bonus or profit share based directly on services that are "incident to" services personally performed by the physician. The commenters stated that while the Phase I preamble plainly contemplated that such bonuses were permitted (66 FR 909), they found the language of the regulatory text in § 411.352(i) to be ambiguous.

Response: The commenters are correct with respect to our intent in Phase I, and we are amending the regulatory text in § 411.352(i)(3) to make our original intent clear. Section 1877(h)(4)(B)(i) of the Act expressly permits a physician in the group practice to receive a profit share or productivity bonus based directly on services that he or she personally performs and services that are "incident to" his or her personally performed services. We have revised the regulations to make clear that profit shares or productivity bonuses can be based directly on services that are "incident to" the physician's personally performed services.

Comment: Two commenters asked that we apply the group practice bonus and profit sharing rules to employees and independent contractors.

Response: For purposes of section 1877 of the Act, a group practice may pay any employee or independent contractor of the group practice who qualifies as a "physician in the group practice" profit shares and productivity bonuses under § 411.352(i). Referrals from a physician in the group practice to the group practice may be protected under the in-office ancillary services exception (provided the conditions of the exception are met). However, if a group practice instead uses the *bona fide* employment, personal service arrangements, or fair market value exceptions to protect referrals from an independent contractor to the group practice, the compensation rules applicable under those exceptions must be satisfied. These rules are discussed in section VIII below.

Comment: Section 411.352(i)(2) provides that "overall profits" of the group must be based on any component of the group consisting of at least five physicians. Several commenters asked that we permit groups to distribute profits based on pools of fewer than five physicians. Another commenter asked that we clarify that any grouping of five physicians in the group constitutes an acceptable pool.

Response: As we explained in the Phase I preamble (66 FR 908), we believe a threshold of at least five physicians is broad enough to attenuate the ties between an individual physician's compensation and his or her referrals. We rejected a previous suggestion from a commenter to the January 1998 proposed rule that we use a threshold of three physicians, because we believed that the lesser threshold would result in pooling that would be

too narrow and, therefore, potentially too closely related to DHS referrals. The commenter is correct that any grouping of five physicians is permissible.

Comment: Two commenters asked that we clarify that bonuses based on factors other than the volume or value of referrals of DHS are permitted. Another commenter asked that we clarify that group practices may distribute all their revenue using the approved allocation methodologies in § 411.352(i)(2) and § 411.352(i)(3).

Response: Nothing in the statute or regulations prohibits or restricts group practice bonuses or incentives based on criteria that do not take into account the volume or value of DHS referrals. There is nothing to prevent a group practice from allocating all of its revenue using the "safe harbored" allocation methodologies.

Comment: One commenter asked that we clarify that, for purposes of the "safe harbors" at § 411.352(i)(2)(iii) and § 411.352(i)(3)(iii), less than five percent of the group practice's revenues and less than five percent of each physician's revenues must be attributable to DHS reimbursable by Medicare or Medicaid.

Response: The commenter is generally correct. The regulations provide that revenues derived from DHS must be less than 5 percent of the group practice's total revenues, and that the amount of those revenues allocated to any individual physician must constitute 5 percent or less of his or her total compensation from the group practice. The regulations define "DHS" as Medicare or Medicaid DHS. Thus, an allocation method is acceptable if less than 5 percent of the group practice's and less than 5 percent of each physician's total revenues come from Medicare or Medicaid DHS.

D. Prepaid Plans (Section 1877(b)(3) of the Act; Phase I—66 FR 911; § 411.355(c))

[If you choose to comment on issues in this section, please include the caption "Prepaid Plans Exception" at the beginning of your comments.]

Comments related to the prepaid plan exception are discussed in connection with comments to the risk-sharing arrangements exception at section XII.F below.

In addition, in the January 1998 proposed rule, we proposed a prepaid plans exception for certain Medicaid prepaid plans. As explained in Phase I (66 FR 911), a number of commenters urged us to expand the exception to include other Medicaid organizations analogous to the Medicare prepaid plans covered by section 1877(b)(3) of the Act, and we agree with these commenters. While we are deferring final regulations for section 1903(s) of the Act, given the prevalence of managed care in the Medicaid program, we believe it would be useful and appropriate to expand the prepaid plans exception at § 411.355(c) to include referrals of enrollees in Medicaid managed care plans analogous to the Medicare plans previously included in the exception. The modification effectively addresses the application of section 1903(s) of the Act to referrals of items or services provided to Medicaid managed care patients by making clear that such referrals would not result in the denial of payment under section 1877 of the Act and thus would not result in denial of Federal financial participation under section 1903(s) of the Act. In short, instead of creating a separate exception for Medicaid prepaid plans as proposed in 1998, we are achieving the proposed regulatory result through modification of § 411.355(c).

VI. General Exception Related Only to Ownership or Investment in Publicly-Traded Securities and Mutual Funds (Section 1877(c) of the Act; Phase II; § 411.356(a) and § 411.356(b))

[If you choose to comment on issues in this section, please include the caption "Publicly-Traded Securities Exception" at the beginning of your comments.]

Existing Law: Section 1877(c) of the Act creates an exception for ownership in certain publicly-traded securities and mutual funds. To qualify for the exception in section 1877(c)(1) of the Act:

(1) The securities must be securities that may be purchased on terms generally available to the public;

(2) The securities must be listed on the New York Stock Exchange, the American Stock Exchange, or any regional exchange in which quotations are published on a daily basis, or be foreign securities listed on comparable exchanges or traded under the National Association of Securities Dealers automated quotation system; and

(3) The ownership must be in a corporation that had shareholder equity exceeding $75 million at the end of the corporation's most recent fiscal year or on average during the previous three fiscal years.

In addition, section 1877(c)(2) of the Act permits ownership of investments in mutual funds with total assets exceeding $75 million at the end of the most recent fiscal year or the average of the last three fiscal years. Investment securities include shares or bonds, debentures, notes, or other debt instruments.

Proposed Rule: The January 1998 proposed rule interpreted the requirement that the investment securities be those that "may be purchased on terms generally available to the public" to mean that, at the time the physician (or his or her immediate family member) obtained the ownership interest, the interest could have been purchased on the open market, even if the physician or family member acquired the interest in another manner. For purposes of the $75 million test, the proposed regulation defined stockholder equity as the difference in the value between a corporation's total assets and total liabilities.

Final Rule: For reasons set out in more detail in the responses to comments that follow, we have reconsidered the interpretation of the "may be purchased on terms generally available to the public" provision in the January 1998 proposed rule. In this Phase II interim final rule, we are interpreting the provision to mean that the ownership interest must be in securities that are generally available to the public at the time of the DHS referral. In other words, securities acquired by a referring physician or his or her family member prior to a public offering will fit in the exception if they are available to the public at the time of any designated health service referral (and the other conditions in the exception are satisfied). In addition, as explained in this preamble in section II.B. we will not consider stock options received as compensation to be ownership or investment interests until the time that they are exercised. Having received no comments on the definition of stockholder equity, we are adopting the January 1998 proposal.

Comment: Several commenters objected to our interpretation in the January 1998 proposed rule that, in order to qualify for the public securities exception, the securities owned by the referring physician (or his or her immediate family member) must have been generally available to the public at the time the physician or family member acquired their ownership interest. According to the commenters, this interpretation conflicted with the language and history of the statute and the overall statutory scheme, which focuses on DHS referrals. The commenters suggested that the proper interpretation should be that the securities are generally available to the public at the time any DHS referrals are made.

Response: After careful consideration of the proposed rule, the statutory scheme, and the comment letters, we have reconsidered our position and

concur with the commenters. The interim final rule adopts the interpretation proffered by the commenters. We believe this rule strikes an appropriate balance between excepting legitimate investments and precluding abusive "sweetheart" deals predicated on referrals.

Comment: Several commenters asserted that the statutory exception's $75 million benchmark is too restrictive and that investments in smaller public companies should be permitted. Two commenters proposed that we except any investment in a publicly-traded company as long as the referring physician's (or immediate family member's) ownership constitutes less than five percent of the total ownership of the company. Another commenter suggested that we except any investment in any publicly-traded corporation or mutual fund. However, one commenter urged us not to expand the publicly-traded securities exception beyond the strict statutory standards.

Response: We find no support in the statutory language for either of the suggested expansions of the exception, nor are we persuaded that either expansion would be without risk of abuse, the standard for promulgating new regulatory exceptions under section 1877(b)(4) of the Act. The commenters urging the five percent ownership test misunderstand the purpose of the statute. The statute is targeted at financial relationships that create financial incentives for physicians to refer to DHS entities. While a five percent test may be probative on the issue of control of an entity, that test would be largely irrelevant to the existence of an incentive to refer. On the other hand, the limitation in the statutory exception to companies with stockholder equity in excess of $75 million is relevant, because it effectively severs any tie between referrals and returns on the investment. In short, the relationship between returns and referrals is sufficiently diffuse. An exception for investments in all publicly-traded companies, including smaller companies, would not preclude abuse.

Comment: One commenter requested that we create a new exception to permit publicly-traded companies that do not meet the statutory thresholds to bill for a *de minimis* amount of Medicare and Medicaid DHS referred by physicians (or immediate family members) if the company does not know that the physicians (or immediate family members) are stockholders of the company.

Response: In Phase I, we added § 411.353(e), which creates an exception for entities that submit claims for DHS if the entity does not have actual knowledge of, and does not act in reckless disregard or deliberate ignorance of, the identity of the referring physician, and the claim otherwise complies with all applicable laws, rules, and regulations. We believe § 411.353(e) adequately addresses the commenter's concerns, and no further exception is needed.

Comment: One commenter requested that we create a new exception to protect investments in privately held companies. According to the commenter, physicians are investing in a variety of risk-bearing, integrated practice structures, such as physician-sponsored organizations (PSOs) and physician practice management companies (PPMCs). The commenter believed that investments in these companies should be protected.

Response: Nothing in the statute or regulations prohibits investments in entities that do not furnish DHS. In Phase I of this rulemaking, we clarified and significantly narrowed the situations in which a managed care entity will be considered an entity providing DHS. (*See* § 411.351 (definition of "entity"); *see also* 66 FR 943.) We also significantly expanded the statutory exception for referrals to prepaid plans at § 411.355(c) and created a new regulatory exception for risk-sharing arrangements at § 411.357(n). These aspects of the interim final rule largely address the situations raised by the commenter. Of course, if the PSO, PPMC, or other investment entity directly (or indirectly through a subsidiary) furnishes DHS (that is, is an "entity" under the definition at § 411.351), there is no reason to treat it differently from any other DHS entity.

Comment: One commenter was concerned that the January 1998 proposed rule imposed an impossible administrative reporting requirement on publicly-traded companies. Under the August 1995 final rule, DHS entities were required to report to the Secretary any ownership, investment, or compensation arrangements, including the names and unique physician identification number (UPIN) of all physicians holding an ownership or investment interest. However, the regulations released entities from reporting any arrangements that qualified for certain exceptions under the Act, including the publicly-traded securities exception. By contrast, the January 1998 proposed rule proposed requiring entities to report all arrangements with physicians, including those that qualify for an exception. According to the commenter, while the proposal makes some effort to accommodate the burden placed on publicly-traded companies, the reporting requirements are unduly burdensome.

Response: As explained in the section on reporting requirements at section IX below, this Phase II interim final rule eliminates the reporting requirement for shareholder information regarding financial relationships that satisfy the exceptions in § 411.356(a) and (b) for ownership and investment interests in publicly-traded securities and mutual funds.

VII. Additional Exceptions Related Only to Ownership or Investment Prohibition (Section 1877(d) of the Act; Phase II; § 411.356)

A. Hospitals in Puerto Rico (Section 1877(d)(1) of the Act; Phase II; § 411.356(c)(2))

Section 1877(d)(1) of the Act provides that an ownership or investment interest in a hospital located in Puerto Rico is not a financial relationship within the meaning of section 1877 of the Act. We received no comments on the January 1998 proposed rule for this exception. The interim final rule adopts the proposed rule without change.

B. Rural Providers (Section 1877(d)(2) of the Act; Phase II; § 411.356(c)(1))

[If you choose to comment on issues in this section, please include the caption "Rural Providers Exception" at the beginning of your comments.]

Existing Law: With respect to DHS furnished in a rural area (as defined in section 1886(d)(2)(D) of the Act), section 1877(d)(2) of the Act provides an exception for ownership or investment interests in rural providers that furnish DHS in a rural area, if substantially all of the DHS are furnished to individuals residing in a rural area. Section 507 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA), (Pub. L. 108–173), amended section 1877(d)(2) of the Act to specify that, for the 18-month period beginning on December 8, 2003, the rural provider may not be a specialty hospital. Section 507 defined the term "specialty hospital" in a new subsection 1877(h)(7).

Proposed Rule: In the January 1998 proposed rule, we defined a "rural provider" as an entity that furnishes at least 75 percent of its total DHS to residents of a rural area. Consistent with the statute, we provided that the DHS must be furnished in a rural area, and we defined a "rural area" as an area that is not an urban area pursuant to

§ 412.62(f)(1)(ii) of this chapter (that is, an area outside a Metropolitan Statistical Area (MSA)). We proposed eliminating the requirement from the August 1995 final rule that the rural provider be located in a rural area.

Final Rule: Except for codifying the changes made by section 507 of MMA, this interim final rule adopts the January 1998 proposed rule without change. In addition, the Phase II interim final rule creates a limited new exception, § 411.355(j), for certain referrals from a referring physician to a DHS entity with which his or her immediate family member has a financial relationship, if the patient being referred resides in a rural area and there is no DHS entity available in a timely manner in light of the patient's condition to furnish the DHS to the patient in his or her home (for DHS furnished to patients in their homes) or within 25 miles of the patient's home (for DHS furnished outside the patient's home).

We have been asked to "grandfather" investments in DHS entities furnishing services in rural areas that are subsequently reclassified as non-rural areas. As we explained in the August 1995 preamble (60 FR 41954), section 1877 of the Act specifically requires that a rural provider provide DHS in a rural area and provide "substantially all" of its DHS to residents of a rural area. Accordingly, if an area is reclassified and these requirements cannot be met, a physician investor in a rural provider cannot refer Medicare patients for DHS to that rural provider. As noted in section II.A above, we have established a regulatory exception at § 411.353(f) for certain arrangements that inadvertently and temporarily fall out of compliance with certain exceptions. This new exception would apply to rural providers.

Comment: Two commenters stated that the proposed exception was too broad and would unfairly benefit physician-owned DHS entities in rural areas, especially home health agencies. One commenter suggested that the exception be limited to areas where there is no other provider of the designated health care services.

Response: The statutory exception clearly applies to rural providers of DHS regardless of whether other DHS entities already operate in a particular rural area or serve a particular rural patient population. In this regard, the statute may benefit physician-owned entities to the detriment of competing DHS entities that are not owned by physicians. However, the statutory directive is clear.

Comment: A commenter objected to our proposed interpretation of the term "substantially all" in section 1877 of the Act as requiring the DHS entity to furnish at least 75 percent of its DHS to residents of a rural area. The commenter stated that many providers in rural areas are part of larger State-wide or regional health care systems that provide services outside the rural area. The commenter suggested that the "substantially all" requirement should be met if the entity provides rural area residents with one or more DHS on a 24-hour basis.

Response: We disagree that a "24-hour basis" rule would appropriately or adequately implement the "substantially all" requirement. Indeed, the suggested test would create a loophole into which virtually any provider could fit, thereby evading the statutory prohibition. While we understand that many services in rural areas may be provided by entities that are part of larger systems, we are not convinced that fact should permit them to have physician ownership simply because they operate minimally in a rural area. We believe the Congress enacted the rural provider exception to ensure adequate access to DHS for residents in rural areas that might otherwise have difficulty attracting a sufficient number of providers and suppliers. The 75 percent test we are adopting fully implements the statutory requirement that "substantially all" of the DHS of an excepted rural provider be furnished to residents of a rural area.

Comment: One commenter urged that physicians be permitted to own DHS entities in "rural" areas located inside an urban area (that is, inside a MSA). The commenter gave an example of a radiologist married to a primary care physician, where the nearest alternate radiologist is 15 miles away. In the commenter's view, it would be a hardship for patients if the primary care physician were to send them to the remote radiology facility.

Response: The fundamental premise of section 1877 of the Act is that physicians should not own DHS entities to which they refer. We see no reason to expand the scope of the rural provider exception beyond the bright line rural area definition provided in the statute. Moreover, commenters to the various rulemakings in section 1877 of the Act have consistently urged us to adopt "bright line" regulations. The commenter's suggested test would blur an existing clear line and would present a substantial risk of program and patient fraud and abuse.

With respect to the commenter's example of the primary care physician (that is, the referring physician) married to the local radiologist (that is, the DHS entity for purposes of the example), the problem is less with the rural provider exception than with the financial relationship resulting from the family relationship (that is, the radiologist's ownership of the DHS entity is imputed to the referring spouse because of the "immediate family" rule). We discussed this problem in some detail in the Phase I preamble at 66 FR 885. There, we responded to a comment asking whether a referral to a physician spouse in another group practice, who subsequently orders a designated health service for the referred patient, could come within the in-office ancillary services exception. We responded that the referral should be allowed as long as DHS were not the reason for the original referral and any subsequent referrals by the physician spouse fit within the in-office ancillary services exception. We further recognized that there could be some circumstances, particularly in underserved areas, where a spouse may be the only qualified provider of a particular designated health service. We indicated that we were considering a limited additional exception and invited comments.

Having considered the issue further, and in the interest of ensuring access for patients in remote or sparsely-served areas, we have concluded that a limited exception is warranted for intra-family rural referrals where there are no other available providers or suppliers of the DHS in the area to furnish the designated health service in a timely manner in light of the patient's condition. So as to prevent program abuse and to minimize any unfair competitive effect on non-physician owned DHS entities that may seek to provide services in rural areas, we have crafted a narrow exception under our authority at section 1877(b)(4) of the Act. The new exception, at § 411.355(j), excepts intra-family rural referrals if the patient resides in a rural area and there is no DHS entity available to furnish the referred DHS to the patient in a timely manner in light of the patient's condition (i) at the patient's residence in the case of home health services or other services required to be furnished in the patient's home (for example, certain DME, such as hospital beds), or (ii) within 25 miles of the patient's residence in the case of services furnished outside the patient's home. Although we have considered the 15-mile radius suggested by the commenter, we believe a 25-mile radius will best serve our need to ensure access to care, preclude any potential for program abuse, and minimize the potential for any unfair competitive

effects on non-physician owned entities in rural areas. We note that this standard is consistent with that used elsewhere in this regulation.

This new exception focuses on the location where the services are furnished, not where the DHS entity is located. In other words, if a physician knows that a home health agency located 50 miles away is willing to provide home health services to a patient, the patient may not be referred to a family-owned home health agency under this exception. The referring physician or the immediate family member must make reasonable inquiries as to the availability of other persons or entities to furnish DHS.

However, neither the referring physician nor the immediate family member has any obligation to inquire as to the availability of persons or entities located farther than 25 miles from the patient's residence. Depending on the circumstances, reasonable inquiry might include, for example, consulting telephone directories, professional associations, other providers, or Internet resources. As with all exceptions in section 1877(b)(4) of the Act, the financial arrangement between the immediate family member and the DHS entity must not violate the anti-kickback statute.

We note that while this new exception looks to timely availability of DHS, it does *not* take into account the quality of other available DHS entities. In other words, the exception is not available if a physician makes an intra-family referral because he or she is dissatisfied with the quality of care provided by an otherwise available DHS entity. While quality services for Medicare beneficiaries and others is of the highest priority, it is not feasible to craft an objective, qualitative measure in the new exception. Other Federal, State, and local laws and regulations exist to address quality issues.

C. Hospital Ownership (Section 1877(d)(3) of the Act; Phase II; § 411.356(c)(3))

Existing Law: Section 1877(d)(3) of the Act provides that, with respect to DHS provided by a hospital, an ownership or investment interest in a hospital (and not merely a subdivision of the hospital) is not a financial relationship within the meaning of section 1877 of the Act if the referring physician is authorized to perform services at the hospital. Section 507 of MMA amended section 1877(d)(3) to provide that, effective for the 18-month period beginning on December 8, 2003, the ownership or investment interest must not be a specialty hospital. Section 507 defined the term "specialty hospital" in a new subsection 1877(h)(7) of the Act.

Proposed Rule: In the preamble to the January 1998 proposed rule (63 FR 1698), we interpreted the requirement that the DHS be "provided by the hospital" to mean that the services had to be furnished by the hospital and not by another hospital-owned entity, such as a skilled nursing facility or a home health agency. We further stated that the exception only protects referred services provided by an entity that is a "hospital" under the Medicare conditions of participation and that the referring physician must be authorized to perform services at the hospital to which he or she wishes to refer. We further explained that a physician can have an ownership or investment interest in a hospital by virtue of holding an interest in an organization (such as a health system) that owns a chain of hospitals, because the statute does not require the physician to have a direct interest in the hospital (63 FR 1713). The interest must be in the whole hospital, not in a part or department of the hospital.

Final Rule: The Phase I final rule reincorporated the definition of "hospital" that was originally established in the August 1995 final regulations and that was followed by the January 1998 proposed rule (with incidental conforming changes). In this Phase II rulemaking, we are adopting the January 1998 proposed rule for the hospital ownership exception without change, except for conforming amendments to incorporate the provisions of section 507 of MMA.

Comments and responses follow.

Comment: A commenter objected generally to the exception as giving physician-owned hospitals an unfair competitive advantage over not-for-profit community hospitals. The commenter recommended that we limit the exception to situations in which the physician-owned hospital was a sole community provider.

Response: While we recognize that physician-owned hospitals may have a competitive advantage under section 1877 of the Act, the statutory language is clear and applies to physician ownership in any hospital (but not a subdivision, part, or department of a hospital), if the DHS are provided by the hospital and the referring physician is authorized to perform services at the hospital. We believe that the statute requires a *bona fide* authorization to perform services at the hospital (for example, granting privileges to a physician who is not expected to perform services at the hospital is not a *bona fide* authorization to perform services). Notwithstanding, physician ownership of hospitals may implicate the anti-kickback statute, section 1128B(b) of the Act, depending on the circumstances. For example, specialty hospital ventures in which investment opportunities are substantially limited to physicians in a position to refer to the specialty hospital may implicate the anti-kickback statute. Physician ownership interest in specialty hospitals may also implicate section 1877 of the Act, as revised by section 507 of the MMA.

Comment: Several commenters, including several hospital trade associations, objected to our interpretation that the exception only applies to services furnished by the hospital and not to services furnished by other providers owned by the hospital. The commenters believe that the interpretation substantially limits the usefulness of the exception, since many hospitals provide DHS through entities that have separate accreditation or licensure. According to the commenters, the larger the consolidated entity (that is, hospital plus subsidiaries), the greater the attenuation of the financial incentive. A hospital trade association asserted that the proposed interpretation was inconsistent with the statutory language "in the case of DHS provided by a hospital." According to the association, if the statute only protected inpatient and outpatient hospital services provided by the hospital, rather than subsidiaries or affiliates, the use of the broader term "DHS" was unnecessary. Another commenter thought the proposed interpretation was inconsistent with the discussion in the January 1998 proposed rule (63 FR 1713) relating to indirect ownership of a hospital through ownership of stock in a hospital chain.

Response: We believe our interpretation is correct and consistent with the statutory language. The commenter's focus on the use of the term "DHS" ignores the modifying language "provided by a hospital" that immediately follows. The interpretation we are adopting gives meaning to every word in the statutory provision. The interpretation proffered by the commenters would effectively create a blanket exemption for for-profit hospital conglomerates and would create incentives for physicians to refer their patients to such conglomerates for all health services. Instead of attenuating the financial incentive to refer, ownership in a large hospital conglomerate is equally likely to intensify the incentive by increasing the

profit opportunities for the physician. Finally, the commenter's suggested interpretation would give for-profit, hospital-owned DHS entities, including DME suppliers and home health agencies, a significant and unwarranted commercial advantage over their free-standing competitors.

With respect to the comment that our interpretation is inconsistent with the discussion in the preamble to the January 1998 proposed rule addressing ownership interests in hospital chains (63 FR 1713), we disagree. In that discussion, we explained that we would except an indirect ownership interest in a hospital if a direct ownership in the hospital would have been excepted. We explained that the statutory language of the exception was not limited to direct ownership interests and that the exception had to be read in conjunction with section 1877(a)(2) of the Act, which establishes the principle that an ownership interest includes an indirect ownership interest for purposes of section 1877 of the Act. In the case of hospital-owned DHS entities, such as home health agencies, however, direct ownership by physicians would be prohibited (absent some other applicable exception). We see no reason to protect indirect ownership of such entities under the hospital ownership exception, nor do we believe that the Congress intended the exception to be used to circumvent the general prohibition on physician ownership of DHS entities. (We note that, in some cases, another exception-such as the rural provider or in-office ancillary services exception—may apply to referrals from a physician-owner of a hospital to a hospital-owned DHS entity.) Our interpretation conforms conceptually with the language in the exception precluding ownership of a part or subdivision of a hospital.

VIII. Exceptions Relating to Other Compensation Arrangements (Section 1877(e) of the Act; Phase II; § 411.357)

A. Rental of Office Space and Equipment (Sections 1877(e)(1)(A) and (e)(1)(B) of the Act; Phase II; § 411.357(a) and § 411.357(b))

[If you choose to comment on issues in this section, please include the caption "Space and Equipment Rental Exception" at the beginning of your comments.]

The Existing Law: Section 1877(e)(1)(A) and section 1877(e)(1)(B) of the Act set forth exceptions for certain lease arrangements for space and equipment that meet six specific criteria: (i) The lease is in writing, signed by the parties, and specifies the space or equipment covered by the lease; (ii) the space or equipment rented or leased does not exceed what is reasonable and necessary for the legitimate business purposes of the lease or rental and is used exclusively by the lessee when being used by the lessee (except that space leases can include appropriately prorated payments for common areas); (iii) the lease or rental term is at least one year; (iv) the rental charges over the term of the lease are set in advance, consistent with fair market value, and not determined in a manner that takes into account the volume or value of any referrals or other business generated between the parties; (v) the lease would be commercially reasonable even if there were no referrals between the parties; and (vi) the lease meets other requirements set by the Secretary to protect against program or patient abuse. "Fair market value" is defined in section 1877(h)(3) of the Act as the value of rental property for general commercial purposes (not taking into account the property's intended use). For rentals or leases where the lessor is a potential source of patient referrals to the lessee, fair market value means general commercial value not taking into account intended use or the additional value the prospective lessee or lessor would attribute to the proximity or convenience to the lessor. The August 1995 final rule enacted § 411.357(a) and § 411.357(b) (space and equipment rentals, respectively), which tracked the statutory language, including the definition of "fair market value."

The Proposed Rule: The preamble to the January 1998 proposed rule set forth several interpretive changes to the lease exceptions. First, we proposed interpreting the requirement that the lease term be for one year as permitting leases to be terminated for cause within the one-year period, provided the parties did not enter into another lease until after the expiration of the original term (63 FR 1713). We also proposed interpreting the one-year term requirement as requiring that any renewal of a lease be for at least one year, thereby precluding holdover month-to-month leases (63 FR 1713). Second, we proposed interpreting the exclusive use provisions to prohibit subleases, unless the sublease itself satisfied the conditions of the exception (63 FR 1714). Third, we proposed interpreting the exceptions as applying to operating leases, but not capital leases (63 FR 1714). Finally, we proposed that "per click" (for example, per use or per service) equipment rental payments would qualify for the equipment rental exception, unless the payments were for the use of the equipment on patients referred by the lessor-physician (63 FR 1714).

The Final Rule: The Phase I final rule addressed the definitions of several terms used in the lease exceptions, including: "fair market value", "set in advance," "volume or value of referrals," and "other business generated between the parties." Under the final rule, these terms have uniform meanings wherever they appear in the regulations, including the lease exceptions. Additional discussion of the "volume or value of referrals," "other business generated," and "set in advance" definitions appear elsewhere in this Phase II preamble in section IV. The final regulations for the lease exceptions at § 411.357(a) and § 411.357(b) adopt the regulatory language of the January 1998 proposed rule, with minor changes noted in the responses to comments below. Specifically:

- Leases or rental agreements may be terminated with or without cause as long as no further agreement is entered into within the first year of the original lease term and any new lease fits on its own terms in an exception.
- Month-to-month holdover leases are allowed for up to six months if they continue on the same terms and conditions as the original lease.
- All leases or rental agreements, whether operating or capital, are eligible for the lease exceptions if they meet the applicable criteria.
- We have revised the "exclusive use" provision to allow subleases in many cases. The exclusive use test will be considered met as long as the lessee (or sublessee) does not share the rented space or equipment with the lessor during the time it is rented or used by the lessee (or sublessee). A subleasing arrangement may create a separate indirect compensation arrangement between the lessor and the sublessee that would need to be evaluated under the indirect compensation rules.
- "Per click" rental payments are permitted for DHS referred by the referring physician as long as the payments are fair market value and do not take into account the volume or value of referrals or other business generated by the referring physician, as those concepts are defined in § 411.351 and § 411.354.

Our responses to comments on the lease exceptions follow.

Comment: Several commenters requested that we interpret the one-year term rule to include leases or rental agreements that provide for termination without cause, as long as the parties do

not enter into a new agreement during the original term. According to the commenters, parties frequently prefer to use a "without cause" provision even if they have sufficient grounds to justify a "for cause" termination to avoid the costs of litigation. Several commenters disagreed with our position that upon expiration of a contract's term, holdover month-to-month tenancies would trigger the statutory prohibition. A commenter suggested that as long as the holdover was on the same terms and conditions as the original lease, there was little additional risk of abuse.

Response: We agree that there is little risk from "without cause" terminations as long as the parties do not enter into a new lease or rental agreement during the first year of the original term and any new agreement fits on its own terms in an exception. We have modified § 411.357(a)(2) and § 411.357(b)(3) accordingly. We also agree that there is little risk if a holdover month-to-month tenancy or possession proceeds on the same terms and conditions as the original lease or rental agreement for a limited time (that is, no more than six months). We have added § 411.357(a)(7) and § 411.357(b)(6) to reflect these interpretations.

Comment: One commenter sought clarification regarding whether the requirement that an arrangement be commercially reasonable in the absence of referrals only applies to referrals of Medicare DHS. The commenter said that a broader interpretation would prohibit the payment of any amounts for referrals of private pay DHS as part of the acquisition of the practice of a non-retiring physician.

Response: In Phase I, we defined a referral for purposes of section 1877 of the Act to mean a request for, or plan of care that includes, a "designated health service" and "designated health service" to include only Medicare-covered services. We intend to use uniform definitions in these regulations whenever possible. For purposes of § 411.357(a)(6) and § 411.357(b)(5), we interpret the restriction to mean that the lease or rental agreement must be commercially reasonable even if no referrals of Medicare DHS are made to the DHS entity. We note, however, that, in addition to the commercial reasonableness condition, sections 1877(e)(1)(A)(iv) and (e)(1)(B)(iv) of the Act provide that rental charges may not be determined in a manner that takes into account "other business generated between the parties." As discussed in this preamble in section IV, § 411.354(d)(3) provides that "other business generated between the parties" includes private pay health care business (but not personally performed services). Of course, as with all exceptions and consistent with the statutory scheme and purpose, the conduct of the actual financial relationship between the parties must comport with the terms of the written agreement. The written agreement is the documentary evidence of the underlying financial relationship.

Comment: A number of commenters objected to the interpretation in the January 1998 proposed rule that the exclusive use requirement in the lease exceptions prohibits subleases. These commenters recommended that we permit subleases if they meet the other requirements of the exception.

Response: We concur with the commenters that the Congress did not intend for the lease exceptions to preclude lessees from subletting leased space or equipment. The statutory lease exceptions provide that the lessee must use the leased space or equipment "exclusively" when the lessee is using the space or equipment. Upon further consideration of the statutory scheme and purpose, we believe a fair reading of the exclusive use provision in the context of the lease exceptions is that the rented space or equipment cannot be shared with the lessor when it is being used or rented by the lessee (or any subsequent sublessee). In other words, a lessee (or sublessee) cannot "rent" space or equipment that the lessor will be using concurrently with, or in lieu of, the lessee (or sublessee). (The statute and these regulations do allow shared common space when the rent is appropriately prorated.) Thus, for example, if a DHS entity rents examination rooms from a physician practice, the physician practice may not use those same examination rooms while the lessee (or a sublessee) is using or renting them.

To preclude referring physicians or group practices from circumventing this rule by setting up separate real estate holding companies or subsidiaries to act as the "lessor", we are modifying the regulations to preclude sharing of rented space with the lessor or any person or entity related to the lessor, including, but not limited to, group practices, group practice physicians, or other providers owned or operated by the lessor. We believe our interpretation effectuates congressional intent to curb abusive rental arrangements, gives meaning to the exclusive use requirement in the statutory exceptions, and, in conjunction with other conditions in the exceptions (such as the fair market value and "reasonable and necessary for legitimate business purposes" requirements) adequately protects against abuses, while allowing legitimate subletting arrangements.

Persons or entities should be aware that, depending on the circumstances, a sublease may create an indirect compensation arrangement between the original lessor and the sublessee through a chain of leases (that is, compensation arrangements). The indirect compensation arrangement thus created would have to fit in the indirect compensation arrangements exception in § 411.357(p).

Finally, we note that, depending on the circumstances, equipment leases may be eligible alternatively under the new fair market value exception in § 411.357(l) (66 FR 917). However, that exception, which is limited to items and services provided by physicians, does not apply to space leases.

Comment: Several commenters disagreed with our interpretation that the lease exceptions apply only to operating leases and not capital leases.

Response: We agree with the commenters. Any kind of *bona fide* lease arrangement that in form and substance satisfies the regulatory conditions can fit in the exceptions.

B. Bona Fide Employment Relationships (Section 1877(e)(2) of the Act; Phase II; § 411.357(c))

[If you choose to comment on issues in this section, please include the caption "Employment Relationships Exception" at the beginning of your comments.]

Existing Law: Section 1877(e)(2) of the Act establishes an exception for payments made by an employer to a physician (or immediate family member) with whom the employer has a *bona fide* employment relationship for the provision of services, if certain conditions are met. These conditions require that—

(1) The employment is for identifiable services;

(2) The amount of the payment is fair market value for the services and is not determined in a manner that takes into account (directly or indirectly) the volume or value of referrals by the referring physician;

(3) The employment agreement would be commercially reasonable even if no referrals were made to the employer; and

(4) The employment meets such other requirements as the Secretary may impose to protect against program or patient abuse.

The statute expressly provides that employers may pay employees productivity bonuses based on services the employee personally performs. The statute defines an "employee" as an individual who would be considered an

employee under the usual common law rules applicable in determining the employer-employee relationship, as applied for purposes of section 3121(d)(2) of the Internal Revenue Code of 1986. (*See* section 1877(h)(2) of the Act.) We note that there is no presumption of employment under section 1877 of the Act.

The August 1995 final rule incorporated the provisions of sections 1877(e)(2) and 1877(h)(2) of the Act into the regulations in § 411.357(c) and § 411.351, respectively, without imposing any additional requirements.

Proposed Rule: The January 1998 proposed rule retained the employee exception in § 411.357(c), with certain additional requirements. The preamble to the January 1998 proposed rule took the position that the productivity bonus provision created an improper financial incentive for physicians to generate referrals of DHS that the physician would personally perform. Thus, under the authority in section 1877(e)(2)(C) of the Act to add additional requirements in the interest of protecting against abuse, we proposed excluding any productivity bonus based on a physician's own referrals of DHS, even where personally performed. We pointed out that this restriction would not limit a physician's ability to receive productivity bonuses for generating referrals of non-DHS or non-covered services. The proposed rule also added a restriction on compensation related to other business generated between the parties that is not present in the statute. The proposed rule made no changes to the August 1995 final rule definition of "employee."

Final Rule: We are adopting the January 1998 proposed rule without the proposed limitation on productivity bonuses or the addition of the "other business generated" language. The limitation is no longer relevant given our determination in the Phase I rulemaking that personally performed DHS are not referrals for purposes of section 1877 of the Act. Moreover, as we explained in the Phase I preamble, the statute contemplates that employed physicians can be paid in a manner that directly correlates to their own personal labor, including labor in the provision of DHS. What the statute does not permit are payments for an employee's productivity in generating referrals of DHS performed by others (66 FR 876). Except as permitted under the group practice definition for employees of group practices, "incident to" DHS may not be the basis for productivity bonuses paid to employed physicians. We are adopting without change the January 1998 proposed rule definition of "employee", which follows the statutory language.

Comments to the "employee" exception and our responses follow.

Comment: Several commenters asked us to expand the statutory definition of "employee" in § 411.351 beyond the common law definition established in the statute to include leased employees as defined by State law.

Response: We believe that the statutory definition is clear and that incorporation of State law definitions of employment would be inconsistent with the statute. As noted above in the discussion of group practices, to the extent that a leased employee is a *bona fide* employee of the DHS entity under IRS rules, remuneration paid to that employee would be eligible under the exception. As with all exceptions, the DHS entity would bear the burden of establishing the necessary indicia of employment. There is no presumption of employment.

Comment: A commenter expressed concern that physicians employed by health care systems are pressured into referring to DHS entities within the same health system, sometimes without regard to a patient's best interests. Other commenters, however, urged that employers should be allowed to control their employees and should be able to require referrals to the employer or an entity affiliated with the employer. These commenters believed that the proper focus is on whether the referral requirement interferes with a physician's medical judgement. A commenter representing emergency room physicians explained that emergency room physicians are often constrained when making referrals because of hospital policies and rules, on-call policies, contractual arrangements, patient's prior contact with primary care doctors or specialists, common practice, or professional courtesy.

Response: We agree that health care referrals should always take a patient's best interests into account and that referral requirements should not interfere with a physician's medical judgement. However, we believe that section 1877 of the Act was not intended to interfere unduly with legitimate employment and health system structures. As discussed above, we have narrowed the rule for directed referrals in § 411.354(d)(4) to employers, managed care organizations, and certain contractual arrangements (including many emergency room physician contracts). We have concluded that a referral restriction will not violate the volume and value of referrals standard in section 1877 of the Act if—

- The referring physician is compensated at fair market value for services performed in an arrangement that otherwise fits within the employment (or another) exception;
- The referral restriction relates solely to the physician's services covered by the scope of the employment or contract and is reasonably necessary to effectuate the legitimate purposes of the compensation relationship; and
- Referrals are not required (directly or indirectly)—

A. When the patient expresses a different choice,

I. When the patient's insurer determines the provider, or when the referral is not in the best medical interest of the patient in the physician's judgment.

We believe this narrower rule strikes a reasonable balance between the legitimate business needs of employers and health systems, and protection of patient choice and physician judgment.

Our determination here is limited to the effect of directed referrals under section 1877 of the Act. Other laws and regulations exist to address medically inappropriate referrals.

Comment: A number of commenters objected to the January 1998 proposal to prohibit productivity bonuses based on personally performed DHS. Some commenters suggested that the limitation should apply only to referrals of DHS performed by others. Some commenters urged, however, that employers be permitted to base productivity bonuses on DHS rendered under the supervision of an employee or, in the case of physicians employed by a group practice, under the supervision of another member of the group practice. A commenter urged that productivity bonuses be permitted for supervision of "incident to" services that are not DHS.

Response: We are not adopting the 1998 proposed prohibition. In Phase I, we concluded that personally performed DHS are not referrals within the meaning of section 1877 of the Act. Accordingly, physicians may be paid productivity bonuses based on personally performed services, including personally performed DHS. In addition, nothing in the exception precludes a productivity bonus based solely on personally performed supervision of services that are not DHS, since that bonus would not take into account the volume or value of DHS referrals.

Productivity bonuses based on supervising DHS raise a different issue. We are concerned that, in some cases, a payment for supervision services may

merely be a proxy payment for having generated the DHS being supervised. In many cases, especially in hospitals, the supervision required under Medicare rules is minimal, and the supervisor need do nothing more than be present in the facility while conducting other work. Accordingly, we are concerned that such payments could mask improper cross-referral or circumvention schemes. We note that any payment for supervision services must meet the fair market value standard in the exception.

As for productivity bonuses for employees of group practices, we expect that most group practices will rely on the in-office ancillary services exception, rather than the employment exception, to protect referrals by employed physicians. In that case, the group practice may compensate the employed physicians under the productivity bonus provisions of the "group practice" definition in § 411.352 (discussed above at section V.C). If a group practice chooses to rely on the employment exception, it must restrict productivity bonuses to personally performed services and comply with the overall fair market value requirement.

Comment: Two commenters asked whether the employment exception would be satisfied if an employer paid an employed physician a flat fee for each mid-level provider he or she supervises in order to compensate the physician for the time spent on supervision.

Response: We see nothing in the exception that would bar flat fee compensation based on the number of mid-level providers under the physician's supervision, as long as the compensation is fair market value for actual time dedicated to supervision services and is not determined in any manner that takes into account, directly or indirectly, the volume or value of DHS referrals generated by the physician. The burden of proving the time will be on the DHS entity.

Comment: A number of commenters raised questions regarding physician compensation that is stable and unvarying, but could still be viewed as predicated on the volume or value of referrals. For example, some commenters inquired regarding exclusivity provisions in employment contracts (for example, contracts for hospital-based physicians). The commenters noted that the exclusivity provision could be viewed as taking into account the volume or value of referrals, even if the dollar compensation paid to the exclusively employed physician is unvarying. One commenter observed that exclusivity in a hospital-based physician contract may be important for liability and insurance purposes. Similarly, some commenters asked for clarification regarding inclusion of covenants not to compete in employment contracts.

Response: We agree that exclusive contracting arrangements between hospitals and traditional hospital-based physicians (radiologists, pathologists, anesthesiologists, and emergency room physicians) can, in certain circumstances, serve legitimate business purposes. To the extent that these payments are for personally performed services, we do not believe they raise any substantial concerns under the statute or regulations. If the payments reflect or take into account non-personally performed services, they may raise concerns under the statute and would merit case-by-case determination, regardless of the apparent fixed payment. In the circumstances described by the commenters, non-compete covenants in employment contracts generally do not take into account the volume or value of referrals. However, the payment for the non-compete covenant must be at fair market value. (We note that, in some contexts, these covenants in conjunction with a lease arrangement may not be able to satisfy the special fair market value rules for leases of space and equipment.)

Comment: Several commenters urged that the exception permit hospitals to pay incentives to employed physicians based on meeting hospital or drug utilization targets. The commenters believe that these payments should not be construed as based on the volume or value of referrals for purposes of section 1877 of the Act.

Response: There is no exception in the statute or in these regulations that would permit payments to physicians based on their utilization of DHS, except as specifically permitted by the risk-sharing arrangements, prepaid plans, and personal service arrangements exceptions. None of those exceptions permit those payments other than in the context of services provided to enrollees of certain health plans. We believe that the Congress intended to limit these kinds of incentives consistent with the civil monetary penalty provision at section 1128A(b)(1) of the Act that prohibits a hospital from paying physicians to reduce or limit care to hospital patients. Given that prohibition, we cannot say that payments based on lowering utilization present no risk of fraud or abuse. Our specific authority in section 1877(e)(2)(D) of the Act to add additional requirements to the employment exception is limited to requirements needed to protect against program or patient abuse. Since section 1128A(b)(1) of the Act represents a legislative determination of potential abuse, we cannot create an exception for those activities.

Comment: According to a commenter representing an integrated delivery system, employers should be able to reward employees based on appropriateness of referrals as measured by quality-oriented medical records review and compliance with clinical protocols and guidelines. In addition, the commenter supported allowing employers to pay employed physicians in part based on volume data in relationship to industry norms. The commenter believed that the statutory language, unencumbered by the 1998 proposed addition, would achieve this result.

Response: We agree that nothing in the statutory exception bars payments based on quality measures, as long as the overall compensation is fair market value and not based directly or indirectly on the volume or value of DHS referrals, and the other conditions of the exception are satisfied. For example, nothing in the statute or regulations would prohibit payments based on achieving certain benchmarks related to the provision of appropriate preventive health care services or patient satisfaction. To the extent that a payment gives a physician an incentive to reduce the volume or value of DHS, it must be a qualified physician incentive plan payment under the personal service arrangements exception or fit in the prepaid plans or risk-sharing arrangements exceptions. Moreover, hospitals should be aware that payments to reduce or limit services—which could include certain payments based on "appropriateness" of referrals—may violate the civil money penalty provision at section 1128A(b)(1) of the Act.

Comment: A commenter presented the following scenario. A hospital employs a physician at an outpatient clinic and pays the physician for each patient seen at the clinic. The physician reassigns his or her right to payment to the hospital, and the hospital bills for the Part B physician service (with a site of service reduction). The hospital also bills for the hospital outpatient services, which may include some procedures furnished as "incident to" services in a hospital setting. The commenter's concern is that the payment to the physician is inevitably linked to a facility fee, which is a designated health service (that is, a hospital service). Accordingly, the commenter wondered whether the payment to the physician

would be considered an improper productivity bonus based on a DHS referral (that is, the facility fee).

Response: The fact that corresponding hospital services are billed would not invalidate an employed physician's personally performed work, for which the physician may be paid a productivity bonus (subject to the fair market value requirement).

Comment: A commenter described the following scenario. A DME supplier leases a supply closet in a physician's office. The DME supplier and the physician share a non-physician employee who measures braces and fits other supplies. If the physician does not see the patient, the DME supplier bills Medicare. If the physician does see the patient, the physician bills Medicare for a level 1 service. The DME supplier and the physician each pay for the employee's services for which each bills. The commenter inquired whether the shared employee creates a financial relationship.

Response: The scenario presented by the commenter suggests several possible financial relationships. First, the "shared" employee raises significant issues. If the salary paid by the DME supplier covers any portion of the employee's work that benefits the physician (for example, work for which the physician would otherwise have incurred costs), that portion of the employee's salary could be remunerated to the physician that would create a financial relationship between the physician and the DME company. Second, if the shared employee is a family member of a referring physician, the employee's salary payments from the DME supplier would also create a compensation arrangement with the referring physician. Third, the rental of the supply closet creates a direct financial relationship between the physician and the DME supplier.

Comment: A commenter inquired whether a physician employed by a hospital-owned management services organization ("MSO") could refer to the hospital if his or her compensation from the management services company fits in the employment exception.

Response: The arrangement described by the commenter is a potential indirect compensation arrangement (hospital—MSO—physician) that would need to be analyzed under the indirect compensation rules (discussed above in section II.B). Under the indirect compensation analysis, the physician's compensation would be excepted if it is fair market value for services and does not reflect the volume or value of referrals to the hospital (that is, the DHS entity). The employment exception is not applicable in the commenter's example, because the exception applies to direct employment arrangements between a referring physician and an employer that is an entity furnishing DHS (for example, section 1877(e)(2)(C) of the Act: "even if no referrals were made *to the employer*") (emphasis added). In the example, the hospital—not the employer MSO—is the entity furnishing DHS. Thus, the referring physician's financial relationship with the hospital is indirect.

Comment: A commenter urged that a physician employed by a hospital should be allowed to refer to a home health agency owned by the hospital.

Response: As in the preceding comment, the commenter's scenario potentially involves an indirect compensation arrangement between the employed physician and the home health agency (the DHS entity) that would have to fit in the indirect compensation arrangements exception. Under that exception, the compensation paid by the hospital to the physician could not vary or otherwise take into account referrals to the home health agency. However, the hospital can require its employees to refer to its home health agency without running afoul of the restriction on compensation that reflects referrals if the requirements of § 411.354(d)(4) are satisfied.

C. Personal Service Arrangements (Section 1877(e)(3) of the Act; Phase II; § 411.357(d))

[If you choose to comment on issues in this section, please include the caption "Personal Services Exception" at the beginning of your comments.]

Existing Law: Section 1877(e)(3) of the Act establishes an exception for personal service arrangements if—

(1) The arrangement is set out in writing, signed by the parties, and specifies the services covered by the arrangement;

(2) The arrangement covers all of the services to be provided by the physician (or immediate family member) to the entity;

(3) The aggregate services contracted for do not exceed those that are reasonable and necessary for the legitimate business purposes of the arrangement;

(4) The term of the arrangement is for at least one year;

(5) The compensation paid over the term is set in advance, does not exceed fair market value, and, except for certain physician incentive plans, is not determined in a manner that takes into account the volume or value of referrals or other business generated between the parties;

(6) The services do not involve the counseling or promotion of an unlawful business arrangement or other activity; and

(7) The arrangement meets the other requirements that the Secretary may impose by regulation to protect against program or patient abuse.

For purposes of the exception, a physician incentive plan (PIP) is defined in section 1877(e)(3)(B)(ii) of the Act as "any compensation arrangement between an entity and a physician or physician group that may directly or indirectly have the effect of reducing or limiting services provided with respect to individuals enrolled with the entity." Under a PIP, compensation may be determined in a manner that takes into account (through a withhold, capitation, bonus or otherwise) directly or indirectly the volume or value of referrals or other business generated between the parties, provided that the PIP meets the following requirements—

(1) No specific payment is made as an inducement to reduce or limit medically necessary services provided with respect to a specific enrolled individual;

(2) If the PIP places the physician at substantial financial risk, the PIP complies with the requirements in section 1876(i)(8)(A)(ii) of the Act; and

(3) Upon the Secretary's request, the entity provides the Secretary with access to descriptive information regarding the PIP to enable the Secretary to determine whether the PIP is in compliance with applicable requirements under the personal services exception.

The August 1995 final rule incorporated section 1877(e)(3) of the Act into regulations in § 411.357(d) and the definition of "physician incentive plan" in § 411.351, without imposing any additional requirements.

Proposed Rule: The January 1998 proposed rule contained several technical changes and some additional proposed interpretations. The technical changes would conform the PIP requirements to the regulations governing PIPs issued on March 27, 1996 (61 FR 13430) established in § 417.479; delete § 411.357(d)(3), a time-sensitive provision that is now obsolete; and reorder certain paragraphs for clarity.

We proposed interpreting the exception as covering services furnished by a physician or his or her immediate family member (63 FR 1701). We proposed interpreting the requirement that the proposed arrangement cover all services to be provided by the physician (or immediate family member) to permit multiple agreements between the

physician and the entity if each individual agreement fits in an exception and all of the agreements incorporate one another by reference (63 FR 1701). With respect to covered "services" under the exception, we concluded that the exception is limited to "personal services", that is, services of any kind performed personally by an individual for an entity, but not including any items or equipment. Thus, "personal services" would not be limited to generic Medicare services (defined in § 400.202). We further interpreted the exception to permit the contracting physician (or immediate family member) to perform the services personally or to provide the services through technicians or others whom they employ (63 FR 1701). We interpreted the exception to apply to situations in which an entity has an arrangement with either an individual physician (or immediate family member) or a group practice to provide personal services. Thus, a hospital could use the exception if it contracted with a group practice for purposes of having group members serve as the hospital's staff (63 FR 1702).

With respect to PIPs, we concluded that the exception applies only when the entity paying the physician or physician group is the kind of entity that enrolls its patients, such as a health maintenance organization (63 FR 1701).

Final Rule: As described in more detail in the responses to comments, we are adopting the January 1998 proposed rule, with some modifications. These modifications include clarifying the treatment of the termination provisions, clarifying that payments from downstream subcontractors are included in the physician incentive plan exception, and easing the incorporation by reference rule. These changes are discussed in greater detail in the following comments and responses. In addition, we are making a technical change to § 411.357(d)(2)(iii) (the physician incentive plan (PIP) exception) by updating the citations to reflect that, since January 1, 1999, the PIP requirements that apply to Medicare risk contracts have been set forth at § 422.208 and § 422.210.

As indicated in the Phase I preamble (66 FR 897) and above in this preamble, we believe that the personal service arrangements exception is the applicable exception for most foundation-model physician practices. The fair market value exception may also be available, depending on the circumstances. Changes we have made to the regulations, particularly in the definitions of "referral" and "set in advance," should enable foundation-model practices to use the personal service arrangements exception to engage freely in common foundation-model structures and compensation arrangements. In particular, the regulations make clear that independent contractor physicians—including most, if not all, foundation-model physicians—can receive compensation that takes into account the volume or value of personally performed services (that is, services that are not referrals for purposes of section 1877 of the Act) and can be compensated using a percentage-based compensation methodology as long as the methodology is set in advance. We also discuss, in the following responses to comments, new "safe harbors" for determining fair market value for physician services.

Comment: Several commenters suggested that the exception not be limited to contracts between entities and physicians or group practices. For example, the commenters suggested that contracts with hospitals, universities, or corporations for the services of employed physicians should be included.

Response: In light of the new exceptions for fair market value compensation arrangements in § 411.357(l), indirect compensation arrangements in § 411.357(p), and risk-sharing arrangements in § 411.357(n), we do not believe any further change is necessary to accommodate the types of arrangements described by the commenter under section 1877 of the Act.

Comment: Several commenters sought clarification concerning whether the aggregate compensation paid under a personal services arrangement needed to be set in advance.

Response: The aggregate compensation need not be set in advance under the personal service arrangements exception. The requirements under the "set in advance" standard are set forth in § 411.354(d)(1) and discussed in this Phase II preamble at section IV above.

Comment: Many commenters stated that the proposed regulations would not permit any termination of a personal service arrangement without cause before the end of the one-year term. These commenters believed that termination should be permitted for any reason as long as the parties do not enter into the same or substantially the same arrangement within the original term.

Response: As with leases, we agree that there is little risk as long as the parties do not enter into the same or substantially the same arrangement during the first year of the original term and any subsequent agreement fits on its own terms in an exception. This provision includes, but is not limited to, arrangements for the same or substantially same services to the same or substantially same patients or entities. We have modified § 411.357(d)(1)(iv) to reflect this interpretation.

Comment: A number of commenters urged that we expand the PIP exception to include incentive plans with entities other than HMOs. Commenters also advocated for expansion of the PIP exception to include arrangements involving subcontractors of the HMO.

Response: The PIP exception in the final rule has been modified to clarify that it applies to downstream subcontractor arrangements related to health plan enrollees. We addressed the issue of incentive plans with other entities in Phase I in connection with the new risk-sharing arrangements exception, discussed in the Phase I preamble (66 FR 912–914).

Comment: Several commenters recommended that the exception be modified to allow physicians to hire independent contractors or use wholly owned companies to perform services they have contracted to provide.

Response: The commenter's proposal would present a potential for abuse. The personal service arrangements exception is not limited to professional services, and physicians may be hired to provide non-physician services as well. Allowing physicians to use independent contractors to provide services would allow a physician to enter into brokering arrangements for virtually any kind of service and take a fee as a middle person, without actually performing any services. This is contrary to the intent and purpose of the statute. Using *bona fide* employees to provide contract services is different. The employment relationship ties the employee to the physician in a manner evidencing a *bona fide* business operated by the physician to provide the services. Along these same lines, we agree that a physician should be able to use a wholly owned company to provide contracted services under the exception.

Comment: One commenter inquired about the relationship between supervision requirements and services provided by a physician's employees.

Response: Nothing in these regulations affects the supervision necessary for Medicare payment and coverage purposes. A physician may only provide services through his or her employees if he or she provides the requisite level of supervision under the applicable payment and coverage rules.

Comment: Several commenters objected to our proposed interpretation

that items and equipment cannot be included in an arrangement under the personal service arrangements exception (63 FR 1701). These commenters urged that equipment or items incidental or peripheral to the provision of personal services should be covered by the exception, if the equipment or items comprise only a minor component of the overall arrangement. These commenters urged that providers not be required to parse an arrangement through several exceptions. One commenter noted that there is a difference between a lease, in which exclusive possession of the leased equipment is transferred, and a services contract in which the services provider uses his or her own equipment to provide a service. One commenter inquired, for example, whether parties contracting for personal services and an equipment lease would have to have two separate contracts.

Response: We have reconsidered our position on items or equipment under the personal service arrangements exception. It is a common practice for many independent contractors to provide the tools of their trade in connection with their services contracts. As a practical matter, given the similarities between the personal service arrangements and equipment rental exceptions, the proposed exclusivity rule would be unnecessarily formalistic. Both exceptions require fair market value compensation that does not take into account the volume or value of DHS referrals or other business generated by the referring physician. For purposes of determining fair market value, however, we will separate services and equipment contained in a single arrangement. As previously noted, in all cases the conduct of the actual financial relationship between the parties must comport with the terms of the written agreement.

Comment: Several commenters inquired about various forms of remuneration to "voluntary" or "affiliated" physicians. For example, one commenter wanted the exception to cover "voluntary leadership" arrangements in which physicians volunteer several hours per week to enhance patient care or further an organization's health care mission, receiving only incidental out-of-pocket expenses or training. According to the commenter, the time volunteered by the physician almost always exceeds the value of the training and costs incurred.

Response: Nothing in the statute precludes a physician from "donating" time spent in excess of the fair market value of the compensation received in the circumstances described by the commenter.

Comment: A commenter explained that many integrated delivery systems rely on affiliation agreements to encourage integration in managed care endeavors. The commenter believed that integrated delivery systems should be able to structure compensation under affiliation agreements that reflects the volume or value of appropriate referrals. The commenter suggested that the PIP exception in § 411.355(d)(2) be expanded to apply equally to compensation "intended to improve the quality of patient care."

Response: As discussed earlier in the context of employment arrangements, we do not believe an expansion of the physician incentive plans exception is appropriate. Compensation arrangements that reward physicians for reducing or limiting care to patients under their clinical care are subject to abuse. (*See,* for example, section 1128A(b)(1) of the Act.) The only permitted arrangements are those that will fit in an existing exception. We note that physician incentive payments under existing exceptions are limited to enrollees of a health plan. Section 1877 of the Act is not a *per se* prohibition on other forms of incentive payments that are not based on the volume or value of referrals or other business generated between the parties and that do not directly or indirectly reduce or limit medically necessary patient care. For example, a bonus paid to a physician for ensuring that his or her patients received preventive care services would not be considered to be a payment to reduce or limit medically necessary services.

Comment: Several commenters stated that requiring multiple agreements to incorporate one another by reference imposes an undue administrative burden on providers, particularly large providers with high volumes of physician contracts, all subject to various commencement and termination dates. In addition, one commenter was concerned that the incorporation requirement potentially created a situation in which an agreement could be technically breached due to a default under a marginally related contract. The commenter offered the following example: if the wife of a physician were to breach her contract as a fitness instructor at a hospital, that breach could taint the hospital's contract with her spouse's group practice for the provision of medical services to hospital patients. Some commenters recommended that the incorporation requirement be deleted or that it be changed to require a cross-reference to a master list of contracts that would be maintained and updated centrally.

Response: We agree that the incorporation requirement may impose a significant burden on entities. We included the incorporation requirement to fulfill the statutory directive in section 1877(e)(3)(A)(ii) of the Act that arrangements cover all of the services to be provided. To alleviate the burden on entities, we are adopting the commenters' suggestion and changing the regulations to require either incorporation of other agreements or cross-referencing to a master list of contracts that is maintained and updated centrally. We understand that some providers may organize their contracting functions by department or otherwise have more than one central repository for contracting data. The master list alternative will be satisfied if more than one master list is maintained and cross-referenced, so long as the several master lists, taken together, cover all of the contracts with the referring physician or immediate family member. Moreover, annual or other regular financial statements (such as quarterly statements) that clearly show parties, dates, payments, and purposes of payments separately for each personal service contract can qualify as a master list if the statements are appropriately cross-referenced in the agreement. We are adding a requirement that the master list or lists be made available for inspection by the Secretary upon request and that the list or lists be maintained in a manner that preserves the historical record (that is, updating should not be done in a manner that erases records of past contracts). We believe this solution adequately fulfills the statutory "covers all" requirement while minimizing the burden on entities.

Comment: A commenter expressed concern that the personal service arrangements exception does not contain an exception for productivity bonuses, noting that this is a particular issue for contractors of group practices, who under the January 1998 proposed rule were not considered members of the group. The commenter asked whether independent contractors can be paid a percentage of collections related to work personally performed by the contractor if the percentage is fair market value and not based on DHS referred to the group by the independent contractor.

Response: Changes made in the Phase I rulemaking largely address the commenter's concern. First, under Phase I, independent contractors are considered "physicians in the group" and may be paid productivity bonuses

in accordance with the group practice rules set forth in § 411.352. However, if the independent contractor generates DHS referrals for the group practice, and the group practice relies on the personal service arrangements exception rather than the in-office ancillary services exception to protect those referrals, then the compensation rules of the personal service arrangements exception would apply. Second, under the Phase I rules, the definition of "referral" no longer includes personally performed DHS, so compensation paid for personally performed services does not vary based on the volume or value of referrals. Thus, all physicians, whether group practice physicians, employed physicians, or independent contractor physicians, can be compensated for personally performed DHS, whether self-referred or referred by someone else. (We note that, under the statute, productivity bonuses for services "incident to" personally performed services are only permitted for physicians in group practices.) The personal service arrangements exception requires that a physician's compensation be "set in advance." Under changes we are making in this Phase II rule to the "set in advance" requirement in § 411.354(d)(1), certain percentage compensation arrangements will be considered "set in advance." Assuming that the new "set in advance" requirements are met, the scenario described by the commenter would be permitted, since the compensation is fair market value and none of the compensation relates to referrals of DHS.

Comment: Two commenters representing independent dialysis laboratories urged us to issue additional regulations prohibiting referrals between dialysis centers and laboratories owned by a common parent company. These commenters believed that the two major corporations that own dialysis facilities should be subject to the same referral prohibition as physicians. In addition, these commenters raised concerns about medical director contracts or other employment or services contracts entered into in connection with a physician's sale of his or her dialysis facility to a corporate owner. The commenters believe that these contracts—which often are long-term and include non-compete clauses—are part of the overall purchase price of the facility and should be considered when determining whether the sale is at fair market value. They also believe that these contracts serve to lock the physician into referring to the corporation's laboratories, thus competitively disadvantaging independent laboratories.

Response: Section 1877 of the Act is limited to referrals by physicians and does not cover referrals among commonly held entities, absent involvement of a referring physician. With respect to medical director contracts or other contracts between corporate dialysis facilities and physicians, these arrangements may create indirect compensation arrangements between the medical director and the corporate laboratory that would need to fit in the indirect compensation exception. In other words, the medical director contract creates a link between the physician and the dialysis facility, which is linked through ownership to the parent corporation, which is linked by ownership to the corporation's laboratory (the DHS entity). If the physician's compensation takes laboratory referrals into account, the arrangement would not fit in the exception. (See discussion of indirect arrangements in section II.B)

Comment: One commenter recommended that we establish a benchmark for evaluating whether end-stage renal disease (ESRD) facility medical director compensation is fair market value by establishing a presumed appropriate fair market value hourly rate.

Response: With respect to the commenters' suggestion that we fix a fair market value benchmark for medical directors, we are not in a position—nor would it be appropriate—to set a fixed, industry-wide fair market value rate for ESRD medical directors. However, we are creating a "safe harbor" provision under the definition of "fair market value" in § 411.351 for hourly payments to physicians for their personal services. The "safe harbor" provision applies to payments for services provided personally by the physician, but not to services provided by the physician's employees or other persons or entities. The safe harbor is not limited to medical director services for ESRD facilities, but may be used for other hourly physician compensation paid by any DHS entity.

The safe harbor consists of two methodologies for calculating hourly rates that will be deemed to be "fair market value" for purposes of section 1877 of the Act. The first methodology requires that the hourly payment be less than or equal to the average hourly rate for emergency room physician services in the relevant physician market, provided there are at least three hospitals providing emergency room services in the market. The second methodology requires averaging the fiftieth percentile salary for the physician's specialty of four national salary surveys and dividing the resulting figure by 2000 hours to establish an hourly rate. The "safe harbor" provides a choice of six recognized, readily-available surveys. If the relevant specialty does not appear on the survey, the safe harbor looks to the salary for general practice.

Compliance with these safe harbor methodologies is entirely voluntary; DHS entities may continue to establish fair market value through other methods. DHS entities that choose to use either of the two "safe harbor" methodologies will be assured that their compensation rates will be deemed fair market value for purposes of section 1877 of the Act. (Their arrangements will still need to meet all other conditions of an applicable exception.) For example, we believe that nephrology salary data from four surveys could be used to calculate an hourly payment for medical directors of ESRD facilities (that is, the average fiftieth percentile nephrologist salary from four surveys divided by 2000 hours). DHS entities using other methodologies to determine fair market value will continue to bear the risk that their rates may not be considered fair market value.

For purposes of section 1877 of the Act, we would treat a sale of a dialysis facility and an accompanying employment contract as separate arrangements to be evaluated under the isolated transactions exception and the employment exception, respectively. Both exceptions require fair market value compensation.

Finally, we note that the arrangements described by the commenters may be problematic under the anti-kickback statute.

Comment: Commenters representing independent dialysis laboratories stated that dialysis corporations sell dialysis supplies at a discount to physicians who agree to refer to the corporation laboratories and enter into management contracts with independent dialysis facilities that steer the facility business to the corporation laboratories.

Response: If the dialysis corporations sell items or services to physicians at a price below fair market value (including any discount), the arrangement will not fit in the exception for payments by a physician for items or services at § 411.357(i). Similarly, cut-rate management contracts in exchange for the ability to steer business will not fit in an exception. Again, these arrangement may raise concerns under the anti-kickback statute.

Comment: Two commenters recommended that the personal service arrangements exception allow the substitution of *bona fide locum tenens* physicians, consistent with the Medicare reassignment rules.

Response: A physician may use a *locum tenens* physician to provide contracted services under this exception. To determine whether a physician is a *bona fide locum tenens* physician for purposes of this rule, we will look to the definition of "locum tenens" in § 411.351, except that the requirement in the definition that the regular physician must be a member of a group practice will not apply (for example, the regular physician could be a sole practitioner). We will apply this standard, even if the contracted services are not reimbursable by Medicare. Also in this regard, in Phase I we expanded the group practice definition to include independent contractors and *locum tenens* physicians.

Comment: In the preamble of the January 1998 proposed rule (63 FR 1700), we indicated our intent to interpret the "commercially reasonable" requirement for purposes of all exceptions that require commercial reasonableness to mean that an arrangement was a sensible, prudent business arrangement from the perspective of the particular parties involved, even in the absence of potential referrals. In the commenter's view, this interpretation injected an unwarranted subjective element into the test.

Response: An arrangement will be considered "commercially reasonable" in the absence of referrals if the arrangement would make commercial sense if entered into by a reasonable entity of similar type and size and a reasonable physician (or family member or group practice) of similar scope and specialty, even if there were no potential DHS referrals.

D. Remuneration Unrelated to the Provision of Designated Health Services (DHS) (Section 1877(e)(4) of the Act; Phase II; § 411.357(g))

[If you choose to comment on issues in this section, please include the caption "Remuneration Unrelated to DHS Exception" at the beginning of your comments.]

Existing Law: Under section 1877(e)(4) of the Act, remuneration provided by a hospital to a physician that does not relate to the furnishing of DHS does not constitute a prohibited compensation arrangement. The exception does not apply to remuneration from a hospital to a member of a physician's immediate family. (Until January 1, 1995, the payments to immediate family members were included.) Nor does it apply to remuneration from entities other than hospitals.

Proposed Rule: To conform to various statutory changes, the January 1998 proposed rule proposed to revise § 411.357(g) by removing that portion that was based on the predecessor provision of section 1877(b)(4) of the Act, since that provision had expired, and by changing the reference to remuneration not related to the furnishing of clinical laboratory services to remuneration not related to the furnishing of DHS.

In addition, the January 1998 proposed rule discussed proposed interpretations of the exception. First, in order to come within the exception, the remuneration would have to be completely unrelated to the provision of DHS. Where a hospital made payments that were inordinately high for apparently unrelated services to a physician who referred DHS to the hospital, we would presume the excess payment was, in fact, related to the DHS. Second, we gave several examples to illustrate potentially "unrelated" services. These examples included fair market value payments by a teaching hospital to a physician to rent a house for use by visiting fellows, as well as payments for teaching, general administrative services, or utilization review. By contrast, payments to a physician for a medical device used in the provision of DHS (for example, inpatient procedures) or for malpractice insurance would be considered related to the provision of DHS. We stated that the test would be whether there was any link between the remuneration and the referral or provision of DHS. We noted that some of these arrangements might fit in another statutory or regulatory exception.

Final Rule: We have incorporated the technical changes described in the January 1998 proposed rule. In light of the statutory history, we are interpreting the exception to be narrow and available only if remuneration is wholly unrelated to the provision of DHS. In general, for purposes of the exception, we will treat any item, service, or cost that could be allocated in whole or in part to Medicare or Medicaid under applicable cost reporting principles to be related directly or indirectly to the provision of DHS. In addition, other remuneration will be considered related to DHS for purposes of this exception if it is furnished, directly or indirectly, explicitly or implicitly, in a selective, targeted, preferential, or conditional manner to medical staff or other physicians in a position to make or influence referrals. The exception will not apply to any other remuneration that is related in any manner to the provision of DHS. Given the other exceptions, especially the personal services arrangements and fair market value exceptions, any *bona fide* compensation relationships related in any way to DHS could be structured to satisfy another exception.

Section 411.357(g) has been modified to reflect these interpretations, which are explained further in the responses to comments.

Comment: Several commenters objected to our statement that any link to the provision of DHS would make the exception unavailable. One commenter stated that our position appeared to mean that if either party would use the items or services provided under the arrangement to furnish DHS, the exception would not apply. Another commenter stated that the broad statements in the preamble to the January 1998 proposed rule were not consistent with the statutory language. Another commenter objected to the example in the preamble suggesting that payments to a physician for a medical device used for an inpatient procedure would be considered related to the provision of a designated health service. The same commenter stated that payment for malpractice insurance should not be considered related to the provision of DHS and that under the proposed interpretation, even granting staff privileges would trigger the prohibition.

Response: We believe that the exception for services unrelated to DHS in section 1877(e)(4) of the Act is intended to be very limited and available only if the remuneration is wholly unrelated to the provision of DHS, such as the rental of residential property. We believe this narrow reading is consistent with the statutory history. Initially, under the original statute, the exception was necessary to insulate a hospital's relationships with physicians that were unrelated to the provision of clinical laboratory services, a very small element of a hospital's practice. Since 1995, however, *all* hospital services are DHS and a narrower interpretation of the exception is required to prevent abuse. Given this breadth of DHS, the statute's purpose, and the industry's desire for bright line rules in connection with section 1877 of the Act, we will treat any item, service, or cost that could be allocated in whole or in part to Medicare or Medicaid under applicable cost reporting principles as related to the provision of DHS. To the extent that the preamble to

the January 1998 proposed rule suggested that general administrative or utilization review services were not related to DHS, we are withdrawing that interpretation. Even if not covered by cost reporting principles, remuneration that is otherwise related to the provision of DHS will not come within the protection of the exception. We will consider remuneration to relate to DHS if it is furnished, directly or indirectly, explicitly or implicitly, to medical staff or other physicians in a position to make or influence referrals in any manner that is selective, targeted, preferential, or conditional. For example, a loan from a hospital to a physician to finance the physician's purchase of an interest in a limited partnership that owns the hospital would be related to the provision of DHS. Likewise, for example, a hospital's lease of office space in a nearby medical building to physicians in a position to refer to the hospital would be related to the provision of DHS. Any such arrangements must comply with another exception. Elsewhere in this rulemaking, we have promulgated sufficient exceptions that any legitimate arrangement between a hospital and a referring physician should be able to qualify for protection under another exception. Finally, the provision of malpractice insurance or other support services to physicians who would otherwise have to pay for them clearly creates a compensation arrangement within the language and intent of the statute.

Comment: One commenter objected that the exception is limited to remuneration paid to physicians and does not extend to payments to immediate family members..

Response: When the Congress amended the exception in 1993, it limited the provision solely to remuneration paid by a hospital to a physician. Accordingly, the regulation tracks the current statute. Legitimate arrangements with immediate family members should be able to qualify for one of the other available exceptions, such as the personal service arrangements or fair market value exceptions.

Comment: A commenter objected to the statement in the preamble that we would presume that an above fair market value payment for services unrelated to the provision of DHS was actually related to those services. The commenter stated that we had no authority to add an additional requirement (that is, that payments for unrelated services be fair market value) to the statutory exception.

Response: The commenter misunderstood our position. We agree that a payment that is wholly unrelated to the provision of DHS does not have to be fair market value for the exception to apply. However, as an enforcement matter, we will carefully scrutinize any payments that are above fair market value to ensure that they are not disguised payments related to DHS.

Comment: One commenter concluded that our broad reading of "related" meant that payments to physicians for covenants not to compete could not fit in the exception, since those covenants were related to the furnishing of DHS. The commenter observed that there is a distinction between a reasonable geographic restriction on providing medical services and an affirmative obligation to make referrals.

Response: We agree with the commenter that a covenant not to compete is not necessarily equivalent to an obligation to make referrals. The statutory exception in section 1877(e)(4) of the Act, however, only protects payments unrelated to the provision of DHS, and a payment by a hospital to a physician for a covenant not to compete is plainly related to the provision of DHS. Nevertheless, transactions involving non-compete covenants can be structured to fit within other exceptions.

Comment: One commenter asked whether the unrelated services exception would be available if the payment were from an entity related to a hospital, but not the hospital itself.

Response: The exception is only available for payments from the hospital itself. Depending on the circumstances, payments from a legal entity related to the hospital would be analyzed as a direct compensation arrangement subject to the direct compensation exceptions or as an indirect compensation arrangement to which the indirect compensation exception may apply.

E. Physician Recruitment (Section 1877(e)(5) of the Act; Phase II; § 411.357(e))

[If you choose to comment on issues in this section, please include the caption "Physician Recruitment Exception" at the beginning of your comments.]

Existing Law: Section 1877(e)(5) of the Act excepts remuneration provided by a hospital to a physician to induce the physician to relocate to the geographic area served by the hospital in order to be a member of the hospital's medical staff. To qualify, the following conditions must be met—

(i) The physician is not required to refer patients to the hospital;

(ii) The amount of remuneration under the arrangement is not determined in a manner that takes into account (directly or indirectly) the volume or value of any referrals by the referring physician;

(iii) The arrangement meets any other requirements imposed by the Secretary to protect against program or patient abuse.

The August 1995 final rule incorporated the provisions of section 1877(e)(5) of the Act into our regulations at § 411.357(e), with the additional requirements that the arrangement and its terms be in writing and signed by both parties and that the physician not be precluded from establishing staff privileges at another hospital or referring to another entity.

Proposed Rule: The January 1998 proposed rule retained § 411.357(e), with minor editorial changes. In the preamble, we interpreted the rule to require that the recruited physician reside outside the hospital's geographic area and actually relocate into the area. We specifically solicited comments on how to define a hospital's "geographic area." We suggested that recruitment payments to physicians already residing in the hospital's geographic area, for example, community physicians or hospital residents, might be excepted under the proposed new "fair market value" compensation exception (§ 411.537(l)).

Final Rule: The final rule substantially modifies the January 1998 proposed rule in the following respects:

- The final rule looks to the relocation of the recruited physician's medical practice, rather than the physician's residence. A physician will be deemed to have relocated to the hospital's geographic area (defined as the lowest number of contiguous postal zip codes from which the hospital draws at least 75 percent of its inpatients) if: (i) The physician has relocated the site of his or her practice a minimum of 25 miles; or (ii) at least 75 percent of the physician's revenues from services provided by the physician to patients (including services to hospital inpatients) are derived from services provided to new patients.
- Residents and physicians who have been in medical practice less than one year will not be considered to have an established practice and will therefore be eligible under the physician recruitment exception regardless of whether or not the physician actually moves his or her practice location.
- We have created a regulatory exception for federally qualified health

centers (FQHCs) that make recruitment payments to physicians on the same basis as hospitals.

• Recruitment payments made through existing medical groups (rather than directly to the recruited physician) in connection with the recruitment of a new physician are covered under certain conditions elaborated below.

• We have added a limited new exception at § 411.357(t) for some retention payments made to physicians with practices in HPSAs.

• We have modified the proposed language requiring recruited physicians to establish staff privileges at other hospitals and to refer to other entities to make clear our original intent that recruitment payments not be used to lock physicians into using the recruiting hospital, except insofar as there may be a separate, excepted employment or contractual arrangement under which required referrals may be permitted in accordance with § 411.354(d)(4). The revised language makes clear that recruited physicians must be allowed to establish staff privileges at other hospitals and, except as noted in the preceding sentence, to refer to other entities (even if the other hospital or entity is a competitor). For purposes of section 1877 of the Act, reasonable credentialing restrictions on physicians becoming competitors of a hospital would not violate this condition.

The reasons for these changes are discussed in the responses to comments that follow.

Comment: A number of commenters objected to the proposed requirement that the recruited physician had to relocate his or her residence to qualify for the exception. The commenters suggested that the relevant inquiry should be where the physician practices medicine, not where the physician lives. One commenter urged abandonment of the relocation requirement entirely on the grounds that other conditions in the proposed regulation were sufficient to prevent abuse. Another commenter proposed that the exception apply as long as the recruited physician is new to the hospital's medical staff and either relocates his or her practice at least ten miles or derives 75 percent of his or her patient revenue from patients new to the physician. A hospital trade association proposed that the test be that the recruited physician either relocates to the hospital's service area (to be defined as the lowest number of contiguous zip codes of 51 percent of its inpatients) or relocates 15 miles.

Response: In general, we agree with the commenters that our proposed regulation was unnecessarily restrictive. The relocation requirement is statutory, and even if it were not, we believe a relocation requirement is an important safeguard against abusive financial incentives disguised as "recruitment" payments. We are persuaded, however, that the recruited physician's practice location, not his or her residence, should be the relevant consideration. As to the test for "relocation to the geographic area served by the hospital," we believe the regulations should set bright line rules, but also incorporate some flexibility to accommodate variations in legitimate recruitment arrangements. We have revised § 411.357(e) by combining and modifying several of the commenters' suggestions. Specifically, the hospital's geographic service area is defined for purposes of the exception as the area composed of the lowest number of contiguous zip codes from which the recruiting hospital draws 75 percent of its inpatients. Given the significant easing of the "relocation" test described below, we believe using a 75 percent criteria is more appropriate than the 51 percent suggested by the commenter. In particular, it is less likely to lead to abusive recruiting payments to established physicians from nearby hospitals.

The relocation test may be met by moving one's medical practice a minimum distance of 25 miles *or* by establishing a practice with a substantial base of new patients (75 percent of the physician's revenues from professional services provided to patients in the relocated practice (including services provided to hospital inpatients)). For the 75 percent revenues test, the regulations measure practice revenue annually on a fiscal or calendar year basis (at the physician's option). For the initial "start up" year of the recruited physician's relocated practice, the test is whether it is reasonable to expect that the recruited physician will meet the 75 percent test. New patients are those patients who have not been seen by the physician in his or her previous practice for at least three years. We believe these tests provide clear rules with sufficient flexibility to permit legitimate recruitment arrangements, while protecting against potentially abusive arrangements (for example, cross-town recruitment of an established physician's practice from a competitor hospital). Recruitment payments to community or other local physicians who do not meet the relocation requirement will not fit in the fair market value exception in § 411.357(1), which requires fair market value payments for services rendered.

Comment: Many commenters objected to treating residents and new physicians as residing in the hospital's service area. These commenters argued that these physicians have not yet established a medical practice, so hospitals should be permitted to recruit them. Other commenters pointed out that for many hospitals with residency programs, the residents were the most likely physicians to stay in the community.

Response: We agree and have modified the regulation to provide that hospital residents, as well as physicians who have been in practice one year or less, will not be subject to the relocation requirement. In our view, these physicians do not have an established practice to relocate. However, the recruited physician must establish his or her medical practice in the geographic area served by the hospital to be eligible for recruitment payments under the exception.

Comment: Two commenters wanted the exception to protect recruitment payments from DHS entities other than hospitals.

Response: The statutory exception is expressly limited to recruitment payments made by hospitals, and we are not persuaded that a wholesale extension to other DHS entities is warranted. Under our authority in section 1877(b)(4) of the Act to create additional exceptions, we are extending the exception to cover federally qualified health centers (FQHCs) that recruit physicians to join their medical staffs. We believe that FQHCs should be able to recruit physicians to join their medical staffs under the same terms and conditions applicable to hospitals. This extension is consistent with the statutory intent and scheme and will help ensure that the statute does not impede efforts by FQHCs, which provide substantial services to underserved populations, to recruit adequate staffs. We are not persuaded that the exception should similarly be extended to other DHS entities, such as nursing homes or home health agencies, that may want to recruit physicians into their service areas. These kinds of recruitment arrangements could pose a risk of abuse. We are not extending the recruitment exception to cover recruitment payments made by physician practices. In the first place, physician practices do not have medical staffs comparable to hospitals under the terms of the exception. Moreover, the in-office ancillary services exception is available to cover referrals from recruited physicians. Because the FQHC expansion falls under our authority in section 1877(b)(4) of the Act, FQHCs will be subject to the additional general conditions that their arrangements not violate the anti-kickback statute and that

claims submissions comply with all program rules. Since these are pre-existing obligations, they are not unduly burdensome.

Comment: Several commenters observed that, contrary to statements in the January 1998 proposed rule (63 FR 1702), payments to recruit residents and payments to existing group practices to recruit physicians would not fit in the new fair market value exception. Two commenters noted that the proposed fair market value exception required compliance with the anti-kickback statute or an anti-kickback safe harbor and that the only available safe harbor was limited to physician recruitment in rural areas. Another commenter questioned whether recruitment would be an "item or service" for purposes of the fair market value exception. The commenter considered that a physician's relocation to a community benefits the community, not the recruiting hospital. Another commenter claimed that the commercial reasonableness and fair market value criteria in the fair market value exception would require hospitals to incur costs for expensive valuations and stated that comparative data was kept confidential and difficult to obtain. Finally, a commenter pointed out that the proposed fair market value exception included none of the additional safeguards contained in the physician recruitment exception.

Response: In the preamble to the Phase I rule, we stated that physician recruitment arrangements might fit in the new fair market value exception, depending on the specific facts. Nevertheless, we recognized that many recruitment arrangements that offer "extra" payments to induce physicians to relocate would not be covered because the compensation would exceed the fair market value of the physician's services (66 FR 919). We concluded that we would consider the issue further in Phase II of the rulemaking.

Upon further consideration, we do not believe that recruitment incentives can fit in the fair market value exception in § 411.357(l). We agree that the physician's relocation is not properly viewed as a benefit to the hospital, except as a potential source of DHS referrals—a consideration that is antithetical to the premise of the statute. As discussed above, we have modified the recruitment exception to make clear that payments to hospital residents can be covered. Payments by a hospital to a physician practice to assist the physician practice in recruiting physicians to the community who will join the existing practice are discussed in the following comment and response. On the issue of anti-kickback compliance, we refer to the discussion in the Phase I rulemaking (66 FR 918).

Comment: Many commenters believed the exception should be expanded to include hospital payments to medical groups in connection with the recruitment of a new physician to join the group. One commenter pointed out that the proposed rule protected any "remuneration provided by a hospital to recruit a physician," but did not specify to whom the payment had to be made (63 FR 1725). The commenters stated that many new physicians prefer to join existing groups and that such arrangements save the costs and labor of setting up a new practice and provide cross-coverage and peer review. Another commenter stated that under the existing Internal Revenue Service (IRS) rules, recruited physicians must report forgivable recruitment loan amounts in the years the debt is forgiven. According to the commenter, this rule discourages recruited physicians from staying in a community; allowing the payments to be made to a group practice might ease the tax burden. One commenter suggested that payments to a medical group be permitted if the group—

- Agrees to participate in Medicare and Medicaid;
- Agrees to participate in the hospital's on-call program;
- Provides professional services to all hospital patients; and
- Enters into an agreement with the recruited physician that does not contain a covenant not to compete or a liquidated damages provision if the physician leaves the group. According to the commenter, these conditions are consistent with IRS Revenue Ruling 97–21. Another commenter thought that payments could be made to groups to recruit physicians as long as the terms of the arrangement are set out in writing and signed by all the parties, and the group agrees to pass substantially all of the remuneration to the recruited physician.

Response: Section 1877(e)(5) of the Act expressly excepts payments made by a hospital "to a physician." We recognize that many new or relocating physicians prefer to join existing practices rather than set up a new practice for legitimate reasons, such as cost, cross-coverage, and professional expertise. We also recognize that hospitals may want to provide financial support through existing medical groups to aid in recruiting new physicians to the community. We are concerned that a recruitment arrangement involving direct or indirect payments to an existing physician practice might be used improperly to pay for referrals from the existing physician practice, in essence creating an improper financial relationship between the hospital and the existing physician practice. However, we have concluded that some narrowly tailored accommodation for recruitment into existing groups would be appropriate under the recruitment exception and have sought to create criteria that would preclude abuse of the exception. Accordingly, the regulations provide that the exception will apply to remuneration provided by a hospital (or FQHC) to a physician indirectly through payments to another physician or physician practice, as long as the following conditions are met:

- The arrangement between the hospital and the physician practice is set out in writing and signed by the parties.
- Except for actual costs incurred by the physician or physician practice in recruiting the new physician, the remuneration is passed directly through to or remains with the recruited physician. Records of the actual costs and the passed-through amounts must be maintained for a period of at least 5 years and made available to the Secretary upon request.
- In the case of an income guarantee made by the hospital to a physician who joins a local physician practice, costs allocated by the physician practice to the recruited physician may not exceed the actual additional incremental costs to the practice attributable to the recruited physician.
- The new physician must establish a medical practice in the hospital's geographic service area and join the hospital's medical staff.
- The physician practice's arrangement with the recruited physician is set out in writing and signed by the parties.
- The new physician is not required to refer patients to the hospital and is allowed to establish staff privileges at any other hospital(s) and to refer business to other entities (except insofar as required referrals are permitted under § 411.354(d)(4)).
- The remuneration from the hospital under the arrangement is not determined in any manner that takes into account (directly or indirectly) the volume or value of any referrals (actual or anticipated) by the recruited physician or by the physician practice receiving the direct payments from the hospital (or any physician affiliated with that physician practice).
- The physician practice receiving the hospital payments may not impose additional practice restrictions on the recruited physician (for example, a non-

compete agreement), but may impose conditions related solely to quality considerations.

The regulations similarly apply to payments made directly to a physician who joins a physician practice.

Because we are expanding this exception under our authority in section 1877(b)(4) of the Act, which authorizes the creation of new exceptions only if the excepted arrangement presents no risk of program or patient abuse, the arrangement must not violate the anti-kickback statute and must comply with all relevant claims submission and billing laws and regulations. In this context, if there is any intent unlawfully to reward or induce referrals from the physician practice whose recruitment the hospital chose to underwrite, the anti-kickback statute would be violated and the exception would not apply.

This rule for pass-through hospital recruitment payments establishes an exception applicable to the compensation arrangement created between the hospital and the recruited physician (and between the hospital and the existing physician practice). We note that if the physician practice receiving the payments from the hospital is a DHS entity to which the recruited physician will refer (that is, the practice submits claims to Medicare for DHS), any separate or additional financial relationship it has with the recruited physician will have to fit in an exception (for example, the in-office ancillary services exception).

Comment: Several commenters suggested that the regulatory exception should be expanded to permit hospitals to provide incentives to retain physicians already on the medical staff. Several commenters pointed out that these incentives are particularly useful for hospitals in rural or inner city areas where there is a shortage of health professionals and constant turnover is a significant problem and expense. One commenter suggested that retention payments could be limited to situations where the hospital had a *bona fide*, reasonable, and documented belief that a physician may terminate his or her staff privileges and join another hospital staff.

Response: We are sympathetic to the problems faced by hospitals and other entities in certain rural and inner city areas in retaining sufficient numbers of qualified physicians in the community. On the other hand, we are concerned about, among other things, protecting payments to physicians in bidding wars between hospitals. The commenter's suggested standard of a reasonable and documented belief that a physician may terminate his staff privileges would not adequately address this potential abuse. We are persuaded that a narrow retention exception for some remuneration paid to physicians with practices in HPSAs to retain them in the community is appropriate and consistent with the statutory scheme. Therefore, in accordance with our authority under section 1877(b)(4) of the Act, we have added a new exception for retention payments made to a physician with a practice located in a HPSA (regardless of whether the HPSA is specifically designated for the physician's particular specialty) who has a firm written recruitment offer from an unrelated hospital or FQHC that specifies the remuneration being offered and that would require the physician to move the location of his or her practice at least 25 miles *and* outside of the geographic area served by the hospital or FQHC making the retention payment. The retention payment must be limited to the lower of (i) the difference between the physician's current income from physician and related services and the income the physician would receive from physician and related services in the recruitment offer (over no more than a 24-month period) or (ii) the reasonable costs the hospital or FQHC would otherwise have to expend to recruit a new physician to the geographic area served by the hospital or federally qualified health center in order to join the medical staff of the hospital or federally qualified health center to replace the retained physician. Parties must use a reasonable methodology to calculate the physician's current and anticipated incomes for purposes of this test. Moreover, parties must use the same methodology when calculating the physician's income from his or her current job and the anticipated income from the recruitment offer. Any retention payment must be subject to the same restrictions, if any, on repayment or forgiveness of indebtedness as the recruitment offer. A hospital may enter into a retention arrangement with a physician no more frequently than once every five years and the amount and terms of the retention payment may not be altered during the term of the arrangement in any manner that takes into account the volume or value of referrals or other business generated by the physician. Except in these limited circumstances, we are unable to devise a sufficiently clear and flexible exception for retention payments that would be without risk of program or patient abuse. If a hospital or federally qualified health center wishes to retain an employed physician by matching a salary offer from another facility, the hospital or federally qualified health center may structure an arrangement to fit in this exception. Alternatively, the arrangement may be structured to fit in the employee exception at § 411.357(c) (as discussed in this preamble at section VIII.B), provided the compensation to be paid to the employed physician will be fair market value and the other conditions of the exception are satisfied. The new exception for retention payments in underserved areas does not protect payments made indirectly to a retained physician via another person or entity, including a physician practice.

Apart from physicians practicing in HPSAs or employed physicians, we think the best approach is to make decisions on retention arrangements on a case-by-case basis through advisory opinions. Thus, the final rule provides for approval of retention payments to physicians in other underserved areas (or serving underserved patient populations) on a case-by-case basis through an advisory opinion. We are not further defining underserved areas or underserved patient populations for purposes of this regulation in order to give the Secretary maximum flexibility in evaluating the special circumstances attendant on retention payments. We expect to approve retention payments in advisory opinions only in unusual and compelling circumstances. We caution that retention arrangements can implicate the anti-kickback statute, and parties should take care to scrutinize their arrangements for compliance with that statute.

Comment: A trade association representing academic medical centers requested a special exception for teaching hospitals.

According to the commenter, teaching hospitals often need to recruit local community physicians to teach. The commenter noted that many academic medical centers have closed medical staffs and would not be able to satisfy the condition that the recruited physician not be required to refer to the hospital.

Response: We are not persuaded that a special exception is needed in light of the academic medical center exception created in the Phase I rulemaking and codified in § 411.355(e) (*see* discussion in section XII.A below). In addition, arrangements with local faculty may fit in the personal service arrangements exception in § 411.357(e)(3) or the employment exception in § 411.357(e)(2).

F. Isolated Transactions (Section 1877(e)(6) of the Act; Phase II; § 411.357(f))

[If you choose to comment on issues in this section, please include the caption "Isolated Transactions Exception" at the beginning of your comments.]

Existing Law: Section 1877(e)(6) of the Act provides that an isolated transaction, such as a one-time sale of property or a practice, is not considered to be a compensation arrangement for purposes of the prohibition on physician referrals if the following conditions are met:

- The amount of remuneration for the transaction is consistent with fair market value and is not determined, directly or indirectly, in a manner that takes into account the volume or value of referrals.
- The remuneration is provided in accordance with an agreement that would be commercially reasonable even if no referrals were made to the entity.
- The transaction meets any other requirements that the Secretary may impose by regulation as needed to protect against program or patient abuse.

The August 1995 final rule incorporated the provisions of section 1877(e)(6) of the Act into our regulations in § 411.357(f), with an additional requirement that there be no additional transactions between the parties for 6 months after the isolated transaction, except for transactions that are specifically excepted under another exception. The August 1995 final rule also established definitions of "transaction" and "isolated transaction" in § 411.351. The rule defined a "transaction" as an instance or process of two or more persons doing business and an "isolated transaction" as a transaction involving a single payment between two or more persons. The definition specifies that a transaction involving long-term or installment payments is not considered an isolated transaction.

Proposed Rule: The January 1998 proposed rule proposed retaining § 411.357(f) and the definitions in § 411.351, with a clarification that "transactions" can involve persons or entities.

Final Rule: The final rule retains the existing exception and definitions with the following modifications (as well as the clarification that transactions can involve persons or entities).

First, we are modifying the definition of "isolated transaction" to permit installment payments, provided the total aggregate payment is: (i) Set before the first payment is made; and (ii) does not take into account, directly or indirectly, referrals or other business generated by the referring physician. Additionally, the outstanding balance must be guaranteed by a third party, secured by a negotiable promissory note, or subject to a similar mechanism to assure payment even in the event of default by the purchaser or obligated party. *Second*, post-closing adjustments that are commercially reasonable and not dependent on referrals or other business generated by the referring physician will be permitted if made within 6 months of the date of a purchase or sale transaction.

Comments and our responses follow.

Comment: Two commenters found the single payment requirement—in conjunction with the six-month prohibition on other transactions—impractical since it precluded common post-closing adjustments in connection with sales of practices and other transactions. According to the commenters, escrows or post-closing adjustments occur shortly after the initial closing and are designed to remedy unknown conditions, shortfalls in accounts receivable, or similar contingencies. One commenter suggested that commercially reasonable post-closing adjustments be permitted within six months, while another commenter requested a one-year grace period.

Response: We have adopted the commenters' suggestion to modify the rule to permit post-closing adjustments within six months of the date of sale if they are commercially reasonable, even if there are no referrals or other business generated by the referring physician.

Comment: Several commenters questioned the necessity for the single payment rule. Several pointed out that the safe harbor under the anti-kickback statute for the sale of a physician's practice (§ 1001.952(e)) does not contain a similar requirement. According to these commenters, as long as the purchase price is set at the time of closing, consistent with fair market value, and not dependent on referrals, it should not matter if the funds are paid out over time. Two commenters observed that a seller would have a breach of contract claim for any unpaid amounts. One commenter pointed out that any risk that a selling physician would have an ongoing incentive to refer to a sold entity to assure payment by the purchaser could be addressed by requiring the purchase obligation to be secured in the event of the purchaser's default or bankruptcy.

Response: The Congress clearly intended that an isolated transaction, whether through a single payment or installment payments, creates a financial relationship between the parties on a prospective basis. We have reconsidered the single payment requirement in light of the comments and have modified the final rule to also permit installment sales under certain conditions. We are concerned, however, that many installment transactions provide continuing incentives to refer. Resort to costly and uncertain litigation to enforce a contractual right is insufficient protection against the pressure to continue referrals. To address that concern, the installment payments rule requires that payments must be either immediately negotiable or otherwise secured so that the seller is guaranteed payment in the event of the purchaser's default or bankruptcy.

Comment: A publicly-held company suggested that we create a special exception for installment payments by companies that are eligible for the publicly-held entity exception in § 411.356(a).

Response: As discussed above, the final rule permits installment sales that meet certain conditions. There is no reason to distinguish between large publicly-held companies and other purchasers.

Comment: A physician association objected to the prohibition on other unexcepted transactions within six months of the transaction qualifying under the isolated transaction exception. According to the association, a better rule would be a maximum number of transactions within a calendar year.

Response: We decline to adopt the suggestion. We think that the concept of an isolated transaction is incompatible with the suggestion that parties can routinely engage in multiple transactions each year or more than one transaction during a short period of time.

Comment: One commenter asked us to clarify that only transactions related to DHS are subject to the prohibition on other transactions within six months of an isolated transaction.

Response: The prohibition applies to all transactions. A financial relationship between a DHS entity and a referring physician can be created by any financial relationship, whether or not the financial relationship involves DHS and whether or not the financial relationship involves Medicare or private pay business. Unless the financial relationship—whatever it may be—can fit in one of the statutory or regulatory exceptions, the physician may not refer any Medicare DHS to the DHS entity and the entity may not

submit claims to Medicare for DHS provided in the event that such patients are nevertheless referred.

G. Certain Group Practice Arrangements with Hospitals (Section 1877(e)(7) of the Act; Phase II; § 411.357(h))

Existing Law: Section 1877(e)(7) of the Act provides that an arrangement between a hospital and group under which DHS are furnished by the group but are billed by the hospital does not constitute a compensation arrangement for purposes of the prohibition on referrals if the following conditions are met:

- With respect to the services furnished to a hospital inpatient, the arrangement is for the provision of inpatient hospital services under section 1861(b)(3) of the Act. The arrangement began before December 19, 1989, and has continued in effect without interruption since that date.
- With respect to the DHS covered by the arrangement, substantially all of those services furnished to patients of the hospital are furnished by the group under the arrangement.
- The arrangement is set out in a written agreement that specifies the services to be furnished by the parties and the amount of compensation.
- The compensation paid over the term of the agreement is consistent with fair market value, and the compensation per unit of services is fixed in advance and is not determined in a manner that takes into account the volume or value of any referrals or other business generated between the parties.
- The compensation is provided under an agreement that would be commercially reasonable even if no referrals were made to the entity.
- The arrangement between the parties meets any other requirements the Secretary may impose by regulation as needed to protect against patient or Medicare program abuse.

The 1995 final rule incorporated the provisions of section 1877(e)(7) of the Act, as they relate to clinical laboratory services, into the regulations in § 411.357(h), without imposing any additional requirements.

Proposed Rule: The January 1998 proposed rule proposed to revise § 411.357(h) to apply the provisions to all DHS, not just clinical laboratory services, and to make certain minor changes. In particular, the proposed rule proposed modifying the regulation to make clear that the arrangement for which the protection of the exception was sought had to have begun prior to December 19, 1989, and have continued in effect, without interruption, since that time. We also proposed interpreting the regulatory language to permit changes to the arrangement over time with respect to the services covered by the arrangement or the physicians providing those services. We also clarified that the "substantially all" test in section 1877(e)(7)(A)(iii) of the Act required that at least 75 percent of the DHS covered under the arrangement furnished to patients of the hospital be furnished by the group under the arrangement.

Final Rule: We received no comments to this provision. This interim final rule adopts the proposed rule.

H. Payments Made by a Physician for Items and Services (Section 1877(e)(8) of the Act; Phase II; § 411.357(i))

Existing Law: Section 1877(e)(8) of the Act creates an exception for certain payments that a physician makes to a laboratory in exchange for clinical laboratory services or to an entity as compensation for other items or services, if the items or services are furnished at a price that is consistent with fair market value. The August 1995 final rule incorporated the provisions of section 1877(e)(8) of the Act into the regulations in § 411.357(i).

Proposed Rule: The January 1998 proposed rule proposed to interpret "other items or services" to mean any kind of items or services that a physician might purchase, but not including clinical laboratory services, or any items or services specifically listed under other compensation exceptions (63 FR 1703). In other words, under the proposed rule, exceptions would be mutually exclusive. In the August 1995 final rule, we had defined remuneration to include discounts and explained that the exception in section 1877(e)(8) of the Act would not be available if the remuneration included a discount that did not reflect fair market value. In the preamble to the January 1998 proposed rule (63 FR 1694), we clarified that a discount would meet the fair market value standard if it were made pursuant to an arm's-length transaction; were offered to all similarly situated individuals regardless of whether they make referrals; did not reflect the volume or value of past or future referrals; and were passed on to Medicare and other insurers. In addition, the January 1998 proposed rule proposed a new exception in § 411.357(j) for discounts to physicians based on the volume of referrals, provided the discount is passed on in full to the patients or their insurers and does not benefit the physicians in any way. The proposed exception would not contain a fair market value standard.

Final Rule: The final rule adopts the January 1998 proposed rule, without the proposed exception for discounts. Upon further consideration, we believe that legitimate discounts will fall within the range of values that is "fair market value." In addition, pursuant to our authority under section 1877(b)(4) of the Act, we are extending the exception to cover payments by a referring physician's immediate family member. We believe the Congress did not intend that the fair market value purchase by immediate family members of items and services from health care entities would create a prohibited financial relationship such that the physician could not refer to the entity.

Comment: Several commenters questioned the statutory authority for our determination that items or services that were potentially covered under another exception, such as a lease or personal service agreement, could not also be excepted under this provision. One commenter noted that in some instances, some payers will not pay separate physician and facility charges for certain hospital-based physician clinics because the physician payment includes practice expenses. In those situations, it is common for the hospital to charge the physician some amount for office space and equipment. However, those kinds of transactions cannot fit in the lease or services exceptions.

Response: In the case of this particular exception, the determination that items and services addressed by another exception should not be covered in this exception is consistent with the overall statutory scheme and purpose and is necessary to prevent the "payments by a physician" exception from negating the statute. However, we are modifying the regulatory text to make clear that parties can use the fair market value exception, where applicable, which should address some of the issues raised by commenters.

XI. Definitions (Section 1877(h) of the Act; Phase I—66 FR 922–49; § 411.351)

[If you choose to comment on issues in this section, please include the caption "Definitions" at the beginning of your comments.]

A. Designated Health Services—General Principles (Section 1877(h)(6) of the Act; Phase I—66 FR 922)

Section 1877(h)(6) of the Act lists eleven broad categories of DHS, but does not further define those categories. In response to requests for clear definitions of the various DHS, Phase I defined the entire scope of the following categories of DHS by reference to specific CPT and HCPCS codes: Clinical

laboratory services; physical therapy, occupational therapy, and speech-language pathology services; radiology and certain other imaging services; and radiation therapy services and supplies. The list of codes used to define these DHS categories appeared in an Attachment to Phase I and is updated on an annual basis in the physician fee schedule final rule and on the CMS Web site. For the convenience of the reader, we are also including this list of codes as an Attachment to this Phase II rule. Commenters generally responded favorably to our use of codes in defining DHS. Phase I defined the remaining DHS categories in regulatory descriptions that did not refer to a service-by-service list of CPT or HCPCS codes.

In Phase I, we also published separate lists of CPT and HCPCS codes to identify DHS that may qualify for the new regulatory exceptions in § 411.355(g) (regarding EPO and other dialysis-related outpatient prescription drugs furnished in or by an ESRD facility) and § 411.355(h) (regarding preventive screening tests, immunizations and vaccines). Services that qualify for one of these exceptions remain DHS for purposes of section 1877 of the Act; however, referrals may be made and claims may be submitted for these DHS if all of the conditions of the applicable exception are satisfied.

As noted below in the comments and responses section, we received a number of comments from various providers advocating that we either exclude certain services from the definition of a particular DHS category or create an exception for financial arrangements involving those services because, in the commenters' view, the items or services pose a low risk of overutilization or abuse. For the reasons stated in Phase I (66 FR 922–923) and our responses below, we continue to decline to make service-by-service determinations of the risk of abuse. Accordingly, we are not adding any new regulatory exceptions for additional DHS in this Phase II rulemaking.

Our responses to comments on the various DHS definitions follow in the order set forth in Phase I.

Comment: Some commenters found it confusing to have a service included on both the list of codes used to define certain DHS and the list of codes that identifies certain services as "excluded" under either § 411.355(g) or § 411.355(h). These commenters suggested that such services be omitted from the DHS list.

Response: If a particular service is a DHS, the fact that it potentially qualifies for an exception under § 411.355 does not negate the fact that it is a DHS. The various exceptions serve to permit referrals and claims submission for DHS when certain enumerated conditions are satisfied. The exceptions do not convert DHS into services that are not DHS. Thus, we cannot omit from the DHS code lists those services that may be covered by a regulatory exception, such as the exception in § 411.355(h) for certain preventive screening tests, immunizations and vaccines. However, with respect to certain definitions in the Attachment to Phase I regarding the codes that would be "excluded" under the exceptions in § 411.355(g) and § 411.355(h), we are making a number of technical revisions to the definitions of DHS in § 411.351 to more clearly reflect the regulatory scheme. In addition, in the December 31, 2002 physician fee schedule final rule (67 FR 79966), we have clarified that the codes listed under "Drugs Used by Patients Undergoing Dialysis" and "Preventive Screening Tests, Immunizations and Vaccines" constitute items or services to which the physician self-referral prohibition does not apply if the items or services are furnished in compliance with all of the conditions listed in the exceptions at § 411.355(g) and § 411.355(h), respectively.

Comment: One commenter urged us to define all categories of DHS by reference to specific CPT, HCPCS, or other relevant codes. In particular, the commenter was concerned about potential confusion regarding whether a supply is considered a DME, orthotic or prosthetic supply versus an ordinary supply.

Response: As explained in the Phase I preamble (66 FR 923), some DHS are not amenable to definition through codes. For those services, we believe the definitions provided in Phase I are sufficiently clear to permit entities and physicians to identify them readily.

With respect to the commenter's particular concern, we are unclear as to how or why the Phase I definitions of "durable medical equipment" and "prosthetics, orthotics, and prosthetic devices and supplies" generate any significant confusion. Phase I did not change any existing definitions for those terms. As discussed in the Phase I preamble (66 FR 932), the simplest way to determine the proper classification of these items is to consult the Durable Medical Equipment, Prosthetics, Orthotics and Supplies (DMEPOS) fee schedule, which identifies such items by HCPCS code and is available on the CMS Web site at: *http://cms.hhs.gov/providers/pufdownload/default.asp#dme*. Most supplies paid under the DMEPOS benefit (as opposed to ordinary supplies used in physician offices) are listed on this Web site. In general, a supply is categorized as a DME supply or a prosthetic, prosthetic device, or orthotic supply if it is disposable in nature and necessary for the effective use of DME, a prosthetic, a prosthetic device, or orthotic equipment by the patient outside of the physician's office.

B. Professional Services as Designated Health Services (Phase I—66 FR 924)

Comment: Our DHS definitions, including the definition of "radiology and certain other imaging services" at § 411.351, encompass both the professional and technical components of a service. A commenter stated that including the professional component is contrary to the statute and creates a significant obstacle to the delivery of ultrasound services provided anywhere except in a physician's office. For example, according to the commenter, if a physician refers a hospital inpatient for an ultrasound, and a member of the referring physician's group practice interprets the ultrasound (that is, provides the professional component), the in-office ancillary services exception is not applicable and the group cannot bill for the professional service.

Response: First, we do not find any evidence that the Congress intended to exclude all professional physician services from the list of DHS, for the reasons explained in the Phase I preamble (66 FR 924). Second, under the physician services exception (section 1877(b)(1) of the Act; § 411.355(a)), the self-referral prohibition does not apply to physician services that are personally performed by, or under the supervision of, another physician who is in the same group practice as the referring physician. Unlike the in-office ancillary services exception, the physician services exception does not impose any "same or centralized building" requirement. Thus, a physician may refer a hospital inpatient for ultrasound services when the professional component is furnished in a hospital by, or under the supervision of, another physician in his or her group practice. In many other cases, physician services that are DHS will fall under one of the other exceptions or will be personally performed by the referring physician and therefore not constitute a "referral" for purposes of section 1877 of the Act.

C. Clinical Laboratory Services (Phase I—66 FR 924)

In Phase I, we defined the entire scope of "clinical laboratory services" by reference to codes "as specifically

identified by the CPT and HCPCS codes posted on the HCFA Web site * * * and in annual updates * * *, except as specifically excluded on the HCFA Web site and in annual updates." We are deleting the phrase "except as specifically excluded on the HCFA Web site and in annual updates" in response to comments discussed in section XI.A addressing the distinction between items and services that do not constitute a DHS and items and services that are DHS but may qualify for an exception under § 411.355. We are not making any other changes to the definition of "clinical laboratory services."

Comment: One commenter urged us to exclude from the definition of "clinical laboratory services" all laboratory tests for which the requirements of CLIA have been waived. The commenter stated that CLIA-waived tests should not be considered DHS because they are an integral part of patient care furnished in the physician office setting.

Response: We see no reason to exclude CLIA-waived tests from the definition of "clinical laboratory services" under § 411.351. Under CLIA regulations, clinical laboratory tests are categorized based on complexity. The three categories are: waived tests, tests of moderate complexity, and tests of high complexity. The commenter is addressing the set of relatively simple tests that the CLIA rules categorize as waived tests. Under § 493.15, waived tests must: (1) Be cleared by the Food and Drug Administration (FDA) for home use; (2) employ methodologies that are so simple and accurate as to render the likelihood of erroneous results negligible; or (3) pose no reasonable risk of harm to the patient if the test is performed incorrectly. None of these factors reduces the risk of overutilization or other abuse for purposes of section 1877 of the Act. To the extent waived tests are an integral part of patient care and are furnished during an office visit, they will likely fit in the in-office ancillary services exception at § 411.355(b).

D. Physical Therapy Services (Phase I—66 FR 924–927)

In Phase I (66 FR 924–27, 955), we defined "physical therapy, occupational therapy, and speech-language pathology services" as those particular services identified by the CPT and HCPCS codes on our Web site (and in annual updates published in the **Federal Register**), regardless of who provides them. We listed the codes for each of these services under a single category because they overlap (for example, a particular service that is associated with a single CPT or HCPCS code may be within the scope of practice of both physical therapists and occupational therapists). We believe that the list of CPT and HCPCS codes for these services represents what most clinicians would define as physical therapy/occupational therapy/speech-language pathology services. However, we are removing CPT code 94762 (measure blood oxygen level) from the list of physical therapy/occupational therapy/speech-language pathology services because it is not a physical therapy service.

We received the following comments.

Comment: One commenter was concerned that our use of the phrase "regardless of who provides them" might imply that people other than licensed physical therapists and physical therapist assistants could provide physical therapy services in a physician's office. The commenter believed that we should develop policies to avoid unlicensed or unqualified individuals from providing physical therapy services.

Response: We do not intend for the description of "Physical therapy, occupational therapy, and speech-language pathology services" in § 411.351 to have any effect on who is allowed to furnish physical therapy services to Medicare patients. Section 411.351 merely defines the scope of services included in the definition; it does not address the qualifications required to perform them. As noted in the preamble to Phase I final rule (66 FR 926), some physical therapy services can be performed by physicians, and we defer in this rule to existing Medicare policy concerning which professionals may provide a given service.

Comment: A commenter stated that we should add two CPT codes to the list of physical therapy codes: 97601 for removal of devitalized tissue from wound without anesthesia and 97602 for non-selective debridement, without anesthesia.

Response: We agree. In Phase I, we defined physical therapy services, as described in section 1861(p) of the Act, to include the following: (i) Assessments, function tests and measurements of strength, balance, endurance, range of motion, and activities of daily living; (ii) therapeutic exercises, massage, and use of physical medicine modalities, assistive devices, and adaptive equipment; and (iii) the establishment of a maintenance therapy program for an individual whose restoration potential has been reached. Removing devitalized tissue and non-selective debridement without anesthesia are physical medicine modalities, and the CPT places the codes for these services within a series of codes for other physical therapy services. We are therefore including CPT codes 97601 and 97602 on the list of codes used to define physical therapy services.

Comment: One commenter asserted that we should not interpret the term "physical therapy services" to include speech-language pathology. According to the commenter, neither section 1877 of the Act nor its legislative history indicates that the term "physical therapy" encompasses speech-language pathology. Another commenter asserted that the Congress intended speech-language pathology services and physical therapy services to be separate benefits. The commenter asserts that although speech therapy services are referenced in section 1861(p) of the Act, the definition of these services is included in a separate statutory provision, section 1861(ll)(l) of the Act. The commenter noted that we also recognize speech-language pathology services as distinct from physical therapy.

Response: As previously noted in Phase I (66 FR 926), the definition of "outpatient physical therapy services" in section 1861(p) of the Act specifically states that "[t]he term 'outpatient physical therapy services' also includes speech-language pathology services furnished by a provider of services, a clinic, rehabilitation agency, or by a public health agency, or by others under an arrangement with, and under the supervision of, such provider, clinic, rehabilitation agency, or public health agency * * *." Thus, by definition, speech-language pathology services are a subset of outpatient physical therapy services under the Medicare statute. Although the term "speech-language pathology services" is defined elsewhere in the Act, and there may be different regulatory guidelines applicable to physical therapy services and speech-language pathology services, the statute clearly includes the latter within the definition of "outpatient physical therapy services."

Comment: One commenter asserted that the Phase I preamble incorrectly stated that device mapping (the fine tuning of cochlear implants) is performed by speech-language pathologists (66 FR 935). According to the commenter, device mapping is not within the speech-language pathology scope of practice. The commenter also asserted that CPT code 92507 (speech/hearing therapy) is not a designated health service and should be deleted from the code list.

Response: In Phase I (§ 411.351; 66 FR 955), we described "speech-language

pathology services" as services performed "for the diagnosis and treatment of speech, language, and cognitive disorders that include swallowing and other oral-motor dysfunctions." We noted in the Phase I preamble (66 FR 935) that, although cochlear implants are considered prosthetic devices, cochlear rehabilitation services (billed under CPT code 92510) are considered speech-language pathology services for purposes of Medicare coverage and payment. The Phase I Attachment also included CPT codes 92506 (speech/hearing evaluation) and 92507–92508 (speech/hearing therapy) as physical therapy/occupational therapy/speech-language pathology services.

We have removed CPT code 92506 (speech/hearing evaluation) from the list of codes used to define physical therapy, occupational therapy, and speech-language pathology services. CPT code 92506 is a diagnostic audiology service. Contrary to the commenter's request, we are not removing CPT code 92507 (speech/hearing therapy) because it is a speech-language pathology service. In addition, we note that we removed CPT 92510 (rehab for ear implant) from the code list in the December 31, 2002 physician fee schedule final rule (67 FR 80017) because we no longer recognize this code as valid for payment purposes. The services formerly billed under this code may be billed under 92507–92508, which remain on the list of codes used to define physical therapy, occupational therapy, and speech-language pathology services.

We did not intend to include audiology services within the scope of our description of speech-language pathology services. Accordingly, we are removing the following four codes, which were erroneously added to the DHS code list in the CY 2003 physician fee schedule update (67 FR 79966, 80016, effective for services furnished on or after March 1, 2003): CPT 92601 (cochlear implant f/up exam <7); 92602 (reprogram cochlear implant <7); 92603 (cochlear implant f/up exam 7>); and 92604 (reprogram cochlear implant 7>). All of these codes represent diagnostic audiology services.

Comment: A commenter stated that there are two additional CPT codes that should be considered speech-language pathology services: CPT 92520 (laryngeal function studies) and CPT 92511 (nasopharyngoscopy). According to the commenter, these services are clearly within the scope of practice of speech-language pathologists.

Response: As we stated in Phase I (66 FR 925), we are defining this category of DHS using specific codes that correspond to services that we consider to be speech-language pathology services. The Medicare program does not currently recognize nasopharyngoscopy (CPT 92511) and laryngeal function studies (CPT 92520) as therapy services. We intend that the list of CPT/HCPCS codes will reflect existing Medicare coverage and payment policies for each DHS category on the list. To include the codes suggested by the commenter would be contrary to existing policy; therefore, we are not including these codes as DHS under the physician self-referral prohibition.

E. Occupational Therapy Services (Phase I—66 FR 926)

We received no comments on this subject. Accordingly, we are not making any changes to the relevant portion of the definition of "physical therapy, occupational therapy, and speech-language pathology services."

F. Radiology and Certain Other Imaging Services (Phase I–66 FR 931)

Under section 1877(h)(6)(D) of the Act, "radiology services, including magnetic resonance imaging, computerized axial tomography, and ultrasound services" are DHS. Radiation therapy services and supplies are DHS under section 1877(h)(6)(E) of the Act. In the January 1998 proposed rule, we proposed a single definition for both of these DHS categories. In Phase I, we took the following steps, among others, to define this category with greater clarity:

- We separately defined the DHS identified in section 1877(h)(6)(D) and section 1877(h)(6)(E) of the Act.
- We defined the category of services covered by section 1877(h)(6)(D) of the Act under the name "radiology and certain other imaging services" to make clear the Congress's intent to include some imaging services other than radiology.
- We defined the entire scope of DHS under section 1877(h)(6)(D) of the Act in a list of CPT and HCPCS codes.
- We excluded the following services from the definition of "radiology and other imaging services": (i) X-ray, fluoroscopy, and ultrasound services that require the insertion of a needle, catheter, tube or probe; (ii) radiology procedures that are integral to the performance of, and are performed during, nonradiological medical procedures; and (iii) nuclear medicine procedures.

We received a number of comments concerning radiology services, particularly with respect to nuclear medicine. We are deleting the parenthetical "(except as otherwise specifically excluded on the CMS Web site and in annual updates)" in response to comments discussed in section XI.A addressing the distinction between items and services that do not constitute a DHS and items and services that are DHS but may qualify for an exception under § 411.355. In response to comments, we are modifying the definition to exclude certain radiology procedures performed immediately after a nonradiological medical procedure.

Comment: Several commenters asked us to confirm their belief that the only services that constitute "radiology and certain other imaging services" for purposes of section 1877 of the Act are those represented by the codes listed in the Attachment to Phase I (66 FR 963) and its subsequent updates.

Response: The commenters are correct.

Comment: One commenter asserted that echocardiograms should not be considered DHS because section 1877 does not include cardiology services as DHS. In addition, an association of cardiologists stated that the Congress's choice of language indicates that it intended to include only ultrasound services that are appropriately considered radiology services. That is, the commenter asserted that, although echocardiography is a diagnostic procedure using ultrasound technology, it should not be considered a radiology service because echocardiography is a service performed primarily by cardiologists, billed under cardiology CPT codes, and furnished to cardiology patients. In addition, the commenter asserted that echocardiography has not been identified as a service that poses a high risk of improper referrals, unlike other services appropriately included in the radiology services category. Another association of cardiologists asserted that we should exclude any ultrasound service not generally performed by radiologists, but instead performed by other specialists as part of their own specialties (such as cardiac, ophthalmic, and gynecologic ultrasound), just as we excluded nuclear medicine in Phase I.

Response: In Phase I, we responded to public comments that questioned why cardiac, vascular, and obstetric ultrasound procedures should be considered radiology services. As we explained then, "these services are subject to the physician self-referral provisions because section 1877(h)(6)(D) of the Act specifically includes ultrasound as a DHS, not because they are ordinarily considered to be 'radiology services.'" (66 FR 928). We see no reason to reconsider this

determination. As explained in Phase I, we do not believe the Congress intended for us to make service-by-service determinations with respect to the risk of overutilization or other abuse. In many cases, these services may qualify for the in-office ancillary services exception or another exception.

Comment: The Phase I definition of "radiology and other imaging services" specifically states that the list of codes used to define these services excludes "[r]adiology procedures that are integral to the performance of, and performed during, nonradiological medical procedures." One commenter preferred the language we used in the preamble to the January 1998 proposed rule to indicate our intention to exclude radiology services that are "incidental" or "secondary" to another procedure (63 FR 1676).

Response: We decline to adopt the standard advocated by the commenter. Many of the comments we received on the January 1998 proposed rule indicated that the "incidental or secondary" standard was confusing or ambiguous. As noted in Phase I (66 FR 928), "it is generally not possible to establish, based on the CPT code used, whether or not the primary purpose of the procedure was the interventional procedure itself (with the imaging procedure being an adjunct procedure) or whether the primary purpose was to take a picture with an imaging modality." Those who commented on the "integral" standard generally favored the new language.

Comment: One commenter asserted that radiology services may be needed before a procedure to plan the manner in which a needle, catheter, or probe will be guided, and that radiology services may be performed after a procedure to assess whether the procedure was effective. Another commenter asserted that we should exclude all interventional radiology services, since in almost all cases, the physician making the referral performs part or all of the procedure.

Response: We interpret the commenter to request that such pre- and post-procedure radiology services be considered "integral to and performed during" a procedure so as to qualify under the standard set forth at § 411.351 (Radiology and other imaging services, subpara. (2)). We agree, in part, with the commenter. We have modified the definition of radiology and other imaging services at § 411.351 to make clear that radiology services performed immediately after a procedure in order to confirm the placement of an item during the procedure are not DHS. Otherwise, we decline to change the regulations for the reasons set forth in Phase I (66 FR 928–929). In addition, depending on the circumstances, existing exceptions in the statute and regulations, such as the in-office ancillary services exception or the rural provider exception, may apply to radiology procedures furnished pre- or post-surgery.

Comment: Two commenters addressed ophthalmic A-scans, and one of the commenters also addressed B-scans. According to the commenters, because A-scans (particularly CPT 76519) must be performed before cataract surgery to determine the appropriate power of the intraocular lens (IOL) to be implanted, these procedures are integral to cataract surgery even though they are not performed during the surgery. One commenter asserted that B-scans are performed only in support of another service or procedure. For example, the commenter stated that B-scans may be used in certain cataract surgery cases to view the posterior segment or retina of the eye to determine if a structural pathology is present. Both commenters argued that the "integral to and performed during" standard should be changed to accommodate A-scans and B-scans. Alternatively, the commenters advocated that we create a special exception for A-scans on the grounds that they are sufficiently integral to another procedure and are subject to little or no overutilization or abuse. One of the commenters alleged that such an exception would be based on the same rationale as that which led us to create the exception in § 411.355(g) regarding EPO and other dialysis-related drugs furnished in or by an ESRD.

Response: We do not see a meaningful distinction between the A-scans and B-scans described by the commenters and other radiology services ordered by surgeons in connection with surgeries; nor do we think that A-scans and B-scans pose no risk of abuse. Moreover, we do not believe that our rationale for creating the exception in § 411.355(g) pertains here. Unlike ESRD services, A-scans and B-scans are not necessarily performed in conjunction with services that are paid for under a composite rate, nor are they subject to strict utilization and coverage criteria. Nevertheless, we would expect that in many cases, the in-office ancillary services exception may apply to A-scans and B-scans.

Comment: Commenters expressed concern that, in many cases, ASCs will not be able to provide radiology and ultrasound services that are not performed during surgery. These commenters urged that, if CMS continues to consider radiology and ultrasound services performed before or after surgery to be DHS, then the same reasons that support a special exception for prosthetic devices implanted in an ASC should also support a specific exception for these radiology services.

Response: We are not persuaded that a special exception is warranted. The exception for implants in ASCs applies to the implantation of a device during a surgical procedure, rather than before or after it. In those circumstances, the implant is clearly integral (indeed, inseparable) from the surgery itself. Similarly, radiology included in the ASC composite rate for an ASC procedure is not a DHS for the reasons set forth in Phase I at 66 FR 923. We see no reason to treat radiology services that are furnished in an ASC, but are not paid for in the ASC composite rate, differently from radiology services provided by any other entity.

Comment: One commenter advocated that we create an exception to permit interventional radiologists to order diagnostic, non-interventional radiology or other imaging procedures from an entity with which they have a financial relationship prior to performing interventional radiology and related surgical procedures. The commenter noted that the professional component of the diagnostic procedure may be performed at a hospital or an ASC by another physician in the radiologist's group practice. According to the commenter, a limited exception would enable beneficiaries to benefit from interventional radiology.

Response: We see no need for a new exception. The self-referral prohibition does not apply to a radiologist's request for diagnostic radiology tests pursuant to a consultation because the request is not a "referral" for purposes of section 1877 of the Act. Our expansion of the definition of "referral" would permit a radiologist to order diagnostic radiology services that are supervised by another radiologist in the same group practice.

If the request is not made pursuant to a consultation, the referral of the professional component may nevertheless qualify for another exception (such as the physician services exception). With respect to any technical component billed by a hospital or ASC, there are sufficient exceptions available in the statute and regulations to address legitimate financial relationships between physicians and these entities.

Comment: A commenter urged us to amend the final rule to clarify that not only the ordering physician, but also other "physicians in the group practice," may provide the professional component of a radiology service if all

the following conditions apply: (1) A physician in the group has ordered the technical component; (2) the professional component is provided at an institutional provider; and (3) the patient is either an outpatient or inpatient of the institution where the professional component is provided.

Response: As explained in section II.D, above, we have expanded the consultation exception in the definition of "referral" in § 411.351 to permit supervision by another physician in the same group practice as the radiologist, as long as the request results from a consultation initiated by another physician and the other conditions of the exception are satisfied. Moreover, the physician services exception may apply in the circumstances described by the commenter.

Comment: One commenter expressed concern that the exclusion of some interventional radiology codes for services such as angiographies, angiograms, cardiac catheterizations, and endoscopies might afford some physicians more incentive to refer for costly interventional tests that may not be medically necessary. Although these studies would be DHS under 1877(h)(6)(K) when performed as inpatient or outpatient hospital services, some will be performed at freestanding facilities and therefore not constitute a DHS. The commenter asked that we reassess our decision, or, in the alternative, instruct contractors to monitor utilization patterns for excluded interventional radiology services.

Response: As explained in Phase I (66 FR 929), the services referenced by the commenter are not fundamentally radiological in nature because they do not involve an imaging service that is described in 1877(h)(6)(D) of the Act. These services are DHS when performed in a hospital inpatient or outpatient setting. Other statutes, including the Federal anti-kickback statute, are available even in instances where a particular item or service is not DHS under section 1877 of the Act.

Comment: An association representing radiologists urged us to consider nuclear medicine a DHS because excluding nuclear medicine, as was done in Phase I, increases the risk of program abuse. The commenter asserted that nuclear medicine is a subspecialty of radiology and that radiologists perform and interpret the vast majority of nuclear medicine studies performed in the United States. The commenter also asserted that the exclusion of nuclear medicine has encouraged potentially abusive business arrangements involving physician financial relationships with entities to which they refer patients for positron emission tomography (PET) scans. Another commenter expressed concern that echocardiography is a DHS, while nuclear medicine procedures (some of which are commonly performed as a clinical alternative for stress echocardiography) are not. The comment suggested that a physician's financial interest in nuclear medicine modalities could influence the physician to select nuclear medicine procedures over echocardiography.

Response: We are making no changes to the treatment of nuclear medicine procedures under the DHS definitions at this time. However, we are mindful of the issue raised by the commenter and are continuing to consider the application of section 1877 of the Act to nuclear medicine procedures. Moreover, parties should be mindful that arrangements involving nuclear medicine may violate the anti-kickback statute, depending on the circumstances.

G. Radiation Therapy Services and Supplies (Phase I—66 FR 931)

Phase I indicated that the list of codes for radiation therapy services and supplies identified on our Web site and in annual updates is based on section 1861(s)(4) of the Act (42 U.S.C. § 1395(x)(s)(4)) and § 410.35, but does not include nuclear medicine procedures. As explained above in the immediately preceding section concerning radiology services, we are continuing to consider the application of section 1877 of the Act to nuclear medicine procedures, but we are not changing the treatment of nuclear medicine procedures under the DHS definitions at this time.

Comment: One commenter opposed our use of CPT and HCPCS codes to define the scope of "radiation therapy services and supplies" because Medicare has never used these codes to define such services.

Response: As explained above, we used codes in Phase I to define various categories of DHS in response to public comments urging us to create "bright line" definitions for DHS. In general, commenters were pleased with this approach. The list of codes applies only to section 1877 of the Act and the corresponding regulations. The list is updated annually, and we look to commenters to identify any specific codes that we have listed that should not be considered "radiation therapy services and supplies."

Comment: One commenter stated that services that are furnished before or after radiation treatment (such as a consultation to plan the placement of radioactive elements or post-surgical dosimetry services) should not be considered radiation therapy services for physician self-referral purposes. According to the commenter, these services are neither radiation therapy services nor inpatient or outpatient hospital services; they are physician services performed in a physician's office.

Response: Pre-planning placement services (CPT codes 77300 and 77305 through 77331) and normal follow-up post-surgical dosimetry services are professional physician services, as are many other radiation therapy services. To the extent that those services are billed as an outpatient hospital service, they would constitute a designated health service under section 1877(h)(6)(K) of the Act. We think that, in many cases, these services will be performed or supervised by a radiation oncologist pursuant to a consultation and therefore will not constitute a "referral" under § 411.351. To the extent that a request for these services constitutes a referral, it would appear that the in-office ancillary services exception and the physician services exception could apply in many cases. However, these exceptions are not available for any technical component that is billed as an outpatient hospital service.

Comment: One commenter asked us to reconsider our statement in the January 2001 final rule preamble (66 FR 931) that there is no logical or empirical evidence that physician ownership of brachytherapy centers improves quality of care.

Response: The commenter offered no evidence or support for the proposition that physician ownership of brachytherapy centers improves quality of care. Our position remains the same.

Comment: One commenter asked that we exclude from the list of codes that defines "radiation therapy services and supplies" the CPT codes for brachytherapy (CPT codes 77781 through 77784). The commenter stated that excluding brachytherapy from the list of DHS codes would be appropriate because the Congress did not intend to include as DHS invasive forms of radiation therapy. According to the commenter, when the Congress expanded section 1877 to apply to radiation therapy services and supplies, radiation therapy typically encompassed only the use of an external electron beam through the body without any invasive procedure. The commenter also noted that the definitions of "radiation" and "radiation therapy" found in Stedman's Medical Dictionary

do not include treatments (such as brachytherapy) in which surgical means are necessary to insert radioactive isotopes into the body. *See The American Heritage Stedman's Medical Dictionary,* Houghton Mifflin Company, Boston, Massachusetts, October 1995 (defining "radiation" as the emission and propagation of energy in the form of rays or waves, and "radiation therapy" as the treatment of disease with radiation, especially selective irradiation with X-rays or other ionizing radiation and by ingestion of a radioisotope). The commenter asserted that the same logic that caused us to exclude certain invasive radiology procedures from the definition of "radiology and certain other imaging services" should persuade us to exclude brachytherapy from the definition of "radiation therapy services and supplies."

Response: As noted in § 411.351, the list of codes defining "radiation therapy services and supplies" is based on section 1861(s)(4) of the Act (authorizing Medicare payment for "x-ray, radium and radioactive isotope therapy"). Brachytherapy involves the placement of radioactive isotopes under the skin for therapeutic purposes, and therefore is clearly within the scope of services identified in section 1861(s)(4) of the Act. Accordingly, brachytherapy is also within the scope of the DHS category of "radiation therapy services and supplies." We find nothing in the statutory scheme or language to suggest that the Congress intended to exclude radiation therapy involving surgical or invasive procedures. We do not believe the Congress intended the definitions of DHS under the statute to be frozen in time, as this would eventually defeat the purpose of the statute. Just as new clinical laboratory tests are, and will continue to be, included in the definition of "clinical laboratory tests," so, too should new radiation therapy services and supplies be included in the definition of "radiation therapy and supplies." Moreover, in 1993, when section 1877 of the Act was made applicable to radiation therapy services and supplies, the Congress would have understood that this category included brachytherapy services. AMA-approved brachytherapy codes have been in existence since 1983: One brachytherapy service (CPT code 77776) received a CPT code in 1983; ten brachytherapy services (CPT codes 77761–63; 77777–78; 77789; 77326–28; and 77799) received CPT codes in 1984; and four brachytherapy services (CPT codes 77781–84) received CPT codes in 1991. Finally, the AMA chose to place the codes for these brachytherapy items and services in the 77000 section, a section for radiation therapy services.

Comment: The same commenter argued in the alternative that we should use our authority pursuant to section 1877(b)(4) of the Act to create an exception for financial relationships involving brachytherapy services. According to the commenter, such financial relationships do not pose a risk of program or patient abuse because brachytherapy is not a diagnostic procedure; it is used only after a diagnosis of cancer has been made by the treating physician. In addition, the commenter asserted that, since brachytherapy can be performed only once on a patient, any abuse in the form of repetitive billing would be obvious. Finally, the commenter asserted that abuse is more likely to occur with other competing and more expensive procedures that have higher profit margins, such as radical prostatectomy or external beam radiation.

Response: We are not persuaded that an additional exception is warranted. To the extent brachytherapy services and supplies are furnished by a radiation oncologist pursuant to a consultation, the consultation exception could apply. To the extent that a urologist provides the services, there are a number of exceptions that could be available, depending on the circumstances. We recognize that there would be no exception available for a facility fee billed by an entity owned by a urologist, unless the entity were located in a rural area or the DHS qualified under the in-office ancillary services exception. However, we continue to believe that brachytherapy may be subject to abuse. For example, a urologist who owns a brachytherapy facility may be more inclined to order brachytherapy rather than another radiation therapy treatment in which he or she may not have a financial interest. The statuory language and structure reflects the Congress' intent to curb physician ownership in DHS entities to which they refer because such ownership creates an inappropriate financial incentive to make referrals. With respect to the commenter's assertions regarding the nature of brachytherapy, all radiation therapy services and supplies are furnished only after a diagnosis of cancer is made; thus, we see no reason to differentiate among radiation therapy treatments on that basis. The fact that other treatments may be more expensive or have higher profit margins—and therefore may be more likely to be abused—is not a basis for concluding that brachytherapy poses no risk of abuse.

Comment: A commenter stated that brachytherapy is less invasive than other procedures for removing a tumor in the prostate gland and that including it as a designated health service will prohibit physicians in multiple specialties from collaborating to provide the service.

Response: We are unclear from the comment as to why including brachytherapy as a DHS will prohibit collaboration on such services. While certain financial interests in brachytherapy services may be prohibited, nothing in the statute or regulations prohibits physicians' professional collaboration on patient care. A physician's personally performed service is not considered a referral for purposes of section 1877 of the Act. Futhermore, physicians are free to refer to one another as long as they do not have a prohibited financial arrangement. Finally, we are not aware of a brachytherapy access problem in the United States.

H. Durable Medical Equipment (DME) and Supplies (Phase I—66 FR 931)

We received only one comment regarding our definition of DME, in which we defined DME with reference to section 1861(n) of the Act and § 414.202. We are not making any changes to this definition.

Comment: The January 1998 proposed rule explicitly stated that home dialysis equipment and supplies do not constitute DME for the purposes of section 1877 of the Act. A commenter sought clarification that the ESRD benefit under section 1861(s)(2)(F) of the Act (providing coverage for home dialysis supplies and equipment) is distinct from the DME benefit in section 1861(s)(6) of the Act, and that home dialysis equipment and supplies are not covered as DME under Medicare.

Response: The commenter is correct. Our position regarding home dialysis equipment and supplies remains the same: The DME and ESRD benefits are distinct, and home dialysis equipment and supplies are not DME, as defined in section 1861(n) of the Act and § 414.202 of the regulations.

I. Parenteral and Enteral Nutrients, Equipment and Supplies (Phase I—66 FR 932)

We received only one comment on this subject and are making no change to the definition set forth in Phase I.

Comment: A commenter stated that the Phase I preamble (66 FR 933) asserts incorrectly that enteral nutrition is widely available in grocery stores, drug stores, and other retail outlets. The statement was made in response to a

comment advocating that we exclude from the definition or create an exception for parenteral nutrition furnished by a physician group practice to its own patients.

Response: We have received conflicting reports about the routine availability of enteral nutrition in grocery stores and drug stores. The commenter may be correct with respect to patients who are completely dependent on enteral formulas for nutrition. Regardless, the Congress specifically excluded the provision of parenteral and enteral nutrients from the in-office ancillary services exception in section 1877(b)(2) of the Act. Accordingly, to the extent that the commenter would like us to reconsider our overall response to the original comment, we cannot do so.

J. Prosthetics, Orthotics, and Prosthetic Devices and Supplies (Phase I—66 FR 933)

We received no comments on this subject and are making no substantive changes to the definition.

K. Home Health Services (Phase I—66 FR 936)

We received no comments on this subject and are making no changes to the definition.

L. Outpatient Prescription Drugs (Phase I—66 FR 937)

Phase I defined outpatient prescription drugs as "all prescription drugs covered by Medicare Part B." We note that, effective January 1, 2006, many additional outpatient prescription drugs will be covered under Medicare Part D, which was added to the Social Security Act by section 101 of MMA. In light of the expanded coverage, we will revisit the definition of "outpatient prescription drugs" in a future rulemaking. The MMA amended Title XVIII to include a definition for "covered Part D drug" in section 1860D–2(e) of the Act. While we have no specific proposal at this time, we are interested in receiving comments regarding approaches to expanding the definition of "outpatient prescription drugs" to reflect the definition of "covered Part D drug" in the MMA. We received the following comments regarding outpatient prescription drugs.

Comment: A commenter asked us to clarify that antigens are not "outpatient prescription drugs" or, in the alternative, to clarify that a referral by a physician for antigens which he or she personally provides is not a "referral" within the meaning of section 1877 of the Act.

Response: We responded to this comment in section V.A, noting that the provision of antigens may be protected under the physician services or in-office ancillary services exceptions. We also noted that when antigens are personally furnished by the referring physician, there is no "referral" for purposes of section 1877 of the Act.

Comment: One commenter urged that any drug administered in a physician's office not be considered an "outpatient prescription drug" because the physician may not be required to write a prescription for that item. According to the commenter, section 1877 of the Act was intended to govern only the in-office dispensing (as opposed to administration) of drugs. In the alternative, the commenter believed that we should exclude all injectables from the definition of "outpatient prescription drugs," whether or not they would qualify as immunizations or vaccines. According to the commenter, the administration of injectable drugs is so integral to a physician service that physicians should be permitted to furnish injectables without complying with the in-office ancillary services exception.

Response: We responded to similar comments in Phase I (66 FR 938). We continue to find no meaningful distinction between prescription drugs dispensed by pharmacies and those mixed and administered in a physician's office. Drugs administered in the physician office setting are outpatient prescription drugs; they are available only upon a physician's order and are provided in an outpatient setting. Phase I made clear that drugs administered in a physician's office may, and typically will, fit in the in-office ancillary services exception. If administered personally by the referring physician, there is no "referral" for purposes of section 1877 of the Act. We are not convinced that creating an additional exception for all drugs administered in the physician office is either necessary or without any risk of fraud or patient abuse.

M. Inpatient and Outpatient Hospital Services (Phase I—66 FR 940)

In the January 1998 proposed rule, we solicited comments on whether we should exclude lithotripsy from the DHS category of "inpatient and outpatient hospital services." We received hundreds of comments urging us to exclude lithotripsy as a designated health service. We addressed these comments in the Phase I preamble (66 FR 940 through 941) and declined to exclude the service as an inpatient or outpatient hospital service. After the publication of Phase I, we received similar comments from two associations representing physicians with ownership interests in lithotriptors.

Given the statutory language, we are not revising the regulatory definition. However, in light of the unique legislative history regarding the application of section 1877 of the Act to lithotripsy, we will not consider lithotripsy an "inpatient or outpatient service" for purposes of section 1877 of the Act. Contractual arrangements between hospitals and physicians or physician practices regarding lithotripsy nevertheless constitute a "financial relationship" under section 1877 of the Act. Accordingly, such contractual arrangements must comply with an exception if the physician will refer Medicare patients to the hospital for services that otherwise constitute an "inpatient or outpatient hospital service" or another designated health service.

N. Other Definitions (Phase I—66 FR 942)

1. Consultation

The definition of "consultation" is addressed in section III.B.2 of the Phase I preamble (66 FR 873), in section II.D of this Phase II preamble (including comments and responses), and in the regulations in § 411.351.

2. Entity

The definition of "entity" is addressed in section VIII.N.2 of the Phase I preamble (66 FR 943) and in the regulations in § 411.351. Comments and our responses on the Phase I definition follow.

Comment: Several commenters claimed that the definition of "entity" was confusing. In particular, the commenters urged that the definition be restructured to be more clear and that the statement that certain organizations that employ a supplier or operate a facility that "could" accept reassignment be changed to clarify whether such entities would, in fact, be deemed to provide DHS.

Response: We have rewritten the language in an effort to provide greater clarity. The substance of the definition remains unchanged.

Comment: A commenter representing independent practice associations urged that we exclude IPAs from the definition of "entity" when they furnish DHS directly, through employees or entities that they own.

Response: We discern no reasonable basis to treat IPAs that furnish DHS differently from other entities that furnish the same services. If an IPA

furnishes DHS through employees or owned entities, then it is a DHS "entity" for purposes of section 1877 of the Act.

3. Fair Market Value

The definition of "fair market value" is addressed in section VIII.N.3 of the Phase I preamble (66 FR 944) and in the regulations in § 411.351. The following are our responses to comments to the Phase I definition.

Comment: A commenter expressed concern that the discussion of "fair market value" in the Phase I preamble does not provide sufficiently clear guidance for determining "fair market value." That commenter recommended that the regulations include a rebuttable presumption of reasonableness and "fair market value" when entities benchmark their arrangements to objective measures or when they obtain the opinion of independent third parties as to "fair market value" in a particular arrangement. The commenter suggested that the presumption be similar to that contained in the IRS's intermediate sanctions provisions.

Response: We appreciate the commenter's desire for clear "bright line" guidance. However, the statute covers such a wide range of potential transactions that it is not possible to verify and list appropriate benchmarks or objective measures for each. Moreover, the definition of "fair market value" in the statute and regulation is qualified in ways that do not necessarily comport with the usage of the term in standard valuation techniques and methodologies. For example, the methodology must exclude valuations where the parties to the transactions are at arm's length but in a position to refer to one another. In addition, the definition itself differs depending on the type of transaction: leases or rentals of space and equipment cannot take into account the intended use of the rented item; and in cases where the lessor is in a position to refer to the lessee, the valuation cannot be adjusted or reflect the value of proximity or convenience to the lessor. Our Phase I discussion made clear that we will consider a range of methods of determining fair market value and that the appropriate method will depend on the nature of the transaction, its location, and other factors. While good faith reliance on a proper valuation may be relevant to a party's intent, it does not establish the ultimate issue of the accuracy of the valuation figure itself. With respect to valuing physician services, however, we are establishing several "safe harbored" methodologies discussed in more detail in section VIII.C.

Comment: A commenter sought clarification that determinations of "fair market value" could involve comparisons of national or regional data where appropriate. By way of example, the commenter suggested that the market for physician recruitment has become national.

Response: Whether resort to national or regional data is appropriate will depend on the facts and circumstances of each case. The regulations necessarily cover a wide variety of arrangements, services, and markets, and no single means for determining "fair market value" will apply to all. For hourly physician compensation, we have added "safe harbored" methodologies for establishing fair market value that take into account national and regional data (section VIII.C of this preamble). If parties are using comparables to establish fair market value, they should take reasonable steps to ensure that the comparables are not distorted.

4. Group Practice

The definition of "group practice" is addressed in section VI.C of the Phase I preamble (66 FR 894), in section V.C of this Phase II preamble, and in the regulations in § 411.352.

5. Health Professional Shortage Area

The definition of "health professional shortage area" is addressed in section VIII.N.5 of the Phase I preamble (66 FR 945) and in the regulations in § 411.351. We received no comments on this definition and are making no changes to it.

6. Employee

The definition of "employee" is addressed in section VIII.N.6 of the Phase I preamble (66 FR 946), in section VIII.B of this Phase II preamble, and in the regulations in § 411.351.

7. Immediate Family Member

The definition of "immediate family member" is addressed in section VIII.N.7 of the Phase I preamble (66 FR 946) and in the regulations in § 411.351. We received no comments on this definition and are making no changes to it.

8. Referral

The definition of "referral" is addressed in section III.B of the Phase I preamble (66 FR 871), section II.C of this Phase II preamble, and in the regulations in § 411.351.

9. Remuneration and the Exceptions in Section 1877(h)(1)(C) of the Act

The definition of "remuneration" (along with the exceptions) is addressed in section VIII.N.9 of the Phase I preamble (66 FR 946) and in the regulations in § 411.351.

The statute expressly excludes from the definition of "remuneration" payments made by an insurer or self-insured plan to a physician to satisfy a claim, submitted on a fee-for-service basis, for the furnishing of health services by that physician to an individual who is covered by a policy with that insurer or by that self-insured plan. This might occur, for example, if a plan enrollee receives out-of-network care in an emergency room. In practice, the application of this rule may not have the intended effect of excluding those payments from the definition of "remuneration." This is because, in many cases, payments are made by downstream subcontractors of insurers or self-insured plans (for example, providers who have assumed risk under a plan), rather than the insurer or plan itself. Accordingly, we have revised the regulations to cover payments made by downstream subcontractors.

In addition, we received the following comment:

Comment: A commenter recommended that the items and services enumerated by the new exceptions for non-monetary compensation, medical staff incidental benefits, and compliance training be excluded from the definition of "remuneration" rather than included in various new exceptions.

Response: We disagree. Most, if not all, of the items and services covered by the new exceptions fit squarely in the broad statutory definition of "remuneration." The Congress included in the definition of "remuneration" a short list of specific items and services that it intended to exclude. The items and services covered by the new exceptions are not among them. Treating them as remuneration (that is, as creating compensation arrangements) and then excepting them is consistent with the statutory scheme and structure.

We note that among the items specifically excluded from the definition of remuneration are items used to collect, transport, process, or store specimens. In the Phase I preamble, we indicated that sterile gloves do *not* fit in this category of items excluded from the definition of remuneration (66 FR 948). Our use of the term "sterile gloves" was intended to be illustrative, not exclusive, and other gloves similarly are *not* excluded from the definition of remuneration. As stated in the Phase I preamble, the provision of any free gloves would be remuneration and would need to fit in an exception.

10. Transaction and Isolated Transaction (Phase II—§ 411.357(f))

The definitions of "transaction" and "isolated transaction" are addressed in section VIII.F of this Phase II preamble and in the regulations in § 411.351.

XII. Regulatory Exceptions

In Phase I, we created a number of new exceptions using the authority granted to the Secretary in section 1877(b)(4) of the Act. We are creating some additional exceptions under section 1877(b)(4) of the Act in Phase II.

Several commenters to Phase I objected to the condition in these new regulatory exceptions that the arrangement in question not violate the anti-kickback statute. The commenters felt that this condition injected an unnecessary facts and circumstances test in what is intended to be a bright line area of law. If the requirement is retained, a commenter urged that the language used in all references to violation of the anti-kickback statute in the regulations be made consistent. One commenter claimed to be confused by the requirement in new exceptions that compensation arrangements comply with all billing and claims submission laws or regulations. The commenter pointed out that, in some cases, it is difficult to see how compensation arrangements implicate billing or claims filing.

We have endeavored to craft bright line rules under these regulations wherever possible. However, our authority under section 1877(b)(4) of the Act is expressly limited to arrangements that pose no risk of program or patient abuse. Thus, if an arrangement poses even a low risk, we cannot create a new exception. The statutory "no risk" standard is not limited to a determination of "no risk" under section 1877 of the Act. Given this broad "no risk" standard, it would be impossible to create new exceptions for many arrangements without the anti-kickback statute condition. Many arrangements that might otherwise warrant an exception under section 1877 of the Act—a strict liability statute—pose some degree of risk under the anti-kickback statute; these arrangements cannot, therefore, be said to pose *no* risk. We are rectifying the lack of consistency in the language used in these regulations when referring to the anti-kickback statute by making technical changes to several provisions. We are also clarifying through a new definition at § 411.351 that a party will be considered to have received a favorable advisory opinion from the OIG with respect to the anti-kickback statute if the opinion indicates that the OIG will not subject the party's arrangement to sanctions arising under the anti-kickback statute.

The billing and claims submission condition was also included to satisfy the absolute *no* risk standard under section 1877(b)(4) of the Act. We agree that many compensation arrangements will not implicate billing or claims filing. However, some arrangements may, and the exceptions are designed to cover a wide scope of arrangements. Moreover, most referrals will implicate billing and claims submission for the referred item or service. If a particular arrangement does not implicate billing or claims submission in any way, then the parties need not be concerned with that condition. We have also revised the regulations to rectify the lack of consistency of the language used in this regard. Specifically, technical changes have been made to several provisions.

We received one comment proposing a new exception that we are not promulgating. The request was for an exception for referrals in areas with a demonstrated community need (for example, areas lacking adequate health care facilities or providers, particularly inner city areas). The proposed exception would be comparable to the rural area exception and permit physician ownership of inner city DHS entities. We are unable to adopt the suggestion. The Congress clearly limited ownership of DHS entities in underserved areas to rural providers (section 1877(d)(2) of the Act). We cannot conclude that ownership in inner city areas—which are proximate to more affluent urban areas from which to draw additional business—would be without risk. We are mindful of the difficulties some inner city areas experience in providing adequate health care to community residents. However, given the numerous statutory and regulatory exceptions—including the fair market value exception—we are not persuaded that section 1877 of the Act is a significant impediment.

Comments and responses to new regulatory exceptions not already discussed in this preamble are set forth below.

A. Academic Medical Centers (Phase I—66 FR 915; § 411.355(e))

[If you choose to comment on issues in this section, please include the caption "Academic Medical Centers Exception" at the beginning of your comments.]

In Phase I, we added a new regulatory exception for academic medical center arrangements, using the authority granted the Secretary under section 1877(b)(4) of the Act. While most commenters praised the new exception in § 411.355(e), many suggested ways to improve it. The most significant comments addressed the requirements in § 411.355(e)(1)(ii) relating to the referring physician's compensation. In particular, commenters observed that the requirement that a physician's compensation be "set in advance" precluded calculating any component of the compensation using a percentage-based methodology. In addition, the requirement that compensation not take into account "other business generated by the referring physician within the academic medical center" potentially affected compensation based on a physician's professional services. Commenters viewed these provisions as more strict than the requirements for physician compensation paid by group practices under § 411.352 or for other physician compensation arrangements.

Other commenters requested modifications to various elements of the definition of an "academic medical center" in § 411.355(e)(2). These commenters wanted greater flexibility as to the number and organization of affiliated practice plans, and they objected to the requirements that a majority of the affiliated hospital's medical staff be faculty members and a majority of the hospital's admissions come from faculty members.

Our modification of the "set in advance" and the "other business generated" provisions (see section IV above) should address the concerns of many commenters. We are revising the rule to make it easier to qualify as an academic medical center or a component of an academic medical center, and we have clarified some of the exception's terminology. The particular changes are discussed in the responses to comments that follow.

Comment: One commenter asked that we broaden the definition of an academic medical center in § 411.355(e)(2) to eliminate the requirement that an academic medical center include an accredited medical school. According to the commenter, if a hospital has an approved medical education program, it should be enough to ensure that the hospital is part of an academic medical center. One commenter suggested including any hospital or health system that sponsors five or more medical education programs.

Response: We agree that the definition is overly restrictive. We have modified the definition of an academic medical center in § 411.355(e)(2)(i) to permit hospitals or health systems that sponsor four or more approved medical education programs (for purposes of the

exception, an "accredited academic hospital") to qualify, provided they meet the other criteria in the exception. We think a requirement for four programs will adequately ensure that the hospital or health system has a substantial teaching mission. A hospital or health system meeting the requirement in § 411.355(e)(2)(i) may be the same hospital that meets the "affiliated hospital" requirement of § 411.355(e)(2)(iii), and we have modified the regulation to reflect this. Finally, to reflect this broader reading of an "academic medical center," we have revised the regulations to clarify that the referring physician may be on the faculty of the affiliated medical school or the accredited academic hospital.

Comment: We received many comments related to various aspects of the affiliated faculty practice plan requirement in § 411.355(e)(2)(ii). A number of commenters objected to the requirement that the practice plan be a tax exempt organization under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Service (IRS) Code. These commenters noted that many bona fide plans are organized as professional corporations or not-for-profit organizations under State law or are not separate legal entities. Other commenters sought clarification as to whether an academic medical center could have more than one affiliated faculty practice plan. Finally, several commenters asked whether the faculty practice plan could be affiliated with the teaching hospital, rather than the medical school.

Response: We recognize that there are many variants of the basic academic medical center arrangement. We are eliminating the requirement that the faculty practice plan or plans be organized in any particular manner. As long as the other criteria of the exception can be met, there is sufficient assurance that the faculty practice plan is part of a *bona fide* academic medical center and that the practice plan supports the core teaching mission. We are also clarifying § 411.355(e)(2)(ii) to reflect that an academic medical center may have more than one affiliated faculty practice plan and that the faculty practice plans can be affiliated with the teaching hospital, the medical school, or the accredited academic hospital.

Comment: A number of commenters questioned aspects of § 411.355(e)(2)(iii), especially the requirements that a majority of the affiliated hospital's medical staff be faculty members and that a majority of the hospital's admissions be made by faculty members. A number of commenters suggested that these requirements are unnecessary in light of § 411.355(e)(1)(i), which contains the requirements for referring physicians. Some commenters sought clarification that residents and non-physician practitioners need not be counted when calculating the percentage of medical staff that are faculty members. Other commenters suggested that courtesy and volunteer faculty should count as faculty members for purposes of the tests in § 411.355(e)(2)(iii), even if they do not qualify as referring physicians under § 411.355(e)(1)(i). One commenter on behalf of a children's hospital stated that children's hospitals frequently affiliate with several medical schools in their geographic area. The commenter suggested that we permit children's hospitals to aggregate the faculty members from all affiliated medical schools. Another commenter on behalf of children's hospitals asked that the tests be restructured to be alternatives, so that satisfying either test would be sufficient. One commenter asked that we include in the exception arrangements between a medical college and a hospital other than an affiliated teaching hospital by broadening the definition of an affiliated hospital; this commenter suggested that we include unaffiliated hospitals where otherwise *bona fide* faculty members of the academic medical center may be assigned by the medical school to perform services as part of their continued employment or appointment with the academic medical center. The commenter noted that these kinds of arrangements occur for a variety of practical reasons, ranging from availability of sophisticated specialty equipment to accommodating the needs of communities located near unaffiliated hospitals.

Response: Given the breadth of the academic medical center exception, it is important to ensure that the relationship between the components is sufficiently focused on the academic medical center's core mission. We believe the tests for affiliated hospital faculty and admissions set forth in § 411.355(e)(2)(iii) are strong indicators of that core relationship. A teaching hospital can include any faculty, including courtesy and volunteer faculty, in determining whether it qualifies under these tests. We are, however, revising the regulatory text to clarify (i) that the majority of physicians on the medical staff must be on the faculty, and (ii) that the aggregation of faculty from any affiliated medical school is permitted. We agree with the commenters that residents and non-physician professionals do not need to be included as medical staff for purposes of § 411.355(e)(2)(iii).

Comment: Several commenters raised issues about the requirement in § 411.355(e)(1)(i) that the referring physician must be an employee of a component of the academic medical center. Other commenters asked that volunteer faculty be included in the requirement. One commenter representing a State institution wanted primary care physicians included, even though they do not have substantial teaching responsibilities. One commenter asked that we clarify that the physician can be an employee of the hospital, as well as the medical school.

Response: The purpose of the academic medical center exception is to provide protection under section 1877 of the Act for academic medical centers because they often have complex compensation arrangements with their faculty. If a physician is not an employee of any of the components of the academic medical center, we believe the relationship between the physician and the party paying the remuneration should not be sufficiently different from the usual arrangements of entities or organizations that are not academic medical centers, and one of the other exceptions under section 1877 of the Act should apply. For the same reasons, we are not including primary care physicians who do not perform substantial academic services or clinical teaching services. While we recognize that primary care services may be part of a State institution's mission, the primary care physicians are essentially in the same circumstances as employed physicians of any health system. Arrangements with those physicians can be structured to fit in other exceptions, including the fair market value exception or the personal services exception.

The referring physician need not be an employee of the medical school, however. Section 411.355(e)(1)(i) requires only that the referring physician be a *bona fide* employee of a component of the academic medical center. A referring physician could be an employee of the teaching hospital and a volunteer faculty member, for example, as long as his or her employment encompasses substantial academic services or clinical teaching services.

Comment: Several commenters also asked that we clarify what constitutes "substantial academic or substantial clinical teaching services" under § 411.355(e)(1)(i)(D).

Response: In the Phase I rule, we did not specify what constitutes "substantial academic services or

clinical teaching services" because we believe it will vary with the precise duties of a given faculty member, and we wanted to provide academic medical centers with flexibility. Nevertheless, to provide added clarity, we are adding a "safe harbor" provision to § 411.355(e)(1)(i)(D) that will deem any referring physician who spends at least 20 percent of his or her professional time or, in the alternative, 8 hours per week providing academic services or clinical teaching services (or a combination of academic services and clinical teaching services) as fulfilling the requirement. This test is intended to be a "safe harbor", not an absolute requirement, and the regulation is being modified to make clear that physicians who do not qualify under this "safe harbor" may still be providing substantial academic services or clinical teaching services, depending on the circumstances. Academic medical centers should use a reasonable and consistent method for calculating a physician's academic services and clinical teaching services. We are also modifying the regulation text to clarify that the substantial services test can be met through either academic services (which would include, without limitation, both classroom and academic research services) or clinical teaching services, or a combination of both.

Comment: One commenter asked that we clarify in which State the referring physician must be licensed.

Response: The referring physician must be licensed in the States in which he or she practices.

Comment: Many commenters objected to the requirements of § 411.355(e)(1)(ii) that the total compensation paid to the referring physician by all components of the academic medical center be "set in advance" and not take into account "other business generated by the referring physician within the academic medical center." The commenters stated that many faculty practice plans, like many group practices, base some part of the physician's compensation on a percentage of collections or revenues attributable to the physician's personally performed services. Moreover, commenters were unclear as to what effect the requirement that the compensation not take into account "other business generated" by the referring physician would have on a physician's personally performed services. The commenters generally thought that academic medical centers should be allowed to compensate referring physicians in the same manner as group practices or entities that employ physicians.

Response: We believe the changes made to the definitions of "set in advance" and "other business generated" described in section IV above largely address the commenters' concerns. We are not persuaded that further changes are needed. Nor are we persuaded that academic medical center arrangements are more similar to group practices than to other contractual arrangements.

Comment: Section 411.355(e)(l)(ii) (and the corresponding preamble discussion) refers to the referring physician's total compensation for the "previous 12-month period (or fiscal year or calendar year)." A commenter found this reference unclear insofar as compensation is generally set for a future period. Moreover, the commenter wondered how the "set in advance" requirement would be applied to compensation in a prior time period. The commenter suggested that the phrase "previous 12-month period" be deleted and that the exception instead require that the compensation be fixed for a specified time period.

Response: We are revising § 411.355(e)(l)(ii) to delete "the previous 12-month period (or fiscal year or calendar year)" language. Upon further consideration, we do not believe that a time period requirement is necessary in light of the remaining conditions in § 411.355(e)(l)(ii) and the exception as a whole.

Comment: One commenter asked us to clarify that in establishing a referring physician's compensation, an academic medical center is not limited to the fair market value at other academic medical centers if the fair market value for comparable private practice physicians in its area is higher.

Response: The commenter is correct. An academic medical center can use either measure of fair market value.

Comment: One commenter asked that the regulation except all transfers of funds between the components of an academic medical center and any other supporting organization, such as a foundation, as long as the supporting organization's primary purpose is supporting the nonprofit mission of the academic medical center, including health care services, education, research, and disease prevention.

Response: We agree in part with the commenter, although we consider the commenter's proposed change to be overly broad in the context of this exception. We have revised the rule to include, in the list of possible components of an academic medical center, not-for-profit supporting organizations whose primary purpose is supporting the teaching mission of the academic medical center.

Comment: A commenter asked that we clarify that the components of the academic medical center need not be separate legal entities.

Response: We have made a clarifying change to § 411.355(e)(1)(i)(A).

Comment: A number of commenters asked that we modify the requirement in § 411.355(e)(1)(iii)(B) that the relationship among the components be set out in a written agreement. Some commenters asked that we permit the relationship to be set out in several separate documents. Others suggested that a course of conduct should be sufficient. A commenter representing an academic medical center with components all owned by a single legal entity noted that the relationship of its components is not reflected in written agreements among the components. This commenter suggested that transfers of funds documented in routine financial reports covering the components should suffice in lieu of written agreements.

Response: We did not intend to restrict the written agreement to a single document. We have modified the regulatory text of § 411.355(e)(1)(iii)(B) to permit the relationship to be memorialized in multiple writings. In order to permit the government to verify an academic medical center's compliance with the exception, it is necessary that the relationship of the components be memorialized in writing or that there be a clearly established course of conduct that is appropriately documented. In the case of a single legal entity academic medical center, we agree that financial reports documenting the transfers of funds between components would be sufficient.

Comment: One commenter asked us to revise the language in § 411.355(e)(1)(iii)(C) to permit use of research money for bona fide research, teaching, indigent care, and community service, the same missions listed in § 411.357(e)(1)(iii)(A), as long as use of the funds is consistent with the terms and conditions of the research grant. The commenter explained that in many instances compensation paid to a physician under a research grant may properly be used for these purposes.

Response: We agree that some additional flexibility in this area is warranted. We have modified the regulations to cover research money used for teaching, a core academic medical center function. However, while we recognize the importance of indigent care and community service, the commenter's proposal is overly broad in the context of research grants,

which can be an area subject to potential abuse. Payments to referring physicians for indigent care or community service may be structured to fit in other exceptions.

B. Services Furnished Under Certain Payment Rates (§ 411.355(d); Phase I—66 FR 924)

Existing Law: In the August 1995 final rule, we took the position that clinical laboratory services furnished as part of a larger service paid by Medicare on a composite basis, such as surgery in an ambulatory surgical center (ASC) or treatment in an end-stage renal dialysis (ESRD) facility, was a referral to an entity providing clinical laboratory services. Accordingly, if the DHS entity and the referring physician had a prohibited financial relationship, any referral and corresponding claim would be tainted. However, under the authority granted in section 1877(b)(4) of the Act, the Secretary determined that referrals for certain clinical laboratory services furnished in ASCs or ESRD facilities or by a hospice do not pose a risk of Medicare program or patient abuse when payments for these services are included in the composite rates for those services. An exception for the services was included in the August 1995 final regulation at § 411.355(d).

Proposed Rule: The January 1998 proposed rule would have retained the exception for certain composite rate services, extending it to all DHS, with an amendment to allow the Secretary to except services furnished under other payment rates that the Secretary determines provide no financial incentive for either underutilization or overutilization or other risk of program or patient abuse. We specifically solicited comment on whether there are analogous composite rates under the Medicaid program.

Final Rule: In the Phase I final rule, we defined designated health services" to exclude services that are reimbursed by Medicare as part of a composite rate (for example, ASC services, skilled nursing facility (SNF) Part A services, or ESRD composite rate services), except to the extent the specifically enumerated DHS in section 1877(h)(6) of the Act are themselves payable through a composite rate (that is, all services provided as home health services or inpatient or outpatient hospital services remain DHS.) (See § 411.351.)

Further, we created several exceptions for specific DHS often performed in association with services reimbursed on a composite rate, such as implants furnished in an ASC and certain drugs administered in or by an ESRD facility. Accordingly, we declined to extend § 411.355(d) beyond clinical laboratory services. Further, we indicated that we were reconsidering the need for § 411.355(d) in light of the new DHS definition and additional regulatory exceptions, and specifically solicited comments on this issue (66 FR 924).

Two commenters believe that the new composite rate exception rendered the prior exception unnecessary and potentially confusing insofar as it would suggest that a separate exception is needed or that clinical laboratory and other DHS would be subject to disparate treatment. One commenter conceded that the prior exception is redundant given the new composite rate rule, but asked that we nonetheless retain it and extend it to all DHS. The commenter stated that a clear, separate rule has been helpful for providers. On balance, we concur with the first two commenters. We are deleting the ASC/ESRD/Hospice exception, formerly in § 411.355(d). We are persuaded that the risk of undue confusion outweighs any utility in having a repetitive exception.

We note that services separately listed in section 1877(h) of the Act that are paid on a composite basis now or in the future (for example, home health and hospital services) are DHS, notwithstanding that they are paid on a composite basis. This concept was incorporated in the Phase I regulations at § 411.351 (definition of "designated health services").

C. Implants in an ASC (Phase I—66 FR 934; § 411.355(f))

In Phase I, we established a new exception for implants furnished by an ASC as a DHS entity. The new exception was necessary because many implantable items are DHS, but are not bundled in the ASC composite rate. Accordingly, the ASC becomes a DHS entity when it furnishes the implants.

Comment: A commenter sought clarification that the new exception for ASC implants applies whether the ASC bills the insurer or the physician bills.

Response: The exception applies to a financial relationship between the physician and the ASC (as the DHS entity) and to a referral for an implant used during an ASC procedure. Accordingly, the exception applies when the implant is billed by the ASC. When a physician bills for an implant, the physician is the DHS entity (as defined in § 411.351), rather than the ASC. In other words, not all implants qualify for this exception; implants implanted in an ASC qualify only if the ASC is the entity furnishing the implant. When a physician bills for the implant, another exception would need to be satisfied, such as the in-office ancillary services exception.

Comment: A commenter also sought confirmation that the exception applies to the implantation of radioactive seeds in the course of brachytherapy.

Response: The exception in § 411.355(f) applies only to "implanted prosthetics, implanted prosthetic devices, and implanted DME." Accordingly, the implantation of radioactive brachytherapy seeds cannot qualify for this exception.

D. Fair Market Value Exception (Phase I—66 FR 917; § 411.357(l))

In Phase I, we finalized an exception for fair market value arrangements originally proposed in the January 1998 proposed rule, with several modifications in response to comments. The fair market value exception applies to arrangements, in writing, for the provision of items and services *by* physicians (provided directly or through employees). Several commenters to the Phase I rule advocated expanding the exception to include remunerative relationships other than the provision of items or services. The commenters urged us to expand the exception to cover the transfer, lease or license of real property, intangible property, property rights, or a covenant not to compete. Moreover, in the commenters' view, the exception should apply equally when the entity provides the items, services, property rights, and so forth to the physician. A commenter pointed out that the fair market value exception does not apply to leases of space *by* entities *to* physicians, contrary to statements in the preamble suggesting that the exception could apply in such circumstances. According to one commenter, as long as the arrangement is commercially reasonable, serves a legitimate business purpose, and provides for fair market value compensation that is set in advance and does not take into account the volume or value of referrals, the arrangement would be free of the potential abuse addressed by section 1877 of the Act. In addition, some commenters asserted that a written agreement should not be necessary if there is equally effective alternative evidence that the arrangement meets all of the requirements of the exception.

We are not persuaded to make substantive changes to the fair market value exception. We believe the other exceptions in the statute and regulations adequately address the various arrangements noted by the commenters, including arrangements in which physicians pay for items or services, such as office space. Moreover, we

believe that it would be difficult to expand the exception to be as comprehensive as the commenters advocate without posing a risk of fraud or abuse.

E. Non-Monetary Compensation up to $300 and Medical Staff Incidental Benefits (Phase I—66 FR 920; § 411.357(k) and § 411.357(m))

In Phase I, we finalized the proposed exception for non-monetary compensation up to $300 and added a new exception for incidental benefits provided by a hospital to its medical staff. Our responses to comments to the Phase I regulations on this subject follow.

Comment: A commenter suggested that we raise the $300 threshold in the non-monetary compensation exception to $600 to conform to IRS Code section 6041A(a), which requires businesses to report remuneration paid to service providers in excess of $600 per year. This change would enable providers to have a single tracking system for both purposes.

Response: We decline to adopt the suggestion. We believe $600 is too high for purposes of section 1877 of the Act and would create a risk of abuse. We do not think it should be unduly burdensome for providers to track when they have met the $300 threshold.

Comment: A commenter stated that the non-monetary compensation and medical staff incidental benefits exceptions imposed an undue burden on DHS entities by requiring them to keep track of the value of all items they provide to each physician in a given year. In addition, the commenter wondered whether an entity would risk having claims denied under section 1877 of the Act if it sends a $25 dollar holiday basket at the end of the year that inadvertently puts the total value of goods provided to the physician over the $300 limit.

Response: Section 1877 of the Act is clearly intended to make DHS entities responsible for monitoring their compensation arrangements with physicians. DHS entities that are not providing a high volume of free items to referring physicians are unlikely to be much affected by the requirement that they not provide more than $300 worth of items a year, nor should tracking be problematic.

Comment: Several commenters suggested that the $300 and $25 thresholds in § 411.357(k) and § 411.357(m) be indexed for inflation, because otherwise the usefulness of the exceptions will diminish over time.

Response: We agree that indexing is appropriate and have revised the regulations to reflect this change. The $300 limit for non-monetary compensation in § 411.357(k) and the $25 limit in § 411.357(m) will be adjusted annually for inflation to the nearest whole dollar effective January 1 of each year using the increase in the Consumer Price Index–Urban All Items (CPI–U) for the 12-month period that ends the previous September 30. As soon as possible after September 30 each year, we intend to display both the increase in the CPI-U for that 12-month period and the new limits on the physician self-referral Web site at *http://cms.hhs.gov/medlearn/refphys.asp.*

Comment: A commenter questioned the restriction in the non-monetary compensation exception on gifts conferred on group practices, rather than individual physicians, such as office parties, equipment, or supplies. The commenter thought that these gifts should be allowed as long as the value apportioned over each physician in the practice is less than $300. By precluding any compensation requested by a physician, the strict anti-solicitation provision reduces the risk that compensation might be solicited in exchange for referrals. Because this is an exception under section 1877(b)(4) of the Act, the exception must be drafted so that covered arrangements pose no risk of patient or program abuse. Consistent with the statutory scheme and structure, as well as the industry's expressed preference for bright line rules, the anti-solicitation provision applies to all physician requests for compensation, regardless of the purpose of the request.

Response: We are retaining the restrictions. Our intent with respect to group gifts is to preclude high value gifts to group practices that may control referrals to the benefactor. The anti-solicitation provision reduces the risk of abuse.

Comment: Several commenters sought clarification of the "on-campus" rule under the new regulatory exception for incidental benefits provided to a hospital's medical staff in § 411.357(m). In particular, the commenters viewed the "on campus" rule as unduly restrictive with respect to electronic communications, internet access (for access to records and patient-related communications), and pagers or two-way radios offered by hospitals to their medical staff. A commenter also explained that many hospitals are developing integrated information systems that electronically link various components of a health care system, including physicians. As part of these programs, physicians may be provided with dedicated computers to allow remote access to a hospital's system in connection with hospital services provided to hospital patients. These systems allow physicians to order tests and medications for hospital patients, check test results, schedule surgery, and access treatment protocols and other decision support references from their own offices.

A commenter also expressed concern about hospital Web sites that identify or list hospital-affiliated physicians. According to the commenter, these listings primarily benefit the hospital or health system and patients, but they may confer an incidental benefit on physicians that would be difficult to value and administratively difficult to track. The commenter urged that these listings be clearly excepted under the incidental benefits exception.

Response: The "on-campus" requirement in the exception was intended to make clear that the new exception for medical staff incidental benefits was limited to benefits, such as parking, cafeteria meals, and the like, that are customarily provided by hospitals to their medical staff and that are incidental to services being provided by the medical staff at the hospital. The exception was not intended to cover the provision of tangential, off-site benefits, such as restaurant dinners or theater tickets, which must comply with the exception for nonmonetary compensation up to $300. As indicated in the Phase I preamble, it was clearly our intent to cover benefits in the form of computer and internet access that "facilitates the maintenance of up-to-date medical records and the availability of cutting edge medical information" (66 FR 921).

Accordingly, we have modified § 411.357(m) to make our intent clear. We are also modifying § 411.357(m)(1) and § 411.357(m)(2) of the regulation by changing the word "offered" to "provided" to be consistent with other paragraphs of the exception and by making clear that § 411.357(m)(1) will be satisfied if the benefits are offered to all members of the medical staff practicing in the same specialty, even if some members do not accept them. Moreover, in the interest of clarity, we are changing the phrase "performing other duties" to "are engaged in other services or activities." These changes will help clarify that dedicated electronic or Internet items or services can meet the requirement in § 411.357(m)(2), since those items or services would be provided "only during periods when the medical staff members are * * * engaged in other services or activities that benefit the

hospital or its patients." Similarly, the revised exception will cover dedicated pagers or two-way radios used to facilitate instant communication with physicians in emergency or other urgent patient care situations when they are away from the hospital campus.

We also agree that the simple listing or identification of the medical staff on a hospital's Web site is an incidental benefit that should be excepted. We are revising the regulation to include listings of affiliated physicians in hospital advertising. However, advertising or promoting a physician's private practice on a hospital Web site is not covered; those arrangements would have to fit in the exception for non-monetary compensation under $300 or the hospital would have to charge the physician or practice a fair market value rate for the advertising. In light of all of the conditions contained in the exception, we do not believe that the arrangements that fit in the exception will pose a risk of program or patient abuse.

A hospital's provision of a computer or other technology that is wholly dedicated to use in connection with hospital services provided to the hospital's patients would be for the hospital's benefit and convenience and would not constitute remuneration to a physician for purposes of section 1877 of the Act. Moreover, while we believe that the provision of valuable information technology, such as computer hardware or software, to physicians may be subject to abuse, using our authority under section 1877(b)(4) of the Act, we are creating a new regulatory exception at § 411.357(u) for the provision of information technology items and services (including both hardware and software) by a DHS entity to a physician to participate in a community-wide health information system designed to enhance the overall health of the community, so long as certain conditions are met. The health information system must be community-wide, that is, available to all providers, practitioners, and residents of the community who desire to participate. The health care system must be one that allows community providers and practitioners to access and share electronic health care records. In addition to health care records, the system may permit access to, and sharing of, complementary drug information systems, general health information, medical alerts, and related information for patients served by community providers and practitioners. The DHS entity may only provide information technology items and services that are necessary to enable the physician to participate in the health information system. Thus, for example, if a physician already owns a computer, it may only be necessary to provide software or training specific to the health information system. Likewise, it would not be considered necessary to provide Internet access to a physician who already has Internet service. In all cases, the information technology items or services furnished under the exception must principally be used by the physician as part of the community-wide health information system. The items and services may not be provided in any manner that takes into account the volume or value of referrals or other business generated by the physicians. Thus, the exception would not apply to the selective provision of items and services to referral sources. Finally, as with all exceptions under section 1877(b)(4) of the Act, the arrangement must not violate the anti-kickback statute and all claims and billing must comply with applicable Federal and State laws and regulations. Under these circumstances, we do not believe that an exception for the provision of community-wide information technology items and services poses a risk of program or patient abuse; however, we will revisit the terms of the exception if we become aware of abusive arrangements.

Comment: A physician professional association asked that § 411.357(m)(5) be deleted from the exception for medical staff incidental benefits. Section 411.357(m)(5) requires that the incidental benefits be of a type offered to medical staff members at other local hospitals or by comparable hospitals in comparable regions. The commenter stated that this requirement imposed an unnecessary burden of inquiry on hospitals. The commenter believes that the $25 per occurrence limit was a sufficient safeguard.

Response: Section 411.357(m)(5) was not intended to, and did not, impose any duty of inquiry on hospitals. We believe that most hospital administrators are familiar with customary medical staff benefits offered by other hospitals locally and farther afield. The provision was included to help limit the exception to the provision of customary and usual staff benefits, such as meals, lab coats, and parking. We are concerned that the exception not be misused to protect an ever-increasing array of new "incidental benefits" that collectively are of considerable value to physicians. Nevertheless, we are persuaded that the other conditions in the exception sufficiently protect against such abuse. Accordingly, we are deleting § 411.357(m)(5).

Comment: One commenter considered the $25 per occurrence limit in the medical staff incidental benefits exception to be too low. The commenter suggested that the limit be deleted, or, in the alternative, raised to $100.

Response: We are not persuaded that the limit is unnecessary or too low. Benefits of higher value may still be protected under the exception for non-monetary compensation up to $300. However, as with the exception for non-monetary compensation, we have revised the regulations to provide for annual inflation indexing.

Comment: A commenter sought clarification regarding our statement in the Phase I preamble (66 FR 921) that we did not believe that medical transcription services were an incidental benefit of nominal value. The commenter found the statement ambiguous. In particular, the commenter asked us to confirm that the statement is limited to medical transcription services of non-hospital services (for example, services provided by physicians in their private offices).

Response: We do not believe that transcription of hospital medical records dictated by an attending physician is a benefit—incidental or otherwise—to the physician. Thus, such services do not create a compensation arrangement. However, the provision of transcription services for the benefit of the physician, such as transcription of his private office records, does create a compensation arrangement between the hospital and the physician that would need to fit in an exception.

Comment: An association representing hospitals inquired about the treatment under section 1877 of the Act of certain benefits provided to physicians that cannot fit in the non-monetary compensation exception, because they are worth more than $300; the medical staff incidental benefits exception, because they are worth more than $25 per occurrence; or the fair market value exception, because they do not involve a written contract.

These examples include:

- Business meetings with physicians (sometimes including spouses) that include a meal (for example, attendance at a Board of Trustees meeting or dinner with a hospital administrator to discuss operation of a hospital department).
- A dinner to which hospital physicians (and sometimes spouses) are invited to meet and recruit a potential new physician for the staff.
- Free use of a dedicated computer terminal located at the physician's office but usable only in connection with hospital patients and services.

• Free continuing medical education (CME) or other training at the hospital. (The commenter notes that hospitals often obtain educational speakers free of charge, thus enabling them to provide low cost training.)

• Physician referral services to the community in which they reside for which the physician may or may not pay a fee.

Response: The first two examples cited by the commenter involve scenarios that do not lend themselves to categorical answers. The statute defines "remuneration" broadly to include any remuneration, directly or indirectly, overtly or covertly, in cash or in kind (Section 1877(h)(1)(B) of the Act). Whether a remunerative arrangement between specific parties would fit in an exception would depend on the particular facts and circumstances. For example, some dinners and meetings might fit in the exception for non-monetary compensation at § 411.357(k) or the exception for fair market value compensation at § 411.357(l); others would not. Nothing in the statute precludes modest meals in connection with services provided by or to Boards of Trustees, Boards of Directors, or hospital administrators, and many of these activities can easily fit in an exception.

The third example cited by the commenter—the free use of a dedicated computer terminal used only for the hospital patients and services strikes us as unlikely to involve remuneration to the physician so long as the computer terminal has no independent value to the physician. Alternatively, the free use of the computer may qualify for the exception for medical staff incidental benefits at § 411.357(m). The fourth example, the free CME, could constitute remuneration to the physician, depending on the content of the program and the physician's obligation to acquire CME credits. With respect to referral services, we believe these services should be excepted under section 1877 of the Act, and, accordingly, we are incorporating the safe harbor under the anti-kickback statute for referral services at § 1001.952(f) into these regulations as a new exception at § 411.357(q). (We note that creation of a referral services exception was supported by a second commenter.)

We recognize that our regulations do not address every possible relationship between physicians and DHS entities of the type addressed by the commenter, nor could they. In some cases, relationships clearly will not involve a transfer of remuneration and thus will not trigger section 1877 of the Act. In others, an activity might involve the transfer of remuneration, and there may be no readily apparent exception. We expect that questions of the kind posed by the commenter will arise with some frequency. Parties may submit advisory opinion requests about specific arrangements according to § 411.370. We will also continue to evaluate whether remunerative arrangements exist for which additional exceptions are necessary and appropriate.

Comment: A commenter urged that long-term care facilities be permitted to use all the exceptions available to other providers, including the medical staff incidental benefits and compliance training exceptions.

Response: As noted in section XII.G, we are expanding the compliance training exception to include all entities. As for the medical staff incidental benefits exception, we agree that certain institutional entities, such as long-term care facilities, FQHCs, and other health care clinics, that have medical staffs should be permitted to provide incidental benefits to those staffs on the same terms and conditions as apply to hospitals under the exception. This exception applies only to *bona fide* medical staffs. Whether a facility has a *bona fide* medical staff will depend on the facts and circumstances. We have modified the regulations accordingly.

Comment: A commenter urged that the Office of Inspector General (OIG) issue a statement that remuneration covered by the non-monetary compensation, medical staff incidental benefits, and compliance training exceptions does not violate the anti-kickback statute.

Response: Whether to issue a statement of the sort requested by the commenter is a decision for the OIG and/or the Department of Justice and is outside the scope of this rulemaking. Parties may seek advisory opinions about their arrangements from the OIG pursuant to regulations at 42 CFR part 1008.

F. Risk-Sharing Arrangements (Phase I—66 FR 912–915; § 411.357(n))

We received several comments to the new risk-sharing arrangements exception in § 411.357(n) established in Phase I. The risk-sharing arrangements exception applies to compensation (including, but not limited to, withholds, bonuses, and risk pools) between a managed care organization or an independent physician's association and a physician (either directly or indirectly through a subcontractor) for services provided to enrollees of a health plan.

Comment: A commenter welcomed the new exception for risk-sharing arrangements, but requested a definition of the term "managed care organization" as used in the exception or clarification in preamble language that the new exception is meant to cover all risk-sharing compensation paid to physicians by an entity downstream of any type of health plan, insurance company, or health maintenance organization (HMO). A commenter sought clarification that the downstream entity could itself be an entity that furnishes DHS, such as a hospital.

Response: The new exception is meant to cover all risk-sharing compensation paid to physicians by an entity downstream of any type of health plan, insurance company, HMO, or Independent Practice Association (IPA), provided the arrangement relates to enrollees and meets the conditions set forth in the exception. All downstream entities are included. We purposefully declined to define the term "managed care organization" so as to create a broad exception with maximum flexibility.

Comment: A physician association asked that the prepaid plans and risk-sharing arrangements exceptions be expanded to include referrals of patients to entities owned by a managed care organization, even if the patients are not enrollees in the managed care organization. The commenter gave as an example a referral to an orthopedic ASC owned by a managed care organization that is, in turn, owned by the referring physician. The commenter considered it illogical that the physician could refer a health plan enrollee to the ASC, but not a Medicare fee-for-service patient.

Response: Contrary to the commenter's perception, we discern nothing illogical in the result under the example provided. The fee-for-service referral to a DHS entity in which the physician has an indirect ownership interest is precisely the kind of improper referral barred by the statute, whereas the statute includes an exception for referrals of Medicare managed care patients (§ 411.355(c)). (We assume, for purposes of responding to the example, that the ASC furnishes some designated health care service not covered by the ASC composite rate, since composite rate services are not DHS for purposes of section 1877 of the Act).

G. Compliance Training (Phase I—66 FR 921; § 411.357(o))

A number of commenters asked that we expand the new compliance training exception to include compliance training provided by entities other than

hospitals. A commenter asked that the exception be expanded to include training of the physician's office staff. We concur with both comments and have modified the exception in § 411.357(o) to include compliance training provided by any entity that furnishes designated health care services to a physician or a physician's office staff. We are also modifying the regulations to include compliance training addressing the requirements of any Federal, State, or local law, regulation, or rule governing the conduct of the party for whom the training is provided. We do not consider continuing medical education (CME) to be compliance training for purposes of this exception, which is primarily intended to promote legal compliance. In many cases, the provision of CME to physicians could constitute a benefit of significant monetary value to physicians. CME may be covered under the non-monetary compensation up to $300 exception.

H. Anti-Kickback Safe Harbors (Phase II, § 411.357(q) and § 411.357(r))

[If you choose to comment on issues in this section, please include the caption "Anti-Kickback Safe Harbor Exception" at the beginning of your comments.]

In the Phase I preamble, we indicated that we were considering an exception for arrangements that fit squarely within an anti-kickback "safe harbor" (§ 1001.952 (Exceptions)). We have been urged to do so by providers frustrated by having to apply two sets of conditions to their financial arrangements. Having carefully considered the issue and the industry perspective, we have concluded that a wholesale importation of the anti-kickback safe harbors into the exceptions in section 1877 of the Act would be problematic. In some cases, the statutory requirements of seemingly comparable "safe harbors" and exceptions vary. In other cases, the section 1877 exception and the anti-kickback statute "safe harbor" for similar conduct differ for reasons attributable to the difference in statutory scope and scheme, core prohibited conduct, or liability standards. In some cases, the section 1877 exception is broader; in other cases, it is narrower. Many of the anti-kickback "safe harbors" address activities that do not implicate section 1877 of the Act. In sum, while we are mindful of the concerns expressed by the commenters, we believe it is not feasible to except financial relationships solely because they fit in an anti-kickback "safe harbor."

Nevertheless, we have reviewed the existing list of "safe harbored" arrangements for which there are no section 1877 analogs and have concluded that the "safe harbors" for referral services (§ 1001.952(f)) and obstetrical malpractice insurance subsidies (§ 1001.952(o)) should be incorporated by reference into section 1877 of the Act. We are therefore creating new exceptions in § 411.357(q) and § 411.357(r) for these arrangements. As the anti-kickback "safe harbor" regulations are amended and supplemented from time to time, we will consider whether any additional "safe harbored" arrangements should be incorporated as exceptions under section 1877 of the Act.

A commenter has also suggested that we create a new exception for any arrangement approved in an OIG advisory opinion regarding the application of the anti-kickback statute to the arrangement. We decline to adopt the commenter's suggestion. OIG advisory opinions may not be relevant in all respects to a determination under section 1877 of the Act. For example, a favorable opinion from the OIG often concludes that a potential remunerative relationship exists, but that the OIG would exercise its discretion and decline to impose sanctions arising from the potential anti-kickback violation (which contains an intent requirement not applicable under section 1877 of the Act). These determinations are not appropriate for blanket protection under section 1877 of the Act.

I. Professional Courtesy (Phase I—66 FR 922; Phase II; § 411.357(s))

[If you choose to comment on issues in this section, please include the caption "Professional Courtesy Exception" at the beginning of your comments.]

A number of commenters responded to our call for comments on a possible exception for professional courtesy. These commenters pointed out that free or discounted "professional courtesy" to physicians and their family members is a longstanding tradition and remains a widespread practice. Most commenters supported creation of an exception. One commenter suggested the following conditions: The services are routinely provided without charge to physicians and their family members by the provider, without regard to referrals, as part of the provider's standard professional courtesy policy and notice is provided to all applicable public or private third party payers that the services were provided without charge to the physician as a professional courtesy (that is, the co-insurance obligation was waived). A commenter representing a radiology concern recommended that professional courtesy be limited to physicians and dependents for whom the physician would pay the medical bill and that the courtesy be further limited to free services for which no person or entity is billed. Further, the commenter wanted to limit the exception to circumstances where professional courtesy is the prevailing practice in a given marketplace.

Another commenter suggested that the definition of "professional courtesy" be limited to partial "out-of-pocket" expense reductions (as opposed to total fee waivers or out-of-pocket cost waivers) offered by health care providers for health care services furnished to physicians and their family members who are not employed by the health care provider. The commenter excluded employees because discounts to employees could be protected under the employee exception. The commenter suggested limiting the exception to partial waivers because health care providers are more likely to offer partial waivers across the board; the commenter believed that health care providers are more likely to offer costly full waivers selectively based on referrals. As for specific conditions to apply under an exception, the commenter suggested the following: (1) The discount is offered to all physicians (whether or not affiliated with the health care provider) without regard to the volume or value of referrals or other business generated between the parties; (2) the professional courtesy policy is set out in writing and approved in advance by the governing body of the health care provider; (3) the discount is limited to 25 percent of what would otherwise have been the physician's out-of-pocket expense and subject to an annual cap; (4) the discount is not offered to a physician (or family member) who is a Federal health care program beneficiary (this condition addresses the beneficiary inducement problem raised by professional courtesy arrangements); (5) all discounts are reported as income to the physician in accordance with Federal and State tax requirements; and (6) to avoid insurance fraud, insurers are informed of any reduction of a co-insurance obligation. The commenter notes that providers may want to make an offer of professional courtesy contingent on the insurer's agreement to provide coverage notwithstanding.

Yet another commenter, representing a physician association, suggested that the exception should cover professional courtesy, including fee waivers or discounts up to $300 per year

(consistent with the non-monetary compensation exception). One commenter expressed concern that providers not be required to offer professional courtesy, and that such arrangements should be entered into at the discretion of the parties.

We are persuaded to promulgate an exception for certain services provided to a physician or his or her immediate family members. We are defining "professional courtesy" in § 411.351 as the provision of free or discounted health care items or services to a physician or his or her immediate family members or office staff. To qualify for the new exception, the arrangement must meet the following conditions:

1. The professional courtesy is offered to all physicians on the entity's *bona fide* medical staff or in the entity's local community without regard to the volume or value of referrals or other business generated between the parties;

2. The health care items and services provided are of a type routinely provided by the entity;

3. The entity's professional courtesy policy is set out in writing and approved in advance by the governing body of the health care provider;

4. The professional courtesy is not offered to any physician (or immediate family member) who is a Federal health care program beneficiary, unless there has been a good faith showing of financial need;

5. If the professional courtesy involves any whole or partial waiver of any coinsurance obligation, the insurer is informed in writing of that reduction so that the insurer is aware of the arrangement.

6. The professional courtesy arrangement does not violate the anti-kickback statute or any billing or claims submission laws or regulations.

While professional courtesy discounts may be covered under the employee exception, nothing in this new exception precludes hospitals or other entities from extending their professional courtesy policies to employees, including non-physician employees, under the new exception. Nothing in these regulations should be construed as requiring or encouraging professional courtesy arrangements. Moreover, parties are cautioned that some professional courtesy arrangements may violate the anti-kickback statute or the civil monetary penalties law against giving inducements to Medicare and Medicaid beneficiaries (section 1128A(a)(5) of the Act). Concerns regarding those laws should be addressed to the OIG. Private insurers may also have concerns about professional courtesy in the form of coinsurance waivers. The requirement to notify private insurers of a professional courtesy arrangement may provide an additional check against abusive arrangements.

J. Charitable Donations by a Physician (Phase II; § 411.357(j))

[If you choose to comment on issues in this section, please include the caption "Charitable Donations" at the beginning of your comments.]

A commenter to the January 1998 proposed rule expressed concern about charitable contributions made by physicians to DHS entities, for example, the purchase of a hospital charity ball ticket or a donation to a charitable health care entity's general fund-raising campaign. The commenter noted that, under section 1877 of the Act, funds flowing from a physician to a DHS entity can create a financial relationship. However, no exception exists for a physician's *bona fide* charitable donations.

We agree that charitable donations from a physician to a DHS entity involve remuneration as defined in the statute, thus creating a compensation arrangement between donor and donee and that an exception for *bona fide* charitable donations is appropriate. Under our authority in section 1877(b)(4) of the Act, we have added a new exception in § 411.357(j) for *bona fide* charitable donations made by a physician (or immediate family member). To qualify, donations must be made to an organization exempt from taxation under the IRS Code (or to an exempt supporting organization, such as a hospital foundation). The new exception provides that the donation may not be solicited or made in any manner that reflects the volume or value of referrals or other business generated from one party for the other. Broad-based solicitations not targeted specifically at physicians, such as sales of charity ball tickets or general fund-raising campaigns, will qualify under this exception. Parties engaged in more selective or targeted fund-raising activities should ensure that those activities are not conducted in any manner that reflects or takes into account referrals or the generation of business between the parties. As with all new regulatory exceptions under section 1877(b)(4) of the Act, a protected arrangement must not violate the anti-kickback statute or billing or claims filing rules.

K. Preventive Screening Tests (Phase I—66 FR 923; § 411.355(h))

[If you choose to comment on issues in this section, please include the caption "Exceptions Preventive Screening" at the beginning of your comments.]

In the Phase I final rule, we used our authority under section 1877(b)(4) of the Act to create a regulatory exception (§ 411.355(h)) for certain preventive screening tests, immunizations and vaccines.

Section 411.355(h)(2) of the exception requires that the preventive screening tests, immunizations, and vaccines be reimbursed by Medicare under a fee schedule. It has come to our attention that some of the vaccines covered by the exception may be paid by Medicare using different reimbursement methods. To avoid confusion, we are deleting the fee schedule requirement from the regulation. We believe the remaining conditions in the exception are sufficient to protect against abuse under section 1877 of the Act.

In addition, we received the following comments.

Comment: Two commenters representing pathologists inquired about the treatment of Pap tests under the final regulations. One association was concerned that only screening Pap tests, but not diagnostic Pap tests, could qualify for the preventive screening tests exception. Another association urged us not to except screening Pap tests because physicians would then have financial incentives to send all screening tests to clinical laboratories with which they have financial relationships and to send all diagnostic tests to different laboratories. In the commenter's view, this might endanger continuity of care and the ability to compare the findings of screening and diagnostic Pap tests.

Response: We can discern no reason to expand the exception to protect referrals for diagnostic Pap tests. As noted above, we created the exception in § 411.355(h) pursuant to our authority under section 1877(b)(4), which authorizes the Secretary to create additional exceptions for financial relationships that do not pose a risk of program or patient abuse. We are not persuaded that diagnostic Pap tests are any different from other diagnostic clinical laboratory tests to which the statutory prohibition applies.

We are unclear as to how the potential use of two different laboratories for two different clinical laboratory tests will compromise continuity of patient care. Moreover, it is our understanding that screening and diagnostic Pap test results are not typically compared. We

continue to believe that the exception as set forth in Phase I is sufficiently limited to pose no risk of program or patient abuse. Accordingly, we are not removing the codes for screening Pap tests from the list of codes identifying those services that may qualify for the exception in § 411.355(h).

Comment: An association representing radiologists supported our decision to include screening mammography in the exception for preventive screening tests at § 411.355(h), but was disappointed that the exception does not cover diagnostic mammography. The association disagreed with our statement that diagnostic mammography could be subject to abuse.

Response: For the reasons stated in Phase I (66 FR 930), diagnostic mammography is treated similarly to all other diagnostic radiology services. In many cases, a radiologist who has performed a screening mammogram will also recommend a diagnostic mammogram. We do not see why diagnostic mammography performed after screening mammography is less subject to abuse than any other diagnostic service that is performed after a screening service. We note that a radiologist who orders a diagnostic mammography pursuant to a consultation does not make a "referral" for purposes of section 1877 of the Act.

Comment: A commenter stated that screening tests should not be considered DHS when performed either as screening tests or as part of a patient's ongoing care once a problem has been identified.

Response: We disagree. Consistent with the statutory and regulatory scheme, we have created an exception for a subset of screening tests furnished under circumstances that do not pose a risk of abuse.

Comment: In the Phase I Attachment, we listed the CPT and HCPCS codes for screening tests that may qualify for the exception in § 411.355(h) if all of the criteria for that exception are satisfied (66 FR 965). We included in that list one code for a bone density test (CPT 76977), which the Phase I Attachment also identified as a radiology service. Several commenters believed that the list should also include five other codes for bone density tests (CPT codes 76070, 76075, 76076, 78350, and 78351).

Response: Generally, a test performed for diagnostic reasons is subject to section 1877 of the Act. However, some tests performed as preventive screening tests are not subject to the physician self-referral prohibition if all conditions of the exception in § 411.355(h) are satisfied. None of the five codes identified by the commenters is a screening test, as none is available to the general population without a pre-existing condition. Section 1861(rr) of the Act, which provides for the bone mass measurement benefit, identifies five specific categories of individuals with pre-existing conditions who qualify for the benefit. Accordingly, none of these five codes will be added to the list of codes that may qualify for the exception in § 411.355(h). Also, we are removing CPT code 76977 from the list of services that may qualify for the exception in § 411.355(h) for preventive screening tests because we had incorrectly identified it as a screening test.

After careful review, we have determined that four of the bone density tests cited by the commenters (76070, 76075, 76076, and 78350), fall within the definition of "radiology and certain other imaging services," yet were not included as such on the Phase I attachment or its updates. (Although CPT code 78351 would otherwise fall within the category of "radiology and certain other imaging services," CPT code 78351 is not a Medicare covered service and, thus, is not subject to the statute.)

In the physician fee schedule final rule, published December 31, 2002 (67 FR 79996), we added CPT code 76070 to the list of codes defining "radiology and certain other imaging services." (At that time, we also added as "radiology and certain other imaging services" two other codes for bone density tests: CPT codes 76071 and 0028T.)

We are now adding to the definitional code list for "radiology and certain other imaging services" the three remaining densitometry scans identified by the commenters (CPT codes 76075, 76076, and 78350) that were inadvertently omitted from the previous list of codes.

Additionally, in reviewing the bone density test codes, we found two codes (CPT code 76078 and HCPCS code G0130) not identified by the commenters. We have determined that these two codes also fall within the category of "radiology and certain other imaging services" and are adding them to that category.

The following is a complete list of the densitometry scans that will be included in the definitional code list for "radiology and certain other imaging services":

76070	Ct bone density, axial
76071	Ct bone density, peripheral
76075	Dexa, axial skeleton study
76076	Dexa, peripheral study
76078	Radiographic absorptiometry
76977	Us bone density measure
78350	Bone mineral, single photon
0028T	Dexa body composition study
G0130	Single energy x-ray study

As explained above, none of these tests qualifies for the exception in § 411.355(h).

L. EPO and Other Dialysis-Related Outpatient Prescription Drugs Furnished in or by an ESRD Facility (Phase I—66 FR 939; § 411.355(g))

[If you choose to comment on issues in this section, please include the caption "Exceptions-Dialysis Drugs" at the beginning of your comments.]

Phase I created a new exception for EPO and certain other dialysis-related outpatient prescription drugs furnished in or by an ESRD facility. The drugs that may qualify for this exception were initially identified by CPT and HCPCS codes in the Phase I Attachment, and updates to that list appear on the CMS Web site and in annual updates published in the **Federal Register**.

Comment: One commenter advocated that we expand the list of codes to include other drugs specifically related to ESRD services if those drugs are used specifically and exclusively for a patient's ESRD treatment. In particular, the commenter believed that the following drugs should be added to the list of drugs that may qualify for the exception in § 411.355(g): heparin (heparin sodium); normal saline (0.9 percent sodium chloride) for catheter maintenance; paricalcitrol; carnitine; and albumin for injection.

Response: We note that, according to section 3168.A of the Medicare Intermediary Manual, heparin and normal saline are included in the ESRD composite rate. Thus, these items do not constitute DHS when reimbursed under the composite rate and therefore did not need to appear on the list of codes that may qualify for the exception in § 411.355(g). In addition, we added paricalcitol to this list of codes in Addendum E of the December 31, 2002 **Federal Register** final rule, Revisions to the Physician Fee Schedule for Calendar Year 2003 (67 FR 79966 and 80172). (Zemplar is the trade name for paricalcitol, which is often referred to as paricalcitrol.)

With respect to the other drugs mentioned by the commenter, we agree that the list of drugs was not broad enough to include all the drugs that should be excepted. We believe it is appropriate to use our authority under section 1877(b)(4) of the Act and the exception at § 411.355(g) to cover these and other outpatient prescription drugs that are required for the efficacy of dialysis, and are not self-administered

(except for EPO and darbepoetin alfa (Aranesp)), provided that all other conditions of the exception are satisfied. Therefore, we are adding to our list albumin and levocarnitine, which is the intravenous form of carnitine.

We are also adding several other drugs to the list. We are including darbepoetin alfa (Aranesp), which is a new drug that is functionally equivalent to EPO although not structurally identical. For physician self-referral purposes, we are using the term EPO to include both epoetin alfa and darbepoetin alfa (Aranesp). Both products use the same biological mechanism to produce stimulation of the bone marrow to produce red blood cells. In addition, we are adding an additional vitamin D drug (calcitonin-salmon), and three additional thrombolytics used to declot central venous catheters. These thrombolytics are streptokinase, urokinase, and retaplase.

We believe that this exception does not pose a risk of patient or program abuse. First, as explained in the Phase I preamble (66 FR 938), we believe that this exception is appropriate because of the high correlation between the use of these drugs and dialysis. Second, strict utilization and coverage criteria for EPO and the other listed medically necessary drugs required for the efficacy of dialysis mitigates the risk of abuse. However, we intend to monitor use of this exception and, if we determine that the exception is abused, we would revisit it. Except as provided in this exception, we believe physician financial interests in the furnishing of self-administered drugs poses a risk of abuse. As we explained in the Phase I preamble (66 FR 938), this exception was never intended to protect drugs or supplies that patients use at home, except EPO in limited circumstances. Accordingly, we want to emphasize that this exception applies only to drugs that are not self-administered except when the facility furnishes EPO or Aranesp to the patient who dialyzes at home. Given the additions to the list of drugs, we are clarifying the regulation text in order to ensure that the exception will continue to pose no risk of program or patient abuse.

M. Intrafamily Referrals (Phase II; § 411.355(j))

[If you choose to comment on issues in this section, please include the caption "Exceptions Intrafamily Referrals" at the beginning of your comments.]

This exception is discussed in section VII.B of this preamble.

N. Exception for Certain Arrangements Involving Temporary Noncompliance (Phase II; § 411.353(f))

[If you choose to comment on issues in this section, please include the caption "Exceptions-Temporary Noncompliance" at the beginning of your comments.]

This exception is discussed in section II.A of this preamble.

O. Retention Payments in Underserved Areas (Phase I; § 411.357(t))

[If you choose to comment on issues in this section, please include the caption "Exceptions—Retention Payments in Underserved Areas" at the beginning of your comments.]

This exception is discussed in section VIII.E of this preamble.

P. Community-Wide Information Systems (Phase II; § 411.357(w))

[If you choose to comment on issues in this section, please include the caption "Exceptions-Community-wide Information Services" at the beginning of your comments.]

This exception is discussed in section XII.E of this preamble.

XIII. Technical Corrections

In Phase I, we indicated our intent to remove § 411.360 relating to physician attestations, but the regulatory text did not do so. We have removed § 411.360. We have also changed references from HCFA to CMS, consistent with the final rule published July 31, 2001 (66 FR 39450), which revised the references in accordance with the name change of the Health Care Financing Administration to the Centers for Medicare & Medicaid Services. In addition, we have updated references to Internet Web sites in the Phase I regulations.

We have removed § 411.354(c)(1)(ii) that specified that the shared compensation for consultations conducted via interactive telecommunications systems required by the Medicare program under § 414.65 was not a compensation arrangement. Section 414.65 was substantially revised in the November 1, 2001 physician fee schedule final rule (66 FR 55332). A consultant practitioner is no longer permitted to share payment with the referring practitioner, and thus, a provision for this situation is no longer necessary.

In addition, pursuant to the Balanced Budget Act of 1997 (Pub. L. 105–33) and the Medicare, Medicaid, and SCHIP Balanced Budget Refinement Act of 1999 (Pub. L. 106–113), we have replaced references to "primary care rural hospitals" with "critical access hospitals" in § 411.351.

We have deleted the mailing address and telephone number for the Superintendent of Documents and the National Technical Information Service from § 411.351 since the Medicare Carriers Manual is available free of charge on the CMS Web site. In light of the recent and ongoing reorganization of CMS manuals, we have clarified that references to specific manual provisions incorporate any amendments to those provisions.

We have also revised the title of subpart J to reflect the current scope of section 1877 of the Act and these regulations.

Comment: One commenter noted that the references in § 411.352(d)(1) to § 411.352(d)(2) and § 411.352(d)(3) should be to § 411.352(d)(3), § 411.352(d)(4), and § 411.352(d)(5).

Response: The commenter is correct. We have made the technical correction. We have also made a technical correction in § 411.352(b) by changing the words "this section" at the end of § 411.352(b) to "§ 411.351".

XIV. Collection of Information Requirements

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

Therefore, we are soliciting public comments on each of these issues for the information collection requirements discussed below.

The following information collection requirements and associated burdens are subject to the PRA.

Section 411.352 Group Practice

Under paragraph (d), a covered entity is required to document the total time each member spends on patient care services, and to maintain and make available to the Secretary, upon request, documentation concerning compliance

with the substantially "all test." This paragraph also requires that a new member's employment with, or ownership interest in, the group practice be documented in writing no later than the beginning of his or her new employment relationship or ownership or investment interest.

The burden associated with these requirements is that of documentation and making available information to the Secretary. This documentation may be in the form of time cards, appointment schedules, personal diaries, or any alternative measure that is reasonable, fixed in advance of the performance of the services being measured, uniformly applied over time, and verifiable. This is not a new requirement to maintain or collect additional information because these types of records are usually kept by group practices in the normal course of business in order to allocate resources such as time, examination space, remuneration, and productivity bonuses. The documentation requirements reflect usual and customary business practices, and, as such, the burden is not subject to the PRA under 5 CFR 1320.3(b)(5); the burden of making the records available is exempt under 5 CFR 1320.4(a) as that incurred during an administrative action, investigation, or audit involving an agency against specific individuals or entities. In addition, this burden was found to be exempt from the requirements of the PRA in Phase I (66 FR 856).

Section 411.354 Financial Relationship, Compensation, and Ownership or Investment Interest

Paragraph (d)(4) of this section mandates that the requirement to make referrals to a particular provider, practitioner, or supplier be set forth in a written agreement signed by the parties.

We do not believe this requirement imposes any additional burden. Where mandatory referral requirements are used, they are already routinely made part of a more comprehensive service agreement (for example, a contract between a physician and a managed care entity for the provision of physician services, or a preferred provider network agreement). We believe that this burden is a result of usual and customary business practice and, as such, is exempt from the PRA under 5 CFR 1320.3(b)(5).

Section 411.355 General Exceptions to the Referral Prohibition Related to Both Ownership/Investment and Compensation

Paragraph (e)(1)(iii) of this section requires that the relationship of the components of the academic medical center must be set forth in written agreement(s) or other written document(s) that have been adopted by the governing body of each component. If the academic medical center is one legal entity, this requirement will be satisfied if transfers of funds between components of the academic medical center are reflected in the routine financial reports covering the components.

The burden associated with this requirement is that of documenting compliance, either in written documents or routine financial reports. The written documents, adopted by the governing body of each component, detailing the relationship of the components of the academic medical center may be any documents generated in the usual course of business, such as articles of incorporation or bylaws. In response to comments, we have decreased the minimal burden associated with this requirement for academic medical centers that consist of one legal entity. Those academic medical centers will satisfy the requirement if transfers of funds between components of the academic medical center are reflected in routine financial reports generated in the usual course of business. We believe that the burden imposed by § 411.351(e)(1)(iii) is a result of usual and customary business practice and, as such, is exempt from the PRA under 5 CFR 1320.3(b)(5). In addition, this burden (without the relief granted in this interim final rule for certain academic medical centers) was found to be exempt from the requirements of the PRA in Phase I (66 FR 856, 949).

Section 411.357 Exceptions to the Referral Prohibition Related to Compensation Arrangements

This section requires a written agreement signed by the parties for space and equipment rental agreements and arrangements for personal services, physician recruitment, certain group practice arrangements with a hospital, fair market value compensation, and indirect compensation. In addition, an entity's professional courtesy policy must be set out in writing if there is any whole or partial coinsurance reduction, and an entity must notify its insurers that the entity has a professional courtesy policy.

The burden associated with these requirements is that of obtaining agreements in writing, setting out professional courtesy policies in writing and notifying insurers that an entity has a professional courtesy policy. The burden also includes a requirement that all separate personal service arrangements between an entity and a physician or an immediate family member of a physician must incorporate each other by reference or the entity must maintain centrally a master list of contracts that is updated and preserves the historical record of the personal service contracts. The lease of equipment is usually and routinely set forth in a written agreement, as are personal services arrangements, recruitment agreements, and contracts between group practices and hospitals. Therefore, the requirement that these arrangements be set forth in a written agreement does not impose an additional burden beyond usual business practices. In addition, the burden that direct and indirect compensation arrangements be set forth in writing was formerly found to be exempt from the requirements of the PRA in the Phase I final rule (66 FR 856). We believe that the burden of these written agreements is a result of usual and customary business practice and, as such, is exempt from the PRA under 5 CFR 1320.3(b)(5).

The requirement to notify insurance companies that an entity has a professional courtesy policy under which coinsurance is reduced or not collected could be met by creating a model letter or applying an edit to a claim where professional courtesy applies. We estimate that a health care entity would have to spend approximately 25 minutes to draft the model letter and then 5 minutes to prepare a letter for each insurer. We do not know how many of the 1.2 million entities (including approximately 581,108 physicians) that furnish services to Medicare beneficiaries would offer professional courtesy to their bona fide medical staffs or to all physicians in the local community. However, traditionally, only hospitals and physicians have provided professional courtesy to physicians, their immediate family members, and sometimes the physician's staff. We do not expect this pattern to change significantly but, for purposes of this analysis, we estimate that 75 percent of hospitals, 100 percent of physicians, and 10 percent of entities other than physicians and hospitals will offer professional courtesy. We also believe that these numbers are high but we

cannot satisfactorily reduce these estimates. That is, we do not believe that all physicians and all hospitals offer professional courtesy and we do not believe that even 10 percent of entities that have rarely offered professional courtesy will now start offering it.

Most of the 581,108 physicians practice in group practices. Many physicians practice in very large groups, while many practice in multi-specialty practices of 15 to 20 physicians or single specialty groups of fewer than 10 physicians. For purposes of this discussion, we assume that the median number of physicians practicing together is 10. Therefore, we assume there are 58,110 physician entities (groups or sole practitioners) that could and would offer professional courtesy. We also assume that 75 percent of all hospitals (6,018 × 75 percent = 4,514) would offer professional courtesy.

We assume that each hospital, physician group practice, and sole physician practice would have to notify 10 insurers the first year under this interim final rule and that the other health care entities would have to notify 5 insurers. Therefore, for physicians and hospitals that choose to use a model letter, 58,110 physician entities + 4,514 hospitals would each spend a total of 75 minutes [25 minutes to prepare model letter + (10 insurers × 5 minutes for preparing each copy) = 75 minutes] to comply with the notification requirement. This would result in an estimated overall burden on physicians and hospitals of approximately 78,280 hours. The overall burden for entities other than hospitals and physicians should be 51,073 hours. (1,200,000 entities − 581,108 physicians − 6,018 hospitals = 612,874 × (10 percent) × [(25 minutes + (5 insurers × 5 minutes for preparing each copy)] = 51,073). In each subsequent year, we expect that there might be one notification per entity to two new insurance companies, which would amount to 10 minutes per entity × (58,111 physicians + 4,514 hospitals + 612,874 other entities) = 102,898 hours.

Although we have estimated that it would take 25 minutes for each entity to create a model letter, we expect that a chain of hospitals or other entities would choose to prepare one model letter for use by each of its members. Also, we expect that some individual may develop a model letter that would be used by many entities. Although the paperwork burden may seem large, overall, we expect that the burden on an individual entity would be relatively minimal. The provisions in the personal services arrangements exception in this section requires that all separate arrangements between an entity and a physician or an entity and a member of a physician's immediate family must incorporate each other by reference or all separate arrangements must be identified in a master list of contracts that is maintained and updated centrally. This requirement was suggested by the industry because it is less burdensome than the requirement in the proposed rule and because it more closely reflects current business practices (or practices that can be easily adapted). We added the requirements that the master list must be made available for review by the Secretary upon request and that the master list must be maintained in a manner that preserves the historical record. In the alternative, annual or other regular financial statements (such as quarterly statements) that clearly show parties, dates, payments, and purposes of payments separately for each personal service contract can qualify as a master list if the statements are appropriately cross-referenced in the agreement. An entity could meet this requirement by having several master lists that, taken together, cover all of the contracts with the referring physician and immediate family members.

The "master list" alternative should impose minimal, if any, burden because it is a usual and customary business practice for a company to maintain records of its contracts. However, for those entities without a master list, multiple lists, or databases, creating a master list will take time. We request comments on these requirements.

Of the approximately 677,002 health care entities (58,110 physician entities + 6,018 hospitals + 612,874 other entities), we estimate that one-quarter, 169,251, contract for personal services with physicians or their immediate family members. We expect that many of these entities are relatively small physician group practices, clinical laboratories or other suppliers that can easily furnish a master list of contracts with physicians and immediate family members or have one contract with a physician or family member that covers everything this individual performs for the small entity. We expect that larger entities can meet this recordkeeping requirement relatively easily by creating a master list of contracts. We recognize that it is possible that some large entities (for example, certain urban hospitals) may have multiple contracts with physicians and family members and not currently meet this requirement.

We estimate that, on average, it would take a large entity 7 hours to meet this requirement and a small entity 2 hours. We assume that, since public commenters recommended the use of cross-referencing to a master list of contracts, many entities already have such a list. Therefore, we estimate that one-half of the 169,251 entities affected by this requirement will have to create a master list. Assuming that one-half of the entities are small and one half are large entities, we estimate that there will be a one-time burden of [(½ × 169,251 × 2 hours) + (½ × 169,251 × 7 hours)] = 677,000 hours. We also estimate that it would take one-half of these entities ½ hour annually to update the master list and it would take one-half of the entities 1 hour annually to update the master list, resulting in an annual burden of 126,938 hours. We note that these are preliminary estimates, so we specifically request comments on these estimates.

Although the overall burden in creating a master list or referencing all other contracts with a physician or immediate family member in each contract might appear sizable, the burden on an individual entity should be relatively minimal.

Under paragraph (d)(2), which allows physician incentive plans under the personal services exception, the entity must give the Secretary access to the plan upon request.

Making the information available (or giving access) to the Secretary should occur rarely and would be exempt from the PRA under 5 CFR 1320.4(a) as information required during an administrative action, investigation, or audit involving an agency against specific individuals or entities.

Section 411.361 Reporting Requirements

This section requires that, except for certain exceptions, all entities furnishing services for which payment may be made under Medicare must submit information to us concerning their financial relationships (as defined in the section), in the form, manner, and at the times that we specify.

The information that we request can include the following:

(1) The name and unique physician identification number (UPIN) of each physician who has a financial relationship with the entity.

(2) The name and UPIN of each physician who has an immediate family member (as defined in § 411.351) who has a financial relationship with the entity.

(3) The covered services furnished by the entity.

(4) With respect to specified physicians, the nature of the financial relationship (including the extent and/or value of the ownership or investment

interest or the compensation arrangement) as evidenced in records that the entity knows or should know about in the course of prudently conducting business, including records that the entity is already required to retain to comply with the rules of the Internal Revenue Service and the Securities and Exchange Commission and other rules of the Medicare and Medicaid programs.

The first 3 requirements above are statutorily mandated. The fourth requirement was proposed in the proposed rule (63 FR 1659) and adopted in this rule with no changes.

Entities that are subject to the requirements of this section must retain the information, and documentation sufficient to verify the information, and, upon request, must make that documentation available to us or to the OIG.

The burden associated with these requirements is that of maintaining documentation and, if necessary, making it available to the Secretary. We believe that the information we are requiring the entities to maintain is information that they would have and maintain already. The proposed rule proposed that entities that are subject to requirements of this section must report to the agency on a prescribed form and thereafter report once a year all changes to the submitted information that occurred in the previous 12 months. In this rule, the requirement has been modified to require entities to make information available only upon request and to maintain the information only for the length of time specified by the applicable regulatory requirements for the information (that is, IRS, SEC, Medicare, Medicaid, or other programs). This substantially reduces the burden on entities, since this is information that is required to be maintained by other regulatory agencies in the usual course of business. We believe that this burden is a result of usual and customary business practice and, as such, is exempt from the PRA under 5 CFR 1320.3(b)(5).

Making information available to the Secretary will rarely be necessary and the information will be collected during the conduct of an administrative action, investigation, or audit involving an agency against specific individuals or entities. It is thus exempt from the PRA under 5 CFR 1320.4(a).

For those requirements that are not exempt from the PRA, we have quantified the burden associated with compliance and have set forth time estimates. The total time estimated to be necessary to comply with the requirements of this section is 806,353 hours for all entities in the country in the first year, and 229,836 hours annually thereafter.

We have submitted a copy of this interim final rule with comment period to OMB for its review of the information collection requirements described above. These requirements are not effective until they have been approved by OMB.

If you comment on any of these information collection and record keeping requirements, please mail copies directly to the following:

Centers for Medicare & Medicaid Services, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development and Issuances, Attn: Reports Clearance Officer, 7500 Security Boulevard, Baltimore, MD 21244–1850, Attn: John Burke, CMS–1810–IFC.

and

Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503, Attn: Brenda Aguilar, Desk Officer.

XV. Regulatory Impact Statement

A. Overall Impact

[If you choose to comment on issues in this section, please include the caption "Impact" at the beginning of your comments.]

We have examined the impact of Phase II of this rulemaking 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). Although we cannot determine with precise certainty the aggregate economic impact of Phase II of this rulemaking, we do not believe that the impact will approach $100 million or more annually. Physicians and DHS entities have been required to comply with the physician self-referral prohibition for many years. The prohibition has applied to physician referrals for clinical laboratory services since 1992 and to referrals for all other DHS since 1995. Phase I interpreted the prohibition narrowly and the exceptions broadly, and established additional regulatory exceptions for legitimate arrangements that would otherwise violate the prohibition. Phase I covered the following:

- Sections 1877(a) and 1877(b) of the Act (the general prohibition and the exceptions applicable to both ownership and compensation arrangements);
- The statutory definitions at section 1877(h) of the Act;
- Certain additional regulatory definitions; and
- New regulatory exceptions promulgated under section 1877(b)(4) of the Act for certain arrangements involving the following—
- Academic medical centers;
- Implants furnished by an ambulatory surgery center;
- EPO and certain dialysis-related outpatient prescription drugs;
- Preventive screening tests, immunizations, and vaccines;
- Eyeglasses and contact lenses after cataract surgery;
- Non-monetary compensation up to $300;
- Fair market value compensation;
- Medical staff incidental benefits;
- Risk-sharing arrangements;
- Compliance training; and
- Indirect compensation arrangements.

Phase II covers—

- The remaining provisions of section 1877 of the Act (namely, the exceptions for ownership and investment interests and the exceptions for various compensation arrangements);
- Additional regulatory definitions; and
- Additional new regulatory exceptions promulgated under section 1877(b)(4) of the Act for certain arrangements involving the following:
- Temporary noncompliance with an applicable exception;
- Intra-family rural referrals;
- Charitable donations by a physician;
- Referral services;
- Obstetrical malpractice insurance subsidies;
- Professional courtesy;
- Retention payments in underserved areas; and
- Community-wide health information systems.

Phase II also addresses public comments on the Phase I regulations.

Among other things, Phase II revises the Phase I "set in advance" definition to permit percentage compensation arrangements; revises the Phase I exception for academic medical centers to make it easier to qualify as an academic medical center or a component of an academic medical center; revises the Phase I "same building" definition to provide a simpler, bright-line rule that will substantially decrease the regulatory burden on many physician practices; eliminates the 1998 proposed restriction on productivity bonuses, thereby permitting employees to be paid based on personal productivity (but not ancillary referrals); expands the physician incentive plan exception to downstream contractors in the managed care context; and expands the physician recruitment exception to federally qualified health centers.

Phase II does not generally unsettle existing financial relationships, and it offers sufficient exceptions to enable parties to restructure noncompliant arrangements. Wherever possible, we have accommodated legitimate financial relationships, thereby reducing the regulatory burden. For these reasons, we conclude that this is not a major rule with an economically significant effect of $100 million in any 1 year.

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 because they are nonprofit organizations or because they generate revenues of $6 million to $29 million in any one year. Currently, there are approximately 1.2 million physicians, other health care practitioners, and medical suppliers that receive Medicare payment. For purposes of the RFA, according to the latest numbers from the Small Business Administration's North American Industrial Classification System, 95 per cent of offices of physicians in the U.S. have total revenues of $8.5 million or less and are considered small entities. Individuals and States are not included in the definition of a small entity. We determine that this interim final rule does not have a significant impact on small businesses because it does not increase regulatory burden, but rather reduces it. As noted above, we are generally interpreting the prohibition narrowly and the exceptions broadly. We are creating new exceptions where appropriate, conforming the regulation to existing Medicare payment and coverage policies, and minimizing the possibility of disrupting non-abusive arrangements. Overall, this rule is very accommodating to legitimate industry practices for hospitals and physicians.

In addition, section 1102(b) of the Act requires us to prepare an RIA 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. For the same reasons identified above for small businesses, this rule does not significantly impact small rural hospitals. Moreover, rural hospitals benefit in this rule from a new exception permitting certain retention payments for physicians in health professional shortage areas (HPSAs), and a new exception for community-wide health information systems. This interim final rule also revises the physician recruitment exception to permit hospitals to recruit residents and physicians who have been in practice for less than one year but for whom recruitment does not require relocation. This benefits small rural hospitals, which often experience difficulty in recruiting physicians. In summary, this interim final rule does not have a substantial negative impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule that may result in an expenditure in any one year by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million. Phase II of this rulemaking does not have such an effect on the governments mentioned, and we do not believe the private sector costs meet the $110 million threshold.

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 do not anticipate that Phase II of this rulemaking will have a substantial effect on State or local governments.

We are not preparing analyses for either the RFA or section 1102(b) of the Act because, for the reasons identified above, we have determined, and we certify, that this interim final 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. For the benefit of the public, we discuss below the anticipated effects of the rule and the alternative regulatory options we considered.

B. Anticipated Effects

This interim final rule with comment period primarily affects physicians and health care entities that furnish items and services to Medicare beneficiaries. For the reasons stated above, we do not anticipate that this rule will have a significant economic impact on a substantial number of small entities. In fact, we expect that Phase II of this rulemaking will have a much smaller impact than the provisions we proposed. Nevertheless, we wish to inform the public of what we regard as the major effects of this rulemaking.

In response to comments on the January 1998 proposed rule, we created in Phase I a more manageable regulation that included "bright line" rules to help the health care community determine more easily when a physician's referrals are in compliance with the law. In this interim final rule, we are continuing our efforts to establish "bright line" rules, and attempting to minimize the effect of this rule on physicians and DHS entities by interpreting the law in a practical and realistic manner. The result, we believe, is an overall approach that should have far less impact on the business relationships of physicians and DHS entities than the January 1998 proposed rule. We discuss below some of the possible economic effects upon physicians and DHS entities. We also briefly discuss the effects of the rules on Medicare beneficiaries.

1. Effects on Physicians

The primary statutory sanctions for violating the physician self-referral prohibition are nonpayment of claims for DHS furnished as the result of a prohibited referral and the corresponding obligation to refund any amounts collected on those claims. These sanctions target the entities that furnish DHS, including physician group practices. Referring physicians may be sanctioned with the imposition of civil monetary penalties (CMPs) only for knowing violations of the statutory prohibition. Nevertheless, although referring physicians are not the primary targets of the sanctions for violating the statute, their financial relationships with DHS entities must comply with the statute and implementing regulations. Accordingly, this interim final rule may affect a physician's or group practice's decision to enter into a particular

financial relationship and the manner in which the arrangement is structured.

We received voluminous comments on the January 1998 proposed rule from or on behalf of physicians and DHS entities (especially hospitals). In addition to specific complaints and objections, the commenters expressed a number of general concerns, including that the proposed regulation inappropriately intruded into the organization and delivery of medical care within physicians' offices; that the regulation conflicted with other longstanding policies on coverage and similar issues; that the rule was unclear in many areas; that "bright line" rules were essential in light of the severe statutory penalties (especially payment denial); and that some aspects of the proposed rule, such as its treatment of indirect financial relationships, were administratively impractical or would have been prohibitively costly in terms of monitoring compliance. We have made every effort in both Phase I and this Phase II rulemaking to address the concerns of physicians and physician group practices while remaining faithful to the statute. We discuss below the major provisions of this rule that affect physicians.

a. *Compensation.* This interim final rule includes many clarifications and several new exceptions related to physician compensation. For example, this interim final rule revises the set-in advance definition to permit certain fluctuating compensation arrangements if the payment methodology is set in advance; eliminates the proposed restriction on productivity bonuses, and permits employees to be paid bonuses based on personal productivity (but not ancillary referrals). Moreover, the regulations permit group practice and employed physicians, like independent contractors, to be paid under risk-sharing arrangements. Phase II also clarifies the indirect compensation arrangements definition and exception, as well as the definitions of certain key concepts, such as "volume and value of referrals" and "other business generated." Phase II also creates a physician hourly compensation "deeming provision" that deems certain hourly compensation to physicians to be fair market value for purposes of complying with various exceptions. All of these changes ease the burden and cost of complying with the statutory prohibition by creating or implementing clear rules in such a way that parties can determine more easily and with greater certainty whether their financial relationships comply with an exception. In addition, by expanding some definitions and exceptions, a greater number of legitimate arrangements can comply with the statute.

b. *In-office Ancillary Services.* This interim final rule revises the in-office ancillary services exception. Specifically, this interim final rule eases the same building requirement by substituting simple, more expansive tests. The revised in-office ancillary services exception should also make it less burdensome for radiologists and oncologists to comply with the exception because the revised exception includes more definite standards. Thus, these physicians will have greater certainty that their arrangements comply with the statute.

c. *Physician Recruitment.* This interim final rule revises the physician recruitment relocation exception to focus on relocation of the physician's office and percentage of new patients, rather than the physician's residence. The exception now provides for either a minimum move of the physician's office practice or a substantial percentage (75 percent) of new patients. In addition, the relocation requirement in this exception does not apply to residents and physicians in practice for less than one year. It also now allows certain joint recruiting with existing group practices. Together, these changes permit a greater number of legitimate arrangements to comply with the statute.

This interim final rule also adds an exemption for certain retention payments for physicians in health professional shortage areas (HPSAs) or in an area with demonstrated need for the retained physician as determined by the Secretary in an advisory opinion issued pursuant to section 1877(d)(6) of the Act. This new exception will permit a greater number of legitimate arrangements to comply with the law.

d. *Miscellaneous.* This interim final rule contains a new exception for professional courtesy, and establishes an exception for certain inadvertent and temporary lapses in compliance with an existing exception, both of which should minimize the effect of the final rule. To the extent that new or expanded exceptions permit additional legitimate arrangements to comply with the law, the potential and significant costs of noncompliance (for example, overpayment refunds, civil monetary penalties) are avoided. In addition, these changes will require fewer arrangements to be restructured to comply with an exception, thus reducing the costs of compliance.

2. Effects on Other Health Care Providers and Suppliers

As we stated above, Phase II of this rulemaking affects entities that furnish DHS by preventing them from receiving payment for services that they furnish as the result of a physician's prohibited referral. Entities may also be subject to other sanctions, including fines and exclusion from Federal health care programs, if they knowingly submit a claim in violation of the prohibition. While all physicians and DHS entities are subject to this rule, we lack the data to determine the number of entities whose financial relationships with physicians must be terminated or revised to comply with this rule. However, we believe the number will be fewer than we had anticipated in the January 1998 proposed rule and the January 4, 2001 Phase I final rule because, as with Phase I, we have interpreted the prohibition narrowly and the exceptions broadly.

There are a few provisions that will be especially beneficial to hospitals and other DHS entities. The first of these is the creation of safe harbors for different types of hourly compensation. This minimizes the risk for physicians, their employers, and DHS entities that contract with physicians to provide services. This interim final rule sets forth a physician hourly compensation deeming provision that deems hourly payments to a physician to be fair market value if the payment equals (i) the community hourly rate for ER doctors, or (ii) the average hourly rate for specialties as determined by averaging certain national physician compensation surveys. This interim final rule also addresses the issue of reporting requirements by requiring that DHS entities retain relevant information and make it available upon request by the Secretary. By not requiring periodic reporting, we have significantly eased the cost and burden of compliance. In addition, Phase II includes ownership exceptions for publicly-traded securities and mutual funds, rural providers, and hospitals. Additional exceptions that benefit DHS entities include the intra-family referrals exception, the physician retention in underserved areas exception, the community-wide health information systems exception, and the temporary grace period exception. Again, to the extent that new or expanded exceptions permit additional legitimate arrangements to comply with the law, the potential and significant costs of restructuring arrangements is reduced, and the costs of noncompliance are avoided entirely.

3. Effects on the Medicare and Medicaid Programs

Section 1877 of the Act was enacted to address over-utilization, anti-competitive behavior, and other abuses of health care services that occur when physicians have financial relationships with certain ancillary services entities to which they refer Medicare or Medicaid patients. Physician financial arrangements may have some anti-competitive effects to the extent that those relationships discourage other providers from entering a market in which patients are primarily referred to physician-owned entities or DHS entities that maintain generous compensation arrangements with physicians. Anti-competitive behavior can increase program costs if the DHS entities with which physicians have financial relationships are favored over other, more cost-efficient providers or providers that furnish higher quality care. Overutilization increases program costs because Medicare (or Medicaid) pays for more items or services than are medically necessary.

We expect that Phase II of this rulemaking will result in savings to the program by minimizing anti-competitive business arrangements as well as over-utilization or other abuse of covered services. For example, the new "same building" definition will prohibit arrangements in which DHS are insufficiently tied to the referring physician's core medical practice and essentially constitute separate business enterprises. We have made clear that these arrangements, which could otherwise encourage overutilization and anti-competitive behavior, will not qualify for the in-office ancillary services exception. We cannot gauge with any certainty the extent of these savings to the program at this time.

We note that while we have delayed rulemaking with respect to portions of the application of section 1903(s)(2) of the Act, the fact that most providers and suppliers of Medicaid services also furnish Medicare services means that the Medicaid programs should indirectly benefit from compliance on the Medicare side. Thus, Phase II of this rulemaking should result in savings to the Medicaid program, but we cannot gauge with any certainty the extent of these savings at this time.

4. Effects on Beneficiaries

Some commenters thought the January 1998 proposed rule exceeded our statutory authority and imposed unnecessary and costly burdens on physicians and other health care providers/suppliers that would harm patient access to health care facilities and services. We have tried to ensure that this rule will not adversely impact the medical care of Federal health care program beneficiaries. Where we have determined that Phase II of this rulemaking may have an impact on current arrangements under which patients are receiving medical care, we have attempted to verify that there are other ways available to structure the arrangement, so that patients may continue to receive services in the same location. In almost all cases, we believe Phase II of this rulemaking should not require substantial changes in delivery arrangements. For the same reasons noted above under "Effects on the Medicare and Medicaid Programs," we believe that this interim final rule will help minimize anti-competitive behavior that can affect where a beneficiary receives health care services and possibly the quality of the services furnished, and we believe this rule will minimize the number of medically unnecessary tests performed or items or services ordered on Federal health care program beneficiaries.

C. Alternatives Considered

In drafting the January 1998 proposed rule, we interpreted the statute strictly and literally. After reviewing the voluminous number of comments we received, we considered in Phase I many alternatives to accommodate the practical problems that commenters raised, while still remaining true to the statutory language and intent. As noted throughout the Phase II preamble, we continued to consider alternatives raised in comments submitted on the January 1998 proposed rule and, where applicable, comments received on Phase I. For example, we received many comments requesting modifications to various provisions concerning academic medical centers. In Phase I, we added a new regulatory exception for academic medical center arrangements, pursuant to section 1877(b)(4) of the Act. In response to objections from Phase I commenters about the definition of an academic medical center in § 411.355(e)(2), we are revising the definition in Phase II to more accurately reflect the nature of these entities. The new definition permits hospitals or health systems that sponsor four or more approved medical education programs to qualify as an academic medical center, provided they meet the other criteria in the exception. We considered requiring the hospital or health system to sponsor five or more approved medical education programs. However, after reviewing the issue more carefully, we decided that a requirement for four programs would adequately ensure that the hospital or health system has a substantial teaching mission and would not disqualify institutions that otherwise appeared to be *bona fide* academic medical centers.

We received comments suggesting that we revise the "same building" requirement in the in-office ancillary services exception to allow non-abusive arrangements or to clarify terms that commenters claimed were ambiguous. We considered maintaining the Phase I "same building" test, but realized that we would be unable to protect legitimate arrangements involving the specialty groups that primarily furnish DHS such as oncology and radiology. For example, under the Phase I definition, the referring physician (or another physician who is a member of the same group practice) must furnish in the same building "substantial" physician services unrelated to the furnishing of DHS. At the suggestion of commenters, we considered replacements for the term "substantial," including "any," "more than incidental," "10 percent," and "significant." Ultimately, we decided that these replacement terms were not sufficiently bright-line and would not necessarily protect legitimate arrangements involving radiologists and oncologists. We replaced the Phase I same building test with three separate options, one of which was specifically designed to permit legitimate arrangements involving radiologists and oncologists. Under that test, a designated health service is furnished in the "same building" if the building is one in which the referring physician or his or her group practice has an office that is normally open to their patients at least 35 hours per week, and the referring physician or one or more members of his or her group regularly practices medicine and furnishes physician services to patients in that office at least 30 hours per week. However, the revised provision should not unsettle legitimate arrangements under the Phase I definition. In fact, the new "same building" test should permit some legitimate arrangements not protected by Phase I.

Many Phase I commenters objected to the definition of compensation that is "set in advance" because it did not permit certain percentage compensation arrangements. We considered maintaining the Phase I definition of "set in advance," but realized that hospitals, academic medical centers, and other entities would have to renegotiate numerous legitimate contracts for physician services, potentially causing significant

disruption within the health care industry without a corresponding program integrity benefit. We were concerned that such disruption could unnecessarily inconvenience Medicare beneficiaries. Accordingly, reviewing this subject more thoroughly, we are revising the definition of "set in advance." Compensation will be considered "set in advance" if the aggregate compensation, or a time-based or unit-of-service-based (whether per-use or per-service) amount, or a specific formula for calculating certain fluctuating compensation, is set forth in the initial agreement between the parties (and before the furnishing of the items or services for which the compensation is to be paid).

Commenters on the January 1998 proposed rule expressed considerable concern that the proposed reporting requirements were unduly burdensome. In response, we are making a number of changes to the reporting requirements. Most significantly, we are eliminating the requirement to report periodically information regarding financial relationships. Instead, we are requiring that entities retain certain information regarding their financial relationships with referring physicians and submit that information only upon request. The information required to be retained is that which the entity knows or should know about in the course of prudently conducting business, including records that the entity is already required to retain in accordance with the rules of the Internal Revenue Service, the Securities and Exchange Commission, and the Medicare and Medicaid programs. We are also specifying that ownership or investment interests in publicly-traded securities and mutual funds need not be reported if they satisfy the exceptions for such financial relationships in § 411.356(a) and § 411.356(b).

We considered maintaining the original reporting requirements, but decided that periodic reporting would not be particularly helpful to the agency. CMS and its contractors would be overwhelmed by the number of reports and financial relationships that would need to be analyzed. We decided that we would make better use of our available resources if we collected information on financial relationships in a more focused manner (such as during a fraud investigation of a particular provider or group of providers).

In response to comments, we considered allowing a referring physician to "stand in the shoes" of his group practice or wholly-owned professional corporation (PC) when the only intervening entity between the referring physician and the DHS entity is his or her PC. Under such a rule, what would otherwise be analyzed as an indirect compensation arrangement could instead be analyzed as a direct compensation arrangement. We recognize in this interim final rule that it is not necessary to treat a referring physician as separate from his or her wholly-owned PC, and we have revised the definition of "referring physician" accordingly. However, we decided not to make any changes to the Phase I rule with respect to the issue of indirect compensation arrangements that are created when a group practice is an intervening entity in the chain between the DHS entity and the referring physicians who are members of the group. We believe that such a change would unnecessarily complicate the final rule and create confusion. Moreover, we believe such a change is unnecessary, since the knowledge standard in the indirect compensation arrangements definition and exception adequately protects DHS entities.

We have created an exception for certain referrals from a referring physician to a DHS entity with which his or her immediate family member has a financial relationship, if the patient being referred resides in a rural area and there is no DHS entity available in a timely manner in light of the patient's condition to furnish the DHS to the patient in his or her home or within 25 miles of the patient's home. In creating this exception for intra-family rural referrals, we considered permitting such referrals regardless of whether the patient resides in a rural area. Although intra-family referrals may be relatively infrequent, we decided to limit the exception to rural referrals because we cannot create a new regulatory exception if it poses any risk of program or patient abuse. In drafting the exception, we also considered using a 15-mile standard. Ultimately, we decided that a 25-mile standard would be more consistent with similar standards elsewhere in the regulation and would minimize any unfair competitive effect on non-physician owned DHS entities that may seek to provide services in rural areas.

As these examples demonstrate, our approach in Phase II of this rulemaking is to address as many of the industry's concerns as possible. As noted throughout this preamble, we considered a variety of suggestions and alternatives, selecting only those that are consistent with the statute's goals and directives and that will protect Federal health care program beneficiaries' access to services.

XVI. Waiver of Proposed Rulemaking

Section 902 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) provides that, effective December 8, 2003, the Secretary, in consultation with the Director of the Office of Management and Budget (OMB), shall establish and publish a regular timeline for the publication of final regulations based on the previous publication of a proposed regulation or an interim final regulation. Section 902 further provides that the timeline may vary among different regulations, but shall not be longer than three years except under exceptional circumstances.

Part of this Phase II rule finalizes portions of a proposed rule that was published in January 1998. Although we do not believe that section 902 prohibits the Secretary from finalizing every proposed rule that was published more than three years before December 8, 2003, we recognize that section 902 may be susceptible to more than one interpretation. Accordingly, out of an abundance of caution, we are not publishing this rule as a final rule. Instead, we are waiving notice of proposed rulemaking and publishing this rule as an interim final rule with comment period. Under the Administrative Procedures Act (5 U.S.C. 553(b)), an agency may waive publication of a notice of proposed rulemaking if the agency finds good cause that the notice and comment procedure is impracticable, unnecessary, or contrary to the public interest and the agency incorporates into the rule a statement of, and the reasons for, such a finding. For the reasons discussed below, we find that it would be impracticable and contrary to the public interest to publish as a proposed rule approximately half of the material contained in this interim final rule with comment period.

The physician self-referral prohibition is implicated in nearly every financial relationship between and among physicians and entities that furnish DHS. Violations of the law (regardless of the intent of the parties) have substantial financial consequences, including denial of payment (or refunding of payments received) for DHS claims; civil monetary penalties; and program exclusion. The imposition of these sanctions can result in multi-million dollar liability. Violations of the physician self-referral prohibition may also be pursued under the False Claims Act, 31 U.S.C. 3729–3733. Given the scope and strict liability nature of the prohibition and the significant financial consequences of noncompliance, the

industry has asked for "bright-line" rules and new regulatory exceptions for nonabusive arrangements.

We believe it is impracticable and not in the public interest to offer what would essentially constitute a third opportunity to comment on much of the material in this rule and thereby delay finalizing useful exceptions and the many "bright-line" rules necessary either to protect the Medicare program from fraud and abuse or permit nonabusive arrangements. We have already issued a proposed rule, major portions of which were finalized upon publication of the Phase I final rule with comment period and became effective on January 4, 2002. This interim final rule responds to public comments received on the January 1998 proposed rule as well as public comments received on Phase I. Phase I comments necessarily informed our rulemaking with respect to finalizing the remainder of the January 1998 proposed rule because those comments addressed definitions and other matters that apply throughout the regulatory scheme. To publish yet another proposed rule on this matter would prevent affected parties from using important new or expanded exceptions. Even if we were able to finalize a proposed rule in an expedited fashion, the inability to use the new or expanded exceptions could expose DHS entities to significant financial liability for otherwise nonabusive relationships. Moreover, the public will not be denied the opportunity to comment on this rule because we are publishing it as an interim final rule with comment period. In accordance with section 902 of MMA, we are obligated to consider comments on this interim final rule and publish a final rule addressing those comments within three years.

In the Phase I preamble, we informed the public that we intended to publish a second final rule with comment period (Phase II) that would address the remainder of the proposed rule as well as comments on Phase I. The additional regulatory definitions and new regulatory exceptions in Phase II are inextricably intertwined with the Phase I final rule. The industry has patiently and eagerly awaited the publication of a single, comprehensive Phase II regulation that would provide the guidance and finality necessary for physicians and health care providers to structure their financial relationships in a manner that assures each party's compliance with the statutory prohibition. It would be contrary to the public interest to upset expectations by publishing another proposed rule thereby denying affected parties the clarity and finality they expected to obtain with this rule. In addition, to extract a significant portion of the material in this interim final rule (much, if not all, of which will not be controversial) and to publish it separately in another proposed rule would thwart our efforts to present the unified and complete regulatory scheme necessary to support both compliance and enforcement efforts.

In addition, further delay could disrupt or hinder our programmatic objective of improving beneficiaries' access to care. For instance, this interim final rule with comment period creates a new exception for certain payments made by a hospital or federally qualified health center to a physician to retain the physician's medical practice in a health professional shortage area. In addition, this interim final rule creates an exception for intra-family rural referrals and obstetrical malpractice insurance subsidies. Beneficiary access to care in underserved or rural areas is a critical programmatic objective. It is not in the public interest to delay finalizing the new exceptions designed to serve this purpose.

For the reasons explained above, we find good cause to waive notice of proposed rulemaking and to issue this rule as an interim final rule with comment period.

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

List of Subjects

42 CFR Part 411

Kidney diseases, Medicare, Physician referral, Reporting and recordkeeping requirements.

42 CFR Part 424

Emergency medical services, Health facilities, Health professions, Medicare.

■ For the reasons set forth in the preamble, CMS amends 42 CFR chapter IV as set forth below:

PART 411—EXCLUSIONS FROM MEDICARE AND LIMITATIONS ON MEDICARE PAYMENT

■ 1. The authority citation for part 411 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 Exclusions and Exclusion of Particular Services

■ 2. In § 411.1, paragraph (a) is republished to read as follows:

§ 411.1 Basis and scope.

(a) *Statutory basis.* Sections 1814(a) and 1835(a) of the Act require that a physician certify or recertify a patient's need for home health services but, in general, prohibit a physician from certifying or recertifying the need for services if the services will be furnished by an HHA in which the physician has a significant ownership interest, or with which the physician has a significant financial or contractual relationship. Sections 1814(c), 1835(d), and 1862 of the Act exclude from Medicare payment certain specified services. The Act provides special rules for payment of services furnished by the following: Federal providers or agencies (sections 1814(c) and 1835(d)); hospitals and physicians outside of the U.S. (sections 1814(f) and 1862(a)(4)); and hospitals and SNFs of the Indian Health Service (section 1880 of the Act). Section 1877 of the Act sets forth limitations on referrals and payment for designated health services furnished by entities with which the referring physician (or an immediate family member of the referring physician) has a financial relationship.

* * * * *

Subpart J—Financial Relationships Between Physicians and Entities Furnishing Designated Health Services

■ 3. The heading for subpart J is revised as set forth above, and subpart J is revised to read as follows:

Subpart J—Financial Relationships Between Physicians and Entities Furnishing Designated Health Services

Sec.

Subpart J—Financial Relationships Between Physicians and Entities Furnishing Designated Health Services

§ 411.350 Scope of subpart.

(a) This subpart implements section 1877 of the Act, which generally prohibits a physician from making a referral under Medicare for designated

health services to an entity with which the physician or a member of the physician's immediate family has a financial relationship.

(b) This subpart does not provide for exceptions or immunity from civil or criminal prosecution or other sanctions applicable under any State laws or under Federal law other than section 1877 of the Act. For example, although a particular arrangement involving a physician's financial relationship with an entity may not prohibit the physician from making referrals to the entity under this subpart, the arrangement may nevertheless violate another provision of the Act or other laws administered by HHS, the Federal Trade Commission, the Securities and Exchange Commission, the Internal Revenue Service, or any other Federal or State agency.

(c) This subpart requires, with some exceptions, that certain entities furnishing covered services under Medicare Part A or Part B report information concerning ownership, investment, or compensation arrangements in the form, in the manner, and at the times specified by CMS.

§ 411.351 Definitions.

As used in this subpart, unless the context indicates otherwise:

Centralized building means all or part of a building, including, for purposes of this subpart only, a mobile vehicle, van, or trailer that is owned or leased on a full-time basis (that is, 24 hours per day, 7 days per week, for a term of not less than 6 months) by a group practice and that is used exclusively by the group practice. Space in a building or a mobile vehicle, van, or trailer that is shared by more than one group practice, by a group practice and one or more solo practitioners, or by a group practice and another provider or supplier (for example, a diagnostic imaging facility) is not a centralized building for purposes of this subpart. This provision does not preclude a group practice from providing services to other providers or suppliers (for example, purchased diagnostic tests) in the group practice's centralized building. A group practice may have more than one centralized building.

Clinical laboratory services means the biological, microbiological, serological, chemical, immunohematological, hematological, biophysical, cytological, pathological, or other examination of materials derived from the human body for the purpose of providing information for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of, human beings, including procedures to determine, measure, or otherwise describe the presence or absence of various substances or organisms in the body, as specifically identified by the List of CPT/HCPCS Codes. All services so identified on the List of CPT/HCPCS Codes are clinical laboratory services for purposes of this subpart. Any service not specifically identified as a clinical laboratory service on the List of CPT/HCPCS Codes is not a clinical laboratory service for purposes of this subpart.

Consultation means a professional service furnished to a patient by a physician if the following conditions are satisfied:

(1) The physician's opinion or advice regarding evaluation and/or management of a specific medical problem is requested by another physician.

(2) The request and need for the consultation are documented in the patient's medical record.

(3) After the consultation is provided, the physician prepares a written report of his or her findings, which is provided to the physician who requested the consultation.

(4) With respect to radiation therapy services provided by a radiation oncologist, a course of radiation treatments over a period of time will be considered to be pursuant to a consultation, provided the radiation oncologist communicates with the referring physician on a regular basis about the patient's course of treatment and progress.

Designated health services (DHS) means any of the following services (other than those provided as emergency physician services furnished outside of the U.S.), as they are defined in this section:

(1) Clinical laboratory services.

(2) Physical therapy, occupational therapy, and speech-language pathology services.

(3) Radiology and certain other imaging services.

(4) Radiation therapy services and supplies.

(5) Durable medical equipment and supplies.

(6) Parenteral and enteral nutrients, equipment, and supplies.

(7) Prosthetics, orthotics, and prosthetic devices and supplies.

(8) Home health services.

(9) Outpatient prescription drugs.

(10) Inpatient and outpatient hospital services.

Except as otherwise noted in this subpart, the term "designated health services" or DHS means only DHS payable, in whole or in part, by Medicare. DHS do not include services that are reimbursed by Medicare as part of a composite rate (for example, ambulatory surgical center services or SNF Part A payments), except to the extent the services listed in paragraphs (1) through (10) of this definition are themselves payable through a composite rate (for example, all services provided as home health services or inpatient and outpatient hospital services are DHS).

Does not violate the anti-kickback statute, as used in this subpart only, means that the particular arrangement—

(1) Meets a safe harbor under the anti-kickback statute in § 1001.952 of this title, "Exceptions";

(2) Has been specifically approved by the OIG in a favorable advisory opinion issued to a party to the particular arrangement (*e.g.*, the entity furnishing DHS) with respect to the particular arrangement (and not a similar arrangement), provided that the arrangement is conducted in accordance with the facts certified by the requesting party and the opinion is otherwise issued in accordance with part 1008 of this title, "Advisory Opinions by the OIG"; or

(3) Does not violate the anti-kickback provisions in section 1128B(b) of the Act.

A favorable advisory opinion for purposes of this definition means an opinion in which the OIG opines that—

(1) The party's specific arrangement does not implicate the anti-kickback statute, does not constitute prohibited remuneration, or fits in a safe harbor under § 1001.952 of this title; or

(2) The party will not be subject to any OIG sanctions arising under the anti-kickback statute (for example, under sections 1128(a)(7) and 1128a(b)(7) of the Act) in connection with the party's specific arrangement.

Durable medical equipment (DME) and supplies has the meaning given in section 1861(n) of the Act and § 414.202 of this chapter.

Employee means any individual who, under the common law rules that apply in determining the employer-employee relationship (as applied for purposes of section 3121(d)(2) of the Internal Revenue Code of 1986), is considered to be employed by, or an employee of, an entity. (Application of these common law rules is discussed in 20 CFR 404.1007 and 26 CFR 31.3121(d)–1(c).)

Entity means—

(1) A physician's sole practice or a practice of multiple physicians or any other person, sole proprietorship, public or private agency or trust, corporation, partnership, limited liability company, foundation, not-for-profit corporation, or unincorporated association that furnishes DHS. An entity does not

include the referring physician himself or herself, but does include his or her medical practice. A person or entity is considered to be furnishing DHS if it-

(i) Is the person or entity to which CMS makes payment for the DHS, directly or upon assignment on the patient's behalf; or

(ii) Is the person or entity to which the right to payment for the DHS has been reassigned pursuant to § 424.80(b)(1) (employer), (b)(2) (facility), or (b)(3) (health care delivery system) of this chapter (other than a health care delivery system that is a health plan (as defined in § 1001.952(l) of this title), and other than any managed care organization (MCO), provider-sponsored organization (PSO), or independent practice association (IPA) with which a health plan contracts for services provided to plan enrollees).

(2) A health plan, MCO, PSO, or IPA that employs a supplier or operates a facility that could accept reassignment from a supplier pursuant to § 424.80(b)(1) and (b)(2) of this chapter, with respect to any designated health services provided by that supplier.

(3) For purposes of this subpart, "entity" does not include a physician's practice when it bills Medicare for a diagnostic test in accordance with § 414.50 of this chapter (Physician billing for purchased diagnostic tests) and section 3060.4 of the Medicare Carriers Manual (Purchased diagnostic tests), as amended or replaced from time to time.

Fair market value means the value in arm's-length transactions, consistent with the general market value. "General market value" means the price that an asset would bring as the result of *bona fide* bargaining between well-informed buyers and sellers who are not otherwise in a position to generate business for the other party, or the compensation that would be included in a service agreement as the result of *bona fide* bargaining between well-informed parties to the agreement who are not otherwise in a position to generate business for the other party, on the date of acquisition of the asset or at the time of the service agreement. Usually, the fair market price is the price at which *bona fide* sales have been consummated for assets of like type, quality, and quantity in a particular market at the time of acquisition, or the compensation that has been included in *bona fide* service agreements with comparable terms at the time of the agreement, where the price or compensation has not been determined in any manner that takes into account the volume or value of anticipated or actual referrals. With respect to rentals and leases described in § 411.357(a), (b), and (l) (as to equipment leases only), "fair market value" means the value of rental property for general commercial purposes (not taking into account its intended use). In the case of a lease of space, this value may not be adjusted to reflect the additional value the prospective lessee or lessor would attribute to the proximity or convenience to the lessor when the lessor is a potential source of patient referrals to the lessee. For purposes of this definition, a rental payment does not take into account intended use if it takes into account costs incurred by the lessor in developing or upgrading the property or maintaining the property or its improvements.

An hourly payment for a physician's personal services (that is, services performed by the physician personally and not by employees, contractors, or others) shall be considered to be fair market value if the hourly payment is established using either of the following two methodologies:

(1) The hourly rate is less than or equal to the average hourly rate for emergency room physician services in the relevant physician market, provided there are at least three hospitals providing emergency room services in the market.

(2) The hourly rate is determined by averaging the 50th percentile national compensation level for physicians with the same physician specialty (or, if the specialty is not identified in the survey, for general practice) in at least four of the following surveys and dividing by 2,000 hours. The surveys are:

- Sullivan, Cotter & Associates, Inc.—Physician Compensation and Productivity Survey
- Hay Group—Physicians Compensation Survey
- Hospital and Healthcare Compensation Services—Physician Salary Survey Report
- Medical Group Management Association—Physician Compensation and Productivity Survey
- ECS Watson Wyatt—Hospital and Health Care Management Compensation Report
- William M. Mercer—Integrated Health Networks Compensation Survey

Home health services means the services described in section 1861(m) of the Act and part 409, subpart E of this chapter.

Hospital means any entity that qualifies as a "hospital" under section 1861(e) of the Act, as a "psychiatric hospital" under section 1861(f) of the Act, or as a "critical access hospital" under section 1861(mm)(1) of the Act, and refers to any separate legally organized operating entity plus any subsidiary, related entity, or other entities that perform services for the hospital's patients and for which the hospital bills. However, a "hospital" does not include entities that perform services for hospital patients "under arrangements" with the hospital.

HPSA means, for purposes of this subpart, an area designated as a health professional shortage area under section 332(a)(1)(A) of the Public Health Service Act for primary medical care professionals (in accordance with the criteria specified in part 5 of this title).

Immediate family member or member of a physician's immediate family means husband or wife; birth or adoptive parent, child, or sibling; stepparent, stepchild, stepbrother, or stepsister; father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law; grandparent or grandchild; and spouse of a grandparent or grandchild.

"Incident to" services means those services that meet the requirements of section 1861(s)(2)(A) of the Act, 42 CFR § 410.26, and section 2050 of the Medicare Carriers (CMS Pub. 14–3), Part 3—Claims Process, as amended or replaced from time to time.

Inpatient hospital services means those services defined in section 1861(b) of the Act and § 409.10(a) and (b) of this chapter and include inpatient psychiatric hospital services listed in section 1861(c) of the Act and inpatient critical access hospital services, as defined in section 1861(mm)(2) of the Act. "Inpatient hospital services" do not include emergency inpatient services provided by a hospital located outside of the U.S. and covered under the authority in section 1814(f)(2) of the Act and part 424, subpart H of this chapter, or emergency inpatient services provided by a nonparticipating hospital within the U.S., as authorized by section 1814(d) of the Act and described in part 424, subpart G of this chapter. "Inpatient hospital services" also do not include dialysis furnished by a hospital that is not certified to provide end-stage renal dialysis (ESRD) services under subpart U of part 405 of this chapter. "Inpatient hospital services" include services that are furnished either by the hospital directly or under arrangements made by the hospital with others. "Inpatient hospital services" do not include professional services performed by physicians, physician assistants, nurse practitioners, clinical nurse specialists, certified nurse midwives, and certified registered nurse anesthetists and qualified psychologists if Medicare reimburses the services independently and not as part of the

inpatient hospital service (even if they are billed by a hospital under an assignment or reassignment).

Laboratory means an entity furnishing biological, microbiological, serological, chemical, immunohematological, hematological, biophysical, cytological, pathological, or other examination of materials derived from the human body for the purpose of providing information for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of, human beings. These examinations also include procedures to determine, measure, or otherwise describe the presence or absence of various substances or organisms in the body. Entities only collecting or preparing specimens (or both) or only serving as a mailing service and not performing testing are not considered laboratories.

List of CPT/HCPCS Codes means the list of CPT and HCPCS codes that identifies those items and services that are designated health services under section 1877 of the Act or that may qualify for certain exceptions under section 1877 of the Act. It is updated annually, as published in the **Federal Register**, and is posted on the CMS Web site at *http://www.cms.gov/medlearn/refphys.asp*.

Locum tenens physician means a physician who substitutes (that is, "stands in the shoes") in exigent circumstances for a physician, in accordance with applicable reassignment rules and regulations, including section 3060.7 of the Medicare Carriers Manual (CMS Pub. 14–3), Part 3—Claims Process, as amended or replaced from time to time.

Member of the group or member of a group practice means, for purposes of this subpart, a direct or indirect physician owner of a group practice (including a physician whose interest is held by his or her individual professional corporation or by another entity), a physician employee of the group practice (including a physician employed by his or her individual professional corporation that has an equity interest in the group practice), a *locum tenens* physician (as defined in this section), or an on-call physician while the physician is providing on-call services for members of the group practice. A physician is a member of the group during the time he or she furnishes "patient care services" to the group as defined in this section. An independent contractor or a leased employee is not a member of the group (unless the leased employee meets the definition of an "employee" under this § 411.351).

Outpatient hospital services means the therapeutic, diagnostic, and partial hospitalization services listed under sections 1861(s)(2)(B) and (s)(2)(C) of the Act; outpatient services furnished by a psychiatric hospital, as defined in section 1861(f) of the Act; and outpatient critical access hospital services, as defined in section 1861(mm)(3) of the Act. "Outpatient hospital services" do not include emergency services furnished by nonparticipating hospitals and covered under the conditions described in section 1835(b) of the Act and subpart G of part 424 of this chapter. "Outpatient hospital services" include services that are furnished either by the hospital directly or under arrangements made by the hospital with others. "Outpatient hospital services" do not include professional services performed by physicians, physician assistants, nurse practitioners, clinical nurse specialists, certified nurse midwives, certified registered nurse anesthetists, and qualified psychologists if Medicare reimburses the services independently and not as part of the outpatient hospital service (even if they are billed by a hospital under an assignment or reassignment).

Outpatient prescription drugs means all prescription drugs covered by Medicare Part B.

Parenteral and enteral nutrients, equipment, and supplies means the following services (including all HCPCS level 2 codes for these services):

(1) *Parenteral nutrients, equipment, and supplies,* meaning those items and supplies needed to provide nutriment to a patient with permanent, severe pathology of the alimentary tract that does not allow absorption of sufficient nutrients to maintain strength commensurate with the patient's general condition, as described in section 65–10 of the Medicare Coverage Issues Manual (CMS Pub. 6), as amended or replaced from time to time; and

(2) *Enteral nutrients, equipment, and supplies,* meaning items and supplies needed to provide enteral nutrition to a patient with a functioning gastrointestinal tract who, due to pathology to or nonfunction of the structures that normally permit food to reach the digestive tract, cannot maintain weight and strength commensurate with his or her general condition, as described in section 65–10 of the Medicare Coverage Issues Manual (CMS Pub. 6), as amended or replaced from time to time.

Patient care services means any task(s) performed by a physician in the group practice that address the medical needs of specific patients or patients in general, regardless of whether they involve direct patient encounters or generally benefit a particular practice. Patient care services can include, for example, the services of physicians who do not directly treat patients, such as time spent by a physician consulting with other physicians or reviewing laboratory tests, or time spent training staff members, arranging for equipment, or performing administrative or management tasks.

Physical therapy, occupational therapy, and speech-language pathology services means those particular services so identified on the List of CPT/HCPCS Codes. All services so identified on the List of CPT/HCPCS Codes are physical therapy, occupational therapy, and speech-language pathology services for purposes of this subpart. Any service not specifically identified as physical therapy, occupational therapy or speech-language pathology on the List of CPT/HCPCS Codes is not a physical therapy, occupational therapy, or speech-language pathology service for purposes of this subpart. The list of codes identifying physical therapy, occupational therapy, and speech-language pathology services for purposes of this regulation includes the following:

(1) *Physical therapy services,* meaning those outpatient physical therapy services (including speech-language pathology services) described at section 1861(p) of the Act that are covered under Medicare Part A or Part B, regardless of who provides them, if the services include—

(i) Assessments, function tests and measurements of strength, balance, endurance, range of motion, and activities of daily living;

(ii) Therapeutic exercises, massage, and use of physical medicine modalities, assistive devices, and adaptive equipment;

(iii) Establishment of a maintenance therapy program for an individual whose restoration potential has been reached; however, maintenance therapy itself is not covered as part of these services; or

(iv) Speech-language pathology services that are for the diagnosis and treatment of speech, language, and cognitive disorders that include swallowing and other oral-motor dysfunctions.

(2) *Occupational therapy services,* meaning those services described at section 1861(g) of the Act that are covered under Medicare Part A or Part B, regardless of who provides them, if the services include—

(i) Teaching of compensatory techniques to permit an individual with

a physical or cognitive impairment or limitation to engage in daily activities;

(ii) Evaluation of an individual's level of independent functioning;

(iii) Selection and teaching of task-oriented therapeutic activities to restore sensory-integrative function; or

(iv) Assessment of an individual's vocational potential, except when the assessment is related solely to vocational rehabilitation.

Physician means a doctor of medicine or osteopathy, a doctor of dental surgery or dental medicine, a doctor of podiatric medicine, a doctor of optometry, or a chiropractor, as defined in section 1861(r) of the Act.

Physician in the group practice means a member of the group practice, as well as an independent contractor physician during the time the independent contractor is furnishing patient care services (as defined in this section) for the group practice under a contractual arrangement with the group practice to provide services to the group practice's patients in the group practice's facilities. The contract must contain the same restrictions on compensation that apply to members of the group practice under § 411.352(g) (or the contract must fit in the personal services exception in § 411.357(d)), and the independent contractor's arrangement with the group practice must comply with the reassignment rules at § 424.80(b)(3) of this chapter (see also section 3060.3 of the Medicare Carriers Manual (CMS Pub. 14–3), Part 3—Claims Process, as amended or replaced from time to time). Referrals from an independent contractor who is a physician in the group practice are subject to the prohibition on referrals in § 411.353(a), and the group practice is subject to the limitation on billing for those referrals in § 411.353(b).

Physician incentive plan means any compensation arrangement between an entity (or downstream subcontractor) and a physician or physician group that may directly or indirectly have the effect of reducing or limiting services furnished with respect to individuals enrolled with the entity.

Plan of care means the establishment by a physician of a course of diagnosis or treatment (or both) for a particular patient, including the ordering of services.

Professional courtesy means the provision of free or discounted health care items or services to a physician or his or her immediate family members or office staff.

Prosthetics, Orthotics, and Prosthetic Devices and Supplies means the following services (including all HCPCS level 2 codes for these items and services that are covered by Medicare):

(1) *Orthotics*, meaning leg, arm, back, and neck braces, as listed in section 1861(s)(9) of the Act.

(2) *Prosthetics*, meaning artificial legs, arms, and eyes, as described in section 1861(s)(9) of the Act.

(3) *Prosthetic devices*, meaning devices (other than a dental device) listed in section 1861(s)(8) of the Act that replace all or part of an internal body organ, including colostomy bags, and one pair of conventional eyeglasses or contact lenses furnished subsequent to each cataract surgery with insertion of an intraocular lens.

(4) *Prosthetic supplies*, meaning supplies that are necessary for the effective use of a prosthetic device (including supplies directly related to colostomy care).

Radiation therapy services and supplies means those particular services and supplies so identified on the List of CPT/HCPCS Codes. All services and supplies so identified on the List of CPT/HCPCS Codes are radiation therapy services and supplies for purposes of this subpart. Any service or supply not specifically identified as radiation therapy services or supplies on the List of CPT/HCPCS Codes is not a radiation therapy service or supply for purposes of this subpart. The list of codes identifying radiation therapy services and supplies is based on section 1861(s)(4) of the Act and § 410.35 of this chapter, but does not include nuclear medicine procedures.

Radiology and certain other imaging services means those particular services so identified on the List of CPT/HCPCS Codes. All services so identified on the List of CPT/HCPCS Codes are radiology and certain other imaging services for purposes of this subpart. Any service not specifically identified as radiology and certain other imaging services on the List of CPT/HCPCS Codes, is not a radiology or certain other imaging service for purposes of this subpart. The list of codes identifying radiology and certain other imaging services includes the professional and technical components of any diagnostic test or procedure using x-rays, ultrasound, or other imaging services, computerized axial tomography, or magnetic resonance imaging, as covered under section 1861(s)(3) of the Act and § 410.32 and § 410.34 of this chapter but does not include—

(1) X-ray , fluoroscopy, or ultrasound procedures that require the insertion of a needle, catheter, tube, or probe through the skin or into a body orifice;

(2) Radiology procedures that are integral to the performance of a nonradiological medical procedure and performed—

(i) During the nonradiological medical procedure; or

(ii) Immediately following the nonradiological medical procedure when necessary to confirm placement of an item placed during the nonradiological medical procedure; and

(3) Diagnostic nuclear medicine procedures.

Referral—

(1) Means either of the following:

(i) Except as provided in paragraph (2) of this definition, the request by a physician for, or ordering of, or the certifying or recertifying of the need for, any designated health service for which payment may be made under Medicare Part B, including a request for a consultation with another physician and any test or procedure ordered by or to be performed by (or under the supervision of) that other physician, but not including any designated health service personally performed or provided by the referring physician. A designated health service is not personally performed or provided by the referring physician if it is performed or provided by any other person, including, but not limited to, the referring physician's employees, independent contractors, or group practice members.

(ii) Except as provided in paragraph (2) of this definition, a request by a physician that includes the provision of any designated health service for which payment may be made under Medicare, the establishment of a plan of care by a physician that includes the provision of such a designated health service, or the certifying or recertifying of the need for such a designated health service, but not including any designated health service personally performed or provided by the referring physician. A designated health service is not personally performed or provided by the referring physician if it is performed or provided by any other person including, but not limited to, the referring physician's employees, independent contractors, or group practice members.

(2) Does not include a request by a pathologist for clinical diagnostic laboratory tests and pathological examination services, by a radiologist for diagnostic radiology services, and by a radiation oncologist for radiation therapy, if—

(i) The request results from a consultation initiated by another physician (whether the request for a consultation was made to a particular physician or to an entity with which the physician is affiliated); and

(ii) The tests or services are furnished by or under the supervision of the pathologist, radiologist, or radiation oncologist, or under the supervision of a pathologist, radiologist, or radiation oncologist, respectively, in the same group practice as the pathologist, radiologist, or radiation oncologist.

(3) Can be in any form, including, but not limited to, written, oral, or electronic.

Referring physician means a physician who makes a referral as defined in this section or who directs another person or entity to make a referral or who controls referrals made by another person or entity. A referring physician and the professional corporation of which he or she is a sole owner are the same for purposes of this subpart.

Remuneration means any payment or other benefit made directly or indirectly, overtly or covertly, in cash or in kind, except that the following are not considered remuneration for purposes of this section:

(1) The forgiveness of amounts owed for inaccurate tests or procedures, mistakenly performed tests or procedures, or the correction of minor billing errors.

(2) The furnishing of items, devices, or supplies (not including surgical items, devices, or supplies) that are used solely to collect, transport, process, or store specimens for the entity furnishing the items, devices, or supplies or are used solely to order or communicate the results of tests or procedures for the entity.

(3) A payment made by an insurer or a self-insured plan (or a subcontractor of the insurer or plan) to a physician to satisfy a claim, submitted on a fee-for-service basis, for the furnishing of health services by that physician to an individual who is covered by a policy with the insurer or by the self-insured plan, if—

(i) The health services are not furnished, and the payment is not made, under a contract or other arrangement between the insurer or the plan (or a subcontractor of the insurer or plan) and the physician;

(ii) The payment is made to the physician on behalf of the covered individual and would otherwise be made directly to the individual; and

(iii) The amount of the payment is set in advance, does not exceed fair market value, and is not determined in a manner that takes into account directly or indirectly the volume or value of any referrals.

Same building means a structure with, or combination of structures that share, a single street address as assigned by the U.S. Postal Service, excluding all exterior spaces (for example, lawns, courtyards, driveways, parking lots) and interior loading docks or parking garages. For purposes of this section, the "same building" does not include a mobile vehicle, van, or trailer.

Specialty hospital means a subsection (d) hospital (as defined in section 1886(d)(1)(B)) that is primarily or exclusively engaged in the care and treatment of one of the following: Patients with a cardiac condition; patients with an orthopedic condition; patients receiving a surgical procedure; or any other specialized category of services that the Secretary designates as inconsistent with the purpose of permitting physician ownership and investment interests in a hospital. A "specialty hospital" does not include any hospital—

(1) Determined by the Secretary to be in operation before or under development as of November 18, 2003;

(2) For which the number of physician investors at any time on or after such date is no greater than the number of such investors as of such date;

(3) For which the type of categories described above is no different at any time on or after such date than the type of such categories as of such date;

(4) For which any increase in the number of beds occurs only in the facilities on the main campus of the hospital and does not exceed 50 percent of the number of beds in the hospital as of November 18, 2003, or 5 beds, whichever is greater; and

(5) that meets such other requirements as the Secretary may specify.

Transaction means an instance or process of two or more persons or entities doing business. An isolated transaction means one involving a single payment between two or more persons or entities or a transaction that involves integrally related installment payments provided that—

(1) The total aggregate payment is fixed before the first payment is made and does not take into account, directly or indirectly, the volume or value of referrals or other business generated by the referring physician; and

(2) The payments are immediately negotiable or are guaranteed by a third party, secured by a negotiable promissory note, or subject to a similar mechanism to assure payment even in the event of default by the purchaser or obligated party. § 411.352 Group practice.

For purposes of this subpart, a group practice is a physician practice that meets the following conditions:

(a) *Single legal entity.* The group practice must consist of a single legal entity operating primarily for the purpose of being a physician group practice in any organizational form recognized by the State in which the group practice achieves its legal status, including, but not limited to, a partnership, professional corporation, limited liability company, foundation, not-for-profit corporation, faculty practice plan, or similar association. The single legal entity may be organized by any party or parties, including, but not limited to, physicians, health care facilities, or other persons or entities (including, but not limited to, physicians individually incorporated as professional corporations). The single legal entity may be organized or owned (in whole or in part) by another medical practice, provided that the other medical practice is not an operating physician practice (and regardless of whether the medical practice meets the conditions for a group practice under this section). For purposes of this subpart, a single legal entity does not include informal affiliations of physicians formed substantially to share profits from referrals, or separate group practices under common ownership or control through a physician practice management company, hospital, health system, or other entity or organization. A group practice that is otherwise a single legal entity may itself own subsidiary entities. A group practice operating in more than one State will be considered to be a single legal entity notwithstanding that it is composed of multiple legal entities, provided that—

(1) The States in which the group practice is operating are contiguous (although each State need not be contiguous to every other State);

(2) The legal entities are absolutely identical as to ownership, governance, and operation; and

(3) Organization of the group practice into multiple entities is necessary to comply with jurisdictional licensing laws of the States in which the group practice operates.

(b) *Physicians.* The group practice must have at least two physicians who are members of the group (whether employees or direct or indirect owners), as defined in § 411.351.

(c) *Range of care.* Each physician who is a member of the group, as defined in § 411.351, must furnish substantially the full range of patient care services that the physician routinely furnishes, including medical care, consultation, diagnosis, and treatment, through the joint use of shared office space, facilities, equipment, and personnel.

(d) *Services furnished by group practice members.* (1) Except as otherwise provided in paragraphs (d)(3), (d)(4), (d)(5), and (d)(6) of this section, substantially all of the patient care services of the physicians who are members of the group (that is, at least 75 percent of the total patient care services of the group practice members) must be furnished through the group and billed under a billing number assigned to the group, and the amounts received must be treated as receipts of the group. "Patient care services" must be measured by one of the following:

(i) The total time each member spends on patient care services documented by any reasonable means (including, but not limited to, time cards, appointment schedules, or personal diaries). (For example, if a physician practices 40 hours a week and spends 30 hours a week on patient care services for a group practice, the physician has spent 75 percent of his or her time providing patient care services for the group.)

(ii) Any alternative measure that is reasonable, fixed in advance of the performance of the services being measured, uniformly applied over time, verifiable, and documented.

(2) The data used to calculate compliance with this "substantially all test" and related supportive documentation must be made available to the Secretary upon request.

(3) The "substantially all test" set forth in paragraph (d)(1) of this section does not apply to any group practice that is located solely in an HPSA, as defined in § 411.351.

(4) For a group practice located outside of an HPSA (as defined in § 411.351), any time spent by a group practice member providing services in an HPSA should not be used to calculate whether the group practice has met the "substantially all test," regardless of whether the member's time in the HPSA is spent in a group practice, clinic, or office setting.

(5) During the "start up" period (not to exceed 12 months) that begins on the date of the initial formation of a new group practice, a group practice must make a reasonable, good faith effort to ensure that the group practice complies with the "substantially all" test requirement set forth in paragraph (d)(1) of this section as soon as practicable, but no later than 12 months from the date of the initial formation of the group practice. This paragraph (d)(5) does not apply when an existing group practice admits a new member or reorganizes.

(6)(i) If the addition to an existing group practice of a new member who would be considered to have relocated his or her practice under § 411.457(e)(2) would result in the existing group practice not meeting the "substantially all" test set forth in paragraph (d)(1) of this section, the group practice will have 12 months following the addition of the new member to come back into full compliance, provided that—

(A) For the 12-month period the group practice is fully compliant with the "substantially all" test if the new member is not counted as a member of the group for purposes of § 411.352; and

(B) The new member's employment with, or ownership interest in, the group practice is documented in writing no later than the beginning of his or her new employment, ownership, or investment.

(ii) This paragraph (d)(6) does not apply when an existing group practice reorganizes or admits a new member who is not relocating his or her practice.

(e) *Distribution of expenses and income.* The overhead expenses of, and income from, the practice must be distributed according to methods that are determined before the receipt of payment for the services giving rise to the overhead expense or producing the income. Nothing in this section prevents a group practice from adjusting its compensation methodology prospectively, subject to restrictions on the distribution of revenue from DHS under § 411.352(i).

(f) *Unified business.* (1) The group practice must be a unified business having at least the following features:

(i) Centralized decision-making by a body representative of the group practice that maintains effective control over the group's assets and liabilities (including, but not limited to, budgets, compensation, and salaries); and

(ii) Consolidated billing, accounting, and financial reporting.

(2) Location and specialty-based compensation practices are permitted with respect to revenues derived from services that are not DHS and may be permitted with respect to revenues derived from DHS under § 411.352(i).

(g) *Volume or value of referrals.* No physician who is a member of the group practice directly or indirectly receives compensation based on the volume or value of referrals by the physician, except as provided in § 411.352(i).

(h) *Physician-patient encounters.* Members of the group must personally conduct no less than 75 percent of the physician-patient encounters of the group practice.

(i) *Special rule for productivity bonuses and profit shares.* (1) A physician in a group practice may be paid a share of overall profits of the group, or a productivity bonus based on services that he or she has personally performed (including services "incident to" those personally performed services as defined in § 411.351), provided that the share or bonus is not determined in any manner that is directly related to the volume or value of referrals of DHS by the physician.

(2) Overall profits means the group's entire profits derived from DHS payable by Medicare or Medicaid or the profits derived from DHS payable by Medicare or Medicaid of any component of the group practice that consists of at least five physicians. Overall profits should be divided in a reasonable and verifiable manner that is not directly related to the volume or value of the physician's referrals of DHS. The share of overall profits will be deemed *not* to relate directly to the volume or value of referrals if *one* of the following conditions is met:

(i) The group's profits are divided per capita (for example, per member of the group or per physician in the group).

(ii) Revenues derived from DHS are distributed based on the distribution of the group practice's revenues attributed to services that are not DHS payable by any Federal health care program or private payer.

(iii) Revenues derived from DHS constitute less than 5 percent of the group practice's total revenues, and the allocated portion of those revenues to each physician in the group practice constitutes 5 percent or less of his or her total compensation from the group.

(3) A productivity bonus should be calculated in a reasonable and verifiable manner that is not directly related to the volume or value of the physician's referrals of DHS. A productivity bonus will be deemed not to relate directly to the volume or value of referrals of DHS if one of the following conditions is met:

(i) The bonus is based on the physician's total patient encounters or relative value units (RVUs). (The methodology for establishing RVUs is set forth in § 414.22 of this chapter.)

(ii) The bonus is based on the allocation of the physician's compensation attributable to services that are not DHS payable by any Federal health care program or private payer.

(iii) Revenues derived from DHS are less than 5 percent of the group practice's total revenues, and the allocated portion of those revenues to each physician in the group practice constitutes 5 percent or less of his or her total compensation from the group practice.

(4) Supporting documentation verifying the method used to calculate the profit share or productivity bonus under paragraphs (i)(2) and (i)(3) of this section, and the resulting amount of

compensation, must be made available to the Secretary upon request.

§ 411.353 Prohibition on certain referrals by physicians and limitations on billing.

(a) *Prohibition on referrals.* Except as provided in this subpart, a physician who has a direct or indirect financial relationship with an entity, or who has an immediate family member who has a direct or indirect financial relationship with the entity, may not make a referral to that entity for the furnishing of DHS for which payment otherwise may be made under Medicare. A physician's prohibited financial relationship with an entity that furnishes DHS is not imputed to his or her group practice or its members or its staff; however, a referral made by a physician's group practice, its members, or its staff may be imputed to the physician, if the physician directs the group practice, its members, or its staff to make the referral or if the physician controls referrals made by his or her group practice, its members, or its staff.

(b) *Limitations on billing.* An entity that furnishes DHS pursuant to a referral that is prohibited by paragraph (a) of this section may not present or cause to be presented a claim or bill to the Medicare program or to any individual, third party payer, or other entity for the DHS performed pursuant to the prohibited referral.

(c) *Denial of payment.* Except as provided in paragraph (e) of this section, no Medicare payment may be made for a designated health service that is furnished pursuant to a prohibited referral.

(d) *Refunds.* An entity that collects payment for a designated health service that was performed under a prohibited referral must refund all collected amounts on a timely basis, as defined in § 1003.101 of this title.

(e) *Exception for certain entities.* Payment may be made to an entity that submits a claim for a designated health service if—

(1) The entity did not have actual knowledge of, and did not act in reckless disregard or deliberate ignorance of, the identity of the physician who made the referral of the designated health service to the entity; and

(2) The claim otherwise complies with all applicable Federal and State laws, rules, and regulations.

(f) *Exception for certain arrangements involving temporary noncompliance.* (1) Except as provided in paragraphs (f)(2), (f)(3), and (f)(4) of this section, an entity may submit a claim or bill and payment may be made to an entity that submits a claim or bill for a designated health service if—

(i) The financial relationship between the entity and the referring physician fully complied with an applicable exception under § 411.355, § 411.356, or § 411.357 for at least 180 consecutive calendar days immediately preceding the date on which the financial relationship became noncompliant with the exception;

(ii) The financial relationship has fallen out of compliance with the exception for reasons beyond the control of the entity, and the entity promptly takes steps to rectify the noncompliance; and

(iii) The financial relationship does not violate the anti-kickback statute (section 1128B(b) of the Act), and the claim or bill otherwise complies with all applicable Federal and State laws, rules, and regulations.

(2) Paragraph (f)(1) of this section applies only to DHS furnished during the period of time it takes the entity to rectify the noncompliance, which must not exceed 90 consecutive calendar days following the date on which the financial relationship became noncompliant with an exception.

(3) This paragraph (f) may only be used by an entity once every 3 years with respect to the same referring physician.

(4) This paragraph (f) does not apply if the exception with which the financial relationship previously complied was § 411.357(k) or (m).

§ 411.354 Financial relationship, compensation, and ownership or investment interest.

(a) *Financial relationships.* (1) *Financial relationship means*—

(i) A direct or indirect ownership or investment interest (as defined in paragraph (b) of this section) in any entity that furnishes DHS; or

(ii) A direct or indirect compensation arrangement (as defined in paragraph (c) of this section) with an entity that furnishes DHS.

(2) A *direct* financial relationship exists if remuneration passes between the referring physician (or a member of his or her immediate family) and the entity furnishing DHS without any intervening persons or entities. (3) An *indirect* financial relationship exists under the conditions described in paragraphs (b)(5) and (c)(2) of this section.

(b) *Ownership or investment interest.* An ownership or investment interest may be through equity, debt, or other means, and includes an interest in an entity that holds an ownership or investment interest in any entity that furnishes DHS.

(1) An ownership or investment interest includes, but is not limited to, stock, stock options other than those described in § 411.354(b)(3)(ii), partnership shares, limited liability company memberships, as well as loans, bonds, or other financial instruments that are secured with an entity's property or revenue or a portion of that property or revenue.

(2) An ownership or investment interest in a subsidiary company is neither an ownership or investment interest in the parent company, nor in any other subsidiary of the parent, unless the subsidiary company itself has an ownership or investment interest in the parent or such other subsidiaries. It may, however, be part of an indirect financial relationship.

(3) Ownership and investment interests do not include, among other things—

(i) An interest in a retirement plan;

(ii) Stock options and convertible securities received as compensation until the stock options are exercised or the convertible securities are converted to equity (before this time the stock options or convertible securities are compensation arrangements as defined in paragraph (c) of this section);

(iii) An unsecured loan subordinated to a credit facility (which is a compensation arrangement as defined in paragraph (c) of this section); or

(iv) An "under arrangements" contract between a hospital and an entity owned by one or more physicians (or a group of physicians) providing DHS "under arrangements" with the hospital (such a contract is a compensation arrangement as defined in paragraph (c) of this section).

(4) An ownership or investment interest that meets an exception set forth in § 411.355 or § 411.356 need not also meet an exception for compensation arrangements set forth in § 411.357 with respect to profit distributions, dividends, or interest payments on secured obligations.

(5) *Indirect ownership or investment interest.* (i) An indirect ownership or investment interest exists if—

(A) Between the referring physician (or immediate family member) and the entity furnishing DHS there exists an unbroken chain of any number (but no fewer than one) of persons or entities having ownership or investment interests; and

(B) The entity furnishing DHS has actual knowledge of, or acts in reckless disregard or deliberate ignorance of, the fact that the referring physician (or immediate family member) has some ownership or investment interest (through any number of intermediary

ownership or investment interests) in the entity furnishing the DHS.

(ii) An indirect ownership or investment interest exists even though the entity furnishing DHS does not know, or act in reckless disregard or deliberate ignorance of, the precise composition of the unbroken chain or the specific terms of the ownership or investment interests that form the links in the chain.

(iii) Notwithstanding anything in this paragraph (b)(5), common ownership or investment in an entity does not, in and of itself, establish an indirect ownership or investment interest by one common owner or investor in another common owner or investor.

(iv) An indirect ownership or investment interest requires an unbroken chain of ownership interests between the referring physician and the entity furnishing DHS such that the referring physician has an indirect ownership or investment interest *in* the entity furnishing DHS.

(c) *Compensation arrangement.* A compensation arrangement is any arrangement involving remuneration, direct or indirect, between a physician (or a member of a physician's immediate family) and an entity. An "under arrangements" contract between a hospital and an entity providing DHS "under arrangements" to the hospital creates a compensation arrangement for purposes of these regulations.

(1) A compensation arrangement does not include the portion of any business arrangement that consists solely of the remuneration described in section 1877(h)(1)(C) of the Act and in paragraphs (1) through (3) of the definition of the term "remuneration" in § 411.351. (However, any other portion of the arrangement may still constitute a compensation arrangement.)

(2) *Indirect compensation arrangement.* An *indirect* compensation arrangement exists if—

(i) Between the referring physician (or a member of his or her immediate family) and the entity furnishing DHS there exists an unbroken chain of any number (but not fewer than one) of persons or entities that have financial relationships (as defined in paragraph (a) of this section) between them (that is, each link in the chain has either an ownership or investment interest or a compensation arrangement with the preceding link);

(ii) The referring physician (or immediate family member) receives aggregate compensation from the person or entity in the chain with which the physician (or immediate family member) has a direct financial relationship that varies with, or otherwise reflects, the volume or value of referrals or other business generated by the referring physician for the entity furnishing the DHS, regardless of whether the individual unit of compensation satisfies the special rules on unit-based compensation under § 411.354(d)(2) or (d)(3). If the financial relationship between the physician (or immediate family member) and the person or entity in the chain with which the referring physician (or immediate family member) has a direct financial relationship is an ownership or investment interest, the determination whether the aggregate compensation varies with, or otherwise reflects, the volume or value of referrals or other business generated by the referring physician for the entity furnishing the DHS will be measured by the nonownership or noninvestment interest closest to the referring physician (or immediate family member). (For example, if a referring physician has an ownership interest in company A, which owns company B, which has a compensation arrangement with company C, which has a compensation arrangement with entity D that furnishes DHS, we would look to the aggregate compensation between company B and company C for purposes of this paragraph (c)(2)(ii)); and

(iii) The entity furnishing DHS has actual knowledge of, or acts in reckless disregard or deliberate ignorance of, the fact that the referring physician (or immediate family member) receives aggregate compensation that varies with, or otherwise reflects, the volume or value of referrals or other business generated by the referring physician for the entity furnishing the DHS.

(d) *Special rules on compensation.* The following special rules apply only to compensation under section 1877 of the Act and subpart J of this part.

(1) Compensation will be considered "set in advance" if the aggregate compensation, a time-based or per unit of service based (whether per-use or per-service) amount, or a specific formula for calculating the compensation is set in an agreement between the parties before the furnishing of the items or services for which the compensation is to be paid. The formula for determining the compensation must be set forth in sufficient detail so that it can be objectively verified, and the formula may not be changed or modified during the course of the agreement in any manner that reflects the volume or value of referrals or other business generated by the referring physician.

(2) Unit-based compensation (including time-based or per unit of service based compensation) will be deemed not to take into account "the volume or value of referrals" if the compensation is fair market value for services or items actually provided and does not vary during the course of the compensation agreement in any manner that takes into account referrals of DHS.

(3) Unit-based compensation (including time-based or per unit of service based compensation) will be deemed not to take into account "other business generated between the parties" so long as the compensation is fair market value for items and services actually provided and does not vary during the course of the compensation arrangement in any manner that takes into account referrals or other business generated by the referring physician, including private pay health care business (except for services personally performed by the referring physician, which will not be considered "other business generated" by the referring physician).

(4) A physician's compensation from a *bona fide* employer or under a managed care or other contract may be conditioned on the physician's referrals to a particular provider, practitioner, or supplier, so long as the compensation arrangement—

(i) Is set in advance for the term of the agreement;

(ii) Is consistent with fair market value for services performed (that is, the payment does not take into account the volume or value of anticipated or required referrals);

(iii) Otherwise complies with an applicable exception under § 411.355 or § 411.357;

(iv) Complies with the following conditions:

(A) The requirement to make referrals to a particular provider, practitioner, or supplier is set forth in a written agreement signed by the parties;

(B) The requirement to make referrals to a particular provider, practitioner, or supplier does not apply if the patient expresses a preference for a different provider, practitioner, or supplier; the patient's insurer determines the provider, practitioner, or supplier; or the referral is not in the patient's best medical interests in the physician's judgment; and

(v) The required referrals relate solely to the physician's services covered by the scope of the employment or the contract and the referral requirement is reasonably necessary to effectuate the legitimate business purposes of the compensation relationship. In no event may the physician be required to make referrals that relate to services that are not provided by the physician under the scope of his or her employment or

contract. § 411.355 General exceptions to the referral prohibition related to both ownership/investment and compensation.

The prohibition on referrals set forth in § 411.353 does not apply to the following types of services:

(a) *Physician services.* (1) Physician services as defined in § 410.20(a) of this chapter that are furnished—

(i) Personally by another physician who is a member of the referring physician's group practice or is a physician in the same group practice (as defined in § 411.351) as the referring physician; or

(ii) Under the supervision of another physician who is a member of the referring physician's group practice or is a physician in the same group practice (as defined at § 411.351) as the referring physician, provided that the supervision complies with all other applicable Medicare payment and coverage rules for the physician services.

(2) For purposes of paragraph (a) of this section, sbull; physician services" include only those "incident to" services (as defined in § 411.351) that are physician services under § 410.20(a) of this chapter.

(3) All other "incident to" services (for example, diagnostic tests, physical therapy) are outside the scope of paragraph (a) of this section.

(b) *In-office ancillary services.* Services (including certain items of durable medical equipment (DME), as defined in paragraph (b)(4) of this section, and infusion pumps that are DME (including external ambulatory infusion pumps), but excluding all other DME and parenteral and enteral nutrients, equipment, and supplies (such as infusion pumps used for PEN)), that meet the following conditions:

(1) They are furnished personally by one of the following individuals:

(i) The referring physician.

(ii) A physician who is a member of the same group practice as the referring physician.

(iii) An individual who is supervised by the referring physician or, if the referring physician is in a group practice, by another physician in the group practice, provided the supervision complies with all other applicable Medicare payment and coverage rules for the services.

(2) They are furnished in one of the following locations:

(i) The same building (as defined in § 411.351), but not necessarily in the same space or part of the building, in which all of the conditions of paragraph (b)(2)(i)(A), (b)(2)(i)(B), *or* (b)(2)(i)(C) of this section are satisfied:

(A)(*1*) The referring physician or his or her group practice (if any) has an office that is normally open to the physician's or group's patients for medical services at least 35 hours per week; *and*

(*2*) The referring physician or one or more members of the referring physician's group practice regularly practices medicine and furnishes physician services to patients at least 30 hours per week. The 30 hours must include some physician services that are unrelated to the furnishing of DHS payable by Medicare, any other Federal health care payer, or a private payer, even though the physician services may lead to the ordering of DHS; or

(B)(*1*) The patient receiving the DHS usually receives physician services from the referring physician or members of the referring physician's group practice (if any);

(*2*) The referring physician or the referring physician's group practice owns or rents an office that is normally open to the physician's or group's patients for medical services at least 8 hours per week; *and*

(*3*) The referring physician regularly practices medicine and furnishes physician services to patients at least 6 hours per week. The 6 hours must include some physician services that are unrelated to the furnishing of DHS payable by Medicare, any other Federal health care payer, or a private payer, even though the physician services may lead to the ordering of DHS; or

(C)(*1*) The referring physician is present and orders the DHS during a patient visit on the premises as set forth in paragraph (b)(2)(i)(C)(*2*) of this section *or* the referring physician or a member of the referring physician's group practice (if any) is present while the DHS is furnished during occupancy of the premises as set forth in paragraph (b)(2)(i)(C)(*2*) of this section;

(*2*) The referring physician or the referring physician's group practice owns or rents an office that is normally open to the physician's or group's patients for medical services at least 8 hours per week; and

(*3*) The referring physician or one or more members of the referring physician's group practice regularly practices medicine and furnishes physician services to patients at least 6 hours per week. The 6 hours must include some physician services that are unrelated to the furnishing of DHS payable by Medicare, any other Federal health care payer, or a private payer, even though the physician services may lead to the ordering of DHS.

(ii) A centralized building (as defined in § 411.351) that is used by the group practice for the provision of some or all of the group practice's clinical laboratory services.

(iii) A centralized building (as defined in § 411.351) that is used by the group practice for the provision of some or all of the group practice's DHS (other than clinical laboratory services).

(3) They are billed by one of the following:

(i) The physician performing or supervising the service.

(ii) The group practice of which the performing or supervising physician is a member under a billing number assigned to the group practice.

(iii) The group practice if the supervising physician is a "physician in the group practice" (as defined at § 411.351) under a billing number assigned to the group practice.

(iv) An entity that is wholly owned by the performing or supervising physician or by that physician's group practice under the entity's own billing number or under a billing number assigned to the physician or group practice.

(v) An independent third party billing company acting as an agent of the physician, group practice, or entity specified in paragraphs (b)(3)(i) through (b)(3)(iv) of this section under a billing number assigned to the physician, group practice, or entity, provided the billing arrangement meets the requirements of § 424.80(b)(6) of this chapter. For purposes of this paragraph (b)(3), a group practice may have, and bill under, more than one Medicare billing number, subject to any applicable Medicare program restrictions.

(4) For purposes of paragraph (b) of this section, DME covered by the in-office ancillary services exception means canes, crutches, walkers and folding manual wheelchairs, and blood glucose monitors, that meet the following conditions:

(i) The item is one that a patient requires for the purposes of ambulating, uses in order to depart from the physician's office, or is a blood glucose monitor (including one starter set of test strips and lancets, consisting of no more than 100 of each). A blood glucose monitor may be furnished only by a physician or employee of a physician or group practice that also furnishes outpatient diabetes self-management training to the patient.

(ii) The item is furnished in a building that meets the "same building" requirements in the in-office ancillary services exception as part of the treatment for the specific condition for which the patient-physician encounter occurred.

(iii) The item is furnished personally by the physician who ordered the DME,

by another physician in the group practice, or by an employee of the physician or the group practice.

(iv) A physician or group practice that furnishes the DME meets all DME supplier standards located in § 424.57(c) of this chapter.

(v) The arrangement does not violate the anti-kickback statute (section 1128B(b) of the Act), or any Federal or State law or regulation governing billing or claims submission.

(vi) All other requirements of the in-office ancillary services exception in paragraph (b) of this section are met.

(5) A designated health service is "furnished" for purposes of paragraph (b) of this section in the location where the service is actually performed upon a patient or where an item is dispensed to a patient in a manner that is sufficient to meet the applicable Medicare payment and coverage rules.

(6) *Special rule for home care physicians.* In the case of a referring physician whose principal medical practice consists of treating patients in their private homes, the "same building" requirements of paragraph (b)(2)(i) of this section are met if the referring physician (or a qualified person accompanying the physician, such as a nurse or technician) provides the DHS contemporaneously with a physician service that is not a designated health service provided by the referring physician to the patient in the patient's private home. For purposes of paragraph (b)(5) of this section only, a private home does not include a nursing, long-term care, or other facility or institution, except that a patient may have a private home in an assisted living or independent living facility.

(c) *Services furnished by an organization (or its contractors or subcontractors) to enrollees.* Services furnished by an organization (or its contractors or subcontractors) to enrollees of one of the following prepaid health plans (not including services provided to enrollees in any other plan or line of business offered or administered by the same organization):

(1) An HMO or a CMP in accordance with a contract with CMS under section 1876 of the Act and part 417, subparts J through M of this chapter.

(2) A health care prepayment plan in accordance with an agreement with CMS under section 1833(a)(1)(A) of the Act and part 417, subpart U of this chapter.

(3) An organization that is receiving payments on a prepaid basis for Medicare enrollees through a demonstration project under section 402(a) of the Social Security Amendments of 1967 (42 U.S.C. 1395b–1) or under section 222(a) of the Social Security Amendments of 1972 (42 U.S.C. 1395b–1 note).

(4) A qualified HMO (within the meaning of section 1310(d) of the Public Health Service Act).

(5) A coordinated care plan (within the meaning of section 1851(a)(2)(A) of the Act) offered by an organization in accordance with a contract with CMS under section 1857 of the Act and part 422 of this chapter.

(6) A managed care organization (MCO) contracting with a State under section 1903(m) of the Act.

(7) A prepaid inpatient health plan (PIHP) or prepaid ambulance health plan (PAHP) contracting with a State under part 438 of this chapter.

(8) A health insuring organization (HIO) contracting with a State under part 438, subpart D of this chapter.

(9) An entity operating under a demonstration project under sections 1115(a), 1915(a), 1915(b), or 1932(a) of the Act.

(d) [Reserved]

(e) *Academic medical centers.* (1) Services provided by an academic medical center if all of the following conditions are met:

(i) The referring physician—

(A) Is a *bona fide* employee of a component of the academic medical center on a full-time or substantial part-time basis. (A "component" of an academic medical center means an affiliated medical school, faculty practice plan, hospital, teaching facility, institution of higher education, departmental professional corporation, or nonprofit support organization whose primary purpose is supporting the teaching mission of the academic medical center.) The components need not be separate legal entities;

(B) Is licensed to practice medicine in the State(s) in which he or she practices medicine;

(C) Has a *bona fide* faculty appointment at the affiliated medical school or at one or more of the educational programs at the accredited academic hospital; and

(D) Provides either substantial academic services or substantial clinical teaching services (or a combination of academic services and clinical teaching services) for which the faculty member receives compensation as part of his or her employment relationship with the academic medical center. Parties should use a reasonable and consistent method for calculating a physician's academic services and clinical teaching services. A physician will be deemed to meet this requirement if he or she spends at least 20 percent of his or her professional time or 8 hours per week providing academic services or clinical teaching services (or a combination of academic services or clinical teaching services). A physician who does not spend at least 20 percent of his or her professional time or 8 hours per week providing academic services or clinical teaching services (or a combination of academic services or clinical teaching services) is not precluded from qualifying under this paragraph (e)(1)(i)(D).

(ii) The total compensation paid by all academic medical center components to the referring physician is set in advance and, in the aggregate, does not exceed fair market value for the services provided, and is not determined in a manner that takes into account the volume or value of any referrals or other business generated by the referring physician within the academic medical center.

(iii) The academic medical center must meet all of the following conditions:

(A) All transfers of money between components of the academic medical center must directly or indirectly support the missions of teaching, indigent care, research, or community service.

(B) The relationship of the components of the academic medical center must be set forth in written agreement(s) or other written document(s) that have been adopted by the governing body of each component. If the academic medical center is one legal entity, this requirement will be satisfied if transfers of funds between components of the academic medical center are reflected in the routine financial reports covering the components.

(C) All money paid to a referring physician for research must be used solely to support *bona fide* research or teaching and must be consistent with the terms and conditions of the grant.

(iv) The referring physician's compensation arrangement does not violate the anti-kickback statute (section 1128B(b) of the Act), or any Federal or State law or regulation governing billing or claims submission.

(2) The "academic medical center" for purposes of this section consists of—

(i) An accredited medical school (including a university, when appropriate) or an accredited academic hospital (as defined at § 411.355(e)(3));

(ii) One or more faculty practice plans affiliated with the medical school, the affiliated hospital(s), or the accredited academic hospital; and

(iii) One or more affiliated hospital(s) in which a majority of the physicians on the medical staff consists of physicians who are faculty members and a majority

of all hospital admissions are made by physicians who are faculty members. The hospital for purposes of this paragraph (e)(2)(iii) may be the same hospital that satisfies the requirement of paragraph (e)(2)(i) of this section. For purposes of this provision, a faculty member is a physician who is either on the faculty of the affiliated medical school or on the faculty of one or more of the educational programs at the accredited academic hospital. In meeting this paragraph (e)(2)(iii), faculty from any affiliated medical school or accredited academic hospital education program may be aggregated, and residents and non-physician professionals need not be counted. Any faculty member may be counted, including courtesy and volunteer faculty.

(3) An accredited academic hospital for purposes of this section means a hospital or a health system that sponsors four or more approved medical education programs.

(f) *Implants furnished by an ASC.* Implants furnished by an ASC, including, but not limited to, cochlear implants, intraocular lenses, and other implanted prosthetics, implanted prosthetic devices, and implanted DME that meet the following conditions:

(1) The implant is implanted by the referring physician or a member of the referring physician's group practice in a Medicare-certified ASC (under part 416 of this chapter) with which the referring physician has a financial relationship.

(2) The implant is implanted in the patient during a surgical procedure paid by Medicare to the ASC as an ASC procedure under § 416.65.

(3) The arrangement for the furnishing of the implant does not violate the anti-kickback statute (section 1128B(b) of the Act).

(4) All billing and claims submission for the implants does not violate any Federal or State law or regulation governing billing or claims submission.

(5) The exception set forth in this paragraph (f) does not apply to any financial relationships between the referring physician and any entity other than the ASC in which the implant is furnished to, and implanted in, the patient.

(g) *EPO and other dialysis-related drugs furnished in or by an ESRD facility.* EPO and other dialysis-related drugs that meet the following conditions:

(1) The EPO and other dialysis-related drugs are furnished in or by an ESRD facility. For purposes of this paragraph (g): "EPO and other dialysis-related drugs" means certain outpatient prescription drugs that are required for the efficacy of dialysis and identified as eligible for this exception on the List of CPT/HCPCS Codes; and "furnished" means that the EPO or dialysis-related drugs are administered to a patient in the ESRD facility, or, in the case of EPO or Aranesp (or equivalent drug identified on the List of CPT/HCPCS Codes) only, are dispensed by the ESRD facility for use at home.

(2) The arrangement for the furnishing of the EPO and other dialysis-related drugs does not violate the anti-kickback statute (section 1128B(b) of the Act).

(3) All billing and claims submission for the EPO and other dialysis-related drugs does not violate any Federal or State law or regulation governing billing or claims submission.

(4) The exception set forth in this paragraph (g) does not apply to any financial relationship between the referring physician and any entity other than the ESRD facility that furnishes the EPO and other dialysis-related drugs to the patient.

(h) *Preventive screening tests, immunizations, and vaccines.* Preventive screening tests, immunizations, and vaccines that meet the following conditions:

(1) The preventive screening tests, immunizations, and vaccines are subject to CMS-mandated frequency limits.

(2) The arrangement for the provision of the preventive screening tests, immunizations, and vaccines does not violate the anti-kickback statute (section 1128B(b) of the Act).

(3) All billing and claims submission for the preventive screening tests, immunizations, and vaccines does not violate any Federal or State law or regulation governing billing or claims submission.

(4) The preventive screening tests, immunizations, and vaccines must be covered by Medicare and must be listed as eligible for this exception on the List of CPT/HCPCS Codes.

(i) *Eyeglasses and contact lenses following cataract surgery.* Eyeglasses and contact lenses that are covered by Medicare when furnished to patients following cataract surgery that meet the following conditions:

(1) The eyeglasses or contact lenses are provided in accordance with the coverage and payment provisions set forth in § 410.36(a)(2)(ii) and § 414.228 of this chapter, respectively.

(2) The arrangement for the furnishing of the eyeglasses or contact lenses does not violate the anti-kickback statute (section 1128B(b) of the Act).

(3) All billing and claims submission for the eyeglasses or contact lenses does not violate any Federal or State law or regulation governing billing or claims submission.

(j) *Intra-family rural referrals.* (1) Services provided pursuant to a referral from a referring physician to his or her immediate family member or to an entity furnishing DHS with which the immediate family member has a financial relationship, if all of the following conditions are met:

(i) The patient who is referred resides in a rural area as defined in § 411.356(c)(1);

(ii) Except as provided in paragraph (j)(1)(iii) of this section, no other person or entity is available to furnish the services in a timely manner in light of the patient's condition within 25 miles of the patient's residence;

(iii) In the case of services furnished to patients where they reside (for example, home health services or in-home DME), no other person or entity is available to furnish the services in a timely manner in light of the patient's condition; and

(iv) The financial relationship does not violate the anti-kickback statute (section 1128B(b) of the Act), or any Federal or State law or regulation governing billing or claims submission;

(2) The referring physician or the immediate family member must make reasonable inquiries as to the availability of other persons or entities to furnish the DHS. However, neither the referring physician nor the immediate family member has any obligation to inquire as to the availability of persons or entities located farther than 25 miles from the patient's residence.

§ 411.356 Exceptions to the referral prohibition related to ownership or investment interests.

For purposes of § 411.353, the following ownership or investment interests do not constitute a financial relationship:

(a) *Publicly-traded securities.* Ownership of investment securities (including shares or bonds, debentures, notes, or other debt instruments) that at the time the DHS referral was made could be purchased on the open market and that meet the requirements of paragraphs (a)(1) and (a)(2) of this section.

(1) They are either—

(i) Listed for trading on the New York Stock Exchange, the American Stock Exchange, or any regional exchange in which quotations are published on a daily basis, or foreign securities listed on a recognized foreign, national, or regional exchange in which quotations are published on a daily basis; or

(ii) Traded under an automated interdealer quotation system operated

by the National Association of Securities Dealers.

(2) They are in a corporation that had stockholder equity exceeding $75 million at the end of the corporation's most recent fiscal year or on average during the previous 3 fiscal years. "Stockholder equity" is the difference in value between a corporation's total assets and total liabilities.

(b) *Mutual funds.* Ownership of shares in a regulated investment company as defined in section 851(a) of the Internal Revenue Code of 1986, if the company had, at the end of its most recent fiscal year, or on average during the previous 3 fiscal years, total assets exceeding $75 million.

(c) *Specific providers.* Ownership or investment interest in the following entities, for purposes of the services specified:

(1) A rural provider, in the case of DHS furnished in a rural area by the provider. A "rural provider" is an entity that furnishes substantially all (not less than 75 percent) of the DHS that it furnishes to residents of a rural area and, for the 18-month period beginning on December 8, 2003 (or such other period as Congress may specify), is not a specialty hospital. A rural area for purposes of this paragraph (c)(1) is an area that is not an urban area as defined in § 412.62(f)(1)(ii) of this chapter.

(2) A hospital that is located in Puerto Rico, in the case of DHS furnished by such a hospital.

(3) A hospital that is located outside of Puerto Rico, in the case of DHS furnished by such a hospital, if—

(i) the referring physician is authorized to perform services at the hospital;

(ii) effective for the 18-month period beginning on December 8, 2003 (or such other period as Congress may specify), the hospital is not a specialty hospital; and

(iii) the ownership or investment interest is in the entire hospital and not merely in a distinct part or department of the hospital.

§ 411.357 Exceptions to the referral prohibition related to compensation arrangements.

For purposes of § 411.353, the following compensation arrangements do not constitute a financial relationship:

(a) *Rental of office space.* Payments for the use of office space made by a lessee to a lessor if there is a rental or lease agreement that meets the following requirements:

(1) The agreement is set out in writing, is signed by the parties, and specifies the premises it covers.

(2) The term of the agreement is at least 1 year. To meet this requirement, if the agreement is terminated during the term with or without cause, the parties may not enter into a new agreement during the first year of the original term of the agreement.

(3) The space rented or leased does not exceed that which is reasonable and necessary for the legitimate business purposes of the lease or rental and is used exclusively by the lessee when being used by the lessee (and is not shared with or used by the lessor or any person or entity related to the lessor), except that the lessee may make payments for the use of space consisting of common areas if the payments do not exceed the lessee's pro rata share of expenses for the space based upon the ratio of the space used exclusively by the lessee to the total amount of space (other than common areas) occupied by all persons using the common areas.

(4) The rental charges over the term of the agreement are set in advance and are consistent with fair market value.

(5) The rental charges over the term of the agreement are not determined in a manner that takes into account the volume or value of any referrals or other business generated between the parties.

(6) The agreement would be commercially reasonable even if no referrals were made between the lessee and the lessor.

(7) A holdover month-to-month rental for up to 6 months immediately following an agreement of at least 1 year that met the conditions of this paragraph (a) will satisfy this paragraph (a), provided the holdover rental is on the same terms and conditions as the immediately preceding agreement.

(b) *Rental of equipment.* Payments made by a lessee to a lessor for the use of equipment under the following conditions:

(1) A rental or lease agreement is set out in writing, is signed by the parties, and specifies the equipment it covers.

(2) The equipment rented or leased does not exceed that which is reasonable and necessary for the legitimate business purposes of the lease or rental and is used exclusively by the lessee when being used by the lessee and is not shared with or used by the lessor or any person or entity related to the lessor.

(3) The agreement provides for a term of rental or lease of at least 1 year. To meet this requirement, if the agreement is terminated during the term with or without cause, the parties may not enter into a new agreement during the first year of the original term of the agreement.

(4) The rental charges over the term of the agreement are set in advance, are consistent with fair market value, and are not determined in a manner that takes into account the volume or value of any referrals or other business generated between the parties.

(5) The agreement would be commercially reasonable even if no referrals were made between the parties.

(6) A holdover month-to-month rental for up to 6 months immediately following an agreement of at least 1 year that met the conditions of this paragraph (b) will satisfy this paragraph (b), provided the holdover rental is on the same terms and conditions as the immediately preceding agreement.

(c) *Bona fide employment relationships.* Any amount paid by an employer to a physician (or immediate family member) who has a *bona fide* employment relationship with the employer for the provision of services if the following conditions are met:

(1) The employment is for identifiable services.

(2) The amount of the remuneration under the employment is—

(i) Consistent with the fair market value of the services; and

(ii) Except as provided in paragraph (c)(4) of this section, is not determined in a manner that takes into account (directly or indirectly) the volume or value of any referrals by the referring physician.

(3) The remuneration is provided under an agreement that would be commercially reasonable even if no referrals were made to the employer.

(4) Paragraph (c)(2)(ii) of this section does not prohibit payment of remuneration in the form of a productivity bonus based on services performed personally by the physician (or immediate family member of the physician).

(d) *Personal service arrangements. (1) General*—Remuneration from an entity under an arrangement or multiple arrangements to a physician, an immediate family member of the physician, or to a group practice, including remuneration for specific physician services furnished to a nonprofit blood center, if the following conditions are met:

(i) Each arrangement is set out in writing, is signed by the parties, and specifies the services covered by the arrangement.

(ii) The arrangement(s) covers all of the services to be furnished by the physician (or an immediate family member of the physician) to the entity. This requirement will be met if all separate arrangements between the entity and the physician and the entity

and any family members incorporate each other by reference or if they cross-reference a master list of contracts that is maintained and updated centrally and is available for review by the Secretary upon request. The master list should be maintained in a manner that preserves the historical record of contracts. A physician or family member can "furnish" services through employees whom they have hired for the purpose of performing the services; through a wholly owned entity; or through *locum tenens* physicians (as defined in § 411.351, except that the regular physician need not be a member of a group practice).

(iii) The aggregate services contracted for do not exceed those that are reasonable and necessary for the legitimate business purposes of the arrangement(s).

(iv) The term of each arrangement is for at least 1 year. To meet this requirement, if an arrangement is terminated during the term with or without cause, the parties may not enter into the same or substantially the same arrangement during the first year of the original term of the arrangement.

(v) The compensation to be paid over the term of each arrangement is set in advance, does not exceed fair market value, and, except in the case of a physician incentive plan, is not determined in a manner that takes into account the volume or value of any referrals or other business generated between the parties.

(vi) The services to be furnished under each arrangement do not involve the counseling or promotion of a business arrangement or other activity that violates any State or Federal law.

(2) *Physician incentive plan exception.* In the case of a physician incentive plan (as defined in § 411.351) between a physician and an entity (or downstream subcontractor), the compensation may be determined in a manner (through a withhold, capitation, bonus, or otherwise) that takes into account directly or indirectly the volume or value of any referrals or other business generated between the parties, if the plan meets the following requirements:

(i) No specific payment is made directly or indirectly under the plan to a physician or a physician group as an inducement to reduce or limit medically necessary services furnished with respect to a specific individual enrolled with the entity.

(ii) Upon request of the Secretary, the entity provides the Secretary with access to information regarding the plan (including any downstream subcontractor plans), in order to permit the Secretary to determine whether the plan is in compliance with paragraph (d)(2) of this section.

(iii) In the case of a plan that places a physician or a physician group at substantial financial risk as defined in § 422.208, the entity (and/or any downstream contractor) complies with the requirements concerning physician incentive plans set forth at § 422.208 and § 422.210 of this chapter.

(e) *Physician recruitment.* (1) Remuneration provided by a hospital to recruit a physician that is paid directly to the physician and that is intended to induce the physician to relocate his or her medical practice to the geographic area served by the hospital in order to become a member of the hospital's medical staff, if all of the following conditions are met:

(i) The arrangement is set out in writing and signed by both parties;

(ii) The arrangement is not conditioned on the physician's referral of patients to the hospital;

(iii) The hospital does not determine (directly or indirectly) the amount of the remuneration to the physician based on the volume or value of any actual or anticipated referrals by the physician or other business generated between the parties; and

(iv) The physician is allowed to establish staff privileges at any other hospital(s) and to refer business to any other entities (except as referrals may be restricted under a separate employment or services contract that complies with § 411.354(d)(4)).

(2) The "geographic area served by the hospital" is the area composed of the lowest number of contiguous zip codes from which the hospital draws at least 75 percent of its inpatients. A physician will be considered to have relocated his or her medical practice if—

(i) The physician moves his or her medical practice at least 25 miles; or

(ii) The physician's new medical practice derives at least 75 percent of its revenues from professional services furnished to patients (including hospital inpatients) not seen or treated by the physician at his or her prior medical practice site during the preceding 3 years, measured on an annual basis (fiscal or calendar year). For the initial "start up" year of the recruited physician's practice, the 75 percent test in the preceding sentence will be satisfied if there is a reasonable expectation that the recruited physician's medical practice for the year will derive at least 75 percent of its revenues from professional services furnished to patients not seen or treated by the physician at his or her prior medical practice site during the preceding 3 years.

(3) Residents and physicians who have been in practice 1 year or less will not be subject to the relocation requirement of this paragraph, except that the recruited resident or physician must establish his or her medical practice in the geographic area served by the hospital.

(4) In the case of remuneration provided by a hospital to a physician either indirectly through payments made to another physician or physician practice, or directly to a physician who joins a physician practice, the following additional conditions must be met:

(i) The written agreement in § 411.357(e)(1) is also signed by the party to whom the payments are directly made;

(ii) Except for actual costs incurred by the physician or physician practice in recruiting the new physician, the remuneration is passed directly through to or remains with the recruited physician;

(iii) In the case of an income guarantee made by the hospital to a recruited physician who joins a physician or physician practice, the costs allocated by the physician or physician practice to the recruited physician do not exceed the actual additional incremental costs attributable to the recruited physician;

(iv) Records of the actual costs and the passed through amounts are maintained for a period of at least 5 years and made available to the Secretary upon request;

(v) The remuneration from the hospital under the arrangement is not to be determined in a manner that takes into account (directly or indirectly) the volume or value of any actual or anticipated referrals by the recruited physician or the physician practice (or any physician affiliated with the physician practice) receiving the direct payments from the hospital;

(vi) The physician or physician practice may not impose additional practice restrictions on the recruited physician other than conditions related to quality of care; and

(vii) The arrangement does not violate the anti-kickback statute (section 1128B(b) of the Act), or any Federal or State law or regulation governing billing or claims submission.

(5) This paragraph (e) applies to remuneration provided by a federally qualified health center in the same manner as it applies to remuneration provided by a hospital, so long as the arrangement does not violate the anti-kickback statute (section 1128B(b) of the Act), or any Federal or State law or

regulation governing billing or claims submission.

(f) *Isolated transactions.* Isolated financial transactions, such as a one-time sale of property or a practice, if all of the following conditions are met:

(1) The amount of remuneration under the isolated transaction is—

(i) Consistent with the fair market value of the transaction; and

(ii) Not determined in a manner that takes into account (directly or indirectly) the volume or value of any referrals by the referring physician or other business generated between the parties.

(2) The remuneration is provided under an agreement that would be commercially reasonable even if the physician made no referrals.

(3) There are no additional transactions between the parties for 6 months after the isolated transaction, except for transactions that are specifically excepted under the other provisions in § 411.355 through § 411.357 and except for commercially reasonable post-closing adjustments that do not take into account (directly or indirectly) the volume or value of referrals or other business generated by the referring physician.

(g) *Certain arrangements with hospitals.* Remuneration provided by a hospital to a physician if the remuneration does not relate, directly or indirectly, to the furnishing of DHS. To qualify as "unrelated," remuneration must be wholly unrelated to the furnishing of DHS and must not in any way take into account the volume or value of a physician's referrals. Remuneration relates to the furnishing of DHS if it—

(1) Is an item, service, or cost that could be allocated in whole or in part to Medicare or Medicaid under cost reporting principles;

(2) Is furnished, directly or indirectly, explicitly or implicitly, in a selective, targeted, preferential, or conditioned manner to medical staff or other persons in a position to make or influence referrals; or

(3) Otherwise takes into account the volume or value of referrals or other business generated by the referring physician.

(h) *Group practice arrangements with a hospital.* An arrangement between a hospital and a group practice under which DHS are furnished by the group but are billed by the hospital if the following conditions are met:

(1) With respect to services furnished to an inpatient of the hospital, the arrangement is pursuant to the provision of inpatient hospital services under section 1861(b)(3) of the Act.

(2) The arrangement began before, and has continued in effect without interruption since, December 19, 1989.

(3) With respect to the DHS covered under the arrangement, at least 75 percent of these services furnished to patients of the hospital are furnished by the group under the arrangement.

(4) The arrangement is in accordance with a written agreement that specifies the services to be furnished by the parties and the compensation for services furnished under the agreement.

(5) The compensation paid over the term of the agreement is consistent with fair market value, and the compensation per unit of service is fixed in advance and is not determined in a manner that takes into account the volume or value of any referrals or other business generated between the parties.

(6) The compensation is provided in accordance with an agreement that would be commercially reasonable even if no referrals were made to the entity.

(i) *Payments by a physician.* Payments made by a physician (or his or her immediate family member)—

(1) To a laboratory in exchange for the provision of clinical laboratory services; or

(2) To an entity as compensation for any other items or services that are furnished at a price that is consistent with fair market value, and that are not specifically excepted under another provision in § 411.355 through § 411.357 (including, but not limited to, § 411.357(l)). "Services" in this context means services of any kind (not just those defined as "services" for purposes of the Medicare program in § 400.202).

(j) *Charitable donations by a physician. Bona fide* charitable donations made by a physician (or immediate family member) to an entity if all of the following conditions are satisfied:

(1) The charitable donation is made to an organization exempt from taxation under the Internal Revenue Code (or to a supporting organization);

(2) The donation is neither solicited, nor made, in any manner that takes into account the volume or value of referrals or other business generated between the physician and the entity; and

(3) The donation arrangement does not violate the anti-kickback statute (section 1128B(b) of the Act), or any Federal or State law or regulation governing billing or claims submission.

(k) *Non-monetary compensation up to $300.* (1) Compensation from an entity in the form of items or services (not including cash or cash equivalents) that does not exceed an aggregate of $300 per year, if all of the following conditions are satisfied:

(i) The compensation is not determined in any manner that takes into account the volume or value of referrals or other business generated by the referring physician.

(ii) The compensation may not be solicited by the physician or the physician's practice (including employees and staff members).

(iii) The compensation arrangement does not violate the anti-kickback statute (section 1128B(b) of the Act) or any Federal or State law or regulation governing billing or claims submission.

(2) The $300 limit in this paragraph (k) will be adjusted each calendar year to the nearest whole dollar by the increase in the Consumer Price Index-Urban All Items (CPI–U) for the 12-month period ending the preceding September 30. CMS intends to display as soon as possible after September 30 each year, both the increase in the CPI–U for the 12–month period and the new non-monetary compensation limit on the physician self-referral Web site: *http://cms.hhs.gov/medlearn/refphys.asp.*

(l) *Fair market value compensation.* Compensation resulting from an arrangement between an entity and a physician (or an immediate family member) or any group of physicians (regardless of whether the group meets the definition of a group practice set forth in § 411.352) for the provision of items or services by the physician (or an immediate family member) or group of physicians to the entity, if the arrangement is set forth in an agreement that meets the following conditions:

(1) The arrangement is in writing, signed by the parties, and covers only identifiable items or services, all of which are specified in the agreement.

(2) The writing specifies the timeframe for the arrangement, which can be for any period of time and contain a termination clause, provided the parties enter into only one arrangement for the same items or services during the course of a year. An arrangement made for less than 1 year may be renewed any number of times if the terms of the arrangement and the compensation for the same items or services do not change.

(3) The writing specifies the compensation that will be provided under the arrangement. The compensation must be set in advance, consistent with fair market value, and not determined in a manner that takes into account the volume or value of referrals or other business generated by the referring physician.

(4) The arrangement would be commercially reasonable (taking into account the nature and scope of the

transaction) and furthers the legitimate business purposes of the parties.

(5) It does not violate the anti-kickback statute (section 1128B(b) of the Act), or any Federal or State law or regulation governing billing or claims submission.

(6) The services to be performed under the arrangement do not involve the counseling or promotion of a business arrangement or other activity that violates a State or Federal law.

(m) *Medical staff incidental benefits.* Compensation in the form of items or services (not including cash or cash equivalents) from a hospital to a member of its medical staff when the item or service is used on the hospital's campus, if all of the following conditions are met:

(1) The compensation is provided to all members of the medical staff practicing in the same specialty (but not necessarily accepted by every member to whom it is offered) without regard to the volume or value of referrals or other business generated between the parties.

(2) Except with respect to identification of medical staff on a hospital Web site or in hospital advertising, the compensation is provided only during periods when the medical staff members are making rounds or are engaged in other services or activities that benefit the hospital or its patients.

(3) The compensation is provided by the hospital and used by the medical staff members only on the hospital's campus. Compensation, including, but not limited to, Internet access, pagers, or two-way radios, used away from the campus only to access hospital medical records or information or to access patients or personnel who are on the hospital campus, as well as the identification of the medical staff on a hospital Web site or in hospital advertising, will meet the "on campus" requirement of this paragraph (m).

(4) The compensation is reasonably related to the provision of, or designed to facilitate directly or indirectly the delivery of, medical services at the hospital.

(5) The compensation is of low value (that is, less than $25) with respect to each occurrence of the benefit (for example, each meal given to a physician while he or she is serving patients who are hospitalized must be of low value). The $25 limit in this paragraph (m)(5) will be adjusted each calendar year to the nearest whole dollar by the increase in the Consumer Price Index-Urban All Items (CPI–U) for the 12–month period ending the preceding September 30. CMS intends to display as soon as possible after September 30 each year both the increase in the CPI–U for the 12–month period and the new limits on the physician self-referral Web site: *http://cms.hhs.gov/medlearn/refphys.asp.*

(6) The compensation is not determined in any manner that takes into account the volume or value of referrals or other business generated between the parties.

(7) The compensation arrangement does not violate the anti-kickback statute, (section 1128B(b) of the Act), or any Federal or State law or regulation governing billing or claims submission.

(8) Other facilities and health care clinics (including, but not limited to, federally qualified health centers) that have *bona fide* medical staffs may provide compensation under this paragraph (m) on the same terms and conditions applied to hospitals under this paragraph (m).

(n) *Risk-sharing arrangements.* Compensation pursuant to a risk-sharing arrangement (including, but not limited to, withholds, bonuses, and risk pools) between a managed care organization or an independent physicians' association and a physician (either directly or indirectly through a subcontractor) for services provided to enrollees of a health plan, provided that the arrangement does not violate the anti-kickback statute (section 1128B(b) of the Act), or any Federal or State law or regulation governing billing or claims submission. For purposes of this paragraph (n), "health plan" and "enrollees" have the meanings ascribed to those terms in § 1001.952(l) of this title.

(o) *Compliance training.* Compliance training provided by an entity to a physician (or to the physician's immediate family member or office staff) who practices in the entity's local community or service area, provided the training is held in the local community or service area. For purposes of this paragraph (o), "compliance training" means training regarding the basic elements of a compliance program (for example, establishing policies and procedures, training of staff, internal monitoring, reporting); specific training regarding the requirements of Federal and State health care programs (for example, billing, coding, reasonable and necessary services, documentation, unlawful referral arrangements); or training regarding other Federal, State, or local laws, regulations, or rules governing the conduct of the party for whom the training is provided (but not including continuing medical education).

(p) *Indirect compensation arrangements.* Indirect compensation arrangements, as defined in § 411.354(c)(2), if all of the following conditions are satisfied:

(1) The compensation received by the referring physician (or immediate family member) described in § 411.354(c)(2)(ii) is fair market value for services and items actually provided and not determined in any manner that takes into account the value or volume of referrals or other business generated by the referring physician for the entity furnishing DHS.

(2) The compensation arrangement described in § 411.354(c)(2)(ii) is set out in writing, signed by the parties, and specifies the services covered by the arrangement, except in the case of a *bona fide* employment relationship between an employer and an employee, in which case the arrangement need not be set out in a written contract, but must be for identifiable services and be commercially reasonable even if no referrals are made to the employer.

(3) The compensation arrangement does not violate the anti-kickback statute (section 1128B(b) of the Act), or any Federal or State law or regulation governing billing or claims submission.

(q) *Referral services.* Remuneration that meets all of the conditions set forth in § 1001.952(f) of this title.

(r) *Obstetrical malpractice insurance subsidies.* Remuneration to the referring physician that meets all of the conditions set forth in § 1001.952(o) of this title.

(s) *Professional courtesy.* Professional courtesy (as defined in § 411.351) offered by an entity to a physician or a physician's immediate family member or office staff if all of the following conditions are met:

(1) The professional courtesy is offered to all physicians on the entity's *bona fide* medical staff or in the entity's local community or service area without regard to the volume or value of referrals or other business generated between the parties;

(2) The health care items and services provided are of a type routinely provided by the entity;

(3) The entity's professional courtesy policy is set out in writing and approved in advance by the entity's governing body;

(4) The professional courtesy is not offered to a physician (or immediate family member) who is a Federal health care program beneficiary, unless there has been a good faith showing of financial need;

(5) If the professional courtesy involves any whole or partial reduction of any coinsurance obligation, the insurer is informed in writing of the reduction; and

(6) The arrangement does not violate the anti-kickback statute (section 1128B(b) of the Act), or any Federal or State law or regulation governing billing or claims submission.

(t) *Retention payments in underserved areas.* (1) Remuneration provided by a hospital or federally qualified health center directly to a physician on the hospital's or federally qualified health center's medical staff to retain the physician's medical practice in the geographic area served by the hospital or federally qualified health center (as defined in paragraph (e)(2) of this section), if all of the following conditions are met:

(i) Paragraphs 411.357(e)(1)(i) through 411.357(e)(1)(iv) are satisfied;

(ii) The geographic area served by the hospital or federally qualified health center is a HPSA (regardless of the physician's specialty) or is an area with demonstrated need for the physician as determined by the Secretary in an advisory opinion issued according to section 1877(g)(6) of the Act;

(iii) The physician has a *bona fide* firm, written recruitment offer from a hospital or federally qualified health center that is not related to the hospital or the federally qualified health center making the payment, and the offer specifies the remuneration being offered and would require the physician to move the location of his or her practice at least 25 miles *and* outside of the geographic area served by the hospital or federally qualified health center making the retention payment;

(iv) The retention payment is limited to the lower of—

(A) The amount obtained by subtracting (1) the physician's current income from physician and related services from (2) the income the physician would receive from comparable physician and related services in the *bona fide* recruitment offer, provided that the respective incomes are determined using a reasonable and consistent methodology, and that they are calculated uniformly over no more than a 24-month period; or

(B) The reasonable costs the hospital or federally qualified health center would otherwise have to expend to recruit a new physician to the geographic area served by the hospital or federally qualified health center in order to join the medical staff of the hospital or federally qualified health center to replace the retained physician;

(v) Any retention payment is subject to the same obligations and restrictions, if any, on repayment or forgiveness of indebtedness as the *bona fide* recruitment offer;

(vi) The hospital or federally qualified health center does not enter into a retention arrangement with a particular referring physician more frequently than once every 5 years and the amount and terms of the retention payment are not altered during the term of the arrangement in any manner that takes into account the volume or value of referrals or other business generated by the physician;

(vii) The arrangement otherwise complies with all of the conditions of this section; and

(viii) The arrangement does not violate the anti-kickback statute (section 1128B(b) of the Act), or any Federal or State law or regulation governing billing or claims submission.

(2) The Secretary may waive the relocation requirement of paragraph (t)(1) of this section for payments made to physicians practicing in a HPSA or an area with demonstrated need for the physician through an advisory opinion issued according to section 1877(g)(6) of the Act, if the retention payment arrangement otherwise complies with all of the conditions of this paragraph.

(u) *Community-wide health information systems.* Items or services of information technology provided by an entity to a physician that allow access to, and sharing of, electronic health care records and any complementary drug information systems, general health information, medical alerts, and related information for patients served by community providers and practitioners, in order to enhance the community's overall health, provided that—

(1) The items or services are available as necessary to enable the physician to participate in a community-wide health information system, are principally used by the physician as part of the community-wide health information system, and are not provided to the physician in any manner that takes into account the volume or value of referrals or other business generated by the physician;

(2) The community-wide health information systems are available to all providers, practitioners, and residents of the community who desire to participate; and

(3) The arrangement does not violate the anti-kickback statute, (section 1128B(b) of the Act), or any Federal or State law or regulation governing billing or claims submission. § 411.361 Reporting requirements.

(a) *Basic rule.* Except as provided in paragraph (b) of this section, all entities furnishing services for which payment may be made under Medicare must submit information to CMS or to the Office of Inspector General (OIG) concerning their reportable financial relationships (as defined in paragraph (d) of this section), in the form, manner, and at the times that CMS or OIG specifies.

(b) *Exception.* The requirements of paragraph (a) of this section do not apply to entities that furnish 20 or fewer Part A and Part B services during a calendar year, or to any Medicare covered services furnished outside the United States.

(c) *Required information.* The information requested by CMS or OIG can include the following:

(1) The name and unique physician identification number (UPIN) of each physician who has a reportable financial relationship with the entity.

(2) The name and UPIN of each physician who has an immediate family member (as defined in § 411.351) who has a reportable financial relationship with the entity.

(3) The covered services furnished by the entity.

(4) With respect to each physician identified under paragraphs (c)(1) and (c)(2) of this section, the nature of the financial relationship (including the extent and/or value of the ownership or investment interest or the compensation arrangement) as evidenced in records that the entity knows or should know about in the course of prudently conducting business, including, but not limited to, records that the entity is already required to retain to comply with the rules of the Internal Revenue Service and the Securities and Exchange Commission and other rules of the Medicare and Medicaid programs.

(d) *Reportable financial relationships.* For purposes of this section, a reportable financial relationship is any ownership or investment interest, as defined in § 411.354(b) or any compensation arrangement, as defined in § 411.354(c), except for ownership or investment interests that satisfy the exceptions set forth in § 411.356(a) or § 411.356(b) regarding publicly-traded securities and mutual funds.

(e) *Form and timing of reports.* Entities that are subject to the requirements of this section must submit the required information, upon request, within the time period specified by the request. Entities are given at least 30 days from the date of the request to provide the information. Entities must retain the information, and documentation sufficient to verify the information, for the length of time specified by the applicable regulatory requirements for the information, and, upon request, must make that

information and documentation available to CMS or OIG.

(f) *Consequences of failure to report.* Any person who is required, but fails, to submit information concerning his or her financial relationships in accordance with this section is subject to a civil money penalty of up to $10,000 for each day following the deadline established under paragraph (e) of this section until the information is submitted. Assessment of these penalties will comply with the applicable provisions of part 1003 of this title.

(g) *Public disclosure.* Information furnished to CMS or OIG under this section is subject to public disclosure in accordance with the provisions of part 401 of this chapter.

PART 424—CONDITIONS FOR 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).

Subpart B—Certification and Plan of Treatment Requirements

■ 2. In § 424.22, paragraph (d) is republished to read as set forth below.

§ 424.22 Requirements for home health services.

* * * * *

(d) *Limitation on the performance of certification and plan of treatment functions.* The need for home health services to be provided by an HHA may not be certified or recertified, and a plan of treatment may not be established and reviewed, by any physician who has a financial relationship, as defined in § 411.351 of this chapter, with that HHA, unless the physician's relationship meets one of the exceptions in section 1877 of the Act, which sets forth general exceptions to the referral prohibition related to both ownership/investment and compensation; exceptions to the referral prohibition related to ownership or investment interests; and exceptions to the referral prohibition related to compensation arrangements.

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

Dated: February 13, 2003.

Thomas A. Scully,

Administrator, Centers for Medicare & Medicaid Services.

Dated: October 23, 2003.

Tommy G. Thompson,

Secretary.

Note: The following attachment will not appear in the Code of Federal Regulations.

Attachment—List of CPT [1]/HCPCS Codes for Purposes of Section 1877 of the Social Security Act—Effective July 26, 2004

Clinical Laboratory Services

Include CPT codes for all clinical laboratory services in the 80000 series, except EXCLUDE CPT codes for the following blood component collection services:

86890 Autologous blood process
86891 Autologous blood, op salvage
86927 Plasma, fresh frozen
86930 Frozen blood prep
86931 Frozen blood thaw
86932 Frozen blood freeze/thaw
86945 Blood product/irradiation
86950 Leukacyte transfusion
86965 Pooling blood platelets
86985 Split blood or products

Include the following CPT and HCPCS level 2 codes for other clinical laboratory services:

0010T TB test, gamma interferon
0023T Phenotype drug test, hiv 1
0026T Measure remnant lipoproteins
0030T Antiprothrombin antibody
0041T Detect ur infect agnt w/cpas
0043T Co expired gas analysis
0058T Cryopreservation, ovary tiss
0059T Cryopreservation, oocyte
G0001 Drawing blood for specimen
G0027 Semen analysis
G0103 Psa, total screening
G0107 CA screen; fecal blood test
G0123 Screen cerv/vag thin layer
G0124 Screen c/v thin layer by MD
G0141 Scr c/v cyto, autosys and md
G0143 Scr c/v cyto, thinlayer, rescr
G0144 Scr c/v cyto, thinlayer, rescr
G0145 Scr c/v cyto, thinlayer, rescr
G0147 Scr c/v cyto, automated sys
G0148 Scr c/v cyto, autosys, rescr
G0306 CBC/diffwbc w/o platelet
G0307 CBC without platelet
G0328 Fecal blood scrn immunoassay
P2028 Cephalin floculation test
P2029 Congo red blood test
P2033 Blood thymol turbidity
P2038 Blood mucoprotein
P3000 Screen pap by tech w md supv
P3001 Screening pap smear by phys
P9612 Catheterize for urine spec
P9615 Urine specimen collect mult
Q0111 Wet mounts/ w preparations
Q0112 Potassium hydroxide preps
Q0113 Pinworm examinations
Q0114 Fern test
Q0115 Post-coital mucous exam

[1] CPT codes and descriptions only are copyright 2003 American Medical Association. All rights are reserved and applicable FARS/DFARS clauses apply.

Physical Therapy, Occupational Therapy, and Speech-Language Pathology

Include the following CPT codes for the physical therapy/occupational therapy/speech-language pathology services in the 97000 series:

97001 Pt evaluation
97002 Pt re-evaluation
97003 Ot evaluation
97004 Ot re-evaluation
97010 Hot or cold packs therapy
97012 Mechanical traction therapy
97016 Vasopneumatic device therapy
97018 Paraffin bath therapy
97020 Microwave therapy
97022 Whirlpool therapy
97024 Diathermy treatment
97026 Infrared therapy
97028 Ultraviolet therapy
97032 Electrical stimulation
97033 Electric current therapy
97034 Contrast bath therapy
97035 Ultrasound therapy
97036 Hydrotherapy
97039 Physical therapy treatment
97110 Therapeutic exercises
97112 Neuromuscular reeducation
97113 Aquatic therapy/exercises
97116 Gait training therapy
97124 Massage therapy
97139 Physical medicine procedure
97140 Manual therapy
97150 Group therapeutic procedures
97504 Orthotic training
97520 Prosthetic training
97530 Therapeutic activities
97532 Cognitive skills development
97533 Sensory integration
97535 Self care mngment training
97537 Community/work reintegration
97542 Wheelchair mngment training
97545 Work hardening
97546 Work hardening add-on
97601 Wound(s) care, selective
97602 Wound(s) care, nonselective
97703 Prosthetic checkout
97750 Physical performance test
97755 Assistive technology assess
97799 Physical medicine procedure

Include CPT codes for physical therapy/occupational therapy/speech-language pathology services not in the 97000 series:

64550 Apply neurostimulator
90901 Biofeedback train, any meth
90911 Biofeedback peri/uro/rectal
92507 Speech/hearing therapy
92508 Speech/hearing therapy
92526 Oral function therapy
92597 Oral speech device eval
92607 Ex for speech device rx, 1hr
92608 Ex for speech device rx addl
92609 Use of speech device service
92610 Evaluate swallowing function
92611 Motion fluoroscopy/swallow
92612 Endoscopy swallow tst (fees)
92614 Laryngoscopic sensory test
92616 Fees w/laryngeal sense test
93797 Cardiac rehab
93798 Cardiac rehab/monitor
94667 Chest wall manipulation
94668 Chest wall manipulation
95831 Limb muscle testing, manual
95832 Hand muscle testing, manual
95833 Body muscle testing, manual
95834 Body muscle testing, manual

95851 Range of motion measurements
95852 Range of motion measurements
96000 Motion analysis, video/3d
96001 Motion test w/ft press meas
96002 Dynamic surface emg
96003 Dynamic fine wire emg
96105 Assessment of aphasia
96110 Developmental test, lim
96111 Developmental test, extend
96115 Neurobehavior status exam
0029T Magnetic tx for incontinence

Include HCPCS level 2 codes for the following physical therapy/occupational therapy/speech-language pathology services:

G0279 Excorp shock tx, elbow epi
G0280 Excorp shock tx other than
G0281 Elec stim unattend for press
G0283 Elec stim other than wound

Radiology and Certain Other Imaging Services

Include the following codes in the CPT 70000 series:

70100 X-ray exam of jaw
70110 X-ray exam of jaw
70120 X-ray exam of mastoids
70130 X-ray exam of mastoids
70134 X-ray exam of middle ear
70140 X-ray exam of facial bones
70150 X-ray exam of facial bones
70160 X-ray exam of nasal bones
70190 X-ray exam of eye sockets
70200 X-ray exam of eye sockets
70210 X-ray exam of sinuses
70220 X-ray exam of sinuses
70240 X-ray exam, pituitary saddle
70250 X-ray exam of skull
70260 X-ray exam of skull
70300 X-ray exam of teeth
70310 X-ray exam of teeth
70320 Full mouth x-ray of teeth
70328 X-ray exam of jaw joint
70330 X-ray exam of jaw joints
70336 Magnetic image, jaw joint
70350 X-ray head for orthodontia
70355 Panoramic x-ray of jaws
70360 X-ray exam of neck
70370 Throat x-ray & fluoroscopy
70371 Speech evaluation, complex
70380 X-ray exam of salivary gland
70450 Ct head/brain w/o dye
70460 Ct head/brain w/dye
70470 Ct head/brain w/o & w/dye
70480 Ct orbit/ear/fossa w/o dye
70481 Ct orbit/ear/fossa w/dye
70482 Ct orbit/ear/fossa w/o & w/dye
70486 Ct maxillofacial w/o dye
70487 Ct maxillofacial w/dye
70488 Ct maxillofacial w/o & w/dye
70490 Ct soft tissue neck w/o dye
70491 Ct soft tissue neck w/dye
70492 Ct sft tsue nck w/o & w/dye
70496 Ct angiography, head
70498 Ct angiography, neck
70540 Mri orbit/face/neck w/o dye
70542 Mri orbit/face/neck w/dye
70543 Mri orbt/fac/nck w/o & w/dye
70544 Mr angiography head w/o dye
70545 Mr angiography head w/dye
70546 Mr angiograph head w/o & w/dye
70547 Mr angiography neck w/o dye
70548 Mr angiography neck w/dye
70549 Mr angiograph neck w/o & w/dye
70551 Mri brain w/o dye
70552 Mri brain w/dye
70553 Mri brain w/o & w/dye
71010 Chest x-ray
71015 Chest x-ray
71020 Chest x-ray
71021 Chest x-ray
71022 Chest x-ray
71023 Chest x-ray and fluoroscopy
71030 Chest x-ray
71034 Chest x-ray and fluoroscopy
71035 Chest x-ray
71100 X-ray exam of ribs
71101 X-ray exam of ribs/chest
71110 X-ray exam of ribs
71111 X-ray exam of ribs/chest
71120 X-ray exam of breastbone
71130 X-ray exam of breastbone
71250 Ct thorax w/o dye
71260 Ct thorax w/dye
71270 Ct thorax w/o & w/dye
71275 Ct angiography, chest
71550 Mri chest w/o dye
71551 Mri chest w/dye
71552 Mri chest w/o & w/dye
71555 Mri angio chest w or w/o dye
72010 X-ray exam of spine
72020 X-ray exam of spine
72040 X-ray exam of neck spine
72050 X-ray exam of neck spine
72052 X-ray exam of neck spine
72069 X-ray exam of trunk spine
72070 X-ray exam of thoracic spine
72072 X-ray exam of thoracic spine
72074 X-ray exam of thoracic spine
72080 X-ray exam of trunk spine
72090 X-ray exam of trunk spine
72100 X-ray exam of lower spine
72110 X-ray exam of lower spine
72114 X-ray exam of lower spine
72120 X-ray exam of lower spine
72125 Ct neck spine w/o dye
72126 Ct neck spine w/dye
72127 Ct neck spine w/o & w/dye
72128 Ct chest spine w/o dye
72129 Ct chest spine w/dye
72130 Ct chest spine w/o & w/dye
72131 Ct lumbar spine w/o dye
72132 Ct lumbar spine w/dye
72133 Ct lumbar spine w/o & w/dye
72141 Mri neck spine w/o dye
72142 Mri neck spine w/dye
72146 Mri chest spine w/o dye
72147 Mri chest spine w/dye
72148 Mri lumbar spine w/o dye
72149 Mri lumbar spine w/dye
72156 Mri neck spine w/o & w/dye
72157 Mri chest spine w/o & w/dye
72158 Mri lumbar spine w/o & w/dye
72170 X-ray exam of pelvis
72190 X-ray exam of pelvis
72191 Ct angiograph pelv w/o & w/dye
72192 Ct pelvis w/o dye
72193 Ct pelvis w/dye
72194 Ct pelvis w/o & w/dye
72195 Mri pelvis w/o dye
72196 Mri pelvis w/dye
72197 Mri pelvis w/o & w/dye
72198 Mr angio pelvis w/o & w/dye
72200 X-ray exam sacroiliac joints
72202 X-ray exam sacroiliac joints
72220 X-ray exam of tailbone
73000 X-ray exam of collar bone
73010 X-ray exam of shoulder blade
73020 X-ray exam of shoulder
73030 X-ray exam of shoulder
73050 X-ray exam of shoulders
73060 X-ray exam of humerus
73070 X-ray exam of elbow
73080 X-ray exam of elbow
73090 X-ray exam of forearm
73092 X-ray exam of arm, infant
73100 X-ray exam of wrist
73110 X-ray exam of wrist
73120 X-ray exam of hand
73130 X-ray exam of hand
73140 X-ray exam of finger(s)
73200 Ct upper extremity w/o dye
73201 Ct upper extremity w/dye
73202 Ct uppr extremity w/o & w/dye
73206 Ct angio upr extrm w/o & w/dye
73218 MRI upper extremity w/o dye
73219 MRI upper extremity w/dye
73220 MRI uppr extremity w/o & w/dye
73221 MRI joint upr extrem w/o dye
73222 MRI joint upr extrem w/dye
73223 MRI joint upr extr w/o & w/dye
73500 X-ray exam of hip
73510 X-ray exam of hip
73520 X-ray exam of hips
73540 X-ray exam of pelvis & hips
73550 X-ray exam of thigh
73560 X-ray exam of knee, 1 or 2
73562 X-ray exam of knee, 3
73564 X-ray exam, knee, 4 or more
73565 X-ray exam of knees
73590 X-ray exam of lower leg
73592 X-ray exam of leg, infant
73600 X-ray exam of ankle
73610 X-ray exam of ankle
73620 X-ray exam of foot
73630 X-ray exam of foot
73650 X-ray exam of heel
73660 X-ray exam of toe(s)
73700 Ct lower extremity w/o dye
73701 Ct lower extremity w/dye
73702 Ct lwr extremity w/o & w/dye
73706 Ct angio lwr extr w/o & w/dye
73718 MRI lower extremity w/o dye
73719 MRI lower extremity w/dye
73720 MRI lwr extremity w/o & w/dye
73721 MRI jnt of lwr extre w/o dye
73722 MRI joint of lwr extr w/dye
73723 MRI joint lwr extr w/o & w/dye
73725 Mr ang lwr ext w or w/o dye
74000 X-ray exam of abdomen
74010 X-ray exam of abdomen
74020 X-ray exam of abdomen
74022 X-ray exam series, abdomen
74150 Ct abdomen w/o dye
74160 Ct abdomen w/dye
74170 Ct abdomen w/o & w/dye
74175 Ct angio abdom w/o & w/dye
74181 MRI abdomen w/o dye
74182 MRI abdomen w/dye
74183 MRI abdomen w/o & w/dye
74185 MRI angio, abdom w or w/o dye
74210 Contrst x-ray exam of throat
74220 Contrast x-ray, esophagus
74230 Cine/vid x-ray, throat/esoph
74240 X-ray exam, upper gi tract
74241 X-ray exam, upper gi tract
74245 X-ray exam, upper gi tract
74246 Contrst x-ray uppr gi tract
74247 Contrst x-ray uppr gi tract
74249 Contrst x-ray uppr gi tract
74250 X-ray exam of small bowel
74290 Contrast x-ray, gallbladder
74291 Contrast x-rays, gallbladder
74710 X-ray measurement of pelvis
75552 Heart mri for morph w/o dye
75553 Heart mri for morph w/dye
75554 Cardiac MRI/function
75555 Cardiac MRI/limited study
75635 Ct angio abdominal arteries

76000 Fluoroscope examination
76006 X-ray stress view
76010 X-ray, nose to rectum
76020 X-rays for bone age
76040 X-rays, bone evaluation
76061 X-rays, bone survey
76062 X-rays, bone survey
76065 X-rays, bone evaluation
76066 Joint survey, single view
76070 Ct bone density, axial
76071 Ct bone density, peripheral
76075 Dexa, axial skeleton study
76076 Dexa, peripheral study
76078 Radiographic absorptiometry
76082 Computer mammogram add-on
76083 Computer mammogram add-on
76090 Mammogram, one breast
76091 Mammogram, both breasts
76092 Mammogram, screening
76093 Magnetic image, breast
76094 Magnetic image, both breasts
76100 X-ray exam of body section
76101 Complex body section x-ray
76102 Complex body section x-rays
76120 Cine/video x-rays
76125 Cine/video x-rays add-on
76150 X-ray exam, dry process
76370 Ct scan for therapy guide
76375 3d/holograph reconstr add-on
76380 CAT scan follow-up study
76400 Magnetic image, bone marrow
76499 Radiographic procedure
76506 Echo exam of head
76511 Echo exam of eye
76512 Echo exam of eye
76513 Echo exam of eye, water bath
76514 Echo exam of eye, thickness
76516 Echo exam of eye
76519 Echo exam of eye
76536 Us Exam of head and neck
76604 Us exam, chest, b-scan
76645 Us exam, breast(s)
76700 Us exam, abdom, complete
76705 Echo exam of abdomen
76770 Us exam abdo back wall, comp
76775 Us exam abdo back wall, lim
76778 Us exam kidney transplant
76800 Us exam, spinal canal
76801 Ob us < 14 wks, single fetus
76802 Ob us < 14 wks, add'l fetus
76805 Ob us >/= 14 wks, sngl fetus
76810 Ob us >/= 14 wks, addl fetus
76811 Ob us, detailed, sngl fetus
76812 Ob us, detailed, addl fetus
76815 Ob us, limited, fetus(s)
76816 Ob us, follow-up, per fetus
76818 Fetal biophys profile w/nst
76819 Fetal biophys profil w/o nst
76825 Echo exam of fetal heart
76826 Echo exam of fetal heart
76827 Echo exam of fetal heart
76828 Echo exam of fetal heart
76856 Us exam, pelvic, complete
76857 Us exam, pelvic, limited
76870 Us exam, scrotum
76880 Us exam, extremity
76885 Us exam infant hips, dynamic
76886 Us exam infant hips, static
76970 Ultrasound exam follow-up
76977 Us bone density measure
76999 Echo examination procedure

Include the following CPT codes for echocardiography and vascular ultrasound:

93303 Echo transthoracic
93304 Echo transthoracic
93307 Echo exam of heart
93308 Echo exam of heart
93320 Doppler echo exam, heart [if used in conjunction with 93303–93308]
93321 Doppler echo exam, heart [if used in conjunction with 93303–93308]
93325 Doppler color flow add-on [if used in conjunction with 93303–93308]
93875 Extracranial study
93880 Extracranial study
93882 Extracranial study
93886 Intracranial study
93888 Intracranial study
93922 Extremity study
93923 Extremity study
93924 Extremity study
93925 Lower extremity study
93926 Lower extremity study
93930 Upper extremity study
93931 Upper extremity study
93965 Extremity study
93970 Extremity study
93971 Extremity study
93975 Vascular study
93976 Vascular study
93978 Vascular study
93979 Vascular study
93980 Penile vascular study
93981 Penile vascular study
93990 Doppler flow testing

Include the following CPT and HCPCS level 2 codes:

51798 Us urine capacity measure
78350 Bone mineral, single photon
91110 Gi tract capsule endoscopy
0028T Dexa body composition study
0042T Ct perfusion w/contrast, cbf
G0130 Single energy x-ray study
G0202 Screening mammography digital
G0204 Diagnostic mammography digital
G0206 Diagnostic mammography digital
G0288 Recon, CTA for surg plan
R0070 Transport portable x-ray
R0075 Transport port x-ray multipl

Radiation Therapy Services and Supplies

Include the following codes in the CPT 70000 series:

77261 Radiation therapy planning
77262 Radiation therapy planning
77263 Radiation therapy planning
77280 Set radiation therapy field
77285 Set radiation therapy field
77290 Set radiation therapy field
77295 Set radiation therapy field
77299 Radiation therapy planning
77300 Radiation therapy dose plan
77301 Radiotherapy dose plan, imrt
77305 Teletx isodose plan simple
77310 Teletx isodose plan intermed
77315 Teletx isodose plan complex
77321 Special teletx port plan
77326 Brachytx isodose calc simp
77327 Brachytx isodose calc interm
77328 Brachytx isodose plan compl
77331 Special radiation dosimetry
77332 Radiation treatment aid(s)
77333 Radiation treatment aid(s)
77334 Radiation treatment aid(s)
77336 Radiation physics consult
77370 Radiation physics consult
77399 External radiation dosimetry
77401 Radiation treatment delivery
77402 Radiation treatment delivery
77403 Radiation treatment delivery
77404 Radiation treatment delivery
77406 Radiation treatment delivery
77407 Radiation treatment delivery
77408 Radiation treatment delivery
77409 Radiation treatment delivery
77411 Radiation treatment delivery
77412 Radiation treatment delivery
77413 Radiation treatment delivery
77414 Radiation treatment delivery
77416 Radiation treatment delivery
77417 Radiology port film(s)
77418 Radiation tx delivery, imrt
77427 Radiation tx management, x5
77431 Radiation therapy management
77432 Stereotactic radiation trmt
77470 Special radiation treatment
77499 Radiation therapy management
77520 Proton trmt, simple w/o comp
77522 Proton trmt, simple w/comp
77523 Proton trmt, intermediate
77525 Proton treatment, complex
77600 Hyperthermia treatment
77605 Hyperthermia treatment
77610 Hyperthermia treatment
77615 Hyperthermia treatment
77620 Hyperthermia treatment
77750 Infuse radioactive materials
77761 Apply intrcav radiat simple
77762 Apply intrcav radiat interm
77763 Apply intrcav radiat compl
77776 Apply interstit radiat simpl
77777 Apply interstit radiat inter
77778 Apply interstit radiat compl
77781 High intensity brachytherapy
77782 High intensity brachytherapy
77783 High intensity brachytherapy
77784 High intensity brachytherapy
77789 Apply surface radiation
77790 Radiation handling
77799 Radium/radioisotope therapy

Include the following CPT and HCPCS level 2 codes classified elsewhere:

31643 Diag bronchoscope/catheter
50559 Renal endoscopy/radiotracer
55859 Percut/needle insert, pros
61770 Incise skull for treatment
61793 Focus radiation beam
92974 Cath place, cardio brachytx
G0173 Stereo radiosurgery, complete
G0242 Multisource photon ster plan
G0243 Multisour photon stero treat
G0251 Linear acc based stero radio
G0338 Linear accelerator stero pln
G0339 Robot lin-radsurg com, first
G0340 Robt lin-radsurg fractx 2–5

EPO and Other Dialysis-Related Drugs

The physician self-referral prohibition does not apply to the following codes for EPO and other dialysis-related drugs furnished in or by an ESRD facility if the conditions in § 411.355(g) are satisfied:

J0630 Calcitonin salmon injection
J0636 Inj calcitriol per 0.1 mcg
J0895 Deferoxamine mesylate inj
J1270 Injection, doxercalciferol
J1750 Iron dextran
J1756 Iron sucrose injection
J1955 Inj levocarnitine per 1 gm
J2501 Paricalcitol
J2916 Na ferric gluconate complex
J2993 Reteplase injection
J2995 Inj streptokinase /250000 IU
J2997 Alteplase recombinant
J3364 Urokinase 5000 IU injection
P9041 Albumin (human), 5%, 50ml
P9045 Albumin (human), 5%, 250ml
P9046 Albumin (human), 25%, 20ml

P9047 Albumin (human), 25%, 50ml
Q4054 Darbepoetin alfa, esrd use
Q4055 Epoetin alfa, esrd use

Preventive Screening Tests, Immunizations and Vaccines

The physician self-referral prohibition does not apply to the following tests if they are performed for screening purposes and satisfy the conditions in § 411.355(h):

76083 Computer mammogram add-on
76092 Mammogram, screening
G0103 Psa, total screening
G0107 CA screen; fecal blood test
G0123 Screen cerv/vag thin layer
G0124 Screen c/v thin layer by MD
G0141 Scr c/v cyto, autosys and md
G0143 Scr c/v cyto, thinlayer, rescr
G0144 Scr c/v cyto, thinlayer, rescr
G0145 Scr c/v cyto, thinlayer, rescr
G0147 Scr c/v cyto, automated sys
G0148 Scr c/v cyto, autosys, rescr
G0202 Screening mammographydigital
G0328 Fecal blood scrn immunoassay
P3000 Screen pap by tech w md supv
P3001 Screening pap smear by phys

The physician self-referral prohibition does not apply to the following immunization and vaccine codes if they satisfy the conditions in § 411.355(h):

90655 Flu vaccine, 6–35 mo, im
90657 Flu vaccine, 6–35 mo, im
90658 Flu vaccine, 3 yrs, im
90732 Pneumococcal vaccine
90740 Hepb vacc, ill pat dose im
90743 Hep b vacc, adol, 2 dose im
90744 Hepb vacc ped/adol 3 dose im
90746 Hepb vaccine, adult, im
90747 Hepb vacc, ill pat 4 dose im

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Federal Register

Friday,
March 26, 2004

Part IV

Department of Defense

General Services Adminstration

National Aeronautics and Space Administration

48 CFR Chapter 1
Federal Acquisition Regulations; Purchases from Federal Prison Industries—Requirement for Market Research and Small Entity Compliance Guide; Interim Rules

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 8, 19, 42, and 52

[FAC 2001–21; FAR Case 2003–023]

RIN 9000–AJ91

Federal Acquisition Regulation; Purchases From Federal Prison Industries—Requirement for Market Research

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement Section 637 of Division F of the Consolidated Appropriations Act, 2004. Section 637 provides that no fiscal year 2004 funds shall be expended for purchase of a product or service offered by Federal Prison Industries, Inc., unless the agency making the purchase determines that the offered product or service provides the best value to the buying agency.

DATES: *Effective Date:* March 26, 2004.

Comment Date: Interested parties should submit comments to the FAR Secretariat at the address shown below on or before May 25, 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: Ms. Laurie Duarte, Washington, DC 20405.

Submit electronic comments via the Internet to— *farcase.2003–023@gsa.gov*.

Please submit comments only and cite FAC 2001–21, FAR case 2003–023, 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. The TTY Federal Relay Number for further information is 1–800–877–8973. For clarification of content, contact Ms. Linda Nelson, Procurement Analyst, at (202) 501–1900. Please cite FAC 2001–21, FAR case 2003–023.

SUPPLEMENTARY INFORMATION:

A. Background

Section 637 of Division F of the Consolidated Appropriations Act, 2004 (Pub. L. 108–199) provides that none of the funds made available under that or any other Act for fiscal year 2004 shall be expended for the purchase of a product or service offered by Federal Prison Industries, Inc. (FPI), unless the agency making such purchase determines that the offered product or service provides the best value to the buying agency pursuant to Governmentwide procurement regulations issued pursuant to 41 U.S.C. 421(c)(1) that impose procedures, standards, and limitations of 10 U.S.C. 2410n.

This interim rule implements Section 637 by amending the FAR to incorporate the requirements of 10 U.S.C. 2410n with regard to purchase of products from FPI. The rule addresses—

- Requirements for conducting market research before purchasing supplies listed in the FPI Schedule;
- Use of competitive procedures if FPI supplies are found to be noncomparable to supplies available from the private sector;
- Limitations on an inmate worker's access to information; and
- Prohibitions on requiring use of FPI as a subcontractor.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The changes may 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 will permit small entities to compete with FPI for contract awards under certain conditions. An Initial Regulatory Flexibility Analysis has been prepared and is summarized as follows:

The rule implements the Consolidated Appropriations Act, 2004, Division F, Section 637 (Public Law 108–199). The Act imposes the procedures, standards, and limitations of 10 U.S.C. 2410n, which requires market research before purchasing a product listed in the FPI catalog, to determine whether the FPI product is comparable to products available from the private sector that best meet the agency's needs in terms of price, quality, and time of delivery. If the FPI product is not comparable, the agency must use competitive procedures to acquire the product or must make an individual purchase under a multiple award contract. In conducting such a competition or making such a purchase, the agency must consider a timely offer from FPI. The impact of the rule is unknown at this time. The elimination of FPI as a mandatory source may have an impact on those small businesses that supply FPI with raw materials, equipment and services. However, the rule could benefit small business concerns that offer products comparable to those listed in the FPI catalog, by permitting those concerns to compete for Federal contract awards.

The FAR Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. Interested parties may obtain a copy from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR Parts 8, 19, 42, and 52 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.* (FAC 2001–21, FAR case 2003–023), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the 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.*

D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary to implement Section 637 of Division F of Public Law 108–199, the Consolidated Appropriations Act, 2004. Section 637 provides that no fiscal year 2004 funds shall be expended for purchase of a product or service offered by Federal Prison Industries, Inc., unless the agency making such purchase determines that the offered product or service provides the best value to the buying agency pursuant to Governmentwide procurement regulations, issued pursuant to 41 U.S.C. 421(c)(1), that impose procedures, standards, and limitations of 10 U.S.C. 2410n. Section 637 became effective on January 23, 2004. However, pursuant to Public Law 98–577 and FAR 1.501, the Councils will consider public

comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 8, 19, 42, and 52

Government procurement.

Dated: March 22, 2004.

Laura Auletta,

Director, Acquisition Policy Division.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2001–21 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2001–21 are effective March 26, 2004.

Dated: March 22, 2004.

Deidre A. Lee,

Director, Defense Procurement and Acquisition Policy.

Dated: March 18, 2004.

David A. Drabkin,

Deputy Associate Administrator, Office of Acquisition Policy, General Services Administration.

Dated: March 18, 2004.

James A. Balinskas,

Acting Assistant Administrator for Procurement, National Aeronautics and Space Administration.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 8, 19, 42, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 8, 19, 42, and 52 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 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

■ 2. Revise subpart 8.6 to read as follows:

Subpart 8.6—Acquisition from Federal Prison Industries, Inc.

Sec.

8.601 General.

(a) Federal Prison Industries, Inc. (FPI), also referred to as UNICOR, is a self-supporting, wholly owned Government corporation of the District of Columbia.

(b) FPI provides training and employment for prisoners confined in Federal penal and correctional institutions through the sale of its supplies and services to Government agencies (18 U.S.C. 4121–4128).

(c) FPI diversifies its supplies and services to minimize adverse impact on private industry.

(d) Supplies manufactured and services performed by FPI are listed in the FPI Schedule, which can be accessed at *http://www.unicor.gov* or by submitting a written request to Federal Prison Industries, Inc., Department of Justice, Washington, DC 20534.

8.602 Policy.

(a) Agencies shall purchase required supplies of the classes listed in the Schedule of Products made in Federal Penal and Correctional Institutions (referred to in this subpart as "the FPI Schedule") at prices not to exceed current market prices, using the procedures in this subpart.

(b) For purchases made by civilian agencies using fiscal year 2004 appropriated funds, and for all purchases made by DoD (Section 637 of Division F of Public Law 108–199, the Consolidated Appropriations Act, 2004; 10 U.S.C. 2410n), agencies shall—

(1) Before purchasing an item of supply listed in the FPI Schedule, conduct market research to determine whether the FPI item is comparable to supplies available from the private sector that best meet the Government's needs in terms of price, quality, and time of delivery. This is a unilateral determination made at the discretion of the contracting officer. The arbitration provisions of 18 U.S.C. 4124(b) do not apply;

(2) Prepare a written determination that includes supporting rationale explaining the assessment of price, quality, and time of delivery, based on the results of market research comparing the FPI item to supplies available from the private sector;

(3) If the FPI item is comparable, purchase the item from FPI following the ordering procedures at *http://www.unicor.gov*, unless a waiver is obtained in accordance with 8.604; and

(4) If the FPI item is not comparable in one or more of the areas of price, quality, and time of delivery—

(i) Acquire the item using—

(A) Competitive procedures (*e.g.*, the procedures in 6.102, the set-aside procedures in subpart 19.5, or competition conducted in accordance with part 13); or

(B) The fair opportunity procedures in 16.505, if placing an order under a multiple award delivery-order contract;

(ii) Include FPI in the solicitation process and consider a timely offer from FPI for award in accordance with the requirements and evaluation factors in the solicitation; and

(iii) When using a multiple award schedule issued under the procedures in subpart 8.4 or when making an award using the fair opportunity procedures in 16.505—

(A) Establish and communicate to FPI the requirements and evaluation factors that will be used as the basis for selecting a source, so that an offer from FPI can be evaluated on the same basis as the contract or schedule holder; and

(B) Consider a timely offer from FPI.

(c) The procedures in paragraph (b) of this section do not apply if an exception in 8.605 applies and the purchase is made from a source other than FPI.

(d) In some cases where FPI and a JWOD participating nonprofit agency produce identical items (see 8.603), FPI grants a waiver to permit the Government to purchase a portion of its requirement from the JWOD participating nonprofit agency. When this occurs, the portion of the requirement for which FPI has granted a waiver—

(1) Shall be purchased from the JWOD participating nonprofit agency using the procedures in subpart 8.7; and

(2) Shall not be subject to the procedures in paragraph (b) of this section.

(e) For civilian agency purchases made using other than fiscal year 2004 appropriated funds, the following policy applies:

(1) Agencies shall purchase required supplies of the classes listed in the FPI Schedule at prices not to exceed current market prices following the ordering procedures at *http://www.unicor.gov*, unless a waiver is obtained in accordance with 8.604.

(2) If the contracting officer believes that the FPI price exceeds the market price, the matter may be referred to the cognizant product division identified in the FPI Schedule or to the FPI Washington office for resolution.

(f) Disputes regarding price, quality, character, or suitability of supplies produced by FPI, except for determinations under paragraph (b)(1) of this section, are subject to arbitration as specified in 18 U.S.C. 4124. The statute provides that the arbitration shall be conducted by a board consisting of the Comptroller General of the United States, the Administrator of General Services, and the President, or their representatives. The decisions of the

board are final and binding on all parties.

8.603 Purchase priorities.

FPI and nonprofit agencies participating in the Javits-Wagner-O'Day (JWOD) Program (see subpart 8.7) may produce identical supplies or services. When this occurs, ordering offices shall purchase supplies and services in the following priorities:

(a) *Supplies.* (1) Federal Prison Industries, Inc. (41 U.S.C. 48).

(2) JWOD participating nonprofit agencies.

(3) Commercial sources.

(b) *Services.* (1) JWOD participating nonprofit agencies.

(2) Federal Prison Industries, Inc., or commercial sources.

8.604 Waivers.

FPI may grant a waiver for purchase of supplies in the FPI Schedule from another source. FPI waivers ordinarily are of the following types:

(a) General or blanket waivers issued when classes of supplies are not available from FPI.

(b) Formal waivers issued in response to requests from offices desiring to acquire, from other sources, supplies listed in the FPI Schedule and not covered by a general waiver. Agencies shall process waiver requests in accordance with the procedures at *http://www.unicor.gov.*

8.605 Exceptions.

Purchase from FPI is not mandatory and a waiver is not required if—

(a) The policy at 8.602(b) applies to the acquisition and—

(1) The contracting officer makes a determination that the FPI item of supply is not comparable to supplies available from the private sector that best meet the Government's needs in terms of price, quality, and time of delivery; and

(2) The item is acquired in accordance with 8.602(b)(4);

(b) Public exigency requires immediate delivery or performance;

(c) Suitable used or excess supplies are available;

(d) The supplies are acquired and used outside the United States;

(e) Acquiring listed items totaling $2,500 or less; or

(f) Acquiring services.

8.606 Evaluating FPI performance.

Agencies shall evaluate FPI contract performance in accordance with subpart 42.15. Performance evaluations do not negate the requirements of 8.602 and 8.604, but they may be used to support a waiver request in accordance with 8.604.

8.607 Performance as a subcontractor.

Agencies shall not require a contractor, or subcontractor at any tier, to use FPI as a subcontractor for performance of a contract by any means, including means such as—

(a) A solicitation provision requiring a potential contractor to offer to make use of FPI supplies or services;

(b) A contract specification requiring the contractor to use specific supplies or services (or classes of supplies or services) offered by FPI; or

(c) Any contract modification directing the use of FPI supplies or services.

8.608 Protection of classified and sensitive information.

Agencies shall not enter into any contract with FPI that allows an inmate worker access to any—

(a) Classified data;

(b) Geographic data regarding the location of—

(1) Surface and subsurface infrastructure providing communications or water or electrical power distribution;

(2) Pipelines for the distribution of natural gas, bulk petroleum products, or other commodities; or

(3) Other utilities; or

(c) Personal or financial information about any individual private citizen, including information relating to such person's real property however described, without the prior consent of the individual.

8.704 [Amended]

■ 3. Amend section 8.704 in paragraph (c) by removing "clearance (8.605)" and adding "waiver (8.604)" in its place.

PART 19—SMALL BUSINESS PROGRAMS

19.502–1 [Amended]

■ 4. Amend section 19.502–1 in paragraph (b) by removing "Federal Prison Industries,".

■ 5. Add section 19.504 to read as follows:

19.504 Inclusion of Federal Prison Industries, Inc.

When using competitive procedures in accordance with 8.602(b)(4), agencies shall include Federal Prison Industries, Inc. (FPI), in the solicitation process and consider a timely offer from FPI.

■ 6. Amend section 19.508 by adding a sentence to the end of paragraphs (c) and (d) to read as follows:

19.508 Solicitation provisions and contract clauses.

* * * * *

(c) * * * Use the clause at 52.219–6 with its Alternate II when including FPI in the competition in accordance with 19.504.

(d) * * * Use the clause at 52.219–7 with its Alternate II when including FPI in the competition in accordance with 19.504.

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PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

42.1503 [Amended]

■ 7. Amend section 42.1503 in the seventh sentence of paragraph (b) by removing "clearance request (see 8.605)" and adding "waiver request (see 8.604)" in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 8. Amend section 52.212–5 by revising the date of the clause; and adding paragraphs (b)(5)(iii) and (b)(6)(iii) to read as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (MAR 2004)

* * * * *

(b) * * *

(5) * * *

___ (iii) Alternate II (MAR 2004) of 52.219–6.

(6) * * *

___ (iii) Alternate II (MAR 2004) of 52.219–7.

* * * * *

■ 9. Amend section 52.219–6 by adding Alternate II to read as follows:

52.219–6 Notice of Total Small Business Set-Aside.

* * * * *

Alternate II (MAR 2004). As prescribed in 19.508(c), substitute the following paragraph (b) for paragraph (b) of the basic clause:

(b) *General.* (1) Offers are solicited only from small business concerns and Federal Prison Industries, Inc. (FPI). Offers received from concerns that are not small business concerns or FPI shall be considered nonresponsive and will be rejected.

(2) Any award resulting from this solicitation will be made to either a small business concern or FPI.

■ 10. Amend section 52.219–7 by adding Alternate II to read as follows:

52.219–7 Notice of Partial Small Business Set-Aside.

* * * * *

Alternate II (MAR 2004). As prescribed in 19.508(d), add the following paragraph (d) to the basic clause:

(d) Notwithstanding paragraph (b) of this clause, offers from Federal Prison Industries, Inc., will be solicited and considered for both the set-aside and non-set-aside portion of this requirement.

[FR Doc. 04–6800 Filed 3–25–04; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Chapter 1

Federal Acquisition Regulation; Small Entity Compliance GUIDE

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Small Entity Compliance Guide.

SUMMARY: This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator for the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of the rule appearing in Federal Acquisition Circular (FAC) 2001–21 which amends the FAR. An asterisk (*) next to a rule indicates that a regulatory flexibility analysis has been prepared. Interested parties may obtain further information regarding these rules by referring to FAC 2001–21 which precedes this document. These documents are also available via the Internet at *http://www.arnet.gov/far.*

FOR FURTHER INFORMATION CONTACT: Laurie Duarte, FAR Secretariat, (202) 501–4225. For clarification of content, contact Ms. Linda Nelson at (202) 501–1900.

*** Purchases From Federal Prison Industries—Requirement for Market Research (FAR Case 2003–023)**

This interim rule amends FAR parts 8, 19, 42, and 52 to implement section 637 of Division F of the consolidated Appropriations Act, 2004. Section 637 provides that no fiscal year 2004 funds shall be expended for purchase of a product or service offered by Federal Prison Industries, Inc., unless the agency making the purchase determines that the offered product or service provides the best value to the buying agency.

Dated: March 22, 2004.

Laura Auletta,

Director, Acquisition Policy Division.

[FR Doc. 04–6801 Filed 3–25–04; 8:45 am]

BILLING CODE 6820–EP–P

Federal Register

Friday,
March 26, 2004

Part V

Securities and Exchange Commission

17 CFR Part 230

Covered Securities Pursuant to Section 18 of the Securities Act of 1933; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 230

[Release No. 33–8404; File No. S7–17–04]

RIN 3235–AJ03

Covered Securities Pursuant to Section 18 of the Securities Act of 1933

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission ("SEC" or "Commission") proposes for comment an amendment to a Rule under Section 18 of the Securities Act of 1933 ("Securities Act"), as amended, to designate securities listed on the International Securities Exchange, Inc. ("ISE") as covered securities. Covered securities under Section 18 of the Securities Act are exempt from state law registration requirements.

DATES: Comments should be submitted on or before April 26, 2004.

ADDRESSES: Comments may be submitted electronically or by paper. Electronic comments may be submitted by: (1) Electronic form on the SEC Web site *(http://www.sec.gov)* or (2) e-mail to *rule-comments@sec.gov*. Mail paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. All submissions should refer to File No. S7–17–04; this file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website *(http://www.sec.gov)*. Comments are also available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. We do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Kelly Riley, Assistant Director, (202) 942–0752, Gordon Fuller, Counsel to the Assistant Director, (202) 942–0792 or Brian Trackman, Attorney, (202) 942–7951, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–1001.

SUPPLEMENTARY INFORMATION:

I. Introduction

In 1996, Congress amended Section 18 of the Securities Act to exempt from state registration requirements securities listed, or authorized for listing, on the New York Stock Exchange ("NYSE"), the American Stock Exchange ("Amex"), or the National Market System of the Nasdaq Stock Market ("Nasdaq/NMS") (collectively, the "Named Markets"), or any national securities exchange designated by the Commission to have substantially similar listing standards to those markets.[1] More specifically, Section 18(a) of the Securities Act provides that "no law, rule, regulation, or order, or other administrative action of any State * * * requiring, or with respect to, registration or qualification of securities * * * shall directly or indirectly apply to a security that "(A) is a covered security."[2] Covered securities are defined in Section 18(b)(1) to include those securities listed, or authorized for listing, on the Named Markets, or securities listed, or authorized for listing on a national securities exchange (or tier or segment thereof) that has listing standards that the Commission determines by rule are "substantially similar" to the Named Markets.[3]

Pursuant to Section 18(b)(1)(B) of the Securities Act, the Commission adopted Rule 146.[4] Rule 146(b) lists those national securities exchanges, or segments or tiers thereof, that the Commission has determined to have listing standards substantially similar to those of the Named Markets and thus securities listed on such exchanges are covered securities.[5] The ISE has petitioned the Commission to amend Rule 146(b) to determine that its listing standards for securities listed on the ISE are substantially similar to those of the Named Markets and, accordingly, that securities listed pursuant to such listing standards are covered securities for purposes of Section 18(b) of the Securities Act.[6] If the Commission makes this determination, then securities listed on the ISE would be exempt from state law registration requirements.[7]

II. Background

In 1998, the Chicago Board Options Exchange, Inc. ("CBOE"), Pacific Exchange, Inc. ("PCX"), the Philadelphia Stock Exchange, Inc. ("Phlx"), and the Chicago Stock Exchange ("CHX") petitioned the Commission to adopt a rule determining that specified portions of the exchanges' listing standards were substantially similar to the listing standards of the Named Markets.[8] In response to the petitions, and after extensive review of the petitioners' listing standards, the Commission adopted Rule 146(b), determining that the listing standards of the CBOE, Tier 1 of the PCX, and Tier 1 of the Phlx were substantially similar to those of the Named Markets and that securities listed pursuant to those standards would be deemed covered securities for purposes of Section 18 of the Securities Act.[9]

In its petition, ISE states that it currently trades only standardized options issued and guaranteed by the Options Clearing Corporation ("OCC"), which are also listed on at least one of the four other options exchanges—Amex, CBOE, PCX and Phlx. Accordingly, the options ISE currently trades are by definition "covered securities" for purposes of Section 18 of the Securities Act. However, ISE may, in the future, list standardized options issued and guaranteed by OCC that are not listed on one of the other options exchanges. Accordingly, ISE has petitioned the Commission to amend Rule 146(b) with a determination that its listing standards are substantially similar to those of the Named Markets, and that securities now listed on ISE are

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[1] *See* National Securities Markets Improvement Act of 1996, Pub. L. 104–290, 110 Stat. 3416 (October 11, 1996).

[2] 15 U.S.C. 77r(a).

[3] 15 U.S.C. 77r(b)(1). In addition, securities of the same issuer that are equal in seniority or senior to a security listed on a Named Market or national securities exchange designated by the Commission as having substantially similar listing standards to a Named Market are covered securities for purposes of Section 18 of the Securities Act. 15 U.S.C. 77r(b)(1)(C).

[4] Securities Act Release No. 7494, Securities Exchange Act Release No. 39542 (January 13, 1998), 63 FR 3032 (January 21, 1998).

[5] 17 CFR 230.146(b).

[6] *See* letter from Michael Simon, Senior Vice President and General Counsel, ISE, to Jonathan G. Katz, Secretary, Commission, dated October 9, 2003.

[7] 15 U.S.C. 77r.

[8] *See* letter from David P. Semak, Vice President, Regulation, PCX, to Arthur Levitt, Jr., Chairman, Commission, dated November 15, 1996; letter from Alger B. Chapman, Chairman, CBOE, to Jonathan G. Katz, Secretary, Commission, dated November 18, 1996; letter from J. Craig Long, Esq., Foley & Lardner, Counsel to CHX, to Jonathan G. Katz, Secretary, Commission, dated February 4, 1997 ("CHX Petition"); and letter from Michele R. Weisbaum, Vice President and Associate General Counsel, Phlx, to Jonathan G. Katz, Secretary, Commission, dated March 31, 1997.

[9] Securities Act Release No. 7494, Securities Exchange Act Release No. 39542 (January 13, 1998), 63 FR 3032 (January 21, 1998). Review of CHX's listing program, including its listing standards and operations, is ongoing. CHX has petitioned the Commission to amend Rule 146(b) to include Tier 1 of CHX's listing standards. *See* letter from Paul B. O'Kelly, Executive Vice President, Market Regulation and Legal, CHX, to Jonathan G. Katz, Secretary, Commission, dated May 17, 2000.

"covered securities" under Section 18(b) of the Securities Act.[10]

III. Discussion

The Commission has reviewed the ISE listing standards for options traded on the ISE and preliminarily believes that they are substantially similar to those of Amex. The Commission notes that, under Section 18(b)(1)(A) of the Securities Act, the Commission has the authority to compare the listing standards of a petitioner with those of either the NYSE, Amex, or Nasdaq/NMS. Because Amex is the only Named Market that lists standardized options, the Commission has compared ISE's listing standards with Amex's listing standards.

In addition, the Commission has interpreted the "substantially similar" standard to require listing standards at least as comprehensive as those of the Named Markets.[11] If a petitioner's listing standards are stricter than the Named Markets, then the Commission may still determine that the petitioner's listing standards are substantially similar to the Named Markets. Finally, the Commission notes that differences in language or approach would not necessarily lead to a determination that the listing standards of the petitioner are not substantially similar to those of a Named Market.

Equity Options. The ISE requirements for listing equity options and maintaining such listings, which are set forth in ISE Rules 502 and 503, closely track Amex Rules 915 and 916. Specifically, the ISE's original listing requirements pertaining to the public float, distribution of shares and trading volume of the underlying security are identical to those of the Amex.[12] At least 7 million shares of the underlying security must be held by persons other than those required to report their security holdings under Section 16(a) of the Securities Exchange Act of 1934 ("Exchange Act").[13] There must also be at least 2,000 holders of the underlying security. Trade volume of the underlying security must be at least 2.4 million shares during the preceding twelve-month period. For securities that are covered securities as defined under Section 18(b) of the Securities Act, the closing price of the underlying security must be at least $3 as measured by the highest closing price reported by the primary market in which the security is traded. For underlying securities that are not covered securities, the closing price must be at least $7.50 for a majority of the business days during the previous three months as measured by the lowest closing price reported in any market in which the security is traded. Finally, if an underlying security does not satisfy the previous closing price requirements, it may be eligible for trading if it satisfies all of ISE's maintenance requirements, is traded on at least one other exchange, and has an average trading volume of at least 5,000 contracts over the preceding three months.[14]

The rules of both ISE and Amex require issuers of the underlying securities to be in full compliance with the Exchange Act. Also, the requirements for securities underlying options are the same under ISE Rule 502 and Amex Rule 915. As is true for equity securities, the ISE and Amex impose the same initial listing requirements for options on American Depositary Receipts ("ADRs"), International Funds, Restructured Companies, Exchange-Traded Fund shares ("ETFs"),[15] and Trust Issued Receipts.[16]

The only difference between the ISE and Amex original listing rules is that Amex members may propose the listing of an option that otherwise meets established listing requirements, but has not been listed on Amex, whereas ISE's members may not. Rather, the ISE exercises discretion in considering potential new listings. The Commission does not believe that this procedural difference in the way options may be considered for listing has any bearing on whether the substantive listing standards are substantially similar.

As noted above, the Commission has interpreted the substantially similar standard to require listing standards at least as comprehensive as those of the Named Markets, and differences in language or approach of the listing standards are not dispositive. Accordingly, because the absence of a provision in the ISE rule permitting ISE members to propose the listing of options on the ISE is not germane to the quality of ISE's listing standards, the Commission preliminarily does not believe that this procedural distinction represents a substantial difference or renders the ISE listing standards less comprehensive than those of the Amex.

As with its original listing standards, the ISE's maintenance requirements for its equity options substantively track those of the Amex.[17] With respect to the underlying security of an equity option, the ISE and Amex have identical maintenance requirements regarding the number of publicly traded shares, their distribution, trade volumes and market price. At least 6.3 million shares of the underlying security must be held by persons other than those required to report their security holdings under Section 16(a) of the Exchange Act.[18] There must also be at least 1,600 holders of the underlying security. Trade volume of the underlying security must be at least 1.8 million shares during the preceding twelve month period, and the closing price must be at least $3 as measured by the closing price reported by the primary market in which the security is traded.[19] Failure to meet any one of these criteria may result in delisting the option.[20]

Both Amex and ISE may withdraw approval for options trading if the issuer of an underlying security that is principally traded on a national securities exchange is delisted from trading on that exchange and neither meets National Market System ("NMS") criteria nor is traded through the facilities of a national securities association. Amex and ISE may also withdraw approval for options trading on a security that is principally traded through facilities of a national securities association, if such security is no longer designated as an NMS security.[21]

Likewise, the ISE and Amex impose the same maintenance requirements for continued listing of options on ADRs, ETFs, Trust Issued Receipts, and

[10] The Commission notes that, currently, the ISE lists only standardized options and, accordingly, only has listing standards for equity and index options.

[11] Securities Act Release No. 7422, Securities Exchange Act Release No. 38728 (June 9, 1997), 62 FR 32705 (June 17, 1997).

[12] *Compare* ISE Rule 502 *with* Amex Rule 915. The Commission notes that no exchange has standards establishing qualifications for issuers of exchange-traded options because all options are issued by the OCC. All options issued by the OCC have the equal protection of OCC's backup system of clearing members' obligations, margin deposits and clearing funds.

[13] 15 U.S.C. 78p(a).

[14] *See* ISE Rule 502(b).

[15] ETFs are defined under Amex Rule 915 to include "shares or other securities that are principally traded on a national securities exchange or through the facilities of a national securities association and reported as a national market security, and that represent an interest in a registered investment company organized as an open-end management investment company, a unit investment trust or a similar entity which holds securities constituting or otherwise based on or representing an investment in an index or portfolio of securities* * *." *See* Amex Rule 915 Commentary .06. These securities are referred to as "Fund Shares" in the ISE rules. *See* ISE Rule 502(h).

[16] *Compare* Subsections (c), (f)–(h), and (j) of ISE Rule 502 *with* Subsections .03–.07 of Amex Rule 915.

[17] *Compare* ISE Rule 503 *with* Amex Rule 916.

[18] 15 U.S.C. 78p(a).

[19] *See* ISE Rule 503(b).

[20] *See* ISE Rule 503.

[21] *See* ISE Rule 503(b)(6); Amex Rule 916 Commentary .01(6).

Holding Company Depositary Receipts.[22]

The only difference between the ISE and Amex maintenance requirements is that the Amex rules include an express provision that the exchange will monitor on a daily basis news sources for information of corporate actions, which might indicate that an underlying security no longer meets the requirements for continued approval, whereas ISE Rule 503 does not.[23] The Commission preliminarily believes that the absence of an express monitoring provision in ISE's rules does not represent a significant difference between ISE and Amex maintenance requirements. Each registered exchange has an obligation under Sections 6 and 19(g) of the Exchange Act to comply with its own rules.[24] To comply with these statutory requirements, the ISE must monitor corporate and other events, which may have a bearing on whether a security underlying an option continues to satisfy ISE's maintenance listing standards. The Commission, however, requests comment on whether this difference should impact the determination of whether ISE's rules are "substantially similar" to Amex's rules.

Index Options. The Commission preliminarily believes that the ISE and the Amex have substantially similar requirements for stock indices that may underlie index options. With regard to broad-based index options, both the ISE and the Amex require that the listing of a class of options on a new underlying index must be filed with the Commission as a proposed rule change under Section 19(b) of the Exchange Act.[25] Furthermore, the Commission preliminarily believes that the exchanges have substantially similar provisions for the designation of narrow-based indices as eligible to underlie index options, including rules that allow certain options to be traded on certain narrow-based indices using an expedited procedure, which involves submitting to the Commission a Form 19b–4(e) under Rule 19b–4(e) of the Exchange Act.[26] The listing and maintenance requirements for component securities comprising narrow-based index options listed on the ISE appear in all material respects to be substantially similar to those of the Amex.[27] Specifically, the ISE and the Amex appear to have substantially similar criteria for index components relating to market value, trading volume, calculation of the index, and inclusion of non-U.S. component securities or ADRs.[28] In addition, the Commission preliminarily believes that ISE and Amex requirements for the index regarding weighting, index components, rebalancing, information barriers maintained by broker-dealers, and the dissemination of index values are substantially similar.[29] Likewise, the ISE rules setting forth position and exercise limits, margin requirements, and settlement terms applicable to index options appear to be substantially similar to those of the Amex.[30] Accordingly, the Commission preliminarily believes that the listing standards of the ISE and the Amex for index options are substantially similar.

IV. Solicitation of Comments

Based on its review of each exchange's rules, for the reasons set forth above, the Commission preliminarily believes that the original listing standards as well as the continued listing standards for equity options and index options of the ISE are substantially similar to those of the Amex. Accordingly, the Commission preliminarily believes options listed on the ISE should be covered securities and entitled to an exemption from state blue sky provisions as set forth in Section 18(a) of the Securities Act.

The Commission seeks comments on the desirability of amending Rule 146(b) to include the ISE.[31] In particular, commenters may wish to address whether they agree with the Commission's preliminary conclusions that ISE's listing and maintenance standards are substantially similar to those of the Named Markets.

In addition, if ISE options are designated as covered securities under Rule 146(b)(1), then ISE's listing standards would be subject to Rule 146(b)(2). Rule 146(b)(2) under the Securities Act conditions the designation of securities as "covered securities" under Rule 146(b)(1) on the identified exchange's listing standards continuing to be substantially similar to those of the Named Markets. Thus, under Rule 146(b)(2), the designation of its securities as covered securities would be conditioned on the ISE maintaining listing standards that were substantially similar to those of the Named Markets. Commenters may wish to address the application and effect of Rule 146(b)(2) on the proposal.

The Commission invites commenters to provide views and data as to the costs, benefits and effects associated with the proposed amendments. Finally, in addition to the questions posed above, commenters are welcome to offer their views on any other matter raised by the proposed amendment to Rule 146(b).

V. Consideration of Promotion of Efficiency, Competition and Capital Formation

As required under the Securities Act,[32] the Commission has preliminarily considered the proposed rule's impact on efficiency, competition and capital formation. Options exchanges are prohibited by Commission rule from prohibiting, conditioning or limiting the listing of any stock options class first listed on another options exchange.[33] Nevertheless, options exchanges do compete for listings of non-equity options such as index options. Thus, as noted above, the Commission preliminarily believes that amending Rule 146(b) to designate options traded on ISE as covered securities offers potential benefits for investors because it would facilitate the ability of ISE to compete for listings, which should increase competition and enhance the overall liquidity of the U.S. securities markets. In addition, the Commission believes that the proposed rule amendment, consistent with Congressional action, is designed to promote efficiency by removing a layer of duplicative regulation. The Commission also preliminarily believes that the proposed amendment to Rule 146(b) should permit ISE to compete with other markets whose options are exempt from state law registration requirements for new options products and listings. Finally, the proposed amendment would impose no recordkeeping or compliance burdens, and merely would provide a limited purpose exemption under the federal securities laws.

Thus, the Commission preliminarily believes that the proposed amendment

[22] *Compare* Subsections (g)–(j) of ISE Rule 503 *with* Subsections .06–.09 of Amex Rule 916.

[23] *Compare* Amex Rule 916.10 *with* ISE Rule 503.

[24] 15 U.S.C. 78f(b), 78s(g).

[25] *See* ISE Rule 2002(a), Amex Rule 901C.01.

[26] *Compare* ISE Rule 2002(b) *with* Amex Rule 901C.02.

[27] *Compare* ISE Rules 502, 2002(c) *with* Amex Rules 915, 901C.02(d).

[28] *Compare* ISE Rule 2002(b) *with* Amex Rule 901C.02.

[29] *Compare* ISE Rules 2002 and 2003 *with* Amex Rule 901C.

[30] *Compare* ISE Rules 413, 417, 418, 709, 1102, 2004–2010, 2012 *with* Amex Rules 462, 903C, 904C, 905C, 909C, 916C, 918C, 951C, and 980C. The ISE and Amex's disclaimer provisions relating to index options are also substantially similar. *Compare* ISE Rule 2011 *with* Amex Rule 902C.

[31] The Commission notes that it has received one comment letter from the OCC, which supports the ISE's petition. *See* letter to Kelly Riley, Senior Special Counsel, SEC, from James R. McDaniel, Counsel to OCC, Sidley Austin Brown & Wood LLP, dated November 4, 2003.

[32] 15 U.S.C. 77b(b).

[33] *See* 17 CFR 240.19c–5.

to Rule 146(b) would promote efficiency, competition and capital formation. Commentators should consider the proposed amendment's effect on competition, efficiency and capital formation.

VI. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 does not apply because the proposed amendment to Rule 146(b) does not impose recordkeeping or information collection requirements or other collection of information, which require the approval of the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

VII. Cost and Benefits of Proposed Rulemaking

Congress amended Section 18 of the Securities Act to exempt covered securities from state registration requirements. These securities are listed on the Named Markets or any other national securities exchange determined by the Commission to have substantially similar listing standards to the Named Markets.[34] Consistent with statutory authority, the Commission proposes to determine that the listing standards of the ISE are substantially similar to those of the Amex, the only Named Market that lists standardized options. Options listed on the ISE would therefore be covered securities subject only to federal regulation.

By exempting options listed on ISE from state law registration requirements, we expect that the listing process will become easier as one layer of regulation is eliminated. Moreover, we also expect adoption of the rule to reduce the administrative burden ISE and the OCC face inasmuch as compliance with state blue sky law requirements will be preempted.

The Commission also preliminarily believes that the proposed amendment to Rule 146(b) should permit ISE to compete with other markets whose options are exempt from state law registration requirements for new options products and listings. This result would likely enhance competition and, potentially, liquidity, thus benefiting market participants and the public.

The proposed amendment would eliminate state registration of options listed with the ISE. There may be a cost to investors through the loss of the benefits of state registration and oversight, although the cost is difficult to quantify. We nevertheless believe that Congress contemplated these costs in relation to the economic benefits of exempting covered securities from state regulation. The Commission, however, is considering the costs and benefits of the proposed amendment to Rule 146(b) and requests commenters to provide views and supporting information as to the costs and benefits associated with this proposal.

VIII. Regulatory Flexibility Act Certification

Section 603(a) of the Regulatory Flexibility Act[35] requires the Commission to undertake an initial regulatory flexibility analysis of the proposed amendment to Rule 146 on small entities unless the Commission certifies that the proposed amendment, if adopted, would not have a significant economic impact on a substantial number of small entities.[36] For purposes of Commission rulemaking in connection the Regulatory Flexibility Act, an issuer is a small business if its "total assets on the last day of its most recent fiscal year were $5,000,000 or less."[37] An exchange is a small business if it has been exempt from the reporting requirements of Rule 11Aa3–1[38] and it is not affiliated with any person other than a natural person that is not a small business.[39] The Commission believes that the proposal to amend Rule 146(b) will not affect small entities because all options listed on the ISE are issued by the OCC, which is not a small entity because it has assets well in excess of $5 million.[40] Further, the ISE is not a small business.[41]

Accordingly, the Commission hereby certifies, pursuant to Section 605(b) of the Regulatory Flexibility Act,[42] that amending Rule 146(b) would not have a significant economic impact on a substantial number of small entities. The Commission encourages written comments regarding this certification. The Commission solicits comment as to whether the proposed amendment to Rule 146(b) could have an effect that we have not considered. We request that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of such impact.

IX. Small Business Regulatory Enforcement Fairness Act of 1996

For purposes of the Small Business Enforcement Fairness Act of 1996, a rule is "major" if it results or is likely to result in:

(i) an annual effect on the economy of $100 million or more;

(ii) a major increase in costs or prices for consumers or individual industries; or

(iii) significant adverse effects on competition, investment, or innovation.[43]

The Commission requests comment regarding the potential impact of the proposed amendment on the economy on an annual basis. Commenters should provide empirical data to support their views to the extent possible.

X. Statutory Authority

The Commission is proposing an amendment to Rule 146 pursuant to the Securities Act of 1933 [15 U.S.C. 77a *et seq.*], particularly Sections 18(b)(1)(B) and 19(a) [15 U.S.C. 77r(b)(1)(B) and 77s(a)].

Text of the Proposed Rule

List of Subjects in 17 CFR Part 230

Securities.

For the reasons set forth in the preamble, Title 17, Chapter II of the *Code of Federal Regulations* is proposed to be amended as follows:

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. The authority citation for Part 230 continues to read, in part, as follows:

Authority: 15 U.S.C. 77b, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z–3, 77sss, 78c, 78d, 78l, 78m, 78n, 78o, 78t, 78w, 78ll(d), 78mm, 79t, 80a–8, 80a–24, 80a–28, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

2. Section 230.146 is amended by revising paragraphs (b)(1)(ii), (b)(1)(iii), and (b)(2) and by adding paragraph (b)(1)(iv) as follows:

§ 230.146 Rules under section 18 of the Act.

* * * * *

(b) * * *

(1) * * *

(i) * * *

(ii) Tier I of the Philadelphia Stock Exchange, Incorporated;

(iii) The Chicago Board Options Exchange, Incorporated; and

---

[34] 15 U.S.C. 77r(b)(1)(B).

[35] 5 U.S.C. 603(a).

[36] 5 U.S.C. 605(b).

[37] 17 CFR 230.157. *See also* 17 CFR 240.0–10(a).

[38] 17 CFR 240.11Aa3–1.

[39] 17 CFR 240.0–10(e).

[40] 17 CFR 240.0–10(d). As of December 31, 2002, OCC reported total assets of nearly $1.5 billion ($1,492,480,906). *See* OCC 2002 Annual Report, at 26 (Statements of Consolidated Financial Condition) (available at *http://www.optionsclearing.com*).

[41] 17 CFR 240.0–10(e).

[42] 5 U.S.C. 605(b).

[43] Pub. L. 104–121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C., and as a note to 5 U.S.C. 601).

(iv) Options listed on the International Securities Exchange, Incorporated.

(2) The designation of securities in paragraphs (b)(1)(i) through (iv) of this section as covered securities is conditioned on such exchanges' listing standards (or segments or tiers thereof) continuing to be substantially similar to those of the NYSE, Amex, or Nasdaq/NMS.

Dated: March 22, 2004.

By the Commission.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04–6815 Filed 3–25–04; 8:45 am]

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Federal Register

Friday,
March 26, 2004

Part VI

The President

Notice of March 24, 2004—Notice of Intention to Enter Into a Free Trade Agreement With the Dominican Republic

Federal Register
Vol. 69, No. 59
Friday, March 26, 2004

Presidential Documents

Title 3—

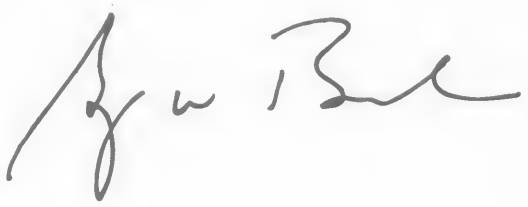
The President

Notice of March 24, 2004

Notice of Intention to Enter Into a Free Trade Agreement With the Dominican Republic

Consistent with section 2105(a)(1)(A) of the Trade Act of 2002, I have notified the Congress of my intention to enter into a free trade agreement with the Government of the Dominican Republic.

In accordance with section 2105(a)(1)(A) of that Act, this notice shall be published in the **Federal Register**.



THE WHITE HOUSE,
March 24, 2004.

[FR Doc. 04–7017
Filed 3–25–04; 10:42 am]
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Last List March 18, 2004

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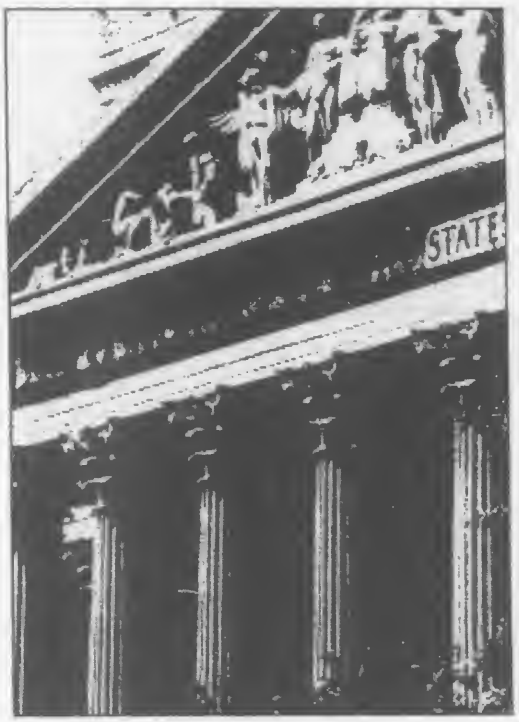

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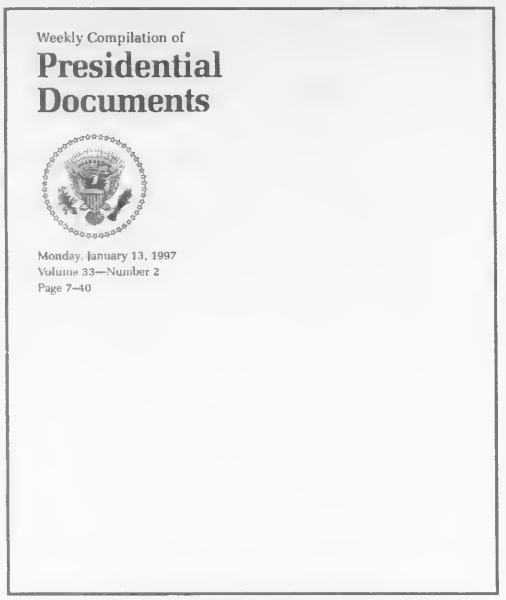

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108th Congress

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