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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.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 731

RIN 3206–AC19

Suitability

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule, extension of effective date.

SUMMARY: The Office of Personnel Management (OPM) published a final rule on personnel suitability on December 28, 2000 in the **Federal Register** (65 FR 82239). Based on a memorandum received from the Assistant to the President and Chief of Staff outlining the President's plan for Regulatory Review, the implementation of these rules has been extended to allow adequate review. The effective date for implementation or these rules is being extended 60 days until March 30, 2001.

DATES: *Effective:* March 30, 2001.

FOR FURTHER INFORMATION CONTACT: Thomas DelPozzo, (724) 794–5612.

Office of Personnel Management.

Steven R. Cohen,

Acting Director.

[FR Doc. 01–2476 Filed 1–24–01; 12:55 pm]

BILLING CODE 6325–40–P

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 103, 208, 210, 212, 235, 241, and 245a

[INS No. 2004–99; A.G. Order No. 2396–2001]

RIN 1115–AF53

Clarification of Parole Authority; Delay of Effective Date

AGENCY: Immigration and Naturalization Service, Department of Justice.

ACTION: Interim rule; delay of effective date.

SUMMARY: In accordance with the memorandum of January 20, 2001, from Andrew H. Card, Jr., the Assistant to the President and Chief of Staff, entitled ''Regulatory Review Plan'' (memorandum), this rule temporarily delays for 60 days the effective date of the interim rule entitled ''Clarification of Parole Authority,'' published in the **Federal Register** on December 28, 2000, at 65 FR 82254. This temporary delay will allow the Department an opportunity for further consideration of this rule.

EFFECTIVE DATE: The effective date of the interim rule amending 8 CFR Parts 103, 208, 210, 212,235, 241, and 245a published at 65 FR 82254, December 28, 2000, is delayed until March 30, 2001.

FOR FURTHER INFORMATION CONTACT: Kevin Jones, Deputy Assistant Attorney General, Office of Policy Development, U.S. Department of Justice, Washington, DC 20530, (202) 514–4604.

SUPPLEMENTARY INFORMATION: To the extent that 5 U.S.C. 553 applies, the Department's implementation of this rule effective upon publication in the **Federal Register** is based upon the ''good cause'' exception. This temporary delay in effective date will give Department officials the opportunity for further review and consideration of the earlier rule, consistent with the Memorandum of January 20, 2001, published in the **Federal Register** on January 24, 2001.

Dated: January 23, 2001.

Eric H. Holder, Jr.,

Acting Attorney General.

[FR Doc. 01–2411 Filed 1–25–01; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Part 244

[INS No. 1972–99; A.G. Order No. 2397–2001]

RIN 1115–AF01

Temporary Protected Status: Amendments to the Requirements for Employment Authorization Fee, and Other Technical Amendments; Delay of Effective Date

AGENCY: Immigration and Naturalization Service, Department of Justice.

ACTION: Final rule; delay of effective date.

SUMMARY: In accordance with the memorandum of January 20, 2001, from Andrew H. Card, Jr., the Assistant to the President and Chief of Staff, entitled ''Regulatory Review Plan'' (memorandum), this rule temporarily delays for 60 days the effective date of the final rule entitled ''Temporary Protected Status: Amendments to the Requirements for Employment Authorization Fee, and Other Technical Amendments,'' published in the **Federal Register** on December 28, 2000, at 65 FR 82256. This temporary delay will allow the Department an opportunity for further consideration of this rule.

EFFECTIVE DATE: The effective date of the final rule published at 65 FR 82256, December 28, 2000, adopting an interim rule that amended 8 CFR Part 244, is delayed until March 30, 2001.

FOR FURTHER INFORMATION CONTACT: Kevin Jones, Deputy Assistant Attorney General, Office of Policy Development, U.S. Department of Justice, Washington, DC 20530, (202) 514–4604.

SUPPLEMENTARY INFORMATION: To the extent that 5 U.S.C. 553 applies, the Department's implementation of this rule effective upon publication in the **Federal Register** is based upon the ''good cause'' exception. This temporary delay in effective date will give Department officials the opportunity for further review and consideration of the earlier rule, consistent with the Memorandum of January 20, 2001, published in the **Federal Register** on January 24, 2001.

Dated: January 23, 2001.

Eric H. Holder, Jr.,

Acting Attorney General.

[FR Doc. 01–2412 Filed 1–25–01; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 201

[Docket No. 90N–0056]

RIN 0910–AA74

Aluminum in Large and Small Volume Parenterals Used in Total Parenteral Nutrition; Delay of Effective Date

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; delay of effective date.

SUMMARY: The Food and Drug Administration (FDA) is delaying until January 26, 2003, the effective date of a final rule published in the **Federal Register** of January 26, 2000 (65 FR 4103), and originally scheduled to become effective on January 26, 2001. The final rule amends FDA's regulations to add certain labeling requirements for aluminum content in large volume parenterals (LVP's), small volume parenterals (SVP's), and pharmacy bulk packages (PBP's) used in total parenteral nutrition (TPN). The rule also specifies an upper limit of aluminum permitted in LVP's and requires applicants to submit to FDA validated assay methods for determining aluminum content in parenteral drug products. FDA is delaying the effective date of this rule to address concerns raised by affected parties about the possible inability to meet the requirements of the rule by the current effective date.

DATES: The effective date for § 201.323 (21 CFR 201.323), added at 65 FR 4103, January 26, 2000, is delayed until January 26, 2003. Submit written comments by April 26, 2001.

ADDRESSES: Submit written comments to the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20857. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Christine F. Rogers, Center for Drug Evaluation and Research (HFD–7), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–594–2041.

SUPPLEMENTARY INFORMATION:

I. Background

On January 26, 2000, the agency published final regulations at § 201.323 (21 CFR 201.323) enacting certain requirements regarding aluminum levels in SVP's, LVP's, and PBP's used in TPN. The new regulations added to part 201 (21 CFR part 201) at § 201.323(a) limit the aluminum content for all LVP's used in TPN therapy to 25 micrograms per liter (μg/L). This requirement applies to all LVP's used in TPN therapy, including, but not limited to, parenteral amino acid solutions, highly concentrated dextrose solutions, parenteral lipid emulsions, saline and electrolyte solutions, and sterile water for injection.

New § 201.323(b) requires the package insert for all LVP's used in TPN therapy to state that the drug product contains no more than 25 μg/L of aluminum. This statement must be included in the ''Precautions'' section of the labeling.

New § 201.323(c) requires the product's maximum level of aluminum at expiry to be stated on the immediate container label of SVP's and PBP's used in the preparation of TPN solutions. The statement on the immediate container label must read as follows: ''Contains more than ____ μg/L of aluminum.'' For those SVP's and PBP's that are lyophilized powders used in the preparation of TPN solutions, the maximum level of aluminum at expiry must be printed on the immediate container label as follows: ''When reconstituted in accordance with the package insert instructions, the concentration of aluminum will be no more than ____ μg/L.'' The maximum level of aluminum must be stated as the highest of: (1) The highest level for the batches produced during the last 3 years; (2) the highest level for the latest five batches, or (3) the maximum historical level, but only until completion of production of the first five batches after the effective date of the rule. The labeling requirement applies to all SVP's and PBP's used in the preparation of TPN solutions, including, but not limited to: Parenteral electrolyte solutions, such as calcium chloride, calcium gluceptate, calcium gluconate, magnesium sulfate, potassium acetate, potassium chloride, potassium phosphate, sodium acetate, sodium lactate, and sodium phosphate; multiple electrolyte additive solutions; parenteral multivitamin solutions; single-entity parenteral vitamin solutions, such as vitamin K injection, folic acid, cyanocobalamin, and thiamine; and trace mineral solutions, such as chromium, copper, iron, manganese, selenium, and zinc.

New § 201.323(d) requires the package insert for all LVP's, SVP's, and PBP's used in TPN to contain a warning statement. The warning statement must be included in the ''Warnings'' section of the labeling. The warning must contain the following language:

> WARNING: This product contains aluminum that may be toxic. Aluminum may reach toxic levels with prolonged parenteral administration if kidney function is impaired. Premature neonates are particularly at risk because their kidneys are immature, and they require large amounts of calcium and phosphate solutions, which contain aluminum.
>
> Research indicates that patients with impaired kidney function, including premature neonates, who receive parenteral levels of aluminum at greater than 4 to 5 μg/kg/day accumulate aluminum at levels associated with central nervous system and bone toxicity. Tissue loading may occur at even lower rates of administration.

New § 201.323(e) requires applicants and manufacturers to use validated assay methods to determine the aluminum content in parenteral drug products used in TPN therapy. The assay methods must comply with current good manufacturing practice regulations under part 211 (21 CFR part 211) (see § 211.194(a)). Holders of approved applications for LVP's, SVP's, and PBP's used in TPN therapy are required to submit a supplement to FDA under 21 CFR 314.70(c); see also 21 U.S.C. 356a(b) describing the assay method used for determining the aluminum content. Applicants must submit the validation method used and the release data for several batches. In addition, manufacturers of parenteral drug products not subject to an approved application must make assay methodology available to FDA during inspections (see §§ 211.160 and 211.180(c)).

New § 201.323 applies to all human drug LVP's, SVP's, and PBP's used in TPN. Licensed biological products are not covered by this rule.

II. Description and Rationale for a Delay of the Effective Date of the Final Rule

Since publication of the final rule, the agency has received letters and has had other communications with industry and industry trade associations in which industry has stated the need for additional time to meet the requirements of the rule. In early June 2000, the agency met with representatives from industry and an industry association. The meeting participants discussed their concerns with the following issues: (1) Inadequate

time for final rule implementation; (2) insufficient space on immediate container label of SVP's to state aluminum levels; (3) LVP's that will not meet the 25 μg/L limit without reformulation or repackaging; (4) unavailability of release data required for submission for low production products; (5) labeling SVP's and PBP's with less than 25 μg/L of aluminum; (6) the need for a uniform approach to aluminum testing during stability studies so that the sampling time points for the tests are the same for all products; and (7) clarification that the final rule applies only to LVP, SVP, and PBP drug products used in TPN and not to devices.

Industry and the industry association stated at this meeting that additional time is necessary for moving methods validation from research and development to production, to order and install equipment, and to reduce aluminum levels in raw materials. They also noted that a number of LVP's are in the 50 μg/L of aluminum range rather than the 25 μg/L range; therefore, these products will require repackaging or reformulation to meet the limit.

FDA has included in docket number 90N–0056 a copy of the meeting minutes. As part of the meeting, FDA confirmed the following: (1) That submission of historical batch release or stability data after completion of production of several batches is consistent with the final rule as it exists; (2) that stability testing at time zero and annually thereafter is consistent with the final rule as it exists; (3) that the final rule applies only to LVP, SVP, and PBP drugs used in TPN; and (4) that when a PBP is divided into aliquots of LVP's, the LVP aliquots must meet the 25 μg/L aluminum limit required for all LVP's.

After the meeting, FDA confirmed that § 201.10(i) permits a small package exemption that applies to SVP's with insufficient space on the immediate container label to state aluminum levels.

FDA is issuing this notice to delay the effective date of the rule to address the concerns raised by industry regarding the inability to meet certain requirements of the rule within 1 year.

III. Comment on the Extension of the Effective Date

FDA placed minutes from the meeting described in Section II of this document in Docket No. 90N–0056 shortly after the meeting in June 2000. Those minutes and the memoranda of associated telephone calls set forth in detail the reasons a stay of the effective date for the aluminum rule until January 26, 2003, would be in the public interest. In particular, the agency is concerned that some products unable to reformulate by the existing effective date are medically necessary and without alternatives thus potentially putting certain patients at great risk. Since the agency is extending the effective date of the aluminum final rule based on the information submitted to it and the safety concerns associated with the potential unavailability of certain medically necessary products it finds, for good cause, that this extension of the effective date of the final rule does not require further notice and comment procedures (5 U.S.C. 553(b); 21 CFR 10.40(e)(1)). More than 6 months have passed since the agency placed supporting information in Docket No. 90N–0056, and the agency has received no adverse correspondence or comments with respect to the request to delay the extension date. In addition, FDA has received several telephone inquiries from other affected parties requesting a delay of the effective date. Therefore, the agency is now extending the effective date of the final rule. However, in accordance with 21 CFR 10.40(e)(1), the agency will accept comment on this extension for a period of 90 days.

Dated: January 18, 2001.

Ann M. Witt,

Acting Associate Commissioner for Policy.

[FR Doc. 01–2125 Filed 1–25–01; 8:45 am]

BILLING CODE 4160–01–F

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CC Docket No. 96–115; FCC 99–223]

Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective date.

SUMMARY: The Commission's amendments to its customer proprietary network information (CPNI) rules, which contained information collection requirements, became effective on March 2, 2000.

EFFECTIVE DATES: The amendments to §§ 64.2005, 64.2007 and 64.2009 became effective on March 2, 2000.

FOR FURTHER INFORMATION CONTACT: Jodie Donovan, Attorney Adviser, Common Carrier Bureau, Policy and Program Planning Division, (202) 418–1580.

SUPPLEMENTARY INFORMATION: On August 16, 1999, the Commission adopted amended rules, pursuant to section 222 of the Communications Act, to protect CPNI and ensure that customers are able to control their personal information from unauthorized use, disclosure and access by common carriers. A summary of these amendments was published in the **Federal Register** (64 FR 53242, October 1, 1999). Because the rules imposed new information collection requirements that had not been approved by OMB, we stated that ''the Commission will publish a document in the **Federal Register** announcing the effective dates of these rules.'' The information collection requirements were approved by OMB on March 2, 2000. *See* OMB Nos. 3060–0715. Due to an oversight, the Commission failed to publish notice of OMB approval earlier, but we have treated the amendments as effective since March 2, 2000, as anticipated by our order. See Implementation of the Telecommunications Act of 1996, Telecommunications Carriers Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of section 271 and 272 of the Communications Act of 1934, as Amended, CC Docket Nos. 96–115 and 96–149, 14 FCC Rcd 14409, 14509, para. 207 (1999). This publication therefore satisfies the statement that the Commission would publish a document announcing the effective date of the rules.

List of Subjects on 47 CFR Part 64

Communications common carriers, Reporting and recordkeeping requirements, Telephone.

Federal Communications Commission.

Magalie R. Salas,

Secretary.

[FR Doc. 01–2151 Filed 1–25–01; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 01–92, MM Docket No. 00–186, RM–9970]

Radio Broadcasting Services; Rapid City, South Dakota, Gillette, Wyoming

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: At the request of Bethesda Christian Broadcasting, Inc., licensee of Station KLMP, Rapid City, South Dakota, the Commission substitutes Channel 250C for 250C1 at Rapid City, modifies the license of Station KLMP's license accordingly, and substitutes Channel 282A for vacant Channel 249A at Gillette, Wyoming, to accommodate the upgrade at Rapid City. See 65 FR 60602 (October 12, 2000). Channel 250C can be allotted at Rapid City, South Dakota, at coordinates 44–19–42 and 103–50–03, at petitioner's requested site. Channel 282A can be allotted at Gillette, Wyoming at coordinates 44–17–36 and 105–30–06 at a site 0.25 kilometers (0.25 miles) north of the community.

DATES: Effective March 5, 2001.

FOR FURTHER INFORMATION CONTACT: Victoria M. McCauley, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 00–186, adopted January 3, 2001, and released January 12, 2001. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street, SW, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Services, Inc., (202) 857–3800, 1231 20th Street, NW, Washington, DC 20036.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Part 73 of title 47 of the Code of Federal Regulations is amended as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

2. Section 73.202(b) the FM Table of Allotments under South Dakota is amended by removing Channel 250C1 at Rapid City and adding Channel 250C at Rapid City.

3. Section 73.202(b) the FM Table of Allotments under Wyoming is amended by removing Channel 249A at Gillette and adding Channel 282A at Gillette.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 01–2281 Filed 1–25–01; 8:45 am]

BILLING CODE 6712–01–U

Proposed Rules

Federal Register
Vol. 66, No. 18
Friday, January 26, 2001

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 THE TREASURY

Internal Revenue Service

26 CFR Part 301

[REG–108553–00]

RIN 1545–AY09

Classification of Certain Pension and Employee Benefit Trusts, and Other Trusts; Hearing Cancellation

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Cancellation of notice of public hearing on proposed rulemaking.

SUMMARY: This document provides notice of cancellation of a public hearing on proposed regulations relating to pension and employment benefit trusts, and other trusts.

DATES: The public hearing originally scheduled for Wednesday, January 31, 2001, at 10 a.m. is canceled.

FOR FURTHER INFORMATION CONTACT: Guy R. Traynor of the Regulations Unit, Office of Special Counsel, at (202) 622–7180 (not a toll-free number).

SUPPLEMENTARY INFORMATION: A notice of proposed rulemaking and notice of public hearing that appeared in the **Federal Register** on Thursday, October 12, 2000 (65 FR 60822), announced that a public hearing was schedule for January 31, 2001, at 10 a.m., in the auditorium of the Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC. The subject of the public hearing is proposed regulations under section 7701 of the Internal Revenue Code. The deadline for requests to speak and outlines of oral comments expired on January 10, 2001.

The notice of proposed rulemaking and notice of public hearing, instructed those interested in testifying at the public hearing to submit a request to speak and an outline of the topics to be addressed. As of January 16, 2001, no one has requested to speak. Therefore, the public hearing scheduled for January 31, 2001, is canceled.

Cynthia E. Grigsby,

Chief, Regulations Unit, Office of Special Counsel (Modernization and Strategic Planning).

[FR Doc. 01–1991 Filed 1–25–01; 8:45 am]

BILLING CODE 4830–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 36, 54, and 69

[CC Docket No. 96–45; FCC 01–8]

Federal-State Joint Board on Universal Service

AGENCY: Federal Communications Commission.

ACTION: Notice of proposed rule.

SUMMARY: In this document, the Commission seeks comment on the Recommended Decision of the Federal-State Joint Board on Universal Service (Joint Board) regarding a plan for reforming the rural universal service support mechanism submitted by the Rural Task Force.

DATES: Comments are due on or before February 26, 2001 and reply comments are due on or before March 12, 2001. Written comments by the public on the proposed and/or modified information collections discussed in this Further Notice of Proposed Rulemaking are due on or before February 26, 2001. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before March 27, 2001.

ADDRESSES: 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 filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. In addition to filing comments with the Secretary, a copy of any comments on the information collection(s) contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 1–C804, 445 12th Street, SW., Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Edward C. Springer, OMB Desk Officer, 10236 NEOB, 725 17th Street, NW., Washington, DC 20503, or via the Internet to vhuth@omb.eop.gov. Parties should also send three paper copies of their filings to Sheryl Todd, Accounting Policy Division, Common Carrier Bureau, Federal Communications Commission, 445 Twelfth Street, SW., Room 5–B540, Washington, DC 20554. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to Sheryl Todd, Accounting Policy Division, Common Carrier Bureau, Federal Communications Commission, 445 Twelfth Street, SW., Room 5–B540, Washington, DC 20554. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Services, Inc., 1231 20th Street, NW., Washington, DC 20037.

FOR FURTHER INFORMATION CONTACT: Greg Guice, Attorney, Common Carrier Bureau, Accounting Policy Division, (202) 418–7400.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Further Notice of Proposed Rulemaking in CC Docket No. 96–45 released on January 12, 2001. The full text of this document is available for public inspection during regular business hours in the FCC Reference Center, Room CY–A257, 445 Twelfth Street, SW., Washington, DC, 20554. This FNPRM contains proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA). It has been submitted to the Office of Management and Budget (OMB) for review under the PRA. OMB, the general public, and other Federal agencies are invited to comment on the proposed information collections contained in this proceeding.

Paperwork Reduction Act

The FPRM contains a proposed information collection. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and OMB to comment on the information collection(s) contained in this NPRM, as required by the PRA, Public Law 104–13. Public and agency comments on the proposed and/or modified information collections discussed in this Notice of

Proposed Rulemaking are due on or before February 26, 2001. Written comments must be submitted by the Office of Management and Budget (OMB) on the proposed and/or modified information collections on or before March 27, 2001.

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.

OMB Control Number: None.

Title: Federal State Joint Board on Universal Service—Proposed Plan for Reforming the Rural Universal Service Support Mechanism, CC Docket No. 96–45.

Form No.: None.

Type of Review: Proposed New Collections.

Respondents: Business or other for-profit.

Title	Number of respondents	Est. time per expense	Total annual burden
1. Self-Certified Disaggregation Plan	873	.66 (40 minutes)	576
2. Reporting of Working Loops at Cost-Zone Level	873	2 hrs	1746
3. State Certification Letter	51	3 hrs	153

Total Annual Burden: 2475.

Cost to Respondents: $0.

Needs and Uses: The Rural Task Force proposes that rural carriers be given a choice of three different options for disaggregating and targeting per-line universal service support, including high-cost loop support, Long Term Support (LTS), and Local Switching Support (LSS), to wire center cost zones. Path 1 would be available to rural carriers that do not want to target high-cost support. Path 2 would be available to rural carriers that want state commission review and approval of a disaggregation plan. Path 3 would be available to rural carriers interested in self-certifying a method for disaggregating universal service support into a maximum of two cost zones per wire center. A disaggregation plan filed under Path 3 must use a rationale that is reasonably related to the cost of providing service for each cost zone within each disaggregation category (high-cost loop support, LSS, and LTS). If these proposals are adopted, rural carriers that elect to disaggregate and target per-line support would be required to report loops at the cost-zone level, as opposed to reporting loops at the study area level. We believe the burden associated with this proposed reporting requirement is appropriately balanced with the benefits reporting rural carriers would receive. The Rural Task Force also proposes extension of the section 254(e) certification process to rural carriers. Under this process, state regulatory commissions would provide the Commission with annual certifications indicating that the carriers in their states receiving federal universal service support will use the support ''only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.'' This reporting requirement would provide states and carriers with access to federal universal service support in a way that ensures the integrity of the universal service fund. This is a nominal burden on rural carriers and is balanced against the high degree of federal universal service benefits rural carriers would receive. This proposed modification would ensure that receipt of the federal support is appropriate and being used in a manner consistent with section 254 of the Telecommunications Act of 1996. The goal of these proposals are to ensure that per-line high-cost universal service support more closely associates the cost of providing service and promotes efficient competitive entry.

Synopsis of NPRM

I. Introduction

1. In this Further Notice of Proposed Rulemaking (FNPRM), we seek comment on the Recommended Decision of the Federal-State Joint Board on Universal Service (Joint Board) regarding a plan for reforming the rural universal service support mechanism. The Joint Board sent to the Commission the Rural Task Force Recommendation as a good foundation for implementing a rural universal service plan that benefits consumers and provides a stable environment for rural carriers to invest in rural America. The Joint Board also identified specific issues for the Commission to address in implementing the Rural Task Force plan. The Joint Board's Recommended Decision, which incorporates the Rural Task Force plan as Appendix A, is attached as Appendix 1 to the FNPRM.

II. Issues for Comment

2. We seek comment on the Joint Board's conclusion that the Rural Task Force Recommendation is a good foundation for implementing a rural universal service plan for the next several years. Should we adopt the Rural Task Force plan as a means of providing stability to rural carriers over the next several years and encouraging investment in rural infrastructure? Does the Rural Task Force plan provide for universal service support that is sufficient for purposes of the Telecommunications Act of 1996? Parties should comment on the public policy implications of the Rural Task Force plan and/or particular aspects of the plan, including its potential effects on the competition and universal service goals of the 1996 Act, and whether and how it would promote consumer welfare. Parties also should address how small business entities, including small incumbent local exchange carriers and new entrants, will be affected by the Rural Task Force plan.

3. We also seek comment on specific implementation issues identified by the Joint Board, as well as any other issues related to implementation of the Rural Task Force Recommendation. First, we invite commenters to address the proposed safety valve mechanism for providing additional support to rural carriers that make meaningful post-transaction investments in acquired exchanges. How should safety valve support be distributed if the total amount of support for which rural carriers are eligible exceeds the proposed cap of five percent of the high-cost loop support fund? How should ''meaningful investment'' be defined for purposes of safety valve support? Should a carrier's safety valve support transfer to a different carrier as a result of a subsequent transfer of exchanges? Should safety valve support be fixed in competitive study areas in the same manner as other high-cost loop support, or would such an approach unduly dissuade investment? We invite commenters to address these and any

other issues involved in implementing a safety valve mechanism.

4. Second, we invite commenters to address implementation of the Rural Task Force proposal to fix per-line support in competitive study areas. The Joint Board agreed with the Rural Task Force that the Commission should fix support when a competitor begins providing services in a given study area, but stated that ''it is unclear how the high-cost loop fund cap would account for fixed rural carrier support.'' We seek comment from interested parties, including the Rural Task Force, on the relationship of the cap on high-cost loop support to fixed per-line support in competitive study areas. We also seek comment on whether the proposed ability of incumbent LECs to adjust their fixed per-line support levels to recover costs associated with catastrophic events should be limited by the availability of support from other sources, such as insurance, Rural Utilities Service loans, and federal or state emergency management relief. Commenters are invited to address these and any other issues involved in implementing the provisions of the Rural Task Force plan for support in competitive study areas.

5. Third, we seek comment on the Rural Task Force proposal to make above-the-cap safety net additive support available in years in which the cap on high-cost loop support is triggered to rural carriers with over 14 percent growth in telecommunications plant in service. As proposed, would the safety net additive mechanism enable rural carriers to recover more than 100 percent reimbursement on their incremental loop investment? If so, how should the mechanism be modified? We invite commenters to address this and any other safety net additive implementation issues. Finally, we invite interested parties to comment on any other issues related to implementation of the Rural Task Force plan.

III. Procedural Issues

A. Ex Parte Presentations

6. This is a permit but disclose rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules.

B. Initial Regulatory Flexibility Analysis

7. As required by the Regulatory Flexibility Act (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the proposals in this FNPRM. Written public comments are requested on the IRFA. These comments must be filed in accordance with the filing deadlines, and should have a separate and distinct heading designating them as responses to the IRFA. The Commission will send a copy of the FNPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA) in accordance with the RFA. In addition, the FNPRM and IRFA (or summaries thereof) will be published in the **Federal Register**.

1. Need for, and Objectives of, the Proposed Rules

8. The 1996 Act requires the Commission to consult with the Joint Board in implementing section 254, which establishes a number of principles for the preservation and advancement of universal service in a competitive telecommunications environment. The Commission initiated this proceeding to consider the Recommended Decision of the Joint Board regarding a rural universal service plan developed by the Rural Task Force. The Rural Task Force plan is a proposal for the distribution of universal service support to rural carriers which is designed to be implemented immediately and to remain in place over a five-year period. The Joint Board found that the Rural Task Force sought to achieve the goals of the 1996 Act to preserve and advance universal service, facilitate competition in rural areas, and provide a predictable level of universal service support. The Joint Board stated that the Rural Task Force plan would provide rural carriers with stability for planning their investments over the next several years, while seeking to encourage competition in high-cost areas through a flexible system for disaggregating support to establish the portable per-line support amount available to all eligible telecommunications carriers. The Joint Board found that additional support under the plan is ''generally designed to provide carriers serving rural areas with increased incentives to invest in new infrastructure and technologies.'' In sum, the Joint Board recommended the Rural Task Force plan to the Commission as a good foundation for implementing a rural universal service plan that benefits consumers and provides a stable environment for rural carriers to invest in rural America.

2. Legal Basis

9. This rulemaking action is supported by sections 4(i), 4(j), 201, 205, 254, and 403 of the Communications Act of 1934, as amended.

3. Description and Estimate of the Number of Small Entities to Which the Notice Will Apply

10. The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines ''small entity'' as having the same meaning as the term ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act, unless the Commission has developed one or more definitions that are appropriate to its activities. Under the Small Business Act, a ''small business concern'' is one that: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the SBA.

11. We have included small incumbent carriers in this RFA analysis. A ''small business'' under the RFA is one that, *inter alia,* meets the pertinent small business size standard (*e.g.,* a telephone communications business having 1,500 or fewer employees), and ''is not dominant in its field of operation.'' The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent carriers are not dominant in their field of operation because any such dominance is not ''national'' in scope. We have therefore included small incumbent carriers in this RFA analysis, although we emphasize that this RFA action has no effect on the Commission's analyses and determinations in other, non-RFA contexts.

12. *Local Exchange Carriers.* Neither the Commission nor the SBA has developed a definition for small providers of local exchange services. The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. According to the most recent *Telecommunications Industry Revenue* data, 1,348 incumbent carriers reported that they were engaged in the provision of local exchange services. We do not have data specifying the number of these carriers that are either dominant in their field of operations, are not independently owned and operated, or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of local exchange carriers that would

qualify as small business concerns under the SBA's definition. Of the 1,348 incumbent carriers, 13 entities are price cap carriers that would not be subject to the rules, if adopted. Consequently, we estimate that fewer than 1,335 providers of local exchange service are small entities or small incumbent local exchange carriers that may be affected by the proposed Rural Task Force plan.

13. *Competitive Access Providers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to competitive access services providers (CAPs). The closest applicable definition under the SBA rules is for telephone communications companies other than except radiotelephone (wireless) companies. According to the most recent *Trends in Telephone Service* data, 212 CAPs/competitive local exchange carriers and 10 other local exchange carriers reported that they were engaged in the provision of competitive local exchange services. We do not have data specifying the number of these carriers that are not independently owned and operated, or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are less than 212 small entity CAPs and 10 other local exchange carriers that may be affected by the proposed Rural Task Force plan.

14. *Cellular Licensees.* Neither the Commission nor the SBA has developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone (wireless) companies. This provides that a small entity is a radiotelephone company employing no more than 1,500 persons. According to the Bureau of the Census, only twelve radiotelephone firms from a total of 1,178 such firms which operated during 1992 had 1,000 or more employees. Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers were small businesses under the SBA's definition. In addition, we note that there are 1,758 cellular licenses; however, a cellular licensee may own several licenses. In addition, according to the most recent *Telecommunications Industry Revenue* data, 808 carriers reported that they were engaged in the provision of either cellular service or Personal Communications Service (PCS) services, which are placed together in the data. We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 808 small cellular service carriers that may be affected by the proposed Rural Task Force plan.

15. *Broadband Personal Communications Service (PCS).* The broadband 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 less than $40 million in the three previous calendar years. For Block F, an additional classification for ''very small business'' was added and is defined as an entity that, together with their affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. These regulations defining ''small entity'' in the context of broadband PCS auctions have been approved by the SBA. No small businesses within the SBA-approved definition 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% of the 1,479 licenses for Blocks D, E, and F. Based on this information, we conclude that the number of small broadband PCS licensees will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks, for a total of 183 small entity PCS providers as defined by the SBA and the Commission's auction rules.

16. *Rural Radiotelephone Service.* The Commission has not adopted a definition of small entity specific to the Rural Radiotelephone Service. A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio Systems (BETRS). We will use the SBA's definition applicable to radiotelephone companies, *i.e.,* an entity employing no more than 1,500 persons. There are approximately 1,000 licensees in the Rural Radiotelephone Service, and we estimate that almost all of them qualify as small entities under the SBA's definition.

17. *Specialized Mobile Radio (SMR).* The Commission awards bidding credits in auctions for geographic area 800 MHz and 900 MHz SMR licenses to firms that had revenues of no more than $15 million in each of the three previous calendar years. In the context of 900 MHz SMR, this regulation defining ''small entity'' has been approved by the SBA; approval concerning 800 MHz SMR is being sought.

18. These fees apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. We do 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. We assume, for purposes of this IRFA, that all of the remaining existing extended implementation authorizations are held by small entities, as that term is defined by the SBA.

19. For geographic area licenses in the 900 MHz SMR band, there are 60 who qualified as small entities. For the 800 MHz SMR's, 38 are small or very small entities.

20. *Fixed Microwave Services.* Microwave services include common carrier, private-operational fixed, and broadcast auxiliary radio services. At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not yet defined a small business with respect to microwave services. For purposes of this IRFA, we will utilize the SBA's definition applicable to radiotelephone companies—i.e., an entity with no more than 1,500 persons. We estimate, for this purpose, that all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition for radiotelephone companies.

21. *39 GHz Licensees.* Neither the Commission nor the SBA has developed a definition of small entities applicable to 39 GHz licensees. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone (wireless) companies. This provides that a small entity is a radiotelephone company employing no more than 1,500 persons. For purposes of the 39 GHz license auction, the Commission defined ''small entity'' as an entity that has average gross revenues of less than $40 million in the three previous calendar years, and ''very small entity'' as an entity that has average gross revenues of not more that $15 million for the preceding three calendar years. The Commission has granted licenses to 29 service providers in the 39 GHz service. We do not have

data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of 39 GHz licensees that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are no more than 29 39 GHz small business providers that may be affected by the proposed Rural Task Force plan.

4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

22. The Rural Task Force proposes that rural carriers be given a choice of three different options for disaggregating and targeting per-line universal service support, including high-cost loop support, Long Term Support (LTS), and Local Switching Support (LSS), to wire center cost zones. Path 1 would be available to rural carriers that do not want to target high-cost support. Path 2 would be available to rural carriers that want state commission review and approval of a disaggregation plan. Path 3 would be available to rural carriers interested in self-certifying a method for disaggregating universal service support into a maximum of two cost zones per wire center. A disaggregation plan filed under Path 3 must use a rationale that is reasonably related to the cost of providing service for each cost zone within each disaggregation category (high-cost loop support, LSS, and LTS). Rural carriers would be required to choose one of the paths within 270 days of the effective date of the proposed new rules. If these proposals are adopted, rural carriers that elect to disaggregate and target per-line support would be required to report loops at the cost-zone level, which would be a modification of the current requirement that carriers report loops at the study-area level. This change should require only minor increases to a carrier's reporting burdens, and predominantly only in the first year that the carrier revises its method of reporting. We estimate that the annual burden hours in the first year would be 60 hours. We estimate subsequent annual burden hours at 8 hours. We believe the burden associated with this proposed reporting requirement is appropriately balanced with the benefits reporting rural carriers would receive.

23. The Rural Task Force also proposes extension of the section 254(e) certification process to rural carriers. Under this process, state regulatory commissions would provide the Commission with annual certifications indicating that the carriers in their states receiving federal universal service support will use the support ''only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.'' This reporting requirement would provide states and carriers with access to federal universal service support in a way that ensures the integrity of the universal service fund. We estimate that the annual burden hours associated with the section 254(e) certification process would be 12 hours per carrier. This is a nominal burden on rural carriers and is balanced against the high degree of federal universal service benefits rural carriers would receive.

5. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

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

25. The Rural Task Force Recommendation under consideration herein is the product of analysis of a number of options for distributing federal universal service support to rural carriers, including the continuation or modification of the current system of support, a system of support based on forward-looking cost models, competitive bidding approaches, rate buy-down mechanisms, and a melded approach combining aspects of both the current, embedded-cost system and a forward-looking support system. The results of the Rural Task Force's evaluation of these various options are set forth in the third and fourth White Papers prepared by the Rural Task Force. The Rural Task Force ultimately recommended the modified version of the current high-cost loop support mechanism based on carriers' embedded costs set forth in its Recommendation.

26. Alternatives to the proposed adoption of the Rural Task Force Recommendation include continuation of the current high-cost loop support mechanism for rural carriers, developing a new support mechanism based on forward-looking economic costs, or adopting specific aspects of the Rural Task Force Recommendation instead of adopting the Recommendation as a whole. We invite comment on how any of these alternatives, or any other alternatives discussed herein, would be likely to affect small businesses.

6. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

27. None.

IV. Comment Filing Procedures

28. Pursuant to §§ 1.415 and 1.419 of the Commission's rules, interested parties may file comments February 26, 2001, and reply comments March 12, 2001. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.

29. 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, 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.

V. Ordering Clauses

30. Pursuant to the authority contained in sections 4(i), 4(j), 201–205, 254, and 403 of the Communications Act of 1934, as amended, this Further Notice of Proposed Rulemaking is adopted.

31. The Commission's Consumer Information Bureau, Reference Information Center, shall send a copy of this Further 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 36

Communications common carriers, Reporting and recordkeeping requirements, Telephone.

47 CFR Part 54

Reporting and recordkeeping requirements, Telecommunications, Telephone.

47 CFR Part 69

Communications common carriers, Reporting and recordkeeping requirements, Telephone.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 01–2377 Filed 1–25–01; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 01–59; MM Docket No. 00–154; RM–9935]

Radio Broadcasting Services; Fair Haven, VT

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; dismissal of.

SUMMARY: The Commission dismisses the request of Vermont Community Radio to allot Channel 223A to Fair Haven, VT, as the community's first local aural service. *See* 65 FR 54833, September 11, 2000. Neither the petitioner nor any other party filed an expression of continuing interest in the allotment.

FOR FURTHER INFORMATION CONTACT: Leslie K. Shapiro, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Report and Order, MM Docket No. 00–154, adopted January 3, 2001, and released January 12, 2001. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 445 12th Street, SW, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Services, Inc., (202) 857–3800, 1231 20th Street, NW, Washington, DC 20036.

List of Subjects in 47 CFR part 73

Radio broadcasting.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 01–1984 Filed 1–25–01; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 01–63, MM Docket No. 98–284, RM–9697]

Radio Broadcasting Services; Galveston and Missouri City, TX

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; denial of petition.

SUMMARY: This document denies a Petition for Rule Making filed by KQQK License, Inc. proposing the reallotment of Channel 293C from Galveston to Missouri City, Texas, and modification of its Station KQQK–FM license to specify Missouri City as the community of license. See 65 FR 57799, September 26, 2000.

FOR FURTHER INFORMATION CONTACT: Robert Hayne, Mass Media Bureau, (202) 418–2177.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order* in MM Docket No. 99–284, adopted January 10, 2001, and released January 12, 2001. The full text of this decision is available for inspection and copying during normal business hours in the FCC Reference Information Center at Portals ll, CY–A257, 445 12th Street, SW, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., (202) 857–3805, 1231 M Street, NW, Washington, DC 20036.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 01–2283 Filed 1–25–01; 8:45 am]

BILLING CODE 6712–01–U

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA No. 01–93, MM Docket No. 01–6, RM–10009]

Radio Broadcasting Services; Steubenville, OH and Burgettstown, PA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition filed on behalf of Keymarket Licenses, LLC, requesting the reallotment of Channel 278B from Steubenville, Ohio, to Burgettstown, Pennsylvania, and modification of the license for Station WOGH (FM) to specify Burgettstown, Pennsylvania, as the community of license. The coordinates for Channel 278B at Burgettstown are 40–20–32 and 80–37–14. Although Burgettstown is located within 320 kilometers of the U.S.-Canadian border, concurrence of the Canadian Government is not required as no change in channel or transmitter site has been requested. In accordance with Section 1.420(i) of the Commission's Rules, we shall not accept competing expressions of interest in the use of Channel 278B at Burgettstown.

DATES: Comments must be filed on or before March 5, 2001, and reply comments on or before March 20, 2001.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner's counsel, as follows: Allan G. Moskowtitz, Kaye, Scholer, Fierman, Hays & Handler, LLP, 901 15th Street, NW., Suite 1100, Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Kathleen Scheuerle, Mass Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rule Making, MM Docket No. 01–6, adopted January 3, 2001, and released January 12, 2001. The full text of this Commission decision is available for inspection and copying during normal business hours in the Commission's Reference Center, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Services, Inc., 1231 20th Street, NW., Washington, DC. 20036, (202) 857–3800, facsimile (202) 857–3805.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting

For the reasons discussed in the preamble, the Federal Communications

Commission proposes to amend 47 CFR part 73 as follows:

PART 73—[RADIO BROADCAST SERVICES]

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Pennsylvania, is amended by adding Burgettstown, Channel 278B.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 01–2282 Filed 1–25–01; 8:45 am]

BILLING CODE 6712–01–U

Notices

Federal Register

Vol. 66, No. 18

Friday, January 26, 2001

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.

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 the Procurement List.

SUMMARY: This action adds to the Procurement List commodities and services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

EFFECTIVE DATE: February 26, 2001.

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: Louis R. Bartalot (703) 603–7740.

SUPPLEMENTARY INFORMATION: On October 13, November 13, November 24 and December 1, 2000, the Committee for Purchase From People Who Are Blind or Severely Disabled published notices (65 FR 60903, 67714, 70549 and 75241) of proposed additions to the Procurement List.

Additions

The following comments pertain to Laundry Service, Stratton Medical Center, 113 Holland Avenue, Albany, New York.

Comments were received from a Member of Congress, a nonprofit agency and from counsel for the current contractor. The Member claimed that the addition of this service to the Procurement List would reduce the current contractor's revenue substantially and could cause people with disabilities employed by the contractor to lose their jobs. The Member also indicated that the Government might pay higher prices for inferior laundry service.

The nonprofit agency in Utica, New York, was concerned that the loss of the contract would force the current contractor to lay off people who are severely disabled and that this was counter to the purpose of the JWOD Program. Counsel for the current contractor made these same points, noting also that the contractor had been given an award by a local disability organization for its hiring of people with disabilities. This commenter claimed that the original estimated price for the laundry service was based on an unrealistically low estimate of the Government's service requirement. The commenter also claimed that the contractor had become dependent on the revenue from this Government service after providing it for five years. The commenter also indicated the assertion that the nonprofit agency would provide inferior service at a higher price was based on the belief that the nonprofit agency is new to the laundry business.

The nonprofit agency that would be performing the service currently operates a laundry service under a State program for nonprofit agencies employing people with disabilities. The Committee has found the nonprofit agency to be capable of performing the service being added to the Procurement List, based on an assessment by the central nonprofit agency, in which the Government contracting activity concurred, and review by its own staff.

The Government's need for laundry services at this location is declining, as shown by the fact that the contract price for the last full year declined considerably from the previous year. This decline is expected to continue, although not as much as the original estimated price, which has been revised upward, would indicate. The revised estimate, which the Committee is adopting as the fair market price for this service, also reflects supply economies available to the nonprofit agency because of its ability to use Government supply sources when providing this service under the Committee's program.

Laundry service at this location uses the Government's laundry facility in Albany, NY. The current contractor has its own facility in Utica, NY, which is also the location of the disability agency which honored the contractor for its hiring of people with disabilities. Because of the distance between Utica and Albany, it is unlikely that employees with disabilities at the Utica facility are being used to provide services in Albany. Any employees with disabilities at the Government facility in Albany would be offered employment by the nonprofit agency. The commenter indicated that such offers have been made. Consequently, the Committee does not believe that addition of this laundry service to the Procurement List is likely to cause people with disabilities to lose their jobs.

Because the contract price for the last full year of laundry service is lower than the previous year, the percentage of the current contractor's total sales which this laundry service represents is lower than the two commenters claimed. This lower percentage is at a level which the Committee normally considers not to constitute severe adverse impact on a contractor. As indicated above, the Committee believes that had the current contractor continued to provide service for this declining requirement, this percentage would have declined further. The Committee looks at the length of continuous service when assessing the dependency of a contractor on a contract for a service. The current contractor's five years of providing this service have not been continuous, as the contractor did not provide the service between April 15, 1992 and December 1, 1998. Accordingly, the Committee does not believe the contractor could have become seriously dependent on revenues from this laundry service. For this reason, and taking into account the impact considerations discussed in the last paragraph, the Committee has concluded that addition of this laundry service to the Procurement List is not likely to have a severe adverse impact on the current contractor.

The following material pertains to all of the items being added to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the commodity and services and impact of the additions on the current or most recent contractors, the Committee has determined that the commodities and services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 46–48c and 41 CFR 51–2.4.

I certify that the following action will not have a significant impact on a

substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the commodities and services to the Government.

2. The action will not have a severe economic impact on current contractors for the commodities and services.

3. The action will result in authorizing small entities to furnish the commodities and services to the Government.

4. 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 commodities and services being added to the Procurement List.

Accordingly, the following commodity and services are hereby added to the Procurement List:

Commodities

Line, Multi-Loop
1670–01–062–6301
1670–01–062–6303
1670–01–062–6306
1670–01–062–6309
1670–01–062–6312
1670–01–062–6313
1670–01–064–4451
1670–01–064–4452
1670–01–064–4454
1670–01–107–7652

Services

Janitorial/Custodial, Mooers Border Station, Mooers, New York
Janitorial/Custodial, Redden U.S. Federal Courthouse, Fleet Management Center, 310 West 6th Street, Medford, Oregon
Janitorial/Custodial, United States Coast Guard Air Station Borinquen, Aguadilla, Puerto Rico,
Janitorial/Grounds Maintenance, Nininger U.S. Army Reserve Center, Fort Lauderdale, Florida
Laundry Service, Stratton Medical Center, 113 Holland Avenue, Albany, New York

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.

G. John Heyer,

General Counsel.

[FR Doc. 01–2417 Filed 1–25–01; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled

ACTION: Proposed Additions to Procurement List.

SUMMARY: The Committee is proposing to add to the Procurement List commodities and a service to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

Comments Must be Received on or Before: February 26, 2001.

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: Louis R. Bartalot (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 possible impact of the proposed actions.

If the Committee approves the proposed additions, all entities of the Federal Government (except as otherwise indicated) will be required to procure the commodities and service listed below from nonprofit agencies employing persons who are blind or have other severe disabilities. I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. 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 commodities and service to the Government.

2. The action will result in authorizing small entities to furnish the commodities 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 commodities and service proposed for addition to the Procurement List. Comments on this certification are invited. Commenters should identify the statement(s) underlying the certification on which they are providing additional information.

The following commodities and service have been proposed for addition to Procurement List for production by the nonprofit agencies listed:

Commodities

Folder, Classification
7530–00–NIB–0548
7530–00–NIB–0549
7530–00–NIB–0550
7530–00–NIB–0551
7530–00–NIB–0552
7530–00–NIB–0555
7530–00–NIB–0556
7530–00–NIB–0557
NPA: The Clovernook Center for the Blind, Cincinnati, Ohio

Hose, Fire
4210–00–777–1591
4210–00–777–1592
4210–00–892–5494
4210–01–037–7031
4210–01–039–4855
4210–01–165–6597
4210–01–166–8122
4210–01–167–1061
NPA: The Oklahoma League for the Blind, Oklahoma City, Oklahoma

Plaques
9905–01–357–9983
9905–01–357–9984
9905–01–357–9985
9905–01–357–9986
9905–01–408–2270
9905–01–408–6049
9905–01–408–6051
NPA: Delaware Division for the Visually Impaired, New Castle, Delaware

Service

Administrative Services
U.S. Army Space and Missile Defense Command (SMDC), Huntsville, Alabama
NPA: Huntsville Rehabilitation Foundation, Huntsville, Alabama

G. John Heyer,

General Counsel.

[FR Doc. 01–2418 Filed 1–25–01; 8:45 am]

BILLING CODE 6353–01–P

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 of Meeting: 26 January 2001.

Time of Meeting: 0800–1500.

Place of Meeting: Fort Belvoir, Virginia.

Agenda: The Army Science Board's (ASB) Special Summer Study on "Manpower and Personnel for the Soldier Systems in the

Objective Force'' will have an introductory meeting to discuss their Terms of Reference, Jan 2001 (Draft) and plans for future effort. A copy of the agenda is provided below: These meetings will be open to the public. Any interested person may attend, appear before, or file statements with the committee at the time and in the manner permitted by the committee. For further information, please contact, Ms. Chérie Smith (703) 806–4237.

Agenda Topics

Welcome—0800–0815
Soldier Systems 2001 Main Study—0815–0900
Future Soldiers a View—0900–0945
Manpower & Personnel Special Study—0945–1000
R&D Program 2001—1000–1045
Break—1045–1100
MANPRINT and FCS—1100–1130
USAR Prospective—1130–1215
Working Lunch—1215–1300
Team Discussion (TOR, Organization, Next Agenda)—1300–1500

Wayne Joyner,

Program Support Specialist, Army Science Board.

[FR Doc. 01–2390 Filed 1–25–01; 8:45 am]

BILLING CODE 3710–08–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 of Meeting: 29–30 January 2001.

Time of Meeting: 0830–1700, 29 January 2001; 0900–1600, 30 Janaury 2001.

Place: 9th floor Conf. Room, Presidential Towers, Crystal City Virginia.

Agenda: The Army Science Board's (ASB) panel will conduct a study on ''Knowledge Based Management and Information Reliability'' to exam innovative ways of addressing technology issues that have the potential to ''weigh down'' our future Warfighters with massive amounts of data. The 2-day meeting will be open to the public. Any interested person may attend, appear before, or file statements with the committee at the time and in the manner permitted by the committee. For further information, please contact Mr. Randy Woodson, Office of the DA DCSINT, 703–604–2462.

Wayne Joyner,

Program Support Specialist, Army Science Board.

[FR Doc. 01–2391 Filed 1–25–01; 8:45 am]

BILLING CODE 3710–08–M

DEPARTMENT OF DEFENSE

Department of the Navy

Special Area Solid Waste Discharge Standards for Ships Decommissioning Between January 1, 2001, and December 31, 2005

AGENCY: Department of Defense.

ACTION: Notice.

SUMMARY: Section 324 of the National Defense Authorization Act for Fiscal Year 1997, Public Law 104–201, requires the Secretary of the Navy to prescribe and publish in the **Federal Register** standards to ensure that ships decommissioning between January 1, 2001, and December 31, 2005, are to the maximum extent practicable without impairing the operations or operational capabilities of the ship, operated in a manner that is consistent with the special area requirements of Regulation 5 of Annex V to The International Convention for the Prevention of Pollution from Ships (MARPOL) and provide a list of the applicable ships.

FOR FURTHER INFORMATION CONTACT: Mr. Louis Maiuri, Office of the Chief of Naval Operations Environmental Protection, Safety and Occupational Health Division, Crystal Plaza #4, Room 654, 2211 South Clark Place, Arlington, Virginia, 22244–5108, telephone number (703) 602–2602.

SUPPLEMENTARY INFORMATION: MARPOL as amended by the MARPOL Protocol of 1978, protects the ocean environment by prohibiting some discharges altogether, restricting other discharges to particular distances from land, and establishing ''special areas'' within which additional discharge limitations apply. One of the discharges specified for restriction under MARPOL Annex V is solid waste.

Ships that are decommissioning between January 1, 2001, and December 31, 2005, and do not have Navy solid waste equipment installed, will, to the maximum extent practicable without impairing the operations or operational capabilities of these ships, be operated in a manner that is consistent with the special area requirements of Regulation 5 of Annex V of MARPOL in accordance with the following standards:

Prior to entering a special area, surface ships will identify essential logistics requirements needed to facilitate the offload and disposal of shipboard garbage at either port reception facilities or supply ships, which have the capacity to receive and store other ship's garbage for transfer and disposal ashore.

Surface ships may not discharge unprocessed garbage in the special areas defined in Regulation 5 of ANNEX V unless such discharge is in compliance with the applicable exceptions listed in Regulation 6 of ANNEX V which states that the prohibition on the discharge of garbage in special areas ''* * * shall not apply to:

(a) the disposal of garbage from a ship necessary for the purpose of securing the safety of a ship and those on board or saving life at sea, or

(b) the escape of garbage resulting from damage to a ship or its equipment provided all reasonable precautions have been taken before and after the occurrence of the damage for the purpose of preventing or minimizing the escape; * * *''

On the unusual occasions in which a discharge may be necessary in a special area in accordance with the exceptions noted above, surface ships shall use all available means to cause unprocessed garbage to sink as rapidly as possible. The commanding officer shall note the details of such a discharge (date of discharge, special area involved, and nature and amount of discharge) in the ship's deck log. Upon completion of operations in a special area in which a garbage discharge was necessary, ships shall report all discharges other than food waste, pulped garbage and shredded and bagged metal and glass to CNO (N45), regarding:

(a) Date of discharge.

(b) Special area involved.

(c) Nature and amount of discharge (estimated pounds of unshredded metal and glass; unpulped wood, paper and cardboard; ceramic; or other non-food material).

These standards apply to the following ships:

USS CONSTELLATION (CV 64)

USS HEWITT (DD 966)

USS AUSTIN (LPD 4)

USS OGDEN (LPD 5)

USS WADSWORTH (FFG 9)

USS GEORGE PHILIP (FFG 12)

USS SAMUEL E. MORISON (FFG 13)

USS SIDES (FFG 14)

USS ESTOCIN (FFG 15)

Dated: January 11, 2001.

J.L. Roth,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 01–2392 Filed 1–25–01; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF ENERGY

Record of Decision for the Programmatic Environmental Impact Statement for Accomplishing Expanded Civilian Nuclear Energy Research and Development and Isotope Production Missions in the United States, Including the Role of the Fast Flux Test Facility

AGENCY: Department of Energy (the Department).

ACTION: Record of Decision (ROD).

SUMMARY: Under the authority of the Atomic Energy Act of 1954, the Department's missions include: (1) Producing isotopes for research and applications in medicine and industry; (2) meeting nuclear material needs of other Federal agencies; and (3) conducting research and development activities for civilian use of nuclear power. The Department has evaluated potential enhancements to its nuclear infrastructure that would allow it to meet these responsibilities over approximately the next three to four decades. As part of this evaluation, the Department prepared the Programmatic Environmental Impact Statement for Accomplishing Expanded Civilian Nuclear Energy Research and Development and Isotope Production Missions in the United States, Including the Role of the Fast Flux Test Facility (Nuclear Infrastructure or NI PEIS) pursuant to the National Environmental Policy Act (NEPA). The NI PEIS evaluates environmental impacts that could result from implementation of alternatives and options that were considered for enhancement of the Department's nuclear infrastructure. The Final NI PEIS (DOE/EIS–0310) was issued on December 15, 2000 (65 FR 78484).

After considering the environmental impacts, costs, public comments, nonproliferation issues, and programmatic factors, the Department has decided to implement the Preferred Alternative identified in Section 2.8 of the Final NI PEIS (Alternative 2, Option 7). Domestic production of plutonium-238 will be reestablished to support U.S. space exploration. For this purpose, the Advanced Test Reactor (ATR) in Idaho and the High Flux Isotope Reactor (HFIR) at the Oak Ridge National Laboratory (ORNL) in Tennessee will be used to irradiate neptunium-237 targets. Plutonium-238 production will not interfere with existing primary missions at ATR and HFIR. The Radiochemical Engineering Development Center (REDC) at ORNL will be used for fabricating targets and isolating plutonium-238 from the irradiated targets.

The Department expects its current nuclear infrastructure to satisfy short-term requirements for isotopes needed in medicine, industry, and research, and nuclear energy research for civilian applications. If significantly larger amounts of isotopes are required in the future, others would need to respond to these requirements. To explore a potential option to address some future research infrastructure needs, DOE intends to work over the next two years to establish a conceptual design for an Advanced Accelerator Applications (AAA) facility, which could be modified to produce some proton-enriched isotopes. The new accelerator(s) (Alternative 3) and new research reactor (Alternative 4) described in the NI PEIS will not be constructed. The Fast Flux Test Facility (FFTF) in Washington will be permanently deactivated. If DOE proposes specific enhancements of existing facilities or deployment of the AAA facility, further NEPA review would be conducted.

ADDRESSES: The Final NI PEIS, including the NI PEIS Summary, and this ROD are available on the Department's National Environmental Policy Act (NEPA) website at *http://tis.eh.doe.gov/nepa/docs/docs.htm.* The ROD is also available at web address *http://www.nuclear.gov.* Requests for copies of the NI PEIS, the NI PEIS Summary, or this ROD should be mailed to Colette E. Brown, Document Manager, Office of Space and Defense Power Systems (NE–50), Office of Nuclear Energy, Science and Technology, U.S. Department of Energy, 19901 Germantown Road, Germantown, MD 20874, Attention: NI PEIS. Requests may also be electronically mailed to Internet address *colette.brown@hq.doe.gov* or faxed to Ms. Brown at 301–903–1510.

FOR FURTHER INFORMATION CONTACT: For information on the nuclear infrastructure missions, alternatives, or environmental impacts, contact Colette E. Brown at the addresses given in the previous paragraph. For general information on the Department's NEPA process, please contact Carol Borgstrom, Director, Office of NEPA Policy and Compliance (EH–42), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585; call 202–586–4600; or leave a message at the toll-free telephone number, 800–472–2756.

SUPPLEMENTARY INFORMATION:

I. Background

On October 5, 1998, the Department published a Notice of Intent (63 FR 53398) to prepare an environmental impact statement concerning the production of plutonium-238 in support of U.S. space missions. Following the public scoping process, which was extended until January 4, 1999, the Department began preparation of the Environmental Impact Statement for the Proposed Production of Plutonium-238 for Use in Advanced Radioisotope Power Systems for Future Space Missions (Plutonium-238 Production EIS). Restarting FFTF was dismissed as a reasonable alternative for that proposed EIS because it would not be cost effective to restart the reactor for the sole purpose of producing plutonium-238.

On August 18, 1999, the Department announced that it would prepare the NI PEIS—a programmatic NEPA document that would evaluate the environmental impacts that could result from enhancement of the Department's nuclear infrastructure. Restart of FFTF was included as a reasonable alternative in the NI PEIS for several missions, including the production of plutonium-238. Preparation of the Plutonium-238 Production EIS was terminated as a separate NEPA review and its scope was incorporated in the NI PEIS.

Purpose and Need for Agency Action

The Department's obligations under the Atomic Energy Act of 1954 require it to operate and maintain nuclear facilities such as reactors, accelerators, and various nuclear support facilities. The shutdown of aging facilities coupled with projected increases in demand for nuclear services and products necessitated an assessment of the Department's nuclear infrastructure needs.

Over the past 50 years, the use of isotopes in medicine and industry has increased markedly. Currently, over 12 million nuclear medical procedures are performed each year in the United States. Expert medical panels have projected significant increases in the use of nuclear diagnostic, therapeutic, and research medicines during the early decades of the twenty-first century. As discussed in the NI PEIS, Chapter 1, Section 1.2.1, an Expert Panel convened by the Department in 1998 concluded that the growth in demand for diagnostic and therapeutic isotopes would likely exceed seven percent per year over the next 20 years. The Panel also concluded that the cost and availability of medical isotopes would constrain progress in various areas of medical research. The Expert Panel's findings were adopted by the Nuclear Energy Research Advisory Committee (NERAC), which further concluded that the current domestic nuclear

infrastructure is not adequate to ensure a continued supply of medical isotopes in the face of projected increases in demand. Approximately one-half of the Department's current isotope production capability is being used. Projections of increased demands for medical isotopes indicate that the Department's production capability will be fully utilized within a decade or less in the absence of enhancements to the existing nuclear infrastructure.

The Department and its predecessor agencies have supplied plutonium-238 for U.S. space programs for more than three decades. The National Aeronautics and Space Administration (NASA) uses plutonium-238 as a source of electric power and heat for deep space missions. Nuclear reactors and chemical processing facilities at the Department's Savannah River Site (SRS) historically produced plutonium-238 for the Nation's space programs. However, all nuclear reactors at SRS have been shut down. Chemical processing facilities in F-Canyon and H-Canyon at SRS are scheduled for shutdown following completion of their current mission to prepare Cold War legacy nuclear materials and some spent nuclear fuel for disposition. In 1992, the Department signed a five-year contract to purchase up to 10 kilograms (22 pounds) of plutonium-238 per year from Russia—not to exceed 40 kilograms (88 pounds) total. In 1997, a five-year contract extension was negotiated. The extension will expire in 2002. Thus far, approximately 9 kilograms (20 pounds) of plutonium-238 have been purchased from Russia under this contract. Plutonium-238 is purchased from Russia on an as-needed basis because it is costly to remove the decay products that result from an extended period of storage. As discussed in detail in Section 1.2.2 of the NI PEIS, updated mission guidance from NASA indicates that the U.S. inventory of plutonium-238 reserved for U.S. space missions is likely to be depleted by 2005. The Department must decide how to continue to meet NASA's need for plutonium-238 beyond that point.

In November 1997, the President's Committee of Advisors on Science and Technology reported that restoring a viable nuclear energy option is important to the Nation's ability to meet its expanding energy requirements (See NI PEIS, Chapter 1, Section 1.2.3). The Committee recommended that the Department reinvigorate its nuclear energy research and development activities to address potential barriers to the expanded use of nuclear power. In response to this recommendation, the Nuclear Energy Research Initiative was started in fiscal year 1999, and the Nuclear Energy Plant Optimization Program was started in fiscal year 2000. The Nuclear Energy Research Initiative sponsors research and development focused on the removal of barriers to the expanded use of nuclear power. Nuclear Energy Plant Optimization is a cost-shared program with private industry that sponsors research and development intended to ensure that current nuclear plants can continue to provide electric power up to and beyond their initial 40-year license period. In June 2000, the NERAC Subcommittee on Long-Term Planning for Nuclear Energy Research developed guidelines for research and development in the areas of materials research, nuclear fuel research, and advanced reactor development. One of the Department's objectives is to provide and maintain a nuclear infrastructure that supports civilian nuclear energy research and development.

In summary, the Department's activities regarding medical isotope supplies, support of U.S. space missions, and research and development in the area of civilian nuclear technology will require an appropriate nuclear infrastructure. In reaching its decision concerning a nuclear infrastructure appropriate for the next 35 years, the Department assigned equal priority to all of these responsibilities.

NEPA Process

On September 15, 1999, the Department published a Notice of Intent in the **Federal Register** (64 FR 50064) to prepare the NI PEIS. The 45-day scoping period for the NI PEIS ended on October 31, 1999. Scoping meetings were held in locations central to potentially affected areas (Oak Ridge, Tennessee; Idaho Falls, Idaho; and Richland, Washington), as well as areas in which the alternatives would have little or no environmental impact, but in which there was public interest (Hood River, Oregon; Portland, Oregon; Seattle, Washington; and Washington, D.C.).

The Department received approximately 7,000 scoping comments. As a result of comments received during the scoping period, a new alternative (Permanently Deactivate FFTF with No New Missions) was added to the alternatives evaluated in the NI PEIS, the Fluorinel Dissolution Process Facility (FDPF) in Idaho was added as a processing facility for the processing of plutonium-238, and a commercial light water reactor at a generic site was added as a candidate irradiation facility for the production of plutonium-238. Other comments included requests for inclusion of information about cleanup and environmental contamination at Hanford, nonproliferation issues including the proposed import of German SNR–300 fuel, transition of FFTF stewardship after it is deactivated, the restart of FFTF and associated budget constraints, and the Tri Party Agreement at Hanford. This information was included in the Draft NI PEIS and/or the separate *NI Nonproliferation Impact Assessment* report.

Availability of the Draft NI PEIS was announced in the **Federal Register** on July 28, 2000 (65 FR 46443). The public comment period extended through September 18, 2000. Seven public hearings were held during late August and early September 2000 at the same locations as the scoping meetings. Pursuant to the Council on Environmental Quality regulations (40 CFR 1505.1(e)), agencies are encouraged to make ancillary decision documents available to the public before a decision is made. The associated cost report and nonproliferation report were made available to the public on August 24, 2000, and September 8, 2000, respectively. The Department mailed these documents to approximately 730 interested parties, and the reports were made available immediately upon release on the Office of Nuclear Energy, Science and Technology website (http://www.nuclear.gov) and in public reading rooms.

Over 6,000 comments were received during the comment period for the Draft NI PEIS. While a wide variety of comments was received, the dominant concerns focused on the: (1) Purpose and need for enhancements to the Department's nuclear infrastructure; (2) impact of certain alternatives on the cleanup efforts at candidate sites and compliance with the existing cleanup agreements; (3) management and disposition of nuclear waste and spent nuclear fuel resulting from implementation of the alternatives; (4) costs and cost benefits of the alternatives; (5) potential effects on nuclear weapons nonproliferation; (6) fairness and effectiveness of the public involvement and decision process; (7) impacts on human health and water quality; (8) safety of reactor operations; (9) use of plutonium-238 in space applications; and (10) restart or deactivation of the Fast Flux Text Facility (FFTF). Comments were considered by the Department and responses were included in Volume 3 of the Final NI PEIS. The NI PEIS was revised in response to comments wherever appropriate. The Notice of Availability for the Final NI PEIS was

published in the **Federal Register** on December 15, 2000 (65 FR 78484).

II. Facility and Site Options

Candidate Irradiation Facilities

Three nuclear reactors were included in the environmental evaluation as candidate irradiation facilities: ATR at Idaho National Engineering and Environmental Laboratory (INEEL); HFIR at ORNL; and FFTF at the Hanford Site. Environmental impacts were also estimated for a generic CLWR, one or two new accelerators at an unspecified Departmental site, and a new research reactor at an unspecified Departmental site.

ATR is a light-water-cooled and -moderated nuclear reactor with a design thermal power of 250 megawatts. Special features of ATR include high neutron flux levels and the ability to vary power to fit different experiment needs in different test positions. ATR operates with highly enriched uranium fuel (uranium fuel containing more than 20 percent uranium-235). The primary mission at ATR is to support naval reactor research and development. The Department proposes to use ATR for isotope production and civilian nuclear energy research missions on a noninterference basis. The Department estimates that ATR alone could produce up to 5 kilograms (11 pounds) of plutonium-238 per year and could be used in combination with any one of the candidate processing facilities for plutonium-238 production.

HFIR is a light-water-cooled and -moderated reactor operated at a thermal power level of 85 megawatts. It is used for both isotope production and neutron research. Originally designed to operate at a full power level of 100 megawatts-thermal, it currently operates at a maximum authorized power level of 85 megawatts-thermal to extend the useful life of the reactor. The reactor operates with highly enriched uranium fuel. The primary mission at HFIR is neutron research for the Department's Office of Science. Civilian nuclear energy research and additional isotope production will be undertaken on a noninterference basis. To complement plutonium-238 production at ATR, HFIR could produce up to 2 kilograms (4.4 pounds) per year.

FFTF is a 400-megawatts-thermal, sodium-cooled nuclear test reactor. It was operated from April 1982 to December 1993. FFTF was used primarily to evaluate reactor fuels and different fuel assembly materials during its 10 years of operation. It also supported test programs for industry, nuclear energy (domestic and international), medical isotope applications and research, space nuclear power, and fusion research programs. FFTF was placed in standby condition in 1993 because of a lack of economically viable missions. Reactor fuel has been removed. The Main Heat Transport System is being operated at approximately 200 °C (400 °F) to keep sodium coolant in the reactor liquefied and circulating. Restarting FFTF would require mechanical equipment upgrades and replacement of outdated control and computer systems. FFTF initially would have operated with mixed-oxide (uranium-plutonium) fuel, followed by operation with uranium fuel. Had FFTF been selected as an irradiation facility, production of medical isotopes and civilian nuclear technology research would have been the primary missions at FFTF.

A CLWR was evaluated as an irradiation facility for plutonium-238 production. No specific light water reactor was selected. Thus, typical characteristics of CLWRs were assumed for the environmental analysis. A typical pressurized water reactor core consists of 170 to 200 fuel assemblies arranged in the reactor vessel in an approximately cylindrical pattern. Most pressurized water reactors operating in the United States are licensed to operate at thermal power levels of 2,500 to 3,500 megawatts for net station electric outputs of 800 to 1,200 megawatts-electric. The primary mission of a CLWR is the production of electric power. Plutonium-238 production would have been conducted on a noninterference basis. Had a CLWR been selected for production of plutonium-238, site specific NEPA reviews would have been conducted prior to selection of a CLWR.

The Department considered construction of one or two accelerators at an unspecified DOE site as candidate irradiation facilities. Environmental impacts that could have resulted from construction and operation of the accelerator(s) used preconceptual designs for low- and high-energy accelerators. The low-energy accelerator was designed to support medical and industrial isotope production as well as civilian nuclear energy research. The high-energy accelerator was designed to support plutonium-238 production and civilian nuclear energy research. The preconceptual designs are described in the NI PEIS. Had either or both accelerator(s) been selected for implementation, site-specific NEPA reviews would have been conducted prior to site selection and production of isotopes and civilian nuclear energy research would have been the primary missions at those facilities.

The Department also considered construction of a new research reactor at an unspecified DOE site as a candidate irradiation facility. A preconceptual design was developed for a new research reactor that would: (1) Produce medical and industrial isotopes, (2) produce up to 5 kilograms (11 pounds) of plutonium-238 per year, and (3) support civilian nuclear energy research and development. The new research reactor would have been fueled by low-enriched uranium (uranium fuel containing less than 20 percent uranium-235). This preconceptual design included the basic elements of the research reactor facility sufficient for the environmental analysis. Had a new research reactor been selected for implementation, site-specific NEPA reviews would have been conducted prior to site selection. Production of isotopes and civilian nuclear energy research would have been the primary missions at the new research reactor.

Candidate Target Fabrication and Postirradiation Processing Facilities

Processing facilities at three Departmental sites were included in the environmental evaluation as candidate target fabrication and postirradiation processing facilities: REDC at ORNL; FDPF at INEEL; the Fuels and Materials Examination Facility (FMEF) at Hanford; and the Radiochemical Processing Laboratory (RPL)/ Development Fabrication Test Laboratory (Building 306–E), also at Hanford. Environmental impacts were also estimated for a new generic support facility at an unspecified DOE site.

REDC at ORNL is a companion facility to HFIR. REDC's two buildings house shielded hot cells and analytical laboratories. These hot cells and laboratories are used in the fabrication of fuel rods and targets for irradiation and to process irradiated rods and targets for the separation and purification of transuranic elements, process development, and product purification and packaging. Several alternatives and options (including the Preferred Alternative) included the use of ORNL's REDC Building 7930 for storage of neptunium-237 and fabrication and postirradiation processing of neptunium-237 targets.

The REDC hot cell facilities to be used under the Preferred Alternative have not yet been used for any mission. Activities required for target fabrication will take place in shielded glove boxes. Mechanical operations involved in the final target fabrication present lesser hazards that may permit them to be

carried out in open boxes. Cell E will contain processing equipment to purify the separated plutonium-238 product, prepare the plutonium oxide, and transfer the oxide into shipping containers. Cell E will also contain vertical storage wells for dry storage of neptunium and other actinides. Cell D activities will include receipt of irradiated targets, as well as target dissolution, chemical separation of neptunium and plutonium from fission products, and partitioning and purification of neptunium. Cell D also contains process equipment to remove transuranic elements from the aqueous waste streams and vitrifying waste.

FDPF is in the Idaho Nuclear Technology and Engineering Center (INTEC), which is located northeast of the Central Facilities Area at INEEL and approximately 3.2 kilometers (2 miles) southeast of ATR. FDPF was a candidate fabrication and postirradiation processing facility in several options under Alternatives 1 through 4. FDPF has no current mission. Historically, INTEC reprocessed spent nuclear fuel from U.S. Government reactors to recover reusable highly enriched uranium. After the Department announced in April 1992 that it would no longer reprocess spent fuel, reprocessing operations at INTEC ended.

Two buildings at INTEC were candidate storage and processing sites for plutonium-238 production: Building CPP–651, the Unirradiated Fuel Storage Facility, and Building CPP–666, FDPF. Under this alternative, chemical separation would occur in the FDPF cell using small centrifugal contactors installed for that purpose. Neptunium-237 would have been stored in FDPF or Building CPP–651, which is located within 100 meters (328 feet) of FDPF. There are 100 in-ground, concrete-shielded storage well positions in this vault. Each storage well contains a rack that can be modified to house containers for neptunium-237.

Hanford's FMEF was a candidate facility for storage of neptunium-237, fabrication of neptunium-237 targets, and processing of irradiated neptunium-237 targets for several options under Alternatives 1 through 4. FMEF could have supported medical and industrial production mission and civilian nuclear energy research and development mission activities at the Hanford Site under Alternative 1. FMEF is west of FFTF in the 400 Area of Hanford. It was built during the late 1970s and early 1980s as a major addition to the breeder reactor technology development program at Hanford. Although it has never been used, the facility was constructed to perform fuel fabrication and development and postirradiation examination of breeder reactor fuels.

FMEF is currently being maintained in mission-ready condition. In 1998, to reduce the cost of maintaining the facility, many systems were shut down and most hazardous materials were removed from the building. FMEF is uncontaminated because no nuclear materials have been introduced. Some critical systems remain in operation, e.g., the fire detection and protection systems. To avoid freezing of the fire protection water systems, limited heating and ventilation remains operational. Electric power and lighting remain available, and the freight elevator remains in service to support routine facility inspection and maintenance. The use of FMEF for neptunium-237 target material storage, target fabrication, and post-irradiation processing would have required construction of a new 76-meter (250-foot) stack.

Two Hanford 300 Area facilities were considered for support of medical and industrial isotope target fabrication and post-irradiation processing: RPL and Building 306–E. RPL/306–E were candidate facilities to support medical and industrial isotope production and civilian nuclear energy research and development activities. RPL would have been the primary site for fabricating the radioactive targets (i.e., targets containing radium-226 or recycled materials from previous irradiations).

Total space within RPL is 13,350 square meters (143,700 square feet), of which 4,140 square meters (44,500 square feet) are occupied by general chemistry laboratories. A recent space utilization survey of RPL indicated that 646 square meters (6,950 square feet), representing 15.6 percent of the laboratory area, are presently unoccupied. All of the occupied and nearly all of the unoccupied laboratories are functional and equipped with standard utilities. Of the 79 functional fume hoods and 23 shielded glove boxes, 50 fume hoods and 15 glove boxes are available for additional work.

Building 306–E was constructed in 1956 as part of the nuclear material production program at Hanford. It was used to develop the co-extrusion process for N-Reactor fuel. Major upgrades and renovations were completed in the late 1960s and early 1970s to support the civilian reactor development program. These activities would not have impacted current missions at the facilities.

A new generic support facility would have had the mission of preparing medical and industrial isotope targets for irradiation, processing exposed targets, and housing the materials research and development activities in association with Alternatives 3 and 4. Siting of the generic support facility for medical and industrial isotope production would have required that the facility be located in the same general vicinity (within 0.2 to 20 kilometers [0.07 to 12.4 miles]) as the new irradiation facility (accelerator or reactor). Collocation with the irradiation facility would have been needed to process irradiated target materials promptly after removal from the reactor/accelerator and to minimize transportation time. Although the facility could have been located within the irradiation facility security protection area, the lack of a defense mission and the lack of a fissile material presence in the generic support facility indicate that a high level of physical protection would not have been warranted.

III. Alternatives and Options

The Department evaluated potential environmental impacts that could result from implementation of alternatives and options that support isotope production and civilian nuclear energy research. A No Action Alternative and five programmatic alternatives were assessed. Table 1 summarizes the facilities associated with each alternative option.

No Action Alternative

Under the No Action Alternative (maintain status quo), FFTF would have been maintained in standby status for 35 years. Ongoing operations at existing facilities would have continued. The Department would not establish a domestic plutonium-238 production capability, but would have continued to purchase Russian plutonium-238 to meet the long-term needs of future U.S. space missions. For the purposes of the environmental analysis, it was assumed that the purchase of plutonium-238 from Russia would continue as needed to support U.S. space missions. The environmental analysis included transportation impacts that could result from the purchase of up to 175 kilograms (385.8 pounds) of plutonium-238 from Russia. Any purchase of plutonium-238 beyond that currently available in the United States through the existing contract would require additional NEPA review. The Department's medical and industrial isotope production and civilian nuclear energy research and development activities would have continued at the current operating levels. A consequence of a No Action decision would have

been the need to determine the future of the neptunium-237 stored at SRS. Therefore, the impacts of possible future transportation and storage of neptunium-237 were evaluated as part of the No Action Alternative.

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Table 1 Nuclear Infrastructure Alternatives and Options

			Plutonium-238 Production Mission		Medical and Industrial Isotopes Production and Nuclear Research and Development Mission	
	Option Number	Irradiation Facility	Storage Facility	Target Fabrication and Processing Facility	Storage Facility	Target Fabrication and Processing Facility
No Action Alternative	1	–	–	–	–	–
	2	–	REDC	–	–	–
	3	–	CPP–651	–	–	–
	4	–	FMEF	–	–	–
Alternative 1: Restart FFTF	1	FFTF[a]	REDC	REDC	RPL/306–E	RPL/306–E
	2	FFTF[a]	FDPF/CPP–651	FDPF	RPL/306–E	RPL/306–E
	3	FFTF[a]	FMEF	FMEF	FMEF	FMEF
	4	FFTF[b]	REDC	REDC	RPL/306–E	RPL/306–E
	5	FFTF[b]	FDPF/CPP–651	FDPF	RPL/306–E	RPL/306–E
	6	FFTF[b]	FMEF	FMEF	FMEF	FMEF
Alternative 2: Use Only Existing Operational Facilities	1	ATR	REDC	REDC	–	–
	2	ATR	FDPF/CPP–651	FDPF	–	–
	3	ATR	FMEF	FMEF	–	–
	4	CLWR	REDC	REDC	–	–
	5	CLWR	FDPF/CPP–651	FDPF	–	–
	6	CLWR	FMEF	FMEF	–	–
	7	HFIR and ATR	REDC	REDC	–	–
	8	HFIR and ATR	FDPF/CPP–651	FDPF	–	–
	9	HFIR and ATR	FMEF	FMEF	–	–
Alternative 3: Construct New Accelerator(s)	1	New	REDC	REDC	New[c]	New[c]
	2	New	FDPF/CPP–651	FDPF	New[c]	New[c]
	3	New	FMEF	FMEF	New[c]	New[c]
Alternative 4: Construct New Research Reactor	1	New	REDC	REDC	New[c]	New[c]
	2	New	FDPF/CPP–651	FDPF	New[c]	New[c]
	3	New	FMEF	FMEF	New[c]	New[c]
Alternative 5: Permanently Deactivate FFTF (with No New Missions)	–	–	–	–	–	–

a. Hanford FFTF would have operated with mixed oxide fuel for 21 years and highly enriched uranium fuel for 14 years.
b. Hanford FFTF would have operated with mixed oxide fuel for 6 years and highly enriched fuel for 29 years.
c. The new facility would not have been required if a site had been selected with available support capability and infrastructure.

Key: ATR, Advanced Test Reactor at INEEL; CLWR, commercial light water reactor; CPP–651, INEEL Building CPP–651 Storage Vault; FDPF, Fluorinel Dissolution Process Facility at INEEL; FFTF, Fast Flux Test Facility at Hanford; FMEF, Fuels and Materials Examination Facility at Hanford; HFIR, High Flux Isotope Reactor at ORNL; REDC, Radiochemical Engineering Development Center at ORNL; RPL/306–E, Radiochemical Processing Laboratory at Hanford, Building 306–E.

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Four options were analyzed under the No Action Alternative. If the Department had decided not to reestablish domestic production of plutonium-238, the inventory of neptunium-237 would have had no programmatic value and Option 1 would have been selected. Under this option, neptunium-237 would have been stabilized in solution form at SRS. Had the Department decided to maintain the neptunium-237 inventory for future plutonium-238 production, the neptunium-237 oxide inventory would have been transported from SRS to one of three candidate sites for up to 35 years of storage for possible future use: Option 2, REDC at ORNL; Option 3, Building CPP–651 at INEEL; or Option 4, FMEF at Hanford. The Department's nuclear infrastructure would not have been expanded under the No Action Alternative.

Alternative 1—Restart FFTF

Under Alternative 1, FFTF at Hanford would have been restarted and operated at a nominal 100 megawatts for 35 years. Production of isotopes and research in civilian nuclear energy would have been the primary missions at FFTF. Targets for medical and industrial isotope production would have been fabricated at one or more facilities at Hanford, irradiated at FFTF, and then returned to the fabrication facility for postirradiation processing. From there, the isotope products would have been sent to commercial pharmaceutical or industrial distributors.

Under this alternative, neptunium-237 would have been transported from SRS to one of the three fabrication/postirradiation processing facilities shown in Table 1: ORNL (Options 1 and 4), INEEL (Options 2 and 5), or Hanford (Options 3 and 6), where targets would have been fabricated as needed to support U.S. space missions. Following irradiation at FFTF, the irradiated targets would have been returned to the fabrication facility for postirradiation extraction of plutonium-238. Plutonium-238 then would have been transported to Los Alamos National Laboratory (LANL) in New Mexico for use in heat and electric power sources.

Under Alternative 1, raw materials, nonirradiated targets, irradiated targets, and processed materials would have been transported between the locations selected for raw target material acquisition, material storage, target fabrication, target irradiation, and postirradiation processing, as well as the final destination for the medical and industrial isotopes and the plutonium-238 product or various research and development test sites. The six options under this alternative are associated with the type of nuclear fuel which was to be used for FFTF operations and the specific facilities which were to be used for target fabrication and processing. The first three options (Options 1 through 3) would have involved operating FFTF with mixed oxide fuel for the first 21 years and uranium fuel for the remaining 14 years. Options 4 through 6 would have involved operating FFTF with mixed oxide fuel for the first 6 years and uranium fuel for the remaining 29 years. Environmental impacts that will result from deactivation of FFTF at the end of its operating life are addressed under Alternative 5.

Alternative 2—Use Only Existing Operational Facilities

Under Alternative 2, the Department will use existing operating reactors to produce plutonium-238 for future space missions. The production of medical and industrial isotopes and support for civilian nuclear energy research and development will continue at approximately current levels without expansion of the Department's nuclear infrastructure.

Environmental impacts were estimated for three irradiation facilities: ATR (only) at INEEL (Options 1 through 3), a generic CLWR (Options 4 through 6), and ATR/HFIR at ORNL (Options 7 through 9). ATR, HFIR, and the CLWR would continue their current primary missions under all options of Alternative 2. Production of plutonium-238 will be conducted as a secondary mission on a noninterference basis. Under Alternative 2, Alternative 5 would also be selected and FFTF would be permanently deactivated.

Neptunium-237 will be processed and transported from SRS to the fabrication facility, where it will be stored until fabrication. The NI PEIS evaluates environmental impacts that could result from target fabrication/postirradiation processing at one of three facilities at ORNL (the preferred facility), INEEL, or Hanford (see Table 1). The targets will be irradiated at ATR and HFIR. Environmental impacts that could result from using a CLWR for irradiation services are also included in the NI PEIS. After irradiation, neptunium-237 targets will be transported back to the fabricating facility for postirradiation processing.

Under Alternative 2, nonirradiated targets, irradiated targets, and processed materials will be transported between the locations selected for storage, target fabrication, target irradiation, and postirradiation processing. In addition, the plutonium-238 product will be transported to LANL.

If DOE proposes specific enhancements of existing facilities in order to implement Alternative 2, further NEPA review would be conducted.

Alternative 3—Construct New Accelerator(s)

Under Alternative 3, one or two new accelerators would have been used for target irradiation. The new accelerator(s) would have been constructed at an existing DOE site(s). Production of isotopes including plutonium-238, and civilian nuclear energy research would have been the primary missions at the new accelerators.

Neptunium-237 would have been transported from SRS to the fabrication facility, where it would have been stored until fabrication. Targets for plutonium-238 production would have been fabricated in one of the three alternative facilities at ORNL (Option 1), INEEL (Option 2), or Hanford (Option 3). The targets would have been irradiated in a new high-energy accelerator and then transported back to the target fabrication facility for postirradiation processing.

Target materials for medical and industrial isotope production would have been stored on site until fabricated into targets in a new support facility located at the same site as the low-energy accelerator. The targets would have been irradiated in the low-energy accelerator and returned to the new support facility for postirradiation processing. Because Alternative 3 was evaluated at a generic site, site selection was not evaluated as part of the NI PEIS and no credit was taken for any support infrastructure existing at the generic site. It was assumed that a new support facility would be required to support operation of the low-energy accelerator and its missions and the high-energy accelerator civilian nuclear energy research and development missions if both accelerators were located on the same site. While this approach bounds the environmental impact assessment for the implementation of Alternative 3, it overstates the impacts because the NI PEIS integrates the impacts associated with constructing new support facilities and infrastructure that may already be available at the existing site. Had Alternative 3 been selected for implementation, site-specific NEPA reviews would have been conducted prior to site selection.

Under Alternative 3, nonirradiated targets, irradiated targets, and processed materials would have been transported between the locations selected for

storage, target fabrication, target irradiation, postirradiation processing, and the final destination of the plutonium-238. The environmental evaluation of Alternative 3 also included environmental effects resulting from decontamination and decommissioning of the accelerator(s) and the processing facility when the missions are over, as well as deactivation of FFTF at Hanford.

Alternative 4—Construct New Research Reactor

Under Alternative 4, a new research reactor would have been used for target irradiation. The new research reactor would have been constructed at an existing site. Production of isotopes including plutonium-238, and civilian nuclear energy research would have been the primary missions at the new research reactor.

Neptunium-237 would have been transported from SRS to the fabrication facilities where it would have been stored until fabrication. As shown in Table 1, targets for plutonium-238 production would have been fabricated at one of the three facilities at ORNL (Option 1), INEEL (Option 2), or Hanford (Option 3). The targets would have been irradiated in the new research reactor and transported back to the target fabrication facilities for postirradiation processing.

Targets for medical and industrial isotope production would have been fabricated in a new support facility located at the same site as the new research reactor. Target materials would have been stored on site until fabrication. The targets would have been irradiated in the new research reactor and returned to the new support facility for postirradiation processing.

Because Alternative 4 was evaluated at a generic DOE site, site selection was not evaluated as part of the NI PEIS and no credit was taken for any existing support infrastructure at the site. It was assumed that a new support facility would be required to support the new research reactor. While this approach bounds the environmental impact assessment for the implementation of Alternative 4, it overstates the impacts because the NI PEIS integrates the impacts associated with constructing new support facilities and infrastructure that may already be available at the existing site. If selected, this alternative would require site-specific NEPA reviews to be completed prior to site selection.

Under Alternative 4, nonirradiated targets, irradiated targets, and processed materials would have been transported between the locations selected for storage, target fabrication, target irradiation, postirradiation processing, and the final destination of the plutonium-238. The environmental evaluation of Alternative 4 also included environmental effects resulting from decontamination and decommissioning the research reactor and the processing facility when the missions are over, as well as deactivation of FFTF at Hanford.

Alternative 5—Permanently Deactivate FFTF with No New Missions

Under Alternative 5, the Department would have permanently deactivated FFTF, with no new missions. Medical and industrial isotope production and civilian nuclear energy research and development missions at existing facilities would have continued at current levels. The Department's nuclear facilities infrastructure would not have been enhanced.

IV. Preferred Alternative

The Council on Environmental Quality (CEQ) regulations require an agency to identify its preferred alternative(s) in the final environmental impact statement (40 CFR 1502.14(e)). The preferred alternative is the alternative that the agency believes would fulfill its statutory mission, giving consideration to environmental, economic, technical, and other factors. Consequently, to identify a preferred alternative, the Department developed information on potential environmental impacts, costs, policy issues, and technical and schedule risks for the alternatives described in the NI PEIS. The NI PEIS provides information on environmental impacts. Cost, nonproliferation policy, and various technical reports have also been prepared and are available for public review in the Department's reading rooms.

The Department's Preferred Alternative, as identified in the Final NI PEIS, was to apply its existing infrastructure to pursue missions outlined in the NI PEIS. Under this approach, the Department would consider opportunities to enhance its existing facilities to maximize the agency's ability to address future mission needs.

Under the Preferred Alternative, the Department would reestablish domestic production of plutonium-238, as needed, to support U.S. space explorations. As discussed in NI PEIS, Chapter 1, Section 1.2.2, reestablishing a domestic plutonium-238 production capability would ensure that the United States has a long-term, reliable supply of this material. ATR in Idaho and HFIR in Tennessee would be used, as appropriate, to irradiate targets for this purpose without interfering with either reactor's primary mission. The Preferred Alternative includes fabricating and processing targets for the production of plutonium-238 at REDC at ORNL.

The Preferred Alternative also addressed the future of FFTF. While the Department recognizes that this facility has unique capabilities, the Preferred Alternative noted the absence of commitments from other agencies, the private sector or other governments that would clearly justify restarting the facility, and accordingly proposed to permanently deactivate FFTF.

In the absence of commitments that would justify the restart of FFTF or the construction of new facilities as proposed under Alternatives 3 and 4, the Department anticipates that its current infrastructure will serve the needs of the research and isotope communities for the next 5–10 years. In particular, DOE will consider opportunities to enhance its effort to provide medical and research isotopes. If significantly larger amounts of isotopes are required in the future, the Department would rely on the private sector to fulfill these needs.

As a potential option for the longer-term future, the Department proposes to work over the next 2 years to establish a conceptual design for an Advanced Accelerator Applications (AAA) facility. Such a facility, which would be used to evaluate spent fuel transmutation, conduct various nuclear research missions, and ensure a viable backup technology for the production of tritium for national security purposes, was proposed and initial work funded in the fiscal year 2001 Energy and Water Appropriation Act. If the Department proposes specific enhancements of existing facilities or development of the AAA facility, further NEPA review would be conducted.

V. Alternatives Considered But Dismissed

In developing a range of reasonable alternatives, the Department examined the capabilities and available capacities of more than 40 candidate irradiation facilities and 30 processing facilities at existing and planned nuclear research facilities (accelerators, reactors, and processing hot cells) that could potentially be used to support one or all of the isotope production and research missions.

Irradiation capabilities of existing government, university, and commercial irradiation facilities were evaluated to determine whether they could adequately support the nuclear

infrastructure missions. Some of the irradiation facilities were dismissed from further evaluation because they lacked technical capability or available capacity. Reasons for dismissal included lack of availability, lack of steady-state neutrons, or insufficient power levels to support steady-state neutron production. Facilities were similarly dismissed if existing capacity was fully dedicated to existing missions, or if use of existing capacity to support the NI PEIS alternatives would impact existing missions.

Numerous existing U.S. processing hot cell facilities possess the capabilities and capacity to support the nuclear infrastructure. Given this general availability, and to minimize transportation costs, only existing processing facilities that are collocated at candidate irradiation facility sites (i.e., ORNL, INEEL, and Hanford) were evaluated in the NI PEIS. Although multiple processing facilities exist at each of these sites, only the most suitable facilities in terms of capability, capacity, and availability were given further consideration.

VI. Summary of Environmental Impacts

The environmental impact analysis in the NI PEIS addressed resource areas pertinent to the sites considered. Impacts were assessed for land resources, noise, air quality, water resources, geology and soils, ecological resources, cultural and paleontological resources, socioeconomics, environmental justice, and waste management. Radiological and nonradiological impacts to workers and the public that could result from construction, normal operations, and accidents were addressed. Environmental impacts of current, proposed, and reasonably foreseeable activities at candidate sites were included in cumulative impacts.

The only resource area that could be significantly impacted by the implementation of any of the alternatives is water use associated with the construction of new facilities. Because no specific site was selected under Alternatives 3 and 4, potential impacts from construction could not be fully evaluated. In the absence of new construction, implementation of the alternatives would not significantly affect water use.

The largest effect on air quality would also occur during construction activities. Under operating conditions, for all alternatives and options, air quality impacts would have been small in comparison with the most stringent standards.

None of the alternatives would have had significant impact on regional economic areas or community services at Hanford, INEEL, and the Oak Ridge Reservation (ORR). Socioeconomic impacts at the generic sites could not be evaluated in detail because areas potentially affected under Alternatives 3 and 4 could vary widely in demographic and economic composition.

Maximum transportation impacts from normal operations for all alternatives and options were calculated to be 0.21 latent cancer fatalities for radiological risks and 0.008 fatalities for vehicle emissions. Maximum impacts from transportation accidents were calculated to be 0.53 latent cancer fatalities for radiological risks and 0.19 fatalities for vehicle collisions. All calculated risks were less than 1 fatality for the 35-year mission.

None of the alternatives at existing candidate sites would have had a significant effect on land use, visual resources, noise, water quality, geology and soils, ecology, cultural resources, and environmental justice. Implementation of the alternatives at one or more generic sites could potentially have resulted in significant impacts in one or more of these resource areas.

The maximum amount of waste generated by waste type under any alternative or option would have been 380 cubic meters of transuranic waste; 5,200 cubic meters of low-level waste; 430 cubic meters of mixed low-level waste; 3,300 cubic meters of hazardous waste; and 1.1×10^{-7} cubic meters of nonhazardous waste. The maximum amount of spent nuclear fuel produced would have been 16 metric tons (heavy metal). Hazardous waste generated under any of the alternatives or combination of alternatives could have been managed under the Department's existing waste management infrastructure. The environmental evaluation provided in the NI PEIS assumed that transuranic waste results from processing irradiated targets. The Department will consider whether the waste that results from processing irradiated neptunium-237 targets should be classified as high-level or transuranic waste. Regardless of the classification, the physical characteristics of the waste generated are the same and waste management activities will be the same.

The maximum calculated radiological risk to the public from normal facility operations for any alternative or option was 0.0039 latent cancer fatalities. The maximum radiological risk to the public from accidents was calculated at 0.54 latent cancer fatalities. The maximum cancer risk from hazardous chemicals under normal operations was calculated to be 2.6×10^{-7} and the maximum hazard index was estimated to be 0.0064. All risks were found to be small and no latent cancer fatalities would be expected to result from implementation of the alternatives at any candidate site.

VII. The Environmentally Preferable Alternative

Environmental impacts, including human health and safety, transportation, socioeconomics, and environmental justice, were estimated to be small for all of the alternatives and did not provide a reasonable basis for discriminating among alternatives. The No Action Alternative and Alternative 5 were found to have the least environmental impact, but neither of these alternatives would have satisfied the Department's missions. Depending on the selected site, new construction could involve previously undisturbed land with a potential direct loss of wetlands and impacts on cultural and paleontological resources, local employment and regional economic conditions, and air quality.

VIII. Other Considerations

Public Input

Approximately 3,500 communications, some with multiple comments, on the Draft NI PEIS were received via U.S. mail, e-mail, fax, and telephone. During the 52-day comment period, DOE held seven hearings to discuss the proposed action and to receive oral and written comments on the Draft NI PEIS. These hearings were held at Oak Ridge, Tennessee; Idaho Falls, Idaho; Hood River, Oregon; Portland, Oregon; Seattle, Washington; Richland, Washington; and Arlington, Virginia. These comments addressed a variety of topics and provided a wide range of views. The general focus of these communications was: (1) Support for deactivation of FFTF; (2) support for restarting FFTF; (3) concerns that a compelling case for the purpose and need was lacking; (4) concerns that restarting FFTF would hinder Hanford cleanup efforts and would be a violation of the Hanford Tri-Party Agreement; and (5) perceptions that production of plutonium-238 would violate U.S. nonproliferation policies. Volume 3 of the NI PEIS provides the Department's responses to these comments. Changes to the Draft NI PEIS that resulted from comments received from the public are discussed in Section 1.8 of the Final NI PEIS.

Costs

The costs of implementing each of the alternatives identified in the NI PEIS are analyzed in the Department's cost study, Cost Report for the Alternatives Presented in the Draft Programmatic Environmental Impact Statement for Accomplishing Expanded Civilian Nuclear Energy Research and Development and Isotope Production Missions in the United States, Including the Role of the Fast Flux Test Facility, dated August 2000. Table 2 presents the range of costs for each of the NI PEIS alternatives. The range of costs for a specific alternative reflects cost differences between options. The FFTF restart implementation costs were assessed with and without the cost for permanently deactivating FFTF.

Nonproliferation Impacts

The Department's Office of Arms Control and Nonproliferation completed an assessment of the nuclear weapons nonproliferation impacts for each of the alternatives. Results of this assessment are provided in a report dated September 2000, Nuclear Infrastructure Nonproliferation Impact Assessment for Accomplishing Expanded Civilian Nuclear Energy Research and Development and Isotope Production Missions in the United States, Including the Role of the Fast Flux Test Facility (DOE/NE–0119). This assessment showed that none of the alternatives was unacceptable from a nonproliferation point of view. Some of the alternatives and options exhibit a more favorable nonproliferation posture than others. The No Action Alternative and other alternative options that incorporate neptunium-237 and plutonium-238 processing at FDPF raised nonproliferation concerns related to supporting negotiation of a verifiable Fissile Material Cutoff Treaty (FMCT) and the potential for international monitoring. FDPF is currently excluded from international monitoring for reasons of national security. Since it is not known whether a Russian facility would be made available for international monitoring, as a result of past and ongoing national security programs at the facility, there is significant uncertainty as to whether international monitoring would be permitted in a Russian Pu-238 processing facility. In addition, the continued production of fresh and recycled neptunium in the Russian nuclear program raises a significant nonproliferation concern.

Table 2 Range of Costs for Implementing NI PEIS Alternative Options

Alternative	Implementation Cost ($ millions)	Annual Operating Cost ($ millions)
No Action	0 - 28	50 - 52
Alternative 1 - Restart FFTF	392 - 432 [a] 673 - 713 [b]	82 -91
Alternative 2 - Use Only Existing Operational Facilities	328 - 383 [b]	15-24
Alternative 3 - Construct New Accelerator(s)	1,490 - 1,530 [b]	77-86
Alternative 4 - Construct New Research Reactor	708 - 746 [b]	58 -67
Alternative 5 - Permanently Deactivate FFTF (with No New Missions)	281 [b]	0

[a] Does not include cost to permanently deactivate FFTF.
[b] Includes $281 million for permanently deactivating FFTF.

IX. Comments on the Final NI PEIS

The Department received comments from about 130 individuals and/or organizations after publication of the Final NI PEIS. Many of the commentors opposed the selection of the Preferred Alternative.

Approximately 50 comments have been received that support the restart of FFTF. These comments supported one or more missions, including the production of medical isotopes and plutonium-238; stated that deactivation of FFTF would take money away from Hanford's cleanup mission; stated that the talented resource pool of personnel at Hanford would be drained if FFTF were shut down; requested reconsideration of permanent shutdown; protested the Preferred Alternative in favor of FFTF restart; requested deferring the shutdown decision until the incoming administration could consider it; and stated that the selection of the Preferred Alternative was purely a political decision.

Several members of the Washington Congressional delegation wrote to the Secretary suggesting that the Department had not given industry a clear opportunity to propose use of the FFTF and advocated a formal solicitation process before action was taken to deactivate the reactor. Other comments that expressed opposition to, or concerns about FFTF activation included the following:

- Letters from national cancer patient organizations (National Association of Cancer Patients and the Children's Cancer Committee) appealing the decision to deactivate FFTF.
- A letter from the Japan Atomic Energy Commission stating Japanese concerns about the loss of FFTF.
- A letter from NASA stating its interest in DOE maintaining the capability to develop space reactor technology.
- A letter from DuPont stating its interest in FFTF operation to produce medical isotopes.
- A letter from a law firm to the Secretary on behalf of Benton County, Washington urging stating the Department to prepare a supplemental PEIS prior to issuance of the Record for Decision.

About 20 comments were received that supported the permanent deactivation of FFTF, stating that it was the right decision for economic, safety, and environmental reasons.

Other comments received on the Final NI PEIS include the following:

• One commentor stated that the Final NI PEIS was biased toward the accelerator alternative (as addressed in the Preferred Alternative).

• One commentor stated that the Department did not request the commitments that would justify restart of FFTF or construction of new facilities that were addressed in the Preferred Alternative.

• One commentor stated that the production of plutonium-238 was not consistent with United States and international policy concerning nonproliferation.

• Mr. Tom Clements of the Nuclear Control Institute reported that his letter of September 18, 2000 was not included in the NI PEIS Comment Response Document, Volume 3. The Department regrets this oversight and provided Mr. Clements written responses to his comments in a letter dated January 5, 2001. Both Mr. Clements' letter and the Department's response were considered in the preparation of this Record of Decision.

The Department considered these comments during the preparation of the Record of Decision. The Department believes that the NI PEIS is adequate for this decision and that no supplement is necessary. The Department recognizes that significant uncertainties remain regarding the future of research and isotope production activities that could justify operation of the FFTF. However, the Department believes that its current infrastructure will serve the needs of the research and isotope communities for the next 5 to 10 years and that opportunities to enhance its existing facilities are available. Although the Department did weigh comments received on the Final PEIS, it does not view these as being significantly different than those received on the Draft PEIS and therefore did not change its views as described in the Preferred Alternative in the Final PEIS.

X. Decision

The Department has decided to implement the Preferred Alternative identified in Section 2.8 of the Final NI PEIS (Alternative 2, Option 7) and if required, part of the No Action Alternative that includes purchasing plutonium-238 from Russia. While it is clear from the analysis in the NI PEIS that FFTF has unique capabilities and could accomplish many of the irradiation missions of the Department, it is also clear that the Department would need to make a long-term commitment to its operation. The Department has not received commitments to support these costs or mitigate the costs of building new facilities. Given that existing facilities can meet DOE's near-term needs for isotope production and research, the Department believes that it should invest its funds in enhancing its existing infrastructure and exploring the potential of a new Advanced Accelerator Applications facility as a long-term option to meet U.S. research needs. It is for these reasons that DOE has chosen to proceed with the Preferred Alternative.

Domestic production of plutonium-238 will be reestablished to support U.S. space exploration. The Advanced Test Reactor (ATR) in Idaho and the High Flux Isotope Reactor (HFIR) in Tennessee will be used to irradiate neptunium-237 targets for the production of plutonium-238. Plutonium-238 production can be accomplished without interfering with the existing primary missions at ATR and HFIR. The Radiochemical Engineering Development Center (REDC) in Tennessee will be used for fabricating targets and processing irradiated targets to recover plutonium-238. These existing operating facilities were selected because of the Department's confidence in the facilities' cost estimates, technical capabilities, and consistency with existing onsite target irradiation and processing activities. Three irradiation facilities were evaluated for Alternative 2. CWLR options were not selected because of uncertainties in the target design, development and fabrication. The design and fabrication technology of neptunium-237 targets for irradiation in ATR and HFIR is much more mature. While ATR alone could meet the plutonium-238 production requirements, the Department selected the HFIR and ATR irradiation option because it offers additional diversity and flexibility in meeting the production goals and reducing potential impacts on future HFIR and ATR missions. Three processing facilities were evaluated for Alternative 2. REDC was selected as the preferred processing facility because of the facility's experience base (30 years of target fabrication and processing experience); current technical staff knowledge base, experience, and testing in support of DOE-funded plutonium-238 production studies and analyses; and the Department's confidence in the facility modification requirements and operating cost estimates. If the Department's existing inventory of plutonium-238 is insufficient to meet near-term space mission requirements, then the Department will pursue purchasing plutonium-238 from Russia while reestablishing domestic production capabilities.

The Department anticipates that its current infrastructure will serve the needs of the research and isotope communities for the next 5 to 10 years. The Department will continue to evaluate the medical and research isotope needs and will propose appropriate actions to meet these needs, as necessary. If significantly larger amounts of isotopes are required in the future, others would need to respond to these requirements.

To explore a potential option to address some future research infrastructure needs, the Department intends to work over the next two years to establish a conceptual design for an Advanced Accelerator Applications (AAA) facility. Such a facility was proposed and initial work funded in the fiscal year 2001 Energy and Water Appropriations Act. This facility would be used to evaluate spent nuclear fuel transmutation, conduct various nuclear research missions, and ensure a viable backup technology for the production of tritium for national security purposes. If the Department proposes specific enhancements of existing facilities or deployment of an AAA facility, further NEPA review will be conducted.

XI. Mitigation

As discussed in the NI PEIS, implementation of any of the alternatives would have had small environmental impacts and no mitigation actions specific to the implementation of the alternatives were identified. The Department's policy is to maintain exposure of workers and the public to radiological and nonradiological emissions to levels that are as low as is reasonably achievable. The Department has adopted stringent controls for minimizing occupational and public exposure to radiological and nonradiological emissions. These measures will avoid, reduce, or eliminate adverse or potentially adverse impacts from activities undertaken as a result of this decision. In implementing this decision, the Department will use all practicable means to avoid or minimize environmental harm. In addition, the Department's policy is to minimize waste generation.

Issued in Washington, D.C., this 19th day of January 2001.

Bill Richardson,

Secretary of Energy.

[FR Doc. 01–2271 Filed 1–25–01; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Interim Management of Nuclear Materials

AGENCY: Department of Energy

ACTION: Amended record of decision.

SUMMARY: On December 12, 1995, the U.S. Department of Energy (DOE) issued a Record of Decision (ROD) and Notice of Preferred Alternatives, 60 FR 65300 (December 19, 1995), for the final environmental impact statement, Interim Management of Nuclear Materials (IMNM EIS) (DOE/EIS–0220, October 20, 1995), at the Savannah River Site (SRS), Aiken, South Carolina. As part of its decision, DOE decided to construct a new facility, the Actinide Packaging and Storage Facility (APSF), to prepare, package, and store plutonium oxide and metal in accordance with DOE's plutonium storage standard, recently revised as Stabilization, Packaging, and Storage of Plutonium-Bearing Materials (DOE–STD–3013–2000). The APSF also was intended to provide space for consolidated storage of plutonium and special actinide materials at the SRS.

For several reasons, including project cost growth concerns, DOE is canceling the APSF project and instead installing the stabilization and packaging capability to meet the plutonium storage standard within Building 235–F, an existing plutonium storage and processing facility in F-Area at the SRS. DOE also will use existing SRS vault storage space, including space in Building 235–F, to store plutonium (and other nuclear material inventories) pending disposition.

FOR FURTHER INFORMATION CONTACT: For further information on the interim management of nuclear materials at the SRS, to receive a copy of the final IMNM EIS, or a copy of the 1995 IMNM ROD, contact: Andrew R. Grainger, NEPA Compliance Officer, U.S. Department of Energy, Savannah River Operations Office, Building 703–47A, Room 122, Aiken, South Carolina 29802 (800) 881–7292 Internet: drew.grainger@sr.srs.gov.

For further information on the DOE NEPA process, contact: Carol M. Borgstrom, Director, Office of NEPA Policy and Compliance (EH–42) U.S. Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585, (202) 586–4600, or leave a message at (800) 472–2756.

Additionally, DOE NEPA information, including the IMNM Final EIS and the 1995 IMNM ROD, can be found on the DOE NEPA web site at: *www.eh.doe.gov/nepa/.*

SUPPLEMENTARY INFORMATION:

Background

NEPA Review and Decisions

The U.S. Department of Energy (DOE) prepared a final environmental impact statement, Interim Management of Nuclear Materials (IMNM EIS) (DOE/EIS–0220, October 20, 1995), in accordance with the National Environmental Policy Act (NEPA), Council on Environmental Quality NEPA implementing regulations, and DOE implementing procedures. The IMNM EIS assessed the potential environmental impacts of actions necessary to safely manage nuclear materials at the Savannah River Site (SRS), Aiken, South Carolina, until decisions on their future use or ultimate disposition are made and implemented. The IMNM EIS grouped the nuclear materials at the SRS into three categories: Stable, Programmatic, and Candidates for Stabilization. Some of the ''Programmatic'' and all of the ''Candidates for Stabilization'' materials could have presented environmental, safety and health vulnerabilities in their then-current storage condition. For materials that could present environmental, safety, or health vulnerabilities, the IMNM EIS evaluated processing alternatives to meet the new plutonium storage standard to ensure safe intermediate to long-term storage. The capability to meet the new storage standard did not exist at the SRS at the time of the preparation of the IMNM EIS, nor at any other DOE site. Subsequently, DOE has been working to establish this capability at its non-pit [1] surplus plutonium sites. Facilities providing this capability at the Rocky Flats Environmental Technology Site (RFETS, Golden, Colorado), Hanford (Richland, Washington), and Lawrence Livermore National Laboratory (Livermore, California) are nearing completion and startup. Stabilizing and packaging plutonium to the storage standard are generally the last steps in completing the stabilization process. The IMNM EIS considered two options for providing this stabilization and packaging capability at the SRS: (1) The construction of a new facility, APSF, and (2) the modification of Building 235–F in F-Area.

On December 12, 1995, DOE issued a Record of Decision (ROD) and Notice of Preferred Alternatives, 60 FR 65300 (December 19, 1995), on the interim management of several categories of nuclear materials at the SRS. As part of its decision, DOE decided to construct a new facility, the APSF, to enable plutonium oxides to be stabilized, and plutonium oxide and metal to be repackaged in accordance with DOE's plutonium storage standard, recently revised as Stabilization, Packaging, and Storage of Plutonium-Bearing Materials (DOE–STD–3013–2000). The APSF also was intended to provide space for consolidated storage of plutonium and special actinide materials at the SRS. Subsequently, DOE issued four supplemental RODs (61 FR 6633, 61 FR 48474, 62 FR 17790, and 62 FR 61099) to make additional decisions and/or modify existing decisions concerning the management of nuclear materials at the SRS. None of these subsequent decisions altered DOE's decision to construct the APSF.

In December 1996, DOE issued the Storage and Disposition of Weapons-Usable Fissile Materials Final Programmatic Environmental Impact Statement (Storage and Disposition PEIS) (DOE/EIS–0229). The Storage and Disposition PEIS, among other things, assesses the potential environmental impacts of alternative approaches and locations for storing weapons-usable fissile materials (plutonium and highly enriched uranium). DOE decided in the Storage and Disposition ROD (January 14, 1997, 62 FR 3014) to expand the storage capacity (from a nominal 2,000 storage positions to 5,000 storage positions) of the prospective APSF to accommodate at the SRS the storage of surplus non-pit plutonium to be received from RFETS, pending disposition. DOE also indicated in the Storage and Disposition ROD that DOE would pursue a strategy for surplus plutonium disposition that allows for immobilization of surplus weapons plutonium in glass or ceramic forms and burning of the surplus plutonium as mixed oxide (MOX)[2] fuel in existing reactors. The immobilized plutonium and the spent MOX fuel would be disposed of in a geologic repository.

Subsequently, in order to support the early closure of RFETS, DOE issued an amended Storage and Disposition ROD (August 6, 1998, 63 FR 43386) to allow the RFETS surplus non-pit plutonium to be sent to the SRS before completion of the APSF. Based upon the amended Storage and Disposition ROD, DOE undertook the K-Area Materials Storage (KAMS) project to modify and prepare existing space within Building 105-K to store surplus plutonium in shipping containers as received from RFETS, pending disposition. The first shipment of surplus plutonium from RFETS for

[1] A ''pit'' is a nuclear weapon component.

[2] A physical blend of uranium oxide and plutonium oxide.

storage in KAMS is scheduled to arrive in early calendar year 2001.

In November 1999, DOE issued the Surplus Plutonium Disposition Final Environmental Impact Statement (SPD EIS) (DOE/EIS–0283), which analyzed alternatives for the siting, construction, and operation of three surplus plutonium disposition facilities. These three facilities would accomplish pit disassembly and conversion, plutonium conversion and immobilization, and MOX fuel fabrication. DOE issued the Surplus Plutonium Disposition ROD on January 4, 2000 (65 FR 1608), which selected the SRS for all three of the new surplus plutonium disposition facilities.

Plutonium Stabilization and Storage Evaluation

In light of APSF project cost growth concerns, SRS program and overall DOE resource limitations, and an opportunity to increase the integration of the surplus plutonium storage and surplus plutonium disposition missions, DOE suspended the APSF project in January 1999, and undertook a systematic review of SRS stabilization and storage options. This review is documented in Evaluation of Savannah River Plutonium Storage and Stabilization Options (July 2000). The evaluation considered several options for managing DOE's surplus plutonium, pending disposition, including: completion of the as-designed (5,000 storage position) APSF project, construction of a further-expanded (10,000 storage position) APSF, and cancellation of the APSF project with surplus plutonium managed through other means (e.g., processed to allow consolidation to metal and/or stabilization and storage in existing modified facilities).

The key recommendations of the evaluation are: (1) Cancel the APSF project and (2) initiate a project to install stabilization and packaging capability in Building 235–F at SRS. The evaluation also recommends that DOE continue with the decision to transfer RFETS stabilized plutonium (packaged in DOE–STD–3013 storage containers within shipping containers) for storage in KAMS in unopened shipping containers. The evaluation also recommends that DOE store SRS stabilized materials in DOE–STD–3013 containers inside shipping containers in existing vaults in Building 235–F, and KAMS as necessary, pending disposition.

The evaluation determined that there would be basically no difference between the APSF and Building 235–F options regarding the completion dates of the capital improvements or the stabilization and packaging activities, but the estimated costs are different, particularly for the near-term. Over the 10-year evaluation period (FY 2001–2010), cost differences (in FY 2001 dollars) range from approximately $5.5 million to $230 million. The least costly options involve varying degrees of modification to Building 235–F. The capital cost for the recommended Building 235–F option is estimated to be $100 million to $250 million, which is $30 million to $180 million less than the lowest cost APSF option. The ''high'' capital cost estimate of $250 million for the recommended Building 235–F option was used in the evaluation to compare costs between the stabilization and storage options.

The evaluation considered options which could best meet the Department's stabilization and storage needs, given various factors, such as funding levels, de-inventory strategies, and surplus plutonium disposition schedules. Surplus plutonium disposition schedules most notably affected overall costs. Delays of approximately seven years or more to DOE's surplus plutonium disposition program would favor the more consolidated plutonium storage options (the APSF options) because operating costs for a large single storage facility are less than for multiple smaller facilities. Even though this ''payback'' would eventually occur if there were substantial delays to the surplus plutonium disposition mission, DOE believes there are more worthy unfunded projects that would provide earlier investment returns in carrying out DOE missions.

Interim Management of Nuclear Materials EIS

Alternatives

The IMNM EIS analyzed several alternatives, including the No Action alternative, for the interim management of eleven (11) types of nuclear materials at the SRS. All of the alternatives except the Continued Storage (No Action) would support DOE's objective of removing nuclear materials from vulnerable conditions and from vulnerable facilities in preparation for decontamination and decommissioning. The IMNM RODs include decisions to undertake stabilization and processing actions for ten (10) SRS nuclear material types. (DOE decided to continue existing actions for the ''Stable'' nuclear material types/category.) Six of these nuclear materials types—(1) plutonium and uranium stored in vaults, (2) Mark–31 targets, (3) aluminum-clad Taiwan Research Reactor fuel and Experimental Breeder Reactor–II slugs, (4) plutonium–239 solutions, (5) plutonium–242 solutions, and (6) neptunium–237 solutions—require, or could require, a new capability to stabilize and package the material to DOE's storage standard to complete stabilization for safe interim management. The latter two materials, plutonium–242 and neptunium–237, were categorized as programmatic materials in the IMNM EIS but were analyzed for completeness of the potential impacts from stabilization and packaging for long-term storage. DOE has since stabilized the plutonium–242 to oxide, and transferred it to the Los Alamos National Laboratory for programmatic use without undergoing stabilization and packaging to the storage standard. The neptunium–237 has yet to be stabilized, and a determination on program need or requirements for packaging to the storage standard has yet to be made. The need for neptunium–237 is being addressed in the Final Programmatic Environmental Impact Statement for Accomplishing Expanded Civilian Nuclear Energy Research and Development and Isotope Production Missions in the United States, Including the Role of the Fast Flux Test Facility (DOE/EIS–0310, December 2000). A Record of Decision for that PEIS is expected to be issued in January 2001.

The IMNM EIS considered two options [see IMNM EIS, Chapter 2. Alternatives and Appendix C, pp. C–41 to C–45] for stabilizing, packaging, and storing plutonium to DOE's storage standard—(1) the construction of the new APSF, and (2) the modification of Building 235–F. The storage standard is designed to help ensure the safe storage of the materials for long periods (e.g., 50 years). Each option was designed to provide the capability to heat plutonium oxide materials to drive off residual and absorbed moisture; package stabilized material (oxides and metal) in at least two corrosion-resistant containers (a container within a container) without the use of plastics, hydrogenous compounds, or organic material; weld-seal the outer container in an inert atmosphere to ensure weld joint and container material integrity; and store the stabilized material and sealed containers.

In addition, the IMNM EIS considered modifications to the FB-Line in the F-Canyon building (Building 221-F) at the SRS to provide storage standard stabilization and packaging capabilities. Under decisions associated with the Final F-Canyon Plutonium Solutions Environmental Impact Statement (DOE/EIS–0219, December 1994) and ROD (February 22, 1995, 60 FR 9824), DOE added to the FB-Line a capability to package plutonium metal within a

single, inert gas-filled, welded container, without the need for plastic and other organic materials. However, DOE concluded that adding the full stabilization and packaging mission to the FB-Line facility would delay completion of the FB-Line's nuclear materials stabilization activities and the planned shutdown of the FB-Line facility.

Potential Environmental Impacts

The IMNM EIS analyzed potential impacts of alternatives for managing all SRS nuclear materials. Summaries of the potential impacts from the alternatives are presented in the IMNM EIS, Table 2–2 through Table 2–12 (pp. 2–48 through 2–58). The IMNM EIS analysis includes potential impacts from heating and repackaging activities to package plutonium to DOE's storage standard.

DOE has reviewed the IMNM EIS and determined that there are no substantial changes in the proposed modification of Building 235–F nor are there any significant new circumstances or information relevant to environmental impacts that would result from modifying Building 235–F. The analysis of potential environmental impacts and the description of the Building 235–F option in the IMNM EIS have not changed since the Final EIS was issued.

The IMNM EIS indicated that there would be minimal environmental impacts from the implementation of any alternative (including the APSF or Building 235–F options) in the areas of geologic, ecological, cultural, aesthetic, and scenic resources, noise, and land use. Impacts in these areas would be limited because facility modifications or construction of new facilities would occur within existing buildings or industrialized portions of the SRS. The existing SRS workforce would support any construction projects and other activities required to implement any of the alternatives, and thus negligible socioeconomic impacts would be expected from implementing any of the alternatives.

Emissions of hazardous air pollutants and releases of hazardous liquid effluents for any of the alternatives would be within applicable standards and existing regulatory permits for the SRS facilities. Similarly, for either the APSF or Building 235–F option for plutonium stabilization and packaging, potential transuranic waste, mixed hazardous waste, and low-level solid waste generated would be handled by existing waste management facilities. All of the waste types and volumes are within the capability of the existing SRS waste management facilities for storage, treatment, or disposal.

While the IMNM EIS indicated that potential adverse impacts to the environment, public, or workers would be small for the packaging and storage alternatives, there would be minor differences between the APSF ''new construction'' and the Building 235–F modification. The modification to Building 235–F would involve work in an existing and radiologically contaminated facility, thereby potentially leading to a small increase over the APSF option in radiological waste generation and construction worker exposure. Through the use of site administrative control limits, however, no worker would be expected to receive a radiological dose beyond that allowed for radiological workers from normal operations, or from facility modification work. Likewise, the existing waste management facilities are capable of handling the additional radiological waste that would result from the Building 235–F modification.

Environmentally Preferable Alternative

The IMNM EIS indicated that potential adverse impacts to the environment, public, or workers would be small for either the APSF or Building 235–F options. While small increases in radiological waste and worker radiological exposure could be expected from the Building 235–F modification option over the APSF option, both options would involve relatively small impacts, and thus neither could be deemed environmentally preferable over the other.

Decision

DOE is amending its previous decision (60 FR 65300) on how to provide a SRS capability for the stabilization and packaging of plutonium to the storage standard (recently revised to DOE–STD–3013–2000). Instead of constructing a new Actinide Packaging and Storage Facility (APSF), DOE will modify existing space within Building 235–F in F-Area. DOE will continue to use existing vault space in Building 235–F for interim storage pending disposition, and existing vault space in FB-Line for interim storage during stabilization actions. [By way of information, DOE previously had decided (63 FR 43386) to store RFETS surplus non-pit plutonium in new vault space established in Building 105–K, instead of in the APSF, pending disposition.]

This decision will allow DOE to stabilize and repackage plutonium to the storage standard within the same time-frame as would have a new APSF (or possibly up to two years sooner). It also allows DOE to accomplish plutonium stabilization and repackaging at a lower cost by cost-effectively integrating surplus plutonium storage activities with surplus plutonium disposition activities. The reduced capital expenditure requirements are more consistent with current and projected near-term budget resources.

Issued at Washington, DC, January 12th, 2001.

Carolyn L. Huntoon,

Assistant Secretary for Environmental Management.

[FR Doc. 01–2369 Filed 1–25–01; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Science; Office of Science Financial Assistance Program Notice 01–21; Advanced Modeling and Simulation of Biological Systems

AGENCY: U.S. Department of Energy (DOE).

ACTION: Notice inviting grant applications.

SUMMARY: The Offices of Advanced Scientific Computing Research (ASCR) and Biological and Environmental Research (OBER) of the Office of Science (SC), U.S. Department of Energy, hereby announce interest in receiving applications for grants in support of computational modeling and simulation of biological systems. The goal of this program is to enable the use of terascale computers to explore fundamental biological processes and predict the behavior of a broad range of protein interactions and molecular pathways in prokaryotic microbes of importance to DOE. This goal will be achieved through the creation of scientific simulation codes that are high performance, scalable to hundreds of nodes and thousands of processors, and able to evolve over time and be ported to future generations of high performance computers. The research efforts being sought under this Program Notice will take advantage of extensive information inferred from the complete DNA sequence, such as the genetics and the biochemical processes available for a well-characterized prokaryotic microbe; for example, *Escherichia coli* (*E. coli*). This notice encourages applications from the disciplines of applied mathematics and computer science in partnership with microbiology, molecular biology, biochemistry and structural and computational biology to combine information available on a well

characterized prokaryotic microbe with advanced mathematics and computer science to enable this new understanding. This announcement is being issued in parallel with Program Notice 01–20, the Microbial Cell Project. Together, they represent a planned first step in an ambitious effort to understand the functions of the proteins in a prokaryotic microbial cell, to understand their interactions as they form pathways that carry out DOE-relevant activities, and to eventually build predictive models for microbial activities that address DOE mission needs.

DATES: Preapplications referencing Program Notice 01–21 should be received by February 21, 2001. Earlier submissions will be gladly accepted. A response to timely preapplications will be communicated to the applicant by March 9, 2001.

Formal applications in response to this notice should be received by 4:30 p.m., E.D.T., April 24, 2001, to be accepted for merit review and funding in FY 2001.

ADDRESSES: Preapplications referencing Program Notice 01–21 should be sent to Dr. Walter M. Polansky, Office of Advanced Scientific Computing Research, SC–32, Office of Science, U.S. Department of Energy, 19901 Germantown Road, Germantown, MD 20874–1290; e-mail is acceptable for submitting preapplications using the following address: walt.polansky@science.doe.gov.

Formal applications referencing Program Notice 01–21, should be forwarded to: U.S. Department of Energy, Office of Science, Grants and Contracts Division, SC–64, 19901 Germantown Road, Germantown, MD 20874–1290, ATTN: Program Notice 01–21. This address must be used when submitting applications by U.S. Postal Service Express Mail or any commercial mail delivery service, or when hand-carried by the applicant.

FOR FURTHER INFORMATION CONTACT: Dr. Walter M. Polansky, Office of Advanced Scientific Computing Research, SC–32, Office of Science, U.S. Department of Energy, 19901 Germantown Road, Germantown, MD 20874–1290; telephone: (301) 903–5995, e-mail: walt.polansky@science.doe.gov.

Dr. John Houghton, Office of Biological and Environmental Research, Office of Science, U.S. Department of Energy, 19901 Germantown Road, Germantown, MD 20874–1290; telephone: (301) 903-8288, e-mail: john.houghton@science.doe.gov.

The full text of Program Notice 01–21 is available via the World Wide Web using the following web site address: *http://www.sc.doe.gov/production/grants/grants.html*.

SUPPLEMENTARY INFORMATION: Extraordinary advances in computing technology in the past decade have set the stage for a new era in scientific computing. Within the next five to ten years, computers running at 1 to 10 trillion floating point operations per second (Tops) will become available. Using such computers, it will be possible to dramatically extend explorations of fundamental processes as well as advance the ability to predict the behavior of a broad range of complex biological systems.

The primary mission of the Office of Advanced Scientific Computing Research is to discover, develop, and deploy the computational and networking tools that enable researchers in the scientific disciplines to analyze, model, simulate and predict complex phenomena important to the Department of Energy. In carrying out this mission, ASCR:

- Maintains world leadership in areas of scientific computing research relevant to the missions of the Department of Energy;
- Integrates the results of advanced scientific computing research into the natural sciences and engineering;
- Provides world class supercomputer and networking facilities for scientists working on problems that are important to the missions of the Department.

The primary mission of the Office of Biological and Environmental Research is to advance environmental and biomedical knowledge connected to energy production, development, and use. In carrying out this mission, OBER:

- Contributes to the environmental remediation and restoration of contaminated environments at DOE sites through basic research in bioremediation, microbial genomics, and ecological science;
- Provides new knowledge that will widen DOE's options for clean and affordable energy through research in microbial genomics and bioinformatics;
- Advances our understanding of and finds solutions for the effects of energy production and use on the environment through research in global climate modeling and simulation, the role of clouds in climate change, carbon cycle and carbon sequestration, atmospheric chemistry, and ecological science;
- Helps protect the health of DOE workers and the public by advancing our understanding of the health effects of energy production and use through basic research in key areas of the life sciences including functional genomics and structural biology as well as low dose radiation research;
- Seeks to develop new applications of radiotracers in diagnosis and treatment and supports biomedical engineering research focused on fundamental studies in medical imaging, biological and chemical sensors, laser medicine, new biocompatible materials, informatics, and artificial organs.

The scope and complexity of the proposed projects will likely require close collaboration among researchers from the biological sciences, computational sciences, computer science, and applied mathematics disciplines. Accordingly, this solicitation calls for the creation of scientific simulation teams, or collaborations, as the organizational basis for a successful application. Partnerships among universities, national laboratories, and industry are encouraged but not required. A scientific simulation team is a multi-disciplinary, and perhaps multi-institutional, group of people who will:

- Create scientific simulation codes that take full advantage of terascale computers,
- Work closely with other research teams and centers to ensure that the best available mathematical algorithms and computer science methods are employed, and
- Manage the work of the team in a way that will foster good communication and decision making.

Biological systems and their regulatory and metabolic pathways are complex. The details of many biological processes are not well understood, and the resulting computations will require new algorithms, computational biology tools, and extraordinary computing resources. The successful development of the new tools will require the sustained efforts of multi-disciplinary teams, and applications of these tools will require Tops-scale and beyond supercomputers, as well as the considerable expertise required to use them. Although forms of these computational tools already exist, considerable research in mathematics and computer science remains to be done in order to develop reliable, robust, efficient, and widely applicable versions of these tools.

Data analysis, computational modeling and simulation will play critical roles in the future of biological research. Large sets of genomic data will be generated by the on-going DNA sequencing efforts at large genome centers around the world. These data

will be analyzed and combined with different types of biological data, including information on structure, expression, and function to develop a more comprehensive understanding of biological systems. Homology-based protein structure correlations identified by pattern searches will be used to predict the structures of the proteins coded by the new genome sequences and will be invaluable for ascertaining protein function and for identifying more distant homologies than are possible by simple sequence comparisons. For selected biochemical processes, computational modeling will be used for a range of applications, from elucidating the mechanisms of enzymatic reactions to identifying the energetic principles underlying macromolecular interactions. Computer models of entire cells and microbial ecosystems will also use the understanding gained about biomolecular processes to predict likely behaviors of organisms under different conditions.

A goal for the research solicited here is to develop a predictive understanding of biological systems using a well characterized prokaryotic microbial cell, for example, *E. coli,* as a model system. Given the immense complexity of even the simplest microbes, fully predictive models that provide quantitatively accurate estimates of each chemical component of a cell will remain a challenge for subsequent generations of researchers. Hence, in the foreseeable future, the modeling of cellular processes will instead be performed at a level beyond that of the individual chemical reactions, perhaps at the level of functional building blocks that can be pieced together or linked into higher order models. At this level, cellular pathways are described either qualitatively as being present or absent, or quantitatively, in terms of the average concentrations and rates of activity derived from experimental data. Despite their lack of chemical detail, such models will provide a powerful tool for integrating and analyzing the very large new biological data sets and, under some conditions, predicting cellular behavior under changing conditions. Just as importantly, these high level models will provide a means of inducing and testing the general principles of cellular function.

Three levels of modeling are included in this solicitation: (1) Molecular simulations of protein function and macromolecular interactions, (2) semi-quantitative simulations of metabolic networks in whole cells, and (3) quantitative kinetic models of biochemical pathways. The latter simulations are much more demanding in terms of the empirical data and computer power required and therefore, will initially be limited to relatively small, well characterized pathways. Since both of these levels of modeling depend on having the (nearly) complete parts lists provided by the fully annotated genome sequences, combined with gene function, expression information and phenotypic data about an organism, the focus of this solicitation will be on E. coli or another well-characterized and studied prokaryotic microbe.

(1) *Molecular simulations of protein function and macromolecular interactions.* The ultimate biological models would be molecular-level simulations of each biochemical process. There are many challenges to molecular-level simulations of biological processes, including the large size of biomolecules and the wide range of time scales of many biological processes, as well as the subtle energetics and complex milieu of biochemical reactions. Moreover, many biochemical reactions occur far from equilibrium and are regulated by both transport of the reactants and subsequent processing of the products. Finally, there remains a wide gulf between the detailed chemical data needed for initiating and validating biomolecular simulations and the data available on many biological processes and environments. Despite these challenges, there are a vast number of biochemical processes for which chemical simulations will have a major impact on our understanding. These problems include the elucidation of the energetic factors underlying protein-protein or protein-DNA interactions and the dissection of the catalytic function of certain enzymes. The promise of such modeling studies is rapidly growing as a result of the development of linear-scaling computational chemical methods and molecular modeling software for massively parallel computers. Additionally, molecular modeling will be used to determine the principles that underlie protein-protein interactions, and ultimately to predict likely protein binding sites.

(2) *Semi-quantitative simulations of metabolic networks.* This modeling approach follows the engineering tradition of making maximal use of limited information by combining highly simplified models with successive constraints to identify an ''envelope'' of expected behaviors of the system under different conditions. A fundamental tenet of such modeling is that the very complex molecular details of biology combine to form robust and relatively simple rules for behavioral responses. Such models are iteratively refined as more functional data and constraints become available from experiments that are themselves guided by the model's predictions.

Since such modeling depends only on the nature of the reactants and products (i.e., the stoichiometry) of the metabolic transformations, rather than the rates of these reactions (kinetics), most of the necessary data for building the model can be derived directly from annotated genomes, in some cases using artificial intelligence based pathway synthesis algorithms. These data are typically encoded in a ''stoichiometry matrix'' relating specific reaction products to metabolic reactions. Numerical analysis of this matrix can identify the entire repertoire of theoretically possible metabolic capabilities of a given genotype, for example, what nutrients are essential and what metabolic pathways are non-redundant. Such information, although qualitative, has enormous potential value. It will allow the inference of phenotypic properties directly from the functionally annotated genotype, help in the optimization of product yield in bio-reactors, and provide a predictive basis for engineering organisms with novel capabilities. Additionally, such analysis can be used to improve and validate tentative functional annotations. Even in the absence of stoichiometric data, mathematical analysis of metabolic networks can shed light on overall biological function. A number of successful models have already been developed for *E. coli* using both stoichiometric data, based on a network analysis, and constraint-based approaches.

Unlike the kinetic pathway described below, computing speed is not typically a limiting factor in molecular pathway analysis. Instead, the primary bottleneck to progress is the availability of functionally annotated genomes and the human talent trained in both the biological sciences and the art of developing and applying such mathematical models. The choice of a well-characterized prokaryotic organism as a model biological system for this solicitation minimizes the challenges associated with the first bottleneck.

(3) *Quantitative kinetic models of biochemical pathways.* Although the metabolic network modeling described above can provide useful qualitative information on possible behavioral characteristics of organisms, a fully predictive understanding of biological processes will require quantitative information about the dynamics of each sub-process. In other words, network

analysis can suggest what metabolic transformations may be possible, but full kinetic details are required to determine which pathways are most important under the given conditions. Such models will require detailed empirical data, including *in vivo* reaction rates and substrate concentrations for each step in the biological system to be simulated. Additionally, these simulations are highly computationally demanding; for example, the simulation of a regulatory circuit involving only several dozen parameters required the use of a parallel supercomputer. These experimental and computational requirements will prohibit such quantitative simulations of whole cells in the foreseeable future. Nevertheless, for selected critical cell subsystems, such simulations offer the promise of quantitative predictions of cellular response and will constitute a rigorous validation of the completeness of our understanding the processes under investigation.

Kinetic models have been applied to a handful of specific cellular pathways that demonstrate both the benefits and technical challenges of such simulations. One of the most complex examples to date has been a full kinetic analysis of the lytic versus lysogenic pathways in phage λ infected *E. coli* cells. The heart of the decision circuitry for this pathway contains only four promoter sites modulated by five gene transcripts, yet the kinetic model required nearly forty empirical rate constants and a number of other parameters. Additionally, to be computationally tractable, this model involved a number of simplifying assumptions, including approximating the cell as a well-stirred homogeneous mixture. Despite these assumptions and the large number of empirical parameters this model yielded reasonably accurate results for the lytic/lysogenic fractions at different levels of viral infection.

An important outcome of this previous work is to highlight the significant differences between the modeling methodologies necessary for biochemical pathways and those used for macroscopic chemical processes (e.g., in optimizing industrial chemical processes.) In the latter the chemical concentrations can be assumed to be continuous and therefore the kinetics can be simulated using ordinary differential equations. In contrast, the very small numbers of individual signaling molecules in biological regulatory pathways require the use of discrete stochastic simulations. Indeed, a number of seemingly non-deterministic features in gene expression have been ascribed to the inherently stochastic fluctuations in the concentrations of very small numbers of regulatory signals.

Overall, both the kinetic models and the metabolic network analysis will provide a means of combining and evaluating the consistency of large sets of biological data. Each requires detailed functional annotation of whole genomes and well as phenotypic data under a wide variety of conditions.

In a parallel solicitation, the Microbial Cell Project (see Program Notice 01–20) supports key DOE missions by building on the successful DOE Microbial Genome Program that has furnished microbial DNA sequence information on microbes relevant to environmental remediation, global carbon sequestration (e.g., CO_2 fixation), complex polymer degradation (e.g., cellulose and lignins), and energy production (fuels, chemicals, and chemical feedstocks). These microbial genome sequences provide a finite set of ''working parts'' for a cell and the challenge now is to understand how these parts are assembled into functional pathways and networks to accomplish activities of interest to the DOE. The traditional reductionist experimental approach has defined specific steps or stages within many physiological processes; however, the availability of whole genomes affords the opportunity to integrate these individual pathways into a larger physiological or whole organism framework. The Microbial Cell Project seeks to integrate available information about individual processes and regulatory complexes to understand the intracellular environment, in which these pathways and networks exist and function. The DOE Microbial Cell Project is part of a coordinated Federal effort called the Microbe Project involving elements from several other Federal agencies. The long-term goal is that research funded in this program and in the Microbial Cell Project will converge so that simulations and models can be developed in organisms and for biochemical pathways important for the DOE mission.

This notice takes advantage of decades of research on *E. coli* (or a similarly well characterized prokaryotic microbe) providing much of the biological information needed to begin developing more comprehensive models of biological systems. It is anticipated that the applied mathematicians and computer scientists will need to partner with biologists in the initial phases of algorithm development, as well as in the design of biological tests to validate models that are developed, including predictions made using these models. Links to some of the vast amount of information available on *E. coli* can be found at *http://genprotec.mbl.edu/start* and *http://web.bham.ac.uk/bcm4ght6/res.html*.

The mathematical and computer science challenges in this effort span a broad range of the current research topics in both fields. A few examples of possible areas include: advanced techniques for data fusion; algorithms for solution of low dimensional dynamical systems in the presence of uncertainty; applications of computational geometry and topology to pattern recognition and analysis; advanced concepts in discrete state machines; and control theory. It must, however, be emphasized that the preceding list is only a list of possible examples and does not reflect any prioritization of areas.

Collaboration and Coordination

Applicants are encouraged to collaborate with researchers in other institutions, such as: universities, industry, non-profit organizations, Federal laboratories and Federally Funded Research and Development Centers (FFRDCs), including the DOE National Laboratories, where appropriate, and to include cost sharing wherever feasible. Further information on preparation of collaborative proposals is available in the Application Guide for the Office of Science Financial Assistance Program that is available via the World Wide Web at: *http://www.science.doe.gov/production/grants/Colab.html*.

Preapplications

Potential applicants are strongly encouraged to submit a brief preapplication that consists of two to three pages of narrative describing the research objectives, the technical approach(es), and the proposed team members and their expertise. The intent in requesting a preapplication is to save the time and effort of applicants in preparing and submitting a formal project application that may be inappropriate for the program. Preapplications will be reviewed relative to the scope and research needs outlined in the summary paragraph and in the **SUPPLEMENTARY INFORMATION**. The preapplication should identify, on the cover sheet, the title of the project, the institution, principal investigator name, telephone, fax, and e-mail address. No budget information or biographical data need be included, nor is an institutional endorsement necessary. A response to each timely preapplication will be communicated to the Principal Investigator by March 9, 2001.

Program Funding

It is anticipated that up to $2 million will be available for all awards in Fiscal Year 2001. Multiple year funding is expected, also contingent on availability of funds and progress of the research; pending the availability of future funding, it is anticipated that this initiative will reflect a long term commitment to understanding the workings of a microbial cell. Awards are expected to range from $250,000 to $600,000 per year with terms of one to three years. The DOE is under no obligation to pay for any costs associated with the preparation or submission of an application. DOE reserves the right to fund, in whole or in part, any, all, or none of the applications submitted in response to this Notice. Applications received by the Office of Science under its normal competitive application mechanisms may also be deemed appropriate for consideration under this announcement and may be funded under this program.

Merit Review

Applications will be subjected to scientific merit review (peer review) and will be evaluated against the following evaluation criteria which are listed in descending order of importance codified at 10 CFR 605.10(d):

1. Scientific and/or Technical Merit of the Project;
2. Appropriateness of the Proposed Method or Approach;
3. Competency of Applicant's Personnel and Adequacy of Proposed Resources;
4. Reasonableness and Appropriateness of the Proposed Budget.

In addition to the above evaluation criteria, applications will also be evaluated on the following:

5. The robustness of the organizational framework if a consortium is proposed;

The evaluation under item 2, Appropriateness of the Proposed Method or Approach, will also consider the following elements:

(a) clarity of the plan in detailing areas of work to be addressed by biologists, computational scientists, applied mathematicians, computer scientists and computer programmers;

(b) quality of the plan for effective collaboration among participants;

(c) viability of the plan for verifying and validating the models developed, including verification using experiment results; and

(d) quality and clarity of the proposed work schedule and project deliverables.

The evaluation will include program policy factors such as the relevance of the proposed research to the terms of the announcement and the agency's programmatic needs. Note, external peer reviewers are selected with regard to both their scientific expertise and the absence of conflict-of-interest issues. Non-federal reviewers will often be used, and submission of an application constitutes agreement that this is acceptable to the investigator(s) and the submitting institution.

Submission Information

The Project Description must be 25 pages or less, exclusive of attachments. It must contain an abstract or project summary on a separate page with the name of the applicant, mailing address, phone, FAX and E-mail listed. The application must include letters of intent from collaborators (briefly describing the intended contribution of each to the research), and short curriculum vitaes, consistent with NIH guidelines, for the applicant and any co-PIs.

To provide a consistent format for the submission, review and solicitation of grant applications submitted under this notice, the preparation and submission of grant applications must follow the guidelines given in the Application Guide for the Office of Science Financial Assistance Program, 10 CFR Part 605. Access to SC's Financial Assistance Application Guide is possible via the World Wide Web at: *http://www.sc.doe.gov/production/grants/grants.html*.

DOE policy requires that potential applicants adhere to 10 CFR part 745 ''Protection of Human Subjects'' (if applicable), or such later revision of those guidelines as may be published in the **Federal Register**.

The Office of Science, as part of its grant regulations (10 CFR 605.11(b)) requires that a grantee funded by SC and performing research involving recombinant DNA molecules and/or organisms and viruses containing recombinant DNA molecules shall comply with the NIH ''Guidelines for Research Involving Recombinant DNA Molecules,'' which is available via the World Wide Web at: *http://www.niehs.nih.gov/odhsb/biosafe/nih/rdna-apr98.pdf*, (59 FR 34496, July 5, 1994), or such later revision of those guidelines as may be published in the **Federal Register**.

Other useful web sites include:

MCP Home Page—*http://microbialcellproject.org*

Microbial Genome Program Home Page—*http://www.er.doe.gov/production/ober/microbial.html*

DOE Joint Genome Institute Microbial Web Page—*http://www.jgi.doe.gov/JGI_microbial/html/*

GenBank Home Page—*http://www.ncbi.nlm.nih.gov/*

Human Genome Home Page—*http://www.ornl.gov/hgmis*

The Catalog of Federal Domestic Assistance Number for this program is 81.049, and the solicitation control number is ERFAP 10 CFR Part 605.

Issued in Washington, D.C. on January 16, 2001.

John Rodney Clark,

Associate Director of Science for Resource Management.

[FR Doc. 01–2372 Filed 1–25–01; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Science Financial Assistance Program Notice 01–18; Low Dose Radiation Research Program—Basic Research

AGENCY: U.S. Department of Energy.

ACTION: Notice inviting grant applications.

SUMMARY: The Office of Biological and Environmental Research (OBER) of the Office of Science (SC), U.S. Department of Energy (DOE), hereby announces their interest in receiving grant applications for research that supports the DOE/OBER Low Dose Radiation Research Program.

Research is sought by the DOE/OBER Low Dose Radiation Research Program for studies involving low LET radiation, in the following areas:

(1) Bystander effects.
(2) Genomic instability.
(3) Adaptive responses.
(4) Endogenous oxidative damage versus low dose radiation-induced damage.
(5) Genetic factors that affect individual susceptibility to low dose radiation.

Applications for *well-justified* research in other areas (see Supplementary Information below) will also be accepted. These Programs use modern molecular tools to develop a better scientific basis for understanding exposures and risks to humans from low doses of low LET radiation that can be used to achieve acceptable levels of human health protection at a reasonable cost.

DATES: Potential applicants should submit a one page preapplication referencing Program Notice 01–18 by 4:30 P.M. E.S.T., February 15, 2001. Receipt of preapplications sent by email will be acknowledged by a return

message. An email response to preapplications discussing the potential program relevance of a formal application generally will be communicated by February 22, 2001.

The deadline for receipt of formal applications is 4:30 P.M., E.D.T., May 15, 2001, in order to be accepted for merit review and to permit timely consideration for award in FY 2001 and FY 2002.

ADDRESSES: Preapplications referencing Program Notice 01–18, should be sent by E-mail to joanne.corcoran@science.doe.gov. Preapplications will also be accepted if mailed to the following address: Ms. Joanne Corcoran, Office of Biological and Environmental Research, SC–72, U.S. Department of Energy, 19901 Germantown Road, Germantown, MD 20874–1290.

Formal applications, referencing Program Notice 01–18, should be sent to: U.S. Department of Energy, Office of Science, Grants and Contracts Division, SC–64, 19901 Germantown Road, Germantown, MD 20874–1290, ATTN: Program Notice 01–18. This address must be used when submitting applications by U.S. Postal Service Express, commercial mail delivery service, or when hand carried by the applicant.

FOR FURTHER INFORMATION CONTACT: For general information, contact Dr. David Thomassen, telephone: (301) 903–9817, E-mail: david.thomassen@science.doe.gov, Office of Biological and Environmental Research, SC–72, U.S. Department of Energy, 19901 Germantown Road, Germantown, MD 20874–1290.

SUPPLEMENTARY INFORMATION:

Description of Research Program Areas

The DOE/OBER Low Dose Radiation Research Program is faced with the challenge of conducting research that can be used to inform the development of future national radiation risk policy for the public and the workplace. For the present solicitation, DOE/OBER is chiefly concerned with very low doses of low LET radiation (x and gamma rays). There are three biological responses of specific interest for this solicitation that are most likely to meet the criteria outlined below. These include bystander effects, induction of genomic instability, and adaptive responses. Applications proposing the use of additional biological responses will be considered only if the biological responses proposed for investigation can be reasonably demonstrated to meet the criteria outlined below. *All applications focused on the characterization of specific biological responses, e.g., bystander effects, etc., should identify how the response of interest meets these criteria.* There is also considerable interest in determining whether these biological responses can be extended from studies in isolated cells to tissues or to more complex tissue-like systems. These responses are discussed here:

Bystander effects—The biological response observed in cells that are not directly traversed by radiation but are neighbors of an irradiated cell. Bystanders have been shown to respond with gene induction and/or production of potential genetic and carcinogenic changes. It is important for the DOE/OBER Low Dose program to determine if these so-called bystander effects can be induced by exposure to low LET (linear energy transfer) radiation delivered at low total doses or dose-rates. If such an effect is demonstrated and quantifiable, it could, potentially, increase estimates of risk from low dose radiation. This bystander effect, in essence, ''amplifies'' the biological effects (and the effective radiation dose) of a low dose exposure by effectively increasing the number of cells that experience adverse effects to a number greater than the number of cells directly exposed to radiation. Research is sought to:

- Characterize the nature of bystander effects at low doses of low LET radiation.
- Determine the relationship between radiation dose and the bystander effects at low doses of low LET radiation.
- Quantify the induction and extent of the bystander effect at low doses of low LET radiation.
- Determine the mechanism of the low LET radiation-induced bystander effect.

Genomic Instability—The loss of genetic stability, a key event in the development of cancer, induced by radiation and expressed as genetic damage many cell divisions after the insult is administered. Current evidence suggests that DNA repair and processing of radiation damage can lead to instability in the progeny of irradiated cells and that susceptibility to instability is under genetic control. However, there is virtually no information on the underlying mechanisms and how the processing of damage leads to instability in the progeny of irradiated cells several generations later. Further, while there has been considerable speculation about the role of such instability in radiation-induced cancer, its role in this process remains to be determined. Research is sought to:

- Characterize the induction of genomic instability by low doses of low LET radiation.
- Determine the relationship between radiation dose and the induction of genomic instability by low doses of low LET radiation.
- Quantify the induction and extent of genomic instability induced by low doses of low LET radiation.
- Determine the mechanism for the induction of genomic instability by low LET radiation.

Adaptive Response—The ability of a low dose of radiation to induce cellular changes that perturb the level of subsequent radiation-induced or spontaneous damage. If low doses of radiation regularly and predictably induce a protective response in cells to subsequent low doses of radiation, or to spontaneous damage, this could have a substantial impact on estimates of adverse health risk from low dose radiation. The generality and the extent of this apparent adaptive response in cells irradiated with small doses of ionizing radiation needs to be quantified. Studies of the adaptive response typically focus on cellular responses to high ''test'' doses of radiation following low ''priming'' doses. However, this solicitation is mainly interested in studying the lower limits for test doses and endpoints that show adaptive response phenomenon. Research is sought to:

- Characterize the adaptive response induced by low doses of low LET radiation.
- Determine the relationship between radiation dose and the adaptive response induced by low doses of low LET radiation.
- Quantify the induction and extent of the adaptive response induced by low doses of low LET radiation.
- Determine the mechanism for the induction of adaptive responses by low LET radiation.

In addition to the three specific biological responses just described, the Program has great interest in understanding endogenous versus low dose radiation induced damage, and the mechanisms underlying individual genetic susceptibility to radiation damage.

Endogenous versus low dose radiation induced damage. A key element of this research program will continue to be the development of an understanding of the similarities and differences between endogenous oxidative damage and damage induced by low levels of ionizing radiation, as well as an understanding of the health risks from both. This information will underpin our interpretation of the biological

effects of exposure to low doses of ionizing radiation. Although always needed, this information was not previously attainable because critical resources and technologies were not available. Today, technologies and resources such as those developed as part of the human genome program, e.g., coupled capillary electrophoresis and mass spectrometry systems and DNA sequence information, have the potential to detect and characterize small differences in damage induced by normal oxidative processes and low doses of radiation. A significant investment in technology development will be required to expand current capabilities for identifying and quantifying small amounts of oxidative or radiation induced damage. Radically new technologies are likely not needed but current technologies will need to be modified. Methodologies having high sensitivity as well as high signal-to-noise ratio will be critical in this effort.

A significant research effort will be required to characterize and quantify normal oxidative damage in cells and the incremental increases induced by low doses of ionizing radiation. Preference will be given to the formation of partnerships between laboratories involved in characterization and quantification of radiation and oxidative damage and groups with expertise in or developing new technology to facilitate progress in both areas simultaneously. Although qualitative descriptions of differences and/or similarities between the types of damage induced under both conditions will be useful in the design and interpretation of experiments in other parts of the program, levels of damage induced by normal oxidative processes and incremental increases due to low dose radiation should be quantified.

Genetic factors that affect individual susceptibility to low dose radiation. The Low Dose Radiation Research Program is interested in determining if genetic differences exist making some individuals more sensitive to radiation-induced damage since these differences could result in sensitive individuals or sub-populations that are at increased risk for radiation-induced cancer. Research should focus on:

- Identification of genes involved in the recognition, repair, and processing of damage induced by ionizing radiation.
- Determining the frequencies of polymorphisms in these genes in the population.
- Determining the biological significance of these polymorphisms with respect to cancer and radiation sensitivity.

Research in these areas will strongly complement ongoing initiatives at the National Institutes of Health (NIH). DOE/OBER staff will work with staff at the NIH to ensure that research in the Low Dose Radiation Research Program is complementary to and not duplicative of research funded by NIH programs.

The National Human Genome Research Institute (NHGRI) is funding research to identify common variants in the coding regions of the majority of human genes identified during the next five years with the goal of developing a catalog of all common variants. The NHGRI is also working to create a map of at least 100,000 single nucleotide polymorphisms (SNPs), the most common polymorphisms in the human genome representing single base-pair differences between two copies of the same gene. These SNPs will be a boon for mapping complex traits such as cancer, cancer susceptibility, and susceptibility to low dose radiation.

The National Institute of Environmental Health Science (NIEHS) is funding research as part of its Environmental Genome Project to understand the impact and interaction of environmental exposures on human disease. The NIEHS project includes efforts to understand genetic susceptibility to environmental agents that will allow more precise identification of the environmental agents that cause disease and the true risks of exposures. The principal focus of NIEHS research will be on chemicals, so the focus on radiation in the Low Dose Radiation Research Program is highly complementary. Initially, the Environmental Genome Project will focus on categories of genes including: xenobiotic metabolism and detoxification genes, hormone metabolic genes, receptor genes, DNA repair genes, cell cycle genes, cell death control genes, genes mediating immune and inflammatory responses, genes mediating nutritional factors, genes involved in oxidative processes and genes for signal transduction systems.

Identification of potential susceptibility genes and polymorphisms in those genes is only the first (and perhaps the easiest) step in the program to characterize and understand genetic susceptibility. Determining the biological significance of these genetic polymorphisms with respect to cancer and radiation sensitivity is the ultimate goal and the more difficult task. The international human genome project, structural biology research, and the NHGRI and NIEHS efforts described above play important roles determining which polymorphisms are most likely to influence gene function. Population genetics and computational biology approaches will be required to estimate the potential impact on estimates of population and individual risk. Genetic epidemiology approaches will also be needed to relate specific polymorphisms and combinations of polymorphisms with cancer risk. Inbred mouse strains and other model organisms with well-characterized differences in susceptibility to radiation-induced cancer are also important tools for identifying significant polymorphisms. Direct assessment of the biological significance of candidate ''susceptibility genes'' can also be undertaken using animal models such as knockout and knock-in mice, mice with specific genes removed or added.

Background information on the Low Dose Radiation Research Program can be found in the research program plan at *http://www.lowdose.org/index.html.* A list of currently funded projects can be found at *http://lowdose.org/research.html.*

Not all research on the biological effects of low doses of radiation will be equally useful for the development of radiation risk policy, though the path from basic radiation biology research to radiation risk policy is admittedly not clear at this time. It is our belief that the most useful research will focus on biological responses that:

- Are known to be induced at low doses of radiation,
- Have the potential to increase or decrease the biological effects of radiation if they occur at low doses of radiation,
- Have the potential to directly impact (i.e., increase or decrease) the subsequent development of cancer or other harmful health impacts,
- Are potentially quantifiable, and
- Could potentially be linked to the development of a biologically based model for radiation risk (see DOE Office of Science Program Notice 01–17).

Alternatively, a biological response of interest could meet all of the above criteria only at high doses but may actually be absent (as opposed to simply undetectable) at low doses of radiation. Since the mechanisms of action may be different after high versus low doses of radiation, such studies would help define these mechanisms. Defining the unique doses where these mechanisms shift is important.

The focus of research in the Low Dose Radiation Research Program should be on doses of low linear energy transfer (LET) radiation that are at or below current workplace exposure limits. In general, research in this program should focus *on total radiation doses that are less than or equal to 10 rads.* Some

experiments will likely involve selected exposures to higher doses of radiation for comparisons with previous experiments or for determining the validity of extrapolation methods previously used to estimate the effects of low doses of radiation from observations made at high doses. Research that principally focuses on radiation doses greater than 10 rads, high LET radiation or non-ionizing radiation will not be considered without substantial justification.

The program is currently funding a number of projects to develop micro-irradiation devices capable of delivering low doses of low LET radiation to individual cells or to specific parts of individual cells. For links to currently funded ''microbeam'' projects see *http://lowdose.org/99meeting/abstracts/tool.html*—projects 26, 28, 29 and *http://lowdose.org/99meeting/abstracts/response.html*—project 3. Investigators are strongly encouraged to use these or similar tools, as appropriate, in the design and conduct of their research. Funds are available to assist in the collaborative use of these or comparable tools or, in some cases, to provide low-cost micro-irradiation devices to individual investigators.

Program Funding

It is anticipated that up to $4.0 million will be available from DOE/OBER for new grant awards during FY 2001 and FY 2002, contingent upon the availability of funds. Multiple year funding of grant awards is expected, and is also contingent upon the availability of appropriated funds, progress of the research, and continuing program need. It is expected that most awards will be from 1 to 5 years and will range from $200,000 to $400,000 per year (total costs). Applications requesting more than 3 years of funding will need to clearly justify the benefits of the additional years of research to the goals of the low dose radiation research program. Please note that funds are available from DOE to assist in the collaborative use of certain microbeam irradiators.

Collaboration

Applicants are encouraged to collaborate with researchers in other institutions, such as universities, industry, non-profit organizations, federal laboratories and Federally Funded Research and Development Centers (FFRDCs), including the DOE National Laboratories, where appropriate, and to incorporate cost sharing and/or consortia wherever feasible.

Preapplication

A preapplication should be submitted. The Preapplication should contain a title, list of investigators, address, telephone, fax and E-mail address of the Principal Investigator, and no more than a one page summary of the proposed research, including project objectives and methods of accomplishment. Responses to the preapplications, encouraging or discouraging formal applications, will generally be communicated within 7 days of receipt. Notification of a successful preapplication is not an indication that an award will be made in response to the formal application.

Merit and Relevance Review

Applications will be subjected to scientific merit review (peer review) and will be evaluated against the following evaluation criteria listed in descending order of importance as codified at 10 CFR 605.10(d):

1. Scientific and/or Technical Merit of the Project.
2. Appropriateness of the Proposed Method or Approach.
3. Competency of Applicant's Personnel and Adequacy of Proposed Resources.
4. Reasonableness and Appropriateness of the Proposed Budget.

The evaluation will include program policy factors such as the relevance of the proposed research to the terms of the announcement and the Department's programmatic needs. External peer reviewers are selected with regard to both their scientific expertise and the absence of conflict-of-interest issues. Non-federal reviewers may be used, and submission of an application constitutes agreement that this is acceptable to the investigator(s) and the submitting institution.

Applications

(Please Note Critical Information Below on Page Limits)

Information about the development and submission of applications, eligibility, limitations, evaluation, selection process, and other policies and procedures may be found in the Application Guide for the Office of Science Financial Assistance Program and 10 CFR Part 605. Electronic access to the Guide and required forms is made available via the World Wide Web at: *http://www.er.doe.gov/production/grants/grants.html.* DOE is under no obligation to pay for any costs associated with the preparation or submission of applications if an award is not made.

The Project Description must be 25 pages or less, exclusive of attachments. *Applications with Project Descriptions longer than 25 pages will be returned to applicants and will not be scientifically reviewed.* The application must contain an abstract or project summary, letters of intent from collaborators, and short curriculum vitas consistent with NIH guidelines.

Adherence to type size and line spacing requirements is necessary for several reasons. No applicants should have the advantage, or by using small type, of providing more text in their applications. Small type may also make it difficult for reviewers to read the application. Applications must have 1-inch margins at the top, bottom, and on each side. Type sizes must be 10 point or larger. Line spacing is at the discretion of the applicant but there must be no more than 6 lines per vertical inch of text. Pages should be standard 8½″ x 11″ (or metric A4, i.e., 210 mm x 297 mm).

Applicants are expected to use the following ordered format to prepare Applications in addition to following instructions in the Application Guide for the Office of Science Financial Assistance Program. Applications must be written in English, with all budgets in U.S. dollars.

- Face Page (DOE F 4650.2 (10–91)).
- Project Abstract (no more than one page).
- Budgets for each year and a summary budget page for the entire project period (using DOE F 4620.1).
- Budget Explanation.
- Budgets and Budget explanation for each collaborative subproject, if any.
- Project Description (The Project Description must be 25 pages or less, exclusive of attachments. *Applications with Project Descriptions longer than 25 pages will be returned to applicants and will not be scientifically reviewed.*)
- Goals.
- Background.
- Research Plan.
- Preliminary Studies and progress (if applicable).
- Research Design and Methodologies.
- Literature Cited.
- Collaborative Arrangements (if applicable).
- Biographical Sketches (limit 2 pages per senior investigator).
- Description of Facilities and Resources.
- Current and Pending Support for each senior investigator.

The Office of Science, as part of its grant regulations, requires at 10 CFR 605.11(b) that a recipient receiving a grant to perform research involving

recombinant DNA molecules and/or organisms and viruses containing recombinant DNA molecules shall comply with the National Institutes of Health ''Guidelines for Research Involving Recombinant DNA Molecules'', which is available via the world wide web at: *http://www.niehs.nih.gov/odhsb/biosafe/nih/rdna-apr98.pdf*, (59 FR 34496, July 5, 1994), or such later revision of those guidelines as may be published in the **Federal Register**.

(The Catalog of Federal Domestic Assistance Number for this program is 81.049, and the solicitation control number is ERFAP 10 CFR Part 605)

Dated: January 22, 2001.

John Rodney Clark,

Associate Director of Science for Resource Management.

[FR Doc. 01–2371 Filed 1–25–01; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Revised Public Participation Policy Guidance

AGENCY: Department of Energy.

ACTION: Notice of availability and solicitation of comments.

SUMMARY: The Department of Energy (DOE) today makes available, and is soliciting public comments on, proposed revisions to its Public Participation Policy internal directive (DOE P 1210.1, issued July 29, 1994). The proposed revisions are intended to clarify and update the policy guidance in the directive and to expand it to incorporate findings and recommendations of the Secretary of Energy Advisory Board's Openness Advisory Panel on improving relations between DOE facilities and their host communities. Under DOE's Directives System, all documents must be reviewed periodically for currency and appropriateness. This policy is not intended to affect requirements imposed by law, regulation, or contractual agreement; neither does it expand or limit any rights available to the public under current law.

DATES: The public comment period will extend to April 30, 2001. Comments received after that date will be considered to the extent practicable.

ADDRESSES: Written comments may be provided by mail to: U.S. Department of Energy, Nevada Operations Office, Office of Public Affairs and Information, P.O. Box 98518—Attn: DOE PPP Comments, Las Vegas, NV 89193–8518.

by fax to (702) 295–0154—Attn: DOE PPP Comments

or electronically to:

DOEPPP__it@nv.doe.gov.

FOR FURTHER INFORMATION CONTACT: Copies of the Proposed Revised Public Participation and Community Relations Policy are available on DOE's World Wide Web Site at *http://www.energy.gov,* under ''Headlines.'' Copies may also be obtained by writing or calling: The Center for Environmental Management Information, P.O. Box 23769, Washington, DC 20026, Telephone: 1–800–736–3282 (in Washington, DC: 202–863–5084).

For further information on the purpose and substance of DOE's Public Participation and Community Relations Policy, please write or call: Ms. Elizabeth A. Nolan, Senior Advisor, Office of Congressional & Intergovernmental Affairs (CI–1), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, Telephone: 202–586–7328.

SUPPLEMENTARY INFORMATION:

Background

DOE issued its Public Participation Policy (DOE P 1210.1) on July 29, 1994. The Policy was in the form of an internal directive that provided policy guidance for DOE officials. Under DOE's Directives System, all documents must be reviewed periodically for currency and appropriateness.

A Task Force of DOE headquarters program and field site managers actively involved in public participation activities was convened to review the policy. The Task Force proposed revisions to clarify and update the policy to reflect current practices and the lessons of six years' experience with public participation.

At about the same time, the Openness Advisory Panel of the Secretary of Energy Advisory Board undertook a review of DOE's relationships with the communities surrounding its laboratories and facilities to assess how DOE is perceived as a neighbor, what it is doing well, and what it could do better. The Panel's initial review focused on Lawrence Berkeley National Laboratory and Lawrence Livermore National Laboratory, both in California, and on the Fernald Plant, in Ohio. On November 17, 2000 the Openness Advisory Panel issued its report, titled Relations between DOE Facilities and their Host Communities: A Pilot Review, which presented Findings and Recommendations on improving community relations. As keys to success, the Openness Advisory Panel identified full, open, timely, two-way communication, the building of positive personal relationships, and accountability on the part of DOE managers. The importance of these elements has been reaffirmed and strengthened in the proposed revisions.

Proposed Revised Policy

Under the proposed revised Public Participation and Community Relations Policy, public participation would be defined as open, ongoing two-way communication, both formal and informal, between DOE and its stakeholders concerning DOE's missions and activities. The Policy would recognize that effective public participation is at the core of good community relations, which are essential for DOE facilities to achieve their missions. Under this Policy, DOE would actively seek, consider, and incorporate or otherwise respond in a timely manner to the views of its stakeholders and affected communities in making its decisions. This Policy would function as a framework within which all DOE programs, including programs of the National Nuclear Security Administration, would operate.

The proposed Public Participation and Community Relations Policy is being released for public comment prior to DOE's decision to approve any of the recommended changes.

Issued in Washington D.C., January 16, 2001.

Linda Lingle,

Principal Deputy Assistant Secretary, Office of Congressional and Intergovernmental Affairs.

[FR Doc. 01–2370 Filed 1–25–01; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC01–57–000, et al.]

The Connecticut Light and Power Company, et al.; Electric Rate and Corporate Regulation Filings

January 19, 2001.

Take notice that the following filings have been made with the Commission:

1. The Connecticut Light and Power Company

[Docket Nos. EC01–57–000 and ER01–947–000]

Take notice that on January 12, 2001, The Connecticut Light and Power Company (Applicant) tendered for filing an Application for approval under section 203 of the Federal Power Act for approval of the disposition of jurisdictional facilities that will result

from the sale of generating units in the 250–MW South Meadow generating station to the Connecticut Resources Recovery Authority (CRRA). Applicant also seeks acceptance under section 205 of the Federal Power Act of an Interconnection and Operation Agreement relating to those facilities.

Applicant requests an effective date for the Interconnection and Operation Agreement of February 28, 2001, and states that copies of this filing are being mailed to CRRA and the Connecticut Department of Public Utility Control.

Comment date: February 2, 2001, in accordance with Standard Paragraph E at the end of this notice.

2. CPV Atlantic, Ltd.

[Docket No. EG01–103–000]

Take notice that on January 17, 2001, CPV Atlantic, Ltd. (CPV Atlantic or Applicant), c/o Competitive Power Ventures, Inc., Silver Spring Metro Plaza I, 8401 Colesville Road, Suite 504, Silver Spring, MD 20910, filed with the Federal Energy Regulatory Commission (Commission) an Application for Determination of Exempt Wholesale Generator Status, pursuant to Part 365 of the Commission's Regulations and Section 32 of the Public Utility Holding Company Act of 1935, as amended.

Applicant, a Florida limited partnership, is a special purpose entity established to develop, construct, own and operate a nominally rated 250 MW natural gas-fired combined cycle generating facility (Facility) to be located in the City of Port St. Lucie, Port St. Lucie County, Florida. The Facility will consist of one (1) F class combustion turbine, one (1) heat recovery steam generator and one (1) steam turbine. The Facility as currently configured will include certain transmission interconnection facilities necessary to effect the sale of electric energy at wholesale and interconnect the Facility to the transmission grid. All of the electricity generated by the Facility will be sold exclusively at wholesale.

Comment date: February 9, 2001, in accordance with Standard Paragraph E at the end of this notice. The Commission will limit its consideration of comments to those that concern the adequacy or accuracy of the application.

3. American Transmission Systems, Inc.

[Docket No. ER01–363–001]

Take notice that on January 16, 2001, American Transmission Systems, Incorporated made a compliance filing to revise Schedule 4A of its Open Access Transmission Tariff in accordance with the Commission's Letter Order of December 29, 2000 in this proceeding. This filing is made pursuant to Section 205 of the Federal Power Act.

Copies of this compliance filing have been served on the Public Utilities Commission of Ohio and parties of record.

Comment date: February 6, 2001, in accordance with Standard Paragraph E at the end of this notice.

4. Allegheny Energy Supply Company, LLC

[Docket No. ER01–944–000]

Take notice that on January 12, 2001, Allegheny Energy Supply Company, LLC (AE Supply) filed with the Federal Energy Regulatory Commission a letter approving its membership in the Western Systems Power Pool (WSPP).

AE Supply requests that the Commission allow its membership in the WSPP to become effective on January 15, 2001.

AE Supply states that a copy of this filing has been provided to the WSPP Executive Committee, the Pennsylvania Public Utility Commission, the Maryland Public Service Commission, the West Virginia Public Service Commission, the Public Utilities Commission of Ohio, the Virginia State Corporation Commission, Michael E. Small, Esq. and David S. Berman, Esq., General Counsel to the WSPP, and the members of the WSPP.

Comment date: February 2, 2001, in accordance with Standard Paragraph E at the end of this notice.

5. North Atlantic Energy Corporation

[Docket No. ER01–949–000]

Take notice that on January 16, 2001, North Atlantic Energy Corporation, tendered for filing revisions to its FERC Electric Service Rate Schedules Nos. 1 and 3. The Revised Rate Schedules would lower rates of North Atlantic Energy Corporation's (North Atlantic) charges to the Public Service Company of New Hampshire (PSNH) for the output of North Atlantic's ownership interest in the Seabrook Nuclear Power Station.

The reductions are the result of a Restructuring Settlement for PSNH. Under the Restructuring Settlement, PSNH will issue revenue reduction bonds, the proceeds of which will be used, in part, to buy down North Atlantic's investment in Seabrook Station. The amendments also reduce North Atlantic's cost of common equity charged under the Rate Schedules from 12.53% to 7.00%.

Copies of this filing were served upon the Office of the Attorney General for the State of New Hampshire, and the Executive Director and Secretary of the New Hampshire Public Utilities Commission.

Comment date: February 6, 2001, in accordance with Standard Paragraph E at the end of this notice.

6. Jersey Central Power & Light Company, Metropolitan Edison Company, and Pennsylvania Electric Company

[Docket No. ER01–950–000]

Take notice that on January 16, 2001, Jersey Central Power & Light Company, Metropolitan Edison Company and Pennsylvania Electric Company (individually doing business as GPU Energy) submitted for filing a Notice of Cancellation of the Service Agreement between GPU Energy and New Energy Ventures, L.L.C. (now AES NewEnergy, Inc.), FERC Electric Tariff, Original Volume No. 1, Service Agreement No. 76.

GPU Energy requests that cancellation be effective the 15th day of March 2001.

Comment date: February 6, 2001, in accordance with Standard Paragraph E at the end of this notice.

7. Jersey Central Power & Light Company, Metropolitan Edison Company, and Pennsylvania Electric Company

[Docket No. ER01–951–000]

Take notice that on January 16, 2001, Jersey Central Power & Light Company, Metropolitan Edison Company and Pennsylvania Electric Company (individually doing business as GPU Energy) submitted for filing a Notice of Cancellation of the Service Agreement between GPU Energy and Energis Resources Incorporated (now PSEG Energy Technologies), FERC Electric Tariff, Original Volume No. 1, Service Agreement No. 84.

GPU Energy requests that cancellation be effective the 15th day of March 2001.

Comment date: February 6, 2001, in accordance with Standard Paragraph E at the end of this notice.

8. Jersey Central Power & Light Company; Metropolitan Edison Company; Pennsylvania Electric Company

[Docket No. ER01–952–000]

Take notice that on January 16, 2001, Jersey Central Power & Light Company, Metropolitan Edison Company and Pennsylvania Electric Company (individually doing business as GPU Energy) submitted for filing a Notice of Cancellation of the Service Agreement between GPU Energy and Dupont Power Marketing, Inc. (now Conoco Power

Marketing, Inc.), FERC Electric Tariff, Original Volume No. 1, Service Agreement No. 82.

GPU Energy requests that cancellation be effective the 15th day of March 2001.

Comment date: February 6, 2001, in accordance with Standard Paragraph E at the end of this notice.

9. Jersey Central Power & Light Company; Metropolitan Edison Company; Pennsylvania Electric Company

[Docket No. ER01–953–000]

Take notice that on January 16, 2001, Jersey Central Power & Light Company, Metropolitan Edison Company and Pennsylvania Electric Company (individually doing business as GPU Energy) submitted for filing a Notice of Cancellation of the Service Agreement between GPU Energy and PacifiCorp Power Marketing, Inc., FERC Electric Tariff, Original Volume No. 1, Service Agreement No. 77.

GPU Energy requests that cancellation be effective the 15th day of March 2001.

Comment date: February 6, 2001, in accordance with Standard Paragraph E at the end of this notice.

10. Jersey Central Power & Light Company; Metropolitan Edison Company; Pennsylvania Electric Company

[Docket No. ER01–954–000]

Take notice that on January 16, 2001, Jersey Central Power & Light Company, Metropolitan Edison Company and Pennsylvania Electric Company (individually doing business as GPU Energy) submitted for filing a Notice of Cancellation of the Service Agreement between GPU Energy and Strategic Energy Ltd., FERC Electric Tariff, Original Volume No. 1, Service Agreement No. 83.

GPU Energy requests that cancellation be effective the 15th day of March 2001.

Comment date: February 6, 2001, in accordance with Standard Paragraph E at the end of this notice.

11. Virginia Electric and Power Company

[Docket No. ER01–955–000]

Take notice that on January 16, 2001, Virginia Electric and Power Company (the Company) tendered for filing a Service Agreement for Short-Term Market Rate Electric Power Sales and the Resale of Transmission Rights with AES Eastern Energy, L.P.

Under the Service Agreement, the Company will provide services to the customer under the terms of the Company's Revised Market-Based Rate Tariff designated as FERC Electric Tariff (Third Revised Volume No. 4), which was accepted by order of the Commission dated August 30, 2000 in Docket No. ER00–1737–001.

The Company requests an effective date of January 16, 2001, the date the service agreement was filed.

Copies of the filing were served upon AES Eastern Energy, L.P., the Virginia State Corporation Commission and the North Carolina Utilities Commission.

Comment date: February 6, 2001, in accordance with Standard Paragraph E at the end of this notice.

12. Virginia Electric and Power Company

[Docket No. ER01–956–000]

Take notice that on January 16, 2001, Virginia Electric and Power Company (Dominion Virginia Power or the Company) tendered for filing the following:

1. Service Agreement for Firm Point-to-Point Transmission Service by Virginia Electric and Power Company to Indiana Electric Marketing LLC designated as Service Agreement No. 312 under the Company's FERC Electric Tariff, Second Revised Volume No. 5;

2. Service Agreement for Non-Firm Point-to-Point Transmission Service by Virginia Electric and Power Company to Indiana Electric Marketing LLC designated as Service Agreement No. 313 under the Company's FERC Electric Tariff, Second Revised Volume No. 5.

The foregoing Service Agreements are tendered for filing under the Open Access Transmission Tariff to Eligible Purchasers effective June 7, 2000. Under the tendered Service Agreements, Dominion Virginia Power will provide point-to-point service to Indiana Electric Marketing LLC under the rates, terms and conditions of the Open Access Transmission Tariff.

Dominion Virginia Power requests an effective date of January 16, 2001, the date of filing of the Service Agreements.

Copies of the filing were served upon Indiana Electric Marketing LLC, the Virginia State Corporation Commission, and the North Carolina Utilities Commission.

Comment date: February 6, 2001, in accordance with Standard Paragraph E at the end of this notice.

13. Wisconsin Electric Power Company

[Docket No. ER01–957–000]

Take notice that on January 16, 2001, Wisconsin Electric Power Company (Wisconsin Electric), tendered for filing an amendment to its Power Sales Agreement (PSA) with Ontonagon County Electrification Association (Ontonagon) along with a complete copy of the PSA with Order 614 designations.

Wisconsin Electric respectfully requests an effective date of January 15, 2001.

Copies of the filing have been served on Ontonagon, the Michigan Public Service Commission, and the Public Service Commission of Wisconsin.

Comment date: February 6, 2001, in accordance with Standard Paragraph E at the end of this notice.

14. Nevada Power Company

[Docket No. ER01–958–000]

Take notice that on January 16, 2001, Nevada Power Company tendered for filing, in accordance with 18 CFR Part 35 of the Commission's Rules and Regulations, a Notice of Cancellation of Agreement for Supplemental Power Service Between Nevada Power Company and Overton Power District No. 5.

This Notice of Cancellation is filed pursuant to the notice of termination of the Agreement for Supplemental Power Service given pursuant to the terms of the agreement by Nevada Power Company to Overton Power District No. 5.

Copies of the filing were served upon Overton Power District No. 5, the Public Utilities Commission of Nevada and the Nevada Attorney General's Bureau of Consumer Protection.

Comment date: February 6, 2001, in accordance with Standard Paragraph E at the end of this notice.

15. Allegheny Energy Global Markets, LLC

[Docket No. ER01–959–000]

Take notice that on January 16, 2001, Allegheny Energy Global Markets, LLC (Allegheny Energy Global, LLC) filed a market rate tariff of general applicability under which it proposes to sell capacity and energy to affiliates and non-affiliates at market-based rates, and to make such sales to franchised public utility affiliates at rates capped by a publicly available regional index price.

Allegheny Energy Global, LLC requests an effective date no later than February 12, 2001.

Copies of the filing have been provided to the Public Utilities Commission of Ohio, the Pennsylvania Public Utility Commission, the Maryland Public Service Commission, the Virginia State Corporation Commission, the West Virginia Public Service Commission, and all parties of record.

Comment date: February 6, 2001, in accordance with Standard Paragraph E at the end of this notice.

16. Arizona Public Service Company

[Docket No. ER01–960–000]

Take notice that on January 16, 2001, Arizona Public Service Company (APS) tendered for filing umbrella Service Agreements to provide Short-Term Firm and Non-Firm Point-to-Point Transmission Service to Abitibi Consolidated Sales Corporation under APS' Open Access Transmission Tariff.

A copy of this filing has been served on Abitibi Consolidated Sales Corporation, and the Arizona Corporation Commission.

Comment date: February 6, 2001, in accordance with Standard Paragraph E at the end of this notice.

17. California Independent System Operator Corporation

[Docket No. ER01–961–000]

Take notice that on January 16, 2001, the California Independent System Operator Corporation (ISO), tendered for filing a Meter Service Agreement for Scheduling Coordinators between the ISO and Calpine Energy Services, LP for acceptance by the Commission.

The ISO states that this filing has been served on Calpine Energy Services, LP and the California Public Utilities Commission.

The ISO is requesting waiver of the 60-day notice requirement to allow the Meter Service Agreement to be made effective as of January 3, 2001.

Comment date: February 6, 2001, in accordance with Standard Paragraph E at the end of this notice.

18. California Independent System Operator Corporation

[Docket No. ER01–962–000]

Take notice that on January 16, 2001, the California Independent System Operator Corporation, tendered for filing a Scheduling Coordinator Agreement between the ISO and Calpine Energy Services, LP for acceptance by the Commission.

The ISO states that this filing has been served on Calpine Energy Services, LP and the California Public Utilities Commission.

The ISO is requesting waiver of the 60-day notice requirement to allow the Scheduling Coordinator Agreement to be made effective as of January 3, 2001.

Comment date: February 6, 2001, in accordance with Standard Paragraph E at the end of this notice.

19. California Independent System Operator Corporation

[Docket No. ER01–963–000]

Take notice that on January 16, 2001, the California Independent System Operator Corporation (ISO), tendered for filing a Meter Service Agreement for Scheduling Coordinators between the ISO and Morgan Stanley Capital Group Inc. for acceptance by the Commission.

The ISO states that this filing has been served on Morgan Stanley Capital Group Inc. and the California Public Utilities Commission.

The ISO is requesting waiver of the 60-day notice requirement to allow the Meter Service Agreement to be made effective as of January 3, 2001.

Comment date: February 6, 2001, in accordance with Standard Paragraph E at the end of this notice.

20. California Independent System Operator Corporation

[Docket No. ER01–964–000]

Take notice that on January 16, 2001, the California Independent System Operator Corporation, tendered for filing a Scheduling Coordinator Agreement between the ISO and Morgan Stanley Capital Group Inc. for acceptance by the Commission.

The ISO states that this filing has been served on Morgan Stanley Capital Group Inc. and the California Public Utilities Commission.

The ISO is requesting waiver of the 60-day notice requirement to allow the Scheduling Coordinator Agreement to be made effective as of January 3, 2001.

Comment date: February 6, 2001, in accordance with Standard Paragraph E at the end of this notice.

21. Jersey Central Power & Light Company, Metropolitan Edison Company, Pennsylvania Electric Company

[Docket No. ER01–965–000]

Take notice that on January 16, 2001, Jersey Central Power & Light Company, Metropolitan Edison Company and Pennsylvania Electric Company (individually doing business as GPU Energy) submitted for filing a Notice of Cancellation of the Service Agreement between GPU Service Corporation and Aquila Power Corporation (now Aquila Energy Marketing Corporation), FERC Electric Tariff, Original Volume No. 1, Service Agreement No. 32.

GPU Energy requests that cancellation be effective the 15th day of March 2001.

Comment date: February 6, 2001, in accordance with Standard Paragraph E at the end of this notice.

22. Union Electric Company, Central Illinois Public Service Company

[Docket No. ER01–966–000]

Take notice that on January 16, 2001, AmerenUE, gave notice, pursuant to Midwest Independent Transmission System Operator, Inc., 84 FERC ¶ 61,231 (1998), that Ameren intends to withdraw from the Midwest ISO.

Comment date: February 6, 2001, in accordance with Standard Paragraph E at the end of this notice.

23. California Independent System Operator Corporation

[Docket No. ER01–967–000]

Take notice that on January 16, 2001, the California Independent System Operator Corporation (ISO) submitted for filing and acceptance an amendment (Amendment No. 1) to the Utility Distribution Company Operating Agreement (UDC Operating Agreement) between the ISO and the City of Pasadena, California (Pasadena).

The ISO requests waiver of the Commission's 60-day prior notice requirement to allow Amendment No. 1 to be made effective as of January 3, 2001, the date on which Amendment No. 1 was executed.

The ISO states that this filing has been served upon all parties in Docket No. ER99–3619–000, the proceeding in which the UDC Operating Agreement was filed.

Comment date: February 6, 2001, in accordance with Standard Paragraph E at the end of this notice.

24. Great Bay Power Corporation

[Docket No. ER01–968–000]

Take notice that on January 16, 2001, Great Bay Power Corporation (Great Bay) tendered for filing a service agreement between Calpine Energy Services, L.P. and Great Bay for service under Great Bay's revised Market-Based Rate Power Sales Tariff (Tariff). This Tariff was accepted for filing by the Commission on May 31, 2000, in Docket No. ER00–2211–000.

The service agreement is proposed to be effective January 1, 2001.

Comment date: February 6, 2001, in accordance with Standard Paragraph E at the end of this notice.

25. Alliant Energy Corporate Services, Inc.

[Docket No. ER01–969–000]

Take notice that on January 16, 2000, Alliant Energy Corporate Services, Inc. tendered for filing executed Service Agreements for network integration transmission service with Xcel Energy Services Inc. as Agent for Northern States Power Company as a network Transmission Customer under the terms of the Alliant Energy Corporate Services, Inc. transmission tariff.

Alliant Energy Corporate Services, Inc. requests an effective date of January 1, 2001, and accordingly, seeks waiver of the Commission's notice requirements.

A copy of this filing has been served upon the Illinois Commerce Commission, the Minnesota Public Utilities Commission, the Iowa Department of Commerce, and the Public Service Commission of Wisconsin.

Comment date: February 6, 2001, in accordance with Standard Paragraph E at the end of this notice.

26. Consumers Energy Company

[Docket No. ER01–970–000]

Take notice that on January 16, 2001, Consumers Energy Company (Consumers) tendered for filing executed Firm and Non-Firm Point to Point Transmission Service Agreements with Tenaska Power Services Co. (Customer) pursuant to the Joint Open Access Transmission Service Tariff filed on December 31, 1996 by Consumers and The Detroit Edison Company (Detroit Edison).

Both Agreements have effective dates of January 1, 2001.

Copies of the filed agreements were served upon the Michigan Public Service Commission, Detroit Edison, and the Customer.

Comment date: February 6, 2001, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraphs

E. Any person desiring to be heard or to protest such filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before the comment date. 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. Copies of these filings are on file with the Commission and are available for public inspection. This filing may also be viewed on the Internet at http://www.ferc.fed.us/ online/rims.htm (call 202–208–2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 01–2386 Filed 1–25–01; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER01–971–000, *et al.*]

Duke Energy Corporation, *et al*; Electric Rate and Corporate Regulation Filings

January 22, 2001.

Take notice that the following filings have been made with the Commission:

1. Duke Energy Corporation

[Docket No. ER01–971–000]

Take notice that on January 17, 2001, Duke Energy Corporation (Duke), tendered for filing a Service Agreement with Duke Power, a division of Duke Energy for Firm Point-To-Point Transmission Service under Duke's Open Access Transmission Tariff.

Duke requests that the proposed Service Agreement be permitted to become effective on December 19, 2000.

Duke states that this filing is in accordance with Part 35 of the Commission's Regulations and a copy has been served on the North Carolina Utilities Commission.

Comment date: February 7, 2001, in accordance with Standard Paragraph E at the end of this notice.

2. Allegheny Energy Service Corporation on behalf of Monongahela Power Company, The Potomac Edison Company, and West Penn Power Company (Allegheny Power)

[Docket No. ER01–614–001]

Take notice that on January 16, 2001, Allegheny Energy Service Corporation on behalf of Monongahela Power Company, The Potomac Edison Company and West Penn Power Company (Allegheny Power), tendered for filing First Revised Service Agreement No. 73 under the Market Rate Tariff to incorporate a Netting Agreement with PG&E Energy Trading—Power, L.P., into the tariff provisions.

Allegheny Power requests a waiver of notice requirements to make the Netting Agreement effective as of January 3, 2001.

Copies of the filing have been provided to the Public Utilities Commission of Ohio, the Pennsylvania Public Utility Commission, the Maryland Public Service Commission, the Virginia State Corporation Commission, the West Virginia Public Service Commission, and all parties of record.

Comment date: February 7, 2001, in accordance with Standard Paragraph E at the end of this notice.

3. Duke Energy Corporation

[Docket No. ER01–972–000]

Take notice that on January 17, 2001, Duke Energy Corporation (Duke), tendered for filing a Service Agreement with Duke Power, a division of Duke Energy for Firm Point-To-Point Transmission Service under Duke's Open Access Transmission Tariff.

Duke requests that the proposed Service Agreement permitted to become effective on December 20, 2000.

Duke states that this filing is in accordance with Part 35 of the Commission's Regulations and a copy has been served on the North Carolina Utilities Commission.

Comment date: February 7, 2001, in accordance with Standard Paragraph E at the end of this notice.

4. Duke Energy Corporation

[Docket No. ER01–973–000]

Take notice that on January 17, 2001, Duke Energy Corporation (Duke), tendered for filing a Service Agreement with Duke Power, a division of Duke Energy for Firm Point-To-Point Transmission Service under Duke's Open Access Transmission Tariff.

Duke requests that the proposed Service Agreement be permitted to become effective on December 20, 2000.

Duke states that this filing is in accordance with Part 35 of the Commission's Regulations and a copy has been served on the North Carolina Utilities Commission.

Comment date: February 7, 2001, in accordance with Standard Paragraph E at the end of this notice.

5. Duke Energy Corporation

[Docket No. ER01–974–000]

Take notice that on January 17, 2001, Duke Energy Corporation (Duke), tendered for filing a Service Agreement with Carolina Power & Light Company for Firm Point-To-Point Transmission Service under Duke's Open Access Transmission Tariff.

Duke requests that the proposed Service Agreement be permitted to become effective on December 19, 2000.

Duke states that this filing is in accordance with Part 35 of the Commission's Regulations and a copy has been served on the North Carolina Utilities Commission.

Comment date: February 7, 2001, in accordance with Standard Paragraph E at the end of this notice.

6. Duke Energy Corporation

[Docket No. ER01–975–000]

Take notice that on January 17, 2001, Duke Energy Corporation (Duke), tendered for filing a Service Agreement

with TransAlta Energy Marketing (U.S.), Inc., for Firm Point-To-Point Transmission Service under Duke's Open Access Transmission Tariff.

Duke requests that the proposed Service Agreement be permitted to become effective on January 8, 2001.

Duke states that this filing is in accordance with Part 35 of the Commission's Regulations and a copy has been served on the North Carolina Utilities Commission.

Comment date: February 7, 2001, in accordance with Standard Paragraph E at the end of this notice.

7. Duke Energy Corporation

[Docket No. ER01–976–000]

Take notice that on January 17, 2001, Duke Energy Corporation (Duke), tendered for filing a Service Agreement with Sempra Energy Trading Corp. for Firm Transmission Service under Duke's Open Access Transmission Tariff.

Duke requests that the proposed Service Agreement be permitted to become effective on December 19, 2000.

Duke states that this filing is in accordance with Part 35 of the Commission's Regulations and a copy has been served on the North Carolina Utilities Commission.

Comment date: February 7, 2001, in accordance with Standard Paragraph E at the end of this notice.

8. Southwest Power Pool, Inc.

[Docket No. ER01–977–000]

Take notice that on January 17, 2001, Southwest Power Pool, Inc. (SPP), tendered for filing 82 executed service agreements for Loss Compensation Service under the SPP Tariff.

SPP seeks an effective date of January 1, 2001, for each of these agreements.

Comment date: February 7, 2001, in accordance with Standard Paragraph E at the end of this notice.

9. Brownsville Power I, L.L.C.

[Docket No. ER01–978–000]

Take notice that on January 17, 2001, Brownsville Power I, L.L.C., tendered for filing a notice of change in status and amendments to its market-based rate tariff and code of conduct to reflect its pending affiliation with Cinergy Corp., and its franchised public utility subsidiaries.

Comment date: February 7, 2001, in accordance with Standard Paragraph E at the end of this notice.

10. Caledonia Power I, L.L.C.

[Docket No. ER01–979–000]

Take notice that on January 17, 2001, Caledonia Power I, L.L.C., tendered for filing a notice of change in status and amendments to its market-based rate tariff and code of conduct to reflect its pending affiliation with Cinergy Corp., and its franchised public utility subsidiaries.

Comment date: February 7, 2001, in accordance with Standard Paragraph E at the end of this notice.

11. Southwest Power Pool, Inc.

[Docket No. ER01–980–000]

Take notice that on January 17, 2001, Southwest Power Pool, Inc., tendered for filing notice that effective January 17, 2001, Service Agreement No. 406, effective date June 29, 2000, and filed with the Federal Energy Regulatory Commission in Docket No. ER01–431 by Southwest Power Pool, Inc., is to be canceled.

Notice of the proposed cancellation have been served upon Southwestern Public Service Company—Wholesale Merchant Function.

Comment date: February 7, 2001, in accordance with Standard Paragraph E at the end of this notice.

12. Entergy Services, Inc.

[Docket No. ER01–982–000]

Take notice that on January 17, 2001, Entergy Services, Inc. (Entergy Services), on behalf of Entergy Arkansas, Inc., and Entergy Gulf States, Inc., tendered for filing Generator Imbalance Agreements between Entergy Gulf States, Inc., and Entergy Services, and between Entergy Arkansas, Inc., and Entergy Power Inc.

Comment date: February 7, 2001, in accordance with Standard Paragraph E at the end of this notice.

13. Allegheny Energy Service Corporation on behalf of Allegheny Energy Supply Hunlock Creek, LLC

[Docket No. ER01–983–000]

Take notice that on January 17, 2001, Allegheny Energy Service Corporation on behalf of Allegheny Energy Supply Hunlock Creek, LLC filed Service Agreement No. 1 to add one (1) new Customer to the Market Rate Tariff under which Allegheny Energy Supply Hunlock Creek, LLC offers generation services.

Allegheny Energy Supply Hunlock Creek, LLC requests a waiver of notice requirements to make service available as of November 13, 2000 to Allegheny Energy Supply Company, LLC.

Copies of the filing have been provided to the Public Utilities Commission of Ohio, the Pennsylvania Public Utility Commission, the Maryland Public Service Commission, the Virginia State Corporation Commission, the West Virginia Public Service Commission, and all parties of record.

Comment date: February 7, 2001, in accordance with Standard Paragraph E at the end of this notice.

14. MidAmerican Energy Company

[Docket No. ER01–984–000]

Take notice that on January 17, 2001, MidAmerican Energy Company (MidAmerican), 401 Douglas Street, P.O. Box 778, Sioux City Iowa 51102, tendered for filing with the Commission a Firm Transmission Service Agreement between MidAmerican, as transmission provider, and MidAmerican Energy Company, as wholesale merchant. The Agreement is dated December 29, 2000 and has been entered into pursuant to MidAmerican's Open Access Transmission Tariff.

MidAmerican requests an effective date of January 1, 2001 for the Agreement and seeks a waiver of the Commission's notice requirement.

MidAmerican has served a copy of the filing on the Iowa Utilities Board, the Illinois Commerce Commission and the South Dakota Public Utilities Commission.

Comment date: February 7, 2001, in accordance with Standard Paragraph E at the end of this notice.

15. MidAmerican Energy Company

[Docket No. ER01–985–000]

Take notice that on January 17, 2001, MidAmerican Energy Company (MidAmerican), 401 Douglas Street, P. O. Box 778, Sioux City Iowa 51102, tendered for filing with the Commission the Fourth Amendment to Network Integration Transmission Service Agreement entered into by MidAmerican and the City of Sergeant Bluff, Iowa, dated December 29, 2000. The Agreement amends the Network Integration Transmission Service Agreement dated April 7, 1997, between the parties.

MidAmerican requests an effective date of January 1, 2001 for the Agreement and seeks a waiver of the Commission's notice requirement.

MidAmerican has served a copy of the filing on the Iowa Utilities Board and the City of Sergeant Bluff, Iowa.

Comment date: February 7, 2001, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraphs

E. Any person desiring to be heard or to protest such filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211

and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before the comment date. 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. Copies of these filings are on file with the Commission and are available for public inspection. This filing may also be viewed on the Internet at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 01–2385 Filed 1–25–01; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[GA47–200003; FRL–6936–9]

Adequacy Status of the Atlanta, GA, Submitted Ozone Attainment State Implementation Plan for Transportation Conformity Purposes; Withdrawal of Adequacy Finding

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of adequacy finding.

SUMMARY: EPA has decided to withdraw our finding of adequacy for the motor vehicle emissions budgets in the Atlanta, Georgia, ozone attainment SIP submitted on October 28, 1999. We are withdrawing our adequacy finding for several reasons. The United States Court of Appeals for the District of Columbia circuit decided on August 30, 2000, that the implementation of the Nitrogen Oxides (NO_X) State Implementation Plan (SIP) Call rule could not be required before May 31, 2004. The emission levels in the Atlanta attainment SIP motor vehicle emissions budget for NO_X were based in part on the assumption that transport of ozone recursors into Atlanta from upwind states would be addressed by May 2003 pursuant to EPA's NO_X SIP Call. Further, the Georgia Environmental Protection Division (EPD) recently requested that EPA withdraw its adequacy determination of the Atlanta ozone attainment SIP motor vehicle emissions budgets. The notice of the adequacy determination that is being withdrawn was made on February 15, 2000, in a letter to the State and was published in the **Federal Register** on February 28, 2000.

DATES: The notice of adequacy is withdrawn as of January 26, 2001.

FOR FURTHER INFORMATION CONTACT: Kelly Sheckler (404–562–9042).

SUPPLEMENTARY INFORMATION:

Background

On February 15, 2000, EPA Region 4 sent a letter to the Georgia Environmental Protection Division stating that the motor vehicle emissions budgets for nitrogen oxides (NO_X) and volatile organic compounds (VOCs) in the October 28, 1999, Atlanta ozone attainment SIP for 2003 were adequate for the purpose of transportation conformity. EPA published a notice in the **Federal Register** on February 28, 2000, [65 FR 10490] announcing that we had made an adequacy determination for the motor vehicle emissions budgets in Atlanta's attainment SIP. This finding was also announced on EPA's conformity website, http://www.epa.gov/oms/traq.

Transportation conformity is required by section 176(c) of the Clean Air Act. EPA's conformity rule requires that transportation plans, programs, and projects conform to SIPs and establishes the criteria and procedures for determining whether or not they do conform. Conformity to a SIP means that transportation activities will not produce new air quality violations, worsen existing violations, or delay timely attainment of the national ambient air quality standards.

EPA described the process for determining the adequacy of submitted SIP budgets in guidance (May 14, 1999, memo titled ''Conformity Guidance on Implementation of March 2, 1999, Conformity Court Decision''). This guidance was used in making the adequacy determination on the motor vehicle emissions budgets contained in the attainment demonstration for Atlanta. The criteria by which EPA determines whether a SIP's motor vehicle emission budgets are adequate for conformity purpose are outlined in 40 CFR 93.118(e)(4). An adequacy review is separate from EPA's SIP completeness review, and it also should not be used to prejudge EPA's ultimate action to approve or disapprove the SIP. The SIP could later be disapproved for reasons unrelated to transportation conformity even though the budgets had been deemed adequate.

The Southern Environmental Law Center (SELC) on behalf of many petitioners, filed a lawsuit on April 28, 2000, with the 11th Circuit Court of Appeals seeking review of EPA's adequacy finding. On July 11, 2000, the petitioners moved, on an expedited basis, to stay EPA's adequacy determination pending that Court's ruling on the merits of their April 28, 2000 Petition. On July 18, 2000, the 11th Circuit Court granted the motion for stay.

Once the 11th Circuit stayed the attainment SIP adequacy determination on July 18, 2000, the United States Department of Transportation (USDOT) had to base any conformity determination on the prior approved motor vehicle emissions budgets contained in the VOC 15 percent and NO_X 9 percent rate of progress SIPs approved by EPA on April 26, 1999, and March 18, 1999, respectively (64 FR 20186 and 64 FR 13348). Today's action does not affect USDOT's July 25, 2000, conformity determination since it was based on these approved budgets and not the submitted attainment budgets, which had been stayed prior to the conformity determination.

EPA believes that a consequence of the D.C. Circuit's order delaying the implementation date of the NO_X SIP Call rule is that the budget submitted by Georgia can no longer be considered adequate for purposes of transportation conformity. This belief is based on the fact that the attainment demonstration relied on the expected reductions from the NO_X SIP call in 2003, whereas those reductions can not now be assumed prior to 2004.

Furthermore, on December 21, 2000, Georgia sent a letter withdrawing the motor vehicle emission budgets contained in the October 28, 1999, SIP submittal and asked that EPA not undertake any further consideration of these budgets until the State concludes the work necessary to submit a revised budget. The revised budget is expected to be based on the results of the recent study of vehicle speeds data, updated vehicle registration data, and modeling information relevant to the estimation of current and future motor vehicle emissions developed since submission of the previous budget. Based on these changes of fact and law, the parties filed a joint motion to the 11th Circuit to hold further proceedings on review of the adequacy determination in abeyance and for permission for EPA to withdraw the finding of adequacy. All parties in those proceedings have agreed that because it is not appropriate for the transportation agencies to rely upon the currently submitted budget for the purpose of making transportation conformity determinations, the stay entered by the Court on July 19, 2000,

should remain in effect pending EPA's completion of the withdrawal action. On January 12, 2001, the court granted EPA the motion to withdraw the adequacy determination.

Consequently, EPA has decided to withdraw the February 15 adequacy determination. Even though adequacy determinations are not considered rulemaking subject to procedural requirements of the Administrative Procedures Act, EPA's policy is to provide a notice and comment period on adequacy determinations. However, we are not providing opportunity for comment on this withdrawal notice for two reasons. EPA is taking this action without prior notice and comment because adequacy determinations are not considered rulemaking subject to the procedural requirements of the Administrative Procedures Act. In addition, EPA does not believe further notice through EPA's conformity website is necessary in advance, since as a result of the stay issued by the court, the conformity determination made by USDOT on July 25, 2000, did not rely on the motor vehicle emission budgets submitted in the attainment SIP. Therefore, although EPA had found these budgets to be adequate, they were never used for transportation conformity purposes. Further, because of the delay in the NO_X SIP Call implementation date, it is clear that the budgets can no longer be considered adequate, and Georgia has requested that EPA withdraw the adequacy determination. Consequently, further public comment would be unnecessary and not in the public interest. In this action, EPA is also withdrawing all statements and comments previously made in relation to its earlier determination of the adequacy of the budgets for transportation conformity purposes. The substance of the budgets and any revisions to them will be further reviewed by EPA as part of its final decision to approve or disapprove the 1-hour ozone attainment demonstration SIP for the Atlanta nonattainment area. This SIP was initially submitted to EPA on October 28, 1999, and was supplemented on January 31, 2000, and July 31, 2000. EPA will consider all of these submissions as well as all comments timely submitted as we decide whether to approve or disapprove the SIP.

EPA will announce the withdrawal of the adequacy determination on its conformity website at *http://www.epa.gov/oms/traq.*

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Ozone.

Dated: January 16, 2001.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

[FR Doc. 01–2169 Filed 1–25–01; 8:45 am]

BILLING CODE 6560–50–M

COUNCIL ON ENVIRONMENTAL QUALITY

OFFICE OF SCIENCE AND TECHNOLOGY POLICY

Notice of Availability and Request for Comments

SUMMARY: On May 3, 2000 the Council on Environmental Quality (CEQ) and the Office of Science and Technology Policy (OSTP) were directed to conduct an interagency assessment of Federal environmental regulations pertaining to agricultural biotechnology. CEQ and OSTP announce the availability of the case studies and invite comment.

DATES: Written comments should be submitted on or before May 1, 2001.

ADDRESSES: Direct written comments to Chair, Council on Environmental Quality and Director, Office of Science and Technology Policy; Executive Office of the President, 17th and G Streets, NW., Washington, DC 20500. Attention: CEQ/OSTP Biotechnology Assessment.

FOR FURTHER INFORMATION CONTACT: Requests for copies of the report may be directed to CEQ and OSTP at the above address or may be requested by calling CEQ at (202) 395–5750 or OSTP at (202) 456–6130. The report also appears on CEQ's website at *www.whitehouse.gov/ceq* and on OSTP's website at *www.ostp.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

On May 3, 2000, the President directed the Council on Environmental Quality (CEQ) and the Office of Science and Technology Policy (OSTP) to ''conduct a six month interagency assessment of Federal environmental regulations pertaining to agricultural biotechnology and, if appropriate, make recommendations to improve them''. The assessment was undertaken as part of a larger set of policy measures intended to build consumer confidence and ensure that U.S. regulations keep pace with the latest scientific and product developments.

The President directed this assessment to further long-standing goals of public access to information and maintenance of strong, science-based regulation. The assessment was intended to focus on environmental regulations through the use of a set of case studies to describe in detail how specific products are being regulated or how they may potentially be regulated. The focus on environmental regulations was based on the premise that this aspect of biotechnology regulation is not well understood by the public and is the subject of considerable interest. The analysis was not intended to be comprehensive in scope, but rather to be based on a set of case studies that could illuminate current agency practices, identify strengths and potential areas for improvement.

In the intervening months, the assessment produced a set of working documents that provide rich detail and information on specific case studies for the public and for policymakers. However, due to time limitations, the interagency working group that was assembled to conduct the assessment was not able to conduct the analysis necessary to develop conclusions or recommendations. The selection of these particular case studies in no way indicates specific concerns with previous regulatory findings. In fact, no significant negative environmental impacts have been associated with the use of any previously approved biotechnology product.

II. Request for Comments

In order to further the assessment process, CEQ and OSTP believe it would be beneficial to have public input on federal regulation of environmental aspects of biotechnology informed by the case studies. Specifically, based on the initial review of the case studies, public comment is requested in the following broad areas of overall federal regulation of environmental aspects of biotechnology: (a) Comprehensiveness and rigor of environmental assessment; (b) comprehensiveness and strength of statutory authority; (c) transparency of the environmental assessment and the decisionmaking process; (d) public involvement; (e) interagency coordination; (f) confidential business information.

Public comments are requested by May 1.

Dated: January 19, 2001.

Dinah Bear,

General Counsel, Council on Environmental Quality.

Clifford Gabriel,

Deputy to the Associate Director, Office of Science and Technology Policy.

[FR Doc. 01–2325 Filed 1–25–01; 8:45 am]

BILLING CODE 3125–01–M

FARM CREDIT ADMINISTRATION

Sunshine Act Meetings; Farm Credit Administration Board; Regular Meeting

AGENCY: Farm Credit Administration.

SUMMARY: Notice is hereby given, pursuant to the Government in the Sunshine Act (5 U.S.C. 552b(e)(3)), that the February 8, 2001 regular meeting of the Farm Credit Administration Board (Board) will not be held. The FCA Board will hold a special meeting at 9 a.m. on Wednesday, February 21, 2001. An agenda for this meeting will be published at a later date.

FOR FURTHER INFORMATION CONTACT: Kelly Mikel Williams, Secretary to the Farm Credit Administration Board, (703) 883–4025, TDD (703) 883–4444.

ADDRESSES: Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102–5090.

Dated: January 23, 2001.

Kelly Mikel Williams,

Secretary, Farm Credit Administration Board.

[FR Doc. 01–2455 Filed 1–24–01; 10:33 am]

BILLING CODE 6705–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

January 17, 2001.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written comments should be submitted on or before March 27, 2001. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all comments to Les Smith, Federal Communications Commissions, 445 12th Street, SW., Room 1–A804, Washington, DC 20554 or via the Internet to lesmith@fcc.gov.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collections contact Les Smith at (202) 418–0217 or via the Internet at lesmith@fcc.gov.

SUPPLEMENTARY INFORMATION:

OMB Approval Number: 3060–0850.

Title: Quick-Form Application for Authorization in the Ship, Aircraft, Amateur, Restricted and Commercial Operator, and General Mobile Radio Services.

Form No.: FCC 605.

Type of Review: Revision to an Existing Collection.

Respondents: Individuals or households; Business or other for-profit; Not-for-profit institutions; State, Local or Tribal Government

Number of Respondents: 170,000.

Estimated Time Per Response: .44 hours.

Total Annual Burden: 74,800 hours.

Total Respondent Cost: $2,465,000.

Needs and Uses: FCC 605 application is a consolidated application form for Ship, Aircraft, Amateur, Restricted and Commercial Radio Operators, and General Mobile Radio Services and is used to collect licensing data for the Universal Licensing System.

The form is being revised to collect Date of Birth for Commercial Operator and Amateur Radio Service applicants.

The data collected on this form includes the applicant's Taxpayer Identification Number, and Date of Birth for Amateur and Commercial Operator licensing, however, this information will be redacted from public view.

There is no change to the estimated average burden or number of respondents. However, this collection reflects a program change increase of $204,000 resulting from a change in the fee amount required with the application since last submission.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 01–2255 Filed 1–25–01; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) being Submitted to OMB for Review and Approval

January 18, 2001.

SUMMARY: The Federal Communications Commissions, as part of its continuing effort to reduce paperwork burden invites the general public and other Federal agencies to take this opportunity to comment on the following information collection, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written comments should be submitted on or before February 26, 2001. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all comments to Les Smith, Federal Communications Commission, Room 1–A804, 445 12th Street, SW., Washington, DC 20554 or via the Internet to *lesmith@fcc.gov*.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collections contact Les Smith at (202) 418–0217 or via the Internet at *lesmith@fcc.gov*.

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0034.

Title: Application for Construction Permit for Reserved Channel Noncommercial Educational Broadcast Station.

Form Number: FCC 340.

Type of Review: Extension of a currently approved collection.

Respondents: Businesses or other for-profit entities.

Number of Respondents: 1,970.

Estimated Time per Response: 2.2 hours.

Frequency of Response: Recordkeeping; On occasion reporting requirements; Third party disclosure.

Total Annual Burden: 4,370 hours.

Total Annual Costs: $8,538,145.

Needs and Uses: FCC Form 340 is used to apply for authority to construct a new noncommercial educational (NCE) FM, TV, DTV broadcast station, or to make changes in the existing facilities of such a station. Form 340 is used for channels that are reserved exclusively for NCE use. 47 CFR 73.3580 requires third party notification—public notice in a newspaper of general circulation—when applications are filed for new facilities or major changes in existing facilities. In addition, all mutually exclusive NCE proposals for the reserved band currently on file with the FCC must supplement their applications with portions of the revised Form 340 to make a selection under the new point system. The FCC will issue a public notice announcing the procedures to be used in this process. These data help the FCC to determine whether an applicant meets basic statutory requirements to become or remain an FCC licensee and to ensure that the public interest will be served by grant of the application. When there are mutually exclusive, qualified applicants, this information will help to determine which proposal would best serve the public interest.

OMB Control Number: 3060–0955.

Title: 2 GHz Mobile Satellite Service Reports.

Form Number: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Businesses or other for-profit entities.

Number of Respondents: 9.

Estimated Time per Response: 3 hours.

Frequency of Response: Recordkeeping; On occasion reporting requirements.

Total Annual Burden: 27 hours.

Total Annual Costs: $14,000.

Needs and Uses: The 2 GHz mobile satellite service rules, 47 CFR part 25, require disclosure in the form of a narrative statement, through amendments to applications or letters of intent, or orbital debris mitigation design and operational strategies and a casualty risk assessment if planned post-mission disposal involves atmospheric re-entry of spacecraft. This requirement will permit the Commission and the public to comment on each system's design. 2 GHz mobile satellite systems receiving expansion spectrum as part of the rural and unserved areas spectrum incentive must provide a report on the actual number of subscriber minutes originating or terminating in unserved areas as a percentage of the actual U.S. system use. This rule will permit the Commission to verify that service is being provided in rural and unserved areas. In addition, system proponents will have to complete critical design review (CDR) within two years of authorization. CDR is a new milestone for satellite services and will permit the Commission to more closely monitor system construction. Without such information, the Commission could not determine whether satellite licensees are operating in conformance with the Commission's rules.

OMB Control Number: 3060–XXXX.

Title: Availability of INTELSAT Space Segment Capacity to Users and Providers Seeking to Access INTELSAT Directly.

Form Number: N/A.

Type of Review: New collection.

Respondents: Businesses or other for-profit entities.

Number of Respondents: 10.

Estimated Time per Response: 2 hours.

Frequency of Response: One-time-only filing requirement.

Total Annual Burden: 20 hours.

Total Annual Costs: $3,000.

Needs and Uses: On September 19, 2000, the FCC released a Report and Order (R&O), IB Docket No. 00–91, FCC 00–340, pursuant to the recently enacted Open-Market Reorganization for the Betterment of International Telecommunications Act (ORBIT Act). Section 641(b) of the Communications Satellite Act of 1962, as amended by the ORBIT Act, requires the FCC to determine whether ''sufficient opportunity'' exists for users and service providers ''to access INTELSAT space segment capacity directly from INTELSAT to meet their service and capacity requirements.'' The R&O concluded that users and service providers currently do not have sufficient opportunity for direct access to INTELSAT. The R&O also concluded that FCC should adopt a ''commercial solution.'' This requires the parties—Comsat (which controls the most U.S. accessible capacity) and other direct access users, to attempt to negotiate mutually agreeable arrangements and to file reports with the Commission on or before March 13, 2001 on the progress of their negotiations.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 01–2374 Filed 1–25–01; 8:45 am]

BILLING CODE 6712–01–U

FEDERAL COMMUNICATIONS COMMISSION

[Report No. AUC–00–31–J (Auction No. 31); DA 01–12]

Auction of Licenses in the 747–762 and 777–792 MHz Bands Scheduled for March 6, 2001; Modifications to the Calculation for Determining Minimum Acceptable Bids and the Provisions Concerning ''Last and Best Bids'' and Other Procedural Issues

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document announces two refinements to the package bidding procedures for Auction No. 31. We adopt our proposal to change part (iii) of the formula for determining minimum acceptable bids to incorporate a shortfall allocation. This revision will ensure a reasonable auction pace and a timely close of the auction. We also adopt our proposal to change provisions concerning last and best bids to allow a bidder to submit up to two sets of last and best bids. This is likely to produce a more efficient assignment of licenses because it permits bidders to express their valuations more precisely. In addition, the Bureau highlights for prospective bidders the dates already set forth for the conduct of Auction No. 31 and recent changes to the Competitive Bidding Rules. To further facilitate participation in the first auction that will allow package bidding as an option, the Bureau has included, in Attachments A and B to the Public Notice, a summary of the provisions that will govern package bidding in this auction and a chart that summarizes package bidding activity calculations, respectively.

DATES: Auction No. 31 is scheduled for March 6, 2001.

FOR FURTHER INFORMATION CONTACT: Walter D. Strack, Bureau Chief Economist, Wireless Telecommunications Bureau, (202) 418–0600; Evan Kwerel, Senior Economist, Office of Plans and Policy, (202) 418–2030; Howard Davenport, Auctions Attorney; Craig Bomberger, Auctions Analyst; or Karen Wrege, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, (202) 418–0600.

SUPPLEMENTARY INFORMATION: This is a summary of a public notice released January 5, 2001. The complete text of the public notice, including the attachments, 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. It may also be purchased from the Commission's copy contractor, International Transcription Services, Inc. (ITS, Inc.) 1231 20th Street, NW., Washington, DC 20036, (202) 857–3800. It is also available on the Commission's web site at *http://www.fcc.gov.*

List of Attachments available at the FCC:

ATTACHMENT A—Summary of Package Bidding Rules for 700 MHz Auction
ATTACHMENT B—Package Bidding Activity Calculations
ATTACHMENT C—FCC Auction Seminar Registration Form
ATTACHMENT D—Guidelines for Completion of FCC Form 175 and Exhibits
ATTACHMENT E—Electronic Filing and Review of the FCC Form 175
ATTACHMENT F—Accessing the FCC Network to File FCC Form 175
ATTACHMENT G—FCC Bidding Preference/Remote Security Access Cards Software Order Form

I. General

1. On July 3, 2000, the Wireless Telecommunications Bureau (Bureau) announced the procedures for implementing package bidding for Auction No. 31. After further testing and analysis, the Bureau issued *Auction No. 31 Package Bidding Further Comment Public Notice,* 65 FR 66752 (November 7, 2000) proposing changes to and seeking comment on the following matters: (i) The calculation for determining minimum acceptable bids; and (ii) the provisions concerning last and best bids. In response to the *Auction No. 31 Package Bidding Further Comment Public Notice,* three comments were filed and no reply comments were filed.

II. Calculation for Determining Minimum Acceptable Bids

Background

2. In the *Auction No. 31 Package Bidding Procedures Public Notice,* 65 FR 43361 (July 13, 2000) the Bureau adopted a three-part formula for determining minimum acceptable bids. Specifically, the minimum acceptable bid for any license or package would be the greater of: (i) the minimum opening bid; (ii) the bidder's own previous high bid on that package plus x%, where the Bureau would specify the value of x in each round; and (iii) the number of bidding units for the license or package multiplied by the lowest $/bidding unit on any provisionally winning package in the last 5 rounds.

3. In the *Auction No. 31 Package Bidding Further Comment Public Notice,* we proposed to replace part (iii) of the minimum acceptable bid formula with the *sum* of a bidder's previous high bid on a license/package and a share of the increase in revenue needed to tie the provisional winners. We defined the *shortfall* associated with a license/package as the difference between the revenue of the provisionally winning bid set and the maximum total revenue associated with the set of bids that includes that particular license/package. The *deficit* was defined as an allocation of the shortfall to the particular license/package in proportion to its share of bidding units relative to those associated with bids that were not part of the provisionally winning set but are part of the set that maximizes revenue when including the particular license/package. (When there is more than one set of bids that yields the same shortfall for a given bid, we proposed to choose the shortfall set that includes the most provisionally winning bidding units.) We proposed to set part (iii) of the minimum acceptable bid formula initially to be a bidder's previous high bid on a license/package plus *100 percent* of the deficit, but retain the discretion to adjust the percentage of the deficit during the course of the auction to provide control over the auction's pace.

Discussion

4. Pekec and Rothkopf agree that using the shortfall calculation in the determination of the minimum acceptable bid price is a clear improvement to the originally proposed calculation. However, they believe that the allocation of this calculated shortfall should be proportional to bid amounts rather than bidding units.

5. The Bureau acknowledges that if all bidders bid in a straightforward fashion, it is likely that current prices would be the best estimate of the relative values of the licenses/packages. Under these circumstances, the proposal made by Pekec and Rothkopf might be a better approach to allocating the shortfall than that set forth by the Bureau. However, the Bureau is concerned with two potential consequences of implementing a procedure that allocates shortfall based on bid amounts. Such an allocation of the shortfall would (i) provide an incentive for bidders to game the auction by bidding up the price on a license/package that would partner with their own license/package in order to shift the burden of the shortfall to another bidder; and (ii) afford to bidders that have not bid on a license/package for some time the ability to ''park'' (*i.e.,* make bids that receive eligibility activity credit but have little prospect of winning) on that license/package since potentially small allocations of shortfall will be added to a bid amount that is well below the amount needed to become a provisional winner. Consequently, the Bureau believes that using bidding units to allocate the shortfall provides an efficient mechanism for determining the minimum bid *increment* added to a bidder's previous high bid. In addition, if the minimum acceptable bid price is too high, bidders will have the opportunity to bid a price less than that amount if they choose to exit the auction via last and best bids.

6. In the *Auction No. 31 Package Bidding Further Comment Public Notice,* we proposed an exception to the modified minimum acceptable bid formula for new packages. We proposed that part (iii) of the formula for the initial minimum acceptable bid for any package other than a global package created during the auction will continue to be calculated by multiplying the number of bidding units in the package by the lowest $/bidding unit of any provisionally winning bid in the last five rounds.

7. Pekec and Rothkopf argue that we should calculate the minimum acceptable bid for new packages the same way as for all other bids and calculate the minimum acceptable bid prices for all possible packages and licenses regardless of whether the bidder has bid on a license/package. We note that this would require the determination of minimum acceptable bid values equal to the total number of possible combinations of the twelve licenses times the number of bidders, with most of the calculations never being used. Alternatively, we could provide for immediate minimum acceptable bid calculations for any new package, but that could allow individuals to flood the FCC bidding system with requests and possibly disrupt the auction.

8. Balancing operational considerations with the desire to set the minimum acceptable bid at a level that provides a realistic chance of a bid becoming a provisional winner, the Bureau adopts the procedure proposed in the *Auction No. 31 Package Bidding Further Comment Public Notice.* For a new package created after the close of

the prior round, part (iii) of the initial minimum acceptable bid will be calculated by multiplying the number of bidding units in the package by the lowest $/bidding unit of any provisionally winning bid in the last five rounds. This exception will not apply to a global package whose minimum acceptable bid will always be (a percentage of) the maximum revenue from the previous round.

9. After each round, the Bureau will, for every bidder, calculate part (iii) of the minimum acceptable bid price based on shortfall allocation for every license and for every *constructed package.* When there is no previous high bid because the bidder has not bid on a license or an already created package, we will use the minimum opening bid as the previous high bid to calculate part (iii) of the minimum acceptable bid rule; and part (ii) of the rule does not apply.

III. ''Last and Best'' Bids

Background

10. In the *Auction No. 31 Package Bidding Procedures Public Notice* the Bureau adopted a ''last and best'' bid procedure. Specifically, bidders that wish to drop out of the auction would have the opportunity before they drop out to make a ''last and best'' bid on any packages for which they remain eligible. Such bids could be of any amount (in thousand dollar increments) between their previous high bid and the minimum acceptable bid. A bidder that submits a last and best bid(s) would not be permitted to make any further bids in the auction.

11. In the *Auction No. 31 Package Bidding Further Comment Public Notice,* we proposed modifying the last and best bid procedure to allow a bidder to submit two sets of mutually exclusive last and best bids. We proposed that in determining the provisionally winning bid(s), the round solver would consider these two sets of mutually exclusive bids as well as any of the bidder's bids that remain in the provisionally winning set.

Discussion

12. In their comments, Pekec and Rothkopf state that the Bureau's proposed modifications, particularly in the case of last and best bid provisions, are of limited importance and are not sufficient to affect the overall quality of the auction.

13. Verizon supports the Bureau's general plan to allow bidders the opportunity to make a last and best bid on any package for which they remain eligible before they drop out of the auction. However, Verizon disagrees with the Bureau's decision to prohibit from further bidding a bidder that chooses to make a last and best bid. Verizon claims that the Bureau's proposal is inconsistent with the public interest because it could prematurely reduce the number of participants in the auction, ultimately resulting in an inefficient assignment of licenses. Verizon urges the Bureau to apply the last and best bid option to licenses and packages, rather than bidders. Verizon further requests that the Bureau clarify or confirm that the second opportunity to place a last and best bid means that a bidder whose last and best bid was bested by another bidder has an opportunity to place an additional last and best bid on another license or package. Verizon also asks that the Bureau provide bidders an example that applies this two-round process to a hypothetical set of last and best bids.

14. The Bureau clarifies the procedure for placing last and best bids as follows. A bidder may make up to two sets of last and best bids. The two sets of last and best bids must be submitted in a single round, but will be treated as mutually exclusive, as are bids placed in two separate rounds. Once last and best bids are placed, the bidder will not be permitted to place new bids or renew previous bids in any subsequent round. If a bidder chooses to submit two sets of last and best bids, then, for the remainder of the auction, the ''solver'' (computer software) will consider those two sets of bids. If a bidder chooses to submit only one set of last and best bids, then, for the remainder of the auction, the solver will consider this set of bids and the set of bids from the last round in which the bidder placed bids. The only other bids that would be considered in a round for a bidder that places last and best bids are provisionally winning bids from the previous round.

15. Each set of last and best bids may consist of bids on any or all of the licenses and any or all of the packages created by the bidder, consistent with the activity rules and the twelve package limitation. The last and best bid amount for any license or package is any amount, in thousand dollar increments, greater than or equal to the bidder's previous high bid on the license or package and less than or equal to the ninth increment above the minimum acceptable bid for that license or package. Note that placing a last and best bid equal to the bidder's previous high bid will be considered as a renewed bid when applying activity rules. Also, if the bidder has never placed a bid on a package or license, the lower bound on the last and best bid amount is equal to the minimum opening bid for that package or license.

16. The Bureau believes that the procedure for placing last and best bids provides a bidder that is dropping out of the auction with sufficient flexibility to pursue its current business strategies, while maintaining bidding rules consistent with the overall auction structure. Moreover, providing bidders with opportunities in each round to place bids below the minimum acceptable bid amount may significantly slow the pace of the auction. Having a bidder-specific procedure, rather than a bid-specific procedure, is also more straightforward to implement. The Bureau believes that bidders are unlikely to exit the auction prematurely, as Verizon argues, because they may renew their bids and utilize activity rule waivers to prevent eligibility reduction.

The following is a simple example of the procedures for last and best bids. Bidder A desires to win the Great Lakes 10 MHz license and either a package of the two licenses in the Pacific region or a package of the two licenses in the Northeast region. To meet this objective, Bidder A has been bidding on the Great Lakes 10 MHz license and a package consisting of both the 10 MHz and the 20 MHz licenses in the Pacific region in even rounds while bidding on the Great Lakes 10 MHz license and a package consisting of both the 10 MHz and the 20 MHz licenses in the Northeast region in odd rounds. Because of the mutual exclusivity of bids placed in different rounds, this strategy will ensure that Bidder A does not win more than it wants. Suppose that Bidder A has decided to place last and best bids. Bidder A may create a set of last and best bids comprised of a bid on the Great Lakes 10 MHz license and a bid on the Pacific region package. Bidder A may also submit a second set of last and best bids comprised of a bid on the Great Lakes 10 MHz license and a bid on the Northeast region package. In this example, the last and best bid procedure affords the bidder the opportunity to value the Great Lakes 10 MHz license differently in the two sets according to its synergistic relation to the other bids in each set.

IV. Ties With the FCC at the Minimum Opening Bid

17. In the *Auction No. 31 Package Bidding Procedures Public Notice,* we stated that individual licenses on which no bids are available to be considered when solving for the provisionally winning set will be treated as having a bid by the FCC at the minimum opening bid. We now wish to clarify treatment of FCC bids where there are other bids available to be considered for the provisionally winning set. Implementing the minimum opening bid requirement by treating the FCC as having a bid on each license at the

minimum opening bid could result in the FCC retaining a license even though a bidder had an equivalent minimum opening bid on that license. To ensure that a bid on a license or package at the minimum opening bid always beats the FCC bid, the Bureau will treat all licenses as having FCC bids at some small amount less than the minimum opening bid.

V. Comments on Other Package Bid Provisions

18. Comments filed by Paul Milgrom and Charles Plott addressed some matters that are beyond the scope of the *Auction No. 31 Package Bidding Further Comment Public Notice* and upon which other parties have not had an opportunity to comment. That document sought comment specifically on the calculation for determining minimum acceptable bids and the last and best bid procedures. While we appreciate the input provided by commenters, we cannot at this time make any further changes to our package bidding procedures. The auction is scheduled to begin on March 6, 2001, and short-form applications are due on February 2, 2001. We are confident that the package bidding procedures we have established for Auction No. 31 will work effectively. We will revisit our package bidding procedure whenever we consider the use of package bidding for another auction.

VI. Auction Schedule

19. The Commission set forth the following dates which will govern the conduct of Auction No. 31:

Opening of the Form 175 Filing Window: January 11, 2001
Bidders' Seminar: January 23, 2001
Industry Test: January 24–26, 2001; 9 a.m. to 5 p.m. ET
Filing Deadline for FCC Form 175: February 2, 2001; 6 p.m. ET
Upfront Payment Deadline: February 16, 2001; 6 p.m. ET
Bidding Preference Form Deadline: February 20, 2001; 6 p.m. ET
Mock Auction: March 1–2, 2001
Auction Start Date: March 6, 2001

VII. Industry Test of the Package Bidding System

20. As stated, package bidding is a new concept in our auctions program. To further facilitate understanding and participation, the Bureau has scheduled an industry test that will help potential bidders and other interested parties to become familiar with the system. The industry test will run from 9 a.m. to 5 p.m. Eastern Time on January 24, 25 & 26, 2001. The test software, like the auction software, will run over the Internet. To use this software, your computer must have the minimum hardware and software listed in the attachment titled *Electronic Filing and Review of the FCC Form 175.*

21. To participate in the test, send an e-mail to 31bidder@fcc.gov by 4 p.m. ET on January 17, 2001. Please include your company name and the name and e-mail address of the person we should contact with any questions. If you want our response sent to a different address than where you sent from, please include that return e-mail address as well. The Bureau will e-mail to that address the URL of our test system, along with a bidder ID and password that you will need to access the system.

VIII. Due Diligence

22. Potential bidders are reminded that there are a number of incumbent broadcast television licensees already licensed and operating in the 746–764 and 776–794 MHz bands (television Channels 60–62 and 65–67) that will be subject to the upcoming auction. Listed in Attachment J to the *Auction No. 31 Procedures Public Notice,* 65 FR 21196 (April 20, 2000) are facilities of incumbent television permittees and licensees on television Channels 60–62 and 65–67 as well as on adjacent television Channels 59, 63, 64, and 68. However, prospective bidders should not rely solely on this list, but should carefully review the Commission's databases and records before formulating bidding strategies.

23. In addition, there are several pending applications and rule making petitions for new analog and digital television authorizations on channel 59 which, if granted, would become additional incumbents on that channel. Information on pending applications can be found in the Mass Media Bureau's Consolidated Database System on the Commission's website. The Commission makes no representations or guarantees regarding the accuracy or completeness of information that has been incorporated into the databases. Potential bidders are strongly encouraged to physically inspect any sites located in or near the geographic area for which they plan to bid.

24. As more fully discussed in the *Auction No. 31 Procedures Public Notice,* we remind potential bidders that certain applications (including those for modification), petitions for rulemaking, waiver requests, requests for special temporary authority (''STA''), petitions to deny, petitions for reconsideration, and applications for review may be pending before the Commission that relate to the facilities listed in Attachment J to the *Auction No. 31 Procedures Public Notice.* We again note that resolution of these pending matters could have an impact on the availability of spectrum for licensees in the 746–764 and 776–794 MHz bands. While the Commission will continue to act on pending matters, some of these matters may not be resolved by the time of Auction No. 31. Potential bidders are strongly encouraged to conduct their own research prior to Auction No. 31 in order to determine the existence of pending proceedings that might affect their decisions regarding participation in the auction. Participants in Auction No. 31 are strongly encouraged to continue such research during the auction.

IX. Other Procedural Issues

25. Since the release of the *Auction No. 31 Package Bidding Procedures Public Notice,* there have been changes in the Competitive Bidding Rules that will apply to Auction No. 31. The Bureau has set forth significant amendments to the Competitive Bidding Rules, but it is the responsibility of each applicant to carefully review and comply with all applicable rules.

Ownership Disclosure Requirements (Form 175 Exhibit A)

26. All applicants must comply with the uniform part 1 ownership disclosure standards and provide information required by §§ 1.2105 and 1.2112 of the Commission's rules. Specifically, in completing Form 175, applicants will be required to file an Exhibit A providing a full and complete statement of the ownership of the bidding entity. The ownership disclosure standards for the short-form are set forth in § 1.2112 of the Commission's rules.

Provisions Regarding Defaulters and Former Defaulters (Form 175, Exhibit D)

27. Each applicant must certify on its FCC Form 175 application that it is not in default on any Commission licenses and that it is not delinquent on any non-tax debt owed to any Federal agency. In addition, each applicant must attach to its FCC Form 175 application a statement made under penalty of perjury indicating whether or not the applicant (or any of the applicant's controlling interests or their affiliates, as defined by § 1.2110 of the Commission's rules, as recently amended in the *Part 1 Fifth Report and Order*) has ever been in default on any Commission licenses or has ever been delinquent on any non-tax debt owed to any federal agency. Applicants must include this statement as Exhibit D of the FCC Form 175. Prospective bidders are reminded that

the statement must be made under penalty of perjury and that submission of a false certification to the Commission is a serious matter that may result in severe penalties, including monetary forfeitures, license revocations, exclusion from participation in future auctions, and/or criminal prosecution.

28. ''Former defaulters''—*i.e.*, applicants, including their attributable interest holders, that in the past have defaulted on any Commission licenses or been delinquent on any non-tax debt owed to any Federal agency, but that have since remedied all such defaults and cured all of their outstanding non-tax delinquencies—are eligible to bid in Auction No. 31, provided that they are otherwise qualified. However, as discussed, former defaulters are required to pay upfront payments that are fifty percent more than the normal upfront payment amounts.

Amount of Upfront Payment

29. In the *Part 1 Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making,* 62 13540 (March 21, 1997) the Commission delegated to the Bureau the authority and discretion to determine an appropriate upfront payment for each license being auctioned. The Bureau set forth the amount of the upfront payment associated with each of the 12 licenses available in this auction. Those amounts remain unchanged.

30. The upfront payment amount for ''former defaulters,'' *i.e.*, applicants that have ever been in default on any Commission license or have ever been delinquent on any non-tax debt owed to any Federal agency, will be fifty percent more than the normal amount required to be paid. Former defaulters should calculate their upfront payment for all licenses by multiplying the number of bidding units they wish to purchase by 1.5. In calculating the number of bidding units to assign to former defaulters, the Commission will divide the upfront payment received by 1.5 and round the result up to the nearest bidding unit.

X. Changes to Post Auction Procedures

Tribal Land Bidding Credit

31. A winning bidder that intends to use its license(s) to deploy facilities and provide services to federally-recognized tribal lands that are unserved by any telecommunications carrier or that have a telephone service penetration rate equal to or below 70 percent is eligible to receive a tribal land bidding credit as set forth in 47 CFR 1.2107 and 1.2110(e). A tribal land bidding credit is in addition to, and separate from, any other bidding credit for which a winning bidder may qualify.

32. Unlike other bidding credits that are requested prior to the auction, a winning bidder applies for the tribal land bidding credit after winning the auction when it files its long-form application (FCC Form 601). In order for a winning bidder to be awarded a tribal land bidding credit, it must provide specific certifications regarding the servicing of tribal lands and is subject to specific performance criteria as set forth in 47 CFR 1.2110(e).

33. For additional information on the tribal land bidding credit, including how to determine the amount of credit available, *see* Public Notice, DA 00–2219, released September 28, 2000, entitled *Wireless Telecommunications Bureau Announces Availability of Bidding Credits for Providing Wireless Services to Qualifying Tribal Lands,* 15 FCC Rcd. 18351 (2000).

Auctions Discount Voucher

34. On June 8, 2000, the Commission awarded Qualcomm, Inc. a transferable Auction Discount Voucher in the amount of $125,273,878.00. This, Auction Discount Voucher may be used by Qualcomm or its transferee, in whole or in part, to adjust a winning bid in any spectrum auction prior to June 8, 2003, subject to terms and conditions set forth in the Commission's Order.

Federal Communications Commission.

Margaret Wiener,

Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau.

[FR Doc. 01–2248 Filed 1–25–01; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Second Meeting of the Advisory Committee for the 2003 World Radiocommunication Conference (WRC–03 Advisory Committee)

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In accordance with the Federal Advisory Committee Act, this notice advises interested persons that the second meeting of the WRC–03 Advisory Committee will be held on February 16, 2001, at the Federal Communications Commission. The purpose of the meeting is to continue preparations for the 2003 World Radiocommunication Conference. The Advisory Committee will consider any consensus views or proposals introduced by the Advisory Committee's Informal Working Groups.

DATES: February 16, 2001; 10 a.m.–12 noon.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Room TW–C305, Washington DC 20554.

FOR FURTHER INFORMATION CONTACT: Julie Garcia, FCC International Bureau, Planning and Negotiations Division, at (202) 418–0763.

SUPPLEMENTARY INFORMATION: The Federal Communications Commission (FCC) established the WRC–03 Advisory Committee to provide advice, technical support and recommendations relating to the preparation of United States proposals and positions for the 2003 World Radiocommunication Conference (WRC–03). In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, this notice advises interested persons of the second meeting of the WRC–03 Advisory Committee. The WRC–03 Advisory Committee has an open membership. All interested parties are invited to participate in the Advisory Committee and to attend its meetings. The proposed agenda for the second meeting is as follows:

Agenda

Second Meeting of the WRC–03 Advisory Committee, Federal Communications Commission, 445 12th Street, SW., Room TW–C305, Washington, DC 20554, February 16, 2001; 10 a.m.–12 noon

1. Opening Remarks.
2. Approval of Agenda.
3. IWG Reports.
4. Consideration of Consensus Views or Proposals.
5. Future Meetings.
6. Other Business.

Federal Communications Commission.

William F. Caton,

Deputy Secretary.

[FR Doc. 01–2285 Filed 1–25–01; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Network Reliability and Interoperability Council

AGENCY: Federal Communications Commission.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, this notice advises interested persons of the third meeting of the Network Reliability

and Interoperability Council (Council) under its charter renewed as of January 6, 2001.

DATES: Wednesday, February 27, 2001 at 2 p.m. to 4 p.m.

ADDRESSES: Federal Communications Commission, 445 12th St. SW., Room TW–C305, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Kent R. Nilsson at 202–418–0845 or TTY 202–418–2989.

SUPPLEMENTARY INFORMATION: The Council was established by the Federal Communications Commission to bring together leaders of the telecommunications industry and telecommunications experts from academic, consumer and other organizations to explore and recommend measures that would enhance network reliability.

The Council will receive reports on and discuss the progress of its three focus groups: Y2K, Network Reliability, and Interoperability. The Council may also discuss such other matters as come before it at the meeting. Members of the general public may attend the meeting. The Federal Communications Commission will attempt to accommodate as many people as possible. Admittance, however, will be limited to the seating available. The public may submit written comments before the meeting to Kent Nilsson, the Commission's Designated Federal Officer for the Network Reliability and Interoperability Council, by email (*KNILSSON@FCC.GOV*) or U.S. mail (7–B452, 445 12th St. SW., Washington, DC 20554). Real Audio and streaming video Access to the meeting will be available at *http://www.fcc.gov/.*

Federal Communications Commission.

William F. Caton,

Deputy, Secretary.

[FR Doc. 01–2284 Filed 1–25–01; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNCIATIONS COMMISSION

[CS Docket No. 00–132, FCC 01–1]

Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document is in compliance with the Communications Act of 1934, as amended, which requires the Commission to report annually to Congress on the status of competition in the market for the delivery of video programming. On January 2, 2001, the Commission adopted its seventh annual report (''*2000 Report*''). The *2000 Report* contains data and information that summarize the status of competition in markets for the delivery of video programming and updates the Commission's prior reports.

FOR FURTHER INFORMATION CONTACT: Marcia Glauberman, Cable Services Bureau, (202) 418–7200, TTY (202) 418–7172.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *2000 Report* in CS Docket No. 00–132, FCC 01–1, adopted January 2, 2001, and released January 8, 2001. The complete text of the *2000 Report* is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street, SW., Washington, DC, 20554, and may also be purchased from the Commission's copy contractor, International Transcription Service (''ITS, Inc.''), (202) 857–3800, 1231 20th Street, NW., Washington, DC 20036. In addition, the complete text of the *2000 Report* is available on the Internet at http://www.fcc.gov/csb/csrptpg.html.

Synopsis of the 2000 Report

1. The Commission's *2000 Report* to Congress provides information about the cable television industry and other multichannel video programming distributors (''MVPDs''), including direct broadcast satellite (''DBS'') service, home satellite dishes (''HSDs''), wireless cable systems using frequencies in the multichannel multipoint distribution service (''MMDS'') and instructional television fixed service (''ITFS''), private cable or satellite master antenna television (''SMATV'') systems, as well as broadcast television service. The Commission also considers several other existing and potential distribution technologies for video programming, including the Internet, home video sales and rentals, local exchange telephone carriers (''LECs''), and electric and gas utilities.

2. The Commission also examines the market structure and competition. We evaluate horizontal concentration in the multichannel video marketplace and vertical integration between cable television systems and programming services. In addition, the *2000 Report* addresses competitors serving multiple dwelling unit buildings (''MDUs''), programming issues, technical advances, and examines a limited number of cases where consumers have a choice between an incumbent cable operator and another MVPD in a specific market. The *2000 Report* is based on publicly available data, filings in various Commission rulemaking proceedings, and information submitted by commenters in response to a *Notice of Inquiry* (65 FR 49804) in this docket.

3. In the *2000 Report,* the Commission finds that competitive alternatives and consumer choices continue to develop. Cable television still is the dominant technology for the delivery of video programming to consumers in the MVPD marketplace, although its market share continues to decline. As of June 2000, 80 percent of all MVPD subscribers received their video programming from a local franchised cable operator, compared to 82 percent a year earlier. There has been an increase in the total number of subscribers to non-cable MVPDs over the last year, which is primarily attributable to the growth of DBS service. However, generally, there have been declines in the number of subscribers and market shares of MVPDs using other distribution technologies. Significant competition from local telephone companies has not generally developed even though the Telecommunications Act of 1996 (''1996 Act'') removed some barriers to LEC entry into the video marketplace.

4. *Key Findings:*

• *Industry Growth:* A total of 84.4 million households subscribed to multichannel video programming services as of June 2000, up 4.4 percent over the 80.9 million households subscribing to MVPDs in June 1999. This subscriber growth accompanied a 2.4 percentage point increase in multichannel video programming distributors' penetration of television households to 83.8 percent as of June 2000. The number of cable subscribers continued to grow, reaching 67.7 million as of June 2000, up about 1.5 percent over the 66.7 million cable subscribers in June 1999. The total number of non-cable MVPD households grew from 14.2 million as of June 1999 to 16.7 million homes as of June 2000, an increase of almost 18 percent. The growth of non-cable MVPD subscribers continues to be primarily attributable to the growth of DBS. Between June 1999 and June 2000, the number of DBS subscribers grew from 10.1 million households to almost 13 million households, which is nearly three times the cable subscriber growth rate. DBS subscribers now represent 15.4 percent of all MVPD subscribers, up from 12.5 percent a year earlier.

• *Convergence of Cable and Other Services:* The 1996 Act removed barriers to LEC entry into the video marketplace

in order to facilitate competition between incumbent cable operators and telephone companies. It was expected that local exchange telephone carriers would begin to compete in video delivery markets, and cable operators would begin to provide local telephone exchange service. The Commission previously reported that there had been an increase in the amount of video programming provided to consumers by telephone companies, although the expected technological convergence that would permit use of telephone facilities for video service had not yet occurred. This year, we find that the rate of entry by LECs appears to be slowing even by the most aggressive telephone companies, and several LECs have reduced or eliminated their MVPD efforts. Alternatively, only a limited number of cable operators have begun to offer telephone service and their strategies for deployment remain varied, with some companies deploying traditional circuit-switched telephone service and others either offering cable-delivered telephony on a limited basis, waiting until Internet Protocol (''IP'') technology becomes available, or continuing to test such service. The most significant convergence of service offerings continues to be the pairing of Internet service with other services. There is evidence that a wide variety of companies throughout the communications industries are attempting to become providers of multiple services, including data access.

• *Promotion of Entry and Competition*: Noncable MVPDs continue to report that regulatory and other barriers to entry limit their ability to compete with incumbent cable operators and to thereby provide consumers with additional choices. Non-cable MVPDs also continue to experience some difficulties in obtaining programming from both vertically integrated cable programmers and unaffiliated programmers who continue to make exclusive agreements with cable operators. In multiple dwelling units (''MDUs''), potential entry may be discouraged or limited because an incumbent video programming distributor has a long-term and/or exclusive contract. Other issues also remain with respect to how, and under what circumstances, existing inside wiring in MDUs may be made available to alternative video service providers. Consumers historically reported that their inability to receive local signals from DBS operators negatively affected their decision as to whether to subscribe to DBS. This year's significant increase in DBS subscribership has been attributed, at least in part, to the authority granted to DBS providers to distribute local broadcast television stations in their local markets by the Satellite Home Viewer Improvement Act of 1999 (''SHVIA'') enacted on November 29, 1999. Under SHVIA, DBS operators can offer a programming package more comparable to and competitive with the services offered by cable operators.

• *Horizontal Concentration*: Consolidations within the cable industry continue as cable operators acquire and trade systems. The ten largest operators now serve close to 90 percent of all U.S. cable subscribers. In terms of one traditional economic measure, the Herfindahl-Hirschman Index or HHI, national concentration among the top MVPDs has increased since last year, although it remains below the levels reported in earlier years. DBS operators DirecTV and EchoStar rank among the ten largest MVPDs in terms of nationwide subscribership along with eight cable multiple system operators (''MSOs''). As a result of acquisitions and trades, cable MSOs have continued to increase the extent to which their systems form regional clusters. Currently, 44 million of the nation's cable subscribers are served by systems that are included in regional clusters. By clustering their systems, cable operators may be able to achieve efficiencies that facilitate the provision of cable and other services, such as telephony.

• *Vertical Integration*: The number of satellite-delivered programming networks has decreased by two from 283 in 1999 to 281 in 2000. Vertical integration of national programming services between cable operators and programmers, measured in terms of the total number of services in operation, declined from last year's total of 37 percent to 35 percent this year, continuing a five year trend. In 2000, one or more of the top five cable MSOs held an ownership interest in each of 99 vertically integrated national programming services. The *2000 Report* also identifies 75 regional networks, 27 of which are sports channels, many owned at least in part by MSOs, and 30 regional and local news networks that compete with local broadcast stations and national cable networks (*e.g.*, CNN).

• *Technological Advances*: Cable operators and other MVPDs continue to develop and deploy advanced technologies, especially digital compression techniques, to increase the capacities and to enhance the capabilities of their transmission platforms. These technologies allow MVPDs to deliver additional video options and other services (*e.g.*, data access, telephony, and interactive services) to their subscribers. To access these wide ranging services, consumers use ''navigation devices.'' The Commission adopted rules that required MVPDs to unbundle security from other functions of digital set-top boxes by July 1, 2000. The cable industry reports that cable operators have met this deadline to have digital separate security modules available for consumers. Interface requirements and a certification process for the high-speed cable modems needed to access data services have also been developed. Cable modems are now for sale in selected markets. The Commission expects these developments to increase competition in the market for equipment used by subscribers. In addition, in the last year, interactive television (''ITV'') services are beginning to be offered through cable, satellite, and terrestrial technologies. ITV provides or has the potential to provide a wide range of services, including video on demand (''VOD''), e-mail, TV-based commerce, Internet access, and program-related content, using digital set-top boxes and other devices that interface with television receivers (e.g., WebTV).

Ordering Clauses

5. This *2000 Report* is issued pursuant to authority contained in sections 4(i), 4(j), 403, and 628(g) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 403, and 548(g).

6. The Office of Legislative and Intergovernmental Affairs shall send copies of the *2000 Report* to the appropriate committees and subcommittees of the United States House of Representatives and United States Senate.

7. The proceeding in CS Docket No. 00–132 IS TERMINATED.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 01–2375 Filed 1–25–01; 8:45 am]

BILLING CODE 6712–01–U

FEDERAL COMMUNICATIONS COMMISSION

[CS DOCKET NO. 01–7, FCC 01–15]

Nondiscrimination in the Distribution of Interactive Television Services Over Cable

AGENCY: Federal Communications Commission.

ACTION: Notice of inquiry.

SUMMARY: In this document, the Commission seeks comment on whether rules should be considered to ensure that interactive television (''ITV'') services develop in a competitive fashion. In the Memorandum Opinion and Order in CS Docket 01–30, the Commission found that important questions were raised regarding ITV services that warrant further examination in a proceeding of general applicability. Accordingly, in this document the Commission considers whether industry-wide rules are needed to address any impediments to the development of ITV services and markets.

DATES: Comments are due on or before March 19, 2001; Reply Comments are due on or before April 20, 2001.

ADDRESSES: Parties who choose to file by paper should send comments to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. Parties who choose to file by paper should also submit their comments on diskette. Parties should submit diskettes to Royce Dickens, Cable Services Bureau, 445 12th Street SW., Room 3A729, Washington, DC 20554. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, 445 12th Street, SW., CY–B400, Washington, DC 20554. Comments filed through the Commission's Electronic Comment Filing System (ECFS) can be sent as an electronic file via the Internet to http://www.fcc.gov/e-file/ecfs.html.

FOR FURTHER INFORMATION CONTACT: Royce Dickens, Cable Services Bureau at (202) 418–7200, TTY (202) 418–7172.

SUPPLEMENTARY INFORMATION: This is a summary of the Notice of Inquiry in CS Docket No. 01–7, FCC 01–15, adopted January 12, 2001, and released January 18, 2001 (''Notice''). The complete text of this document is available for inspection and copying during normal business hours in the FCC Reference Center, 554 12th Street, SW., Washington, DC, and also may be purchased from the Commission's copy contractor, International Transcription Service, 445 12th Street, SW., CY–B400, Washington, DC 20554. In addition, the document is available via the Internet at http://www.fcc.gov/Bureaus/csb.

Synopsis of the Notice of Inquiry

1. In this Notice, the Commission considers whether rules are needed to address any impediments to the development of ITV services and markets.

2. The Notice seeks comment on what services constitute ITV services, what entities constitute ITV providers, how ITV services will be delivered, what business models will govern the delivery of ITV services to consumers, and the general status of an ITV services market. The Notice seeks comment on whether, if it were determined that operators of cable systems (or another delivery platform) had the incentive and ability to behave anti-competitively vis-a-vis ITV service providers, the Commission should consider prohibiting those operators from discriminating between affiliated and unaffiliated ITV service providers.

3. The Notice also seeks comment on the legal classifications of ITV services, what public policy and statutory objectives ITV rules would promote, and the Commission's authority to protect this market. The Notice asks questions about enforcement of any new rules, proposing alternatively a voluntary arbitration, subject to judicial review, or a Commission complaint procedure.

Filing Procedures

4. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, 47 CFR 1.415 and 1.419, interested parties may file comments in response to this Notice on or before March 19, 2001 and reply comments on or before April 20, 2001. Comments may be filed using the Commission's Electronic Comment Filing System (''ECFS'') or by filing paper copies. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc/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, 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.

5. Parties who choose to file by paper must file an original and four copies of each filing. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. 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 filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554. The Cable Services Bureau contact for this proceeding is Royce Dickens.

6. Parties who choose to file by paper should also submit their comments on diskette. Parties should submit diskettes to Royce Dickens, Cable Services Bureau, 445 12th Street SW., Room 3A729, Washington, DC 20554. Such a submission should be on a 3.5-inch diskette formatted in an IBM compatible form using MS DOS 5.0 and Microsoft Word, or compatible software. The diskette should be accompanied by a cover letter and should be submitted in ''read only'' mode. The diskette should be clearly labeled with the party's name, proceeding (including the lead docket number in this case CS Docket No. 01–7), type of pleading (comments or reply comments), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase ''Disk Copy—Not an Original.'' Each diskette should contain only one party's pleadings, referable in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, International Transcription Service, 445 12th Street, SW., CY–B400, Washington, DC, 20554.

Federal Communications Commission.

William F. Caton,

Deputy Secretary, Federal Communications Commission.

[FR Doc. 01–2376 Filed 1–25–01; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Notices; Meeting

AGENCY: Federal Election Commission.

* * * * *

DATE & TIME: *Tuesday, January 30, 2001 at 10 a.m.*

PLACE: 999 E Street, NW., Washington, DC.

STATUS: This meeting will be closed to the public.

ITEMS TO BE DISCUSSED:

Compliance matters pursuant to 2 U.S.C. 437g.

Audits conducted pursuant to 2 U.S.C. 437g, 438(b), and Title 26, U.S.C.

Matters concerning participation in civil actions or proceedings or arbitration.
Internal personnel rules and procedures or matters affecting a particular employee.

* * * * *

PREVIOUSLY ANNOUNCED DATE & TIME: *Thursday, February 1, 2001, 10 a.m.*
Meeting open to the public.
This Meeting was Cancelled.

PERSON TO CONTACT FOR INFORMATION: Mr. Ron Harris, Press Officer, Telephone: (202) 694–1220.

Mary W. Dove,

Acting Secretary of the Commission.

[FR Doc. 01–2441 Filed 1–23–01; 4:34 pm]

BILLING CODE 6715–01–M

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA–1357–DR]

Louisiana; Major Disaster and Related Determinations

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This is a notice of the Presidential declaration of a major disaster for the State of Louisiana (FEMA–1357–DR), dated January 12, 2001, and related determinations.

EFFECTIVE DATE: January 12, 2001.

FOR FURTHER INFORMATION CONTACT: Madge Dale, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–3772.

SUPPLEMENTARY INFORMATION: Notice is hereby given that, in a letter dated January 12, 2001, the President declared a major disaster under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 USC 5121, *et seq.*, as amended by the Disaster Mitigation Act of 2000, Pub. L. 106–390, 114 Stat. 1552 (2000), as follows:

I have determined that the damage in certain areas of the State of Louisiana, resulting from a severe winter ice storm beginning December 11, 2000, and continuing through January 3, 2001, is of sufficient severity and magnitude to warrant a major disaster declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 USC 5121, *et seq.*, as amended by the Disaster Mitigation Act of 2000, Pub. L. No. 106–390, 114 Stat. 1552 (2000) (Stafford Act), I, therefore, declare that such a major disaster exists in the State of Louisiana.

In order to provide Federal assistance, you are hereby authorized to allocate from funds available for these purposes, such amounts as you find necessary for Federal disaster assistance and administrative expenses.

You are authorized to provide Public Assistance and Hazard Mitigation in the designated areas and any other forms of assistance under the Stafford Act you may deem appropriate. Consistent with the requirement that Federal assistance be supplemental, any Federal funds provided under the Stafford Act for Public Assistance or Hazard Mitigation will be limited to 75 percent of the total eligible costs.

Further, you are authorized to make changes to this declaration to the extent allowable under the Stafford Act.

Notice is hereby given that pursuant to the authority vested in the Director of the Federal Emergency Management Agency under Executive Order 12148, I hereby appoint Carlos N. Mitchell of the Federal Emergency Management Agency to act as the Federal Coordinating Officer for this declared disaster.

I do hereby determine the following areas of the State of Louisiana to have been affected adversely by this declared major disaster:

Bienville, Caddo, Claiborne, Lincoln, Union, and Webster Parishes for Public Assistance.

All parishes within the State of Louisiana are eligible to apply for assistance under the Hazard Mitigation Grant Program.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 83.537, Community Disaster Loans; 83.538, Cora Brown Fund Program; 83.539, Crisis Counseling; 83.540, Disaster Legal Services Program; 83.541, Disaster Unemployment Assistance (DUA); 83.542, Fire Suppression Assistance; 83.543, Individual and Family Grant (IFG) Program; 83.544, Public Assistance Grants; 83.545, Disaster Housing Program; 83.548, Hazard Mitigation Grant Program.)

James L. Witt,

Director.

[FR Doc. 01–2363 Filed 1–25–01; 8:45 am]

BILLING CODE 6718–02–P

FEDERAL EMERGENCY MANAGEMENT AGENCY

[FEMA–1356–DR]

Texas; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster for the State of Texas (FEMA–1356–DR), dated January 8, 2001, and related determinations.

EFFECTIVE DATE: January 15, 2001.

FOR FURTHER INFORMATION CONTACT: Madge Dale, Response and Recovery Directorate, Federal Emergency Management Agency, Washington, DC 20472, (202) 646–3772.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this disaster is closed effective January 15, 2001.

(The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 83.537, Community Disaster Loans; 83.538, Cora Brown Fund Program; 83.539, Crisis Counseling; 83.540, Disaster Legal Services Program; 83.541, Disaster Unemployment Assistance (DUA); 83.542, Fire Suppression Assistance; 83.543, Individual and Family Grant (IFG) Program; 83.544, Public Assistance Grants; 83.545, Disaster Housing Program; 83.548, Hazard Mitigation Grant Program.)

Lacy E. Suiter,

Executive Associate Director, Response and Recovery Directorate.

[FR Doc. 01–2362 Filed 1–25–01; 8:45 am]

BILLING CODE 6718–02–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Notice of Meeting: Secretary's Advisory Committee on Generic Testing

Pursuant to Public Law 92–463, notice is hereby given of the seventh meeting of the Secretary's Advisory Committee on Genetic Testing (SACGT), U.S. Public Health Service. The meeting will be held from 9 a.m. to 3:15 p.m. on February 15, 2001 and 10:15 a.m. to 4:30 p.m. on February 16, 2001 at the National Institutes of Health, Building 31, C Wing, Conference Room 10, 9000 Rockville Pike, Bethesda, MD 20892. The meeting will be open to the public with attendance limited to space available.

The Committee will discuss a number of topics, including a proposed classification methodology for genetic tests; a draft genetic test information template for health professionals; and a draft white paper on genetics education for health professionals. Breakout sessions are scheduled for SACGT's working groups to meet and discuss ongoing and future projects. The Committee will be updated on the working groups' activities and progress during the full Committee meeting. The Committee will also hear an update on the activities of the Food and Drug Administration. There will be a limited period of time provided for public comment and interested individuals

should notify the contact person listed below.

Under authority of 42 U.S.C. 217a, Section 222 of the Public Health Service Act, as amended, the Department of Health and Human Services established SACGT to advise and make recommendations to the Secretary through the Assistant Secretary for Health on all aspects of the development and use of genetic tests. The SACGT is directed to (1) recommend policies and procedures for the safe and effective incorporation of genetic technologies into health care; (2) assess the effectiveness of existing and future measures for oversight of genetic tests; and (3) identify research needs related to the Committee's purview.

The draft meeting agenda and other information about SACGT will be available at the following web site: *http://www4.od.nih.gov/oba/sacgt.htm*. Individuals who wish to provide public comments or who plan to attend the meeting and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the SACGT Executive Secretary, Ms. Sarah Carr, by telephone at 301–496–9838 or E-mail at *sc112c@nih.gov.* The SACGT office is located at 6705 Rockledge Drive, Suite 750, Bethesda, Maryland 20892.

Dated: January 11, 2001.

Sarah Carr,

Executive Secretary, SACGT.

[FR Doc. 01–2326 Filed 1–25–01; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Program Announcement 01022]

Epidemiology and Laboratory Capacity for Infectious Diseases; Notice of Availability of Funds

A. Purpose

The Centers for Disease Control and Prevention (CDC) announces the availability of fiscal year (FY) 2001 funds for a cooperative agreement program to promote adequate capacity of local, State, and national efforts for epidemiologic and laboratory surveillance and response for infectious diseases. This program addresses the ''Healthy People 2010'' focus area of Immunization and Infectious Diseases. For the conference copy of ''Healthy People 2010'', visit the internet site: <*http://www.health.gov/healthypeople*>

The purpose of the Epidemiology and Laboratory Capacity in Infectious Diseases (ELC) program is to assist State and eligible local public health agencies in strengthening basic epidemiologic and laboratory capacity to address infectious disease threats with a focus on notifiable diseases, food-, water-, and vector-borne diseases, vaccine-preventable diseases, and drug-resistant infections. Awards are intended to support activities that enhance the ability of a program to identify and monitor the occurrence of infectious diseases of public health importance in a community, characterize disease determinants, identify and respond to disease outbreaks, use public health data for priority setting and policy development, and assess the effectiveness of activities. Strengthening collaboration between laboratory and epidemiology practice is seen as a crucial component of this program.

This program is designed to support grantees in a variety of ways. For example, in health departments where gaps in personnel and equipment are identified as major barriers to effective surveillance and response, the ELC program can provide resources to hire staff or purchase necessary equipment. Funds can also be used to enhance ongoing activities.

B. Eligible Applicants

Limited Competition

Assistance will be provided only to the health departments of States or their bona fide agents, including the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, federally recognized Indian tribal governments, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau. In addition, official public health agencies of city governments with jurisdictional populations greater than 1,500,000 or county governments with jurisdictional populations greater than 8,000,000 (based on 1990 census data) are eligible to apply.

The ELC program was initiated in 1995 with Program Announcement 95043 and expanded in 1997 and 1999 with Program Announcements 97020 and 99032, respectively. A total of 39 state and 4 local health departments have been funded to date. This announcement is a further expansion of the ELC program and is intended to add new eligible applicants not already funded in the program. States, counties, and cities currently funded under the ELC program are not eligible to apply under this program announcement.

C. Availability of Funds

Approximately $5,250,000 is available in FY 2001 to fund approximately 15 awards. It is expected that the average award (total direct and indirect costs) will be $350,000. Individual awards may range from $100,000 to $500,000. It is expected that the awards will begin on or about April 1, 2001, and will be made for a 12-month budget period within a project period of up to five years. Funding estimates may change.

Continuation awards within an approved project period will be made on the basis of satisfactory progress as evidenced by required reports and the availability of funds.

Recipient Financial Participation

Although a requirement for matching funds is not a condition for receiving an award under this cooperative agreement program, applicants must document the non-Federal human and fiscal resources that will be available to conduct activities outlined in the proposal. Federal funds cannot be used to replace or supplant existing State and local support. See Evaluation Criteria (paragraph 6: Budget) for additional information.

D. Program Requirements

In conducting activities to achieve the purpose of this program, the recipient will be responsible for the activities listed under 1. (Recipient Activities) and CDC will be responsible for the activities listed under 2. (CDC Activities).

1. Recipient Activities

a. Enhance local capacity for gathering and evaluating infectious disease surveillance data, detecting and investigating outbreaks, and using surveillance data for public health practice and clinical follow-up. Applicants should analyze their current surveillance infrastructure, identify gaps in core epidemiologic and laboratory capacity, and develop applications to this program announcement that address the needs of their respective health jurisdictions. National priority program areas are briefly described below and are examples of activities that would be appropriate to propose under this program announcement. Applicants are encouraged to consider activities in these areas, yet there is no requirement to do so. Details and example activities for each are provided as Attachments in the Application Kit.

(1) Antimicrobial Resistance (Attachment 2)

Develop or improve health department capacity for surveillance, prevention, and control of antimicrobial resistant infections.

(2) Food-borne Disease (Attachment 3)

Enhance capacity for investigation, control, and reporting of foodborne disease outbreaks and improve laboratory-based surveillance for emerging foodborne pathogens.

(3) Hepatitis (Attachment 4)

(a) Develop capacity to prevent and control hepatitis C virus (HCV) infection through activities that are integrated into existing public health prevention services and programs.

(b) Enhance capacity for surveillance of chronic hepatitis B virus (HBV) and hepatitis C virus (HCV) infection.

(4) Influenza (Attachment 5)

Develop and enhance capacity for influenza surveillance and response.

(5) National Electronic Disease Surveillance System (NEDSS) Assessment and Planning (Attachment 6)

Assess current information systems personnel and technical infrastructure and develop a plan for the implementation of the NEDSS systems architecture (intended for applicants that did not receive any NEDSS funding from CDC in FY 2000).

(6) West Nile Virus (Attachment 7)

Develop and implement effective surveillance, prevention, and control of West Nile virus and other arboviruses that occur in the U.S.

b. Ensure appropriate representation at planning and priority-setting meetings organized for recipients of this cooperative agreement program, including sending two representatives to the International Conference on Emerging Infections scheduled for March 2002 in Atlanta.

c. If a proposed project involves research on human participants, ensure appropriate Independent Review Board (IRB) review.

2. CDC Activities

a. Provide consultation and assistance in enhancing local epidemiologic and laboratory capacity for surveillance and response for infectious diseases.

b. Assist in monitoring and evaluating scientific and operational accomplishments and progress in achieving the purpose of this program.

c. Provide national coordination of activities where appropriate.

d. If during the project period research involving human subjects should be conducted and if CDC scientists will be co-investigators in that research, assist in the development of a research protocol for IRB review by all institutions participating in the research project. The CDC IRB will review and approve the protocol initially and on at least an annual basis until the research project is completed.

E. Application Content

Letter of Intent (LOI)

In order to assist CDC in planning and executing the evaluation of applications submitted under this announcement, all parties intending to submit an application are requested to inform CDC of their intention to do so not later than February 9, 2001. Notification should include: (1) name and address of the institution, (2) name, address and telephone number of the contact person, and (3) a list of the activities/areas that will be addressed in the application. This letter of intent will not be used in evaluation of the application. Notification should be provided by facsimile, postal mail, or E-mail, to the Grants Management Specialist identified in the ''Where to Obtain Additional Information'' section of this announcement''.

Application

Use the information in this section and in the Program Requirements, Other Requirements, and Evaluation Criteria sections to develop the application content.

Your application will be evaluated on the criteria listed in Section G., so it is important that your narrative follow the criteria in the order presented.

The application narrative (excluding budget, budget narrative, appendices, and required forms) must not exceed 20 single-spaced pages, printed on one side, with one inch margins, a font size no smaller than 10, and on white 8.5″ × 11″ paper. All pages must be clearly numbered, a complete index to the application and its appendices must be included, and the required original and two copies must be submitted unstapled and unbound (*i.e.*, so it can be easily fed through an automatic document feed copier).

To the extent possible, application narratives and budgets should clearly delineate separate and distinct program areas or groups of activities.

If any proposed activities involve human subjects research, include plans to assure that appropriate Institutional Review Board (IRB) approval is obtained. Include protocols and IRB review/approval status if available.

If indirect costs are being charged, include a copy of your organization's most current indirect cost rate agreement or cost allocation plan.

Letters of support can be included if applicants anticipate the participation of other organizations or political subdivisions in conducting proposed activities. Specific roles and responsibilities should be delineated. Do NOT include any letters of support from CDC. CDC assistance will be provided to all recipients as described in CDC Activities, above.

F. Submission and Deadline

Letter of Intent (LOI)

The Letter of Intent (LOI) should be submitted on or before February 9, 2001 and can be provided by facsimile, postal mail, or E-mail to the Grants Management Specialist identified in the ''Where to Obtain Additional Information'' section of this announcement. Your letter of intent should include: (1) Name and address of the institution, (2) name, address, and telephone number of the contact person, and (3) a list of the activities/areas that will be addressed in the application.

Application

Submit the original and two copies of CDC 0.1246(E). Forms are in the application kit. Submit the application to the Grants Management Specialist identified in the ''Where to Obtain Additional Information'' section of this announcement, on or before February 23, 2001.

Deadline: Applications shall be considered as meeting the deadline if they are either:

(a) Received on or before the deadline date; or

(b) Sent on or before the deadline date and received in time for submission to the independent review group. (Applicants must request a legibly dated U.S. Postal Service postmark or obtain a legibly dated receipt from a commercial carrier or U.S. Postal Service. Private metered postmarks shall not be acceptable as proof of timely mailing.)

Late Applications: Applications which do not meet the criteria in (a) or (b) above are considered late applications, will not be considered, and will be returned to the applicant.

G. Evaluation Criteria

Each application will be evaluated individually against the following criteria by an independent review group appointed by CDC.

1. Description of the population under surveillance, either the State or other

appropriate jurisdiction (if an applicant is a county, city, or other agency) (5 points). Extent to which the application provides information on the population size, demographic characteristics, geographic distribution, racial/ethnic makeup, and health care delivery systems.

2. Description of existing public health infectious disease epidemiology, laboratory, and information systems capacity (15 points). Extent to which the applicant:

a. Describes existing infectious disease surveillance and response activities, including reporting requirements, spectrum of laboratory specimen testing performed, degree of automation of laboratory and epidemiologic information management, and public health response capacity.

b. Provides information on existing staffing, management, material and equipment investment, training, space, and financial support of laboratory and epidemiologic capacity for public health surveillance and response for infectious diseases.

c. Describes current collaboration between its epidemiology and laboratory programs in surveillance and response including the existence of, or potential for, integrated uses of surveillance data;

d. Describes current or previous collaborative relationships with clinical laboratories, local health agencies, academic medicine groups, and health care practitioners, including HMOs or managed care providers; and demonstrates the potential of these relationships for enhanced surveillance and public health response activities.

3. Identification of areas of need (gaps) in surveillance and response for infectious diseases and understanding of the objectives of this cooperative agreement program (20 points).

The extent to which the applicant outlines State and local needs in epidemiology, laboratory, and/or information systems capacity for public health surveillance and response for infectious diseases.

4. Operational Plan (**Note:** Provide a detailed description of first year activities only and briefly describe future year activities) (45 points). Extent to which the proposed plan:

a. Outlines activities that clearly address the applicant's identified needs in capacity and that are appropriate for any specific diseases, conditions, and/or national priority program areas addressed by the applicant.

b. Describes steps to be taken to facilitate and strengthen collaboration between epidemiology and laboratory practice.

c. Includes current letters of support from participating agencies, institutions, and organizations indicating their willingness to participate in the activities as proposed in the operational plan.

d. If any research involving human subjects is proposed, has met the CDC Policy requirements regarding the inclusion of women, ethnic, and racial groups in any proposed research. This includes:

(1) The proposed plan for the inclusion of both sexes and racial and ethnic minority populations for appropriate representation.

(2) The proposed justification when representation is limited or absent.

(3) A statement as to whether the design of the study is adequate to measure differences when warranted.

(4) A statement as to whether the plans for recruitment and outreach for study participants include the process of establishing partnerships with community(ies) and recognition of mutual benefits.

5. Plan for monitoring and evaluation (15 points). The extent to which the applicant describes a detailed plan for monitoring the implementation of the activities and evaluating the extent to which the proposed activities strengthen local and national epidemiologic and laboratory capacity for infectious diseases.

6. Budget (not scored)

a. A detailed budget with a line-item justification and any other information to demonstrate that the request for assistance is consistent with the purpose and objectives of this cooperative agreement program.

b. Although matching funds are not a condition for receiving an award under this program, include in the budget, a separate line-item accounting of non-Federal contributions (funding, personnel, and other resources) that will be directly allocated to the proposed activities. Identify any non-applicant sources of these contributions.

c. If requesting funds for any contractual activities, provide the following information for each contract: (1) Name of proposed contractor, (2) breakdown and justification for estimated costs, (3) description and scope of activities to be performed by contractor, (4) period of performance, (5) method of contractor selection (e.g., sole-source or competitive solicitation), and (6) method of accountability.

7. Human Subjects: (Not Scored)

If any research involving human subjects is proposed, does the application adequately address the requirements of Title 45 CFR part 46 for the protection of human subjects?

H. Other Requirements

Technical Reporting Requirements

Provide CDC with original plus two copies of:

1. progress reports (annual), no more than 90 days after the end of the budget period;

2. financial status report, no more than 90 days after the end of the budget period; and

3. Final Financial Status and Performance reports, no more than 90 days after the end of the project period.

Send all reports to the Grants Management Specialist identified in the ''Where to Obtain Additional Information'' section of this announcement.

Public Health Surveillance and Information Systems

To modernize and enhance public health surveillance and information systems, CDC and its public health partners are implementing the NEDSS. CDC's NEDSS implementation strategies include ensuring that relevant activities funded through its various cooperative agreement programs will be consistent with the functional and technical specifications of the NEDSS information architecture (www.cdc.gov/od/hissb/docs.htm). As part of the terms of this program announcement, grantees agree to evaluate current activities with respect to the NEDSS information systems architecture; plan how to modify these activities, if necessary, so that they are consistent with NEDSS specifications; and, if possible, begin to implement NEDSS specifications in relevant activities.

The following additional requirements are applicable to this program. For a complete description of each, see Attachment 1 in the application kit.

AR–1 Human Subjects Requirements

AR–2 Requirements for Inclusion of Women and Racial and Ethnic Minorities in Research

AR–7 Executive Order 12372 Review

AR–10 Smoke-Free Workplace Requirements

AR–11 Healthy People 2010

AR–12 Lobbying Restrictions

I. Authority and Catalog of Federal Domestic Assistance Number

This program is authorized under the Public Health Service Act Sections 301(a)[42 U.S.C. 241(a)] and 317(k)(2)[42 U.S.C. 247b(k)(2)], as amended. The Catalog of Federal Domestic Assistance number is 93.283.

J. Where to Obtain Additional Information

This and other CDC announcements can be found on the CDC home page Internet address—<http://www.cdc.gov>. Click on ''Funding'' then ''Grants and Cooperative Agreements.''

If you have questions after reviewing the contents of all the documents, business management technical assistance may be obtained from:

Gladys Gissentanna, Grants Management Specialist, Grants Management Branch, Procurement and Grants Office, Centers for Disease Control and Prevention (CDC), 2920 Brandywine Road, Room 3000, Atlanta, Georgia 30341–5539, Telephone (770) 488–2753, Email address : gcg4@cdc.gov

For program technical assistance, contact: Deborah A. Deppe, M.P.A., National Center for Infectious Diseases, Mailstop C12, Centers for Disease Control and Prevention, Atlanta, GA 30333, Telephone (404) 639–4668, E-mail address: dad1@cdc.gov

Dated: January 22, 2001.

John L. Williams,

Director, Procurement and Grants Office, Centers for Disease Control and Prevention (CDC).

[FR Doc. 01–2365 Filed 1–25–01; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

[Document Identifier: HCFA–1561]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Health Care Financing Administration.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Health Care Financing Administration (HCFA), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

Type of Information Collection Request: New Collection.

Title of Information Collection: Health Insurance Benefit Agreement and Supporting Regulations in 42 CFR part 489.

Form No.: HCFA–1561 (OMB #0938–NEW).

Use: Applicants to the Medicare program are required to agree to provide services in accordance with Federal requirements. The HCFA–1561 is essential for HCFA to ensure that applicants are in compliance with the requirements. Applicants will be required to sign the completed form and provide operational information to HCFA to assure that they continue to meet the requirements after approval.

Frequency: Other: as needed.

Affected Public: Business or other for-profit, Not-for-profit institutions, and State, Local or Tribal Government.

Number of Respondents: 3,000.

Total Annual Responses: 3,000.

Total Annual Hours: 150.

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, access HCFA's Web Site address at http://www.hcfa.gov/regs/prdact95.htm, or E-mail your request, including your address, phone number, OMB number, and HCFA document identifier, to Paperwork@hcfa.gov, or call the Reports Clearance Office on (410) 786–1326. Written comments and recommendations for the proposed information collections must be mailed within 60 days of this notice directly to the HCFA Paperwork Clearance Officer designated at the following address: HCFA, Office of Information Services, Security and Standards Group, Division of HCFA Enterprise Standards, Attention: Dawn Willinghan, Room N2–14–26, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

Dated: January 18, 2001.

John P. Burke III,

HCFA Reports Clearance Officer, HCFA Office of Information Services, Security and Standards Group, Division of HCFA Enterprise Standards.

[FR Doc. 01–2393 Filed 1–25–01; 8:45 am]

BILLING CODE 4120–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; Comment Request; Evaluation of the NIDCD Minority and Disability Supplement Program

SUMMARY: In compliance with the requirement of section 350(6)(2)(A) of the Paperwork Reduction Act of 1993, for opportunity for public comment on proposed data collection projects, the National Institute on Deafness and Other Communication Disorders (NIDCD), the National Institutes of Health (NIH), will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review an approval.

Proposed Collection:

Title: Evaluation of the Minority and Disability Supplement Program. *Type of Information Request:* New. *Need and Use of Information Collection:* The NIDCD was established to support biomedical and behavioral research and research training in hearing, smell, balance, taste, voice, speech and language. Although minorities and people with disabilities will soon dominate the work force, these groups are underrepresented in the professional fields of science and health. To encourage members of these groups to pursue careers in these fields, NIDCD provides opportunities for extramural grant recipients to mentor promising candidates. The proposed survey will collect information from participants in the Minority and Disability Supplement Program and will yield information about satisfaction of participants with the program and how participation may have lead to the pursuit of a career in the health field. *Frequency of Response:* One. *Affected Public:* Individuals. *Type of Respondent:* Minority individuals and individuals with disabilities who have previously participated in the Supplement Program. The annual reporting burden is as follows: *Estimated Number of Respondents:* 200. *Estimated Number of Responses per Respondent:* One. *Average Burden Hours Per Response:* 0.5; and *Estimated Total Annual Burden Hours Requested:* 100. The annualized cost to respondents is estimated at: $150. There are no Capital Costs to report. There are no Operating or Maintenance Costs to report.

Type of respondents	Estimated number of respondents	Estimated number of responses per respondent	Average burden hours per response	Estimated total annual burden hours requested
Survey of Participant	200	1	0.5	100
Total	200			100

Request for Comment:

Written comments and/or suggestions are invited from the public and affected agencies on one or more of the following points: (1) Whether the proposed collection of information is necessary for fulfillment of the Minority and Disability Supplement Grants Program, including whether the information will be useful; (2) the accuracy of the estimate of the burden of the proposed data collection, including the validity of the methodology; (3) ways to enhance the quality, utility, and clarity of the data collection; and (4) ways to minimize the burden of the collection of information on the respondents, including appropriate use of automated collection techniques and information technology.

FOR FURTHER INFORMATION CONTACT: To request more information on the proposed survey and intent to collect data, or to obtain a copy of the design of the collection, contact Judith A. Cooper, Ph.D., Chief, Scientific Programs Branch, NIDCD, NIH, 6120 Executive Blvd., EPS 400–C, MSC 7180, Bethesda, MD 20892, or call non toll-free number (301) 496–5061, or E-mail your request, including your address to: judith_cooper@nih.gov

Comments Due Date:

Comments regarding this information collection are best assured of having their full effect if received on or before March 27, 2001.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 4 CFR 1320.3(c) and includes agency requests or requirements that the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires federal agencies to provide a 60-day notice in the **Federal Register** concerning proposed collections of information before submitting the collection to OMB for approval. To comply with this requirement, NIDCD is publishing notice of the proposed collection of information listed below.

The NIDCD Minority and Disability Supplement Program was designed to encourage individuals underrepresented in biomedical and behavioral research in human communication to participate in that research. The individuals participate on currently funded NIDCD grants and receive mentoring from NIDCD Principal Investigators.

Anecdotal feedback indicates that program participants and mentors find the program provides interesting opportunities and encourages individuals to pursue careers in a variety of health fields. However, there is little systematic evidence evaluating the level of the Program's success or failure in accomplishing these goals. The proposed survey will attempt to assess how individuals' participation in the Supplement Program has influenced career and educational choices. This information will provide support for NIDCD's continued participation in the Program.

One survey has been proposed to collect information on the current status of individuals previously supported by an NIDCD Supplement. This survey will obtain the current contact information of the participants and assess the individuals' educational and career achievements, their goals for future education, and current specific field(s) of study/employment.

The survey will be administered via a telephone interview that should take approximately 30 minutes to complete. Respondents who cannot schedule 30 minutes of time or who find telephone conversations difficult will be given the opportunity to respond by alternate means such as mail, fax, and e-mail. All participants from the inception of the program will be included in this survey process. It is anticipated that the total number of participants will not exceed 200.

Dated: January 17, 2001.

David Kerr,

Executive Officer, NIDCD.

[FR Doc. 01–2328 Filed 1–25–01; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Consensus Development Conference on Diagnosis and Management of Dental Caries Throughout Life

Notice is hereby given of the National Institutes of Health (NIH) Consensus Development Conference on ''Diagnosis and Management of Dental Caries Throughout Life,'' which will be held March 26–28, 2001, in the NIH's Natcher Conference Center, 9000 Rockville Pike, Bethesda, Maryland, 20892. The conference begins at 8 am on March 26 and 27, and at 9 am on March 28 and is open to the public.

The purpose of the conference is to examine the current state of dental caries detection, management, and prevention so that health care providers and the general public can make informed decisions about this important public health issue.

During the first day-and-a-half of the conference, experts will present the latest research findings on dental caries to an independent, non-Federal consensus development panel. After weighing all of the scientific evidence, the panel will draft a statement that will address the following key questions:

- What are the best methods for detecting early and advanced dental caries [validity and feasibility of traditional methods; validity and feasibility of emerging methods]?
- What are the best indicators for an increased risk of dental caries?
- What are the best methods available for the primary prevention of dental caries initiation throughout life?
- What are the best treatments available for reversing or arresting the progression of early dental caries?
- How should clinical decisions regarding prevention and/or treatment be affected by detection methods and risk assessment?
- What are promising new research directions for the prevention, diagnosis, and treatment of dental carries?

On the final day of the conference, the panel's draft statement will be read in public, at which time members of the public are invited to offer comments on the draft.

The primary sponsors of this meeting are the National Institute of Dental and Craniofacial Research and the NIH office of Medical Applications of Research. Cosponsors include the National Institute on Aging and the U.S. Food and Drug Administration.

This is the 115th Consensus Development Conference held by the NIH in the 24-year history of the Consensus Development Program. Advance information about the conference and conference registration materials may be obtained from Prospect Associates of Silver Spring, Maryland by calling (301) 592–3320 or by email to *dentalcaries@prospectassoc.com.* Prospect Associates' address is 10720 Columbia Pike, Suite 500, Silver Spring, Maryland 20901–4437. A conference agenda and registration information is also available on the NIH Consensus Program Web site at *http://consensus.nih.gov.*

Dated: January 13, 2001.

Yvonne T. Maddox,

Acting Deputy Director, NIH.

[FR Doc. 01–2327 Filed 1–25–01; 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 Heart, Lung, and Blood Institute Special Emphasis Panel.

Date: February 15–16, 2001.

Time: 7 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn—Chevy Chase, 5520 Wisconsin Avenue, Bethesda, MD 20815.

Contact Person: Roy L White, PhD, Scientific Review Administrator, Review Branch, NIH, NHLBI, Rockledge Building II, 6701 Rockledge Drive, Room 7196, Bethesda, MD 20892, 301–435–0291.

(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: January 17, 2001.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 01–2339 Filed 1–25–01; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Nursing Research; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with 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 Nursing Research Initial Review Group.

Date: February 15–16, 2001.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn, 5520 Wisconsin Ave, Chase Room, Chevy Chase, MD 20815.

Contact Person: Mary J. Stephens-Frazier, PhD, Scientific Review Administrator, National Institute of Nursing Research, National Institutes of Health, Natcher Building, Room 3AN32, 45 Center Drive, Bethesda, MD 20892, (301) 594–5971.

(Catalogue of Federal Domestic Assistance Program Nos. 93.361, Nursing Research, National Institutes of Health, HHS)

Dated: January 18, 2001.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 01–2329 Filed 1–25–01; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Nursing Research; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Nursing Research Special Emphasis Panel.

Date: February 22–23, 2001.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Mary J. Stephens-Frazier, PhD, Scientific Review Administrator, National Institute of Nursing Research, National Institutes of Health, Natcher Building, Room 3AN32, Bethesda, MD 20892, (301) 594–5971.

(Catalogue of Federal Domestic Assistance Program Nos. 93.361, Nursing Research, National Institutes of Health, HHS)

Dated: January 18, 2001.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 01–2330 Filed 1–25–01; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Arthritis and Musculoskeletal and Skin Disease; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of a meeting of the National Arthritis and Musculoskeletal and Skin Diseases Advisory Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign

language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Arthritis and Musculoskeletal and Skin Diseases Advisory Council.

Date: February 15, 2001.

Open: 8:30 a.m. to 2 p.m.

Agenda: The meeting will be open to the public to discuss administrative details relating to Council business and special reports.

Place: 31 Center Drive, Bldg., 31; Conference Room 6, Bethesda, MD 20892.

Closed: 2 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: 31 Center Drive, Bldg., 31; Conference Room 6, Bethesda, MD 20892.

Contact Person: Steven J. Hausman, PhD, Deputy Director, NIAMS/NIH, Bldg. 31, Room 4C–32, 31 Center Dr, MSC 2350, Bethesda, MD 20892–2350.

(Catalogue of Federal Domestic Assistance Program Nos. 93.846, Arthritis, Musculoskeletal and Skin Diseases Research, National Institutes of Health, HHS)

Dated: January 18, 2001.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 01–2331 Filed 1–25–01; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Arthritis and Musculoskeletal and Skin 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 person privacy.

Name of Committee: National Institute of Arthritis and Musculoskeletal and Skin Diseases Special Emphasis Panel.

Date: February 20, 2001.

Time: 8:30 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Marriott Hotel, 5151 Pooks Hill Road, Bethesda, MD 20814.

Contact Person: Aftab A. Ansari, PhD, Scientific Review Administrator, National Institutes of Health, NIAMS, Natcher Building, 45 Center Drive, Room 5AS25N, Bethesda, MD 20892, 301–594–4952.

(Catalogue of Federal Domestic Assistance Program Nos. 93.846, Arthritis, Musculoskeletal and Skin Diseases Research, National Institutes of Health, HHS)

Dated: January 18, 2001.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 01–2332 Filed 1–25–01; 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 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 Environmental Health Sciences Special Emphasis Panel Centers for Children's Environmental Health and Disease Prevention Research (RFA ES–00–008).

Date: March 11–14, 2001.

Time: 7 p.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: NC Biotechnology Center, 15 T. W. Alexander Drive, Post Office Box 13547, Research Triangle Park, NC 27709.

Contact Person: Linda K. Bass, PhD, Scientific Review Administrator, NIEHS, PO Box 12233 EC–30, Research Triangle Park NC 27709, (919) 541–1307.

Name of Committee: National Institute of Environmental Health Sciences Special Emphasis Panel Advanced Research Cooperation in Environmental Health Sciences (ARCH), RFA ES–00–006.

Date: March 14–16, 2001.

Time: 7 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: Hawthorn Suites Hotel, 300 Meredith Drive, Durham, NC 27713.

Contact Person: J. Patrick Mastin, PhD, Scientific Review Administrator, Scientific Review Branch/DERT, NIEHS, P.O. Box 12233 MD EC–30, Research Triangle Park, NC 27709 (919) 541–1446.

Name of Committee: National Institute of Environmental Health Sciences Special Emphasis Panel Research Scientist Development Awards (KO2s).

Date: April 11, 2001.

Time: 1 p.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: NIEHS—East Campus, Building 4401, Conference Room 122, 79 Alexander Drive, Research Triangle Park, NC 27709 (Telephone Conference Call).

Contact Person: Linda K. Bass, PhD, Scientific Review Administrator, NIEHS, PO Box 12233 EC–30, Research Triangle Park, NC 27709 (919) 541–1307.

Name of Committee: National Institute of Environmental Health Sciences Special Emphasis Panel Mentored Quantitative Research Career Development Awards (K25s).

Date: April 11, 2001.

Time: 2 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: NIEHS—East Campus, Building 4401, Conference Room 122, 79 Alexander Drive, Research Triangle Park, NC 27709 (Telephone Conference Call).

Contact Person: Linda K. Bass, PhD, Scientific Review Administrator, NIEHS, PO Box 12233 EC–30, Research Triangle Park, NC 27709 (919) 541–1307.

Name of Committee: National Institute of Environmental Health Sciences Special Emphasis Panel Mentored Patient-Oriented Research Career Development Awards (K23s).

Date: April 12, 2001.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: NIEHS, 79 T. W. Alexander Drive, Building 4401, Conference Room 3446, Research Triangle Park, NC 27709 (Telephone Conference Call).

Contact Person: Linda K. Bass, PhD, Scientific Review Administrator, NIEHS, PO Box 12233 EC–30, Research Triangle Park, NC 27709, (919) 541–1307.

(Catalogue of Federal Domestic Assistance Program Nos. 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing; 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, National Institutes of Health, HHS)

Dated: January 18, 2001.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 01–2333 Filed 1–25–01; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel SBIR: ''High Performance Chemistry—Directed Analog Synthesis''.

Date: February 1, 2001.

Time: 1:30 p.m. to 3:30 p.m.

Agenda: To review and evaluate contract proposals.

Place: Neuroscience Center, National Institutes of Health, 6001 Executive Blvd., Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Eric Zatman, Contract Review Specialist, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, DHHS, 6001 Executive Boulevard, Room 3158, MSC 9547, Bethesda, MD 20892–9547, (301) 435–1438.

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. 93.277, Drug Abuse Scientist Development Award for Clinicians, Scientist Development Awards, and Research Scientist Awards; 93.278, Drug Abuse National Research Service Awards for Research Training; 93.279, Drug Abuse Research Programs, National Institutes of Health, HHS)

Dated: January 17, 2001.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 01–2335 Filed 1–25–01; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel.

Date: February 2, 2001.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate contract proposals.

Place: Neuroscience Center, National Institutes of Health, 6001 Executive Blvd., Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Phillip F. Wiethorn, Scientific Review Administrator, Scientific Review Branch, NINDS/NIH/DHHS, Neuroscience Center, 6001 Executive Blvd, Suite 3208, MSC 9529, Bethesda, MD 20892–9529, 301–496–9223.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: January 17, 2001.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 01–2336 Filed 1–25–01; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel, Centers Review Committee.

Date: February 20, 2001.

Time: 8:30 am to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Ritz-Carlton Hotel at Pentagon City, 1250 South Hayes Street, Arlington, VA 22202.

Contact Person: Rita Liu, PhD, Health Scientist Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, DHHS, 6001 Executive Boulevard, Room 3158, MSC 9547, Bethesda, MD 20892–9547, (301) 443–2620.

Name of Committee: National Institute on Drug Abuse Initial Review Group, Health Services Research Subcommittee.

Date: February 28–March 1, 2001.

Time: 9 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites & Chevy Chase Pavilion, 4300 Military Road, NW., Wisconsin at Western Avenue, Washington, DC 20015.

Contact Person: Marina L. Volkov, PhD, Health Scientist Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, DHHS, 6001 Executive Boulevard, Room 3158, MSC 9547, Bethesda, MD 20892–9547, (301) 435–1433.

Name of Committee: National Institute on Drug Abuse Initial Review Group, Treatment Research Subcommittee.

Date: February 28, 2001.

Time: 10 a.m. to 6 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: Kesinee Nimit, Md, Health Scientist Administrator, Office of Extramural Affairs, National Institute on Drug Abuse,

National Institutes of Health, DHHS, 6001 Executive Boulevard, Room 3158, MSC 9547, Bethesda, MD 20892–9547, (301) 435–1432.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel, Treatment Research.

Date: February 28, 2001.

Time: 12:30 p.m. to 1:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, N.W., Wisconsin Ave. and Western Ave., Washington, DC 20015.

Contact Person: Mark R. Green, PhD, Chief, CEASRB, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, DHHS, Suite 3158, 6001 Executive Boulevard, Bethesda, MD 20892–9547, (301) 435–1431.

Name of Committee: National Institute on Drug Abuse Initial Review Group, Training and Career Development Subcommittee.

Date: March 6–8, 2001.

Time: 9 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Arlington Hyatt, 1325 Wilson Boulevard, Arlington, VA 22209.

Contact Person: Mark Swieter, PhD, Health Scientist Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, DHHS, 6001 Executive Boulevard, Room 3158, MSC 9547, Bethesda, MD 20892–9547, (301) 435–1389.

Name of Committee: National Institute on Drug Abuse Initial Review Group, Medication Development Research Subcommittee.

Date: March 7, 2001.

Time: 9 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Chevy Chase Holiday Inn, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Contact Person: Khursheed Asghar, PhD, Chief, Basic Sciences Review Branch, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, 6001 Executive Boulevard, Room 3158, MSC 9547, Bethesda, MD 20892–9547, (301) 443–2620.

(Catalogue of Federal Domestic Assistance Program Nos. 93.277, Drug Abuse Scientist Development Award for Clinicians, Scientist Development Awards, and Research Scientist Awards; 93.278, Drug Abuse National Research Service Awards for Research Training; 93.279, Drug Abuse Research Programs, National Institutes of Health, HHS)

Dated: January 17, 2001.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 01–2337 Filed 1–25–01; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Dental & Craniofacial Research; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is hereby given of a meeting of the National Advisory Dental and Craniofacial Research Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Dental and Craniofacial Research Council.

Date: January 22, 2001.

Open: 8:30 a.m. to 12:15

Agenda: Director's Report, Scientific Presentations.

Place: 45 Center Drive Natcher Building, Conference Room E1/2, Bethesda, MD 20892.

Closed: 12:30 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications and/or proposals.

Place: 45 Center Drive, Natcher Building, Conference Room E1/2, Bethesda, MD 20892.

Contact Person: Dushanka V. Kleinman, DDS, Deputy Director, National Institute of Dental & Craniofacial Res., National Institutes of Health, 9000 Rockville Pike, 31/2C39, Bethesda, MD 20892, (301) 496–9469.

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. 93.121, Oral Diseases and Disorders Research, National Institutes of Health, HHS)

Dated: January 17, 2001.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 01–2338 Filed 1–25–01; 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.

Date: January 21, 2001.

Time: 1:30 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: Fairmont Hotel, San Jose, 170 South Market Street, San Jose, CA 95113.

Contact Person: Eugene Vigil, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5144, MSC 7840, Bethesda, MD 20892, (301) 435–1025.

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.

Date: January 23, 2001.

Time: 10 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: NIH, Rockledge 2, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Stephen M. Nigida, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4112, MSC 7812, Bethesda, MD 20892, (301) 435–3565.

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.

Date: January 31, 2001.

Time: 12 p.m. to 1:30 p.m.

Agenda: To review and evaluate grant applications.

Place: NIH, Rockledge 2, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Stephen M. Nigida, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of

Health, 6701 Rockledge Drive, Room 4112, MSC 7812, Bethesda, MD 20892, (301) 435–3565.

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: Cell Development and Function Integrated Review Group Cell Development and Function 2.

Date: February 1–2, 2001.

Time: 8:30 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn Georgetown, 2101 Wisconsin Avenue, N.W., Washington, DC 20007.

Contact Person: Ramesh K. Nayak, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5146, MSC 7840, Bethesda, MD 20892, (301) 435–1026.

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.

Date: February 4–6, 2001.

Time: 7:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: University Park Hotel, 20 Sidney Street, Cambridge, MA 02139.

Contact Person: Lee Rosen, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5126, MSC 7854, Bethesda, MD 20892, (301) 435–1171.

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: Surgery, Radiology and Bioengineering Integrated Review Group, Surgery and Bioengineering Study Section.

Date: February 5–6, 2001.

Time: 8:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Hotel, One Bethesda Metro Center, Bethesda, MD 20814.

Contact Person: Teresa Nesbitt, DVM, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5118, MSC 7854, Bethesda, MD 20892, (301) 435–1172, nesbitt@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.

Date: February 5–6, 2001.

Time: 8:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: George Hotel, 15 E Street, N.W., Washington, DC 20001.

Contact Person: Mary Custer, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5102, MSC 7850, Bethesda, MD 20892, (301) 435–1164.

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.

Date: February 6, 2001.

Time: 1:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: NIH, Rockledge 2, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Alexander D. Politis, PhD, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4204, MSC 7812, Bethesda, MD 20892, (301) 435–1225, *politisa@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. 93.306, Comparative Medicine, 93.306; 93.333, Clinical Research, 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: January 18, 2001.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 01–2334 Filed 1–25–01; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4644–N–04]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for possible use to assist the homeless.

EFFECTIVE DATE: January 26, 2001.

FOR FURTHER INFORMATION CONTACT: Clifford Taffet, Department of Housing and Urban Development, Room 7262, 451 Seventh Street SW., Washington, DC 20410; telephone (202) 708–1234; TTY number for the hearing- and speech-impaired (202) 708–2565, (these telephone numbers are not toll-free), or call the toll-free Title V information line at 1–800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with the December 12, 1988 court order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.), HUD publishes a Notice, on a weekly basis, identifying unutilized, underutilized, excess and surplus Federal buildings and real property that HUD has reviewed for suitability for use to assist the homeless. Today's Notice is for the purpose of announcing that no additional properties have been determined suitable or unsuitable this week.

Dated: January 18, 2001.

John D. Garrity,

Director, Office of Special Needs Assistance Programs.

[FR Doc. 01–2027 Filed 1–25–01; 8:45 am]

BILLING CODE 4210–29–M

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Notice of Ratification of Decision To Take 90.94 Acres of Land, More or Less, Into Trust for the Lower Brule Sioux Tribe of Indians of South Dakota

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of ratification of decision.

SUMMARY: This publication provides notice that the decision of the Department of the Interior published on May 18, 2000, in the **Federal Register**, 65 FR 31594, to acquire 90.94 acres of land, more or less, in trust for the Lower Brule Sioux Tribe of Indians of South Dakota is hereby ratified. This ratification incorporates the entire record of decision supporting the Department's April 6, 2000, decision to acquire land in trust for the Lower Brule Sioux Tribe of Indians of South Dakota and incorporates the Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) issued on December 14, 2000, into the administrative record. This notice of ratification will be considered final no sooner than thirty days after this notice is published. This notice is published in the exercise of authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 DM 8.1 and pursuant to 25 CFR 151.12(b), 61 FR 18082, April 24, 1996.

FOR FURTHER INFORMATION CONTACT: Terrance L. Virden, Bureau of Indian Affairs, Director, Office of Trust Responsibilities, MS–4513–MIB, 1849 C Street, NW, Washington, DC 20240; telephone (202) 208–5831.

SUPPLEMENTARY INFORMATION: On April 6, 2000, the Assistant Secretary—Indian Affairs made a final determination that

the United States will accept 90.94 acres of land, more or less, in trust for the Lower Brule Sioux Tribe of Indians of South Dakota. It was determined that the acceptance of the 90.94 acres in trust, pursuant to 25 U.S.C. 465, would be in the best interest of the Lower Brule Sioux Tribe of Indians of South Dakota. On December 14, 2000, the Bureau issued an EA and FONSI for the trust acquisition of the Lower Brule Sioux Tribe and the construction of the Native American Scenic Byway. Based on the additional environmental information contained in the EA, the Department ratifies its April 6, 2000, decision to take 90.94 acres of land in trust for the Lower Brule Sioux Tribe of Indians of South Dakota.

Dated: January 18, 2001.

Michael J. Anderson,

Acting Assistant Secretary—Indian Affairs.

[FR Doc. 01–2383 Filed 1–25–01; 8:45 am]

BILLING CODE 4310–02–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Big Sandy Rancheria Liquor Ordinance

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: This notice publishes the Big Sandy Rancheria Liquor Ordinance. The Ordinance regulates the control of, the possession of, and the sale of liquor on the Big Sandy Rancheria trust lands, and is in conformity with the laws of the State of California, where applicable and necessary. Although the Ordinance was adopted on August 30, 2000, it does not become effective until published in the **Federal Register** because the failure to comply with the ordinance may result in criminal charges.

DATES: This Ordinance is effective on January 26, 2001.

FOR FURTHER INFORMATION CONTACT: Kaye Armstrong, Office of Tribal Services, 1849 C Street, NW, MS 4631–MIB, Washington, D.C. 20240–4001; telephone (202) 208–4400.

SUPPLEMENTARY INFORMATION: Pursuant to the Act of August 15, 1953, Public Law 83–277, 67 Stat. 586, 18 U.S.C. 1161, as interpreted by the Supreme Court in *Rice* v. *Rehner,* 463 U.S. 713 (1983), the Secretary of the Interior shall certify and publish in the **Federal Register** notice of adopted liquor ordinances for the purpose of regulating liquor transaction in Indian country. The Big Sandy Rancheria Liquor Ordinance, Resolution No. 00–14, was duly adopted by the Big Sandy Rancheria Tribal Council on August 30, 2000. The Big Sandy Rancheria, in furtherance of its economic and social goals, has taken positive steps to regulate retail sales of alcohol and use revenues to combat alcohol abuse and its debilitating effects among individuals and family members within the Big Sandy Rancheria.

This notice is being published in accordance with the authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs by 209 Departmental Manual 8.

I certify that by Resolution No. 00–14, the Big Sandy Rancheria Liquor Ordinance was duly adopted by the Big Sandy Tribal Council on August 30, 2000.

Dated: January 19, 2001.

Michael J. Anderson,

Acting Assistant Secretary—Indian Affairs.

The Big Sandy Rancheria Liquor Ordinance, Resolution No. 00–14, reads as follows:

Big Sandy Rancheria Liquor Ordinance

Chapter I—Introduction

Section 101. Title. This ordinance shall be known as the Liquor Ordinance of the Big Sandy Rancheria of Mono Indians of California.

Section 102. Authority. This ordinance is enacted pursuant to the Act of August 15, 1953 (Public Law 83–277, 67 Stat. 588, 18 U.S.C. 1161) and the Constitution of the Big Sandy Rancheria of Mono Indians of California (Big Sandy Rancheria or Rancheria).

Section 103. Purpose. The purpose of this ordinance is to regulate and control the possession and sale of liquor on lands under the control of the Big Sandy Rancheria. The enactment of a tribal ordinance governing liquor possession and sale on the Rancheria will increase the ability of the tribal government to control Rancheria liquor distribution and possession, and at the same time will provide an important source of revenue for the continued operation and strengthening of the tribal government and the delivery of tribal government services.

Chapter II—Definitions

Section 201. Definitions. As used in this ordinance, the following words shall have the following meanings unless the context clearly requires otherwise.

Alcohol means that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine which is commonly produced by the fermentation or distillation of grain, starch, molasses, or sugar, or other substances including all dilutions of this substance.

Alcoholic Beverage is synonymous with the term ''liquor'' as defined in this Chapter.

Bar means any establishment with special space and accommodations for sale by the glass, can or bottle and for consumption on the premises of liquor, as herein defined.

Beer means any beverage obtained by the alcoholic fermentation of an infusion or decoction of pure hops, or pure extract of hops and pure barley malt or other wholesome grain of cereal in pure water containing not more than 4 percent of alcohol by volume. For the purposes of this title, any such beverage, including ale, stout, and porter, containing more than 4 percent of alcohol by weight shall be referred to as ''strong beer.''

General Membership means the general membership of the Big Sandy Rancheria, which is composed of the membership of the Tribe as a whole.

Liquor includes the four varieties of liquor herein defined (alcohol, spirits, wine and beer), and all fermented spirituous, vinous, or malt liquor or combination thereof, and mixed liquor, or otherwise intoxicating; and every liquor or solid or semisolid or other substance, patented or not, containing alcohol, spirits, wine or beer, and all drinks or drinkable liquids and all preparations or mixtures capable of human consumption and any liquid, semisolid, solid, or other substances, which contain more than 1 percent of alcohol by weight shall be conclusively deemed to be intoxicating.

Liquor Store means any store at which liquor is sold and, for the purposes of this ordinance, includes stores only a portion of which are devoted to sale of liquor or beer.

Malt Liquor means beer, strong beer, ale stout, and porter.

Package means any container or receptacle used for holding liquor.

Public Place includes state or county or tribal or federal highways or roads; buildings and grounds used for school purposes; public dance halls and grounds adjacent thereto; soft drink establishment, public buildings, public meeting halls, lobbies, halls and dining rooms of hotels, restaurants, theater, gaming facilities, entertainment centers, store garages, and filling stations which are open to and/or are generally used by the public and to which the public is permitted to have unrestricted access; public conveyances of all kinds of character; and all other places of like or similar nature to which the general public has unrestricted right of access, and which are generally used by the

public. For the purposes of this ordinance, ''public place'' shall also include any establishment other than a single family home which is designed for or may be used by more than just the owner of the establishment.

Rancheria means land held in trust by the United States Government for the benefit of the Big Sandy Rancheria of Mono Indians of California (See also Tribal Land).

Sale and Sell include exchange, barter, and traffic; and also include the selling or supplying or distributing by any means whatsoever, of liquor, or of any liquid known or described as beer or by any name whatsoever commonly used to describe malt or brewed liquor or wine by any person to any person.

Spirits mean any beverage, which contains alcohol obtained by distillation, including wines exceeding 17 percent of alcohol by weight.

Tribal Council means the Tribal Council of the Big Sandy Rancheria of Mono Indians of California.

Tribal Land means any land within the exterior boundaries of the Rancheria which is held in trust by the United States for the Tribe as a whole, including such land leased to other parties and lands held in trust under lease to Big Sandy Rancheria.

Tribe means the Big Sandy Rancheria of Mono Indians of California.

Trust Account means the account designated by the Tribal Council for deposit of proceeds from the tax from the sale of alcoholic beverages.

Trust Agent means the Tribal Chairperson or a designee of the Chairperson.

Wine means any alcoholic beverage obtained by fermentation of fruits (grapes, berries, apples, etc.) or other agricultural product containing sugar, to which any saccharine substances may have been added before, during or after fermentation, and containing not more than 17 percent of alcohol by weight, including sweet wines fortified with wine spirits such as port, sherry, muscatel, and angelica, not exceeding 17 percent of alcohol by weight.

Chapter III—Powers of Enforcement

Section 301. Powers. The Tribal Council, in furtherance of this ordinance, shall have the following powers and duties:

(a) To publish and enforce the rules and regulations governing the sale, manufacture, and distribution of alcoholic beverages on the Rancheria;

(b) To employ managers, accountants, security personnel, inspectors, and such other persons as shall be reasonably necessary to allow the Tribal Council to perform its functions;

(c) To issue licenses permitting the sale or manufacture or distribution of liquor on the Rancheria;

(d) To hold hearings on violations of this ordinance or for the issuance or revocation of licenses hereunder;

(e) To bring suit in the appropriate court to enforce this ordinance as necessary;

(f) To determine and seek damages for violation of this ordinance;

(g) To make such reports as may be required by the Council;

(h) To collect taxes and fees levied or set by the Tribal Council and to keep accurate records, books, and accounts.

Section 302. Limitation on Powers. In the exercise of its powers and duties under this ordinance, the Tribal Council and its individual members shall not accept any gratuity, compensation or other thing of value from any liquor wholesaler, retailer, or distributor or from any licensee.

Section 303. Inspection Rights. The premises on which liquor is sold or distributed shall be open for inspection by the Tribal Council or its designee at all reasonable times for the purposes of ascertaining whether the rules and regulations of this ordinance are being complied with.

Chapter IV—Sales of Liquor

Section 401. Licenses Required. No sales of alcoholic beverages shall be made within the exterior boundaries of the Rancheria, except at a tribally licensed or tribally owned business operated on tribal land within the exterior boundaries of the Rancheria.

Section 402. Sales Only on Tribal Land. All liquor sales within the exterior boundaries of the Rancheria shall be on tribal land, including leases thereon.

Section 403. Sales for Cash. All liquor sales within the Rancheria boundaries shall be on a cash only basis and no credit shall be extended to any person, organization, or entity, except that this provision does not prevent the use of major credit cards such as Visa, American Express, etc.

Section 404. Sale for Personal Consumption. All sales shall be for the personal use and consumption of the purchaser. Resale of any alcoholic beverage purchased within the exterior boundaries of the Rancheria is prohibited. Any person who is not licensed pursuant to this ordinance who purchases an alcoholic beverage within the boundaries of the Rancheria and sells it, whether in the original container or not, shall be guilty of a violation of this ordinance and shall be subjected to paying damages to the Tribe as set forth herein.

Chapter V—Licensing

Section 501. Application for Tribal Liquor License Requirements. No tribal license shall be issued under this ordinance except upon a sworn application filed with the Tribal Council containing a full and complete showing of the following:

(a) Satisfactory proof that the applicant is or will be duly licensed by the State of California.

(b) Satisfactory proof that the applicant is of good character and reputation among the people of the Rancheria and that the applicant is financially responsible.

(c) The description of the premises in which the intoxicating beverages are to be sold, proof that the applicant is the owner of such premises, or lessee of such premises, for at least the term of the license.

(d) Agreement by the applicant to accept and abide by all conditions of the tribal license.

(e) Payment of $250 fee as prescribed by the Tribal Council.

(f) Satisfactory proof that neither the applicant nor the applicant's spouse has ever been convicted of a felony.

(g) Satisfactory proof that notice of the application has been posted in a prominent, noticeable place on the premises where intoxicating beverages are to be sold for at least 30 days prior to consideration by the Tribal Council and has been published at least twice in such local newspaper serving the community that may be affected by the license the Tribal Chairperson or Secretary may authorize. The notice shall state the date, time and place when the application shall be considered by the Tribal Council pursuant to Section 502 of this ordinance.

Section 502. Hearing on Application for Tribal Liquor License. All applications for a tribal liquor license shall be considered by the Tribal Council in open session at which the applicant, his attorney, and any person protesting the application shall have the right to be present, and to offer sworn oral or documentary evidence relevant to the application. After the hearing, the Tribal Council shall determine whether to grant or deny the application based on:

(1) Whether the requirements of Section 501 have been met; and

(2) Whether the Tribal Council, in its discretion, determines that granting the license is in the best interests of the Tribe.

In the event that the applicant is a member of the Tribal Council, or a member of the immediate family of a

Tribal Council member, such members shall not vote on the application or participate in the hearings as a Tribal Council member.

Section 503. Temporary Permits. The Tribal Council or their designee may grant a temporary permit for the sale of intoxicating beverages for a period not to exceed 3 days to any person applying for the same in connection with a tribal or community activity; Provided, That the conditions prescribed in Section 504 of this ordinance shall be observed by the permittee. Each permit issued shall specify the types of intoxicating beverages to be sold. Further, a fee of $25 will be assessed on temporary permits.

Section 504. Conditions of the Tribal License. Any tribal license issued under this title shall be subject to such reasonable conditions as the Tribal Council shall fix, including, but not limited to the following:

(a) The license shall be for a term not to exceed 1 year.

(b) The licensee shall at all times maintain an orderly, clean and neat establishment, both inside and outside the licensed premises.

(c) The State of California shall have jurisdiction over offenses and civil causes of action committed on the licensed premises to the same extent that it has jurisdiction over offenses and civil causes of action committed elsewhere within California, and the California criminal laws, and civil laws of general applicability to private persons or private property, shall have the same force and effect on the licensed premises as they have elsewhere in California.

(d) The licensed premises shall be subject to patrol by the tribal enforcement department, and such other law enforcement officials as may be authorized under federal, California, or tribal law.

(e) The licensed premises shall be open to inspection by duly authorized tribal officials at all times during the regular business hours.

(f) Subject to the provisions of subsection (g) of this section, no intoxicating beverages shall be sold, served, disposed of, delivered or consumed on the licensed premises except in conformity with the hours and days prescribed by the laws of the State of California, and in accordance with the hours fixed by the Council, provided that the licensed premises shall not operate or open earlier or operate or close later than is permitted by the laws of the State of California.

(g) No liquor shall be sold within 200 feet of a polling place on tribal election days, or when a referendum is held of the people of the Tribe, and including special days of observation as designated by the Tribal Council.

(h) All acts and transactions under authority of the tribal liquor license shall be in conformity with the laws of the State of California, and shall be in accordance with this ordinance and any tribal license issued pursuant to this ordinance.

(i) No person under the age permitted under the laws of the State of California shall be sold, served, delivered, given, or allowed to consume alcoholic beverages in the licensed establishment and/or area.

(j) There shall be no discrimination in the operations under the tribal license by reason of race, color, or creed.

Section 505. License Not a Property Right. Notwithstanding any other provision of this ordinance, a tribal liquor license is a mere permit for a fixed duration of time. A tribal liquor license shall not be deemed a property right or vested right of any kind, nor shall the granting of a tribal liquor license give rise to a presumption of legal entitlement to the granting of such license for a subsequent time period.

Section 506. Assignment or Transfer. No tribal license issued under this ordinance shall be assigned or transferred without the written approval of the Tribal Council expressed by formal resolution.

Chapter VI—Rules, Regulations, and Enforcement

Section 601. Sales or Possession With Intent to Sell Without a Permit. Any person who shall sell or offer for sale or distribute or transport in any manner, any liquor in violation of this ordinance, or who shall operate or shall have liquor in his possession with intent to sell or distribute without a permit, shall be guilty of a violation of this ordinance.

Section 602. Purchases From Other Than Licensed Facilities. Any person within the boundaries of the Rancheria who buys liquor from any person other than at a properly licensed facility shall be guilty of a violation of this ordinance.

Section 603. Sales to Persons Under the Influence of Liquor. Any person who sells liquor to a person apparently under the influence of liquor shall be guilty of a violation of this ordinance.

Section 604. Consuming Liquor in Public Conveyance. Any person engaged wholly or in part in the business of carrying passengers for hire, and every agent, servant or employee or such person who shall knowingly permit any person to drink any liquor in any public conveyance shall be guilty of an offense. Any person who shall drink any liquor in a public conveyance shall be guilty of a violation of this ordinance.

Section 605. Consumption or Possession of Liquor by Persons Under 21 Years of Age. No person under the age of 21 years shall consume, acquire or have in his possession any alcoholic beverage. No person shall permit any other person under the age of 21 to consume liquor on his premises or any premises under his control except in those situations set out in this section. Any person violating this section shall be guilty of a separate violation of this ordinance for each and every drink so consumed.

Section 606. Sales of Liquor to Persons Under 21 Years of Age. Any person who shall sell or provide liquor to any person under the age of 21 years shall be guilty of a violation of this ordinance for each sale or drink provided.

Section 607. Transfer of Identification to Minor. Any person who transfers in any manner an identification of age to a minor for the purpose of permitting such minor to obtain liquor shall be guilty of an offense; Provided, That corroborative testimony of a witness other than the minor shall be a requirement of finding a violation of this ordinance.

Section 608. Use of False or Altered Identification. Any person who attempts to purchase an alcoholic beverage through the use of false or altered identification, which falsely purports to show the individual to be over the age of 21 years, shall be guilty of violating this ordinance.

Section 609. Violations of This Ordinance. Any person guilty of a violation of this ordinance shall be liable to pay the Tribe a penalty not to exceed $500 per violation as civil damages to defray the Tribe's cost of enforcement of this ordinance. In addition to any penalties so imposed, any license issued hereunder may be suspended or canceled by the Tribal Council after 10 days notice to the licensee. The decision of the Tribal Council shall be final.

Section 610. Acceptable Identification. Where there may be a question of a person's right to purchase liquor by reason of his age, such person shall be required to present any one of the following issued cards of identification which shows his correct age and bears his signature and photograph:

(a) Driver's license of any state or identification card issued by any State Department of Motor vehicles;

(b) United States Active Duty Military; or

(c) Passport.

Section 611. Possession of Liquor Contrary to This Ordinance. Alcoholic beverages which are possessed contrary to the terms of this ordinance are declared to be contraband. Any tribal agent, employee, or officer who is authorized by the Tribal Council to enforce this section shall have the authority to, and shall seize, all contraband.

Section 612. Disposition of Seized Contraband. Any officer seizing contraband shall preserve the contraband in accordance with the appropriate California law code. Upon being found in violation of the ordinance by the Tribal Council, the party shall forfeit all right, title and interest in the items seized which shall become the property of the Tribe.

Chapter VII—Taxes

Section 701. Sales Tax. There is hereby levied and shall be collected a tax on each sale of alcoholic beverages on the Rancheria in the amount of 1 percent of the amount actually collected, including payments by major credit cards. The tax imposed by this section shall apply to all retail sales of liquor on the Rancheria and shall preempt any tax imposed on such liquor sales by the State of California.

Section 702. Payment of Taxes to Tribe. All taxes from the sale of alcoholic beverages on the Rancheria shall be paid over to the trust agent of the Tribe.

Section 703. Taxes Due. All taxes for the sale of alcoholic beverages on the Rancheria are due within 30 days at the end of the calendar quarter for which the taxes are due.

Section 704. Reports. Along with payment of the taxes imposed herein, the taxpayer shall submit an accounting for the quarter of all income from the sale or distribution of said beverages as well as for the taxes collected.

Section 705. Audit. As a condition of obtaining a license, the licensee must agree to the review or audit of its books and records relating to the sale of alcoholic beverages on the Rancheria. Said review or audit may be done annually by the Tribe through its agents or employees whenever, in the opinion of the Tribal Council, such a review or audit is necessary to verify the accuracy of reports.

Chapter VIII—Profits

Section 801. Disposition of Proceeds. The gross proceeds collected by the Tribal Council from all licensing provided from the taxation of the sale of alcoholic beverages on the Rancheria shall be distributed as follows:

(a) For the payment of all necessary personnel, administrative costs, and legal fees for the operation and its activities.

(b) The remainder shall be turned over to the Trust Account of the Tribe.

Chapter IX—Severability and Miscellaneous

Section 901. Severability. If any provision or application of this ordinance is determined by review to be invalid, such adjudication shall not be held to render ineffectual the remaining portions of this title or to render such provisions inapplicable to other persons or circumstances.

Section 902. Prior Enactments. All prior enactments of the Tribal Council, which are inconsistent with the provisions of this ordinance, are hereby rescinded.

Section 903. Conformance with California Laws. All acts and transactions under this ordinance shall be in conformity with the laws of the State of California as that term is used in 18 U.S.C. 1161.

Section 904. Effective Date. This ordinance shall be effective on such date as the Secretary of the Interior certifies this ordinance and publishes the same in the **Federal Register**.

Chapter X—Amendment

This ordinance may only be amended by majority vote of the Tribal Council.

Chapter XI—Sovereign Immunity

Nothing contained in this ordinance is intended to, nor does in any way limit, alter, restrict, or waive the Tribe's sovereign immunity from unconsented suit or action.

[FR Doc. 01–2384 Filed 1–25–01; 8:45 am]

BILLING CODE 4310–02–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[Docket No. OR–035–01–1220–AB: GP0–01–0075]

Notice of Meeting of the Oregon Trail Interpretive Center Advisory Board

AGENCY: National Historic Oregon Trail Interpretive Center, Vale District, Bureau of Land Management, Interior.

ACTION: Notice of meeting.

SUMMARY: Notice is given that a meeting of the Advisory Board for the National Historic Oregon Trail Interpretive Center will be held on Tuesday, February 20, 2001 from 8:00 a.m. to 12:00 Noon in the Library Room at the Best Western Sunridge Inn, One Sunridge Lane, Baker City, Oregon. Public comments will be received from 12:00 noon to 12:15 p.m., February 20, 2001. Topics to be discussed are the Action Plan Development for Advisory Board recommendations for FY2001–2002, Marketing Strategy for NHOTIC, and the Capital Expansion Plan.

DATES: The meeting will begin at 8:00 a.m. and run to 12:00 Noon, February 20, 2001.

FOR FURTHER INFORMATION CONTACT: David B. Hunsaker, Bureau of Land Management, National Historic Oregon Trail, Interpretive Center, PO Box 987, Baker City, OR 97814, (Telephone 541–523–1845).

Roy L. Masinton,

Acting Vale District Manager.

[FR Doc. 01–2396 Filed 1–25–01; 8:45 am]

BILLING CODE 4310–33–M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CO–170–1430–00; COC 64613, COC 64614]

Notice of Realty Action: Commercial Permit/Lease/Easement on Public Land.

AGENCY: Bureau of Land Management, Interior.

ACTION: Proposed commercial permit/lease/easement, section 302, Federal Land Policy and Management Act.

SUMMARY: The Bureau of Land Management, San Juan Field Office, Durango, Colorado, has for consideration interest in land use authorization(s) under Section 302 of the Federal Land Policy and Management Act of 1976 (90 Stat. 2762; 43 U.S.C. 1732), and regulations at 43 CFR Part 2920. There are two proponents for use of BLM managed public lands in the Silverton, Colorado vicinity. Core Mountain Enterprises, LLC proposes to use approximately 1600 acres of public land for a recreation/learning facility. Velocity Peak Inc, proposes to use approximately 3660 acres of public land for recreation development. The respective areas of proposed use overlap in some locations.

Description: An area of federal lands managed by the Bureau of Land Management, Department of the Interior, lying approximately within sections 20–21, 27–34 of protracted Township 42 N., R.7 W., and, also within sections 3–9 of protracted Township 41 N., R.7 W., New Mexico Principal Meridian. Further described as north of Silverton, in San Juan County, Colorado, and bounded as follows:

Beginning at the north end of Silverton, thence westerly along Cement Creek and Colorado State Highway #110, to Gladstone, thence southeasterly along the Middle Fork of Cement Creek to the divide between the Middle Fork Cement Creek and the South Fork of the Animas River, thence south along the eastern slope of the Boulder Gulch drainage to Colorado State Highway #110, thence southwest to the north end of Silverton and the point of beginning.

The area described contains approximately 3660 acres of federal land and is exclusive of the private land adjacent to and contained within the perimeter of the project.

A determination to analyze the proposed projects separately or jointly will be made subsequent to a review of the proponents' applications which will be accepted after the publication of the NORA.

If found suitable for the proposed uses, such uses would be authorized through a competitive or non-competitive process, by permit, lease, or easement, as appropriate, at fair market rental, paid annually in advance. A permit or permits, lease or leases, or easement or easements, singly or in combination, could authorize use of the land for extreme skiing/snow-boarding and winter related learning courses offered during the winter months, and biking, hiking and all season sightseeing. A holder of a permit, easement, or lease would be required, in advance of authorization, to agree to the terms and conditions of 43 CFR 2920.7 and such additional terms and conditions as are deemed necessary for the particular use authorization.

Permitting/leasing or issuance of easements under Section 302 of FLPMA within the above-described area would be consistent with the Bureau of Land Management's current San Juan Resource Area Management Plan.

An authorized permittee, lessee, or easement holder, would be required, in advance, to reimburse the United States for reasonable administrative fees and monitoring of construction, operation, maintenance, and rehabilitation of the land authorized. The reimbursement of costs would be in accordance with 43 CFR 2920.6.

Any permit, lease, or easement authorized would be subject to valid existing rights, including, but not limited to the following:

1. A right-of-way for microwave reflector purposes granted to Western Tele-Comm by right-of-way Colorado 4702, under the Act of March 11, 1911.

2. A right-of-way for electric power distribution line granted to San Miguel Power Association by right-of-way Colorado 18281, under the Act of February 15, 1901 (16 U.S.C. 79, 522).

3. A right-of-way for public highway granted to the Colorado Department of Transportation by right-of-way Colorado 44623, under the Act of October 21, 1976 (43 U.S.C. 1761).

4. A right-of-way for telephone service granted to QWEST Corporation by right-of-way Colorado 57856, under the Act of October 21, 1976 (43 U.S.C. 1761).

5. A right-of-way for water facility granted to the Town of Silverton by right-of-way Colorado 39506, under the Act of October 21, 1976 (43 U.S.C. 1761).

6. A right-of-way for access road granted to John Quenoy, et al, by right-of-way Colorado 46581, under the Act of October 21, 1976 (43 U.S.C. 1761).

7. A right-of-way for a communication site granted to San Miguel Power by right-of-way Colorado 36698, under the Act of October 21, 1976 (43 U.S.C. 1761).

8. A right-of-way for electric power distribution line granted to San Miguel Power Association by right-of-way Colorado 7845, under the Act of March 4, 1911 (16 U.S.C. 5, 420, 523).

Detailed information is available for review at the office of the Bureau of Land Management, San Juan Field Office, 15 Burnett Court, Durango, Colorado.

DATES: Interested parties may submit comments until March 12, 2001, to: Bureau of Land Management, Field Office Manager, San Juan Field Office, 15 Burnett Court, Durango, Colorado 81301.

FOR FURTHER INFORMATION CONTACT: Charlie Higby, San Juan Field Office, Bureau of Land Management, 15 Burnett Court, Durango, Colorado 81301; (970) 247–4874.

Dated: January 10, 2001.

Calvin Joyner,

Field Office Manager.

[FR Doc. 01–1361 Filed 1–25–01; 8:45 am]

BILLING CODE 4310–JB–U

DEPARTMENT OF THE INTERIOR

Minerals Management Service

Outer Continental Shelf (OCS) Operations; Annual List of Notices to Lessees and Operators (NTLs)

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Notice.

SUMMARY: This notice informs the public, industry, and other Government agencies of NTLs that are in effect as of January 15, 2001. It also officially rescinds several regional NTLs and one regional Letter to Lessees and Operators (LTL).

ADDRESSES: You may obtain copies of NTLs through our website at http://www.mms.gov/ntls/ or by contacting the MMS National Office or the OCS Region that issued the NTL at the following addresses:

National Office: Minerals Management Service, Engineering and Operations Division, 381 Elden Street, Herndon, Virginia 20170–4817, Attention: Ms. Alexis London; telephone (703) 787–1600.

Alaska OCS Region: Minerals Management Service, 949 East 36th Avenue, Room 308, Anchorage, Alaska 99508–4363, Attention: Ms. Christine Huffaker; telephone (907) 271–6621.

Gulf of Mexico (GOM) OCS Region: Minerals Management Service, 1201 Elmwood Park Blvd., New Orleans, Louisiana 70123–2394, Attention: Mr. Michael Dorner; telephone (504) 736–2599.

Pacific OCS Region: Minerals Management Service, 770 Paseo Camarillo, Camarillo, California 93010–6064, Attention: Ms. Freddie Mason; telephone (805) 389–7566.

FOR FURTHER INFORMATION CONTACT: Alexis London, Engineering and Operations Division; telephone (703) 787–1600.

SUPPLEMENTARY INFORMATION: The MMS is responsible for oil and gas or sulphur operations in the OCS to ensure operational safety and protection of the environment. In addition to our regulations, under the authority of 30 CFR 250.103, we issue NTLs to provide guidance and to further clarify, interpret, or describe regulatory requirements on a national or regional basis.

In the past, we have also issued LTLs for this purpose or to communicate information to OCS lessees and operators. Recently we have rescinded or revised most of the LTLs and reissued them as NTLs. There are still a few active LTLs in the GOM OCS Region that have not yet been superseded by NTLs or rescinded. Although not listed in this Notice, please note that they will remain in effect until they are superseded or rescinded. To obtain a list or copies of the active LTLs, please contact the GOM OCS Region.

For your convenience, the following table lists the current active NTLs issued by the National Office and the OCS Regions. Therefore, if an NTL issued before January 15, 2001, is not listed, it is canceled and no longer in effect.

NTL No.	Effective date	Title/subject
Current Notices to Lessees and Operators Issued by the National Office		
96–7N*	12/10/96	OCS Civil Penalties Program (*Modified by 97–5N).
97–2N*	08/01/97	Well Naming and Numbering Standards (*Will be superseded 5/01/2001 by NTL 00–N07).
97–3N	08/01/97	OCS Program—Annual Performance Review.
97–4N	09/01/97	Civil Penalties Program Annual Summary to be Published.
97–5N*	10/07/97	OCS Civil Penalties Program Revised Assessment Matrix (*Modifies 96–7N).
98–1N	01/02/98	Interim Guidance for Applying Platform Design Criteria from American Petroleum Institute (API) Recommended Practice (RP) 2A, ''Planning, Designing, and Constructing Fixed Offshore Platforms,'' 19th Edition (8/1/91) and 20th Edition (7/1/93) and its Supplement 1 (2/1/97).
98–4N	03/04/98	Interim Guidance for Applying ''Simplified Fatigue Analysis'' Procedure from API RP 2A.
98–5N	04/01/98	Application and Audit Fees for Requests for Royalty Relief or Adjustment Under 30 CFR Part 203.
98–12N	07/01/98	Determination of Pollution Inspection Frequencies for Unmanned Facilities.
98–13N	07/01/98	Use of New or Alternative Technology and Procedures.
98–18N	12/28/98	Supplemental Bond Procedures.
98–18N Addendum 1	09/12/00	Additional Guidance for Third-Party Guarantees.
99–N01	01/06/99	Guidelines for Oil Spill Financial Responsibility for Covered Facilities.
99–N03	03/01/99	Performance Measures for OCS Operators & Form MMS–131.
99–N04	03/05/99	Revised Guidelines for Royalty Relief Under 30 CFR Part 203.
00–N03*	10/13/00	Clarification of 30 CFR 250, Subpart O—Well Control & Production Safety Training (*Rescission Date 10/15/2002).
00–N04*	09/15/01	Guidelines for Crane & Rigging Operations on Fixed Offshore OCS Facilities (*Rescission Date 04/01/2001).
00–N05	10/01/00	Conservation Information.
00–N06	10/01/00	Deepwater Operations Plans.
00–N07	05/01/01	Well Naming and Numbering Standards.
00–N08*	12/21/00	Synthetic Moorings Workshop (*Rescission Date 01/30/2001).
Current Notices to Lessees and Operators Issued by the Alaska OCS Region		
00–A01	01/27/00	Shallow Hazards Geophysical Survey & Evaluation for OCS Exploration and Development Drilling.
00–A02	01/27/00	Shallow Hazards Geophysical Survey & Evaluation for OCS Pipeline Routes and Rights-of-Way.
00–A03	01/27/00	Archaeological Survey & Evaluation for OCS Exploration and Development Activities.
Current Notices to Lessees and Operators Issued by the Gulf of Mexico OCS Region		
96–08	11/25/96	Time Allowed for the Correction of Incidents of Noncompliance (INC's) and for the Return of Notification of INC Forms.
96–10	12/05/96	Air Emissions Information for Application for Accessory Platforms to Pipeline Rights-of-Way.
97–06	03/01/97	Timely Submittal of Drilling Well Records in Accordance with 30 CFR 250.66 [Redesignated 30 CFR 250.416].
97–07	03/01/97	Revised Conditions of Approval to Drill, Sidetrack and/or Complete for Oil and Gas Production.
97–16	08/01/97	Production Within 500 Feet of a Unit or Lease Line.
97–17	08/01/97	Containment Requirements for Bolted or Welded Stock Tanks.
97–18	08/18/97	Timely Submittal of Deepwater Royalty Relief Applications.
98–05	07/01/98	Confirmation of Deepwater Royalty Relief for Leases Issued After November 28, 1995.
98–06	08/10/98	Archaeological Requirements.
98–09	08/10/98	Proposed and As-Built Pipeline Location Data.
98–10	08/10/98	Best Available Control Technology (Sulphur Dioxide).
98–12	08/10/98	Implementation of Consistent Biological Stipulation Measures in the Central and Western Gulf of Mexico.
98–13	08/10/98	Minimizing Oil and Gas Structures in the Gulf of Mexico.
98–16	08/10/98	Hydrogen Sulfide (H_2S) Requirements.
98–18	09/01/98	Change of Address for the Submittal of Certain Drilling Records in Accordance with 30 CFR 250.416.
98–19	09/15/98	Temporary Abandonment of Wells and Maintenance, Protection and Removal of Underwater Casing Stubs.
98–20	09/15/98	Shallow Hazards Requirements.
98–23	10/15/98	Interim Reporting Requirements for 30 CFR 250, Subpart K, Oil and Gas Production Rates.
98–24	10/15/98	Rate Control Section Address, Office Hours, and Telephone Procedures.
98–26	11/30/98	Minimum Interim Requirements for Site Clearance (and Verification) of Abandoned Oil and Gas Structures in the Gulf of Mexico.
98–27	12/01/98	Guidelines for Eliminating Trash and Debris Resulting from Gulf of Mexico OCS Operations.
98–29	12/18/98	Announcement of Project to Clean Up Historical Well Data.
98–29 Addendum 1	03/15/99	Well Records for Information Corrected or Completed During Project to Clean Up Historical Well Data Exemption from Incidents of Non-compliance.
98–29 Addendum 2	02/16/00	Wells (holes-in-ground) Without Assigned MMS API Numbers.
98–30	03/01/99	Regional Oil Spill Response Plans.
99–G01	02/12/99	Deepwater Emergency Well Control Operations.
99–G05	04/26/99	Submittal of Documents for Platforms and Structures.
99–G06	05/01/99	Economic Assumptions for RSVP Deepwater Royalty Relief Model.
99–G07	05/03/99	U.S. Air Force Communication Towers.
99–G08	05/10/99	Removing Underwater Casing Stubs.
99–G09	05/10/99	Location of Choke and Kill Lines on BOP Stacks.

NTL No.	Effective date	Title/subject
99–G10	05/11/99	Designated Safe Welding and Burning Areas on Rigs.
99–G11	06/07/99	Approval of Acidizing Operations.
99–G12	06/07/99	Increased Level II Underwater Structural Inspection Intervals.
99–G15*	06/30/99	Production Activities Information Collection and Reporting (Western Gulf of Mexico) (*Rescission Date 1/31/2001).
99–G16	07/08/99	Live-Bottom Surveys and Reports.
99–G17	07/08/99	North American Datum 83 Implementation Plan for the GOM.
99–G19	09/07/99	Downhole Commingling Policies.
99–G20	09/07/99	Downhole Commingling Applications.
99–G21	09/13/99	Platform Removal Applications.
99–G22	09/24/99	Guidelines for Subsea Disposal & Offshore Storage of Solid Wastes.
00–G02	01/25/00	Deepwater Experimental Oil Release Study.
00–G03	01/28/00	Functional Responsibilities of MMS Regulations.
00–G04	01/28/00	Well Producibility Determinations.
00–G06	02/04/00	Supervisory Control and Data Acquisition (SCADA) Systems.
00–G07	02/22/00	Accidental Disconnect of Marine Drilling Risers.
00–G08*	03/01/00	Drilling Windows, Eastern Gulf of Mexico (*Expires 3/1/2001).
00–G11	05/12/00	Pollution Inspection Intervals for Unmanned Facilities.
00–G13	05/25/00	Production Safety Systems Requirements.
00–G14	08/29/00	Contact with District Offices and the Pipeline section Outside Regular Work Hours.
00–G15	09/06/00	Hurricane and Tropical Storm Evacuation and Production Curtailment Procedures.
00–G16	09/07/00	Guidelines for General Lease Surety Bonds.
00–G17	09/01/00	Suspension of Production/Operations Overview.
00–G18*	11/21/00	Meteorological Data Collection and Reporting (Breton National Wildlife Refuge/Wilderness Area) (*Rescission Date 11/30/2001).
00–G19	11/21/00	Production Activities Information Collection and Reporting (Breton National Wildlife Refuge/Wilderness Area) (*Rescission Date 11/30/2001).
00–G20	12/06/00	Deepwater Chemosynthetic Communities.
00–G21	12/26/00	Information Requirements for Exploration Plans and Development Operations Coordination Documents.
00–G22	12/22/00	Subsalt Lease Term Extension.
Current Notices to Lessees and Operators Issued by the Pacific OCS Region		
92–01	03/24/92	Warning Signs: Pipelines and Power Cables.
98–01	03/05/98	Santa Maria District Office Phone Call Procedures and Hours.
98–02	03/05/98	Camarillo District Office Phone Call Procedures and Hours.
98–04	07/01/98	Gas Volume Statement Requirements.
98–05	08/04/98	Archaeological Survey and Report Requirements.
98–06	08/04/98	Change of Ownership/Operatorship of Leases and Pipelines.
98–07	08/04/98	Helideck Closures.
98–09	08/11/98	Hydrogen Sulfide (H_2S) Requirements.
98–10	08/21/98	Liquid Royalty Measurement Facilities.
98–11	08/31/98	Submission of Digitized Well Log Data on Magnetic Tape.
98–12	08/11/98	Guidelines for Shallow Hazards and Report Requirements for Exploration Drilling.
98–13	08/11/98	Guidelines for Shallow Hazards and Report Requirements for OCS Development Operations.
98–14	11/04/98	Cooperative Drilling Rig (Only Non-Producing Lease Operators).
99–P01	07/15/99	Oil Spill Response Plans.
99–P04	11/04/99	Flaring and Venting Gas.
99–P05	12/10/99	Decommissioning of Pacific OCS Facilities.
00–P01	01/20/00	Standby Testing During Air Pollution Emergency Episodes.
00–P02	04/17/00	Sustained Casing Pressure.
00–P04	11/01/00	Biological Survey Criteria.

Effective with the publication of this Notice, we are rescinding the following National NTL, two NTLs issued by the GOM OCS Region, and one LTL issued by the Pacific OCS Region:

- NTL 98–2N, Guidance Regarding API Specification 14A, ''Specification for Subsurface Safety Valve Equipment,'' Ninth Edition (7/1/94) and Supplement 1. This NTL is superseded by the final rule published December 8, 2000 (65 FR 76933).
- NTL 86–05, New Form for Designated Operators. This NTL has served its purpose and is no longer needed. The form MMS–1123 used to designate operators is available on the MMS website at: http://www.gomr.mms.gov/homepg/mmsforms/frmindx.html.
- NTL 98–15, Time Allowed Between Lease Holding Operations (30 CFR 250.13 [Redesignated 30 CFR 250.113]). This NTL is superseded by the final rule revising the 30 CFR 250, Subpart A regulations, at 250.180.
- LTL dated August 28, 1992, subject: NAD 27 & NAD 83.

Dated: January 8, 2001.

Carolita U. Kallaur,

Associate Director for Offshore Minerals Management.

[FR Doc. 01–2308 Filed 1–25–01; 8:45 am]

BILLING CODE 4310–MR–W

DEPARTMENT OF THE INTERIOR

National Park Service

Final Legislative Environmental Impact Statement, Timbisha Shoshone Homeland, Death Valley National Park; Notice of Availability

SUMMARY: Pursuant to § 102(2)c of the National Environmental Policy Act of 1969 (Pub. L. 91–190, as amended), and the Council on Environmental Quality regulations (40 CFR parts 1500–1508), at the request of the Department of the Interior, the National Park Service, in cooperation with the Bureau of Land Management, Fish and Wildlife Service, and the Bureau of Reclamation has prepared a Final Legislative Environmental Impact Statement (LEIS) identifying and evaluating alternatives for a Timbisha Shoshone Homeland within and around Death Valley National Park, California. Potential impacts and appropriate mitigation strategies are identified and assessed for each alternative.

On July 19, 2000 the United States Senate passed the Timbisha Shoshone Homeland Act. A similar version of the Act was passed on October 17, 2000 by the House of Representatives, and on November 1, 2000 the Act was signed by the President. The plan will guide management actions in the transfer of lands and the development of cooperative agreements.

Proposal: The proposed Timbisha Shoshone Homeland (Alternative A-Preferred) would transfer approximately 7,500 acres of federal lands (identified as ''multiple use'' and managed by Death Valley National Park and the Bureau of Land Management in California and Nevada) into trust with the Department of the Interior for the creation of a tribal homeland. Permission would be sought for acquisition of two parcels (approximately 120 acres of former Indian allotted lands) in Saline Valley, California, and approximately 2,430 acres near Lida, Nevada, from private owners, as willing sellers. Also, water rights (either appurtenant or separately held) could be obtained from willing sellers. Cooperative activities at Ash Meadows National Wildlife Refuge would also be undertaken. Some portions of lands previously designated by Congress as ''wilderness'' would be also recognized as Timbisha Shoshone Natural and Cultural Preservation Area, but ownership would not be transferred.

Alternatives: Alternative B maintains the status quo, as described in Chapter 2, Description of Proposed Action, No Action, and Alternatives Considered But Not Brought Forward For Analysis. It provides a baseline from which to compare and evaluate the magnitude of proposed changes, and to measure the foreseeable environmental effects of those changes. This no-action concept follows the guidance of the Council on Environmental Quality, which describes the no-action alternative as no change from the current management direction or level of management intensity.

Background: Although initial scoping is not required for the preparation of a LEIS, an understanding of public concerns was desired. Accordingly, a notice was published in the **Federal Register** on April 19, 1999 announcing to the public the opportunity of commenting on a Draft Secretarial Report regarding the Homeland initiative. In addition, six public meetings were conducted (attended by 79 persons), and five informational meetings were held at the request of state congressional delegations and county commissioners and supervisors. Over 550 letters were received during the public scoping period. In October 1999, a copy of the 11-page Scoping Summary Document was mailed to everyone who attended the public meetings or commented during the process.

In October, 1999 the Department of the Interior determined that the NPS would serve as the lead agency for this conservation planning and environmental impact analysis process. As noticed in the **Federal Register** on May 12, 2000, a draft Timbisha Shoshone Homeland LEIS was prepared pursuant to the National Environmental Policy Act, and distributed by mail and libraries for a formal public review period ending August 21, 2000. In addition, the document was available via the internet at http//www3.iwvisp.com/blm/report. Five public meetings were conducted (attended by 100 persons), and 238 letters were received.

Availability: The Final Timbisha Shoshone Homeland LEIS was sent directly to the project mailing list. Copies are also available at park headquarters at Furnace Creek, field offices of BLM Ridgecrest, California and Tonopah, Nevada. Also, the Final LEIS will be posted on the internet at http://www.nps.gov/deva. Inquiries should be addressed to the Superintendent, Death Valley National Park, P.O. Box 579, Death Valley, California 92328.

All comments received throughout the conservation planning and environmental impact analysis process are archived and will be available for public review in the park's library. If individuals submitting comments requested that their name or\and address be withheld from public disclosure, it will be honored to the extent allowable by law. Such requests must be stated prominently in the beginning of the comments. There may also be circumstances wherein the NPS will withhold a respondent's identity as allowable by law. As always, the NPS will make available for public inspection all submissions from organizations or businesses and from persons identifying themselves as representatives or officials of organizations and businesses, and anonymous comments may not be considered.

Recommendation Process: A notice of final recommendations will be published in the **Federal Register** not sooner than thirty (30) days after the final document is distributed. This is expected to occur early in 2001. The National Park Service officials responsible for implementation will be the Superintendent, Death Valley National Park and the Regional Director, Pacific West Region; as well as the State Directors, Bureau of Land Management, Nevada and California; the Assistant Secretary for Indian Affairs; and the Bureau of Indian Affairs, Central California Agency.

Dated: January 9, 2001.

Patricia L. Neubacher,

Acting Regional Director, Pacific West Region.

[FR Doc. 01–2340 Filed 1–25–01; 8:45 am]

BILLING CODE 4310–70–P

DEPARTMENT OF THE INTERIOR

National Park Service

Cape Cod National Seashore, South Wellfleet, MA; Cape Cod National Seashore Advisory Commission Two Hundred Thirty Second Meeting; Notice of Meeting

Notice is hereby given in accordance with the Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770, 5 U.S.C. App 1, section 10), that a meeting of the Cape Cod National Seashore Advisory Commission will be held on Friday, February 9, 2001.

The Commission was reestablished pursuant to Public Law 87–126 as amended by Public Law 105–280. The purpose of the Commission is to consult with the Secretary of the Interior, or his designee, with respect to matters relating to the development of Cape Cod National Seashore, and with respect to carrying out the provisions of sections 4 and 5 of the Act establishing the Seashore.

The Commission members will meet at 1 p.m. at Headquarters, Marconi Station, Wellfleet, Massachusetts for the regular business meeting to discuss the following:

1. Adoption of Agenda
2. Approval of minutes of previous meeting (November 16, 2000)
3. Reports of Officers
4. Report of ORV Subcommittee
5. Superintendent's Report
   Dune Shacks
   Highlands Center
   Salt Pond Visitor Center
   Zoning Standards
   Status nomination process—role of alternates
   News from Washington
6. Old Business
   Advisory Commission Handbook
7. New Business
8. Agenda for next meeting—March 23, 2001
9. Public comment and
10. Adjournment

The meeting is open to the public. It is expected that 15 persons will be able to attend the meeting in addition to Commission members.

Interested persons may make oral/written presentations to the Commission during the business meeting or file written statements. Such requests should be made to the park superintendent at least seven days prior to the meeting. Further information concerning the meeting may be obtained from the Superintendent, Cape Cod National Seashore, 99 Marconi Site Road, Wellfleet, MA 02667.

Dated: January 18, 2001.

Maria Burks,

Superintendent.

[FR Doc. 01–2341 Filed 1–25–01; 8:45 am]

BILLING CODE 4310–70–P

DEPARTMENT OF THE INTERIOR

National Park Service

Gettysburg National Military Park

AGENCY: National Park Service, Interior.

ACTION: Notice of meeting.

SUMMARY: This notice sets forth the date of the thirty-fourth meeting of the Gettysburg National Military Park Advisory Commission.

DATES: The public meeting will be held on February 15, 2001, from 7:00 p.m. to 9:00 p.m.

Location: The meeting will be held at the Cyclorama Auditorium, 125 Taneytown Road, Gettysburg, Pennsylvania 17325.

Agenda: Sub-Committee Reports, Federal Consistency Projects Within the Gettysburg Battlefield Historic District, Operational Updates on Park Activities, Election of Chairperson and Vice-Chairperson, Update from the President of the Gettysburg National Battlefield Museum Foundation, and the Citizens Open Forum.

FOR FURTHER INFORMATION CONTACT: John A. Latschar, Superintendent, Gettysburg National Military Park, 97 Taneytown Road, Gettysburg, Pennsylvania 17325.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public. Any member of the public may file with the Commission a written statement concerning agenda items. The statement should be addressed to the Advisory Commission, 97 Taneytown Road, Gettysburg, Pennsylvania 17325. Minutes of the meeting will be available for inspection four weeks after the meeting at the permanent headquarters of the Gettysburg National Military Park located at 97 Taneytown Road, Gettysburg, Pennsylvania 17325.

Dated: January 11, 2001.

John A. Latschar,

Superintendent, Gettysburg NMP/Eisenhower NHS.

[FR Doc. 01–2348 Filed 1–25–01; 8:45 am]

BILLING CODE 4310–70–M

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate a Cultural Item in the Possession of The Detroit Institute of Arts, Detroit, MI

AGENCY: National Park Service

ACTION: Notice

Notice is hereby given under the Native American Graves Protection and Repatriation Act, 43 CFR 10.10 (a)(3), of the intent to repatriate a cultural item in the possession of The Detroit Institute of Arts, Detroit, MI that, based on preponderance of the evidence, meets the definition of ''object of cultural patrimony'' under Section 2 of the Act.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 43 CFR 10.2 (c). The determinations within this notice are the sole responsibility of the museum that has control of the cultural item. The National Park Service is not responsible for the determinations within this notice.

The 1 cultural item is a bear claw necklace composed of 30 grizzly bear claws separated by large, faceted blue glass beads attached to a foundation wrapped with trimmed otter fur.

During the 1950's, according to documentation and oral testimony, this cultural item passed through the possession of the Lyons Pawn Shop, Pawnee, OK; the Southern Plains Indian Museum and Crafts Center, Anadarko, OK; Mr. Warner, Oklahoma City, OK; Mr. Milford Chandler, Detroit, MI; and Mr. Richard Pohrt, Flint, MI. In 1981, The Detroit Institute of Arts purchased this bear claw necklace from Mr. Pohrt.

Based on consultation and documentary evidence provided by historic photographs and newspaper accounts, this bear claw necklace is known to have been in the possession of Mr. James White Cloud (born 1841-died 1940), a tribal chief of the Iowa Tribe of Kansas and Nebraska. Documentation also indicates that this necklace was used in 1940 during the installation of Mr. Louis White Cloud, son and successor of Mr. James White Cloud, as chief of the Iowa Tribe of Kansas and Nebraska. Further documentation also indicates that in 1952, this necklace was withheld by Mr. Daniel White Cloud, son and successor to Mr. Louis White Cloud, from the installation of Mr. James Rhodd, elected chief of the Iowa Tribe of Kansas and Nebraska. Consultation evidence offered by a direct lineal descendant (now deceased) of Mr. James White Cloud argued that the necklace had been inherited through direct patrilineal descent through male members of the White Cloud family. Officials of The Detroit Institute of Arts do not believe that any direct patrilineal descendants of Mr. James White Cloud are now living. Consultation evidence provided by representatives of the Iowa Tribe of Kansas and Nebraska indicates that this bear claw necklace is a symbol of authority used by Iowa chiefs and, as such, passed down in installation ceremonies from chief to chief. Representatives of the Iowa Tribe of Kansas and Nebraska also state that this bear claw necklace has ongoing historical, traditional, and cultural importance central to the tribe itself, and could not have been alienated, appropriated, or conveyed by any individual. Since the Indian Reorganization Act of 1934 established the authority of the Iowa Tribe of Kansas and Nebraska to elect tribal chiefs, officials of The Detroit Institute of Arts believe a reasonable interpretation of the facts is that the Iowa Tribe of Kansas and Nebraska now possesses authority over traditional symbols of their tribal chiefs, the evidence of the necessity of direct patrilineal descent notwithstanding.

The Iowa Tribe of Kansas and Nebraska will have this bear claw necklace curated at an established museum until a tribal museum is established.

Based on the above-mentioned information, officials of The Detroit Institute of Arts believe that, pursuant to 43 CFR 10.2 (d)(4), this one cultural item has ongoing historical, traditional, and cultural importance central to the tribe itself, and could not have been alienated, appropriated, or conveyed by any individual. Officials of The Detroit Institute of Arts also have determined that, pursuant to 43 CFR 10.2 (e), there is a relationship of shared group identity that can be reasonably traced between this object of cultural patrimony and the Iowa Tribe of Kansas and Nebraska.

This notice has been sent to officials of the Iowa Tribe of Kansas and Nebraska and the Iowa Tribe of Oklahoma. Representatives of any other Indian tribe that believes itself to be culturally affiliated with this object of cultural patrimony should contact David W. Penney, Chief Curator, The Detroit Institute of Arts, 5200 Woodward Avenue, Detroit, MI 48202, telephone (313) 833-1432, before February 26, 2001. Repatriation of this object of cultural patrimony to the Iowa Tribe of Kansas and Nebraska may begin after that date if no additional claimants come forward.

Dated: January 15, 2001.

John Robbins,

Assistant Director, Cultural Resources Stewardship and Partnerships.

[FR Doc. 01–2346 Filed 1–25–01; 8:45 am]

BILLING CODE 4310–70–F

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate a Cultural Item in the Possession of the Ilwaco Heritage Foundation, Ilwaco, WA

AGENCY: National Park Service

ACTION: Notice

Notice is hereby given under the Native American Graves Protection and Repatriation Act, 43 CFR 10.10(a)(3), of the intent to repatriate a cultural item in the possession of the Ilwaco Heritage Museum, Ilwaco, WA, that meets the definitions of ''sacred object'' under Section 2 of the Act.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 43 CFR 10.2(c). The determinations within this notice are the sole responsibility of the museum that has control over this cultural item. The National Park Service is not responsible for determinations within this notice.

The cultural item is a carved ceremonial staff with the head of Raven, 85 cm long (accession number 1987.164/2, catalog number 85.7).

The cultural item was acquired by the late Charles Bacon of Ilwaco, WA, on the Quinault Reservation in Taholah, WA, in 1952. Mr. Bacon transferred the cultural item to the Ilwaco Heritage Museum in 1987.

Cultural affiliation with the Quinault Tribe of the Quinault Reservation, Washington, is indicated by the object's place of acquisition on the Quinault Reservation in Taholah, WA. Correspondence with the Quinault Cultural Center further indicates the object is a speaker's staff needed by Quinault traditional religious leaders today for ongoing sacred Thunderbird, Wolf, Bear, Sea Lion, Otter, and Raven ceremonies, and to honor the First Salmon Ceremony, the Salmon Berry Feasts, and Elk Festival. Consultation with the Quinault Cultural Center suggests that, since one would expect such an object to be handed down from generation to generation within a family group, the raven staff also may be an object of cultural patrimony.

Based on the above-mentioned information, and with the recommendation of the staff of the Ilwaco Heritage Museum, the Ilwaco Heritage Foundation Board of Directors has determined that, pursuant to 43 CFR 10.2(d)(3), this cultural item is a specific ceremonial object needed by traditional Native American religious leaders for the practice of traditional Native American religions by their current-day adherents. The Ilwaco Heritage Foundation Board of Directors also has determined that, pursuant to 43 CFR 10.2(e), there is a relationship of shared identity that can be traced between this cultural item and the Quinault Tribe of the Quinault Reservation, Washington.

This notice has been sent to officials of the Quinault Tribe of the Quinault Reservation, Washington. Representatives of any other Indian tribe that believes itself to be culturally affiliated with this cultural item should contact Hobe Kytr, Administrator of the Ilwaco Heritage Museum, P.O. Box 153, Ilwaco, WA 98624, telephone (360) 642–3446, before February 26, 2001. Repatriation of the cultural item to the Quinault Tribe of the Quinault Reservation, Washington may begin after that date if no additional claimants come forward.

Dated: January 17, 2001.

John Robbins,

Assistant Director, Cultural Resources Stewardship and Partnerships.

[FR Doc. 01–2323 Filed 1–25–01; 8:45 am]

BILLING CODE 4310–70–F

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion for Native American Human Remains and Associated Funerary Objects in the Possession of the Milwaukee Public Museum, Milwaukee, WI

AGENCY: National Park Service

ACTION: Notice

Notice is hereby given in accordance with provisions of the Native American Graves Protection and Repatriation Act (NAGPRA), 43 CFR 10.9, of the completion of an inventory of human remains and associated funerary objects in the possession of the Milwaukee Public Museum, Milwaukee, WI.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 43 CFR 10.2 (c). The determinations within this notice are the sole responsibility of the museum, institution, or Federal agency that has control of these 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 Milwaukee Public Museum professional staff and contract specialists in physical anthropology, in consultation with representatives of the Confederated Tribes of the Colville Reservation.

At an unknown date, human remains representing two individuals were removed from an unknown site in the Okanogan Valley, WA, by Harry Brainerd. Mr. Brainerd donated the remains and associated funerary objects to the Milwaukee Public Museum in 1952. No known individuals were identified. The 158 associated funerary objects are 81 copper tube beads, 35 blue and white glass beads, 10 shell beads, 24 dentalia shell beads, 2 fragmented beaver incisors, 1 seal tooth, 1 perforated elk's tooth, 1 bone tube bead, 1 metal button, 1 copper alloy ring, and 1 rectangular piece of copper alloy with a perforation at one end.

Based on dental traits and funerary associations, these individuals have been identified as Native American. The associated funerary objects date the burial to circa 1800-1830. The

geographical location of the burial is consistent with the prehistoric and historic territory of the Confederated Tribes of the Colville Reservation. Consultation evidence provided by representatives of the Confederated Tribes of the Colville Reservation indicates that the Okanogan Valley is part of the Okanogan people's traditional and historically known occupation territory, and that descendents of the Okanogan now reside on the Colville Reservation.

Based on the above-mentioned information, officials of the Milwaukee Public Museum have determined that, pursuant to 43 CFR 10.2 (d)(1), the human remains listed above represent the physical remains of two individuals of Native American ancestry. Officials of the Milwaukee Public Museum also have determined that, pursuant to 43 CFR 10.2 (d)(2), the 158 objects listed 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 Milwaukee Public Museum have determined that, pursuant to 43 CFR 10.2 (e), there is a relationship of shared group identity that can be reasonably traced between these Native American human remains and associated funerary objects and the Confederated Tribes of the Colville Reservation.

This notice has been sent to officials of the Confederated Tribes of the Colville Reservation. Representatives of any other Indian tribe that believes itself to be culturally affiliated with these human remains and associated funerary objects should contact Dr. Alex Barker, Anthropology Section Head, Milwaukee Public Museum, 800 West Wells Street, Milwaukee, WI 53233, telephone (414) 278-2786, before February 26, 2001. Repatriation of the human remains and associated funerary objects to the Confederated Tribes of the Colville Reservation may begin after that date if no additional claimants come forward.

Dated: January 15, 2001.

John Robbins,

Assistant Director, Cultural Resources, Stewardship, and Partnerships.

[FR Doc. 01–2342 Filed 1–25–01; 8:45 am]

BILLING CODE 4310–70–F

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion for Native American Human Remains and Associated Funerary Objects in the Possession of the Milwaukee Public Museum, Milwaukee, WI

AGENCY: National Park Service.

ACTION: Notice.

Notice is hereby given in accordance with provisions of the Native American Graves Protection and Repatriation Act (NAGPRA), 43 CFR 10.9, of the completion of an inventory of human remains and associated funerary objects in the possession of the Milwaukee Public Museum, Milwaukee, WI.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 43 CFR 10.2 (c). The determinations within this notice are the sole responsibility of the museum, institution, or Federal agency that has control of these 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 Milwaukee Public Museum professional staff and contract specialists in physical anthropology, in consultation with representatives of Central Council of Tlingit and Haida Indian Tribes of Alaska.

At an unknown date, human remains representing one individual were removed from an unknown location in Rudyerd Bay, AK, by Walter Pelzer. Mr. Pelzer donated the human remains to the Milwaukee Public Museum in 1946. At the time of donation, Mr. Pelzer identified the context of removal as a burial. No known individual was identified. No associated funerary objects are present.

Based on cranial morphology and dental traits, this individual is identified as Native American. The geographical location of the grave is consistent with the historic territory of the Tlingit people. Consultation evidence provided by representatives of the Central Council of Tlingit and Haida Indian Tribes of Alaska indicates that the Rudyerd, AK, area is part of the aboriginal territory of the Tlingit and Haida peoples.

Based on the above-mentioned information, officials of the Milwaukee Public Museum have determined that, pursuant to 43 CFR 10.2 (d)(1), the human remains listed above represent the physical remains of one individual of Native American ancestry. Officials of the Milwaukee Public Museum also have determined that, pursuant to 43 CFR 10.2 (e), there is a relationship of shared group identity that can be reasonably traced between these Native American human remains and the Central Council of Tlingit and Haida Indian Tribes of Alaska.

This notice has been sent to officials of the Central Council of Tlingit and Haida Indian Tribes of Alaska, the Yakutat Tlingit Tribe, Douglas Indian Association, Angoon Community Association, Hoonah Indian Association, the Organized Village of Kake, Chilkat Indian Village (Klukwan), Craig Community Association, Sitka Tribe of Alaska, Hydaburg Cooperative Association, Organized Village of Kasaan, Sealaska Heritage Foundation, Cape Fox Corporation, Ketchikan Indian Corporation, and the Organized Village of Saxman. Representatives of any other Indian tribe that believes itself to be culturally affiliated with these human remains should contact Dr. Alex Barker, Anthropology Section Head, Milwaukee Public Museum, 800 West Wells Street, Milwaukee, WI 53233, telephone (414) 278-2786, before February 26, 2001. Repatriation of the human remains to the Central Council of Tlingit and Haida Indian Tribes of Alaska may begin after that date if no additional claimants come forward.

Dated: January 15, 2001.

John Robbins,

Assistant Director, Cultural Resources, Stewardship, and Partnerships.

[FR Doc. 01–2343 Filed 1–25–01; 8:45 am]

BILLING CODE 4310–70–F

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion for Native American Human Remains and Associated Funerary Objects in the Possession of the Milwaukee Public Museum, Milwaukee, WI

AGENCY: National Park Service.

ACTION: Notice.

Notice is hereby given in accordance with provisions of the Native American Graves Protection and Repatriation Act (NAGPRA), 43 CFR 10.9, of the completion of an inventory of human remains and associated funerary objects in the possession of the Milwaukee Public Museum, Milwaukee, WI.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 43 CFR 10.2 (c). The determinations within this

notice are the sole responsibility of the museum, institution, or Federal agency that has control of these 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 Milwaukee Public Museum professional staff and contract specialists in physical anthropology, in consultation with representatives of the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota.

At an unknown date prior to 1921, human remains representing two individuals were removed from the Motsiff Farm Site (32-MO-29), Mandan, Morton County, ND, by Field Museum of Natural History staff L. L. Walters. Mr. Walters sold these human remains to the Milwaukee Public Museum in 1921. No known individuals were identified. No associated funerary objects are present.

At an unknown date prior to 1921, human remains representing five individuals were removed from sites in the vicinity of Mandan, Morton County, ND, by Field Museum of Natural History staff L.L. Walters. Mr. Walters sold these human remains to the Milwaukee Public Museum in 1921. No known individuals were identified. No associated funerary objects are present.

Other material culture from the sites from which the remains were removed date the occupations to circa A.D. 1500-1700.

Based on cranial morphology, dental traits, and burial associations, these individuals are identified as Native American. The geographical location and dates of the burials are consistent with the traditional territory of the Mandan people during the same time period. Consultation evidence provided by representatives of the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota has identified the sites as part of the Mandan's traditional occupation area between A.D. 1500-1700.

Based on the above-mentioned information, officials of the Milwaukee Public Museum have determined that, pursuant to 43 CFR 10.2 (d)(1), the human remains listed above represent the physical remains of seven individuals of Native American ancestry. Officials of the Milwaukee Public Museum also have determined that, pursuant to 43 CFR 10.2 (e), there is a relationship of shared group identity that can be reasonably traced between these Native American human remains and the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota.

This notice has been sent to officials of the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota. Representatives of any other Indian tribe that believes itself to be culturally affiliated with these human remains should contact Dr. Alex Barker, Anthropology Section Head, Milwaukee Public Museum, 800 West Wells Street, Milwaukee, WI 53233, telephone (414) 278-2786, before February 26, 2001. Repatriation of the human remains to the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota may begin after that date if no additional claimants come forward.

Dated: January 15, 2001.

John Robbins,

Assistant Director, Cultural Resources, Stewardship, and Partnerships.

[FR Doc. 01–2344 Filed 1–25–01; 8:45 am]

BILLING CODE 4310–70–F

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion for Native American Human Remains and Associated Funerary Objects in the Possession of the Milwaukee Public Museum, Milwaukee, WI

AGENCY: National Park Service.

ACTION: Notice.

Notice is hereby given in accordance with provisions of the Native American Graves Protection and Repatriation Act (NAGPRA), 43 CFR 10.9, of the completion of an inventory of human remains and associated funerary objects in the possession of the Milwaukee Public Museum, Milwaukee, WI.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 43 CFR 10.2 (c). The determinations within this notice are the sole responsibility of the museum, institution, or Federal agency that has control of these 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 Milwaukee Public Museum professional staff and contract specialists in physical anthropology, in consultation with representatives of the Aleut Corporation.

In 1934, human remains representing one individual were removed from a cave on ''Dorathy Island'' (probably Dora Island, AK, first named in 1934) by R. J. Schwerbel while Mr. Schwerbel was stationed in the Aleutian Islands with the U.S. Navy. Mr. Schwerbel donated the remains to the Milwaukee Public Museum in 1934. No known individual was identified. No associated funerary objects are present.

Based on cranial morphology and dental traits, this individual is identified as Native American. The mode of interment in a cave and the geographical location of the burial is consistent with the traditional territory of the Aleut Corporation.

Based on the above-mentioned information, officials of the Milwaukee Public Museum have determined that, pursuant to 43 CFR 10.2 (d)(1), the human remains listed above represent the physical remains of one individual of Native American ancestry. Officials of the Milwaukee Public Museum also have determined that, pursuant to 43 CFR 10.2 (e), there is a relationship of shared group identity that can be reasonably traced between these Native American human remains and the Aleut Corporation.

This notice has been sent to officials of the Native Village of Atka, the Native Village of Akutan, the Native Village of Nelson Lagoon, the Native Village of False Pass, the Agdaagux Tribe of King Cove, the Native Village of Nikolski, St. George Island Village Council, the Aleut Community of St. Paul Island, the Qagun Tayagungin Tribe of Sand Point, the Native Village of Unga, the Qawalangin Tribe of Unalaska, the Native Village of Belkofski, and the Aleut Corporation. Representatives of any other Indian tribe that believes itself to be culturally affiliated with these human remains should contact Dr. Alex Barker, Anthropology Section Head, Milwaukee Public Museum, 800 West Wells Street, Milwaukee, WI 53233, telephone (414) 278-2786, before February 26, 2001. Repatriation of the human remains to the Aleut Corporation may begin after that date if no additional claimants come forward.

Dated: January 15, 2001.

John Robbins,

Assistant Director, Cultural Resources, Stewardship, and Partnerships.

[FR Doc. 01–2345 Filed 1–25–01; 8:45 am]

BILLING CODE 4310–70–F

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion for Native American Human Remains and Associated Funerary Objects in the Possession of the Milwaukee Public Museum, Milwaukee, WI

AGENCY: National Park Service.

ACTION: Notice.

Notice is hereby given in accordance with provisions of the Native American Graves Protection and Repatriation Act (NAGPRA), 43 CFR 10.9, of the completion of an inventory of human remains and associated funerary objects in the possession of the Milwaukee Public Museum, Milwaukee, WI.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 43 CFR 10.2 (c). The determinations within this notice are the sole responsibility of the museum, institution, or Federal agency that has control of these 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 Milwaukee Public Museum professional staff and contract specialists in physical anthropology, in consultation with representatives of the Lac du Flambeau Band of Lake Superior Indians.

In 1902, human remains representing two individuals and associated funerary objects were removed during excavation of a mound burial on Fox Island, Rest Lake (47-VI-7), Manitowosh Waters Township, Vilas County, WI, by James G. Albright. The human remains and some (an unknown number) of the associated funerary objects were sold to the Wisconsin Natural History Society in 1902. The Wisconsin Natural History Society donated the remains and associated funerary objects to the Milwaukee Public Museum the same year. Mr. Albright donated the remaining associated funerary objects to the Milwaukee Public Museum in 1942. No known individuals were identified. The 20 associated funerary objects are a German silver brooch with engraved geometric designs, a broken porcelain saucer, fragments of a metal bucket that originally contained a granulated substance (maple sugar?), half of a tin cup, birch bark wrappings, metal fragments, glass beads, shell, wood fragments, wool cloth fragments, a horn knife handle, a pocket mirror, two German silver bracelets with a piece of silk ribbon, fragments of a metal necklace with imitation gems, spectacle glass with copper frame, an iron axe head, a knife with wood handle, a hatchet head, and a limestone Micmac-style pipe.

The associated funerary objects from this site can be stylistically dated to circa A.D. 1770-1875.

Based on cranial morphology, dental traits, archeological context, and associated funerary objects, these individuals are determined to be Native American. The geographical location of the site and date of the burial is consistent with the historic territory of the Lac du Flambeau Band of Lake Superior Indians and very near the modern-day Lac du Flambeau Reservation. Consultation evidence provided by representatives of the Lac du Flambeau Band of Lake Superior Indians has identified Site 47-VI-7 as part of the area from which the Lac Du Flambeau Band was drawn following the creation of their reservation in the mid-19th century.

Based on the above-mentioned information, officials of the Milwaukee Public Museum have determined that, pursuant to 43 CFR 10.2 (d)(1), the human remains listed above represent the physical remains of two individuals of Native American ancestry. Officials of the Milwaukee Public Museum also have determined that, pursuant to 43 CFR 10.2 (d)(2), the 20 objects listed 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 Milwaukee Public Museum have determined that, pursuant to 43 CFR 10.2 (e), there is a relationship of shared group identity that can be reasonably traced between these Native American human remains and associated funerary objects and the Lac du Flambeau Band of Lake Superior Chippewa Indians.

This notice has been sent to officials of the Lac du Flambeau Band of Lake Superior Chippewa Indians. Representatives of any other Indian tribe that believes itself to be culturally affiliated with these human remains and associated funerary objects should contact Dr. Alex Barker, Anthropology Section Head, Milwaukee Public Museum, 800 West Wells Street, Milwaukee, WI 53233, telephone (414) 278-2786, before February 26, 2001. Repatriation of the human remains and associated funerary objects to the Lac du Flambeau Band of Lake Superior Chippewa Indians may begin after that date if no additional claimants come forward.

Dated: January 22, 2001.

John Robbins,

Assistant Director, Cultural Resources, Stewardship, and Partnerships.

[FR Doc. 01–2347 Filed 1–25–01; 8:45 am]

BILLING CODE 4310–70–F

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion for Native American Human Remains and Associated Funerary Objects in the Possession of the Nebraska State Historical Society, Lincoln, NE

AGENCY: National Park Service.

ACTION: Notice.

Graves Protection and Repatriation Act (NAGPRA), 43 CFR 10.9, of the completion of an inventory of human remains and associated funerary objects in the possession of the Nebraska State Historical Society, Lincoln, NE.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 43 CFR 10.2(c). The determinations within this notice are the sole responsibility of the museum, institution, or Federal agency that has control of these 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 and associated funerary objects was made by Nebraska State Historical Society professional staff in consultation with representatives of the Omaha Tribe of Nebraska.

Prior to 1908, human remains representing one individual, consisting of a skull and mandible, were donated to the Nebraska State Historical Society by U.S. Marshall J. H. Thrasher of Plattsmouth, NE. No known individual was identified. No associated funerary objects are present.

Museum documentation that describes the human remains as ''skull and lower jaw of an Indian (Omaha) killed with a club in 1860'' indicates that the human remains are Native American and culturally affiliated with the Omaha Tribe.

In 1968, a burial ossuary was discovered at Site 25TS12 during road construction in Thurston County, NE. Human remains representing a minimum of five individuals were recovered from the site by Nebraska State Historical Society archeologist Gayle Carlson. With the exception of one bone fragment, the human remains were repatriated to the Omaha Tribe

that year. The bone fragment represents one individual and is in the possession of the Nebraska State Historical Society. No known individual was identified. The 21 associated funerary objects are white quartzite debitage, red ochre fragments, a shell bead, unmodified fresh water mussel shell fragments, and a polished fresh water mussel shell fragment.

The manner of interment, material culture, and the site location indicate that the human remains are Native American and culturally affiliated with the Omaha Tribe.

In 1970, human remains representing a minimum of two individuals were recovered from Site 25AP32, Antelope County, NE. Nebraska State Historical Society staff archaeologist Gayle Carlson collected material recovered by a private individual who had notified the historical society of the site; Mr. Carlson also excavated material at the edge of earlier digging at Site 25AP32 by the owner. No known individuals were identified. The 13 associated funerary objects are a French long arm escutcheon, a bison rib wrench, sandstone shaft smoothers, a flake of chalcedony, a small grooved hammer, silt stone, a blue glass bead, and a chert flake.

Cranial measurements, material culture, and site location indicate that these human remains are Native American and culturally affiliated with the Omaha Tribe. The remains of one individual include approximately 80 bone fragments. The remains of the second individual include approximately 50 bone fragments and a skull fragment. The two remains represent an individual male aged 40-49 years at death and a child aged 3.5-5 years at death.

Based on the above-mentioned information, officials of the Nebraska State Historical Society have determined that, pursuant to 43 CFR 10.2 (d)(1), the human remains listed above represent the physical remains of four individuals of Native American ancestry. Officials of the Nebraska State Historical Society also have determined that, pursuant to 43 CFR 10.2 (d)(2), the 34 objects listed 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 Nebraska State Historical Society have determined that, pursuant to 43 CFR 10.2 (e), there is a relationship of shared group identity that can be reasonably traced between these Native American human remains and associated funerary objects and the Omaha Tribe of Nebraska.

This notice has been sent to officials of the Omaha Tribe of Nebraska. Representatives of any other Indian tribe that believes itself to be culturally affiliated with these human remains should contact Rob Bozell, Associate Director, Nebraska State Historical Society, 1500 R Street, P.O. Box 82554, Lincoln, NE 68501–2554, telephone (402) 471–4789, before February 26, 2001. Repatriation of the human remains and associated funerary objects to the Omaha Tribe of Nebraska may begin after that date if no additional claimants come forward.

Dated: January 19, 2001.

John Robbins,

Assistant Director, Cultural Resources Stewardship and Partnerships.

[FR Doc. 01–2320 Filed 1–25–01; 8:45 am]

BILLING CODE 4310–70–F

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion for Native American Human Remains and Associated Funerary Objects in the Possession of the Nebraska State Historical Society, Lincoln, NE

AGENCY: National Park Service.

ACTION: Notice.

Notice is hereby given in accordance with provisions of the Native American Graves Protection and Repatriation Act (NAGPRA), 43 CFR 10.9, of the completion of an inventory of human remains and associated funerary objects in the possession of the Nebraska State Historical Society, Lincoln, NE.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 43 CFR 10.2(c). The determinations within this notice are the sole responsibility of the museum, institution, or Federal agency that has control of these 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 and associated funerary objects was made by Nebraska State Historical Society professional staff in consultation with representatives of the Ponca Tribe of Nebraska and the Ponca Tribe of Indians of Oklahoma.

In 1956, human remains representing one individual recovered from site 25PT30 in Platte County, NE, were donated to the Nebraska State Historical Society by a private individual. No known individual was identified. The 17 associated funerary objects are 1 stone scraper, 10 limestone fragments, and 6 animal bones.

From cranial measurements, the Nebraska State Historical Society has determined that the individual is Native American and is culturally affiliated with the Ponca. Historical records indicate that the Ponca hunted in the region and occasionally lived among the Pawnee, whose homeland includes Platte County. The specific attribution of this individual as Ponca and not Pawnee is based on statistical analysis of cranial measurements compared with known populations of both tribes.

In 1961, human remains representing one individual were uncovered during road construction in Knox County, NE. The remains from site 25KX13 were recovered by Nebraska State Historical Society archeologist James Marshall and were transferred to the Nebraska State Historical Society. No known individual was identified. No funerary objects are present.

Oral history indicates that the individual is Native American and is culturally affiliated with the Ponca.

The remains from this site were reported to the Nebraska State Historical Society by Ponca Chief Lea Peniska, who identified the remains as that of a Ponca person. This portion of Knox County is historically the territory of the Ponca. Members of the Ponca tribes have indicated to the staff of the Nebraska State Historical Society that Mr. Peniska was very knowledgeable with regard to Ponca traditions and burial locations.

Between 1963 and 1980, human remains representing one individual were recovered by the University of South Dakota from previously looted graves on a ridge called the Niobara Bridge, site 25KX207, in Knox County, NE, and were transferred to the Nebraska State Historical Society in 1989. The Nebraska State Historical Society also collected material from the surface of the same site in 1980. No known individual was identified. The 247 associated funerary objects are modified and unmodified shell and animal bone, ceramic sherds, glass beads, stone tools, metal tools and ornaments, chipped stone debris, ground stone tools, natural stone, ocher, and wood.

Archeological evidence and historical documentation indicates that the individual is Native American and is culturally affiliated with the Ponca. Based on the quantity of Euro-American trade goods, the site is dated to the post-contact period, and is located in the heart of territory inhabited exclusively

by the Ponca from the 1700's to the 1870's.

In 1987, a private individual found human remains representing one individual, a female of approximately 50 years of age, eroding from the bank of Clear Creek, Butler County, NE. The remains were transferred to the Nebraska State Historical Society by the officials of the Butler County Extension Office and the Butler County Sheriff's Office. No known individual was identified. The two associated funerary objects include a mussel shell and a fragmented metal kettle or pail.

Cranial measurements indicate that the individual is Native American and is culturally affiliated with the Ponca. The site is near the Pawnee Linwood site and the Ponca are known to have lived here with the Pawnee in the 19th century. The specific attribution of this individual as Ponca and not Pawnee is based on statistical analysis of cranial measurements compared with known populations of both tribes.

Based on the above-mentioned information, officials of the Nebraska State Historical Society have determined that, pursuant to 43 CFR 10.2 (d)(1), the human remains listed above represent the physical remains of four individuals of Native American ancestry. Officials of the Nebraska State Historical Society also have determined that, pursuant to 43 CFR 10.2 (d)(2), the 266 objects listed 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 Nebraska State Historical Society have determined that, pursuant to 43 CFR 10.2 (e), there is a relationship of shared group identity that can be reasonably traced between these Native American human remains and associated funerary objects and the Ponca Tribe of Nebraska and the Ponca Tribe of Indians of Oklahoma.

This notice has been sent to officials of the Ponca Tribe of Nebraska and the Ponca Tribe of Indians of Oklahoma. Representatives of any other Indian tribe that believes itself to be culturally affiliated with these human remains should contact Rob Bozell, Associate Director, Nebraska State Historical Society, 1500 R Street, P.O. Box 82554, Lincoln, NE 68501–2554, telephone (402) 471–4789, before February 26, 2001. Repatriation of the human remains and associated funerary objects to the Ponca Tribe of Nebraska and the Ponca Tribe of Indians of Oklahoma may begin after that date if no additional claimants come forward.

Dated: January 19, 2001.

John Robbins,

Assistant Director, Cultural Resources Stewardship and Partnerships.

[FR Doc. 01–2321 Filed 1–25–01; 8:45 am]

BILLING CODE 4310–70–F

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion for Native American Human Remains and Associated Funerary Objects in the Possession of the Nebraska State Historical Society, Lincoln, NE

AGENCY: National Park Service.

ACTION: Notice.

Notice is hereby given in accordance with provisions of the Native American Graves Protection and Repatriation Act (NAGPRA), 43 CFR 10.9, of the completion of an inventory of human remains and associated funerary objects in the possession of the Nebraska State Historical Society, Lincoln, NE.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 43 CFR 10.2(c). The determinations within this notice are the sole responsibility of the museum, institution, or Federal agency that has control of these 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 and associated funerary objects was made by Nebraska State Historical Society professional staff in consultation with representatives of the Cheyenne-Arapaho Tribes of Oklahoma; the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana; and the Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota.

In 1992, human remains representing one individual were recovered from site 25DW211, Dawes County, NE, by Nebraska State Historical Society staff archeologist Terry Steinacher at the request of the landowner. No known individual was identified. The 636 associated funerary objects are glass beads, leather fragments, buttons, tin can fragments, and a comb.

From archeological evidence and skeletal morphology, the Nebraska State Historical Society has determined that the individual is Native American from the 19th century. Cranial measurements of the individual, which are consistent with known Cheyenne populations, and historical documents and tribal traditions, which place the Cheyenne tribe in this territory during the mid- and late 19th century, indicate that the human remains are culturally affiliated with the Cheyenne-Arapaho Tribes of Oklahoma and the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana.

Based on the above-mentioned information, officials of the Nebraska State Historical Society have determined that, pursuant to 43 CFR 10.2 (d)(1), the human remains listed above represent the physical remains of one individual of Native American ancestry. Officials of the Nebraska State Historical Society also have determined that, pursuant to 43 CFR 10.2 (d)(2), the 636 objects listed 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 Nebraska State Historical Society have determined that, pursuant to 43 CFR 10.2 (e), there is a relationship of shared group identity that can be reasonably traced between these Native American human remains and associated funerary objects and the Cheyenne-Arapaho Tribes of Oklahoma and the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana.

This notice has been sent to officials of the Cheyenne-Arapaho Tribes of Oklahoma; the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana; and the Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota. Representatives of any other Indian tribe that believes itself to be culturally affiliated with these human remains should contact Rob Bozell, Associate Director, Nebraska State Historical Society, 1500 R Street, P.O. Box 82554, Lincoln, NE 68501–2554, telephone (402) 471–4789, before February 26, 2001. Repatriation of the human remains and associated funerary objects to the Cheyenne-Arapaho Tribes of Oklahoma and the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana may begin after that date if no additional claimants come forward.

Dated: January 19, 2001.

John Robbins,

Assistant Director, Cultural Resources Stewardship and Partnerships.

[FR Doc. 01–2322 Filed 1–25–01; 8:45 am]

BILLING CODE 4310–70–F

DEPARTMENT OF THE INTERIOR

National Park Service

Availability of Plan of Operations and Supplement to Environmental Assessment for Well Plugging and Removal of Oil and Gas Production Equipment; Merit Energy Company, Big Thicket National Preserve, Hardin County, Texas

Notice is hereby given in accordance with section 9.52(b) of Title 36 of the code of Federal Regulations, Part 9, Subpart B, that the National Park Service has accepted a Plan of Operations from Merit Energy Company for Well Plugging and Removal of Oil and Gas Production Equipment in Big Thicket National Preserve, Hardin County, Texas.

The Plan of Operations and corresponding Supplement to the Environmental Assessment are available for public review and comment for a period of 30 days from the publication date of this notice. Both documents can be viewed during normal business hours at the Office of the Superintendent, Big Thicket National Preserve, 3785 Milam Street, Beaumont, Texas. Copies can be requested from the Superintendent, Big Thicket National Preserve, 3785 Milam Street, Beaumont, TX 77701.

Dated: January 12, 2001.

Lila L. Walker,

Superintendent, Acting, Big Thicket National Preserve.

[FR Doc. 01–2349 Filed 1–25–01; 8:45 am]

BILLING CODE 4310–70–M

INTERNATIONAL TRADE COMMISSION

[Investigations Nos. 701–TA–364 (Review) and 731–TA–711 and 713–716 (Review)]

Oil Country Tubular Goods From Argentina, Italy, Japan, Korea, and Mexico

AGENCY: United States International Trade Commission.

ACTION: Scheduling of full five-year reviews concerning the countervailing duty order on oil country tubular goods from Italy and the antidumping duty order on oil country tubular goods from Argentina, Italy, Japan, Korea, and Mexico.

SUMMARY: The Commission hereby gives notice of the scheduling of full reviews pursuant to section 751(c)(5) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(5)) (the Act) to determine whether revocation of the countervailing duty order on oil country tubular goods from Italy and/or the antidumping duty order on oil country tubular goods from Argentina, Italy, Japan, Korea, and Mexico would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. For further information concerning the conduct of these reviews and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

EFFECTIVE DATE: January 23, 2001.

FOR FURTHER INFORMATION CONTACT: Elizabeth Haines (202–205–3200), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*http://www.usitc.gov*).

SUPPLEMENTARY INFORMATION:

Background.—On October 5, 2000, the Commission determined that responses to its notice of institution of the subject five-year reviews were such that full reviews pursuant to section 751(c)(5) of the Act should proceed (65 FR 63889, October 25, 2000). A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements are available from the Office of the Secretary and at the Commission's web site.

Participation in the reviews and public service list.—Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in these reviews as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11 of the Commission's rules, by 45 days after publication of this notice. A party that filed a notice of appearance following publication of the Commission's notice of institution of the reviews need not file an additional notice of appearance. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the reviews.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in these reviews available to authorized applicants under the APO issued in the reviews, provided that the application is made by 45 days after publication of this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the reviews. A party granted access to BPI following publication of the Commission's notice of institution of the reviews need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff report.—The prehearing staff report in the reviews will be placed in the nonpublic record on April 18, 2001, and a public version will be issued thereafter, pursuant to section 207.64 of the Commission's rules.

Hearing.—The Commission will hold a hearing in connection with the reviews beginning at 9:30 a.m. on May 8, 2001, at the U.S. International Trade Commission Building. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before April 30, 2001. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should attend a prehearing conference to be held at 9:30 a.m. on May 3, 2001, at the U.S. International Trade Commission Building. Oral testimony and written materials to be submitted at the public hearing are governed by sections 201.6(b)(2), 201.13(f), 207.24, and 207.66 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony *in camera* no later than 7 days prior to the date of the hearing.

Written submissions.—Each party to the reviews may submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of section 207.65 of the Commission's rules; the deadline for filing is April 27, 2001. Parties may also file written testimony in connection with their presentation at the hearing, as provided in section 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of section 207.67 of the Commission's rules. The deadline for filing posthearing briefs is May 17, 2001; witness testimony must be filed no later

than three days before the hearing. In addition, any person who has not entered an appearance as a party to the reviews may submit a written statement of information pertinent to the subject of the review on or before May 17, 2001. On June 6, 2001, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before June 8, 2001, but such final comments must not contain new factual information and must otherwise comply with section 207.68 of the Commission's rules. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means.

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the reviews must be served on all other parties to the reviews (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

By order of the Commission.
Issued: January 23, 2001.

Donna R. Koehnke,

Secretary.

[FR Doc. 01–2406 Filed 1–25–01; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigations Nos. 731–TA–888–890 (Final)]

Stainless Steel Angle From Japan, Korea, and Spain

AGENCY: United States International Trade Commission.

ACTION: Scheduling of the final phase of antidumping investigations.

SUMMARY: The Commission hereby gives notice of the scheduling of the final phase of antidumping investigations Nos. 731–TA–888–890 (Final) under section 735(b) of the Tariff Act of 1930 (19 U.S.C. § 1673d(b)) (the Act) to determine whether an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of less-than-fair-value imports from Japan, Korea, and Spain of stainless steel angle, provided for in subheading 7222.40.30 of the Harmonized Tariff Schedule of the United States.[1]

For further information concerning the conduct of this phase of the investigations, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

EFFECTIVE DATE: January 12, 2001.

FOR FURTHER INFORMATION CONTACT: Brian R. Allen (202–708–4728), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*http://www.usitc.gov*).

SUPPLEMENTARY INFORMATION:

Background.—The final phase of these investigations is being scheduled as a result of affirmative preliminary determinations by the Department of Commerce that imports of stainless steel angle from Japan, Korea, and Spain are being sold in the United States at less than fair value within the meaning of section 733 of the Act (19 U.S.C. 1673b). The investigations were requested in a petition filed on August 18, 2000 by Slater Steels Corporation, Specialty Alloys Division, Fort Wayne, IN, and the United Steelworkers of America, AFL–CIO/CLC, Pittsburgh, PA.

Participation in the investigations and public service list.—Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the final phase of these investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11 of the Commission's rules, no later than 21 days prior to the hearing date specified in this notice. A party that filed a notice of appearance during the preliminary phase of the investigations need not file an additional notice of appearance during this final phase. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in the final phase of these investigations available to authorized applicants under the APO issued in the investigations, provided that the application is made no later than 21 days prior to the hearing date specified in this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the investigations. A party granted access to BPI in the preliminary phase of the investigations need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff report.—The prehearing staff report in the final phase of these investigations will be placed in the nonpublic record on March 14, 2001, and a public version will be issued thereafter, pursuant to section 207.22 of the Commission's rules.

Hearing.—The Commission will hold a hearing in connection with the final phase of these investigations beginning at 9:30 a.m. on March 27, 2001, at the U.S. International Trade Commission Building. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before March 19, 2001. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should attend a prehearing conference to be held at 9:30 a.m. on March 22, 2001, at the U.S. International Trade Commission Building. Oral testimony and written materials to be submitted at the public hearing are governed by sections 201.6(b)(2), 201.13(f), and 207.24 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony in camera no later than 7 days prior to the date of the hearing.

[1] For purposes of these investigations, Commerce has defined the subject merchandise as stainless steel angle that ''includes hot rolled, whether or not annealed or descaled, stainless steel products of equal leg length angled at 90 degrees that are not otherwise advanced.''

Written submissions.—Each party who is an interested party shall submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of section 207.23 of the Commission's rules; the deadline for filing is March 21, 2001. Parties may also file written testimony in connection with their presentation at the hearing, as provided in section 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of section 207.25 of the Commission's rules. The deadline for filing posthearing briefs is April 3, 2001; witness testimony must be filed no later than three days before the hearing. In addition, any person who has not entered an appearance as a party to the investigations may submit a written statement of information pertinent to the subject of the investigations on or before April 3, 2001. On April 26, 2001, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before April 30, 2001, but such final comments must not contain new factual information and must otherwise comply with section 207.30 of the Commission's rules. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means.

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.21 of the Commission's rules.

By order of the Commission.

Issued: January 23, 2001.

Donna R. Koehnke,

Secretary.

[FR Doc. 01–2407 Filed 1–25–01; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Federal Bureau of Investigation

Criminal Justice Information Services (CJIS) Division; Agency Information Collection Activities: Proposed Collection: Comment Request

ACTION: Notice of Information Collection Under Review: SUPPLEMENTARY HOMICIDE REPORT.

The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted until March 27, 2001.

Request written comments and suggestions from the public and affected agencies concerning the proposed collection of information. Comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques of other forms of information technology, *e.g.,* permitting electronic submission of responses.

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 Gregory E. Scarbro (phone number and address listed below). Additional information as well as copies of the proposed information collection instrument with instructions are available by contacting Gregory E. Scarbro, Unit Chief, telephone 304–625–4830, FBI, CJIS Division, Crime Statistics Management Unit, E–3, 1000 Custer Hollow Road, Clarksburg, WV 26306.

Overview of this information collection:

(1) *Type of information collection:* Extension of Current Collection.

(2) *The title of the form/collection:* Supplementary Homicide Report.

(3) *The agency form number, if any, and applicable component of the Department Sponsoring the collection:* Form I–704. Federal Bureau of Investigation, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as brief abstract. Primary:* Local and State law enforcement agencies. These reports will gather information on age, sex, race, ethnic origin and relationship of murder victims; the weapon and motive. Summary statistics are published in the annual report *Crime in the United States.*

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: 16,788 agencies with 201,456 responses (including zero reports); and with an average of 9 minutes a month per responding agency.

(6) An estimate of the total public burden (in hours) associated with this collection: 30,218 hours annually.

If additional information is required contact: Mr. Robert B. Briggs, Clearance Officer, United States Department of Justice, Information Management and Security Staff, Justice Management Division, Suite 850, Washington Center, 1001 G Street, NW., Washington, DC 20530.

Dated: January 22, 2001.

Robert B. Briggs,

Department Clearance Officer, United States Department of Justice.

[FR Doc. 01–2364 Filed 1–25–01; 8:45 am]

BILLING CODE 4410–02–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 of prevailing rates and fringe benefits have been made in accordance with 29 CFR part 1, by authority of the Secretary

of Labor pursuant to the provisions of the Davis-Bacon Act of March 3, 1931, as amended (46 Stat. 1494, as amended, 40 U.S.C. 276a) and of other Federal statutes referred to in 29 CFR part 1, Appendix, as well as such additional statutes as may from time to time be enacted containing provisions for the payment of wages determined to be prevailing by the Secretary of Labor in accordance with the Davis-Bacon Act. The prevailing rates and fringe benefits determined in these decisions shall, in accordance with the provisions of the foregoing statutes, constitute the minimum wages payable on Federal and federally assisted construction projects to laborers and mechanics of the specified classes engaged on contract work of the character and in the localities described therein.

Good cause is hereby found for not utilizing notice and public comment procedure thereon prior to the issuance of these determinations as prescribed in 5 U.S.C. 553 and not providing for delay in the effective date as prescribed in that section, because the necessity to issue current construction industry wage determinations frequently and in large volume causes procedures to be impractical and contrary to the public interest.

General wage determination decisions, and modifications and supersedes decisions thereto, contain no expiration dates and are effective from their date of notice in the **Federal Register,** or on the date written notice is received by the agency, whichever is earlier. These decisions are to be used in accordance with the provisions of 29 CFR parts 1 and 5. Accordingly, the applicable decision, together with any modifications issued, must be made a part of every contract for performance of the described work within the geographic area indicated as required by an applicable Federal prevailing wage law and 29 CFR part 5. The wage rates and fringe benefits, notice of which is published herein, and which are contained in the Government Printing Office (GPO) document entitled ''General Wage Determinations Issued Under The Davis-Bacon And Related Acts,'' shall be the minimum paid by contractors and subcontractors to laborers and mechanics.

Any person, organization, or governmental agency having an interest in the rates determined as prevailing is encouraged to submit wage rate and fringe benefit information for consideration by the Department. Further information and self-explanatory forms for the purpose of submitting this data may be obtained by writing to the U.S. Department of Labor, Employment Standards Administration, Wage and Hour Division, Division of Wage Determinations, 200 Constitution Avenue, NW., Room S–3014, Washington, DC 20210.

Modifications to General Wage Determination Decisions

The number of decisions listed in the Government Printing Office document entitled ''General Wage Determinations Issued Under the Davis-Bacon and related Acts'' being modified are listed by Volume and State. Dates of publication in the **Federal Register** are in parentheses following the decisions being modified.

Volume I

None.

Volume II

None.

Volume III

None.

Volume IV

None.

Volume V

None.

Volume VI

None.

Volume VII

None.

General Wage 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.

The general wage determinations issued under the Davis-Bacon and related Acts are available electronically by subscription to the FedWorld Bulletin Board System of the National Technical Information Service (NTIS) of the U.S. Department of Commerce at 1–800–363–2068.

Hard-copy subscriptions may be purchased from: Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 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 seven 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 are distributed to subscribers.

Signed at Washington, D.C. this 18th day of January, 2001.

Carl J. Poleskey,

Chief, Branch of Construction Wage Determinations.

[FR Doc. 01–2164 Filed 1–25–01; 8:45 am]

BILLING CODE 4510–27–M

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Meetings of Humanities Panel

AGENCY: The National Endowment for the Humanities.

ACTION: Notice of meetings.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Public Law 92–463, as amended), notice is hereby given that the following meetings of the Humanities Panel will be held at the Old Post Office, 1100 Pennsylvania Avenue, NW., Washington, DC 20506.

FOR FURTHER INFORMATION CONTACT: Laura S. Nelson, Advisory Committee Management Officer, National Endowment for the Humanities, Washington, DC 20506; telephone (202) 606–8322. Hearing-impaired individuals are advised that information on this matter may be obtained by contacting the Endowment's TDD terminal on (202) 606–8282.

SUPPLEMENTARY INFORMATION: The proposed meetings are for the purpose of panel review, discussion, evaluation and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including discussion of information given in confidence to the agency by the grant applicants. Because the proposed meetings will consider information that is likely to disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential and/or information of a personal nature the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, pursuant to authority granted me by the Chairman's Delegation of Authority to Close Advisory Committee meetings, dated July 19, 1993, I have determined that these meetings will be closed to the public pursuant to subsections (c)(4),

and (6) of section 552b of Title 5, United States Code.

1. *Date:* February 1, 2001.

Time: 9:00 a.m. to 5:00 p.m.

Room: 415.

Program: This meeting will review applications for Library and Archival Preservation and Access/Reference Materials, submitted to the Division of Preservation and Access at the January 5, 2001 deadline.

Laura S. Nelson,

Advisory Committee Management Officer.

[FR Doc. 01–2404 Filed 1–25–01; 8:45 am]

BILLING CODE 7536–01–M

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–361 and 50–362]

Southern California Edison Company, San Onofre Nuclear Generating Station, Units 2 and 3; Notice of Withdrawal of Application for Amendments to Facility Operating Licenses

The U.S. Nuclear Regulatory Commission (the Commission) has granted the request of Southern California Edison (licensee) to withdraw its January 19, 2000, application, for proposed amendments to Facility Operating Licenses No. NPF–10 and NPF–15 for the San Onofre Nuclear Generating Station, Units 2 and 3 respectively, located in San Diego County, California.

The proposed amendments would have modified facility Technical Specification Surveillance Requirement 3.0.3.

The Commission had previously issued a Notice of Consideration of Issuance of Amendment published in the **Federal Register** on April 19, 2000 (65 FR 21038). However, by letter dated January 4, 2001, the licensee withdrew the proposed change.

For further details with respect to this action, see the application for amendments dated January 19, 2000, and the licensee's letter dated January 4, 2001, which withdrew the application for license amendments. These documents may be examined, and/or copied for a fee, at the NRC's Public Document Room, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the ADAMS Public Library component on the NRC Web site (the Electronic Reading Room).

For the Nuclear Regulatory Commission.

Dated at Rockville, Maryland, this 18th day of January, 2001.

L. Raghavan,

Senior Project Manager, Section 2, Project Directorate IV & Decommissioning, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 01–2373 Filed 1–25–01; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–43859; File No. SR–NYSE–00–62]

Self-Regulatory Organizations; Notice of Filing Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Specialists' Specialty Stock Option Transactions

January 18, 2001

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 December 22, 2000, the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend paragraph (l) of the Guidelines to NYSE Rule 105 and paragraph (a) of NYSE Rule 98. These proposed amendments permit an NYSE Rule 98 approved person of a specialist to act as competitive market maker or perform other similar non-primary/supplemental market-making activities in any option as to which the underlying security is a stock in which the related specialist is registered.

Below is the text of the proposed rule change. Proposed new language is *italicized* and proposed deletions are in brackets.

* * * * *

Rule 105. Specialists' Interest in Pools and Options

* * * * *

Guidelines for Specialists' Speciality Stock Options Transactions Pursuant to Rule 105 (a) Through (k)—No change

* * * * *

(l) Specialist Shall Not Be Options Market-Maker

Except as provided below, [N]*o* equity specialist, his member organization, other member, allied member or approved person in such member organization or officer or employee thereof shall act as an options market-maker or option specialist, or function in any capacity involving market-making responsibilities, in any option as to which the underlying security is a stock in which the specialist is registered as such.

Notwithstanding the above, an approvedperson is so ating as an options market maker pursuant to this paragraph, neither that approved person of an equity specialist entitled to an exemption from this rule under Rule 98 may act as a competitive market maker, competitive options trader, registered options trader, or in a similar non-primary market-making capacity in any option as to which the underlying security is a stock in which the associated specialist is registered as such; provided, however, that if an approved person is so acting as an options market maker pursuant to this paragraph, neither that approved person, nor any other approved person of the specialist, may act as a market maker in any equity security in which the associated specialist is registered as such and which underlies an option as to which the approved person acts as an options market maker.[3]

* * * * *

Rule 98. Restrictions on Approved Person Associated With a Specialists' Member Organization

(a) So long as paragraph (b) of this Rule is complied with, (i) each specialist within a member organization that is associated with an approved person shall be exempt from the provisions of Rule 104 and 104.13 as they relate to such approved person, and (ii) the approved person that is associated with such member organization shall be exempt from (A) the restrictions on trading in specialty stock options as provided by Rule 105 *and on acting as an options market maker as provided in paragraph (l) of the Rule 105 Guidelines,* (B) the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Minor technical corrections have been made to the rule text. The NYSE will file an amendment indicating these changes to the rule text. Telephone conversation between Jeff Rosenstrock, Esquire, Senior Project Specialist, Rule Development, NYSE, and Sapna C. Patel, Attorney, Division of Market Regulation, Commission, on January 16, 2001.

provisions of Rule 113(a) and the prohibition against ''popularizing'' as provided by Rule 113.20, provided, that the disclosures specified in that Rule are made, and (C) the provisions of Rule 460, except as specified therein.

(b) In order to obtain the exemptions referred to in paragraph (a) above, the approved person and the specialist member organization with which such approved person is to be associated shall be required to obtain the prior written agreement of the Exchange that such approved person and such member organization are in compliance with the ''Guidelines for Approved Persons Associated with a Specialist's Member Organization'' as promulgated by the Exchange and as may be amended from time to time.

(c) Whenever the approved person controls, is controlled by, or is under common control with, a person, other than the member organization with which it is associated, the exemptions provided in paragraph (a) above shall be available only so long as the approved person and its associated member organization have satisfied the Exchange that the relationship between the approved person, the member organization and such other person satisfies all of the conditions specified in the ''Guidelines.''

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for the Proposed Rule Change

1. Purpose

Currently, paragraph (l) of the Guidelines to NYSE Rule 105 prohibits Exchange specialists and approved persons of an Exchange specialist from acting as an options market maker or options specialist, or from functioning in any capacity involving market-making responsibilities in any option as to which the underlying security is a stock in which the specialist is registered. This prohibition applies to all approved persons of specialists, including those who are otherwise exempt from specific specialist rules pursuant to NYSE Rule 98.

The prohibitions were intended to address potential conflict-of-interest concerns raised by the possibility of side-by-side stock and options trading by a specialist and a specialist affiliate. The prohibitions were adopted in the early 1980s when options were not listed and traded on more than one exchange as they are today.[4]

The Exchange therefore proposes to amend paragraph (l) of the NYSE Rule 105 Guidelines and paragraph (a) of NYSE Rule 98 to permit NYSE Rule 98 approved persons of specialists to act as non-primary options market makers in options overlying securities in which an affiliated specialist is registered.

NYSE Rule 98 Approved Person

Under Exchange rules, a person or entity entering into any type of control relationship with a member organization may be deemed to be an approved person of the member organization.[5] The term ''approved person'' refers to an individual or entity that controls a member organization, or is engaged in the securities business and is either controlled by or is under common control with a member organization. Approved persons of specialist member organizations are subject to a number of Exchange rules (including NYSE Rule 105) that place restrictions on their ability to trade in the specialty stocks of the related specialist. NYSE Rule 98 provides exemptive relief for an approved person associated with a specialist's member organization that complies with the NYSE Rule 98 implementing guidelines.

Paragraph (a) of NYSE Rule 98 is proposed to be amended to permit an NYSE Rule 98 approved person to act in a non-primary market-making capacity in an option overlying a security in which an associated specialist is registered.[6] In order to meet the test for an NYSE Rule 98 approved person and obtain exemptive relief, an approved person and an associated specialist organization must submit a written statement to the Exchange describing the internal controls they intend to adopt for the establishment of procedures sufficient to restrict the flow of privileged information between the approved person and the associated specialist organization. The procedures are intended to preclude the possibility that privileged information will be made available to be used in any way to influence a particular trading decision by a specialist in the associated specialist organization, or vice versa. These internal control and procedures would apply in situations where an NYSE Rule 98 approved person intended to act as a non-primary market maker in an option.

Proposed Changes to Paragraph (l) of NYSE Rule 105 Guidelines

The Exchange proposes to amend paragraph (l) of the NYSE Rule 105 Guidelines to permit an NYSE Rule 98 approved person of a specialist to act as a competitive market maker or perform other similar non-primary/supplemental market-making activities in any option as to which the underlying security is a stock in which the related specialist is registered. The prohibition on acting as a primary market maker would be retained.

The difference in treatment between primary market makers and competitive (or non-primary) market makers stems from their differing obligations on the options exchanges. On the various options exchanges, primary market makers (''PMMs''), also called Designated Primary Market Makers (''DPMs''), Lead Market Makers (''LMMs''), and Registered Equity Market Makers, similar to specialists on the Exchange, are market makers with significant responsibilities, including overseeing the opening and closing of trading in option classes, and providing continuous, two-sided quotations in all of their assigned stock options. Competitive Market Makers (''CMMs''), also called competitive options traders, registered options traders and non-primary market makers, are market makers who quote independently and add depth and liquidity to the market, but do not have the primary responsibility to maintain a fair and orderly market.

The Exchange believes that potential conflicts of interest with respect to stock and options trading are somewhat less significant with respect to supplemental, as opposed to primary, options market-making, and in any event the Exchange believes that they are effectively addressed by NYSE Rule 98's requirement that material market information be kept strictly segregated.

[4] *See* Securities Exchange Act Release No. 21710 (February 4, 1985), 50 FR 5708 (February 11, 1985) (approving SR–NYSE–82–2).

[5] NYSE Rule 2 defines control as the power to direct or cause the direction of the management or policies of a person whether through ownership of securities, by contract or otherwise. A presumption of control is made in certain circumstances outlined in the rule.

[6] The distinction between primary and non-primary market makers for purposes of the proposed rule change is described more fully below.

The Exchange also proposes to amend paragraph (l) of the NYSE Rule 105 Guidelines by adding the following additional restriction: if an NYSE Rule 98 approved person is acting as an options market maker in an option overlying a specialty stock, neither it, nor any other approved person of the specialist, may act as a market maker in any speciality stock underlying an option as to which the NYSE Rule 98 approved person acts as an options market maker. The Exchange believes that this restriction will ensure that market information gleaned from the options market is not used to gain trading advantages by approved persons of the specialist in other equity markets. The potential for manipulative activity resulting from the market maker's unique informational advantage of seeing ''the book'' of both a stock and its underlying option should be substantially lessened; the proposed additional restriction would prevent a non-primary market maker in the options market from relaying information obtained on the floor (due to time and place advantage) to an approved person of the specialist who trades the stock underlying the option on a regional exchange or in another market.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Act [7] in general, and furthers the objectives of Section 6(b)(5) of the Act [8] in particular, because it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that the proposed fee change will not impose any burden on competition that is not necessary or appropriate in the furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submission should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NYSE. All submissions should refer to File No. SR–NYSE–00–62 and should be submitted by February 16, 2001.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[9]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 01–2379 Filed 1–25–01; 8:45 am]

BILLING CODE 8010–01–M

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] 17 CFR 200.30–2(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–43864; International Series Release No. 1245; File No. SR–Phlx–01–06]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. To Amend Rule 1063(a) and Options Floor Procedure Advices A–10 and C–1, Relating to Trading in Foreign Currency Options

January 19, 2001.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 11, 2001, the Philadelphia Stock Exchange, Inc. (''Phlx'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Phlx. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx proposes to amend Phlx Rule 1063(a), Phlx Options Floor Procedure Advice A–10, and Phlx Options Floor Procedure Advice C–1. The proposed amendments would provide an exception, limited only to foreign currency options (''FCOs''), from the requirement that a Registered Options Trader (''ROT'') be present at the trading post in certain circumstances. The proposal would also make certain non-substantive stylistic changes to Floor Procedure Advices A–10 and C–1. The text of the proposed rule change is available at the principal offices of the Phlx and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Phlx included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it had received on the proposal. The text of these statements may be examined at the places specified in Item IV below. The Phlx has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Phlx is seeking approval of amendments of Phlx Rule 1063(a) (''Responsibilities of Floor Brokers''), Phlx Options Floor Procedure Advice A–10 (''Specialist Trading With Book''), and Phlx Options Floor Procedure Advice C–1 (''Ascertaining the Presence of ROTs in a Trading Crowd''), as discussed below. Phlx Rule 1063(a) provides that Options Floor Brokers shall ascertain that at least one Registered Options Trading (''ROT'') is present at the trading post before representing an order for execution. Phlx Options Floor Procedure Advice A–10 provides that in any instance where a Specialist wishes to participate as principal in a trade with an order placed on that Specialist's book, the Specialist must ensure that at least one ROT is present in the trading crowd and is aware of the Specialist's intention to trade with the book both at the time of and immediately before the execution. Phlx Options Floor Procedure Advice C–1 provides that a Floor Broker representing an order in options shall, before executing the order, ascertain that at least one ROT is present in the trading crowd at the post where the order is executed.

Each of these rules currently contains a temporary exception that is limited only to FCO transactions. Pursuant to the temporary exception, which expires on March 31, 2001, an FCO Specialist may trade as principal with an order on the book and an FCO Floor Broker may represent an order or execute a trade when no ROT registered in the FCO is present on the Phlx's FCO trading floor.[3]

The Commission approved the temporary exception on January 3, 2001, on an accelerated basis.[4] The Phlx requested accelerated approval of the temporary exception after it learned that, as of January 3, 2001, no ROTs would be doing business on a regular basis on the Phlx's FCO floor. The Phlx anticipated that there very likely would be periods of time when FCO Specialists and FCO Floor Brokers would be on the FCO floor with no FCO ROTs present, and that compliance with Phlx Rule 1063(a) and Phlx Options Floor Procedure Advices A–10 and C–1 would not be possible under those circumstances. In the Phlx's view, the amendments were necessary in order to enable the Phlx to continue to provide fair and orderly markets in FCOs in the absence of FCO ROTs on the FCO floor.

The Phlx now proposes a rule change that would permanently exempt FCO Specialists and FCO Floor Brokers from the requirements in Phlx Rule 1063(a) and Phlx Options Floor Procedure Advices A–10 and C–1. Specifically, the Phlx proposes to amend Rule 1063(a) and Phlx Options Floor Procedure Advices A–10 and C–1 by deleting from each rule the words ''until March 31, 2001,'' thereby making permanent the temporary exceptions that those rules currently provide.[5] The Phlx represents that, like the temporary rule change, the permanent exception would apply only if no ROT is present on the FCO floor when an FCO Specialist trades as principal with an order on the book, or when an FCO Floor Broker represents an order or executes a trade. The Phlx believes that the proposed rule change would enable it to provide fair and orderly markets in FCOs in the event that FCO ROTs are absent from the FCO floor after the current temporary rule change expires on March 31, 2001.

2. Statutory Basis

The Phlx believes that the proposed rule change is consistent with Section 6(b) of the Act in general, and furthers the objectives of Section 6(b)(5) in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, and processing information with respect to transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Moreover, the Phlx believes that the proposed rule change is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. In the Phlx's view, the proposed rule change will permit Phlx Specialists to continue to trade as principal with orders on the book, and will allow Phlx Floor Brokers to continue to represent and execute orders in FCOs in the event that no ROTs are present on the FCO floor.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Phlx does not believe that the proposed rule change will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Phlx has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Phlx consents, the Commission will:

A. by order approve such rule change; or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Phlx. All submissions should refer to File No. SR–Phlx–01–06 and should be submitted by February 16, 2001.

[3] The Phlx's FCO trading floor is located in the same building as its equity options trading floor, but is in a different room.

[4] Securities Exchange Act Release No. 43799 (January 3, 2001), 66 FR 2469 (January 11, 2001) (File No. SR–Phlx–00–111).

[5] The proposed rule change also makes non-substantive changes to Phlx Rule 1063(a) and Phlx Options Floor Procedure Advices A–10 and C–1 by replacing the shorthand term ''ROT'' with the term ''Registered Options Trader.'' The temporary rule change incorporated those same changes.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[6]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 01–2380 Filed 1–25–01; 8:45 am]

BILLING CODE 8010–01–M

[6] 17 CFR 200.30–3(a)(12).

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Proposed Request and Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages that will require clearance by the Office of Management and Budget (OMB) in compliance with Pub.L. 104–13 effective October 1, 1995, The Paperwork Reduction Act of 1995. SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility and clarity; and on ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology.

Written comments and recommendations regarding the information collection(s) should be submitted to the SSA Reports Clearance Officer and to the OMB Desk Officer at the following addresses:

(OMB), Attn: Desk Officer for SSA, New Executive Office Building, Room 10230, 725 17th St., NW., Washington, DC 20503

(SSA), Social Security Administration, DCFAM, Attn: Frederick W. Brickenkamp 1–A–21 Operations Bldg., 6401 Security Blvd., Baltimore, MD 21235

I. The information collections listed below will be submitted to OMB within 60 days from the date of this notice. Therefore, your comments should be submitted to SSA within 60 days from the date of this publication. You can obtain copies of the collection instruments by calling the SSA Reports Clearance Officer at 410–965–4145, or by writing to him at the address listed above.

1. Application for Retirement Insurance Benefits—0960–0007. In order to receive Social Security retirement insurance benefits, an individual must file an application with the Social Security Administration (SSA). The SSA–1 is one application that the Commissioner of Social Security prescribes to meet this requirement. The information that SSA collects will be used to determine entitlement to retirement benefits. The respondents are individuals who choose apply for Social Security retirement insurance.

Number of Respondents: 1,460,692.

Frequency of Response: 1.

Average Burden Per Response: 10.5 minutes.

Estimated Annual Burden: 255,621 hours.

2. Pain Report-Child—0960–0540. The information collected on form SSA–3371–BK will be used to obtain the types of information specified in the regulations and to provide disability interviewers (and applicants/claimants in self-help situations) with a convenient means of recording the information obtained. This information is used by the State disability determination services (DDS) adjudicators, and administrative law judges, to assess the effects of symptoms on functionality for determining disability under the Social Security Act. The respondents are applicants for SSI benefits.

Number of Respondents: 250,000.

Frequency of Response: 1.

Average Burden Per Response: 15 minutes.

Estimated Annual Burden: 62,500 hours.

3. Reconsideration Report for Disability Cessation—0960–0350. Form SSA–782–BK will be used by claimants and SSA field offices to document new developments on the claimant's condition (as perceived by the claimant), since the prior continuing disability interview was conducted. The form will also be used by the SSA interviewer to provide his/her observations of the claimant. The respondents are claimants for Old-Age, Survivors and Disability Insurance and Supplemental Security Income, who file a Request for Reconsideration—Disability Cessation.

Number of Respondents: 100,000.

Frequency of Response: 1.

Average Burden Per Response: 30 minutes.

Estimated Annual Burden: 50,000 hours.

4. Request for Waiver of Overpayment Recovery or Change in Repayment Notice—0960–0037. Form SSA–632 collects information on the circumstances surrounding overpayment of Social Security Benefits to recipients. SSA uses the information to determine whether recovery of an overpayment amount can be waived or must be repaid and, if repaid, how recovery will be made. The respondents are recipients of Social Security, Medicare, Black Lung or Supplemental Security Income overpayments.

Number of Respondents: 500,000.

Frequency of Response: 1.

Average Burden Per Response: 120 minutes.

Estimated Annual Burden: 1,000,000 hours.

5. Beneficiary Interview and Auditor's Observations Form-0960–0630. The information collected through the Beneficiary Interview and Auditor's Observations form, SSA–322, will be used by SSA's Office of the Inspector General (OIG) to interview beneficiaries and/or their caregivers to determine whether representative payees are complying with their duties and responsibilities. Respondents to this collection will be randomly selected Supplemental Security Income recipients and Social Security beneficiaries that have representative payees.

Number of Respondents: 150.

Frequency of Response: 1.

Average Burden Per Response: 15 minutes.

Estimated Annual Burden: 38 hours.

II. The information collections listed below have been submitted to OMB for clearance. Your comments on the information collections would be most useful if received by OMB and SSA within 30 days from the date of this publication. You can obtain a copy of the OMB clearance packages by calling the SSA Reports Clearance Officer on (410) 965–4145, or by writing to him at the address listed above.

1. Discrimination Complaint Form—0960–0585. The information collected on form SSA–437 will be used by SSA to investigate and informally resolve complaints of discrimination based on race, color, national origin, sex, age, religion and retaliation in any program or activity conducted by SSA. A person who believes that he or she has been discriminated against on any of the above bases may file a written complaint of discrimination. The information will be used to identify the complainant; identify the alleged discriminatory act; ascertain the date of such alleged act; obtain the identity of the individual(s)/ facility/component that allegedly discriminated; and ascertain other relevant information that would assist in the investigation and resolution of the complaints. The respondents are individuals who allege discrimination on the grounds described above.

Number of Respondents: 300.

Frequency of Response: 1.

Average Burden Per Response: 1 hour.

Estimated Annual Burden: 300 hours.

2. Claimant's Statement When Request for Hearing is Filed and the

Issue is Disability—0960–0316. SSA requests that a claimant complete an HA–4486 when a claim for title II disability benefits or title XVI Supplemental Security Income benefits is denied and the claimant wishes a hearing before an Administrative Law Judge (ALJ). SSA uses this form to obtain updated information on the claimant's medical treatment to assist the ALJ in preparing for the hearing and in issuing a decision on entitlement to benefits. The respondents are individuals whose claims have been denied and who want a hearing before an ALJ.

Number of Respondents: 442,720.

Frequency of Response: 1.

Average Burden Per Response: 15 minutes.

Estimated Annual Burden: 110,680.

Dated: January 19, 2001.

Frederick W. Brickenkamp,

Reports Clearance Officer.

[FR Doc. 01–2324 Filed 1–25–01; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 3561]

Culturally Significant Objects Imported for Exhibition Determinations: ''European Masterworks: Paintings from the Collection of the Art Gallery of Ontario''

AGENCY: United States Department of State.

ACTION: Notice.

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 [79 Stat. 985, 22 U.S.C. 2459], the Foreign Affairs Reform and Restructuring Act of 1998 [112 Stat. 2681 *et seq.*], Delegation of Authority No. 234 of October 1, 1999 [64 FR 56014], and Delegation of Authority No. 236 of October 19, 1999 [64 FR 57920], as amended by Delegation of Authority No. 236–3 of August 28, 2000 [65 FR 53795], I hereby determine that the objects to be included in the exhibit, ''European Masterworks: Paintings from the Collection of the Art Gallery of Ontario'' imported from abroad for the temporary exhibition without profit within the United States, is of cultural significance. The objects are imported pursuant to loan agreements with foreign lenders. I also determine that the temporary exhibition or display of the objects at the Frist Center for the Visual Arts, Nashville, Tennessee, from on or about April 8, 2001, to on or about July 8, 2001, is in the national interest. Public Notice of these determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Paul W. Manning, Attorney-Adviser, Office of the Legal Adviser, 202/619–5997, and the address is Room 700, United States Department of State, 301 4th Street, SW., Washington, DC 20547–0001.

Dated: January 17, 2001.

Helena Kane Finn,

Acting Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. 01–2410 Filed 1–25–01; 8:45 am]

BILLING CODE 4710–08–P

DEPARTMENT OF STATE

[Public Notice 3560]

Culturally Significant Objects Imported for Exhibition Determinations: ''Rembrandt's Portrait of an Elderly Woman''

AGENCY: United States Department of State.

ACTION: Notice.

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 [79 Stat. 985, 22 U.S.C. 2459], the Foreign Affairs Reform and Restructuring Act of 1998 [112 Stat. 2681 *et seq.*], Delegation of Authority No. 234 of October 1, 1999 [64 FR 56014], and Delegation of Authority No. 236 of October 19, 1999 [64 FR 57920], as amended by Delegation of Authority No. 236–3 of August 28, 2000 [65 FR 53795], I hereby determine that the object to be included in the exhibit, ''Rembrandt's *Portrait of an Elderly Woman,*'' imported from abroad for the temporary exhibition without profit within the United States, is of cultural significance. The object is imported pursuant to a loan agreement with a foreign lender. I also determine that the temporary exhibition or display of the object at the Museum of Fine Arts, Houston, Texas, from on or about February 1, 2001, to on or about August 31, 2001, is in the national interest. Public Notice of these determinations is ordered to be published in the **Federal Register.**

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit object, contact Paul W. Manning, Attorney-Adviser, Office of the Legal Adviser, 202/619–5997, and the address is Room 700, United States Department of State, 301 4th Street, SW., Washington, DC 20547–0001.

Dated: January 17, 2001.

Helena Kane Finn,

Acting Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. 01–2409 Filed 1–25–01; 8:45 am]

BILLING CODE 4710–08–P

DEPARTMENT OF STATE

[Public Notice Number 3541]

Shipping Coordinating Committee International Maritime Organization Legal Committee; Notice of Meeting

The U.S. Shipping Coordinating Committee (SHC) will conduct an open meeting at 10:00 a.m. on Tuesday, March 6, 2001, in Room 2415 at U.S. Coast Guard Headquarters, 2100 Second Street, SW., Washington, DC. The purposes of this meeting are to prepare for: (1) The International Conference on Liability and Compensation for Bunker Oil Damage, 2001 (bunkers convention diplomatic conference); (2) an informal meeting of interested delegates to the International Maritime Organization (IMO) Legal Committee to discuss the draft protocol to the Athens Convention Relating to the Carriage of Passengers and Their Luggage By Sea (draft Athens protocol); and (3) the next meeting of the Joint International Maritime Organization/International Labor Organization Ad Hoc Expert Working Group on Liability and Compensation Regarding Claims for Death, Personal Injury and Abandonment of Seafarers (IMO/ILO Ad Hoc Expert Working Group). Finally, the meeting will afford an opportunity to review the work plan of the IMO Legal Committee and, in particular, the anticipated timeframe for submission of the draft Athens protocol and a draft Wreck Removal Convention to diplomatic conferences.

The headquarters of IMO will host the bunkers convention diplomatic conference, which will be held from 19 through 23 March 2001. This conference will consider the adoption of a draft International Convention on Liability and Compensation for Bunker Oil Pollution Damage. The headquarters of IMO tentatively also will host an informal meeting of interested delegates on March 14, 2001, to discuss outstanding issues regarding the draft Athens protocol. Finally, the IMO/ILO Ad Hoc Expert Working Group will meet at IMO headquarters from April 30 through May 4, 2001, and will continue to examine the issue of financial security for seafarers and their dependents with regard to compensation in cases of personal injury, death and abandonment.

Members of the public are invited to attend the SHC meeting up to the seating capacity of the room. For further information, or to submit views in advance of the meeting, please contact Captain Joesph F. Ahern or Lieutenant Daniel J. Goettle, U.S. Coast Guard, Office of Maritime and International Law (G–LMI), 2100 Second Street, SW., Washington, DC 20593–0001; telephone (202) 267–1527; fax (202) 267–4496.

Dated: January 22, 2001.

Mira Piplani,

International Transportation Commercial Officer, Shipping Coordinating Committee, Department of State.

[FR Doc. 01–2408 Filed 1–25–01; 8:45 am]

BILLING CODE 4710–07–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

[USCG–201–8720]

National Boating Safety Advisory Council; Charter Renewal

AGENCY: Coast Guard, DOT.

ACTION: Notice of charter renewal.

SUMMARY: The Secretary of Transportation has renewed the charter for the National Boating Safety Advisory Council (NBSAC) for 2 years from December 20, 2000 until December 20, 2002. NBSAC is a Federal advisory committee under 5 U.S.C. App. 2. It advises the Coast Guard on the need for Federal regulations and other major boating safety matters.

ADDRESSES: You may request a copy of the charter by writing to Commandant (G–OPB–1), U.S. Coast Guard, 2100 Second Street SW., Washington, DC 20593–0001; by calling 202–267–0950; or by faxing 202–267–4850. This notice and the charter are available on the Internet at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Albert J. Marmo, Executive Director of NBSAC, telephone 202–267–0950, fax 202–267–4285.

Dated: January 17, 2001.

Terry M. Cross,

Rear Admiral U.S. Coast Guard, Assistant Commandant for Operations.

[FR Doc. 01–2187 Filed 1–25–01; 8:45 am]

BILLING CODE 4910–15–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 Exemptions.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, exemptions from the Department of Transportation's Hazardous Materials Regulations (49 CFR part 107, Subpart B), notice is hereby given that the Office of Hazardous Materials Safety has received the applications 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. Requests for 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'' denote a modification request. These applications have been separated from the new applications for exemptions to facilitate processing.

DATES: Comments must be received on or before February 12, 2001.

ADDRESS COMMENTS TO: Records 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 exemptions 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 January 22, 2001.

J. Suzanne Hedgepeth,

Director, Office of Hazardous Materials Exemptions and Approvals.

Application number	Docket number	Applicant	Modification of exemption
8757–M		YZ Systems, Inc., Conroe, TX (See Footnote 1)	8757
8865–M		Carleton Technologies, Inc., Orchard Park, NY (See Footnote 2)	8865
9758–M		The Coleman Company, Inc., Wichita, KS (See Footnote 3)	9758
10985–M		Georgia-Pacific Corporation, Atlanta, GA (See Footnote 4)	10985
11440–M		PPG Industries, Inc., Pittsburgh, PA (See Footnote 5)	11440
12074–M	RSPA–1998–3841	Van Hool NV, B–2500 Lier Koningshooikt, BE (See Footnote 6)	12074
12184–M	RSPA–1998–4886	Weldship Corporation, Bethlehem, PA (See Footnote 7)	12184
12266–M	RSPA–1999–5636	Toyota Motor Sales, U.S.A., Inc., Torrance, CA (See Footnote 8)	12266
12581–M	RSPA–2000–8387	Nat'l Aero & Space Admn (Goodard Space Flight Ctr), Greenbelt, MD (See Footnote 9).	12581

[1] To modify the exemption to authorize a design change of the non-DOT specification stainless cylinder for shipment of compressed gases.

[2] To modify the exemption to update the packaging language of the non-DOT specification cylinders to include the reclassified pyrotechnic devices for the transportation of compressed gases.

[3] To modify the exemption to authorize a design change of the non-refillable, non-DOT specification inside container for the transportation of certain Division 2.1 gases.

[4] To modify the exemption to allow for the transportation of Division 2.1 materials in tank cars.

[5] To modify the exemption to authorize the use of plastic pallets for the loading of polyethylene drums or composite packagings transporting certain Division 6.1 materials.

[6] To modify the exemption to update the filling requirements to include suitable liquid level gauging devices for the transportation of Division 2.1 and 2.2 materials in DOT Specification steel portable tanks.

[7] To modify the exemption to authorize alternative testing procedures of DOT–3A and DOT–3AA cylinders.

[8] To modify the exemption to allow for rail freight as an authorized mode of transportation for small quantities of Class 3 materials in non-refillable containers.

[9] To modify the exemption to include Competent Authority Approval for the transportation of helium in non-DOT specification packaging.

[FR Doc. 01–2402 Filed 1–25–01; 8:45am]

BILLING CODE 4910–60–M

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

Office of Hazardous Materials Safety; Notice of Applications for Exemptions

AGENCY: Research and Special Programs Administration, DOT.

ACTION: List of Applicants for Exemptions.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, exemptions from the Department of Transportation's Hazardous Materials Regulations (49 CFR Part 107, Subpart B), notice is hereby given that the Office of Hazardous Materials Safety has received the applications 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 February 26, 2001.

ADDRESS COMMENTS TO: Records 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 application number.

FOR FURTHER INFORMATION CONTACT: Copies of the applications (See Docket Number) are available for inspection at the New Docket Management Facility, PL–401, at the U.S. Department of Transportation, Nassif Building, 400 7th Street, SW., Washington, DC 20590 or at http://dms.dot.gov.

This notice of receipt of applications for new exemptions 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 January 22, 2001.

J. Suzanne Hedgepeth,

Director, Office of Hazardous Materials Exemptions and Approvals.

Application No.	Docket No.	Applicant	Regulation(s) affected	Nature of exemption thereof
12607–N	RSPA–01–8641	FIBA Technologies Inc., Westboro, MA.	49 CFR (vi), 173.34(e)(1), (e)(3), (e)(4), (e)(8), (e)(14), (e)(15).	To authorize an alternative method of retest for DOT 3AL seamless cylinders manufactured from 6061 alloy for use in transporting Division 2.1, 2.2 and 2.3 materials. (modes 1, 2, 3, 4, 5).
12608–N	RSPA–01–8639	Solvay Interox, Inc., Houston, TX.	49 CFR 172.102(c)(7)(ii)	To authorize the transportation in commerce of hydrogen peroxide aqueous solutions in concentrations exceeding 72 percent but not exceeding 92 percent in DOT specification IM 101 steel portable tanks. (modes 1, 3).
12609–N	RSPA–01–8640	Department of Defense (DOD), Alexandria, VA.	49 CFR 171.14(a)(1), 171.8	To authorize the transportation in commerce of non-bulk packagings containing Class 8 material that are no longer authorized for transportation. (mode 1).
12611–N	RSPA–01–8635	Hodgdon Powder Co., Inc., Shawnee Mission, KS.	49 CFR 173.171	To authorize the transportation in commerce of smokeless powder for shipments of small arms in quantities that exceed the prescribed limit. (modes 1, 2, 3).
12612–N	RSPA–01–8637	Genlabs, Chino, CA	49 CFR 173.156	To authorize the transportation in commerce of small quantities of Class 8 material in non-bulk packages in quantities that exceed the weight allowable per pallet. (mode 1).
12613–N	RSPA–01–8702	Nova Chemical Co., Red Deer, Alberta, CN.	49 CFR 172.203(a), 173.31(c)(1), 179.13.	To authorize the transportation in commerce of a Class 3 material in DOT112J340 tank cars with a maximum gross weight on rail that exceed the maximum limit of 263,000 pounds. (mode 2).

[FR Doc. 01–2403 Filed 1–25–01; 8:45 am]

BILLING CODE 4910–60–M

DEPARTMENT OF THE TREASURY

Financial Crimes Enforcement Network; Proposed Collection; Comment Request

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury is engaged in a multi-year education program to disseminate information to the Money Services Business (MSB) industry regarding regulations which requires MSBs to register with the Financial Crimes Enforcement Network (FinCEN) and to

file Suspicious Activity Reports (SARs). MSBs include money transmitters; issuers, redeemers, and sellers of money orders and traveler's checks; check cashers; and currency exchangers. Treasury places a high priority on effective and broad-reaching initiatives to facilitate the education of MSBs and their agents. The survey is intended to provide baseline data regarding the makeup of the MSB industry and the extent of knowledge within the industry regarding its obligations under the Bank Secrecy Act and its accompanying regulations.

DATES: Written comments should be received on or before March 27, 2001 to be assured of consideration.

ADDRESSES: Direct all written comments to: Financial Crimes Enforcement Network, Eileen C. Mayer, 2070 Chain Bridge Road, Vienna, VA 22182, (202) 354–6400; E-mail: *mayere@fincen.treas.gov*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the survey form and instructions should be directed to: Department of the Treasury, Office of Public Education, Malcolm Carter, 1500 Pennsylvania Avenue, NW, Room 2222, Washington, DC 20220, Phone: (202) 622–0211; E-mail: *malcolm.carter@do.treas.gov*

SUPPLEMENTARY INFORMATION:

Title: Money Services Business Program Response.

OMB Number: New Collection.

Abstract: Telephone Survey to be conducted with business owners and managers in the Money Services Business industry. Survey asks respondents to report methods used to educate employees about regulations and provide general organizational information.

Current Actions: New.

Type of Review: New.

Affected Public: Business.

Estimated Number of Respondents: 600.

Estimated Time Per Respondent: Fifteen Minutes.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on—(a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have a practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information of respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: January 22, 2001.

Kevin Hamer,

Chief of Staff, Department of the Treasury, Office of Public Education.

[FR Doc. 01–2387 Filed 1–25–01; 8:45 am]

BILLING CODE 4810–25–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 8875

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8875, Taxable REIT Subsidiary Election.

DATES: Written comments should be received on or before March 27, 2001 to be assured of consideration.

ADDRESSES: Direct all written comments to Garrick R. Shear, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Martha R. Brinson, (202) 622–3869, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Taxable REIT Subsidiary Election.

OMB Number: 1545–1721

Form Number: 8875.

Abstract: A corporation and a REIT use Form 8875 to jointly elect to have the corporation treated as a taxable REIT subsidiary as provided in section 856(l).

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 1,000.

Estimated Time Per Respondent: 7hr., 40 min.

Estimated Total Annual Burden Hours: 7,660.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. 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.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 16, 2001.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 01–2350 Filed 1–25–01; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form SS–8

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form SS–8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding.

DATES: Written comments should be received on or before March 27, 2001 to be assured of consideration.

ADDRESSES: Direct all written comments to Garrick R. Shear, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Martha Brinson, (202) 622–3869, Internal Revenue Service, Room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding.

OMB Number: 1545–0004.

Form Number: SS–8.

Abstract: Form SS–8 is used by employers and workers to furnish information to IRS in order to obtain a determination as to whether a worker is an employee for purposes of Federal employment taxes and income tax withholding. IRS uses the information on Form SS–8 to make the determination.

Current Actions: There are no changes being made to the Form SS–8 at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, individuals, not-for-profit institutions, Federal government, farms, and state, local or tribal governments.

Estimated Number of Respondents: 6,900.

Estimated Time Per Respondent: 23 hrs., 59 mins.

Estimated Total Annual Burden Hours: 165,462.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. 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.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 16, 2001.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 01–2351 Filed 1–25–01; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Forms W–2, W–2c, W–2AS, W–2GU, W–2VI, W–3, W–3c, W–3cPR, W–3PR, and W–3SS

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Forms W–2, W–2c, W–2AS, W–2GU, W–2VI, W–3, W–3c, W–3cPR, W–3PR, and W–3SS.

DATES: Written comments should be received on or before March 27, 2001 to be assured of consideration.

ADDRESSES: Direct all written comments to Garrick R. Shear, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the forms and instructions should be directed to Carol Savage, (202) 622–3945, Internal Revenue Service, room 5242, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: W–2 (Wage and Tax Statement), W–2c (Corrected Wage and Tax Statement), W–2AS (American Samoa Wage and Tax Statement), W–2GU (Guam Wage and Tax Statement), W–2VI (U.S. Virgin Islands Wage and Tax Statement), W–3 (Transmittal of Wage and Tax Statements), W–3c (Transmittal of Corrected Wage and Tax Statements), W–3PR (Informe de Comprobantes de Retencion), W–3cPR (Transmision de Comprobantes de Retencion Corregidos), and W–3SS (Transmittal of Wage and Tax Statements).

OMB Number: 1545–0008.

Form Number: Forms W–2, W–2c, W–2AS, W–2GU, W–2VI, W–3, W–3c, W–3cPR, W–3PR, and W–3SS.

Abstract: Employers report income and withholding information on Form W–2. Forms W–2AS, W–2GU and W–2VI are variations of Form W–2 for use in U.S. possessions. The Form W–3 series is used to transmit W–2 series forms to the Social Security Administration. Forms W–2c, W–3c and W–3cPR are used to correct previously filed Forms W–2, W–3, and W–3PR. Individuals use Form W–2 to prepare their income tax returns.

Current Actions: There are no changes being made to these forms at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, individuals or households, not-for-profit institutions, farms, and Federal, state, local or tribal governments.

Estimated Number of Responses: 253,007,121.

Estimated Time Per Response: Varies.

Estimated Total Annual Burden Hours: 126,579,897.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. 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.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 11, 2001.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 01–2352 Filed 1–25–01; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 1098–T

AGENCY: International Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13(44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 1098–T, Tuition Payments Statement.

DATES: Written comments should be received on or before March 27, 2001 to be assured of consideration.

ADDRESSES: Direct all written comments to Garrick R. Shear, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Larnice Mack, (202) 622–3179, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Tuition Payments Statement.

OMB Number: 1545–1574.

Form Number: Form 1098–T.

Abstract: Section 6050S of the Internal Revenue Code requires eligible education institutions to report certain information regarding tuition payments to the IRS and to students. Form 1098–T is used for this purpose.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations and not-for-profit institutions.

Estimated Number of Responses: 21,078,651.

Estimated Time Per Response: 9 min.

Estimated Total Annual Burden Hours: 3,372,585.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. 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.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 18, 2001.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 01–2353 Filed 1–25–01; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 1098–E

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 1098–E, Student Loan Interest Statement.

DATES: Written comments should be received on or before March 27, 2001 to be assured of consideration.

ADDRESSES: Direct all written comments to Garrick R. Shear, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Larnice Mack, (202) 622–3179, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Student Loan Interest Statement.

OMB Number: 1545–1576.

Form Number: Form 1098–E.

Abstract: Section 6050S(b)(2) of the Internal Revenue Code requires persons (financial institutions, governmental units, etc.) to report $600 or more of interest paid on student loans to the IRS and the students. Form 1098–E is used for this purpose.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organzations, not-for-profit institutions, and State, local or tribal governments.

Estimated Number of Responses: 8,761,303.

Estimated Time Per Response: 3 min.

Estimated Total Annual Burden Hours: 525,679.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. 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.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 19, 2001.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 01–2354 Filed 1–25–01; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 1024

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 1024, Application for Recognition of Exemption Under Section 501(a).

DATES: Written comments should be received on or before March 27, 2001 to be assured of consideration.

ADDRESSES: Direct all written comments to Garrick R. Shear, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Martha R. Brinson, (202) 622–3869, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Application for Recognition of Exemption Under Section 501(a).

OMB Number: 1545–0057.

Form Number: 1024.

Abstract: Organizations seeking exemption from Federal income tax under Internal Revenue Code section 501(a) as an organization described in most paragraphs of section 501(c) must use Form 1024 to apply for exemption. The information collected is used to determine whether the organization qualifies for tax-exempt status.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Not-for-profit institutions.

Estimated Number of Respondents: 4,718.

Estimated Time Per Respondent: 61 hr., 47 min.

Estimated Total Annual Burden Hours: 291,529.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. 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.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 16, 2001.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 01–2355 Filed 1–25–01; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 1139

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 1139, Corporation Application for Tentative Refund.

DATES: Written comments should be received on or before March 27, 2001 to be assured of consideration.

ADDRESSES: Direct all written comments to Garrick R. Shear, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Martha R. Brinson, (202) 622–3869, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Corporation Application for Tentative Refund.

OMB Number: 1545–0582.

Form Number: Form 1139.

Abstract: Form 1139 is filed by corporation that expect to have a net operating loss, net capital loss, or unused general business credits carried back to a prior tax year. IRS uses Form 1139 to determine if the amount of the loss or unused credits is proper.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 3,000.

Estimated Time Per Respondent: 40 hr., 23 min.

Estimated Total Annual Burden Hours: 121,170.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. 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.

Request for Comments

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 16, 2001.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 01–2356 Filed 1–25–01; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[FI–59–89]

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing final regulation, FI–59–89 (TD 8394), Proceeds of Bonds Used for Reimbursement (§ 1.150–2(e) (originally contained in § 1.104–18(c)).

DATES: Written comments should be received on or before March 27, 2001 to be assured of consideration.

ADDRESSES: Direct all written comments to Garrick R. Shear, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this regulation should be directed to Faye Bruce, (202) 622–6665, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Proceeds of Bonds Used for Reimbursement.

OMB Number: 1545–1226.

Regulation Project Number: FI–59–89.

Abstract: This regulation clarifies when the allocation of bond proceeds to reimburse expenditures previously made by an issuer of the bond is treated as an expenditure of the bond proceeds. The issuer must express a reasonable official intent, on or prior to the date of payment, to reimburse the expenditure in order to assure that the reimbursement is not a device to evade requirements imposed by the Internal Revenue Code with respect to tax exempt bonds.

Current Actions: There is no change to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: State, local or tribal governments, and not-for-profit institutions.

Estimated Number of Respondents: 2,500.

Estimated Time Per Respondent: 2 hours, 24 minutes.

Estimated Total Annual Burden Hours: 6,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. 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.

Request for Comments

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 16, 2001.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 01–2357 Filed 1–25–01; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[REG–109704–97]

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent

burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing notice of proposed rulemaking and temporary regulation, REG–109704–97, HIPAA Mental Health Parity Act (§ 54.9812).

DATES: Written comments should be received on or before March 27, 2001 to be assured of consideration.

ADDRESSES: Direct all written comments to Garrick R. Shear, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to Larnice Mack, (202) 622–3179, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: HIPAA Mental Health Parity Act.

OMB Number: 1545–1577.

Regulation Project Number: Reg–109704–97.

Abstract: The regulations provide guidance for group health plans with mental health benefits about requirements relating to parity in the dollar limits imposed on mental health benefits and medical/surgical benefits.

Current Actions: There is no changes being made to these existing regulations.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, state, local or tribal governments, and not-for-profit institutions.

Estimated Number of Respondents: 7,053.

Estimated Time Per Respondent: 28 min.

Estimated Total Annual Burden Hours: 3,280.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. 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.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 16, 2001.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 01–2358 Filed 1–25–01; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

[REG–120200–97]

Proposed Collection; Comment Request for Regulation Project

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning an existing final regulation, REG–120200–97 (TD 8775), Election Not to Apply Look-Back Method in De Minimis Cases (§ 1.460–6).

DATES: Written comments should be received on or before March 27, 2001 to be assured of consideration.

ADDRESSES: Direct all written comments to Garrick R. Shear, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulation should be directed to Larnice Mack, (202) 622–3179, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Election Not to Apply Look-Back Method in De Minimis Cases.

OMB Number: 1545–1572.

Regulation Project Number: Reg–120200–97.

Abstract: Under Internal Revenue Code section 460(b)(6), a taxpayer may elect not to apply the look-back method to long-term contracts in de minimis cases. The taxpayer is required under the regulation to notify the IRS of its election.

Current Actions: There are no changes being made to this existing regulation.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 20,000.

Estimated Time Per Respondent: 12 min.

Estimated Total Annual Burden Hours: 4,000.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. 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.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 16, 2001.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 01–2359 Filed 1–25–01; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Notice 98–1

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Notice 98–1, Nondiscrimination Testing.

DATES: Written comments should be received on or before March 27, 2001 to be assured of consideration.

ADDRESSES: Direct all written comments to Garrick R. Shear, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the notice should be directed to Larnice Mack, (202) 622–3179, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Nondiscrimination Testing.

OMB Number: 1545–1579.

Notice Number: Notice 98–1.

Abstract: Notice 98–1 provides guidance for discrimination testing under section 401(k) and (m) of the Internal Revenue Code as amended by section 1433(c) and (d) of the Small Business Job Protection Act of 1996. The guidance is directed to employers maintaining retirement plans subject to these Code sections.

Current Actions: There are no changes being made to the notice at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, and not-for-profit institutions.

Estimated Number of Respondents: 147,000.

Estimated Time Per Respondent: 20 min.

Estimated Total Annual Burden Hours: 49,000.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. 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.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 19, 2001.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 01–2360 Filed 1–25–01; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Notice of Solicitation of Panel Members

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: Applications are being accepted for membership on the panels, located in Brooklyn, Florida, Milwaukee and Seattle.

DATES: The Application period is January 29, 2001 to March 9, 2001.

FOR FURTHER INFORMATION CONTACT: Michael Lewis, Director, IRS Citizen Advocacy Panel, Office of the Assistant Secretary for Management and Chief Financial Officer, Department of the Treasury, 1500 Pennsylvania Avenue, NW., Room 2421, Washington, DC 20220. Information is also available at *www.improveirs.org.*

SUPPLEMENTARY INFORMATION: The mission of the panels is: to provide citizen input into enhancing IRS customer service by identifying problems and making recommendations for improvement with IRS systems and procedures; elevate the identified problems to the appropriate IRS official and monitor the progress to effect change; and refer individual taxpayers to the appropriate IRS office for assistance in resolving their problems. The panels will consist of 9–14 volunteer members who serve at the pleasure of the Secretary of Treasury and will function solely as advisory bodies.

The panels are seeking applicants who have an interest in good government, a personal commitment to volunteer approximately 300 hours a year and a desire to help improve IRS customer Service. Potential candidates must be U.S. Citizens, compliant with Federal, State and Local Taxes, and pass a FBI name check. Experience in the following areas is helpful: formulating and presenting proposals; knowledge of taxpayer concerns; experience representing the interests of your community, state or region; working with people from diverse backgrounds; and helping people resolve disputes.

Dated: January 11, 2001.

John J. Mannion,

Director, Program Planning and Quality.

[FR Doc. 01–2361 Filed 1–25–01; 8:45 am]

BILLING CODE 4830–01–P

Federal Register

Friday,
January 26, 2001

Part II

Sentencing Commission

Sentencing Guidelines for United States Courts; Notice

SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

AGENCY: United States Sentencing Commission.

ACTION: Notice of (A) proposed temporary, emergency amendments to sentencing guidelines, policy statements, and commentary; (B) proposed permanent, non-emergency amendments to sentencing guidelines, policy statements, and commentary. Request for public comment. Notice of public hearing.

SUMMARY: Pursuant to section 994(a), (o), and (p) of title 28, United States Code, and section 3664 of Pub. L. 106–310 (with respect to proposed emergency amendment #1), section 3611 of Pub. L. 106–310 (with respect to proposed emergency amendment #2), section 3651 of Pub. L. 106–310 (with respect to proposed emergency amendment #3), and section 112(b) of Pub. L. 106–386 (with respect to proposed emergency amendment #4) the Commission is considering promulgating certain amendments to the sentencing guidelines, policy statements, and commentary. This notice sets forth the proposed amendments and, for each proposed amendment, a synopsis of the issues addressed by that amendment.

DATES: Written public comment on the proposed emergency amendments in part (A) should be received by the Commission not later than February 5, 2001. Written public comment on the proposed permanent, non-emergency amendments in part (B), and on the proposed amendments in part (A) for purposes of promulgating those amendments as permanent, non-emergency amendments, should be received by the Commission not later than March 26, 2001. The Commission requests that, to the extent practicable, commentators submit written public comment on the proposed permanent, non-emergency amendments not later than March 9, 2001, in order for the Commission to consider that comment before its public hearing scheduled for the March 19–20, 2001 session. Note that the Commission may, at its February 2001 public meeting, revise the deadline for submission of written public comment to provide for an earlier deadline than the deadline published in this notice. *See* USSC Rules of Practice and Procedure, Rule 1.2.

The Commission plans to hold a public hearing on the proposed permanent, non-emergency amendments during its March 2001 session in Washington, DC. The public hearing will be held at the Thurgood Marshall Federal Judiciary Building, One Columbus Circle, NE., Washington, DC 20002–8002. A person who desires to testify at the public hearing should notify Michael Courlander, Public Affairs Officer, at (202) 502–4590, not later than March 9, 2001. Written testimony for the public hearing must be received by the Commission not later than March 9, 2001. Timely submission of written testimony is a requirement for testifying at the public hearing. The Commission requests that, to the extent practicable, commentators submit an electronic version of the comment and of the testimony for the public hearing.

ADDRESSES: Public comment should be sent to: United States Sentencing Commission, One Columbus Circle, NE., Suite 2–500, Washington, DC 20002–8002, Attention: Public Information.

FOR FURTHER INFORMATION CONTACT: Michael Courlander, Public Affairs Officer, Telephone: (202) 502–4590.

SUPPLEMENTARY INFORMATION: The United States Sentencing Commission is an independent agency in the judicial branch of the United States Government. The Commission promulgates sentencing guidelines and policy statements for federal sentencing courts pursuant to 28 U.S.C. 994(a). The Commission also periodically reviews and revises previously promulgated guidelines pursuant to 28 U.S.C. 994(o) and submits guideline amendments to the Congress not later than the first day of May each year pursuant to 28 U.S.C. 994(p). This year, the Commission may submit non-emergency amendments to the Congress not later than May 1, 2001.

The Commission seeks comment on the proposed amendments, alternative proposed amendments, issues for comment, and any other aspect of the sentencing guidelines, policy statements, and commentary.

The Commission also requests public comment regarding whether the Commission should specify for retroactive application to previously sentenced defendants any of the proposed, permanent, non-emergency amendments published in this notice and in the **Federal Register** notice of November 7, 2000 (*see* 65 FR 66792). The Commission requests comment regarding which, if any, of the proposed non-emergency amendments that may result in a lower guideline range should be made retroactive to previously sentenced defendants pursuant to § 1B1.10 (Reduction in Term of Imprisonment as a Result of Amended Guideline Range).

The proposed amendments are presented in this notice in one of two formats. First, some of the amendments are proposed as specific revisions to a guideline or commentary. Bracketed text within a proposed amendment indicates a heightened interest on the Commission's part for comment and suggestions for alternative policy choices; for example, a proposed enhancement of [2] levels indicates that the Commission is considering, and invites comment on, alternative policy choices regarding the appropriate level of enhancement. Similarly, bracketed text within a specific offense characteristic or application note means that the Commission specifically invites comment on whether the proposed provision is appropriate. Second, the Commission has highlighted certain issues for comment and invites suggestions for how the Commission should respond to those issues.

Reports and other additional information pertaining to the proposed amendments described in this notice may be accessed through the Commission's website at www.ussc.gov.

Authority: 28 U.S.C. § 994(a), (o), (p), (x); section 112(b) of Pub. L. 106–386; and sections 3611, 3651, and 3664 of Pub. L. 106–310; USSC Rules of Practice and Procedure, Rules 4.3, 4.4.

Diana E. Murphy,
Chair.

Proposed Amendments to the Sentencing Guidelines

Part (A): Proposed Temporary, Emergency Amendments and Intent To Make Permanent Each of the Proposed Temporary, Emergency Amendments

The Commission hereby gives notice of, and requests comment on, its intent to promulgate each of the proposed amendments set forth in this Part as a temporary, emergency amendment and after promulgation as an emergency amendment, to promulgate each such amendment as a permanent, non-emergency amendment.

Proposed Amendment: Ecstasy

1. *Synopsis of Proposed Amendment:* This proposed amendment addresses the directive in the Ecstasy Anti-Proliferation Act of 2000 (the ''Act''), section 3664 of Pub. L. 106–310, which instructs the Commission to provide, under emergency amendment authority, increased penalties for the manufacture, importation, exportation, or trafficking of Ecstasy. The directive specifically requires the Commission to increase the base offense level for 3,4-methylenedioxy methamphetamine (MDMA), 3,4-methylenedioxy

amphetamine (MDA), 3,4-methylenedioxy-N-ethylamphetamine (MDEA), paramethoxy-methamphetamine (PMA), and any other controlled substance that is marketed as Ecstasy and that has either a chemical structure similar to MDMA or an effect on the central nervous system substantially similar to or greater than MDMA.

The proposed amendment addresses the directive by amending the Drug Equivalency Table in § 2D1.1, Application Note 10, to increase the marihuana equivalencies for the specified controlled substances. The increased equivalencies make the penalties for these substances comparable to other drugs of abuse. The increases also satisfy the sense of Congress in the Act that the penalties for these substances, particularly for high-level traffickers, are too low.

An issue for comment regarding whether the Commission should base the penalties of Ecstasy on the penalties for other drugs of abuse, such as powder cocaine, methamphetamine mixture, or mescaline follows the proposed amendment.

Proposed Amendment

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the Drug Equivalency Tables in the subdivision captioned ''LSD, PCP, and Other Schedule I and II Hallucinogens (and their immediate precursors)*'' in the line referenced to ''MDA'' by striking ''50 gm'' and inserting ''1 kg''; in the line referenced to ''MDMA'' by striking ''35 gm'' and inserting ''1 kg''; in the line referenced ''MDEA'' by striking ''30 gm'' and inserting ''1 kg''; and by inserting ''1 gm of Paramethoxymethamphetamine/PMA = 1 kg of marihuana'' after the line referenced to ''MDEA''.

Issue for Comment: It has been represented to the Commission that Ecstasy (*i.e.,* MDMA, MDEA, MDA and PMA) is similar in its hallucinogenic effect on the user to mescaline, and also has been described as having an added stimulant component that can elevate heart rate, blood pressure, and body temperature. It has also been suggested that the drug is neither physically nor psychologically addictive. The Commission invites comment on these representations and on the appropriate penalty structure for Ecstasy. The proposed amendment treats Ecstasy as being of comparable seriousness to heroin, providing a marihuana equivalency for Ecstasy that is the same as heroin. Accordingly, for sentencing purposes, 1 gm of Ecstasy will be the equivalent of 1 kg of marihuana. Should the Commission alternatively treat Ecstasy comparably to some other major drug of abuse? For example, should the Commission treat Ecstasy as being of comparable seriousness to powder cocaine (which would result in a marihuana equivalency for Ecstasy of 200 gm) or methamphetamine mixture (which would result in a marihuana equivalency for Ecstasy of 2 kg)? Or should the penalty be comparable to that for mescaline (which would result in a marihuana equivalency for Ecstasy of 10 gm) or some multiple of the penalty for mescaline? Comment also is requested regarding whether the Drug Quantity Table in § 2D1.1 should be revised with respect to Ecstacy to provide additional incremental penalties (perhaps with exponential quantity increases) so as to punish more severely those offenders who traffic in larger quantities.

Proposed Amendment: Amphetamine

2. *Synopsis of Proposed Amendment:* This proposed amendment implements the directive in the Methamphetamine Anti-Proliferation Act of 2000, section 3611 of Pub. L. 106–310 (the ''Act''), which directs the Commission to provide, under emergency amendment authority, increased guideline penalties for amphetamine such that those penalties are comparable to the base offense level for methamphetamine.

There are no mandatory minimum sentences for amphetamine offenses. Currently, a quantity of amphetamine is sentenced at the same level as an equal quantity of powder cocaine. That is, with no or minimal criminal history, an offender convicted of trafficking 500 grams of amphetamine would receive a guideline range of 63 to 78 months, based solely on the weight of the drug. A weight of 5,000 grams (5 kilograms), and the lowest criminal history category, would result in a sentencing range of 121 to 151 months. The mathematical relationships between the weight of amphetamine and the current five- and ten-year quantity thresholds for methamphetamine-mix and methamphetamine-actual are 10-to-1 and 100-to-1, respectively.

The proposed amendment provides two options for implementing the directive. Both options propose to treat amphetamine and methamphetamine identically, at a 1:1 ratio (*i.e.,* the same quantities of amphetamine and methamphetamine would result in the same base offense level) because of the similarities of the two substances. Specifically, amphetamine and methamphetamine (A) chemically are similar; (B) are produced by a similar method, and are trafficked in a similar manner; (C) share similar methods of use; (D) affect the same parts of the brain; and (E) have similar intoxicating effects. Both options also distinguish between pure amphetamine (*i.e.,* amphetamine (actual)) and amphetamine mixture in the same manner, and at the same quantities, as pure methamphetamine (*i.e.,* methamphetamine (actual) and methamphetamine mixture).

Although both options ultimately achieve the same penalty increase, the proposed options differ in how they implement the directive. Option One amends the Drug Equivalency Table of § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy). To determine the offense level under this option, the quantity of amphetamine (actual or mixture) is converted to its marijuana weight equivalency using the Drug Equivalency Tables. Option Two, on the other hand, amends § 2D1.1 specifically to include amphetamine in the Drug Quantity Table.

Included in both options is a reference to the controlled substance dextroamphetamine, which is a substance quite similar to amphetamine. Currently, dextroamphetamine has the same marihuana equivalency as amphetamine mixture. The proposed amendment (A) distinguishes between dextroamphetamine mixture and dextroamphetamine (actual); and (B) provides penalties for the dextroamphetamine mixture and dextroamphetamine (actual) that are the same as amphetamine mixture and amphetamine (actual), respectively.

Two issues for comment follows the proposed amendment. The first requests comment regarding whether the Commission should provide an alternative quantity ratio between amphetamine and methamphetamine. The second requests comment regarding whether § 2D1.1(b)(4) should be amended to include amphetamine and dextroamphetamine.

Proposed Amendment

Option 1

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the Drug Equivalency Tables in the subdivision captioned ''Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)*'' by striking ''200 gm'' after ''1 gm of Amphetamine ='' and inserting ''2 kg'';

by inserting ''1 gm of Amphetamine (Actual) = 20 kg of marihuana'' after the line referenced to ''Amphetamine''; by striking ''200 gm'' after ''1 gm of Dextroamphetamine ='' and inserting ''2 kg''; and by inserting ''1 gm of Dextroamphetamine (Actual) = 20 kg of marihuana'' after the line referenced to ''Dextroamphetamine''.

Option 2

Section 2D1.1(c)(1) is amended by inserting after the fifth entry the following:

''15 KG or more of Amphetamine, or 1.5 KG or more of Amphetamine (actual), or 15 KG or more of Dextroamphetamine, or 1.5 KG or more of Dextroamphetamine (actual);''.

Section 2D1.1(c)(2) is amended by inserting after the fifth entry the following:

''At least 5 KG but less than 15 KG of Amphetamine, or at least 500 G but less than 1.5 KG of Amphetamine (actual), or at least 5 KG but less than 15 KG of Dextroamphetamine, or at least 500 G but less than 1.5 KG of Dextroamphetamine (actual);''.

Section 2D1.1(c)(3) is amended by inserting after the fifth entry the following:

''At least 1.5 KG but less than 5 KG of Amphetamine, or at least 150 G but less than 500 G of Amphetamine (actual), or at least 1.5 KG but less than 5 KG of Dextroamphetamine, or at least 150 G but less than 500 G of Dextroamphetamine (actual);''.

Section 2D1.1(c)(4) is amended by inserting after the fifth entry the following:

''At least 500 G but less than 1.5 KG of Amphetamine, or at least 50 G but less than 150 G of Amphetamine (actual), or at least 500 G but less than 1.5 KG of Dextroamphetamine, or at least 50 G but less than 150 G of Dextroamphetamine (actual);''.

Section 2D1.1(c)(5) is amended by inserting after the fifth entry the following:

''At least 350 G but less than 500 G of Amphetamine, or at least 35 G but less than 50 G of Amphetamine (actual), or at least 350 G but less than 500 G of Dextroamphetamine, or at least 35 G but less than 50 G of Dextroamphetamine (actual);''.

Section 2D1.1(c)(6) is amended by inserting after the fifth entry the following:

''At least 200 G but less than 350 G of Amphetamine, or at least 20 G but less than 35 G of Amphetamine (actual), or at least 200 G but less than 350 G of Dextroamphetamine, or at least 20 G but less than 35 G of Dextroamphetamine (actual);''.

Section 2D1.1(c)(7) is amended by inserting after the fifth entry the following:

''At least 50 G but less than 200 G of Amphetamine, or at least 5 G but less than 20 G of Amphetamine (actual), or at least 50 G but less than 200 G of Dextroamphetamine, or at least 5 G but less than 20 G of Dextroamphetamine (actual);''.

Section 2D1.1(c)(8) is amended by inserting after the fifth entry the following:

''At least 40 G but less than 50 G of Amphetamine, or at least 4 G but less than 5 G of Amphetamine (actual), or at least 40 G but less than 50 G of Dextroamphetamine, or at least 4 G but less than 5 G of Dextroamphetamine (actual);''.

Section 2D1.1(c)(9) is amended by inserting after the fifth entry the following:

''At least 30 G but less than 40 G of Amphetamine, or at least 3 G but less than 4 G of Amphetamine (actual), or at least 30 G but less than 40 G of Dextroamphetamine, or at least 3 G but less than 4 G of Dextroamphetamine (actual);''.

Section 2D1.1(c)(10) is amended by inserting after the fifth entry the following:

''At least 20 G but less than 30 G of Amphetamine, or at least 2 G but less than 3 G of Amphetamine (actual), or at least 20 G but less than 30 G of Dextroamphetamine or at least 2 G but less than 3 G of Dextroamphetamine (actual);''.

Section 2D1.1(c)(11) is amended by inserting after the fifth entry the following:

''At least 10 G but less than 20 G of Amphetamine, or at least 1 G but less than 2 G of Amphetamine (actual), or at least 10 G but less than 20 G of Dextroamphetamine, or at least 1 G but less than 2 G of Dextroamphetamine (actual);''.

Section 2D1.1(c)(12) is amended by inserting after the fifth entry the following:

''At least 5 G but less than 10 G of Amphetamine, or at least 500 MG but less than 1 G of Amphetamine (actual), or at least 5 G but less than 10 G of Dextroamphetamine, or at least 500 MG but less than 1 G of Dextroamphetamine (actual);''.

Section 2D1.1(c)(13) is amended by inserting after the fifth entry the following:

''At least 2.5 G but less than 5 G of Amphetamine, or at least 250 MG but less than 500 MG of Amphetamine (actual), or at least 2.5 G but less than 5 G of Dextroamphetamine, or at least 250 MG but less than 500 MG of Dextraomphetamine (actual);''.

Section 2D1.1(c)(14) is amended by inserting after the fifth entry the following:

''Less than 2.5 G of Amphetamine, or less than 250 MG of Amphetamine (actual), or less than 2.5 G of Dextroamphetamine, or less than 250 MG of Dextraomphetamine (actual);''.

Section 2D1.1(c) is amended in Note (B) of the ''Notes to Drug Quantity Table'', by inserting '', ''Amphetamine (actual), ''Dextroamphetamine (actual)','' after ''terms ''PCP (actual)''; by inserting '', amphetamine, dextroamphetamine,'' after ''substance containing PCP''; and by inserting '', amphetamine (actual), dextroamphetamine (actual),'' after ''weight of the PCP (actual)''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 9 by inserting '', amphetamine, dextroamphetamine,'' after ''PCP''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the Drug Equivalency Tables in the subdivision captioned ''Cocaine and Other Schedule I and II Stimulants (and their immediate precursors)'' by striking ''200 gm'' after ''1 gm of Amphetamine = and inserting ''2 kg''; by inserting ''1 gm of Amphetamine (Actual) = 20 kg of marihuana'' after the line referenced to ''Amphetamine''; by striking ''200 gm'' after ''1 gm of Dextroamphetamine ='' and inserting ''2 kg''; and by inserting ''1 gm of Dextroamphetamine (Actual) = 20 kg of marihuana'' after the line referenced to ''Dextramphetamine''.

Issues for Comment

(1) In response to the directive in the Methamphetamine Anti-Proliferation Act of 2000 that instructs the Commission to provide, under emergency amendment authority, increased guideline penalties for amphetamine such that those penalties are comparable to the base offense level for methamphetamine, the Commission has proposed two amendment options that use a 1:1 ratio between amphetamine and methamphetamine (*i.e.,* the same quantities of amphetamine and methamphetamine will result in the imposition of the same base offense level from the Drug Quantity Table in § 2D1.1). The Commission invites comment on whether some alternative ratio should be used. For example, should the Commission use a 2:1 ratio or a 5:1 ratio between amphetamine and methamphetamine, and if so, why?

(2) Section 2D1.1(b)(4) currently provides a two-level enhancement if the

offense involved the importation of methamphetamine or the manufacture of methamphetamine from listed chemicals that the defendant knew were imported unlawfully. The Commission invites comment regarding whether this enhancement should be amended to include the importation of amphetamine or the manufacture of amphetamine from listed chemicals that the defendant knew were imported unlawfully. If so, should the Commission also include the importation of dextroamphetamine or the manufacture of dextroamphetamine from listed chemicals that the defendant knew were imported unlawfully, particularly because dextroamphetamine is so similar to amphetamine and would be treated the same as amphetamine under the proposed amendment options?

Proposed Amendment: Trafficking in List I Chemicals

3. *Synopsis of Proposed Amendment:* This proposed amendment addresses the three-part directive in the Methamphetamine Anti-Proliferation Act of 2000, section 3651 of Pub. L. 106–310 (the ''Act''), regarding enhanced punishment for trafficking in List I chemicals. That section requires the Commission to promulgate an amendment implementing the directive under emergency amendment authority.

First, the directive instructs the Commission ''to provide increased penalties for offenses involving ephedrine, phenylpropanolamine (PPA), or pseudoephedrine (including their salts, optical isomers, and salts of optical isomers) to correspond to the quantity of controlled substance that reasonably could have been manufactured using the quantity of ephedrine, PPA, and pseudoephedrine possessed or distributed.'' In response to this directive, the proposed amendment provides a new chemical table specifically for ephedrine, pseudoephedrine, and PPA. The table ties the base offense levels for these chemicals to the base offense levels for methamphetamine (actual) set forth in § 2D1.1, assuming a 50 percent yield of the controlled substance from the chemicals. Methamphetamine (actual) is used rather than methamphetamine mixture because ephedrine, PPA, and pseudoephedrine produce methamphetamine (actual).

This new table has a maximum base offense level of level 38 (as opposed to a maximum base offense level of 30 for all other precursor chemicals). Providing a maximum base offense level of level 38 increases the sentences for ephedrine, pseudoephedrine, and PPA by linking the theoretical yield of these chemicals to methamphetamine (actual) instead of methamphetamine (mixture) as had been done in the past. Additionally, this adjustment will have an impact on the relationship between §§ 2D1.1 and 2D1.11 by eliminating the six-level distinction that currently exists between offenses that involve possession of these precursor chemicals with intent to manufacture methamphetamine and offenses that involve an attempt to manufacture methamphetamine, at least for offenses involving ephedrine, PPA, and pseudoephedrine.

In order to address cases that involve more than one chemical, the proposed amendment eliminates the ephedrine equivalency table and instead proposes a rule that would require the court to determine the base offense level by using the quantity of the single chemical that results in the greatest base offense level. An upward departure is provided for cases in which the offense level does not adequately address the seriousness of the offense.

However, the proposed amendment provides an exception to this rule for offenses that involve a combination of ephedrine, pseudoephedrine, or phenylpropanolamine because these chemicals often are used in the same manufacturing process. In a case that involves two or more of these chemicals, the base offense level will be determined using the total quantity of the chemicals involved, based on an ephedrine equivalency.

Second, the directive instructs the Commission ''to establish, based on scientific, law enforcement, and other data the Commission considers appropriate, a table in which the quantity of controlled substance that could reasonably have been manufactured shall be determined by using a table of manufacturing conversion ratios for ephedrine, PPA, and pseudoephedrine.'' In response to the directive, the proposed amendment adds to the Drug Equivalency Tables in § 2D1.1 a conversion table for ephedrine, PPA, and pseudoephedrine for cases that are cross-referenced out of § 2D1.11 because the offense involved the manufacture of methamphetamine. This table, which provides for a 50 percent conversion ratio for ephedrine, PPA, and pseudoephedrine, was developed using data from the Drug Enforcement Agency, Office of Diversion Control, as published on the web site of the Office of National Drug Control Policy (ONDCP). These data indicate that the actual yield of methamphetamine from ephedrine and pseudoephedrine is ''typically in the range of 50 to 75 percent''.

Third, the directive instructs the Commission ''to increase penalties for offenses involving any List I chemical other than ephedrine, PPA, and pseudoephedrine, such that those penalties reflect the dangerous nature of such offenses, the need for aggressive law enforcement action to fight such offenses, and the extreme dangers associated with unlawful activity involving methamphetamine and amphetamine.'' In response to this directive, the proposed amendment increases the base offense level for Benzaldehyde, Hydriodic Acid, Methylamine, Nitroethane, and Norpseudoephedrine by two levels. These five additional List I chemicals also are associated with methamphetamine and amphetamine production. The maximum base offense level for these five chemicals will increase from level 30 to level 32. All other List I chemicals will remain at their current maximum base offense level of level 30.

An issue for comment follows the proposed amendment regarding whether, as an alternative, the maximum base offense level in the proposed Ephedrine, Pseudoephedrine, Phenylpropanolamine Table in § 2D1.11 should be set lower than the maximum base offense level in § 2D1.1. This reduction would maintain the existing distinction between offenses involving possession of precursor chemicals with intent to manufacture versus attempt to manufacture for ephedrine, PPA, and pseudoephedrine currently captured by the maximum base offense level of 30 in § 2D1.11. The original relationship between controlled substances in § 2D1.1 and list I chemicals in § 2D1.11 presumed a 50 percent yield of controlled substances from each chemical and then reduced the entire table by eight levels. The eight level distinction later was reduced to six levels in response to a congressional directive.

Proposed Amendment

Section 2D1.11(d) is amended by striking the Chemical Quantity Table and the Notes that follow the Table in their entirety and inserting the following:

(D)(1) EPHEDRINE, PSEUDOEPHEDRINE, AND PHENYLPROPANOLAMINE QUANTITY TABLE*

[Methamphetamine and amphetamine precursor chemicals]

Quantity	Base offense level
(1) 3 KG or more of Ephedrine; 3 KG or more of Phenylpropanolamine; 3 KG or more of Pseudoephedrine	Level 38.
(2) At least 1 KG but less than 3 KG of Ephedrine; At least 1 KG but less than 3 KG of Phenylpropanolamine; At least 1 KG but less than 3 KG of Pseudoephedrine.	Level 36.
(3) At least 300 G but less than 1 KG of Ephedrine; At least 300 G but less than 1 KG of Phenylpropanolamine; At least 300 G but less than 1 KG of Pseudoephedrine.	Level 34.
(4) At least 100 G but less than 300 G of Ephedrine; At least 100 G but less than 300 G of Phenylpropanolamine; At least 100 G but less than 300 G of Pseudoephedrine.	Level 32.
(5) At least 70 G but less than 100 G of Ephedrine; At least 70 G but less than 100 G of Phenylpropanolamine; At least 70 G but less than 100 G of Pseuodoephedrine.	Level 30.
(6) At least 40 G but less than 70 G of Ephedrine; At least 40 G but less than 70 G of Phenylpropanolamine; At least 40 G but less than 70 G of Pseudoephedrine.	Level 28.
(7) At least 10 G but less than 40 G of Ephedrine; At least 10 G but less than 40 G of Phenylpropanolamine; At least 10 G but less than 40 G of Pseudoephedrine.	Level 26.
(8) At least 8 G but less than 10 G of Ephedrine; At least 8 G but less than 10 G of Phenylpropanolamine; At least 8 G but less than 10 G of Pseudoephedrine.	Level 24.
(9) At least 6 G but less than 8 G of Ephedrine; At least 6 G but less than 8 G of Phenylpropanolamine; At least 6 G but less than 8 G of Pseudoephedrine.	Level 22.
(10) At least 4 G but less than 6 G of Ephedrine; At least 4 G but less than 6 G of Phenylpropanolamine; At least 4 G but less than 6 G of Pseudoephedrine.	Level 20.
(11) At least 2 G but less than 4 G of Ephedrine; At least 2 G but less than 4 G of Phenylpropanolamine; At least 2 G but less than 4 G of Pseudoephedrine.	Level 18.
(12) At least 1 G but less than 2 G of Ephedrine; At least 1 G but less than 2 G of Phenylpropanolamine; At least 1 G but less than 2 G of Pseudoephedrine.	Level 16.
(13) At least 500 MG but less than 1 G of Ephedrine; At least 500 MG but less than 1 G of Phenylpropanolamine; At least 500 MG but less than 1 G of Pseudoephedrine.	Level 14.
(14) Less than 500 MG of Ephedrine; Less than 500 MG of Phenylpropanolamine; Less than 500 MG of Pseudoephedrine	Level 12

(D)(2) CHEMICAL QUANTITY TABLE *

[All other precursor chemicals]

Listed chemicals and quantity	Base offense level
(1) List I Chemicals:	Level 32.
51 KG or more of Benzaldehyde;	
132 KG or more of Hydriodic Acid;	
12 KG or more of Methylamine;	
37.8 KG or more of Nitroethane;	
600 KG or more of Norpseudoephedrine.	
(2) List I Chemicals:	Level 30.
At least 17 KG but less than 51 KG of Benzaldehyde;	
20 KG or more of Benzyl Cyanide;	
200 G or more of Ergonovine;	
400 G or more of Ergotamine;	
20 KG or more of Ethylamine;	
At least 44 KG but less than 132 KG of Hydriodic Acid;	
320 KG or more of Isosafrole;	
At least 4 KG but less than 12 KG of Methylamine;	
500 KG or more of N-Methylephedrine;	
500 KG or more of N-Methylpseudoephedrine;	
At least 12.6 KG but less than 37.8 KG of Nitroethane;	
At least 200 KG but less than 600 KG of Norpseudoephedrine;	
20 KG or more of Phenylacetic Acid;	
10 KG or more of Piperidine;	
320 KG or more of Piperonal;	
1.6 KG or more of Propionic Anhydride;	
320 KG or more of Safrole;	
400 KG or more of 3, 4-Methylenedioxyphenyl-2-propanone.	
(3) List I Chemicals:	Level 28.
At least 5.3 KG but less than 17.8 KG of Benzaldehyde;	
At least 6 KG but less than 20 KG of Benzyl Cyanide;	
At least 60 G but less than 200 G of Ergonovine;	
At least 120 G but less than 400 G of Ergotamine;	
At least 6 KG but less than 20 KG of Ethylamine;	
At least 13.2 KG but less than 44 KG of Hydriodic Acid;	
At least 96 KG but less than 320 KG of Isosafrole;	
At least 1.2 KG but less than 4 KG of Methylamine;	
At least 150 KG but less than 500 KG of N-Methylephedrine;	
At least 150 KG but less than 500 KG of N-Methylpseudoephedrine;	

(D)(2) CHEMICAL QUANTITY TABLE *—Continued

[All other precursor chemicals]

Listed chemicals and quantity	Base offense level
At least 3.8 KG but less than 12.6 KG of Nitroethane;	
At least 60 KG but less than 200 KG of Norpseudoephedrine;	
At least 6 KG but less than 20 KG of Phenylacetic Acid;	
At least 3 KG but less than 10 KG of Piperidine;	
At least 96 KG but less than 320 KG of Piperonal;	
At least 480 G but less than 1.6 KG of Propionic Anhydride;	
At least 96 KG but less than 320 KG of Safrole;	
At least 120 KG but less than 400 KG of 3, 4-Methylenedioxyphenyl-2-propanone;	
List II Chemicals:	
11 KG or more of Acetic Anhydride;	
1175 KG or more of Acetone;	
20 KG or more of Benzyl Chloride;	
1075 KG or more of Ethyl Ether;	
1200 KG or more of Methyl Ethyl Ketone;	
10 KG or more of Potassium Permanganate;	
1300 KG or more of Toluene.	
(4) List I Chemicals:	Level 26.
At least 1.8 KG but less than 5.3 KG of Benzaldehyde;	
At least 2 KG but less than 6 KG of Benzyl Cyanide;	
At least 20 G but less than 60 G of Ergonovine;	
At least 40 G but less than 120 G of Ergotamine;	
At least 2 KG but less than 6 KG of Ethylamine;	
At least 4.4 KG but less than 13.2 KG of Hydriodic Acid;	
At least 32 KG but less than 96 KG of Isosafrole;	
At least 400 G but less than 1.2 KG of Methylamine;	
At least 50 KG but less than 150 KG of N-Methylephedrine;	
At least 50 KG but less than 150 KG of N-Methylpseudoephedrine;	
At least 1.3 KG but less than 3.8 KG of Nitroethane;	
At least 20 KG but less than 60 KG of Norpseudoephedrine;	
At least 2 KG but less than 6 KG of Phenylacetic Acid;	
At least 1 KG but less than 3 KG of Piperidine;	
At least 32 KG but less than 96 KG of Piperonal;	
At least 160 G but less than 480 G of Propionic Anhydride;	
At least 32 KG but less than 96 KG of Safrole;	
At least 40 KG but less than 120 KG of 3, 4-Methylenedioxyphenyl-2-propanone;	
List II Chemicals:	
At least 3.3 KG but less than 11 KG of Acetic Anhydride;	
At least 352.5 KG but less than 1175 KG of Acetone;	
At least 6 KG but less than 20 KG of Benzyl Chloride;	
At least 322.5 KG but less than 1075 KG of Ethyl Ether;	
At least 360 KG but less than 1200 KG of Methyl Ethyl Ketone;	
At least 3 KG but less than 10 KG of Potassium Permanganate;	
At least 390 KG but less than 1300 KG of Toluene.	
(5) List I Chemicals:	Level 24.
At least 1.2 KG but less than 1.8 KG of Benzaldehyde;	
At least 1.4 KG but less than 2 KG of Benzyl Cyanide;	
At least 14 G but less than 20 G of Ergonovine;	
At least 28 G but less than 40 G of Ergotamine;	
At least 1.4 KG but less than 2 KG of Ethylamine;	
At least 3.08 KG but less than 4.4 KG of Hydriodic Acid;	
At least 22.4 KG but less than 32 KG of Isosafrole;	
At least 280 G but less than 400 G of Methylamine;	
At least 35 KG but less than 50 KG of N-Methylephedrine;	
At least 35 KG but less than 50 KG of N-Methylpseudoephedrine;	
At least 879 G but less than 1.3 KG of Nitroethane;	
At least 14 KG but less than 20 KG of Norpseudoephedrine;	
At least 1.4 KG but less than 2 KG of Phenylacetic Acid;	
At least 700 G but less than 1 KG of Piperidine;	
At least 22.4 KG but less than 32 KG of Piperonal;	
At least 112 G but less than 160 G of Propionic Anhydride;	
At least 22.4 KG but less than 32 KG of Safrole;	
At least 28 KG but less than 40 KG of 3, 4-Methylenedioxyphenyl-2-propanone;	
List II Chemicals:	
At least 1.1 KG but less than 3.3 KG of Acetic Anhydride;	
At least 117.5 KG but less than 352.5 KG of Acetone;	
At least 2 KG but less than 6 KG of Benzyl Chloride;	
At least 107.5 KG but less than 322.5 KG of Ethyl Ether;	
At least 120 KG but less than 360 KG of Methyl Ethyl Ketone;	
At least 1 KG but less than 3 KG of Potassium Permanganate;	
At least 130 KG but less than 390 KG of Toluene.	

(D)(2) CHEMICAL QUANTITY TABLE *—Continued

[All other precursor chemicals]

Listed chemicals and quantity	Base offense level
(6) List I Chemicals:	Level 22.
At least 712 G but less than 1.2 KG of Benzaldehyde;	
At least 800 G but less than 1.4 KG of Benzyl Cyanide;	
At least 8 G but less than 14 G of Ergonovine;	
At least 16 G but less than 28 G of Ergotamine;	
At least 800 G but less than 1.4 KG of Ethylamine;	
At least 1.76 KG but less than 3.08 KG of Hydriodic Acid;	
At least 12.8 KG but less than 22.4 KG of Isosafrole;	
At least 160 G but less than 280 G of Methylamine;	
At least 20 KG but less than 35 KG of N-Methylephedrine;	
At least 20 KG but less than 35 KG of N-Methylpseudoephedrine;	
At least 503 G but less than 879 G of Nitroethane;	
At least 8 KG but less than 14 KG of Norpseudoephedrine;	
At least 800 G but less than 1.4 KG of Phenylacetic Acid;	
At least 400 G but less than 700 G of Piperidine;	
At least 12.8 KG but less than 22.4 KG of Piperonal;	
At least 64 G but less than 112 G of Propionic Anhydride;	
At least 12.8 KG but less than 22.4 KG of Safrole;	
At least 16 KG but less than 28 KG of 3, 4-Methylenedioxyphenyl-2-propanone;	
List II Chemicals:	
At least 726 G but less than 1.1 KG of Acetic Anhydride;	
At least 82.25 KG but less than 117.5 KG of Acetone;	
At least 1.4 KG but less than 2 KG of Benzyl Chloride;	
At least 75.25 KG but less than 107.5 KG of Ethyl Ether;	
At least 84 KG but less than 120 KG of Methyl Ethyl Ketone;	
At least 700 G but less than 1 KG of Potassium Permanganate;	
At least 91 KG but less than 130 KG of Toluene.	
(7) List I Chemicals:	Level 20.
At least 178 G but less than 712 G of Benzaldehyde;	
At least 200 G but less than 800 G of Benzyl Cyanide;	
At least 2 G but less than 8 G of Ergonovine;	
At least 4 G but less than 16 G of Ergotamine;	
At least 200 G but less than 800 G of Ethylamine;	
At least 440 G but less than 1.76 KG of Hydriodic Acid;	
At least 3.2 KG but less than 12.8 KG of Isosafrole;	
At least 40 G but less than 160 G of Methylamine;	
At least 5 KG but less than 20 KG of N-Methylephedrine;	
At least 5 KG but less than 20 KG of N-Methylpseudoephedrine;	
At least 126 G but less than 503 G of Nitroethane;	
At least 2 KG but less than 8 KG of Norpseudoephedrine;	
At least 200 G but less than 800 G of Phenylacetic Acid;	
At least 100 G but less than 400 G of Piperidine;	
At least 3.2 KG but less than 12.8 KG of Piperonal;	
At least 16 G but less than 64 G of Propionic Anhydride;	
At least 3.2 KG but less than 12.8 KG of Safrole;	
At least 4 KG but less than 16 KG of 3,4-Methylenedioxyphenyl-2-propanone;	
List II Chemicals:	
At least 440 G but less than 726 G of Acetic Anhydride;	
At least 47 KG but less than 82.25 KG of Acetone;	
At least 800 G but less than 1.4 KG of Benzyl Chloride;	
At least 43 KG but less than 75.25 KG of Ethyl Ether;	
At least 48 KG but less than 84 KG of Methyl Ethyl Ketone;	
At least 400 G but less than 700 G of Potassium Permanganate;	
At least 52 KG but less than 91 KG of Toluene.	
(8) List I Chemicals:	Level 18.
At least 142 G but less than 178 G of Benzaldehyde;	
At least 160 G but less than 200 G of Benzyl Cyanide;	
At least 1.6 G but less than 2 G of Ergonovine;	
At least 3.2 G but less than 4 G of Ergotamine;	
At least 160 G but less than 200 G of Ethylamine;	
At least 352 G but less than 440 G of Hydriodic Acid;	
At least 2.56 KG but less than 3.2 KG of Isosafrole;	
At least 32 G but less than 40 G of Methylamine;	
At least 4 KG but less than 5 KG of N-Methylephedrine;	
At least 4 KG but less than 5 KG of N-Methylpseudoephedrine;	
At least 100 G but less than 126 G of Nitroethane;	
At least 1.6 KG but less than 2 KG of Norpseudoephedrine;	
At least 160 G but less than 200 G of Phenylacetic Acid;	
At least 80 G but less than 100 G of Piperidine;	
At least 2.56 KG but less than 3.2 KG of Piperonal;	

(D)(2) CHEMICAL QUANTITY TABLE *—Continued

[All other precursor chemicals]

Listed chemicals and quantity	Base offense level
At least 12.8 G but less than 16 G of Propionic Anhydride;	
At least 2.56 KG but less than 3.2 KG of Safrole;	
At least 3.2 KG but less than 4 KG of 3,4-Methylenedioxyphenyl-2-propanone;	
List II Chemicals:	
At least 110 G but less than 440 G of Acetic Anhydride;	
At least 11.75 KG but less than 47 KG of Acetone;	
At least 200 G but less than 800 G of Benzyl Chloride;	
At least 10.75 KG but less than 43 KG of Ethyl Ether;	
At least 12 KG but less than 48 KG of Methyl Ethyl Ketone;	
At least 100 G but less than 400 G of Potassium Permanganate;	
At least 13 KG but less than 52 KG of Toluene.	
(9) List I Chemicals:	Level 16.
3.6 KG or more of Anthranilic Acid;	
At least 107 G but less than 142 G of Benzaldehyde;	
At least 120 G but less than 160 G of Benzyl Cyanide;	
At least 1.2 G but less than 1.6 G of Ergonovine;	
At least 2.4 G but less than 3.2 G of Ergotamine;	
At least 120 G but less than 160 G of Ethylamine;	
At least 264 G but less than 352 G of Hydriodic Acid;	
At least 1.92 KG but less than 2.56 KG of Isosafrole;	
At least 24 G but less than 32 G of Methylamine;	
4.8 KG or more of N-Acetylanthranilic Acid;	
At least 3 KG but less than 4 KG of N-Methylephedrine;	
At least 3 KG but less than 4 KG of N-Methylpseudoephedrine;	
At least 75 G but less than 100 G of Nitroethane;	
At least 1.2 KG but less than 1.6 KG of Norpseudoephedrine;	
At least 120 G but less than 160 G of Phenylacetic Acid;	
At least 60 G but less than 80 G of Piperidine;	
At least 1.92 KG but less than 2.56 KG of Piperonal;	
At least 9.6 G but less than 12.8 G of Propionic Anhydride;	
At least 1.92 KG but less than 2.56 KG of Safrole;	
At least 2.4 KG but less than 3.2 KG of 3,4-Methylenedioxyphenyl-2-propanone;	
List II Chemicals:	
At least 88 G but less than 110 G of Acetic Anhydride;	
At least 9.4 KG but less than 11.75 KG of Acetone;	
At least 160 G but less than 200 G of Benzyl Chloride;	
At least 8.6 KG but less than 10.75 KG of Ethyl Ether;	
At least 9.6 KG but less than 12 KG of Methyl Ethyl Ketone;	
At least 80 G but less than 100 G of Potassium Permanganate;	
At least 10.4 KG but less than 13 KG of Toluene.	
(10) List I Chemicals:	Level 14.
At least 2.7 KG but less than 3.6 KG of Anthranilic Acid;	
At least 71.2 G but less than 107 G of Benzaldehyde;	
At least 80 G but less than 120 G of Benzyl Cyanide;	
At least 800 MG but less than 1.2 G of Ergonovine;	
At least 1.6 G but less than 2.4 G of Ergotamine;	
At least 80 G but less than 120 G of Ethylamine;	
At least 176 G but less than 264 G of Hydriodic Acid;	
At least 1.44 KG but less than 1.92 KG of Isosafrole;	
At least 16 G but less than 24 G of Methylamine;	
At least 3.6 KG but less than 4.8 KG of N-Acetylanthranilic Acid;	
At least 2.25 KG but less than 3 KG of N-Methylephedrine;	
At least 2.25 KG but less than 3 KG of N-Methylpseudoephedrine;	
At least 56.25 G but less than 75 G of Nitroethane;	
At least 800 G but less than 1.2 KG of Norpseudoephedrine;	
At least 80 G but less than 120 G of Phenylacetic Acid;	
At least 40 G but less than 60 G of Piperidine;	
At least 1.44 KG but less than 1.92 KG of Piperonal;	
At least 7.2 G but less than 9.6 G of Propionic Anhydride;	
At least 1.44 KG but less than 1.92 KG of Safrole;	
At least 1.8 KG but less than 2.4 KG of 3, 4-Methylenedioxyphenyl-2-propanone;	
List II Chemicals:	
At least 66 G but less than 88 G of Acetic Anhydride;	
At least 7.05 KG but less than 9.4 KG of Acetone;	
At least 120 G but less than 160 G of Benzyl Chloride;	
At least 6.45 KG but less than 8.6 KG of Ethyl Ether;	
At least 7.2 KG but less than 9.6 KG of Methyl Ethyl Ketone;	
At least 60 G but less than 80 G of Potassium Permanganate;	
At least 7.8 KG but less than 10.4 KG of Toluene.	
(11) List I Chemicals:	

(D)(2) CHEMICAL QUANTITY TABLE *—Continued

[All other precursor chemicals]

Listed chemicals and quantity	Base offense level
Less than 2.7 KG of Anthranilic Acid;	
Less than 71.2 G of Benzaldehyde;	
Less than 80 G of Benzyl Cyanide;	
Less than 800 MG of Ergonovine;	
Less than 1.6 G of Ergotamine;	
Less than 80 G of Ethylamine;	
Less than 176 G of Hydriodic Acid;	
Less than 1.44 KG of Isosafrole;	
Less than 16 G of Methylamine;	
Less than 3.6 KG of N-Acetylanthranilic Acid;	
Less than 2.25 KG of N-Methylephedrine;	
Less than 2.25 KG of N-Methylpseudoephedrine;	
Less than 56.25 G of Nitroethane;	
Less than 800 G of Norpseudoephedrine;	
Less than 80 G of Phenylacetic Acid;	
Less than 40 G of Piperidine;	
Less than 1.44 KG of Piperonal;	
Less than 7.2 G of Propionic Anhydride;	
Less than 1.44 KG of Safrole;	
Less than 1.8 KG of 3, 4-Methylenedioxyphenyl-2-propanone;	
List II Chemicals:	
Less than 66 G of Acetic Anhydride;	
Less than 7.05 KG of Acetone;	
Less than 120 G of Benzyl Chloride;	
Less than 6.45 KG of Ethyl Ether;	
Less than 7.2 KG of Methyl Ethyl Ketone;	
Less than 60 G of Potassium Permanganate;	
Less than 7.8 KG of Toluene.	

***Notes:**

(A) Except as provided in subdivision (B), to calculate the base offense level in an offense that involves two or more chemicals, use the quantity of the single chemical that results in the greatest offense level, regardless of whether the chemicals are set forth in different tables or in different categories (*i.e.* list I or list II) under subsection (d) of this guideline.

(B) To calculate the base offense level in an offense that involves two or more chemicals set forth in the Ephedrine, Pseudoephedrine, and Phenylpropanolamine Quantity Table, (i) convert each chemical to its ephedrine equivalency using the table below; (ii) add the quantities that result from that equivalency; and (iii) use the Ephedrine, Pseudoephedrine, and Phenylpropanolamine Quantity Table to determine the base offense level.

Pseudoephedrine and Phenylpropanolamine Equivalency Table

1 gm of Pseudoephedrine=1 gm of Ephedrine

1 gm of Phenylpropanolamine=1 gm of Ephedrine

(C) In a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.''.

The Commentary to § 2D1.11 captioned ''Application Notes'' is amended by striking the text of Note 4 in its entirety and inserting the following:

''(A) Determining the Base Offense Level for Two or More Chemicals.—Except as provided in subdivision B, if the offense involves two or more chemicals, use the quantity of the single chemical that results in the greatest offense level, regardless of whether the chemicals are set forth in different tables or in different categories (*i.e.,* list I or list II) under subsection (d) of this guideline.

Example: The defendant was in possession of five kilograms of ephedrine and 300 grams of hydriodic acid. Ephedrine and hydriodic acid typically are used together in the same manufacturing process to manufacture methamphetamine. The base offense level for each chemical is calculated separately and the chemical with the higher base offense level is used. Five kilograms of ephedrine result in a base offense level of level 38; 300 grams of hydriodic acid result in a base offense level of 16. In this case, the base offense level would be level 38.

(B) Determining the Base Offense Level for Offenses Involving Ephedrine, Pseudoephedrine, or Phenylpropanolamine.—If the offense involves two or more chemicals set forth in the Ephedrine, Pseudoephedrine, and Phenylpropanolamine Quantity Table, (i) convert each chemical to its ephedrine equivalency; (ii) add the quantities that result from that equivalency; and (iii) use the Ephedrine, Pseudoephedrine, and Phenylpropanolamine Quantity Table to determine the base offense level.

Example: The defendant was in possession of 80 grams of ephedrine and 50 grams of phenylpropanolamine. The 50 grams of phenylpropanolamine converts to 50 grams of ephedrine, which when added to the quantity of ephedrine, results in a total of 130 grams of ephedrine. In this case, the base offense level would be level 32.

(C) Upward Departure.—In a case involving two or more chemicals used to manufacture different controlled substances, or to manufacture one controlled substance by different manufacturing processes, an upward departure may be warranted if the offense level does not adequately address the seriousness of the offense.''.

The Commentary to § 2D1.11 captioned ''Application Notes'' is amended by striking Notes 5 and 6 in their entirety; and by redesignating Notes 7 and 8 as Notes 5 and 6, respectively.

The Commentary to § 2D1.11 captioned ''Background'' is amended in the first sentence by inserting

''(including ephedrine, pseudoephedrine, and phenylpropanolamine)'' after ''list I chemicals''.

The Commentary to 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the ''Drug Equivalency Tables'' by inserting after the subdivision captioned ''Schedule V Substances'' the following new subdivision:

List I Chemicals (Relating to the Manufacture of Amphetamine or Methamphetamine) * * *

1 gm of Ephedrine=10 kg of marihuana
1 gm of Phenylpropanolamine=10 kg of marihuana
1 gm of Pseudoephedrine=10 kg of marihuana

* * * Provided, that in a case involving ephedrine, pseudoephedrine, or phenylpropanolamine tablets, use the weight of the ephedrine, pseudoephedrine, or phenylpropanolamine contained in the tablets, not the weight of the entire tablets, in calculating the base offense level.''.

Issues for Comment

(1) Currently, there is a six level difference between the base offense levels in the Drug Quantity Table of § 2D1.1 and the Chemical Quantity Table in § 2D1.11. (The original relationship between controlled substances in § 2D1.1 and list I chemicals in § 2D1.11 presumed a 50 percent yield of controlled substances from each chemical and then reduced the entire table in § 2D1.11 by eight levels. The eight level distinction was later reduced to six levels as a result of a congressional directive.) This six level difference effectively creates a distinction between offenses involving possession of precursor chemicals with intent to manufacture a controlled substance and offenses involving an actual attempt to manufacture a controlled substance. However, the proposed amendment essentially will eliminate this distinction for cases involving ephedrine, pseudoephedrine, and phenylpropanolamine by (1) Eliminating that six-level difference in offense level from the § 2D1.1 offense level that corresponds to the amount of controlled substance that could be manufactured from a given quantity of precursor chemical (assuming a 50% yield); and (2) setting the maximum base offense level at level 38, the maximum base offense level provided for the manufacture of methamphetamine in § 2D1.1. The Commission invites comment regarding whether the maximum base offense level for the proposed Ephedrine, Pseudoephedrine, Phenylpropanolamine Table in § 2D1.11 should be lower than level 38. A lower maximum base offense level would maintain a distinction between offenses involving possession of precursor chemicals with intent to manufacture methamphetamine and offenses involving an actual attempt to manufacture methamphetamine.

(2) In response to the congressional directive to increase penalties for offenses involving List I chemicals other than ephedrine, PPA, and pseudoephedrine, the Commission invites comment regarding whether, in addition to or instead of the proposed amendment, the penalty structure in § 2D1.11 should be changed to increase penalties for Benzaldehyde, Hydriodic Acid, Methylamine, Nitroethane, and Norpseudoephedrine at each quantity level in the Chemical Quantity Table, and if so, by how much.

Proposed Amendment: Human Trafficking

4. *Synopsis of Proposed Amendment:* This amendment implements the directive found at section 112(b) of the Victims of Trafficking and Violence Protection Act of 2000 (the ''Act''), Pub. L. 106–386.

The directive confers emergency authority on the Commission to amend the federal sentencing guidelines to reflect changes to 18 U.S.C. 1581(a) (Peonage), 1583 (Enticement into Slavery), and 1584 (Sale into Involuntary Servitude). The Commission is also directed to consider how to address four new statutes: 18 U.S.C. 1589 (Forced Labor); 18 U.S.C. 1590 (Trafficking with Respect to Peonage, Involuntary Servitude or Forced Labor); 18 U.S.C. 1591 (Sex Trafficking of Children by Force, Fraud or Coercion); and 18 U.S.C. § 1592 (Unlawful Conduct with Respect to Documents in Furtherance of Peonage, Involuntary Servitude or Forced Labor).

Specifically, the Commission is directed to ''review and, if appropriate, amend the sentencing guidelines applicable to * * * the trafficking of persons including * * * peonage, involuntary servitude, slave trade offenses, and possession, transfer or sale of false immigration documents in furtherance of trafficking, and the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act.''

The Commission is directed to ''take all appropriate measures to ensure that these sentencing guidelines * * * are sufficiently stringent to deter and adequately reflect the heinous nature of these offenses.'' The Commission is also directed to ''consider providing sentencing enhancements'' in cases which involve: (A) a large number of victims; (B) a pattern of continued and flagrant violations; (C) the use or threatened use of a dangerous weapon; or (D) the death or bodily injury of any person.

To address this multi-faceted directive, this proposed amendment makes changes to several existing guidelines and creates a new guideline for criminal violations of the Migrant and Seasonal Agricultural Worker Protection Act. Although the directive instructs the Commission to amend the guidelines applicable to the Fair Labor Standards Act (29 U.S.C. 201 et. seq.), a criminal violation of the Act is only a Class B misdemeanor. *See* 29 U.S.C. 216. Thus, the guidelines are not applicable to those offenses.

The proposed amendment references the new offense at 18 U.S.C. 1591 to § 2G1.1 (Promoting Prostitution or Prohibited Sexual Conduct). Section 1591 punishes a defendant who participates in the transporting or harboring of a person, or who benefits from participating in such a venture, with the knowledge that force, fraud or coercion will be used to cause that person to engage in a commercial sex act or with knowledge that the person is not 18 years old and will be forced to engage in a commercial sex act. Despite the statute's inclusion in a chapter of title 18 devoted mainly to peonage offenses, section 1591 offenses are analogous to the offenses referenced to the prostitution guideline.

Section 2G1.1(b)(2) is proposed to be amended to include a [6][9] level increase for victimization of children who have not attained the age of 12 years, a [4][6] level increase for victimization of children who have not attained the age of 14 years, and a [2][3] level increase for children who have not attained the age of 16 years. This change increases by [2][5] levels the punishment for victimization of a child under 12 years of age and creates an additional category of victims—children between the ages of 12 and 14 years. These changes were proposed in recognition of Congress's distinction in section 1591 between offenses involving minors under 14 years of age (statutory cap of ''any term of years or life'') and offenses involving minors between 14 and 18 years of age (statutory cap of ''not more than 20 years''). This change conforms the guidelines to the penalties of section 1591.

The special instruction at § 2G1.1(d)(2) has been added to ensure that attempts to violate section 1591 are

not to be referred to § 2X1.1 (Attempt, Solicitation, or Conspiracy). This change implements Congress's direction in 18 U.S.C. 1594 that ''whoever attempts to violate section * * * 1591 shall be punishable in the same manner as a completed violation of that section.''

An additional application note—Application Note 12—has been added to § 2G1.1 to provide an encouraged upward departure when an offense ''involved substantially more than [6][10][25] victims.'' This encouraged upward departure was added in response to Congress's directive that the Commission consider enhanced sentencing in cases which involve ''a large number of victims.'' A departure note is provided, rather than an enhancement, because of the current special grouping rule in § 2G1.1(d)(1) regarding multiple victims that requires that counts involving different victims not be grouped.

Section 1591 cases have been alternatively referred in Appendix A to § 2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material). This has been done in anticipation that some portion of section 1591 cases will involve children being forced or coerced to engage in commercial sex acts for the purpose of producing pornography. Such offenses, as recognized by the higher base offense level at § 2G2.1, are more serious because they both involve specific harm to an individual victim and further an additional criminal purpose, commercial pornography. In the interest of consistency and proportionality, the same changes have been made to § 2G2.1 as those discussed above for § 2G1.1.

The proposed amendment conforms to the view that § 2H4.1 (Peonage, Involuntary Servitude, and Slave Trade) continues to be an appropriate tool for determining sentences for violations of 18 U.S.C. 1581, 1583, and 1584 . Section 2H4.1 is also designed to cover offenses under three new statutes, 18 U.S.C. 1589, 1590, and 1592. Section 1589 punishes defendants who provide or obtain the labor services of another by the use of threats of serious harm or physical restraint against a person, or by a scheme or plan intended to make the person believe that if he or she did not perform the labor or services, he or she would suffer physical restraint or serious harm. This statute also applies to defendants who provide or obtain labor services of another by abusing or threatening abuse of the law or the legal process. *See* 18 U.S.C. 1589. Section 1590 punishes defendants who harbor, transport, or are otherwise involved in obtaining, a person for labor or services. Section 1592 punishes a defendant who knowingly possesses, destroys, or removes an actual passport, other immigration document, or government identification document of another person in the course of a violation of §§ 1581 (peonage), 1583 (enticement into slavery), 1584 (sale into involuntary servitude), 1589 (forced labor), 1590 (trafficking with respect to these offenses), 1591 (sex trafficking of children by force, fraud or coercion), or 1594(a) (attempts to violate these offenses). Section 1592 also punishes a defendant who, with intent to violate § 1581, § 1583, § 1584, § 1589, § 1590, or § 1591, knowingly possesses, destroys, or removes an actual passport, other immigration document, or government identification document of another person. These statutes prohibit the types of behaviors which have been traditionally sentenced under § 2H4.1.

The proposed amendment provides an alternative, less punitive base offense level for those who violate 18 U.S.C. 1592, an offense which limits participation in peonage cases to the destruction or wrongful confiscation of a passport or other immigration document. This alternative, lower base level reflects the lower statutory maximum sentence set for section 1592 offenses (*i.e.,* 5 years). The amendment proposes level [15] as the appropriate level because similar offenses involving documents are punishable at level 15 under § 2L2.1 (Trafficking in a Document Relating to Naturalization, Citizenship or Legal Resident Status or a United States Passport). However, the proposed amendment also includes an additional, bracketed base offense level of [18].

Section 2H4.1(b)(2) has been expanded to provide a 2-level increase if a dangerous weapon was brandished or its use was threatened, with an increase to 4 levels for actual use. Currently, only actual use of a dangerous weapon is covered. This change reflects Congress's directive to consider an enhancement for the ''use or threatened use of a dangerous weapon.''

The proposed amendment adds an enhancement at § 2H4.1(b)(3), for offenses involving more than [6][10][25] victims. This change reflects Congress's directive to consider an enhancement for cases ''involving a large number of victims.'' Also, § 2H4.1, Application Note 3, which formerly provided an encouraged upward departure for offenses involving more than 10 victims, has been altered to encourage departure ''if the offense involved substantially more than [6][10][25] victims.''

The proposed amendment also adds § 2H4.1 to the list of guidelines in § 2X1.1 that expressly cover attempts and conspiracies. This change implements Congress's direction in 18 U.S.C. 1594 that ''whoever attempts to violate § 1581, § 1583, § 1584, § 1589, § 1590, or § 1591 shall be punishable in the same manner as a completed violation of that section.'' With the exception of section 1591, all the specified statutes are referenced to § 2H4.1. Conforming amendments are made to the title of § 2H4.1.

The proposed amendment creates a new guideline, § 2H4.2 (Willful Violations of the Migrant and Seasonal Agricultural Worker Protection Act), in response to Congress's directive to amend the guidelines applicable to such offenses. These offenses, which have a statutory maximum sentence of one year imprisonment for first offenses and three years imprisonment for subsequent offenses, currently are not referred to any specific guideline. The Department of Justice and Department of Labor both recommend creation of a discrete guideline for these offenses. The proposed base offense level (level [4][6]) has been proposed in recognition of the small statutory maximum sentences set for these cases by Congress. Similarly, § 2H4.2(b)(1), an enhancement for bodily injury, and § 2H4.2(b)(2), an enhancement for offenders who commit their offenses after previously sustaining a civil penalty for similar misconduct, have been established to respond to Congress's directive that the Commission consider sentencing enhancement for these offense characteristics. This section addresses the Department of Justice's and the Department of Labor's concern regarding prior administrative and civil adjudications.

This proposed amendment also addresses that portion of section 112 of the Act that amends chapter 77 of title 18, United States Code, to provide mandatory restitution for peonage and involuntary servitude offenses. The proposed amendment amends § 5E1.1 (Restitution) to include a reference to 18 U.S.C. 1593 in the guideline provision regarding mandatory restitution.

Proposed Amendment

Section 2G1.1 is amended by striking subsection (b)(2) in its entirety and inserting the following:

''[(2) If the offense involved a victim who had (A) not attained the age of 12 years, increase by [6][9] levels; (B) attained the age of 12 years but not attained the age of 14 years, increase by [4][6] levels; or (C) attained the age of 14

years but had not attained the age of 16 years, increase by [2][3] levels.]''.

Section 2G1.1(d) is amended by adding at the end the following:

''(2) If the defendant was convicted of an attempt to commit an offense under 18 U.S.C. 1591, do not apply § 2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)).''.

The Commentary to § 2G1.1 captioned ''Statutory Provisions'' is amended by inserting ''1591,'' before ''2421''.

The Commentary to § 2G1.1 captioned ''Application Notes'' is amended in Note 2 in the fourth sentence by adding ''(B)'' after ''purposes of subsection (b)(1).''.

The Commentary to § 2G1.1 captioned ''Application Notes'' is amended by adding at the end the following:

''[12.Upward Departure.—If the offense involved substantially more than [6][10][25] victims, an upward departure may be warranted.]''.

The Commentary to § 2G1.1 captioned ''Background'' is amended by adding at the end the following paragraph:

''This guideline also covers offenses under section 1591 of title 18, United States Code. These offenses involve recruiting or transporting a person in interstate commerce knowing either that (A) force, fraud, or coercion will be used to cause the person to engage in a commercial sex act; or (B) the person (i) had not attained the age of 18 years; and (ii) will be caused to engage in a commercial sex act.''.

Section 2G2.1 is amended by striking subsection (b)(1) in its entirety and inserting the following:

''[(1) If the offense involved a victim who had (A) not attained the age of 12 years, increase by [6][9] levels; (B) attained the age of 12 years but not attained the age of 14 years, increase by [4][6] levels; or (C) attained the age of 14 years but had not attained the age of 16 years, increase by [2][3] levels.]''.

Section 2G2.1(c) is amended by adding at the end the following:

''(2) If the defendant was convicted of an attempt to commit an offense under 18 U.S.C. 1591, do not apply § 2X1.1 (Attempt, Solicitation, or Conspiracy (Not Covered by a Specific Offense Guideline)).''.

The Commentary to § 2G2.1 captioned ''Statutory Provisions'' is amended by inserting ''1591,'' before ''2251(a)''.

The Commentary to § 2G2.1 captioned ''Application Notes'' is amended by adding at the end the following:

''[6. Upward Departure.—If the offense involved substantially more than [6][10][25] victims, an upward departure may be warranted.]''.

Section 2H4.1 is amended in the title by adding ''; Attempt or Conspiracy'' after ''Trade''.

Section 2H4.1(a) is amended by striking ''22'' and inserting the following:

''(1) 22; or

(2) [15][18], if the defendant was convicted only of an offense under 18 U.S.C. 1592.''.

Section 2H4.1(b) is amended by striking subdivision (2) in its entirety and inserting the following:

''[(2) If (i) a dangerous weapon was used, increase by 4 levels; or (ii) a dangerous weapon was brandished or its use was threatened, increase by 2 levels.]''.

Section 2H4.1(b) is amended by redesignating subdivisions (3) and (4) as subdivisions (4) and (5), respectively, and inserting after subdivision (2) the following:

''[(3) If the offense involved more than [6][10][25] victims, increase by [2][4] levels.]''.

The Commentary to § 2H4.1 captioned ''Statutory Provisions'' is amended by striking ''1588'' and inserting ''1590, 1592''.

The Commentary to § 2H4.1 captioned ''Application Notes'' is amended by striking the text of Note 3 in its entirety and inserting the following:

''Upward Departure.'' If the offense involved substantially more than [6][10][25] victims, an upward departure may be warranted.''.

The Commentary to § 2X1.1 captioned ''Application Notes'' is amended in Note 1 in the second paragraph by inserting after ''2E5.1;'' the following new lines:

''§ 2G1.1 (if the defendant was convicted of an attempt to commit an offense under 18 U.S.C. 1591 (*See* 18 U.S.C. 1594(a));

§ 2H4.1;''.

The Commentary to § 2X1.1 captioned ''Application Notes'' is amended in Note 1 in the third paragraph by inserting ''2H4.1'' after ''2H1.1''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to ''18 U.S.C. 1588'' the following new lines:

''18 U.S.C. 1589 2H4.1
18 U.S.C. 1590 2H4.1
18 U.S.C. 1591 2G1.1, 2G2.1
18 U.S.C. 1592 2H4.1''.

Chapter Two, Part H, is amended in Subpart 4 by adding at the end the following:

''§ 2H4.2. Willful Violations of the Migrant and Seasonal Agricultural Worker Protection Act

(a) Base Offense Level: [4][6].

(b) Specific Offense Characteristics.

(1) If the offense involved (i) serious bodily injury, increase by [4] levels; or (ii) bodily injury, increase by [2] levels.

(2) If the defendant committed any part of the instant offense subsequent to sustaining a civil or administrative adjudication for similar misconduct, increase by [2] levels.

Commentary

Statutory Provision: 29 U.S.C. 1851

Application Notes:

1. Definitions.—For purposes of subsection (b)(1), ''bodily injury'' and ''serious bodily injury'' have the meaning given those terms in Application Note 1 of the Commentary to § 1B1.1 (Application Instructions).

2. Application of Subsection (b)(2).—Section 1851 of title 29, United States Code, covers a wide range of conduct. Accordingly, the enhancement in subsection (b)(2) applies only if the instant offense is similar to previous misconduct that resulted in a civil or administrative adjudication under the provisions of the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1801 *et seq.*).''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to ''29 U.S.C. 1141'' the following:

''29 U.S.C. 1851 2H4.2''.

Section 5E1.1(a)(1) is amended by inserting ''§ 1593,'' after ''18 U.S.C.''.

The Commentary to § 5E1.1 captioned ''Background'' is amended in the first paragraph by inserting ''1593,'' after ''18 U.S.C. §§ ''.

Part (B): Proposed Non-Emergency Amendments

Proposed Amendment: Sexual Predators

5. *Synopsis of Proposed Amendment:* This is a three-part amendment that includes:

(A) Amendments to implement the ''pattern of activity'' directive in the Protection of Children from Sexual Predators Act of 1998, Pub. L. 105–314 (the ''Act''), and related amendments.

(B) Amendments related to grouping certain child pornography counts of conviction.

(C) Amendments to implement the directive in the Act to provide an enhancement for transportation offenses under chapter 117 of title 18, United States Code, and other related amendments.

Part (A): Enhancement for Pattern of Activity

Synopsis: Part A proposes several options, including a possible combination of approaches to satisfy the

Congressional directive in the Act that requires the Commission to increase the penalties in any case in which the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor. There are many types of conduct that may indicate that a defendant is a high risk sex offender engaging in a pattern of prohibited sexual conduct. Each of these components considers various aspects of sex offenders and the types of activity involved in a pattern of behavior. There are four options presented by this amendment that could be used either in combination or alone to implement the directive. In addition to these four options, the proposal amends the guideline covering terms of supervised release, § 5D1.2, to provide that the term of supervised release for a defendant convicted of a sex crime shall be the maximum term authorized by statute.

The first option would create a new Chapter Four guideline, § 4B1.5, that aims to incapacitate high risk sex offenders who have an instant offense of conviction of sexual abuse and a prior felony conviction for sexual abuse. Two options are contained within this option. Option 1A sanctions defendants whose instant offense of conviction and prior conviction involve prohibited sexual conduct. In contrast to option 1B, option 1A increases the defendant's criminal history to not less than category IV or V, as opposed to criminal history category VI. Option 1A also includes a wider range of offenses involving prohibited sexual conduct. Under Option 1A, chapter 109A offenses are bracketed for either (1) possible exclusion from the scope of instant offenses of conviction that would trigger the guideline, or (2) limiting those offenses to those that are perpetrated against a minor. Excluding chapter 109A offenses focuses application of the guideline to those defendants who use the internet or other interstate means to prey on minors.

Option 1B tracks legislation from the 106th Congress that proposed a mandatory minimum life sentence for defendants whose instant offense of conviction and prior conviction involved direct sexual contact. This option provides for sentences at or near the statutory maximum for these types of defendants.

The second option would create a Chapter Four guideline, § 4B1.6, that provides a five-level increase (and a minimum offense level of level 32) for defendants who engage in a pattern of activity involving prohibited sexual conduct. This guideline requires that (1) the defendant's instant offense of conviction is a sex crime; and (2) the defendant previously has engaged in two or more instances of prohibited sexual conduct, whether or not that conduct resulted in a conviction.

The third option would provide a Chapter Two specific offense characteristic in the sexual abuse guidelines. This specific offense characteristic mirrors the current pattern of activity adjustment in § 2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor). A defendant who abuses or exploits a minor on two or more occasions will receive a two-level increase in offense level pursuant to this enhancement.

The fourth option provides language encouraging an upward departure for a defendant who commits repeated acts of sexual abuse of the same minor. This component would allow courts to sanction a defendant for a pattern of multiple acts of abuse of the same victim over a period of time.

Proposed Amendment

(1) Option 1: Chapter Four, Part B, is amended by adding at the end the following:

''§ 4B1.5. Repeat and Dangerous Sex Offender

(a) A defendant is a repeat and dangerous sex offender if—

(1) The instant offense of conviction is a sex crime; and

(2) The defendant committed the instant offense of conviction subsequent to sustaining at least one sex offense conviction.

(b) If (1) a repeat and dangerous sex offender is not a career offender pursuant to § 4B1.1 (Career Offender); and (2) the offense level for that repeat and dangerous sex offender from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply.

Offense statutory maximum	Offense level
(A) Life	[37]
(B) 25 years or more	[34]
(C) 20 years or more, but less than 25 years	[32]
(D) 15 years or more, but less than 20 years	[29]
(E) 10 years or more, but less than 15 years	[24]
(F) 5 years or more, but less than 10 years	[17]
(G) More than 1 year, but less than 5 years	[12]

(c) If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the applicable offense level in subsection (b) by the number of levels corresponding to that adjustment.

(d) A repeat and dangerous sex offender's criminal history category in every case shall be [Option 1A: not less than Category [IV][V]] [Option 1B: Category VI].

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline:

'Offense Statutory Maximum' means the maximum term of imprisonment authorized for the instant offense of conviction that is a sex crime, including any increase in that maximum term under a sentencing enhancement provision that applies to that sex crime because of the defendant's prior criminal record (such as the sentencing enhancement provisions contained in 18 U.S.C. §§ 2247(a) and 2426(a)).

[Option 1A:

'Sex offense conviction' has the meaning given that term in 18 U.S.C. § 2426, but such term does not include trafficking in, receipt of, or possession of, child pornography.

2. Requirement of Sex Crime as Instant Offense of Conviction.—For purposes of subsection (a)(1), the instant offense of conviction must be an instant offense of conviction under [chapter 109A,] [chapter 109A perpetrated against a minor,] chapter 110 (not including trafficking in, receipt of, or possession of, child pornography, or recordkeeping offenses), or chapter 117 (not including transmitting information about a minor or filing a factual statement about alien individual), of title 18, United States Code, or an attempt or a conspiracy to commit such an offense.]

[Option 1B:

'Sex offense conviction' means a prior conviction for (A) any sex crime referred to in Application Note 2; or (B) any offense under State law consisting of conduct that would have been such a sex crime if the conduct had occurred within the special maritime and territorial jurisdiction of the United States. The term ''State'' has the meaning given that term in 18 U.S.C. § 2426(b)(2).

2. Requirement of Sex Crime as Instant Offense of Conviction.—For purposes of subsection (a)(1), the instant offense of conviction must be an instant offense of conviction under 18 U.S.C. § 2241, § 2242, § 2243, § 2244, § 2245, § 2251A, or § 2423, including an attempt or conspiracy to commit such an offense.]

3. Determination of Prior Sex Offense Convictions Under Subsection (a)(2).—For purposes of subsection (a)(2), the date that a defendant sustained a conviction shall be the date that the

guilt of the defendant was established, whether by guilty plea, trial or plea of nolo contendere.

4. Determination of Offense Statutory Maximum in the Case of Multiple Counts of Conviction.—In a case in which more than one count of the instant offense of conviction is a felony that is a sex crime, the court shall use the maximum authorized term of imprisonment for the count that has the greatest offense statutory maximum, for purposes of determining the offense statutory maximum under subsection (b).

[5. Departure Provision.—There may be cases in which reliable information indicates that the guideline sentence resulting from application of this guideline either understates or overstates the likelihood that the defendant will commit another sexual offense, or the seriousness of the defendant's criminal history. In such cases, an upward or a downward departure, respectively, may be warranted. Such reliable information may include, for example, risk assessments and other expert testimony regarding the likelihood of recidivism.]''.

(2) Option 2:

Chapter Four, Part B, [as amended by this amendment,] is amended by adding at the end the following:

''§ 4B1.6 Sexual Predator

If—

(a) the defendant is not a career offender pursuant to § 4B1.1 (Career Offender) and is not a repeat and dangerous sex offender pursuant to § 4B1.5 (Repeat and Dangerous Sex Offender); and

(b)(1) the instant offense of conviction is a sex offense that the defendant committed as part of a pattern of activity involving prohibited sexual conduct [with a minor]; [[and][or] (2) the instant offense of conviction is a sex offense and the defendant is a sexual predator], increase by [5] levels; but if the resulting offense level is less than [32][30], increase to level [32][30].

Commentary

Application Notes:

1. Definitions.—For purposes of this guideline:

'Sex offense' means an offense under [chapter 109A,] [chapter 109A perpetrated against a minor,] chapter 110 (not including trafficking, receipt, or possession of, child pornography), or chapter 117 of title 18, United States Code, or an attempt or a conspiracy to commit any such offense.

'Pattern of activity' means any combination of two or more prior separate instances of prohibited sexual conduct by the defendant with a minor victim other than a minor victim of the instant offense of conviction, whether or not the conduct resulted in a conviction for such conduct.

'Prohibited sexual conduct' (A) means any sexual activity for which a person can be charged with a criminal offense; (B) includes the production of child pornography; (C) includes trafficking in child pornography if the defendant has a prior felony conviction for trafficking in child pornography; and (D) does not include possession of child pornography. 'Child pornography' has the meaning given that term in 18 U.S.C. 2256(8).

[2. Sexual Predator Determination.—For purposes of this guideline, the defendant is a sexual predator if the court determines, under the totality of the circumstances, that the defendant is likely to continue to engage in prohibited sexual conduct with minors in the future. [In making this determination, the court may rely on information such as expert psychosexual evaluations and other reliable evidence.]]

Background: This guideline is intended to provide lengthy incarceration for offenders who present a continuing danger to the public. It applies to any offender whose instant offense of conviction is a sex offense, regardless of the specific sex offense of conviction or Chapter Two guideline under which the offender is sentenced. The relevant criminal provisions provide for increased statutory maximum penalties for repeat sex offenders and make those increased statutory maximum penalties available if the defendant was convicted of any of several federal and state sex offenses (see 18 U.S.C. 2247, 2426). In addition, section 632 of Pub. L. 102–141 and section 505 of Pub. L. 105–314 directed the Commission to ensure lengthy incarceration for offenders who engage in a pattern of activity involving the sexual abuse or exploitation of minors.

[The guideline is intended to target those dangerous offenders for whom future sex offending is likely. Research has shown that recidivism rates vary depending on characteristics of the offender that may be determined at the time of sentencing, such as a proven sexual preference for minors or other psychopathy. Psychosexual evaluations by certified professionals using empirically-validated risk assessment instruments may be useful to identify those offenders who are most likely to reoffend.]

The statutory maximum term of supervised release is recommended for offenders sentenced under this guideline. In addition, treatment and monitoring are important tools for supervising offenders and should be considered as special conditions of the term of supervised release that is imposed.]''.

(3) Option Three: Section 2A3.1(b) is amended by adding at the end the following:

''(7) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by [2] levels.''.

The Commentary to § 2A3.1 captioned ''Application Notes'' is amended by adding at the end the following:

''8. Pattern of Activity Enhancement.—

'Pattern of activity involving the sexual abuse or exploitation of a minor' means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same or different victims; or (C) resulted in a conviction for such conduct.

'Sexual abuse or exploitation' means conduct constituting criminal sexual abuse of a minor, sexual exploitation of a minor (including trafficking in material relating to the sexual abuse or exploitation of a minor), abusive sexual contact of a minor, any similar offense under state law, any offense involving the promotion or enticement of minors to engage in sexual activity, or an attempt or a conspiracy to commit any of the above offenses.

If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(7) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(7) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved or the likelihood of recidivism.

Prior convictions taken into account under subsection (b)(7) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).''.

Section 2A3.2(b) is amended by adding at the end the following:

''(5) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by [2] levels.''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended by adding at the end the following:

''9. Pattern of Activity Enhancement.—

'Pattern of activity involving the sexual abuse or exploitation of a minor' means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same or different victims; or (C) resulted in a conviction for such conduct.

'Sexual abuse or exploitation' means conduct constituting criminal sexual abuse of a minor, sexual exploitation of a minor (including trafficking in material relating to the sexual abuse or exploitation of a minor), abusive sexual contact of a minor, any similar offense under state law, any offense involving the promotion or enticement of minors to engage in sexual activity, or an attempt or a conspiracy to commit any of the above offenses.

If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(5) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(5) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved or the likelihood of recidivism.

Prior convictions taken into account under subsection (b)(5) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).''.

Section 2A3.3(b) is amended by adding at the end the following:

''(3) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by [2] levels.''.

The Commentary to § 2A3.3 captioned ''Application Notes'' is amended by adding at the end the following:

''5. Pattern of Activity Enhancement.—

'Pattern of activity involving the sexual abuse or exploitation of a minor' means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same or different victims; or (C) resulted in a conviction for such conduct.

'Sexual abuse or exploitation' means conduct constituting criminal sexual abuse of a minor, sexual exploitation of a minor (including trafficking in material relating to the sexual abuse or exploitation of a minor), abusive sexual contact of a minor, any similar offense under state law, any offense involving the promotion or enticement of minors to engage in sexual activity, or an attempt or a conspiracy to commit any of the above offenses.

If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(3) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(3) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved or the likelihood of recidivism.

Prior convictions taken into account under subsection (b)(3) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).''.

Section 2A3.4(b) is amended by adding at the end the following:

''(6) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by [2] levels.''.

The Commentary to § 2A3.4 captioned ''Application Notes'' is amended by adding at the end the following:

''9. Pattern of Activity Enhancement.—

'Pattern of activity involving the sexual abuse or exploitation of a minor' means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same or different victims; or (C) resulted in a conviction for such conduct.

'Sexual abuse or exploitation' means conduct constituting criminal sexual abuse of a minor, sexual exploitation of a minor (including trafficking in material relating to the sexual abuse or exploitation of a minor), abusive sexual contact of a minor, any similar offense under state law, any offense involving the promotion or enticement of minors to engage in sexual activity, or an attempt or a conspiracy to commit any of the above offenses.

If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(6) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(6) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved or the likelihood of recidivism.

Prior convictions taken into account under subsection (b)(6) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).''.

(4) Option Four: The Commentary to § 2A3.1 captioned ''Application Notes'' is amended by adding at the end the following:

''8. Upward Departure Provision.—If the defendant committed repeated acts of sexual abuse of the same minor over a period of time and the court determines that the guideline has not adequately taken these repeated acts into account, an upward departure may be warranted.''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended by adding at the end the following:

''9. Upward Departure Provision.—If the defendant committed repeated acts of sexual abuse of the same minor over a period of time and the court determines that the guideline has not adequately taken these repeated acts into account, an upward departure may be warranted.''.

The Commentary to § 2A3.3 captioned ''Application Notes'' is amended by adding at the end the following:

''5. Upward Departure Provision.—If the defendant committed repeated acts of sexual abuse of the same minor over a period of time and the court determines that the guideline has not adequately taken these repeated acts into account, an upward departure may be warranted.''.

The Commentary to § 2A3.4 captioned ''Application Notes'' is amended by adding at the end the following:

''9. Upward Departure Provision.—If the defendant committed repeated acts of sexual abuse of the same minor over a period of time and the court determines that the guideline has not adequately taken these repeated acts into account, an upward departure may be warranted.''.

(5) Conforming Amendments: The Commentary to § 2A3.1 captioned ''Application Notes'' is amended by striking Notes 5 and 7 in their entirety; and by redesignating Note 6 as Note 5.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended by striking Note 8.

The Commentary to § 2A3.3 captioned ''Application Notes'' is amended by striking Note 4.

The Commentary to § 2A3.4 captioned ''Application Notes'' is amended by striking Note 8.

(6) Supervised Release Provision: Section 5D1.2 is amended by striking subsection (b) in its entirety and inserting the following:

''(b) Except as otherwise provided—

(1) The term of supervised release imposed shall be not less than any statutorily required term of supervised release; and

(2) If the instant offense of conviction is a sex offense, the term of supervised release shall be the maximum term of supervised release authorized by statute.''.

The Commentary to § 5D1.2 captioned ''Application Notes'' is amended in Note 1 by inserting ''Safety Valve Cases.—'' before ''A defendant who qualifies''; in Note 2 by inserting ''Supervised Release Cases.—'' before ''Upon motion of the Government''; by redesignating Notes 1 and 2 as Notes 2 and 3, respectively; and by inserting before Note 2, as redesignated by this amendment, the following:

''1. Definition.—For purposes of this guideline, the term 'sex offense' means an offense under [chapter 109A,] [chapter 109A perpetrated against a minor,] chapter 110 (not including trafficking, receipt, or possession of, child pornography), or chapter 117 of title 18, United States Code, or an attempt or a conspiracy to commit any such offense.''.

Issue for Comment: Option Two proposes a new guideline at § 4B1.6 that would provide a five-level increase and a minimum offense level of level [32] if the defendant is a sexual predator. As highlighted by the bracketed language ''[and][or]'' in § 4B1.6(b)(2), the Commission invites comment regarding whether the court must find both that the defendant is a sexual predator and that the defendant engaged in a pattern of activity involving sexual abuse or exploitation, or whether a finding of one of these factors would be sufficient in order for the five-level increase to apply.

Part (B): Grouping

Synopsis: Part B of the proposed amendment resolves a circuit conflict regarding who the ''victim'' is in child pornography cases for purposes of grouping of multiple counts. The amendment proposes two options for resolving the circuit conflict on the grouping of multiple counts of child pornography trafficking, receipt, and possession. Option One would allow grouping of child pornography trafficking and possession counts pursuant to § 3D1.2(d). This grouping provision does not require a determination of whether counts involve the same victim in order to calculate a combined adjusted offense level for multiple counts of conviction. Option Two would not permit the grouping of multiple counts of child pornography trafficking and possession pursuant to § 3D1.2. This option is based on the premise that multiple acts of possession or trafficking represent separate instances of fear and risk of harm, and would require the assignment of units pursuant to § 3D1.4.

Proposed Amendment

(1) Option One: Section 3D1.2(d) is amended by inserting after ''§§ 2F1.1, 2F1.2;'' the following new line:

''§§ 2G2.2, 2G2.4;''.

(2) Option Two: The Commentary to § 2G2.1 captioned ''Application Notes'' is amended in Note 2 by adding at the end the following new paragraph:

''Similarly, [multiple counts involving the exploitation of the same minor are not to be grouped under § 3D1.2 and] counts involving the production of material involving the exploitation of a minor are not to be grouped under § 3D1.2 with counts involving the trafficking of material involving the exploitation of a minor, even in cases in which the production count and the trafficking count involve the same minor (*i.e.*, cases that involve both a count of producing material involving the exploitation of a minor and a count of trafficking in the same material). In such cases, the harm involved in producing the material is separate and distinct from the harm involved in trafficking in that material.''.

The Commentary to § 2G2.2 captioned ''Application Notes'' is amended by adding at the end the following application note:

''4. For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving trafficking in, receiving, transporting, shipping, advertising, or possessing with the intent to distribute, material involving the exploitation of a minor are not to be grouped under § 3D1.2 (Groups of Closely Related Counts). Such counts do not involve 'substantially the same harm' for purposes of § 3D1.2.

Similarly, such counts are not to be grouped under § 3D1.2 with counts involving the production of material involving the exploitation of a minor, even in cases in which the production count and the trafficking count involve the same minor (*i.e.*, cases that involve both a count of producing material involving the exploitation of a minor and a count of trafficking in the same material). In such cases, the harm involved in producing the material is separate and distinct from the harm involved in trafficking in that material.''.

The Commentary to § 2G2.4 captioned ''Application Notes'' is amended by adding at the end the following application note:

''3. For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving the possession of material involving the exploitation of a minor are not to be grouped under § 3D1.2 (Groups of Closely Related Counts). Such counts do not involve 'substantially the same harm' for purposes of § 3D1.2.''.

Section 3D1.2(d) is amended by inserting '', 2G2.2, 2G2.4;'' after ''2G2.1''.

Part (C): Enhancement for Transportation Offenses and Other Amendments

Synopsis: Part C of the proposed amendment responds to the directive in the Act to provide an enhancement for offenses under chapter 117 of title 18, United States Code, involving the transportation of minors for prostitution or prohibited sexual conduct. Pursuant to the authority in the Act and pursuant to the Commission's general authority under 28 U.S.C. 994 to promulgate guideline amendments, the amendment proposes a number of offense level increases in § 2A3.2, the ''statutory rape'' guideline, and in § 2A3.4, the abusive sexual contact guideline. Specifically, the amendment proposes to do the following:

(1) Distinguish between chapter 117 violations that involve the commission of an underlying sexual act and those violations (*e.g.*, sting cases) that do not, by providing in an alternative base offense level in § 2A3.2 three additional levels for chapter 117 violations that also involve an underlying sexual act.

(2) Provide an across-the-board three-level increase in the base offense level for offenses sentenced under § 2A3.2, such that the base offense level (A) for statutory rape in its most basic form unaccompanied by aggravating conduct is increased from level 15 to level 18; (B) for a chapter 117 violation (unaccompanied by a sexual act) is increased from level 18 to level 21; and (C) a chapter 117 violation (accompanied by a sexual act) results in a base offense level of level 24. This increase also maintains the proportionality between §§ 2A3.2 and 2G2.2.

(3) Provide an enhancement of 2 levels if the offense involved incest as

an additional enhancement to the two-level enhancement for custody, care, or supervisory control, and provide in the Commentary a definition of ''incest'' that tracks that found in the Model Penal Code. A review of the 228 case files from FY 99 that involved sex crimes against children revealed that 26% of the offenders were parents or relatives of the victim. Additionally, 45 other offenders were either the boyfriend/girlfriend of the parent, or a step-parent or step grandparent of the victim.

(4) Amend the Statutory Index to include a reference to the statutory rape guideline, § 2A3.2, for chapter 117 offenses. Often in ''sting'' cases, the defendant travels across state lines in order to meet a minor for what the defendant believes will be an encounter involving consensual sexual activity.

(5) Make conforming changes to the existing three-level decrease for chapter 117 violations that do not include aggravating conduct so that such violations receive the offense level applicable to statutory rape in its basic form.

(6) Make technical changes (such as the addition of headings and the reordering of applications notes) not intended to have substantive effect.

In addition, the amendment proposes to amend the guideline covering the production of child pornography, § 2G2.1, to provide additional enhancements to account for aggravating conduct that may be present in such cases, specifically, the production of sadistic or masochistic material, serious bodily injury, or the trafficking of produced materials. Note that the addition of the enhancement in § 2G2.1 for the production of sadistic or masochistic material would result in the grouping of child pornography trafficking and production counts of conviction under § 3D1.2(c), contrary to the proposal in Option 2 of Part B of this amendment. These amendments also are intended to restore proportionality in sentences between child pornography production offenses and child pornography trafficking offenses.

Proposed Amendment

Section 2A3.1(b) is amended by adding at the end the following:

''(7) If the offense involved incest, increase by 2 levels.''.

The Commentary to § 2A3.1 captioned ''Application Notes'' is amended in Note 1 by striking ''For purposes of this guideline—'' and inserting the following:

''Definitions.—For purposes of this guideline:

'Incest' means any sexual act between the defendant and the victim in any case in which the defendant-victim relationship is that of (A) ancestor-descendant (*e.g.*, parent-child and grandparent-child); (B) brother-sister of the whole or half blood; (C) sister-brother of the whole or half blood; (D) uncle-nephew of the whole blood; (E) uncle-niece of the whole blood; (F) aunt-nephew of the whole blood; or (G) aunt-niece of the whole blood. The relationships referred to in this definition include blood relationships without regard to legitimacy, the relationship of parent-child by adoption, and the relationship of step parent-step child.''; and by inserting after ''18 U.S.C. 2256(8).'' the following new paragraph:

'' 'Sexual act' has the meaning given that term in 18 U.S.C. 2246(2).''.

The Commentary to § 2A3.1 captioned ''Application Notes'' is amended in Note 2 by inserting ''Custody, Care, and Supervisory Control Enhancement.—'' before ''Subsection''.

Section 2A3.2(a) is amended by redesignating subdivisions (1) and (2) as subdivisions (2) and (3), respectively; and by inserting after ''Base Offense Level:'' the following:

''(1) [24], if the offense involved a violation of chapter 117 of title 18, United States Code and the commission, or attempted commission, of a sexual act;''.

Section 2A3.2(a) is amended in redesignated subdivision (2) by striking ''18'' and inserting ''[21]''; and by inserting '', but not the commission, or attempted commission, of a sexual act'' before the semicolon.

Section 2A3.2(a) is amended in redesignated subdivision (3) by striking ''15'' and inserting ''[18]''.

Section 2A3.2(b) is amended by striking subdivision (4) in its entirety and inserting the following:

''(4) If (A) none of subsections (b)(1) through (b)(3) applies; and (B) subsection (a)(1) applies, decrease by 6 levels.'';

By redesignating subdivision (4) as subdivision (5); and by inserting after subdivision (3) the following:

''(4) If the offense involved incest, increase by 2 levels.''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended in Note 1 by striking ''For purposes of this guideline—'' and inserting the following:

''Definitions.—For purposes of this guideline:

'Incest' means any sexual act between the defendant and the victim in any case in which the defendant-victim relationship is that of (A) ancestor-descendant (*e.g.*, parent-child and grandparent-child); (B) brother-sister of the whole or half blood; (C) sister-brother of the whole or half blood; (D) uncle-nephew of the whole blood; (E) uncle-niece of the whole blood; (F) aunt-nephew of the whole blood; or (G) aunt-niece of the whole blood. The relationships referred to in this definition include blood relationships without regard to legitimacy, the relationship of parent-child by adoption, and the relationship of step parent-step child.''; and by inserting after ''(sexual abuse)'' the following paragraph:

'' 'Sexual act' has the meaning given that term in 18 U.S.C. 2246(2).''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended by striking Note 2 in its entirety; and by redesignating Notes 3 through 7 as Notes 2 through 6, respectively.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended in redesignated Note 2 (formerly Note 3) by inserting ''Custody, Care, and Supervisory Control Enhancement.—'' before ''Subsection''; and by inserting ''(A)'' after ''(b)(1)''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended in redesignated Note 3 (formerly Note 4) by inserting ''Abuse of Position of Trust.—'' before ''If the''; and by inserting ''(A) or (B)'' after ''(b)(1)''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended in redesignated Note 4 (formerly Note 5) by inserting ''Misrepresentation of Identity.—'' before ''The enhancement''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended in redesignated Note 5 (formerly Note 6) by inserting ''Use of Computer or Internet-Access Device.—'' before ''Subsection (b)(3) provides''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended in redesignated Note 6 (formerly Note 7) by inserting ''Cross Reference.—'' before ''Subsection (c)(1)''.

The Commentary to § 2A3.2 captioned ''Application Notes'' is amended by striking Note 8 in its entirety and inserting the following:

''7. Upward Departure Considerations.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:

(A) The defendant's criminal history includes a prior sentence for conduct that is similar to the instant offense.

(B) The defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting persons for the purpose of prostitution, or the production of pornography.''.

Section 2A3.4(b) is amended by adding at the end the following:

''(6) If the offense involved incest, increase by 2 levels.

(7) If the offense involved a violation of chapter 117 of title 18, United States Code, increase by 3 levels.''.

The Commentary to § 2A3.4 captioned ''Application Notes'' is amended in Note 1 by striking ''For purposes of this guideline—'' and inserting the following:

''Definitions.—For purposes of this guideline:

'Incest' means any sexual act between the defendant and the victim in any case in which the defendant-victim relationship is that of (A) ancestor-descendant (*e.g.*, parent-child and grandparent-child); (B) brother-sister of the whole or half blood; (C) sister-brother of the whole or half blood; (D) uncle-nephew of the whole blood; (E) uncle-niece of the whole blood; (F) aunt-nephew of the whole blood; or (G) aunt-niece of the whole blood. The relationships referred to in this definition include blood relationships without regard to legitimacy, the relationship of parent-child by adoption, and the relationship of step parent-step child.'';

and by inserting at the end the following:

'' 'Sexual act' has the meaning given that term in 18 U.S.C. § 2246(2).''.

Section 2G2.1(b) is amended by adding at the end the following:

''(4) If (A) the offense involved the production of sexually explicit material that portrays sadistic or masochistic conduct or other depictions of violence; or (B) the victim sustained serious bodily injury, increase by [2][4] levels.

(5) If the offense involved any distribution of the sexually explicit material, increase by [2] levels.''.

The Commentary to § 2G2.1 captioned ''Application Notes'' is amended by striking Note 1 in its entirety and inserting the following:

''1. Definitions.—For purposes of this guideline:

'Minor' means an individual who had not attained the age of 18 years.

'Distribution' has the meaning given that term in Application Note 1 of the Commentary to § 2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Advertising, or Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic).''.

Appendix A (Statutory Index) is amended in the line referenced to ''18 U.S.C. § 2423(b)'' by inserting '', 2A3.4'' after ''2A3.3''.

Issues for Comment

(1) The Commission invites comment on whether and, if so, to what extent, the guidelines covering sexual abuse, §§ 2A3.1 (Criminal Sexual Abuse), 2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape)), 2A3.3 (Criminal Sexual Abuse of a Ward), and 2A3.4 (Abusive Sexual Contact), should be amended to provide an enhancement if the offense involved the transportation, persuasion, inducement, enticement, or coercion of a child to engage in prohibited sexual conduct. Do enhancements added to these guidelines (that became effective November 1, 2000) for use of a computer and/or misrepresentation of a criminal participant's identity sufficiently provide an appropriate enhancement, or is an additional enhancement in these guidelines for other aggravating conduct needed?

(2) The Commission invites comment on whether and, if so, to what extent, the guidelines covering sexual abuse, §§ 2A3.1 (Criminal Sexual Abuse), 2A3.2 (Criminal Sexual Abuse of a Minor (Statutory Rape)), 2A3.3 (Criminal Sexual Abuse of a Ward), and 2A3.4 (Abusive Sexual Contact), should be amended to provide an enhancement in order to maintain proportionality between these guidelines and the guidelines covering pornography offenses, particularly, 2G2.2 (Trafficking In Material Involving the Sexual Exploitation of a Minor).

Proposed Amendment: Stalking and Domestic Violence

6. *Synopsis of Proposed Amendment:* This proposed amendment addresses section 1107 of the Victims of Trafficking and Violence Act 2000 (the ''Act''), Pub. L. 106–386. That section amends 18 U.S.C. 2261, 2261A, and 2262 to broaden the reach of these statutes to include international travel to stalk, commit domestic violence, or violate a protective order. Section 2261A also is amended to broaden the category of persons protected by this statute to include intimate partners of the person. The Act also amends section 2261A to provide a new offense at section 2262A(2) which prohibits the use of the mail or any facility of interstate or foreign commerce to commit a stalking offense. Several technical changes were also made to these statutes.

The Act also includes a directive to the Commission to amend the federal sentencing guidelines to reflect the changes made to 18 U.S.C. 2261 with specific consideration to be given to the following factors:

(i) Whether the Federal Sentencing Guidelines relating to stalking offences should be modified in light of the amendment made by this subsection; and

(ii) Whether any changes the Commission may make to the Federal Sentencing Guidelines pursuant to clause (i) should also be made with respect to offenses under chapter 110A of title 18, United States Code (stalking and domestic violence offenses).

This proposed amendment increases the base offense level in § 2A6.2 (Stalking or Domestic Violence) and adds a cross reference to § 1B1.5 (Interpretation of References to Other Offense Guidelines).

For several reasons, the proposed amendment treats the new stalking by mail offense the same under the guidelines as other stalking offenses and covers it under § 2A6.2 (Stalking or Domestic Violence). First, the statutory penalties for stalking by mail are the same as the statutory penalties for other stalking offenses. Second, although there was some consideration to referring this new offense to § 2A6.1 (Threatening or Harassing Communications), stalking by mail offenses differ significantly from threatening communications in that stalking by mail offenses require the defendant's intent to kill, or injure a person, or place a person in reasonable fear of death or serious bodily injury. Third, referencing stalking by mail offenses to § 2A6.1, could possibly result in these offenses receiving higher penalties than other stalking offenses. For example, a defendant who writes a threatening letter, violates a protective order and engages in some conduct evidencing an intent to carry out such threat, receives an offense level of level 20 under § 2A6.1. A defendant who commits a stalking offense, violates a protective order, and actually commits bodily injury on the person who is the subject of the protection order, receives an offense level of level 18 under § 2A6.2. Arguably, the second defendant should receive punishment, equal to, or perhaps greater than that received by the first defendant.

Because of the concern with regard to the proportionality in sentencing stalking and domestic violence offenses vis-a-vis other crimes, such as

threatening or harassing communications, this amendment proposes to increase the base offense level in § 2A6.2 from level 14 to level [16][18]. Setting the base offense level at level [16] [18] for stalking and domestic violence crimes ensures that these offenses are sentenced at or above the offense levels for offenses involving threatening and harassing communications.

This amendment also amends Application Note 3 to § 1B1.5 (Interpretation of References to Other Offense Guidelines) to clarify generally the operation of cross references. A review of the 16 cases sentenced under this guideline in fiscal years 1998 and 1999 indicated that there is some confusion as to whether a cross reference can and should be applied to conduct that is not within federal jurisdiction (*e.g.*, conduct in violation of state or local law) as is often the case in stalking and domestic violence offenses. This new application note makes clear that, unless otherwise specified, cross references in Chapter Two are to be determined consistent with the provisions of § 1B1.3 (Relevant Conduct). Therefore, in a case in which the guideline includes a reference to use another guideline if the conduct involved another offense, the other offense includes conduct that may be a state or local offense or conduct that occurred under circumstances that would constitute a federal offense had the conduct taken place within the territorial or maritime jurisdiction of the United States.

Proposed Amendment

Section 2A6.2(a) is amended by striking ''14'' and inserting ''[16][18]''.

The Commentary to § 2A6.2 captioned ''Application Notes'' is amended in Note 1 by striking the last paragraph in its entirety and inserting:

''Stalking' means (A) traveling with the intent to kill, injure, harass, or intimidate another person and, in the course of, or as a result of, such travel, placing the person in reasonable fear of death or serious bodily injury to that person, the person's immediate family, including that person's spouse or intimate partner; or (B) using the mail or any facility of interstate or foreign commerce to engage in a course of conduct that places that person in reasonable fear of the death of, or serious bodily injury to, any of the persons described in subdivision (A) of this note. *See* 18 U.S.C. § 2261A. 'Immediate family' has the meaning set forth in 18 U.S.C. § 115(c)(2). 'Course of conduct' and 'spouse or intimate partner' have the meaning given those terms in 18 U.S.C. § 2266(2) and (7), respectively.''.

The Commentary to § 1B1.5 captioned ''Application Notes'' is amended in Note 3 by inserting after the first sentence the following:

''Consistent with the provisions of § 1B1.3 (Relevant Conduct), such other offense includes conduct that may be a state or local offense or conduct that occurred under circumstances that would constitute a federal offense had the conduct taken place within the territorial or maritime jurisdiction of the United States.''.

Proposed Amendment: Re-Promulgation of Emergency Amendment Regarding Enhanced Penalties for Amphetamine or Methamphetamine Laboratory Operators as Permanent Amendment

7. *Synopsis of Proposed Amendment:* This proposed amendment addresses the ''substantial risk'' directive in the Methamphetamine and Club Drug Anti-Proliferation Act of 2000 (the ''Act''), section 102 of Pub. L. 106–310.

The Act requires the Commission to promulgate amendments under emergency amendment authority. Although the Act generally provides that the Commission shall promulgate various amendments ''as soon as practicable,'' the substantial risk directive specifically requires that the amendment implementing the directive shall apply ''to any offense occurring on or after the date that is 60 days after the date of the enactment'' of the Act. Because of ex post facto concerns raised by this 60-day clause, the Commission promulgated an amendment in November 2000 that implemented the substantial risk directive. The amendment became effective December 16, 2000.

The directive instructs the Commission to amend the federal sentencing guidelines with respect to any offense relating to the manufacture, attempt to manufacture, or conspiracy to manufacture amphetamine or methamphetamine in (A) the Controlled Substances Act (21 U.S.C. 801 *et seq.*); (B) the Controlled Substances Import and Export Act (21 U.S.C. 951 *et seq.*); or (C) the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 *et seq.*).

In carrying out this directive, the Act requires the Commission to provide the following enhancements—

(A) if the offense created a substantial risk of harm to human life (other than a life described in subparagraph (B)) or the environment, increase the base offense level for the offense—

(i) By not less than 3 offense levels above the applicable level in effect on the date of the enactment of this Act; or

(ii) If the resulting base offense level after an increase under clause (i) would be less than level 27, to not less than level 27; or

(B) If the offense created a substantial risk of harm to the life of a minor or incompetent, increase the base offense level for the offense—

(i) By not less than 6 offense levels above the applicable level in effect on the date of the enactment of this Act; or

(ii) if the resulting base offense level after an increase under clause (i) would be less than level 30, to not less than level 30.

Three options are now presented to implement the directive on a permanent basis.

Option 1.—Option 1 proposes to re-promulgate the emergency amendment without any changes. The pertinent parts of Option 1 are as follows:

(1) Guidelines Amended.—The amendment provides new enhancements in §§ 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking) and 2D1.10 (Endangering Human Life While Illegally Manufacturing a Controlled Substance) that also apply in the case of an attempt or a conspiracy to manufacture amphetamine or methamphetamine. The amendment does not amend § 2D1.11 (Unlawfully Distributing, Importing, Exporting or Possessing a Listed Chemical) or § 2D1.12 (Unlawful Possession, Manufacture, Distribution, or Importation or Prohibited Flask or Equipment). Although offenses that involve the manufacture of amphetamine or methamphetamine also are referenced in Appendix (A) (Statutory Index) to §§ 2D1.11 and 2D1.12, the cross reference in these guidelines, which applies if the offense involved the manufacture of a controlled substance, will result in application of § 2D1.1 and accordingly, the new enhancements.

(2) Structure.—The basic structure of the amendment to §§ 2D1.1 and 2D1.10 tracks the structure of the directive. Accordingly, in § 2D1.1, the amendment provides a three-level increase and a minimum offense level of level 27 if the offense (A) involved the manufacture of amphetamine or methamphetamine; and (B) created a substantial risk of either harm to human life or the environment. For offenses that created a substantial risk of harm to the life of a minor or an incompetent, the amendment provides a six-level increase and a minimum offense level of 30.

However, the structure of the amendment in § 2D1.10 differs from that

in § 2D1.1 with respect to the first prong of the enhancement (regarding substantial risk of harm to human life or to the environment). Specifically, the amendment provides a three-level increase and a minimum offense level of level 27 if the offense involved the manufacture of amphetamine or methamphetamine without making application of the enhancement dependent upon whether the offense also involved a substantial risk of either harm to human life or the environment. Consideration of whether the offense involved a substantial risk of harm to human life is unnecessary because § 2D1.10 applies only to convictions under 21 U.S.C. 858, and the creation of a substantial risk of harm to human life is an element of a § 858 offense. Therefore, the base offense level already takes into account the substantial risk of harm to human life. Consideration of whether the offense involved a substantial risk of harm to the environment is unnecessary because the directive predicated application of the enhancement on substantial risk of harm either to human life or to the environment, and the creation of a substantial risk of harm to human life is necessarily present because it is an element of the offense.

(3) Determining ''Substantial Risk of Harm''.—Neither the directive nor any statutory provision defines ''substantial risk of harm''. Based on an analysis of relevant case law that interpreted ''substantial risk of harm'', the amendment provides commentary setting forth factors that may be relevant in determining whether a particular offense created a substantial risk of harm.

(4) Definitions.—The definition of ''incompetent'' is modeled after several state statutes, which proved useful for purposes of this amendment.

The definition of ''minor'' has the meaning given that term in Application Note 1 of the Commentary to § 2A3.1 (Criminal Sexual Abuse).

Option 2.—Option 2 proposes to expand the emergency amendment, as set forth in Option 1, to apply to the manufacture of all controlled substances rather than only amphetamine or methamphetamine. Although the directive specifically instructs the Commission to provide increased penalties for the manufacture of amphetamine and methamphetamine, the Commission may, under its general promulgation authority, expand the scope of an emergency amendment when it re-promulgates the amendment as a permanent amendment. The reason for the proposed expansion is that if the manufacture of any controlled substance creates a substantial risk of harm to human life or the environment, there is a strong argument that the increased penalties should apply regardless of the type of controlled substances involved in the offense. The pertinent parts of Option 2 are as follows:

(1) § 2D1.1.—The enhancement in subsection (b)(6) is proposed to apply to the manufacture of any controlled substance, not just to the manufacture of amphetamine or methamphetamine. The expansion to all controlled substances in § 2D1.1 is rather straightforward. Conforming changes are made to the Commentary, but the amendment to § 2D1.1 otherwise remains the same as the emergency amendment.

(2) § 2D1.10.—Option 2's proposed expansion to all controlled substances in § 2D1.10 requires a restructuring of the guideline (as it was amended by the emergency amendment).

First, Option 2 proposes to increase the alternative base offense level in subsection (a)(1) from ''3 plus'' to ''6 plus the offense level from the Drug Quantity Table in § 2D1.1''. This proposed increase corresponds to the proposed deletion of subsection (b)(1)(A) of the emergency amendment. As explained above in the description of Option 1 under ''Structure,'' subsection (b)(1)(A) provides a three-level increase ''if the offense involved the manufacture of amphetamine or methamphetamine,'' without making application of the enhancement dependent upon whether the offense also involved a substantial risk of either harm to human life or the environment. However, if the emergency amendment is to be expanded to apply to the manufacture of all controlled substances, this enhancement no longer is appropriate. In order not to lose the three-level increase that was provided by this enhancement, the three levels from this enhancement are built into the alternative base offense level in subsection (a)(1).

Second, Option 2 proposes two alternatives for addressing the minimum offense level of level 27 that also was provided by the enhancement in subsection (b)(1)(A). Option 2(a) increases the current alternative base offense level in subsection (a)(2) from level 20 to level 27. Although this option is consistent with expanding the entire emergency amendment to all controlled substances, the impact of this change is likely to be significant for lower level drug offenders. Option 2(b) proposes to add an additional alternative base offense level of level 27 if the offense involved the manufacture of amphetamine or methamphetamine, but maintains the alternative base offense level 20 for all other controlled substances. Although this option has less of an impact on lower level drug offenders than Option 2(a), it is not consistent with the approach otherwise taken in Option 2 of expanding the emergency amendment to cover all controlled substances.

Finally, Option 2 makes the enhancement that applies if the offense created a substantial risk of harm to the life of a minor or an incompetent applicable to all controlled substances. Conforming amendments are made to the Commentary.

Option 3.—This option assumes that the manufacture of amphetamine or methamphetamine is inherently dangerous and poses a substantial risk of harm to human life or the environment. Thus, the statutorily directed minimum enhancement and minimum offense level is automatic for the manufacture of amphetamine or methamphetamine. For all other controlled substances, it must be proved that the manufacturing process created the substantial risk of harm.

This option also combines the substantial risk enhancement with the environmental damage enhancement in § 2D1.1(b)(5).

Proposed Amendment

Option 1:

Sections 2D1.1 and 2D1.10, as amended by Amendment 608 (*see* Supplement to the 2000 Supplement to Appendix C), are repromulgated with the following minor, editorial changes:

The Commentary to § 2D1.1 captioned ''Background'' is amended by striking ''Public Law 106–878'' and inserting ''Public Law 106–310''.

The Commentary to § 2D1.10 captioned ''Background'' is amended by striking ''Public Law 106–878'' and inserting ''Public Law 106–310''.

Option 2:

Section 2D1.1(b)(6)(A) is amended in subdivision (i) by striking ''amphetamine or methamphetamine'' and inserting ''a controlled substance''.

Section 2D1.1(b)(6)(B) is amended in subdivision (i) by striking ''amphetamine or methamphetamine'' and inserting ''a controlled substance''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 20 by inserting ''Hazardous or Toxic Substances.—''before ''Subsection (b)(5) applies''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in the heading to Note 21 by striking ''Amphetamine and Methamphetamine'' and inserting ''Controlled Substances''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 21(A)(iv) by striking ''amphetamine or methamphetamine'' and inserting ''illicit''.

The Commentary to § 2D1.1 captioned ''Background'' is amended by inserting '', in a broader form,'' after ''Subsection (b)(6) implements''.

Section 2D1.10 is amended by striking subdivisions (a) and (b) in their entirety and inserting the following:

''(a) Base Offense Level (Apply the greater):

(1) 6 plus the offense level from the Drug Quantity Table in § 2D1.1; or

[Option 2(a): (2) 27.]

[Option 2(b): (2) 27, if the offense involved the manufacture of amphetamine or methamphetamine; or

(3) 20, otherwise.]

(b) Specific Offense Characteristic

(1) If the offense created a substantial risk of harm to the life of a minor or an incompetent, increase by 3 levels. If the resulting offense level is less than level 30, increase to level 30.''

The Commentary to § 2D1.10 captioned ''Application Notes'' is amended in the heading to Note 1 by striking ''Associated with the Manufacture of Amphetamine and Methamphetamine''.

The Commentary to § 2D1.10 captioned ''Application Notes'' is amended in Note 1(A)(iv) by striking ''amphetamine or methamphetamine laboratory'' and inserting ''illicit''.

The Commentary to § 2D1.10 captioned ''Background'' is amended by striking ''Subsection'' and inserting ''Subsections (a)(2) and''; by striking ''implements'' and inserting ''implement , in a broader form,''; and by striking ''Public Law 106–878'' and inserting ''Public Law 106–310''.

Option 3:

Section 2D1.1(b) is amended by redesignating subdivision (7) as (6); and by striking subdivisions (5) and (6) in their entirety and inserting the following:

''(5) (Apply the greater):

(A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by 2 levels.

(B) If the offense (i) involved the manufacture of amphetamine or methamphetamine; or (ii)(I) involved the manufacture of a controlled substance other than amphetamine or methamphetamine; and (II) created a substantial risk of harm to human life or the environment, increase by 3 levels. If the resulting offense level is less than level 27, increase to level 27.

(C) If the offense (i) involved the manufacture of a controlled substance; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by 6 levels. If the resulting offense level is less than level 30, increase to level 30.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 20 by inserting ''(A)'' after ''Subsection (b)(5)''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in the heading to Note 21 by striking ''Amphetamine and Methamphetamine'' and inserting ''Controlled Substances''.

The Commentary to § 2D1.1 captioned ''Application Notes is amended in Note 21(A) by striking ''subsection (b)(6)'' and inserting ''subsections (b)(5)(B) and (b)(5)(C)''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 21(A)(iv) by striking ''amphetamine or methamphetamine'' and inserting ''illicit''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 21 subdivision (B) by striking ''(b)(6)'' and inserting ''(b)(5)''.

The Commentary to § 2D1.1 captioned ''Background'' is amended by inserting ''(A)'' after ''Subsection (b)(5)''; by striking ''Subsection (b)(6)'' and inserting ''Subsections (b)(5)(B) and (b)(5)(C)''; by striking implements'' and inserting ''implement, in a broader form,''; and by striking ''Public Law 106–878'' and inserting ''Public Law 106–310''.

Section 2D1.10(a) is amended in subdivision (2) by striking ''20'' and inserting ''27''.

Section 2D1.10(b) is amended by striking subdivision (1) in its entirety and inserting the following:

''(1) If the offense created a substantial risk of harm to the life of a minor or an incompetent, increase by 3 levels. If the resulting offense level is less than level 30, increase to level 30.''

The Commentary to 2D1.10 captioned ''Application Notes'' is amended in the title to Note 1 by striking ''Associated with the Manufacture of Amphetamine and Methamphetamine''.

The Commentary to 2D1.10 captioned ''Application Notes'' is amended in Note 1(A)(iv) by striking ''amphetamine or methamphetamine'' and inserting ''illicit''.

The Commentary to 2D1.10 captioned ''Background'' is amended by striking ''Subsection'' and inserting ''Subsections (a)(2) and''; by striking ''implements'' and inserting ''implement, in a broader form,''; and by striking ''Public Law 106–878'' and inserting ''Public Law 106–310''.

Issue for Comment: The Commission invites comment regarding whether it should provide, for controlled substances other than amphetamine or methamphetamine, an upward departure rather than an enhancement provision if the manufacture of the controlled substance created a substantial risk of harm to human life or the environment.

Proposed Amendment: Mandatory Restitution for Amphetamine and Methamphetamine Offenses

8. *Synopsis of Proposed Amendment:* This proposed amendment implements the provision in the Methamphetamine Anti-Proliferation Act of 2000, section 3613 of Pub. L. 106–310, that amends 21 U.S.C. 853(q) to provide mandatory restitution for offenses that involve the manufacture of methamphetamine. The proposed amendment amends § 5E1.1 (Restitution) to include a reference to 21 U.S.C. § 853(q) in the guideline provision regarding mandatory restitution.

Proposed Amendment

Section 5E1.1 is amended in subsection (a)(1) by inserting '', or 21 U.S.C. § 853(q)'' after ''3663A''.

The Commentary to § 5E1.1 captioned ''Background'' is amended in the first paragraph by inserting '', and 21 U.S.C. § 853(q)'' after ''3663A''.

Proposed Amendment: Safety Valve

9. *Synopsis of Proposed Amendment:* This amendment proposes to delete the language in § 2D1.1(b)(6) that limits application of the safety valve to defendants at offense levels 26 and greater. The proposed amendment also deletes commentary that is outdated because of the operation of § 5C1.2 (Limitation on Applicability on Statutory Minimum Sentences in Certain Cases). Conforming changes are made to § 5C1.2.

Proposed Amendment

Section 2D1.1(b)(6) is amended by striking ''subdivisions (1)–(5)'' and inserting ''subsections (a)(1)–(5)''; and by striking ''and the offense level determined above is level 26 or greater''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended by striking Note 14 in its entirety; and by redesignating Notes 15 through 20 as Notes 14 through 19, respectively.

Section 5C1.2 is amended in the first paragraph by striking ''In'' and inserting ''(a) Except as provided in subsection (b), in''.

Section 5C1.2 is amended by inserting after subsection (a), as so designated by this amendment, the following:

''(b) In the case of a defendant (1) who meets the criteria set forth in subsection (a); and (2) for whom the statutorily required minimum sentence is at least five years, the offense level applicable from Chapters Two (Offense Conduct) and Three (Adjustments) shall be not less than level 17.''.

The Commentary to § 5C1.2 captioned ''Application Notes'' is amended in Notes 2 through 7 by striking ''subdivision'' each place it appears and inserting ''subsection (a)''; and by striking ''subdivisions'' in Note 3 and inserting ''subsection (a)''.

Proposed Amendment: Anhydrous Ammonia

10. *Synopsis of Proposed Amendment:* This proposed amendment addresses the new offense, at section 423 of the Controlled Substances Act (21 U.S.C. 864), of stealing or transporting across state lines anhydrous ammonia knowing, intending, or having reasonable cause to believe that such anhydrous ammonia will be used to manufacture a controlled substance. This new offense, created by the Methamphetamine Anti-Proliferation Act of 2000, section 3653 of Pub. L. 106–310, carries the statutory penalties contained in section 403 of the Controlled Substances Act (21 U.S.C. 843), *i.e.,* not more than fours years' imprisonment (or not more than eight years' imprisonment in the case of certain prior convictions) or not more than 10 years' imprisonment (or not more than 20 years' imprisonment in the case of certain prior convictions) if the offense involved the manufacture of methamphetamine.

The proposed amendment references the new offense to § 2D1.12 (Unlawful Possession, Manufacture, Distribution, or Importation of Prohibited Flask or Equipment; Attempt or Conspiracy). Reference to this guideline is appropriate because the new offense is similar to other offenses already referenced to the guideline and having the same penalty structure, such as 21 U.S.C. 843(a)(6), which among other things makes it unlawful to possess any chemical, product, or material which may be used to manufacture a controlled substance. The proposed amendment also makes minor, non-substantive changes to the guideline in order to fully reference the new and existing offenses into the guideline.

Proposed Amendment

Section 2D1.12 is amended in the heading by inserting ''Transportation, Exportation,'' after ''Distribution,''; by striking ''or'' before ''Equipment'' and inserting a comma; and by inserting '', Chemical, Product, or Material'' after ''Equipment''.

Section 2D1.12 is amended in each of subsections (a)(1), (a)(2), and (b)(1), by inserting ''flask,'' after ''prohibited''; and by inserting '', chemical, product, or material'' after ''equipment''.

The Commentary to § 2D1.12 captioned ''Statutory Provisions'' is amended by inserting ''§ '' before ''843''; and by inserting '', 864'' after ''(7)''.

The Commentary to § 2D1.12 captioned ''Application Notes'' is amended by striking the text of Note 1 in its entirety and inserting the following:

''If the offense involved the large-scale [(A)] manufacture, distribution, transportation, exportation, or importation of prohibited flasks, equipment, chemicals, products, or material [; or (B) theft of anhydrous ammonia,] an upward departure may be warranted.''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to ''21 U.S.C. § 863'' the following:

''21 U.S.C. § 864 2D1.12''.

Issue for Comment: The Commission invites comment regarding whether the enhancement at § 2D1.12(b)(1) is sufficient to account for the seriousness of attempting or intending to manufacture methamphetamine through the use of anhydrous ammonia. Should, for example, subsection (b)(1) of § 2D1.12 provide for an enhancement of up to [10] levels, or should an alternative method be provided to account for the seriousness of using anhydrous ammonia, such as a cross reference to § 2D1.11 using a conversion to methamphetamine if anhydrous ammonia is involved? Generally, what is the most appropriate penalty structure for offenses involving anhydrous ammonia?

Proposed Amendment: GHB

11. *Synopsis of Proposed Amendment:* This proposed amendment implements the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000, Pub. L. 106–172 (the ''Act''), which provides the emergency scheduling of gamma hydroxybutyric acid (''GHB'') as a Schedule I controlled substance under the Controlled Substances Act when the drug is used illicitly. (There are approved applications of GHB under the Federal Food, Drug, and Cosmetic Act, for which the drug is scheduled in Schedule III.) The Act also amended section 401(b)(1)(C) of the Controlled Substances Act (21 U.S.C. 841(b)(1)(C)) and section 1010(b)(3) of the Controlled Substances Import and Export Act (21 U.S.C. § 960(b)(3)) to provide penalties of not more than 20 years for an offense that involves GHB. Additionally, the Act added gamma butyrolactone (''GBL'') to the list of List I chemicals in section 401(b)(1)(C) of the Controlled Substances Act (21 U.S.C. 841(b)(1)(C)).

Under the current structure of the Drug Quantity Table in § 2D1.1, GHB and other Schedule I and II depressants, with statutory maximum terms of imprisonment of 20 years, are sentenced identically to Schedule III substances, which have a five-year statutory maximum. The guidelines provide a maximum offense level of level 20 for these substances, which equates to a sentencing range of 33 to 44 months for offenders with minimal or no criminal history (Criminal History Category I). The lack of penalty distinctions between offenses with such divergent statutory maxima raises proportionality concerns. Recognizing the need to provide higher penalties for the more serious offenses involving Schedule I and II depressants, the proposed amendment eliminates the maximum base offense level of level 20 in the Drug Quantity Table of § 2D1.1 for Schedule I and II depressants (including GHB). The same change is made with respect to flunitrazepam, which, for sentencing purposes, is tied to Schedule I and II depressants.

The proposed amendment also amends the Chemical Quantity Table in § 2D1.11 to include GBL, a precursor for GHB, as a List I chemical. Offense levels for GBL were established in the same fashion as other list I chemicals. The offense level for a specific quantity of GHB that can be produced from a given quantity of GBL, assuming a 50 percent yield, was determined using the Drug Quantity Table in § 2D1.1. From this offense level, six levels were subtracted. This result identifies the corresponding offense level in the Chemical Quantity Table in § 2D1.11.

The proposed amendment also adds Iodine to the Chemical Quantity Table in response to a recent classification of iodine as a List II chemical. Iodine is used to produce hydrogen iodide which, in the presence of water, becomes hydriodic acid, a list I chemical that is a reagent used in the production of amphetamine and methamphetamine. The penalties for Iodine were established based upon its conversion to hydriodic acid.

Proposed Amendment

(1) Uncap Schedule I and II Depressants

Section 2D1.1(c)(1) is amended by striking the period after ''Hashish Oil'' and inserting a semi-colon; and by inserting at the end the following:

''30,000,000 units or more of Schedule I or II Depressants; 1,875,000 units or more of Flunitrazepam.''.

Section 2D1.1(c)(2) is amended by striking the period after ''Hashish Oil'' and inserting a semi-colon; and by inserting at the end the following:

''At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants; At least 625,000 but less than 1,875,000 units of Flunitrazepam.''.

Section 2D1.1(c)(3) is amended by striking the period after ''Hashish Oil'' and inserting a semi-colon; and by inserting at the end the following:

''At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants; At least 187,500 but less than 625,000 units of Flunitrazepam.''.

Section 2D1.1(c)(4) is amended by striking the period after ''Hashish Oil'' and inserting a semi-colon; and by inserting at the end the following:

''At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants; At least 62,500 but less than 187,500 units of Flunitrazepam.''.

Section 2D1.1(c)(5) is amended by striking the period after ''Hashish Oil'' and inserting a semi-colon; and by inserting at the end the following:

''At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants; At least 43,750 but less than 62,500 units of Flunitrazepam.''.

Section 2D1.1(c)(6) is amended by striking the period after ''Hashish Oil'' and inserting a semi-colon; and by inserting at the end the following:

''At least 400,000 but less than 700,000 units of Schedule I or II Depressants; At least 25,000 but less than 43,750 units of Flunitrazepam.''.

Section 2D1.1(c)(7) is amended by striking the period after ''Hashish Oil'' and inserting a semi-colon; and by inserting at the end the following:

''At least 100,000 but less than 400,000 units of Schedule I or II Depressants; At least 6,250 but less than 25,000 units of Flunitrazepam.''

Section 2D1.1(c)(8) is amended by striking the period after ''Hashish Oil'' and inserting a semi-colon; and by inserting at the end the following:

''At least 80,000 but less than 100,000 units of Schedule I or II Depressants; At least 5,000 but less than 6,250 units of Flunitrazepam.''.

Section 2D1.1(c)(9) is amended by striking the period after ''Hashish Oil'' and inserting a semi-colon; and by inserting at the end the following:

''At least 60,000 but less than 80,000 units of Schedule I or II Depressants; At least 3,750 but less than 5,000 units of Flunitrazepam.''.

Section 2D1.1(c)(10) is amended in the line referenced to Schedule I or II Depressants by striking ''40,000 or more'' and inserting ''At least 40,000 but less than 60,000''; and in the line referenced to Flunitrazepam, by striking ''2,500 or more'' and inserting ''At least 2,500 but less than 3,750''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the Drug Equivalency Tables in the subdivision captioned ''Flunitrazepam * * * '' in the heading by striking '' * * * '' after ''Flunitrazepam''; and by striking the following:

'' * * * Provided, that the combined equivalent weight of flunitrazepam, all Schedule I or II depressants, Schedule III substances, Schedule IV substances, and Schedule V substances shall not exceed 99.99 kilograms of marihuana.''.

The Commentary to § 2D1.1 captioned ''Application Notes'' is amended in Note 10 in the Drug Equivalency Tables in the subdivision captioned ''Schedule I or II Depressants * * * '' in the heading by striking ''* * * '' after ''Schedule I or II Depressants''; and by striking the following:

'' * * * Provided, that the combined equivalent weight of all Schedule I or II depressants, Schedule III substances, Schedule IV substances (except flunitrazepam), and Schedule V substances shall not exceed 59.99 kilograms of marihuana.''.

(2) Adding GBL and Iodine to the Chemical Quantity Table in § 2D1.11

Section 2D1.11(d)(1) is amended by inserting at the end the following:

''10,000 KG or more of Gamma-butyrolactone.''.

Section 2D1.11(d)(2) is amended in the subdivision captioned ''List I Chemicals'' by inserting at the end the following:

''At least 3,000 KG but less than 10,000 KG of Gamma-butyrolactone;'';

and in the subdivision captioned ''List II Chemicals'' by striking the period after ''Toluene'' and inserting a semi-colon; and by inserting at the end the following:

''7.52 KG or more of Iodine.''.

Section 2D1.11(d)(3) is amended in the subdivision captioned ''List I Chemicals'' by inserting at the end the following:

''At least 1,000 KG but less than 3,000 KG of Gamma-butyrolactone;'';

and in the subdivision captioned ''List II Chemicals'' by striking the period after ''Toluene'' and inserting a semi-colon; and by inserting at the end the following:

''At least 2.51 KG but less than 7.52 KG of Iodine.''.

Section 2D1.11(d)(4) is amended in the subdivision captioned ''List I Chemicals'' by inserting at the end the following:

''At least 700 KG but less than 1,000 KG of Gamma-butyrolactone;'';

and in the subdivision captioned ''List II Chemicals'' by striking the period after ''Toluene'' and inserting a semi-colon; and by inserting at the end the following:

''At least 1.76 KG but less than 2.51 KG of Iodine.''.

Section 2D1.11(d)(5) is amended in the subdivision captioned ''List I Chemicals'' by inserting at the end the following:

''At least 400 KG but less than 700 KG of Gamma-butyrolactone;'';

and in the subdivision captioned ''List II Chemicals'' by striking the period after ''Toluene'' and inserting a semi-colon; and by inserting at the end the following:

''At least 1 KG but less than 1.76 KG of Iodine.''.

Section 2D1.11(d)(6) is amended in the subdivision captioned ''List I Chemicals'' by inserting at the end the following:

''At least 100 KG but less than 400 KG of Gamma-butyrolactone;'';

and in the subdivision captioned ''List II Chemicals'' by striking the period after ''Toluene'' and inserting a semi-colon; and by inserting at the end the following:

''At least 250.8 G but less than 1 KG of Iodine.''.

Section 2D1.11(d)(7) is amended in the subdivision captioned ''List I Chemicals'' by inserting at the end the following:

''At least 80 KG but less than 100 KG of Gamma-butyrolactone;'';

and in the subdivision captioned ''List II Chemicals'' by striking the period after ''Toluene'' and inserting a semi-colon; and by inserting at the end the following:

''At least 200.64 G but less than 250.8 G of Iodine.''.

Section 2D1.11(d)(8) is amended in the subdivision captioned ''List I Chemicals'' by inserting at the end the following:

''At least 60 KG but less than 80 KG of Gamma-butyrolactone;'';

and in the subdivision captioned ''List II Chemicals'' by striking the period after ''Toluene'' and inserting a semi-colon; and by inserting at the end the following:

''At least 150.48 G but less than 200.64 KG of Iodine.''.

Section 2D1.11(d)(9) is amended in the subdivision captioned ''List I Chemicals'' by inserting at the end the following:

''At least 40 KG but less than 60 KG of Gamma-butyrolactone;'';

and in the subdivision captioned ''List II Chemicals'' by striking the period after ''Toluene'' and inserting a semi-colon; and by inserting at the end the following:

''At least 100.32 G but less than 150.48 G of Iodine.''.

Section 2D1.11(d)(10) is amended in the subdivision captioned ''List I Chemicals'' by inserting at the end the following:

''Less than 40 KG of Gamma-butyrolactone;'';

and in the subdivision captioned ''List II Chemicals'' by striking the period after ''Toluene'' and inserting a semi-colon; and by inserting at the end the following:

''Less than 100.32 G of Iodine.''.

Proposed Amendment: Economic Crime Package

12. *Synopsis of Proposed Amendment:* The Economic Crime Package consists of six parts. Part A is a proposal to consolidate the theft, property destruction and fraud guidelines. Part B contains three options for the loss table for the consolidated guideline and two options for a revised loss table in § 2T4.1 (Tax Table). Part C contains two proposals to amend the definition of loss for the consolidated guideline. Part D proposes necessary changes to several guidelines which refer to the loss tables in either § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) or § 2F1.1 (Fraud and Deceit) if the Commission were to adopt one of the proposed new loss tables. Part E contains the technical and conforming amendments to the guidelines that would be necessary as a result of the theft and fraud consolidation. Part F contains a proposal to resolve a circuit split regarding the computation of tax loss in § 2T1.1.

Part A. Consolidation of Theft, Property Destruction and Fraud

Synopsis of Proposed Amendment: This amendment consolidates the three guidelines covering theft (§ 2B1.1), property destruction (§ 2B1.3), and fraud (§ 2F1.1). Consolidation of these guidelines is proposed in response to concerns raised by probation officers, judges, and practitioners over several years. The issues were among those discussed during Commission public hearings in 1997 and 1998 on difficulties posed by having different commentary in the theft and fraud guidelines applicable to the calculation and definition of loss and related issues. Commentators have also noted that although theft and fraud offenses are conceptually similar, differences in guideline structure can lead to disparate penalty levels among similar cases, depending on how the offense is charged, and the court's choice of the applicable guideline pursuant to § 1B1.2.

Bracketed place holders are indicated for the loss table (see Part B), definition of loss (see Part C), and the options regarding two circuit conflicts: Tax loss (see Part F) and new commentary regarding the application of subsection (b)(3) regarding a ''person in the business of receiving and selling receiving stolen property,'' and a scholarship fraud enhancement and accompanying application note. In the event that the Commission does not promulgate the consolidation proposal, these bracketed options can be promulgated separately.

Base Offense Level: The proposal calls for a base offense level of level 6. The current base offense level for fraud offenses is level 6; the base offense level for theft and property destruction offenses currently is level 4. Starting with the base offense level 6, the proposed loss table for the consolidated guideline envisions two-level increments for increasing loss amounts beginning at $5,000. Currently the loss table for theft offenses provides one-level enhancements when loss exceeds $100, $1,000, $2,000, and $5,000, respectively, so that a theft offense involving more than $2,000 in loss results in an offense level of level 7, with the possibility of an additional increase for more-than-minimal planning. Under the proposed consolidated loss table, a theft offense involving more than $2,000 (but less than $5,000) would receive the base offense level of level 6, with no possible increase for more-than-minimal planning.

In contrast, under the proposed table, a fraud offense involving the same amount of loss would start with the same base offense level of level 6 but would receive no additional increase based on the loss amount. Under the current fraud table, this offense would result in an offense level of level 7 for loss because the current fraud loss table provides a one-level increase for loss amounts in excess of $2,000 (but less than $5,000).

More than Minimal Planning: Section 2F1.1(b)(2) currently provides a two-level increase if the offense involved (A) more than minimal planning, or (B) a scheme to defraud more than one victim. The proposal deletes this enhancement from the consolidated guideline. The more than minimal planning enhancement is deleted due to the potential overlap between this enhancement and the sophisticated means enhancement. The scheme to defraud more than one victim enhancement is deleted for two reasons: (1) If the adjustment were retained unmodified in a consolidated guideline, it would apply to cases currently sentenced under § 2B1.1 where it is not currently applicable; and (2) in its current form it might be hard to justify providing a two-level increase in every case in which there is more-than-one victim, particularly in the face of the new Chapter Three adjustment in the vulnerable victim guideline (§ 3A1.1) that provides (only) a two-level increase if the offense involved ''a large number of vulnerable victims.''

As an alternative to the scheme to defraud more than one victim enhancement, this amendment provides an enhancement based on the number of victims, to provide additional punishment for offenses involving multiple victims. The victim table proposes building in the current ''mass-marketing'' enhancement as an alternative way of triggering the two-level increase provided if there were more than 4 and less than 50 victims. The amendment proposes that if the proposed victim table is adopted, and a victim enhancement is applicable in a given case, then the enhancement under 3A1.1(b)(2) for ''a large number of vulnerable victims'' could not also apply in that case.

Theft of Undelivered U.S. Mail: The current ''floor'' offense level of level 6 for the theft of undelivered United States mail is proposed to be deleted because the proposal raises the base offense level from level 4 to 6 for such offenses, making the floor unnecessary. However, if the Commission adopts the enhancement providing for a two-level reduction if loss is less than $2,000, it might be necessary to retain this floor of level 6.

In the Business of Receiving and Selling Stolen Property: Section 2B1.1(b)(4)(B) provides a 2-level enhancement if the offense involved receiving stolen property and the defendant was in the business of receiving and selling stolen property. The proposed amendment addresses an issue that has arisen in case law regarding what conduct qualifies a defendant for the 4-level enhancement.

In determining the meaning of ''in the business of'', three circuits apply what has been coined the ''fence test'' in which the court must consider (1) if the stolen property was bought and sold, and (2) to what extent the stolen property transactions encouraged others to commit property crimes. Three other circuits have adopted the ''totality of the

circumstances test'' that focuses on the ''regularity and sophistication'' of the defendant's operation. Though the factors considered by all of these circuits are similar, the approaches are different.

The fence test involves making an ultimate determination of whether (1) the stolen property was bought and sold, and (2) the stolen property transactions encouraged others to commit property crimes. In making this determination, the court considers factors such as the regularity of the defendant's operation, the volume of the business, the quick turnover of the stolen items, the value of the stolen items, the sophistication of the defendant's operation, any use of a legitimate business to facilitate the turnover of the stolen items, the defendant's connections with thieves and purchasers of the stolen items, and the use of technology and communications.

The totality of the circumstances test involves consideration of the circumstances in each case with particular emphasis on the regularity and sophistication of the defendant's operation, looking at such factors as the amount of income generated through fencing activities, the value of the property handled, the defendant's past activities, the defendant's demonstrated interest in continuing or expanding the operation, the use of technology and communication, and the defendant's connections with thieves and purchasers of stolen property.

This amendment adopts the totality of the circumstances test, basing application of the enhancement on the circumstances surrounding the defendant and his business as opposed to the effect the fencing operation has in encouraging others to commit crimes.

College Scholarship Fraud

Subsection (b)(9)(D) implements the the directive in section 3 of the College Scholarship Fraud Prevention Act of 1999, Pub. L. 106–420. The directive requires the Commission to amend the guidelines:

* * * in order to provide for enhanced penalties for any offense involving fraud or misrepresentation in connection with the obtaining or providing of, or the furnishing of information to a consumer on, any scholarship, grant, loan, tuition, discount, award, or other financial assistance for purposes of financing an education at an institution of higher education, such that those penalties are comparable to the base offense level for misrepresentation that the defendant was acting on behalf of a charitable, educational, religious, or political organization, or a government agency.

The amendment adds an additional alternative enhancement that applies if the offense involves a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education. This proposed enhancement is targeted at the provider of the financial assistance or scholarship services, not the individual applicant for such assistance or scholarship, consistent with the intent of the legislation.

Risk of Bodily Injury Enhancement: The proposal provides for two substantive changes with respect to the enhancement involving conscious or reckless risk of serious bodily injury. First, it increases the ''floor'' offense level from level 13 to level 14. Second, it inserts ''death'' before the term ''or serious bodily injury'' because, as a practical matter, a risk of serious bodily injury is likely also to entail a risk of death. Including ''of death'' also will provide consistency throughout the *Guidelines Manual.* Currently, ''risk of death or serious bodily injury'' appears in a number of other guidelines as either an alternative base offense level, specific offense characteristic, or invited upward departure (*see, e.g.,* § 2A2.2 comment (n.3); § 2K1.4(a)(1)(2); § 2Q1.4(b)(1)). The fraud guideline is the only guideline in which risk of serious bodily injury appears as a sentencing factor without a reference to ''risk of death''.

This enhancement stems from a 1988 congressional directive in which the Commission was instructed to amend the fraud guideline to provide an appropriate enhancement for a fraud offense that creates a conscious or reckless risk of serious bodily injury. The Commission was further instructed to consider the appropriateness of a minimum enhancement of two offense levels for this conduct. The legislation did not require a ''floor'' offense level.

The proposal increases the ''floor'' from level 13 to level 14 to promote proportionality between this and other guidelines covering similar conduct. Within the current theft and fraud guidelines, there are three specific offense characteristics that have a higher floor offense level than the current risk of bodily injury enhancement: (1) ''Chop shops'': level 14; (2) jeopardizing the solvency of a financial institution: level 24; and (3) personally receiving more than $1 million from a financial institution: level 24 (congressionally directed minimum).

Other conceptually similar offense conduct under various guidelines is graded as follows:

(1) Reckless voluntary manslaughter (§ 2A1.4): level 14

(2) Operating a common carrier under influence of drugs or alcohol, no death or serious bodily injury resulting (§ 2D2.3): level 13

(3) Arson creating a substantial risk of death or serious bodily injury (§ 2K1.4): level 20

(4) Immigration smuggling offense creating a substantial risk of death or serious bodily injury (§ 2L1.1): 2-level enhancement, ''floor'' of level 18

(5) Environmental offenses resulting in risk of death or serious bodily injury (§§ 2Q1.1, 2Q1.2, 2Q1.3, 2Q1.4): Offense level varies from level 17 to level 24.

Gross Receipts Enhancement: The proposed amendment presents two options for modifying this enhancement, which currently provides a 4-level increase and a floor offense level of level 24 for a defendant who personally derives more than $1 million in gross receipts from an offense that affected a financial institution.

The gross receipts enhancement derives from a 1990 congressional directive requiring a minimum offense level of level 24 if the defendant derived more than $1 million in gross receipts from certain offenses that affected financial institutions. The Commission had received and implemented a related directive the previous year requiring that the guidelines provide a ''substantial period of incarceration'' for certain specific offenses that ''substantially jeopardize the safety and soundness of a federally insured financial institution.'' In each case, the Commission constructed an enhancement that was considerably broader and more severe than the directive required. In part, this was the Commission's way of responding to the increases in statutory maximum penalties for financial institution offenses that Congress enacted in 1989 and 1990. The Commission had modestly increased the penalties for all fraud offenses with substantial monetary losses in 1989. Rather than increase the loss table again, or adopt a generally applicable enhancement for fraud against financial institutions, the Commission elected to use the two congressionally directed enhancements as mechanisms for ensuring more stringent penalties for the more severe forms of those offenses.

Option 1 deletes the 4-level increase for deriving more than $1 million in gross receipts from the offense but retains the ''floor'' offense level of level 24 for such conduct (in order to retain compliance with the congressional directive). The 4-level increase is deleted under the assumption that a loss

table will be adopted that builds in increases for relatively high dollar losses; the deletion would prevent double-counting for the fact of a high dollar loss. Option 2 retains the current floor offense level but reduces the 4-level enhancement to 2 levels.

Sentencing Data: Due to the structure of this enhancement and the Commission's data collection methods it is impossible to determine which offenders received increases for jeopardizing a financial institution and which offenders received increases for gross receipts in excess of $1,000,000. Nevertheless, 33 fraud offenders (0.5 %) received an increase under this enhancement.

Additional Cross References

(A) This proposal adds a more generally applicable cross reference that would apply whenever a broadly applicable fraud statute is used to reach conduct that is more specifically addressed in another Chapter Two guideline [if the resulting offense level is greater].

Currently, Application Note 14 in the fraud guideline instructs the user to move to another, more appropriate Chapter Two guideline under circumstances in which: (1) The defendant is convicted of a broadly applicable fraud statue (*e.g.,* 18 U.S.C. § 1001), and (2) the convicted conduct is more appropriately covered by another Chapter Two guideline specifically tailored to that conduct. In essence, this note is not a cross reference, but rather a reminder of the principles enunciated in § 1B1.2 regarding application of the guideline most appropriate for the convicted conduct. Moreover, unlike the more typical cross reference, under this instruction the user locates and applies the more appropriate guideline, even if it yields an offense level lower than would have been obtained under the fraud guideline.

Experience over the years demonstrates that this application note is not well known or understood, and hence, not applied consistently. One way of possibly addressing these problems would be to convert the application note into a cross reference. The more highly visible approach of incorporating the instruction directly into the guideline should ensure more consistent application, without changing the basic policy of using the cross reference to move to the guideline most appropriate for the conduct of which the defendant was convicted.

Proposed Amendment (Part A)

Chapter Two, Part F, is amended in the heading by striking ''—Offenses Involving Fraud or Deceit''; and by striking §§ 2F1.1 and 2F1.2 in their entirety.

Chapter Two is amended by striking the heading to Part B; by striking the heading to Subpart 1; by striking the Introductory Commentary to such subpart; and by striking §§ 2B1.1 and 2B1.3 in their entirety and inserting the following:

''Part B—Basic Economic Offenses

1. Theft, Embezzlement, Receipt of Stolen Property, Property Destruction, Fraud and Insider Trading

Introductory Commentary

These sections address basic forms of property offenses: theft, embezzlement, fraud, forgery, counterfeiting (other than offenses involving altered or counterfeit bearer obligation of the United States), insider trading, transactions in stolen goods, and simple property damage or destruction. (Arson is dealt with separately in Part K, Offenses Involving Public Safety.) These guidelines apply to offenses prosecuted under a wide variety of federal statutes, as well as offenses that arise under the Assimilative Crimes Act.

§ 2B1.1. Larceny, Embezzlement, and Other Forms of Theft; Offenses Involving Stolen Property; Property Damage or Destruction; Fraud and Deceit; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the loss exceeded [$2000][$5,000], increase the offense level as follows:

[Loss Table Options—See Part B of this amendment]

(2) If the offense—

(A) (i) involved more than 4, but less than 50, victims; or (ii) was committed through mass-marketing, increase by 2 levels; or

(B) involved 50 or more victims, increase by 4 levels.

(3) If the theft was from the person of another, increase by 2 levels.

(4) If the offense involved receiving stolen property, and the defendant was a person in the business of receiving and selling stolen property, increase by 2 levels.

(5) If the offense involved misappropriation of a trade secret and the defendant knew or intended that the offense would benefit any foreign government, foreign instrumentality, or foreign agent, increase by 2 levels.

(6) If the offense involved theft to, damage of, or destruction of property from a national cemetery, increase by 2 levels.

[(7) If the loss was $2,000 or less, decrease by 2 levels.]

(8) If the offense involved (A) a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency; (B) a misrepresentation or other fraudulent action during the course of a bankruptcy proceeding; (C) a violation of any prior, specific judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines [; or (D) a misrepresentation to a consumer in connection with obtaining, providing, or furnishing financial assistance for an institution of higher education, increase by 2 levels]. If the resulting offense level is less than level 10, increase to level 10.

(9) If (A) the defendant relocated, or participated in relocating, a fraudulent scheme to another jurisdiction to evade law enforcement or regulatory officials; (B) a substantial part of a fraudulent scheme was committed from outside the United States; or (C) the offense otherwise involved sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(10) If the offense involved—

(A) the possession or use of any device-making equipment;

(B) the production or trafficking of any unauthorized access device or counterfeit access device; or

(C) (i) the unauthorized transfer or use of any means of identification unlawfully to produce or obtain any other means of identification; or (ii) the possession of 5 or more means of identification that unlawfully were produced from another means of identification or obtained by the use of another means of identification, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(11) If the offense involved an organized scheme to steal vehicles or vehicle parts, and the offense level is less than level 14, increase to level 14.

(12) If the offense involved (A) the conscious or reckless risk of death or serious bodily injury; or (B) possession of a dangerous weapon (including a firearm) in connection with the offense, increase by 2 levels. If the resulting offense level is less than level 14, increase to level 14.

(13) If the offense substantially jeopardized the safety and soundness of a financial institution, increase by 4 levels. If the resulting offense level is less than level 24, increase to level 24.

[Option 1: (14) If (A) the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense; and (B) the offense level is less than level 24, increase to level 24.]

[Option 2: (14) If the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by 2 levels. If the resulting offense level is less than level 24, increase to level 24.]

(c) Cross References

(1) If (A) a firearm, destructive device, explosive material, or controlled substance was taken, or the taking of such item was an object of the offense; or (B) the stolen property received, transported, transferred, transmitted, or possessed was a firearm, destructive device, explosive material, or controlled substance, apply § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking; Attempt or Conspiracy), § 2D2.1 (Unlawful Possession; Attempt or Conspiracy), § 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), or § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition), as appropriate, if the resulting offense level is greater than that determined above.

(2) If the offense involved arson, or property damage by use of explosives, apply § 2K1.4 (Arson; Property Damage by Use of Explosives), if the resulting offense level is greater than that determined above.

(3) If (A) none of subdivisions (1) or (2) of this subsection apply; (B) the defendant was convicted under a statute proscribing false, fictitious, or fraudulent statements or representations generally (*e.g.*, 18 U.S.C. § 1001, § 1341, § 1342, or § 1343); and (C) the count of conviction establishes an offense more aptly covered by another guideline in Chapter Two, apply that other guideline [if the resulting offense level is greater].

(d) Special Instruction

(1) If the defendant is convicted under 18 U.S.C. § 1030(a)(4) or (a)(5) the minimum guideline sentence, notwithstanding any other adjustment, shall be six months' imprisonment.

Commentary

Statutory Provisions: 7 U.S.C. §§ 6, 6b, 6c, 6h, 6o, 13, 23; 15 U.S.C. §§ 50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644; 18 U.S.C. §§ 225, 285–289, 471–473, 500, 510, 553(a)(1), 641, 656, 657, 659, 662, 664, 1001–1008, 1010–1014, 1016–1022, 1025, 1026, 1028, 1029, 1030(a)(4), 1030(a)(5), 1031, 1341–1344, 1361, 1363, 1702, 1703 (if vandalism or malicious mischief, including destruction of mail is involved), 1708, 1831, 1832, 2113(b), 2312–2317; 29 U.S.C. § 501(c). For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

1. For purposes of this guideline.—

'Financial institution'' as used in this guideline, is defined to include any institution described in 18 U.S.C. §§ 20, 656, 657, 1005–1007, and 1014; any state or foreign bank, trust company, credit union, insurance company, investment company, mutual fund, savings (building and loan) association, union or employee pension fund; any health, medical or hospital insurance association; brokers and dealers registered, or required to be registered, with the Securities and Exchange Commission; futures commodity merchants and commodity pool operators registered, or required to be registered, with the Commodity Futures Trading Commission; and any similar entity, whether or not insured by the federal government. ''Union or employee pension fund'' and ''any health, medical, or hospital insurance association,'' as used above, primarily include large pension funds that serve many individuals (*e.g.,* pension funds of large national and international organizations, unions, and corporations doing substantial interstate business), and associations that undertake to provide pension, disability, or other benefits (*e.g.*, medical or hospitalization insurance) to large numbers of persons.

'Firearm' and ''destructive device'' are defined in the Commentary to § 1B1.1 (Application Instructions).

'Foreign instrumentality' and ''foreign agent'' are defined in 18 U.S.C. § 1839(1) and (2), respectively.

'From the person of another' refers to property, taken without the use of force, that was being held by another person or was within arms' reach. Examples include pick-pocketing or non-forcible purse-snatching, such as the theft of a purse from a shopping cart.

'Mass-marketing' means a plan, program, promotion, or campaign that is conducted through solicitation by telephone, mail, the Internet, or other means to induce a large number of persons to (A) purchase goods or services; (B) participate in a contest or sweepstakes; or (C) invest for financial profit. The enhancement would apply, for example, if the defendant conducted or participated in a telemarketing campaign that solicited a large number of individuals to purchase fraudulent life insurance policies.

'National cemetery' means a cemetery (A) established under section 2400 of title 38, United States Code; or (B) under the jurisdiction of the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Interior.

'Trade secret' is defined in 18 U.S.C. § 1839(3).

2. [Definition of Loss—See Part C of this amendment]

3. Controlled substances should be valued at their estimated street value.

[4. Enhancement for Business of Receiving and Selling Stolen Property.—

(A) In General.—The court shall consider the totality of the circumstances to determine whether a defendant was in the business of receiving and selling stolen property for purposes of subsection (b)(4).

(B) Factors to Consider.—The following is a non-inclusive list of factors that the court may consider in determining whether the defendant was in the business of receiving and selling stolen property for purposes of subsection (b)(4):

(i) The regularity or sophistication of the defendant's activities;

(ii) The value and size of the inventory of stolen property maintained by the defendant;

(iii) The extent to which the defendant's activities encouraged or facilitated other crimes; or

(iv) The defendant's past activities involving stolen property.]

5. Application of Subsection (b)(8).—

(A) In General.—The adjustments in subsection (b)(8) are alternative rather than cumulative. If, in a particular case, however, more than one of the enumerated factors applied, an upward departure may be warranted.

(B) Misrepresentation Defendant Was Acting On Behalf of Charitable Institution.—Subsection (b)(8)(A) provides an adjustment for a misrepresentation that the defendant was acting on behalf of a charitable, educational, religious or political organization, or a government agency. Examples of conduct to which this factor applies would include a group of defendants who solicit contributions to a non-existent famine relief organization by mail, a defendant who diverts donations for a religiously affiliated school by telephone solicitations to church members in which the defendant falsely claims to be a fund-raiser for the school, or a defendant who poses as a federal collection agent in order to collect a delinquent student loan.

(C) Fraud in Contravention of Prior Judicial Order.—Subsection (b)(8)(C) provides an enhancement if the defendant commits a fraud in contravention of a prior, official judicial or administrative warning, in the form of an order, injunction, decree, or process, to take or not to take a specified action. A defendant who does not comply with such a prior, official judicial or administrative warning demonstrates aggravated criminal intent and deserves additional punishment. If it is established that an entity the defendant controlled was a party to the prior proceeding that resulted in the official judicial or administrative action, and the defendant had knowledge of that prior decree or order, this enhancement applies even if the defendant was not a specifically named party in that prior case. For example, a defendant whose business previously was enjoined from selling a dangerous product, but who nonetheless engaged in fraudulent conduct to sell the product, is subject to this enhancement. This enhancement does not apply if the same conduct resulted in an enhancement pursuant to a provision found elsewhere in the guidelines (*e.g.*, a violation of a condition of release addressed in § 2J1.7 (Commission of Offense While on Release) or a violation of probation addressed in § 4A1.1 (Criminal History Category)).

(D) College Scholarship Fraud.—

For the purposes of subsection (b)(8)(D)—

'Financial assistance' means any scholarship, grant, loan, tuition, discount, award, or other financial assistance for the purposes of financing an education.

'Institution of higher education' has the meaning given that term in section 101 of the Higher Education Act of 1954 (20 U.S.C. § 1001).]

(E) Non-Applicability of Enhancement.—If the conduct that forms the basis for an enhancement under (b)(8)(B) or (C) is the only conduct that forms the basis for an adjustment under § 3C1.1 (Obstruction of Justice), do not apply an adjustment under § 3C1.1.

6. Application of Subsection (b)(9).—

(A) Definition of United States.—'United States' means each of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

(B) Sophisticated Means Enhancement.—For purposes of subsection (b)(9)(C), ''sophisticated means'' means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. For example, in a telemarketing scheme, locating the main office of the scheme in one jurisdiction but locating soliciting operations in another jurisdiction would ordinarily indicate sophisticated means. Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore bank accounts also ordinarily would indicate sophisticated means.

(C) Non-Applicability of Enhancement.—If the conduct that forms the basis for an enhancement under subsection (b)(9) is the only conduct that forms the basis for an adjustment under § 3C1.1 (Obstruction of Justice), do not apply an adjustment under § 3C1.1.

7. Application of Subsection (b)(10).—

(A) Definitions.—

'Counterfeit access device' (A) has the meaning given that term in 18 U.S.C. § 1029(e)(2); and (B) also includes a telecommunications instrument that has been modified or altered to obtain unauthorized use of telecommunications service. 'Telecommunications service' has the meaning given that term in 18 U.S.C. § 1029(e)(9).

'Device-making equipment' (A) has the meaning given that term in 18 U.S.C. § 1029(e)(6); and (B) also includes (i) any hardware or software that has been configured as described in 18 U.S.C. § 1029(a)(9); and (ii) a scanning receiver referred to in 18 U.S.C. § 1029(a)(8). 'Scanning receiver' has the meaning given that term in 18 U.S.C. § 1029(e)(8).

'Means of identification' has the meaning given that term in 18 U.S.C. § 1028(d)(3), except that such means of identification shall be of an actual (*i.e.,* not fictitious) individual other than the defendant or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct).

'Produce' includes manufacture, design, alter, authenticate, duplicate, or assemble. 'Production' includes manufacture, design, alteration, authentication, duplication, or assembly.

'Unauthorized access device' has the meaning given that term in 18 U.S.C. § 1029(e)(3).

(B) Subsection (b)(10)(C)(i).—This subsection applies in a case in which a means of identification of an individual other than the defendant (or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct)) is used without that individual's authorization unlawfully to produce or obtain another means of identification.

(C) Examples of Conduct Under (b)(10)(C)(i).—Examples of conduct to which this subsection should apply are as follows:

(i) A defendant obtains an individual's name and social security number from a source (*e.g.,* from a piece of mail taken from the individual's mailbox) and obtains a bank loan in that individual's name. In this example, the account number of the bank loan is the other means of identification that has been obtained unlawfully.

(ii) A defendant obtains an individual's name and address from a source (*e.g.,* from a driver's license in a stolen wallet) and applies for, obtains, and subsequently uses a credit card in that individual's name. In this example, the credit card is the other means of identification that has been obtained unlawfully.

(D) Nonapplicability of subsection (b)(10)(C)(i):—Examples of conduct to which this subsection should not apply are as follows:

(i) A defendant uses a credit card from a stolen wallet only to make a purchase. In such a case, the defendant has not used the stolen credit card to obtain another means of identification.

(ii) A defendant forges another individual's signature to cash a stolen check. Forging another individual's signature is not producing another means of identification.

(E) Subsection (b)(10)(C)(ii).—This subsection applies in any case in which the offense involved the possession of 5 or more means of identification that unlawfully were produced or obtained, regardless of the number of individuals in whose name (or other identifying information) the means of identification were so produced or so obtained.

(F) Upward Departure.—In a case involving unlawfully produced or unlawfully obtained means of identification, an upward departure may be warranted if the offense level does not adequately address the seriousness of the offense. Examples may include the following:

(i) The offense caused substantial harm to the victim's reputation or credit record, or the victim suffered a substantial inconvenience related to repairing the victim's reputation or a damaged credit record.

(ii) An individual whose means of identification the defendant used to obtain unlawful means of identification is erroneously arrested or denied a job because an arrest record has been made in the individual's name.

(iii)The defendant produced or obtained numerous means of identification with respect to one

individual and essentially assumed that individual's identity.

(G) Counterfeit Access Devices.—In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device. In any such case, loss shall be not less than $500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than $100 per unused means.

8. Chop Shop Enhancement.—For purposes of (b)(11), a minimum offense level is provided in the case of an ongoing, sophisticated operation (such as an auto theft ring or 'chop shop') to steal vehicles or vehicle parts, or to receive stolen vehicles or vehicle parts. ''Vehicles'' refers to all forms of vehicles, including aircraft and watercraft.

9. Substantially Jeopardized the Safety and Soundness of a Financial Institution.—For the purposes of subsection (b)(13), an offense shall be considered to have substantially jeopardized the safety and soundness of a financial institution if, as a consequence of the offense, the institution became insolvent; substantially reduced benefits to pensioners or insureds; was unable on demand to refund fully any deposit, payment, or investment; was so depleted of its assets as to be forced to merge with another institution in order to continue active operations; or was placed in substantial jeopardy of any of the above.

10. Application of Subsection of (b)(14).—

In General.—For the purposes of (b)(14), the defendant shall be considered to have derived more than $1,000,000 in gross receipts if the gross receipts to the defendant individually, rather than to all participants, exceeded $1,000,000.

Gross Receipts From the Offense.—'Gross receipts from the offense' includes all property, real or personal, tangible or intangible, which is obtained directly or indirectly as a result of such offense. *See* 18 U.S.C. § 982(a)(4).

11. Cross References.—

(A) General Fraud Statutes.—Subsection (c)(3) provides a cross reference to another Chapter Two guideline in cases in which the defendant is convicted of a general fraud statute, and the count of conviction (or a stipulation as described in § 1B1.2(a)) establishes an offense more aptly covered by another guideline [and the resulting offense level is greater]. Sometimes, offenses involving fraudulent statements are prosecuted under 18 U.S.C. § 1001, or a similarly general statute, although the offense is also covered by a more specific statute. Examples include false entries regarding currency transactions, for which § 2S1.3 would be more apt, and false statements to a customs officer, for which § 2T3.1 likely would be more apt. In certain other cases, the mail or wire fraud statutes, or other relatively broad statutes, are used primarily as jurisdictional bases for the prosecution of other offenses.

(B) Identification Documents.—Offenses involving identification documents, false identification documents, and means of identification, in violation of 18 U.S.C. § 1028, also are covered by this guideline. If the primary purpose of the offense was to violate, or assist another to violate, the law pertaining to naturalization, citizenship, or legal resident status, apply § 2L2.1 (Trafficking in a Document Relating to Naturalization) or § 2L2.2 (Fraudulently Acquiring Documents Relating to Naturalization), as appropriate, rather than § 2F1.1.

12. Continuing Financial Crimes Enterprise.—If the defendant is convicted under 18 U.S.C. § 225 (relating to a continuing financial crimes enterprise), the offense level is that applicable to the underlying series of offenses comprising the 'continuing financial crimes enterprise.'

13. Upward Departure in Cases Involving Theft of Information from a Protected Computer.—In cases involving theft of information from a 'protected computer', as defined in 18 U.S.C. § 1030(e)(2)(A) or (B), an upward departure may be warranted where the defendant sought the stolen information to further a broader criminal purpose.

14. Multiple Count Indictments.—Some fraudulent schemes may result in multiple-count indictments, depending on the technical elements of the offense. The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction. *See* Chapter Three, Part D (Multiple Counts).

15. Upward Departure in Cases Involving Access Devices.—Offenses involving access devices, in violation of 18 U.S.C. §§ 1028 and 1029, are also covered by this guideline. In such a case, an upward departure may be warranted where the actual loss does not adequately reflect the seriousness of the conduct.

16. Vulnerable Victims.—

(A) In General.—Except as provided in subdivision (b)(2)(B), if the fraud exploited vulnerable victims, an enhancement shall apply. *See* § 3A1.1 (Hate Crime Motivation or Vulnerable Victim).

(B) Nonapplicability of § 3A1.1(b)(2) in Certain Cases.—If subsection (b)(2)[(B)] applies, an enhancement under § 3A1.1(b)(2) shall not apply.

Background: This guideline covers offenses involving theft, stolen property, property damage or destruction, fraud, forgery, and counterfeiting (other than offenses involving altered or counterfeit bearer obligations of the United States). It also covers offenses involving altering or removing motor vehicle identification numbers, trafficking in automobiles or automobile parts with altered or obliterated identification numbers, odometer laws and regulations, obstructing correspondence, the falsification of documents or records relating to a benefit plan covered by the Employment Retirement Income Security Act, and the failure to maintain, or falsification of, documents required by the Labor Management Reporting and Disclosure Act.

Because federal fraud statutes often are broadly written, a single pattern of offense conduct usually can be prosecuted under several code sections, as a result of which the offense of conviction may be somewhat arbitrary. Furthermore, most fraud statutes cover a broad range of conduct with extreme variation in severity. The specific offense characteristics [and cross references] contained in this guideline are designed with these considerations in mind.

[Loss Background Commentary—See Part C]

Theft from the person of another, such as pickpocketing or non-forcible purse-snatching, receives an enhanced sentence because of the increased risk of physical injury. This guideline does not include an enhancement for thefts from the person by means of force or fear; such crimes are robberies and are covered under § 2B3.1 (Robbery).

A minimum offense level of level 14 is provided for offenses involving an organized scheme to steal vehicles or vehicle parts. Typically, the scope of such activity is substantial, but the value of the property may be particularly difficult to ascertain in individual cases because the stolen property is rapidly resold or otherwise disposed of in the course of the offense. Therefore, the specific offense characteristic of 'organized scheme' is

used as an alternative to 'loss' in setting a minimum offense level.

Use of false pretenses involving charitable causes and government agencies enhances the sentences of defendants who take advantage of victims' trust in government or law enforcement agencies or the generosity and charitable motives of victims. Taking advantage of a victim's self-interest does not mitigate the seriousness of fraudulent conduct; rather, defendants who exploit victims' charitable impulses or trust in government create particular social harm. In a similar vein, a defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.

Offenses that involve the use of transactions or accounts outside the United States in an effort to conceal illicit profits and criminal conduct involve a particularly high level of sophistication and complexity. These offenses are difficult to detect and require costly investigations and prosecutions. Diplomatic processes often must be used to secure testimony and evidence beyond the jurisdiction of United States courts. Consequently, a minimum level of 12 is provided for these offenses.

Subsection (b)(6) implements the instruction to the Commission in section 2 of Public Law 105–101.

Subsection (b)(9) implements, in a broader form, the instruction to the Commission in section 6(c)(2) of Public Law 105–184.

Subsections (b)(10)(A) and(B) implement the instruction to the Commission in section 4 of the Wireless Telephone Protection Act, Public Law 105–172.

Subsection (b)(10)(C) implements the directive to the Commission in section 4 of the Identity Theft and Assumption Deterrence Act of 1998, Public Law 105–318. This subsection focuses principally on an aggravated form of identity theft known as 'affirmative identity theft' or 'breeding,' in which a defendant uses another individual's name, social security number, or some other form of identification (the 'means of identification') to 'breed' (*i.e.,* produce or obtain) new or additional forms of identification. Because 18 U.S.C. § 1028(d) broadly defines 'means of identification,' the new or additional forms of identification can include items such as a driver's license, a credit card, or a bank loan. This subsection provides a minimum offense level of level 12, in part, because of the seriousness of the offense. The minimum offense level accounts for the fact that the means of identification that were 'bred' (*i.e.,* produced or obtained) often are within the defendant's exclusive control, making it difficult for the individual victim to detect that the victim's identity has been 'stolen.' Generally, the victim does not become aware of the offense until certain harms have already occurred (*e.g.,* a damaged credit rating or inability to obtain a loan). The minimum offense level also accounts for the non-monetary harm associated with these types of offenses, much of which may be difficult or impossible to quantify (*e.g.,* harm to the individual's reputation or credit rating, inconvenience, and other difficulties resulting from the offense). The legislative history of the Identity Theft and Assumption Deterrence Act of 1998 indicates that Congress was especially concerned with providing increased punishment for this type of harm.

Subsection (b)(12)(B) implements, in a broader form, the instruction to the Commission in section 110512 of Public Law 103–322.

Subsection (b)(13) implements, in a broader form, the instruction to the Commission in section 961(m) of Public Law 101–73.

Subsection (b)(14) implements, in a broader form, the instruction to the Commission in section 2507 of Public Law 101–647.

Subsection (d) implements the instruction to the Commission in section 805(c) of Public Law 104–132.''.

The Commentary to § 1B1.1 captioned ''Application Notes'' is amended in Note 1 by striking subdivision (f) in its entirety.

The Commentary to § 1B1.1 captioned ''Application Notes'' is amended in Note 4 in the second paragraph by striking ''For example, the adjustments from § 2F1.1(b)(2) (more than minimal planning) and § 3B1.1 (Aggravating Role) are applied cumulatively.''.

The Commentary to § 2A2.2 captioned ''Application Notes'' is amended in Note 2 by striking ''more than minimal planning,''.

The Commentary to § 2A2.2 captioned ''Application Notes'' is amended by adding at the end the following:

''4. 'More than minimal planning' means more planning than is typical for commission of the offense in a simple form. 'More than minimal planning' also exists if significant affirmative steps were taken to conceal the offense, other than conduct to which § 3C1.1 (Obstructing or Impeding the Administration of Justice) applies. For example, waiting to commit the offense when no witnesses were present would not alone constitute more than minimal planning. By contrast, luring the victim to a specific location, or wearing a ski mask to prevent identification, would constitute more than minimal planning.''.

The Commentary to § 2B2.1 captioned ''Application Notes'' is amended in Note 1 by striking ''More than minimal planning'', ''firearm,'' and inserting ''Firearm,'' ''.

The Commentary to § 2B2.1 captioned ''Application Notes'' is amended in Note 2 by striking ''§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud).''.

The Commentary to § 2B2.1 captioned ''Application Notes'' is amended by adding at the end the following:

''4. 'More than minimal planning' means more planning than is typical for commission of the offense in a simple form. 'More than minimal planning' also exists if significant affirmative steps were taken to conceal the offense, other than conduct to which § 3C1.1 (Obstructing or Impeding the Administration of Justice) applies. For example, checking the area to make sure no witnesses were present would not alone constitute more than minimal planning. By contrast, obtaining building plans to plot a particular course of entry, or disabling an alarm system, would constitute more than minimal planning.''.

Issues for Comment

(1) The Commission invites comment on whether and how the rules on inchoate and partially completed offenses, as currently expressed in § 2X1.1, § 1B1.2 application note 7, § 2B1.1 application note 2 (last paragraph), and § 2F1.1 application Note 10, should apply under the proposed revised and consolidated economic crime guideline (§ 2B1.1) and the proposed revised definition of ''loss.'' If the current rules are retained, how might they be revised to make their application clearer, simpler, and more consistent? Alternatively, should the current rules be replaced with permissive, encouraged downward departure commentary? If the current rules are modified in regard to offenses sentenced under the revised, consolidated guideline, what conforming changes should be made in § 2X1.1 to ensure similar treatment for similar offense conduct not subject to the revised consolidated guideline?

(2) The Commission also requests comment on whether, and if so, to what

extent it should provide an enhancement for the destruction of, or damage to, unique or irreplaceable items of cultural heritage, archaeological, or historical significance. As one means of providing an enhancement, should the Commission provide an alternative loss calculation based on the cultural heritage, archaeological, or historical significance of the item or based on the cost of the item's restoration and repair? *See, e.g., United States* v. *Shumway,* 47 F.3d 1413, 1424 (10th Cir. 1997). Alternatively, should the Commission provide an upward departure provision for such cases, or some combination of an alternative measure of loss and an upward departure provision? Should the Commission also consider amending the current enhancement for damage to, or destruction of, property of a national cemetery in §§ 2B1.1 and 2B1.3 to include, for example, offenses involving human remains and funerary objects located on federal or Indian land?

Part B. Loss Tables for Consolidated Guideline and § 2T4.1 (Tax Table)

Synopsis of Proposed Amendment: This amendment proposes three options for a loss table for the consolidated guideline, § 2B1.1, and two options for a loss table for § 2T4.1 (Tax Table). If a decision is made to use the same table, the effect would be to sentence the offenses under both guidelines in a similar manner. This would represent a change from the current relationship in which tax offenses generally face slightly higher offense levels for a given loss amount than fraud and theft offenses.

Regarding the tables for both guidelines, each option attempts to compress the loss table by (generally) moving from one-level to two-level increments, thus increasing the range of losses that correspond to an individual increment. This is designed to minimize fact-finding and the appearance of false precision.

Proposed Amendment (Part B)

Sections 2B1.1(b)(1), as amended by Part A of this amendment, is further amended to read as follows:

Option One

''(1) If the loss exceeded $2,000, increase the offense level as follows:

Loss (apply the greatest)	Increase in level
(A) $2,000 or less	no increase.
(B) More than $2,000	add 1.
(C) More than $5,000	add 2.
(D) More than $10,000	add 4.
(E) More than $20,000	add 6.
(F) More than $40,000	add 8.
(G) More than $80,000	add 10.
(H) More than $200,000	add 12.
(I) More than $500,000	add 14.
(J) More than $1,200,000	add 16.
(K) More than $2,500,000	add 18.
(L) More than $7,500,000	add 20.
(M) More than $20,000,000	add 22.
(N) More than $50,000,000	add 24.
(O) More than $100,000,000	add 26.''.

Option Two

''(1) If the loss exceeded $5,000, increase the offense level as follows:

Loss (apply the greatest)	Increase in level
(A) $5,000 or less	no increase.
(B) More than $5,000	add 2.
(C) More than $10,000	add 4.
(D) More than $30,000	add 6.
(E) More than $70,000	add 8.
(F) More than $120,000	add 10.
(G) More than $200,000	add 12.
(H) More than $400,000	add 14.
(I) More than $1,000,000	add 16.
(J) More than $2,500,000	add 18.
(K) More than $7,000,000	add 20.
(L) More than $20,000,000	add 22.
(M) More than $50,000,000	add 24.
(N) More than $100,000,000	add 26.''.

Option Three

(1) If the loss exceeded $5,000, increase the offense level as follows:

Loss (apply the greatest)	Increase in level
(A) $5,000 or less	no increase.
(B) More than $5,000	add 2.
(C) More than $10,000	add 4.
(D) More than $20,000	add 6.
(E) More than $40,000	add 8.
(F) More than $80,000	add 10.
(G) More than $160,000	add 12.
(H) More than $400,000	add 14.
(I) More than $1,000,000	add 16.
(J) More than $2,500,000	add 18.
(K) More than $7,5000,000	add 20.
(L) More than $20,000,000	add 22.
(M) More than $50,000,000	add 24.
(N) More than $125,000,000	add 26.''.

Section 2T4.1 is amended by striking the table in its entirety and inserting the following:

Option One

Tax loss (apply the greatest)	Offense level
(A) $2,000 or less	6.
(B) More than $2,000	8.
(C) More than $5,000	10.
(D) More than $12,500	12.
(E) More than $30,000	14.
(F) More than $80,000	16.
(G) More than $200,000	18.
(H) More than $500,000	20.
(I) More than $1,200,000	22.
(J) More than $2,500,000	24.
(K) More than $7,500,000	26.
(L) More than $20,000,000	28.
(M) More than $50,000,000	30.
(N) More than $100,000,000	32.''.

Option Two

''Tax loss (apply the greatest)	Offense level
(A) $5,000 or less	6
(B) More than $5,000	8
(C) More than $10,000	10
(D) More than $30,000	12
(E) More than $70,000	14
(F) More than $120,000	16
(G) More than $200,000	18
(H) More than $400,000	20
(I) More than $1,000,000	22
(J) More than $2,500,000	24
(K) More than $7,000,000	26
(L) More than $20,000,000	28
(M) More than $50,000,000	30
(N) More than $100,000,000	32.''.

Part C. Revised Definition of Loss for Offenses Sentenced Pursuant to § 2B1.1, the Consolidated Guideline

Synopsis of Proposed Amendment: The proposed amendment provides two major options to create one definition of loss for offenses sentenced pursuant to § 2B1.1 (Larceny, Embezzlement and Other Forms of Theft) and § 2F1.1 (Fraud and Deceit). Each option is designed to resolve circuit conflicts, address case law and application issues, and to promote consistency in application. To the extent practicable, each of the proposed definitions retains existing language and concepts that have not proven problematic. The first option was prepared by the Commission and is intended to invite comment on the major issues related to the definition of loss, including those presented in the second option. The second option was prepared by the Criminal Law Committee (CLC) of the Judicial Conference and is included for publication in its entirety in recognition of the years of effort that the members of that committee have put into the preparation of a new definition of loss.

The proposed amendment would accomplish the following purposes:

(1) Combine the loss definitions in the commentary to the theft and fraud guidelines into one definition with a simplified format;

(2) Provide definitions for key concepts of loss, including ''actual loss'', ''pecuniary harm'', and ''intended loss'';

(3) Provide two options for a causation standard: (A) ''but for'' causation standard (and an example) plus reasonable foreseeability; and (B)

combine current loss concepts from §§ 2B1.1 and 2F1.1 and make clear ''but for'' causation is required but without concept of reasonable foreseeability;

(4) Clarify the concept of intended loss in terms of the applicability of any credits or offsets, and to resolve a circuit conflict to provide that intended loss includes unlikely or impossible losses that are intended;

(5) Provide two options for when loss should be measured: (A) at the time of sentencing; and (B) when the offense was detected;

(6) Provide three options for what should be considered the time of detection: (A) when the offense is discovered by a victim or governmental agency; (B) when the defendant should have known the offense was detected [or about to be detected]; and (C) at the earlier of those two occurrences;

(7) Provide two options regarding inclusion of interest: (A) to explicitly exclude interest; and (B) to provide for the inclusion of only that interest that is accrued and unpaid that was bargained for as part of a lending transaction involved in the offense;

(8) Exclude certain costs incurred by the government and victims in connection with prosecution and criminal investigation of the offense;

(9) Provide for exclusion from loss of certain economic benefits transferred to victims, to be measured at the time of detection;

(10) Provide an option for certain exceptions to what constitutes ''economic benefits'': (A)(i) benefits of ''de minimis'' value; or (ii) benefits that are substantially different from what the victim intended to receive; and (B) services fraudulently rendered by defendants posing as licensed professionals and for goods falsely represented as approved by a regulatory agency or for which regulatory approval was obtained by fraud;

(11) Provide two options for excluding certain benefits transferred to victims of investment fraud schemes, both of which would resolve a circuit conflict: (A) Exclude gain to an individual investor in the scheme from being used to offset the loss to other individual investors in the scheme; and (B) exclude benefits transferred to victims designed to lure additional investments in the scheme from being used to offset the loss;

(12) Provide greater clarity regarding the flexibility that judges have in estimating loss;

(13) Provide four options for the use of gain: (A) Allow the use of gain as one of the factors to be used in estimating loss; (B) allow use of pecuniary gain as an alternative measure of loss if the gain is greater than loss; (C) provide for use of gain when loss cannot reasonably be determined or when gain is greater than loss; and (D) allow use of gain as an alternative when loss cannot reasonably be determined but the gain can be determined;

(14) Provide that the special loss rules establish a minimum loss rule in the specific context described;

(15) Further revise the special rule on determining loss in cases involving diversion of government program benefits to resolve an apparent circuit conflict;

(16) Reformat and clarify the provisions dealing with departures, including a bracketed option that would permit a downward departure where the loss exceeds the greater of the [defendant's] actual or intended [personal] gain; and

(17) Reposition into the background commentary examples from the current rules on inclusion of consequential damages in offenses involving product substitution and government contract fraud, consistent with option one regarding a causation standard.

Proposed Amendment (Part C)

Option One (Commission Proposal)

The Commentary to § 2B1.1 captioned ''Application Notes'', as amended by Part A of this amendment, is further amended by inserting after Note 1 the following:

''2. For purposes of subsection (b)(1).—

(A) General Rule.—Subject to the exclusions in subdivision (B), loss is the greater of actual loss or intended loss.

[Option 1: 'Actual loss' means the reasonably foreseeable pecuniary harm that resulted or will result from the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct).

'Reasonably foreseeable pecuniary harm' means pecuniary harm that the defendant knew, or under the circumstances of the particular case, reasonably should have known, likely would result, in the ordinary course of events, from that conduct. For example, in an offense involving unlawfully accessing, or exceeding authorized access to, a 'protected computer,' as defined in 18 U.S.C. § 1030(e)(2)(A) or (B), 'loss' is the reasonably foreseeable pecuniary harm to the victim, which typically includes costs such as conducting a damage assessment and restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service.

For example, defendant H pays defendant D $500 to inspect a home defendant H has contracted to purchase. Defendant D does not actually conduct an inspection, but rather mails defendant H a fraudulent inspection report stating that the property is free of all defects. Two days before closing, an underground oil tank—which must be removed before the sale may close—is discovered on the property. Due to the resulting unavoidable delay caused by the need to remove the tank, the closing must be postponed. Because defendant H's lease on his present residence expired on the original closing date, defendant H must locate temporary housing at additional cost. Further, defendant H loses the financing he had obtained and must procure new financing, at a higher interest rate, from another bank. On his way to the new bank to complete the paper work for the new loan, defendant H is in an automobile accident resulting in damage to the vehicle and injuries to defendant H. The $500 paid for the inspection report is includeable in loss as a direct loss. The increased rental payment for temporary housing and the cost resulting from the higher interest rates are also included in loss because they follow in the ordinary course and, therefore, are foreseeable. However, although the damage incurred in the automobile accident would not have occurred but for the fraud, it nevertheless did not follow in the ordinary course of events and was not foreseeable by a reasonable person in the defendant's position. Accordingly, it is not included in loss.]

[Option 2: 'Actual loss' means the pecuniary harm that resulted or will result from the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). 'Pecuniary harm' includes the value of the property taken, damaged, or destroyed, and the value of money and services unlawfully taken. Ordinarily, in a case in which property is taken or destroyed, the loss is the fair market value of the particular property at issue. If the market value is difficult to ascertain or inadequately measures harm to the victim, the court may measure loss in some other way, such as reasonable replacement cost to the victim.]

'Intended loss' means the pecuniary harm that was intended to result from the conduct for which the defendant is accountable under § 1B1.3. 'Intended loss' includes intended harm that would have been impossible or unlikely to occur (*e.g.,* as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value)[so long as the intended loss reasonably would have resulted if the

facts were as the defendant believed them to be].

[Option 1:

(B) Time of measurement.—Loss ordinarily should be measured at the time of sentencing, except as provided herein.]

[Option 2:

(B) Time of measurement.—Loss ordinarily should be measured at the time the offense was detected. An offense is detected [Option 2A: When the offense is discovered by a victim or a governmental agency.] [Option 2B: When the defendant knew or reasonably should have known that the offense was detected [or about to be detected] by a victim or a public law enforcement agency.] [Option 2C: The earlier of when an offense is discovered by a victim or a governmental agency or the defendant knew or reasonably should have known that the offense was detected [or about to be detected] by a victim or a public law enforcement agency.]

(C) Exclusions from Loss.—

[Option 1: (i) Interest of any kind, finance charges, late fees, penalties, amounts based on an agreed-upon return or rate of return, or other opportunity costs.]

[Option 2: (i) Interest of any kind, except if it is bargained for as part of a lending transaction that is involved in the offense. In such a case, the court shall include any such interest that is accrued and unpaid as of the time the defendant knew or should have known that the offense had been detected.]

(ii) Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense, even if such costs are reasonably foreseeable.

[(iii) The value of the economic benefit the defendant or other persons acting jointly with the defendant transferred to the victim before the offense was detected.]

(I) For purposes of this subdivision.—

''Economic benefit'' [includes][means] money, property, or services performed.

''Transferred'' means pledged or otherwise provided as collateral, returned, repaid, or otherwise conveyed.

(II) The value of any ''economic benefit'' transferred to the victim by the defendant ordinarily shall be measured at the time the offense was detected.

(III) However, in a case involving collateral pledged by a defendant, the ''economic benefit'' of such collateral to the victim for purposes of this subdivision is the amount the victim has recovered at the time of sentencing from disposition of the collateral. If the collateral has not been disposed of by that time, the 'economic benefit' of the collateral is its value at the time of sentencing.

[(IV) However, loss shall not be reduced by the value of:

(1) [benefits of de minimis value transferred by the defendant to the victim(s)][economic benefit transferred to the victim that has little or no value to the victim because it is substantially different from what the victim intended to receive]; or

(2) services fraudulently rendered to victims by persons falsely posing as licensed professionals, or goods falsely represented as approved by a governmental regulatory agency, or goods for which regulatory approval by a government agency was obtained by fraud.]

[Option 1:(V) In a case involving a fraudulent investment scheme, such as a Ponzi scheme, the loss shall not be reduced by the value of the economic benefit transferred to any individual investor in the scheme in excess of that investor's principal investment (*i.e.,* the gain to an individual investor in the scheme shall not be used to offset the loss to another individual investor in the scheme).]

[Option 2:(V) In a case involving a fraudulent investment scheme, such as a Ponzi scheme, loss shall not be reduced by the benefit transferred to victims designed to lure additional 'investments' in the scheme.]

(D) Estimation of Loss.—In order to determine the applicable offense level, the court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference. *See* 18 U.S.C. § 3742(e) and (f).

The estimate of the loss shall be based on available information, taking into account, as appropriate and practicable under the circumstances, factors such as the following:

(i) The fair market value of the property, or other thing of value, taken or otherwise unlawfully acquired, misapplied, misappropriated, or destroyed; or if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property or other thing of value.

(ii) The cost of repairs to damaged property, not to exceed the replacement cost had the property been destroyed.

(iii) The approximate number of victims multiplied by the average loss to each victim.

(iv) More general factors, such as the scope and duration of the offense and revenues generated by similar operations.

[Option 1:(v) The gain from the offense.]

[Option 2:

(E) Pecuniary Gain.—The court shall use the defendant's pecuniary gain as an alternative measure of loss if the pecuniary gain is greater than loss (which may be zero).

''Pecuniary gain'' has the meaning given that term in Application Note 3(h) of the Commentary to § 8A1.2 (Application Instructions—Organizations) (*i.e.,* the before-tax profit resulting from the relevant conduct of the offense).]

[Option 3:

(E) Pecuniary Gain.—The court shall use the defendant's pecuniary gain as an alternative measure of loss if (i) loss cannot reasonably be determined; or (ii) gain is greater than loss.

'Pecuniary gain' has the meaning given that term in Application Note 3(h) of the Commentary to § 8A1.2 (Application Instructions—Organizations) (*i.e.,* the before-tax profit resulting from the relevant conduct of the offense).]

[Option 4:

(E) Gain.—The Court shall use the defendant's gain if loss cannot reasonably be determined. For purposes of this application note, ''gain'' means the proceeds from the illegal activity.]

[(F) Special Rules.—The following special rules shall be used to assist in determining loss in the cases indicated:

(i) Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes.—In a case involving any counterfeit access device or unauthorized access device, loss includes any unauthorized charges made with the counterfeit access device or unauthorized access device. In any such case, loss shall be not less than $500 per access device. However, if the unauthorized access device is a means of telecommunications access that identifies a specific telecommunications instrument or telecommunications account (including an electronic serial number/mobile identification number (ESN/MIN) pair), and that means was only possessed, and not used, during the commission of the offense, loss shall be not less than $100 per unused means. For purposes of this application note, ''counterfeit access device'' and ''unauthorized access device'' have the meaning given those terms in Application Note 15.

(ii) Government Benefits.—In a case involving government benefits (*e.g.,* grants, loans, entitlement program payments), loss shall be considered to be not less than the value of the benefits

obtained by unintended recipients or diverted to unintended uses, as the case may be. For example, if the defendant was the intended recipient of food stamps having a value of $100 but fraudulently received food stamps having a value of $150, the loss is $50.

In a case involving a Davis-Bacon Act violation (*i.e.,* a violation of 40 U.S.C. § 276a, criminally prosecuted under 18 U.S.C. § 1001), the value of the benefits shall be considered to be not less than the difference between the legally required and actual wages paid.

In the case of a loan (*e.g.,* a student educational loan), the value of the benefits shall be considered to be not less than the amount of savings in interest over the life of the loan compared to alternative loan terms for which the applicant would have qualified.]

(G) Departure Considerations.—

(i) Upward Departure Considerations.—There may be cases in which the offense level determined under this guideline substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:

(I) A primary objective of the offense was an aggravating, non-monetary objective. For example, a primary objective of the offense was to inflict emotional harm.

(II) The offense caused or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest.

(III) The offense involved a substantial amount of interest of any kind, finance charges, late fees, penalties, anticipated profits, amounts based on an agreed-upon return or rate of return, or other opportunity costs, not included in the determination of loss for purposes of subsection (b)(1).

(IV) The offense created a risk of substantial loss beyond the loss determined for purposes of subsection (b)(1).

(V) The offense endangered the solvency or financial security of one or more victims.

(ii) Downward Departure Considerations. There also may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether a downward departure is warranted.

(I) The primary objective of the offense was a mitigating, non-monetary objective, such as to fund medical treatment for a sick parent. However, if, in addition to that primary objective, a substantial objective of the offense was to benefit the defendant economically, a downward departure for this reason would not ordinarily be warranted.

[(II)The loss significantly exceeds the greater of the [defendant's] actual or intended [personal] gain, and therefore significantly overstates the culpability of the defendant.]''.

The Commentary to § 2B1.1 captioned ''Background Commentary'', as amended by Part A of this proposed amendment, is further amended by inserting the following after the second paragraph:

The Commission has determined that, ordinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the pecuniary harm caused by their crimes. Accordingly, along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under this guideline. Because of the structure of the Sentencing Table (Chapter 5, Part A), subsection (b)(1) results in an overlapping range of enhancements based on the loss.

[Except as excluded above, both direct and indirect pecuniary harm that is a reasonably foreseeable result of the offense will be taken into account in determining the loss. Accordingly, in any particular case, the determination of loss may include consideration of factors not specifically set forth in this guideline. For example, in an offense involving unlawfully accessing, or exceeding authorized access to, a protected computer, as defined in 18 U.S.C. § 1030(e)(2)(A) or (B), loss is the reasonably foreseeable pecuniary harm to the victim, which typically includes costs such as conducting a damage assessment and restoring the system and data to their condition prior to the offense [, and any lost revenue due to interruption of service]. Likewise, in a product substitution case, the loss includes the victim's reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered, or modifying the product so that it can be used for its intended purpose, plus the victim's reasonably foreseeable cost of correcting the actual or potential disruption to the victim's business caused by the product substitution. Similarly, in a defense contract fraud case, loss includes the reasonably foreseeable administrative cost to the government and other participants of repeating or correcting the procurement action affected, plus any increased cost to procure the product or service involved that was reasonably foreseeable.]''.

Option Two (Criminal Law Committee Proposal)

The Commentary to § 2B1.1 captioned ''Application Notes'', as amended by Part A of this amendment, is further amended by inserting after Note 1 the following:

''2. For purposes of subsection (b)(1)—

(A) General Rule.—Loss is the greater of the actual loss or the intended loss.

'Actual loss' means the reasonably foreseeable pecuniary harm that resulted or will result from the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct).

'Reasonably foreseeable pecuniary harm' means pecuniary harm that the defendant knew or, under the circumstances of the particular case, reasonably should have known likely would result in the ordinary course of events from the conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct).

'Intended loss' means the pecuniary harm that was intended to result from the conduct for which the defendant is accountable under § 1B1.3, even if that harm would have been impossible or unlikely to occur (*e.g.,* as in a government sting operation, or an intended insurance fraud in which the claim exceeded the insured value), so long as the intended loss would reasonably have resulted if the facts were as the defendant believed them to be.

(B) Exclusions from Loss.—Loss does not include the following:

(i) Interest of any kind, finance charges, late fees, penalties, anticipated profits, or amounts based on an agreed-upon return or rate of return.

(ii) Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense, even if such costs are reasonably foreseeable.

(C) Credits In Determining Loss.—

(i) Loss shall be determined by excluding the value of the economic benefit the defendant or other persons acting jointly with the defendant transferred to the victim before the offense was detected. However, loss shall not be reduced by the value of:

(a) benefits of de minimis value transferred by the defendant to the victim(s).

(b) services fraudulently rendered to victims by persons falsely posing as licensed professionals, or goods falsely represented as approved by a governmental regulatory agency, or goods for which regulatory approval by a government agency was obtained by fraud.

(ii) In a case involving a fraudulent investment scheme, such as a 'Ponzi scheme,' the loss shall not be reduced by the value of the economic benefit transferred to any investor in the scheme in excess of that investor's principal investment (*i.e.,* the gain to one investor in the scheme shall not be used to offset the loss to another investor in the scheme).

(iii) For purposes of this subsection: (A) 'economic benefit' means money, property, or services performed; and (B) 'transferred' includes pledged or otherwise provided as collateral, returned, repaid, or otherwise conveyed.

(D) Time of measurement: Loss should ordinarily be measured at the time the offense was detected.

(i) For purposes of this guideline, an offense is detected when the defendant knew or reasonably should have known that the offense was detected by a victim or a public law enforcement agency.

(ii) Except as provided in subsection (D)(iii), the value of any 'economic benefit' transferred to the victim by the defendant for purposes of Subsection (C) shall be measured at the time the offense was detected.

(iii) However, in a case involving collateral pledged by a defendant, the 'economic benefit' of such collateral to the victim for purposes of Subsection (C) is the amount the victim has recovered at the time of sentencing from disposition of the collateral. If the collateral has not been disposed of by that time, the 'economic benefit' of the collateral is its value at the time of sentencing.

(E) Estimation of Loss. The court need not determine the precise amount of the loss. Rather, it need only make a reasonable estimate of loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference. See 18 U.S.C. 3742(e) and (f).

The estimate of the loss shall be based on available information, taking into account and using as appropriate and practicable under the circumstances, factors such as the following:

(i) The fair market value of the property, or other thing of value, taken or otherwise unlawfully acquired, misapplied, misappropriated, or destroyed; or if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property or other thing of value.

(ii) The cost of repairs to damaged property, not to exceed the replacement cost had the property been destroyed.

(iii) The approximate number of victims multiplied by the average loss to each victim.

(iv) More general factors, such as the scope and duration of the offense and revenues generated by similar operations.

(F) Gain. The court shall use the defendant's gain as an alternative measure of loss when loss cannot otherwise reasonably be determined, but the defendant's gain can reasonably be determined.

(G) Special Rules. The following special rules shall be used to assist in determining actual loss in the cases indicated:

(i) Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes. In a case involving stolen or counterfeit credit cards (*see* 15 U.S.C. 1602(k)), stolen or counterfeit access devices (*see* 18 U.S.C. 1029(e)(1)), or purloined numbers or codes, the actual loss includes any unauthorized charges made with the credit cards, access devices, or numbers or codes. The actual loss determined for each such credit card, access device, number or code shall be not less than $500.

(ii) Diversion of Government Program Benefits. In a case involving diversion of government program benefits, actual loss is the value of the benefits diverted from intended recipients or uses. For example, if the defendant was the lawful recipient of food stamps having a value of $100 but fraudulently received food stamps having a value of $150, the loss is $50.

(iii) Davis-Bacon Act Cases. In a case involving a Davis-Bacon Act violation (*i.e.,* a violation of 40 U.S.C. 276a, criminally prosecuted under 18 U.S.C. 1001), the actual loss is the difference between the legally required and actual wages paid.

(H) Departure Considerations.

(1) Upward Departure Considerations. There may be cases in which the loss substantially understates the seriousness of the offense or the culpability of the defendant. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:

(a) A primary objective of the offense was an aggravating, non-monetary objective, such as to inflict emotional harm.

(b) The offense resulted in or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest.

(c) The offense created a risk of substantial loss beyond the loss determined above.

(d) The offense endangered the solvency or financial security of one or more victims.

(e) The offense involved a substantial risk that a victim would lose a significant portion of his or her net worth or suffer other significant financial hardship.

(2) Downward Departure Considerations. There may be cases in which the loss substantially overstates the seriousness of the offense or the culpability of the defendant. In such cases, a downward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether a downward departure is warranted:

(a) The primary objective of the offense was a mitigating, non-monetary objective, such as to fund medical treatment for a sick parent. However, if, in addition to that primary objective, a substantial objective of the offense was to benefit the defendant economically, a downward departure for this reason would not ordinarily be warranted.

(b) The loss significantly exceeds the greater of the defendant's actual or intended personal gain, and therefore significantly overstates the culpability of the defendant.''.

The Commentary to § 2B1.1 captioned ''Background'', as amended by Part A of this amendment, is further amended by inserting after the second paragraph the following:

The Commission has determined that, ordinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the pecuniary harm caused by their crimes. Accordingly, along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under this guideline.

Both direct and indirect pecuniary harm that is a reasonably foreseeable result of the offense will be taken into account in determining the loss. For example, in an offense involving unlawfully accessing, or exceeding

authorized access to, a ''protected computer,' as defined in 18 U.S.C. § 1030(e)(2)(A) or (B), 'loss' is the reasonably foreseeable pecuniary harm to the victim, which typically includes costs such as conducting a damage assessment and restoring the system and data to their condition prior to the offense. Likewise, in a product substitution case, the loss includes the victim's reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered or modifying the product so that it can be used for its intended purpose, plus the victim's reasonably foreseeable cost of correcting the actual or potential disruption to the victim's business caused by the product substitution. Similarly, in a defense contract fraud case, loss includes the reasonably foreseeable administrative cost to the government and other participants of repeating or correcting the procurement action affected, plus any increased cost to procure the product or service involved that was reasonably foreseeable.''.

Part D. Referring Guidelines for Theft and Fraud

Synopsis of Proposed Amendment: The following proposed amendments are intended to be made in conjunction with a change to the loss tables in § 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) or § 2F1.1 (Fraud and Deceit). The amendments provide a 1-level increase in several guidelines that refer to the loss tables for cases in which the loss is more than $2,000 but not more than $5,000. This increase would be provided to avoid a 1-level decrease that would otherwise occur for offenses involving losses of more than $2,000 but not more than $5,000 because the proposed table does not provide the first increase for loss amount until loss exceeds $5,000.

Proposed Amendments (Part D)

Section 2B2.3(b) is amended by striking subdivision (3) in its entirety and inserting the following:

''(3) If (A) the offense involved invasion of a protected computer; and (B) the loss resulting from the invasion (i) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (ii) exceeded $5,000, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.''.

Section 2B3.3(b) is amended by striking subdivision (1) in its entirety and inserting the following:

''(1) If the greater of the amount obtained or demanded (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.''.

Section 2B4.1(b) is amended by striking subdivision (1) in its entirety and inserting the following:

''(1) If the greater of the value of the bribe or the improper benefit to be conferred (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.''.

Section 2B5.1(b) is amended by striking subdivision (1) in its entirety and inserting the following:

''(1) If the face value of the counterfeit items (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.''.

Section 2B5.3(b) is amended by striking subdivision (1) in its entirety and inserting the following:

''(1) If the infringement amount (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.''.

Section 2B6.1(b) is amended by striking subdivision (1) in its entirety and inserting the following:

''(1) If the retail value of the motor vehicles or parts (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.''.

Section 2C1.1(b)(2) is amended by striking subdivision (A) in its entirety and inserting the following:

''(A) If the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest (i) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (ii) exceeded $5,000, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.''.

Section 2C1.2(b)(2) is amended by striking subdivision (A) in its entirety and inserting the following:

''(A) If the value of the gratuity (i) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (ii) exceeded $5,000, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.''.

Section 2C1.6(b) is amended by striking subdivision (1) in its entirety and inserting the following:

''(1) If the value of the gratuity (i) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (ii) exceeded $5,000, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.''.

Section 2C1.7(b)(1) is amended by striking subdivision (A) in its entirety and inserting the following:

''(A) If the loss to the government, or the value of anything obtained or to be obtained by a public official or others acting with a public official, whichever is greater, (i) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (ii) exceeded $5,000, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.''.

Section 2E5.1(b) is amended by striking subdivision (2) in its entirety and inserting the following:

''(2) If the value of the prohibited payment or the value of the improper benefit to the payer, whichever is greater (A) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (B) exceeded $5,000, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount.''.

Section 2G2.2(b)(2)(A) is amended by striking ''§ 2F1.1 (Fraud and Deceit)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

Section 2G3.1(b)(1)(A) is amended by striking ''§ 2F1.1 (Fraud and Deceit)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

Section 2G3.2(b)(2) is amended by striking ''at § 2F1.1 (b)(1)'' and inserting ''in § 2B1.1 (Theft, Property Destruction, and Fraud).''.

Section 2Q2.1(b)(3) is amended by striking subdivision (A) in its entirety and inserting the following:

''(A) If the market value of the fish, wildlife, or plants (i) exceeded $2,000 but did not exceed $5,000, increase by 1 level; or (ii) exceeded $5,000, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that

amount, [but in no event more than [18] levels]; or''.

Section 2S1.3(a) is amended by striking ''§ 2F1.1 (Fraud and Deceit)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

Part E. Technical and Conforming Amendments

The Commentary to § 1B1.2 captioned ''Application Notes'' is amended in Note 1 in the fourth paragraph by striking ''§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)'' and inserting ''§ 2F1.1 (Theft, Property Destruction, and Fraud)''.

The Commentary to § 1B1.3 captioned ''Application Notes'' is amended in Note 5 by striking ''§ 2F1.1 (Fraud and Deceit)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

Chapter Two, Part B, Subpart 1, is amended by inserting after § 2B1.3 the following:

''§ 2B1.4. Insider Trading

(a) Base Offense Level: 8.

(b) Specific Offense Characteristic.

(1) Increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the gain resulting from the offense.

Commentary

Statutory Provisions: 15 U.S.C. 78j and 17 CFR 240.10b–5. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Note

1. Section 3B1.3 (Abuse of Position of Trust or Use of Special Skill) should be applied only if the defendant occupied and abused a position of special trust. Examples might include a corporate president or an attorney who misused information regarding a planned but unannounced takeover attempt. It typically would not apply to an ordinary ''tippee.''

Background: This guideline applies to certain violations of Rule 10b–5 that are commonly referred to as 'insider trading.' Insider trading is treated essentially as a sophisticated fraud. Because the victims and their losses are difficult if not impossible to identify, the gain, *i.e.*, the total increase in value realized through trading in securities by the defendant and persons acting in concert with him or to whom he provided inside information, is employed instead of the victims' losses.

Certain other offenses, *e.g.*, 7 U.S.C. 13(e), that involve misuse of inside information for personal gain also may appropriately be covered by this guideline.''.

The Commentary to § 2B5.1 captioned ''Application Notes'' is amended in Note 3 by striking ''§ 2F1.1 (Fraud and Deceit)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

The Commentary to § 2B5.3 captioned ''Background'' is amended in the second sentence of the first paragraph by striking ''guidelines'' and inserting ''guideline''.

The Commentary to § 2B2.3 captioned ''Application Notes'' is amended in Note 2 by striking ''§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

The Commentary to § 2B3.1 captioned ''Application Notes'' is amended in Note 3 by striking ''§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

The Commentary to § 2B6.1 captioned ''Application Notes'' is amended in Note 1 by striking ''§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

The Commentary to § 2B6.1 captioned ''Application Notes'' is amended by striking Note 2 in its entirety and inserting the following:

''2. The 'Increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to that amount,' as used in subsection (b)(1), refers to the number of levels corresponding to the retail value of the motor vehicles or parts involved.''.

The Commentary to § 2C1.1 captioned ''Application Notes'' is amended in Note 2 by striking ''§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) and includes both actual and intended loss'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

The Commentary to § 2C1.7 captioned ''Application Notes'' is amended in Note 3 by striking ''§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) and includes both actual and intended los'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

Section 2H3.3(a) is amended in subdivision (2) by inserting ''or destruction'' after ''theft''; and by striking ''§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

Section 2H3.3(a) is amended by striking subdivision (3) in its entirety.

The Commentary to § 2H3.3 captioned ''Background'' is amended by striking ''§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft) or § 2B1.3 (Property Damage or Destruction)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

The Commentary to § 2J1.1 captioned ''Application Notes'' is amended in Note 2 by striking ''§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

Section 2K1.4(a) is amended in subdivision (3) by striking ''§ 2F1.1 (Fraud and Deceit) if the offense was committed in connection with a scheme to defraud; or'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud).''.

Section 2K1.4(a) is amended by striking subdivision (4) in its entirety.

Section 2K1.4(b)(2) is amended in subdivision (2) by striking ''(4)'' and inserting ''(3)''.

Section 2N2.1(b)(1) is amended by striking ''§ 2F1.1 (Fraud and Deceit)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

The Commentary to § 2N2.1 captioned ''Application Notes'' is amended in Note 2 by inserting ''theft, property destruction, and'' after ''involved'' and by striking ''(*e.g.*, theft, bribery, revealing trade secrets, or destruction of property)'' and inserting ''(*e.g.*, bribery).''.

The Commentary to § 2N2.1 captioned ''Application Notes'' is amended in Note 4 by striking ''2F1.1 (Fraud and Deceit)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

Section 2N3.1(b)(1) is amended by striking ''§ 2F1.1 (Fraud and Deceit)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

The Commentary to § 2N3.1 captioned ''Background'' is amended in the first paragraph by striking ''the guideline for fraud and deception, § 2F1.1,'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

Section 2Q1.6(a)(2) is amended by striking ''§ 2B1.3 (Property Damage or Destruction)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

Section 2T1.6(b)(1) is amended by striking ''§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

The Commentary to § 3B1.3 captioned ''Application Notes'' is amended by adding at the end the following:

''4. The following additional illustrations of an abuse of a position of trust pertain to theft or embezzlement from employee pension or welfare benefit plans or labor unions:

(A) If the offense involved theft or embezzlement from an employee pension or welfare benefit plan and the

defendant was a fiduciary of the benefit plan, an adjustment under this section for abuse of a position of trust will apply. ''Fiduciary of the benefit plan'' is defined in 29 U.S.C. 1002(21)(A) to mean a person who exercises any discretionary authority or control in respect to the management of such plan or exercises authority or control in respect to management or disposition of its assets, or who renders investment advice for a fee or other direct or indirect compensation with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or who has any discretionary authority or responsibility in the administration of such plan.

(B) If the offense involved theft or embezzlement from a labor union and the defendant was a union officer or occupied a position of trust in the union (as set forth in 29 U.S.C. 501(a)), an adjustment under this section for an abuse of a position of trust will apply.''.

Section 3D1.2(d) is amended by striking ''2B1.3'' and inserting ''2B1.4''; and by striking ''§§ 2F1.1, 2F1.2;''.

The Commentary to § 3D1.2 captioned ''Application Notes'' is amended in the third paragraph of Note 6 by striking '', and would include, for example, larceny, embezzlement, forgery, and fraud''.

Section 3D1.3(b) is amended by striking ''(*e.g.*, theft and fraud)''.

The Commentary to § 3D1.3 captioned ''Application Notes'' is amended in Note 3 by striking ''(*e.g.*, theft and fraud)''; and by striking ''In addition, the adjustment for 'more than minimal planning' frequently will apply to multiple count convictions for property offenses.''.

The Commentary to § 3D1.5 captioned ''Illustrations of the Operation of the Multiple-Count Rules'' is amended by striking Illustration 2 in its entirety and by redesignating Illustrations 3 and 4 as illustrations 2 and 3, respectively.

The Commentary to § 3D1.5 captioned ''Illustrations of the Operation of the Multiple-Count Rules'' is amended in Illustration, as redesignated by this amendment, 3 by striking ''§ 2F1.1 (Fraud and Deceit)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''; and in the last sentence by striking ''§ 2F1.1'' after ''or'' and inserting ''2B1.1''.

The Commentary to § 8A1.2 captioned ''Application Notes'' is amended in Note 3(i) by striking ''§§ 2B1.1 (Larceny, Embezzlement, and Other Forms of Theft), 2F1.1 (Fraud and Deceit)'' and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

Section 8C2.1(a) is amended by striking ''2B1.3'' and inserting ''2B1.4'' and by striking ''§§ 2F1.1; 2F1.2;''.

The Commentary to § 8C2.1 captioned ''Application Notes'' is amended in Note 2 by striking wherever it appears ''§ 2F1.1 (Fraud and Deceit)'' each place it appears and inserting ''§ 2B1.1 (Theft, Property Destruction, and Fraud)''.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. 6 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. 6b(A) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. 6b(C) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. 6c by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. 6h by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. 6o by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. 13(a)(2) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. 13(a)(3) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. 13(a)(4) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. 13(d) by striking ''2F1.2'' and inserting ''2B1.4''.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. 13(f) by striking ''2F1.2'' and inserting ''2B1.4''.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. 23 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. 270 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. 2024(b) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 7 U.S.C. 2024(c) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 12 U.S.C. 631 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 50 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 77e by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 77q by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 77x by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 78j by striking ''2F1.1'' and inserting ''2B1.1''; and by striking ''2F1.2'' and inserting ''2B1.4''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 78ff by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 80b–6 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 158 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 645(a) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 645(b) by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 645(c) by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 714m(a) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 714m(b) by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 1281 by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 1644 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 1681q by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 15 U.S.C. 1693n(a) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 16 U.S.C. 114 by striking ‘‘, 2B1.3’’.

Appendix A (Statutory Index) is amended in the line referenced to 16 U.S.C. 117c by striking ‘‘, 2B1.3’’.

Appendix A (Statutory Index) is amended in the line referenced to 16 U.S.C. 123 by striking ‘‘2B1.3,’’.

Appendix A (Statutory Index) is amended in the line referenced to 16 U.S.C. 146 by striking ‘‘2B1.3,’’.

Appendix A (Statutory Index) is amended in the line referenced to 16 U.S.C. 413 by striking ‘‘, 2B1.3’’.

Appendix A (Statutory Index) is amended in the line referenced to 16 U.S.C. 433 by striking ‘‘, 2B1.3’’.

Appendix A (Statutory Index) is amended in the line referenced to 16 U.S.C. 831t(b) by striking ‘‘2F1.1’’ and inserting ‘‘2B1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 16 U.S.C. 831t(c) by striking ‘‘2F1.1’’ and inserting ‘‘2B1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 32(a), (b) by striking ‘‘2B1.3’’ and inserting ‘‘2B1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 33 by striking ‘‘2B1.3’’and inserting ‘‘2B1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 37 by striking ‘‘2B1.3’’ and inserting ‘‘2B1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 43 by striking ‘‘2B1.3’’ and inserting ‘‘2B1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 112(a) by striking ‘‘2B1.3’’ and inserting ‘‘2B1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 152 by striking ‘‘2F1.1’’ and inserting ‘‘2B1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 153 by striking ‘‘, 2F1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 155 by striking ‘‘2F1.1’’ and inserting ‘‘2B1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 225 by striking ‘‘, 2F1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 285 by striking ‘‘, 2F1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 286 by striking ‘‘2F1.1’’ and inserting ‘‘2B1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 287 by striking ‘‘2F1.1’’ and inserting ‘‘2B1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 288 by striking ‘‘2F1.1’’ and inserting ‘‘2B1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 289 by striking ‘‘2F1.1’’ and inserting ‘‘2B1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 332 by striking ‘‘, 2F1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 335 by striking ‘‘2F1.1’’ and inserting ‘‘2B1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 470 by inserting ‘‘2B1.1,’’ before ‘‘2B5.1’’; and by striking ‘‘, 2F1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 471 by inserting ‘‘2B1.1,’’ before ‘‘2B5.1’’; and by striking ‘‘, 2F1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 472 by inserting ‘‘2B1.1,’’ before ‘‘2B5.1’’; and by striking ‘‘, 2F1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 473 by inserting ‘‘2B1.1,’’ before ‘‘2B5.1’’; and by striking ‘‘, 2F1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 474 by inserting ‘‘2B1.1,’’ before ‘‘2B5.1’’; and by striking ‘‘, 2F1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 474A by inserting ‘‘2B1.1,’’ before ‘‘2B5.1’’; and by striking ‘‘, 2F1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 476 by inserting ‘‘2B1.1,’’ before ‘‘2B5.1’’; and by striking ‘‘, 2F1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 477 by inserting ‘‘2B1.1,’’ before ‘‘2B5.1’’; and by striking ‘‘, 2F1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 478 by striking ‘‘2F1.1’’ and inserting ‘‘2B1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 479 by striking ‘‘2F1.1’’ and inserting ‘‘2B1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 480 by striking ‘‘2F1.1’’ and inserting ‘‘2B1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 481 by striking ‘‘2F1.1’’ and inserting ‘‘2B1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 482 by striking ‘‘2F1.1’’ and inserting ‘‘2B1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 483 by striking ‘‘2F1.1’’ and inserting ‘‘2B1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 484 by inserting ‘‘2B1.1,’’ before ‘‘2B5.1’’; and by striking ‘‘, 2F1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 485 by inserting ‘‘2B1.1,’’ before ‘‘2B5.1’’; and by striking ‘‘, 2F1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 486 by inserting ‘‘2B1.1,’’ before ‘‘2B5.1’’; and by striking ‘‘, 2F1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 488 by striking ‘‘2F1.1’’ and inserting ‘‘2B1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 491 by inserting ‘‘2B1.1,’’ before ‘‘2B5.1’’; and by striking ‘‘, 2F1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 493 by inserting ‘‘2B1.1,’’ before ‘‘2B5.1’’; and by striking ‘‘, 2F1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 494 by striking ‘‘2F1.1’’ and inserting ‘‘2B1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 495 by striking ‘‘2F1.1’’ and inserting ‘‘2B1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 496 by striking ‘‘2F1.1’’ and inserting ‘‘2B1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 497 by striking ‘‘2F1.1’’ and inserting ‘‘2B1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 498 by striking ‘‘2F1.1’’ and inserting ‘‘2B1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 499 by striking ‘‘2F1.1’’ and inserting ‘‘2B1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 500 by striking ‘‘, 2F1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 501 by inserting ‘‘2B1.1,’’ before ‘‘2B5.1’’; and by striking ‘‘, 2F1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 502 by striking ‘‘2F1.1’’ and inserting ‘‘2B1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 503 by striking ‘‘2F1.1’’ and inserting ‘‘2B1.1’’.

Appendix A (Statutory Index) is amended in the line referenced to 18

U.S.C. 505 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 506 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 507 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 508 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 509 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 510 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 513 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 514 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 642 by inserting ''2B1.1,'' before ''2B5.1'' and striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 656 by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 657 by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 659 by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 663 by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 665(a) by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 666(a)(1)(A) by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 709 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 712 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 911 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 914 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 915 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 917 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 970(a) by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1001 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1002 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1003 by inserting ''2B1.1,'' before ''2B5.1'' and striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1004 by striking '', 2F1.1''; and by inserting ''2B1.1,'' before ''2B5.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1005 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1006 by striking '', 2F1.1''; and by inserting ''2B1.1,'' before ''2B5.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1007 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1010 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1011 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1012 by inserting ''2B1.1,'' before ''2C1.3'' and striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1013 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1014 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1015 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1016 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1017 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1018 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1019 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1020 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1021 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1022 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1023 by striking '', 2F1.1'' .

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1025 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1026 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1028 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1029 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1030(a)(4) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1030(a)(5) by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1030(a)(6) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1031 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1032 by inserting ''2B1.1,'' before ''2B4.1''; and by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1033 by striking ''2F1.1,''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1035 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1341 by inserting ''2B1.1,'' before ''2C1.7''; and by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1342 by inserting ''2B1.1,'' before ''2C1.7''; and by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1343 by inserting ''2B1.1,'' before ''2C1.7''; and by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1344 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1347 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1361 by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1362 by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1363 by striking ''2B1.3'' and inserting ''2B1.1.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1366 by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1422 by inserting ''2B1.1,'' before ''2C1.2''; and by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1702 by striking ''2B1.3,''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1703 by striking ''2B1.3,''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1704 by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1705 by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1706 by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1708 by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1712 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1716C by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1720 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1728 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1852 by striking '', 2B1.3''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1853 by striking '', 2B1.3''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1854 by striking '', 2B1.3''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1857 by striking '' 2B1.3,'' and inserting ''2B1.1,''

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1861 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1902 by striking ''2F1.2'' and inserting ''2B1.4''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1919 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1920 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1923 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 1992 by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 2071 by striking '', 2B1.3''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 2072 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 2073 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 2197 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 2272 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 2275 by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 2276 by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 2280 by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 2281 by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 2314 by striking '', 2F1.1'' .

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 2315 by striking '', 2F1.1'' .

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 2332a by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 19 U.S.C. 1434 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 19 U.S.C. 1435 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 19 U.S.C. 1436 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 19 U.S.C. 1919 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 19 U.S.C. 2316 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 20 U.S.C. 1097(a) by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 20 U.S.C. 1097(b) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 20 U.S.C. 1097(d) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 21 U.S.C. 333(a)(2) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 22 U.S.C. 1980(g) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 22 U.S.C. 2197(n) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 22 U.S.C. 4221 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 25 U.S.C. 450d by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 26 U.S.C. 7208 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 26

U.S.C. 7214 by inserting ''2B1.1,'' before ''2C1.2'' and striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 26 U.S.C. 7232 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 29 U.S.C. 1141 by inserting ''2B1.1,'' before ''2B3.2'' and striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 38 U.S.C. 787 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 38 U.S.C. 3502 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 41 U.S.C. 423(e) by inserting ''2B1.1,'' before ''2C1.1''; and by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 408 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 1307(a) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 1307(b) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 1307a–7b by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 1383(d)(2) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 1383a(a) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 1383a(b) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 1395nn(a) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 1395nn(c) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 1396h(a) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 1713 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 1760(g) by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 1761(o)(1) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 1761(o)(2) by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 3220(a) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 3220(b) by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 3426 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 3791 by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 3792 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 3795 by striking '', 2F1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 42 U.S.C. 5157(a) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 45 U.S.C. 359(a) by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 46 U.S.C. 1276 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 49 U.S.C. 121 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 49 U.S.C. 11903 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 49 U.S.C. 11904 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 49 U.S.C. 14912 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 49 U.S.C. 16102 by striking ''2F1.1'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 49 U.S.C. 60123(d) by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 49 U.S.C. 80116 by striking ''2F1.1''and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 49 U.S.C. 80501 by striking ''2B1.3'' and inserting ''2B1.1''.

Appendix A (Statutory Index) is amended in the line referenced to 49 U.S.C. App. § 1687(g) by striking ''2B1.3'' and inserting ''2B1.1''.

Part F: Computing Tax Loss Under § 2T1.1

Synopsis of Proposed Amendment: This proposed amendment addresses a circuit conflict regarding how tax loss under § 2T1.1 (Tax Evasion) is computed for cases that involve a defendant's under-reporting of income on both individual and corporate tax returns. Such a case often arises when (1) the defendant fails to report, and pay corporate income taxes on, income earned by the corporation, (2) diverts that unreported corporate income for the defendant's personal use, and (3) fails to report, and to pay personal income taxes on, that income. The proposed amendment clarifies that the amount of the tax loss is the aggregate amount of federal income tax that would have due by both the corporation and the individual defendant.

More specifically, the circuits are split on which methodology should be used to calculate tax loss in these cases. Two circuits use a sequential calculation method the aggregate tax loss. Under this method, the court determines the corporate federal income tax that would have been due, subtracts that amount from the amount diverted to the defendant personally, then determines the personal federal income tax that would have been due on the reduced diverted amount. *See United States* v. *Harvey*, 996 F.2d 919 (7th Cir. 1993); *United States* v. *Martinez-Rios*, 143 F.3d 662 (2d Cir. 1998). In contrast, one circuit holds that the court should determine the aggregate tax loss by adding the corporate federal income tax that would have been due on the total amount of unreported income and the personal federal income tax that would have been due on that total amount. *See United States* v. *Cseplo*, 42 F.3d 36 (6th Cir. 1994).

The amendment adopts the *Harvey* approach, clarifying the existing rule in Application Note 7 of § 2T1.1 that ''if the offense involves both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses taken together''.

The amendment also clarifies that the loss in § 2T1.1 refers to federal, and not state and local, tax loss. The alternative interpretation of this provision would greatly complicate the guideline because of the multitude of state and local tax rates and provisions.

The amendment also adds an application note to § 2T1.1 clarifying that a tax evasion count and a count charging the offense that provided the income on which tax was evaded are grouped together under § 3D1.2(c). This application note is consistent with the longstanding view of the staff as to how such counts should be treated for grouping purposes.

Proposed Amendment (Part F)

Section § 2T1.1(c)(1) is amended in by adding at the end the following:

''(D) If the offense involved (i) conduct described in paragraphs (A), (B), or (C); and (ii) both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses taken together.''.

Section 2T1.1(c)(2) is amended by inserting ''(A)'' before ''If''; and by adding at the end the following:

''(B) If the offense involved (i) conduct described in paragraph (A), and; (ii) both individual and corporate tax returns, the tax loss is the aggregate tax loss from the offenses taken together.''.

The Commentary to § 2T1.1 captioned ''Application Notes'' is amended in Note 1 by adding at the end the following paragraph:

''Tax loss'' means federal tax loss; it does not include state or local tax loss.''.

The Commentary to § 2T1.1 is amended in Note 7 by adding at the end the following:

''Accordingly, in a case in which a defendant fails to report income derived from a corporation on either the defendant's individual tax return or the corporate tax return, the tax loss is the aggregate amount due to the treasury from the offenses taken together. For example, the defendant, the sole owner of a corporation, fraudulently understates the corporation's income in the amount of $100,000 on the corporation's tax return, diverts the funds to his own use, and does not report these funds on the defendant's individual tax return. For purposes of this example, assume that the applicable tax rate is 34% and the applicable individual tax rate is 28%. The tax loss attributable to the defendant's corporate tax returns is $34,000 ($100,000 multiplied by 34%). The tax loss attributable to the defendant's individual tax return is based on the unreported $100,000 in income less the $34,000 in corporate tax on these same funds. This avoids double counting because the $34,000 in corporate tax reduces the defendant's effective income from $100,000 to $66,000. The tax loss attributable to the defendant's individual tax return is $18,480 ($66,000 multiplied by 28%). Consequently, the aggregate tax loss for the offenses, taken together, is $52,480 ($34,000 plus $18,480).''.

The Commentary to § 2T1.1 captioned ''Application Notes'' is amended by adding at the end the following:

''8. If the defendant is sentenced for a count charging an offense from which the defendant derived income and a count charging a tax offense involving that criminally derived income, the counts are to be grouped together as closely related counts under subsection (c) of § 3D1.2 (Groups of Closely Related Counts). Such counts are to be grouped together whether or not the amount of criminally derived income is sufficient to warrant the enhancement under subsection (b)(1).''.

Issues for Comment

(1) The proposed amendment uses a sequential method to determine tax loss in cases in which the defendant is both the individual and the corporate tax payer. Commission invites comment on whether § 2T1.1 instead should be amended to provide that, in such cases, the aggregate tax loss is the sum of (A) the total amount of unreported income multiplied by the corporate tax rate; and (B) the total amount of unreported income multiplied by the individual tax rate.

(2) The Commission also invites comment on whether the definition of ''tax loss'' should include interest and penalties in evasion-of-payment tax cases. Such cases are distinguishable from evasion-of-assessment tax cases.

(3) The Commission also invites comment on whether the ''sophisticated concealment'' enhancement in §§ 2T1.1(b)(2) and 2T1.4(b)(2) should be revised to conform to the ''sophisticated means'' enhancement in § 2F1.1(b)(6)(C), including imposition of a minimum of offense level of level 12.

Proposed Amendment: Aggravating and Mitigating Factors in Fraud and Theft Cases

13. *Synopsis of Proposed Amendment:* This amendment proposes two options to provide for the consideration of a number of aggravating and mitigating factors that may be present in theft and fraud cases. Option One provides for a four-level increase if the offense involved significantly aggravating factors, a two-level increase if the offense involved aggravating factors, a two-level decrease if the offense involved mitigating factors, and a four-level decrease if the offense involved significantly mitigating factors. Option One provides a non-exhaustive list of aggravating and mitigating factors for the court to consider in determining whether, on balance and after weighing the presence and intensity of the factors, the offense involves significantly aggravating, aggravating, mitigating, or significantly mitigating factors. In contrast, Option Two provides for a two-level increase if the offense involved certain aggravating factor(s) and no mitigating factors or if the aggravating factor(s) present in the case outweigh all mitigating factors present in the case, and a two-level decrease if the offense involved certain mitigating factors and no aggravating factors or if the mitigating factor(s) present in the case outweigh all aggravating factors present in the case. Option Two provides an exhaustive list of aggravating and mitigating factors that may trigger application of the enhancement.

An issue for comment follows regarding whether any of the factors in the existing specific offense characteristics in the fraud (§ 2F1.1), theft (§ 2B1.1), and property destruction (§ 2B1.3) guidelines should be incorporated into the aggravating and mitigating factors found in either of Option One or Two and, accordingly, eliminated as a specific offense characteristic within the guideline.

Proposed Amendment

Option 1

Section 2B1.1, as amended by Amendment 12, is further amended by redesignating subsections (b)(8) through (b)(14) as subsections (b)(9) through (b)(15), respectively; and by inserting after subsection (b)(7) the following:

''(8) If the offense involved—

(A) Aggravating circumstances, increase by 2 levels;

[(B) Significantly aggravating circumstances, increase by 4 levels;]

(C) Mitigating circumstances, decrease by 2 levels;

[(D) Significantly mitigating circumstances, decrease by 4 levels.]

[In cases falling between (A) and (B), increase by 3 levels; in cases falling between (C) and (D), decrease by 3 levels.]''.

The Commentary to § 2B1.1 captioned ''Application Notes'', as amended by Amendment 12, is further amended by adding at the end the following:

''17. (A) Whether an offense involved aggravating circumstances or significantly aggravating circumstances is based on consideration of the presence and intensity of aggravating factors, such as the following:

(i) The offense caused or risked reasonably foreseeable, substantial non-monetary harm;

(ii) False statements were made for the purpose of facilitating some other crime;

(iii) The offense caused reasonably foreseeable, physical or psychological harm or emotional trauma;

(iv) The offense endangered national security or military readiness;

(v) The offense caused a loss of confidence in an important institution;

(vi) The offense involved the knowing endangerment of the solvency of one or more victims;

(vii) The offense involved more than [10][25] victims;

(viii) The offense involved the destruction or damage to irreplaceable items of cultural, historical or archeological significance;

[(ix) The loss amount determined above was at or near the highest amount possible for the range of loss that corresponds to the applicable offense level determined by the loss table].

(B) Whether an offense contains mitigating circumstances or significantly mitigating circumstances is based on consideration of the presence and intensity of mitigating factors such as the following:

(i) The defendant, prior to detection of the offense, made significant efforts to limit the pecuniary harm caused by the crime;

(ii) [The defendant's attempted offense was impossible or extremely unrealistic;]

(iii) The defendant's actual or intended gain was substantially less than the loss determined above;

(iv) The offense was not committed for commercial advantage or financial gain;

(v) The offense was committed because of extreme financial hardship [caused by extraordinary unforseen circumstances not caused by the defendant and beyond the defendant's control] [caused by excessive costs for the life sustaining needs of the defendant or his immediate family];

(vi) The offense involved minimal or no planning;

[(vii) The loss amount determined above was at or near the lowest amount possible for the range of loss that corresponds to the applicable offense level determined by the loss table].

(C) In a case involving both aggravating and mitigating factors, the court will determine, after consideration of all of the factors, whether the case involves, on balance, aggravating[, significantly aggravating,] or mitigating[, or significantly mitigating] circumstances.

(D) When applying this section, the court must make specific findings regarding the offense characteristics, and clearly articulate the factors and weight given those factors, that the court is relying on to determine whether the offense involved aggravating circumstances, [significantly aggravating circumstances,] mitigating circumstances [or significantly mitigating circumstances]. Such a determination should be based on the presence and intensity, rather than on a simple counting, of the factors listed above.

(E) Consistent with the overall structure of the guidelines, the government bears the burden of persuasion in establishing the factors associated with aggravating circumstances, while the defendant bears the burden of persuasion in establishing the factors associated with mitigating circumstances.

(F) Application of this section does not preclude consideration of any of these factors, for the purposes of an upward or downward departure, even though the reason for the departure has been taken into consideration in determining the guideline range, if the court determines that the factor is present to an unusual or extraordinary degree.''.

Option 2

Section 2B1.1, as amended by Amendment 12, is further amended by redesignating subsections (b)(8) through (b)(14) as subsections (b)(9) through (b)(15), respectively; and by inserting after subsection (b)(7) the following:

''(8) If the offense—

(A) Involved (i) at least one qualifying aggravating factor and no qualifying mitigating factors; or (ii) one or more qualifying aggravating factors the seriousness of which outweigh the mitigating effect of all qualifying mitigating factors present in the offense, increase by 2 levels; or

(B) Involved (i) at least one qualifying mitigating factor and no qualifying aggravating factors; or (ii) one or more qualifying mitigating factors the mitigating effect of which outweigh the seriousness of all qualifying aggravating factors present in the offense, decrease by 2 levels.''.

The Commentary to § 2B1.1 captioned ''Application Notes'', as amended by Amendment 12, is further amended by adding at the end the following:

''17. For purposes of subsection (b)(8):

'Qualifying aggravating factor' means any of the following:

(A) the offense involved [a large number of] [more than 10] victims, and subsection (b)(3) is not applicable;

(B) The offense [involved the knowing endangerment of the solvency of one or more victims] [caused one or more victims to suffer insolvency or substantial financial hardship]; and subsection (b)(7) does not apply;

(C) The offense caused reasonably foreseeable, substantial non-monetary harm (*e.g.*, physical or psychological harm or emotional trauma);

(D) The defendant's conduct was unusually heinous, cruel, brutal or degrading to a victim;

(E) The offense was committed for the purpose of facilitating another crime;

(F) The offense endangered public health or safety, national security, or military readiness;

(G) The offense (i) substantially disrupted an important government function; or (ii) caused a loss of confidence in an important institution and the enhancement in subsection (b)(7)(A) does not apply; or

(H) The offense involved destruction or substantial damage to unique property of environmental, cultural, historical, or archeological significance.

'Qualifying mitigating factor' means any of the following:

(A) Prior to detection of the offense, the defendant remedied, or made every reasonable effort to remedy, the harm resulting from the offense;

(B) The defendant's attempted offense (i) did not involve a government 'sting' operation; (ii) was highly improbable of success; and (iii) did not result in actual loss;

(C) The defendant neither intended to profit, nor actually profited, from the offense, and the offense was not committed for the purpose of inflicting non-monetary harm; or

(D) The defendant committed the offense in order to avoid a perceived greater harm, other than the avoidance or mitigation of personal financial hardship, (*e.g.*, the defendant committed the offense in order to fund medical treatment for a gravely ill family member).

Subsection (b)(8) applies in cases in which qualifying aggravating factors or qualifying mitigating factors are present to such a degree that an increase or a decrease in the sentence, respectively, is appropriate. An increase or a decrease in the sentence pursuant to subsection (b)(8) shall not apply in a case in which both qualifying aggravating factors and qualifying mitigating factors are present, but the seriousness of the qualifying aggravating factors is equal to the mitigating effect of the qualifying mitigating factors.

Application of subsection (b)(8) does not preclude consideration of any of the factors listed in such subsection for purposes of an upward or downward departure if the court determines that

the factor is present to an unusual or extraordinary degree.''.

Issue for Comment: The Commission invites comment whether any of the factors in the existing specific offense characteristics in the fraud (§ 2F1.1), theft (§ 2B1.1), and property destruction (§ 2B1.3) guidelines should be incorporated into the aggravating and mitigating factors found in either of Option One or Two and, accordingly, eliminated as a separate specific offense characteristic within the guideline.

Proposed Amendment: Sentencing Table Amendment and Alternative to Sentencing Table Amendment

14. *Synopsis of Proposed Amendment:* In August 2000, the Commission indicated that one of its policy priorities would be to begin a review of the guidelines relating to Criminal History. *See* 65 FR 50034, 50035 (Aug. 16, 2000). As part of that long range review and as part of a review of the Economic Crime Package set forth in Amendment #12, the Commission is publishing part I of this amendment (*i.e.,* the proposed Sentencing Table amendment) as one item that may facilitate public discussion and inform Commission consideration about related issues. The Sentencing Table amendment proposes to change the Sentencing Table in Chapter Five by expanding each of Zones B and C by two levels in Criminal History Categories I and II.

The second part of this amendment, intended as an alternative to the Sentencing Table amendment, proposes a new guideline, which would be added at the end of Chapter Three or in Chapter Five immediately following the Sentencing Table. It provides a two-level reduction in offense level for certain less serious economic offenses, in furtherance of the statutory command in 28 U.S.C. 994(j). The eligibility criteria generally parallel those determined by Congress under 18 U.S.C. 3553(f) to gain relief from applicable controlled substance mandatory minimums. Certain additional requirements are added in order to more fully define the categories of first offenders who have not been convicted of a ''crime of violence or an otherwise serious offense.'' Importantly, eligibility for the reduction also hinges on making, or committing to make, full restitution.

Proposed Amendment

Option 1 (Sentencing Table Amendment)

The Sentencing Table in Chapter Five, Part A, is amended by increasing Zone B by two levels in Criminal History Category I (so that Zone B contains offense levels 9, 10, 11, and 12 in Criminal History Category I); by increasing Zone B by two levels in Criminal History Category II (so that Zone B contains offense levels 6, 7, 8, 9, 10, and 11 in Criminal History Category II); by increasing Zone C by two levels in Criminal History Category I (so that Zone C contains offense levels 13, 14, 15, and 16 in Criminal History Category I); and by increasing Zone C by two levels in Criminal History Category II (so that Zone C contains offense levels 12, 13, 14, and 15 in Criminal History Category II).

Option 2 (Alternative to Sentencing Table Amendment)

Chapter Five, Part A, is amended by adding at the end the following:

''§ 5A1.2. Adjustment for Certain Less Serious Economic Crimes

If each of subsections (a) through (f) applies, decrease the offense level by 2 levels—

(a) The defendant's Chapter Two offense level is determined solely by applying one or more of the following offense guidelines in Chapter Two:

(1) §§ 2B1.1, 2B1.3, 2B2.1, 2F1.1, 2N2.1, 2N1.3, 2S1.1, 2S1.2, 2S1.3, 2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.8, 2T2.1, 2T2.2, 2T3.1;

(2) § 2X1.1 (if the Chapter Two offense level for the substantive offense or offenses is determined solely from a guideline in subsection (a)(1));

(3) § 2X2.1, § 2X3.1, § 2X4.1 (if the Chapter Two offense level for the underlying offense is determined solely from a guideline in subsection (a)(1));

(4) § 2X5.1 (if the Chapter Two offense level is determined solely from a guideline in subsection (a)(1) determined to be sufficiently analogous).

(b) The defendant has no criminal history points;

(c) The defendant did not use violence or a threat of violence or possess or use a firearm or other dangerous weapon;

(d) The offense did not involve bodily injury or a conscious or reckless risk of serious bodily injury;

(e) The defendant did not receive an increase in offense level under any of the following guideline sections:

(1) § 2B1.1(b)(4)(B)—(b)(7);
(2) § 2F1.1(b)(4)—(b)(8);
(3) § 2S1.1(b)(1);
(4) § 2S1.2(b)(1)(A);
(5) § 2S1.3(b)(1);
(6) § 2T1.1(b)(1) or (b)(2);
(7) § 2T1.4(b)(1) or (b)(2);
(8) Chapter Three, Parts A, B, or C;
(9) § 4B1.3; and

(f) The defendant, prior to sentencing, (1) voluntarily makes full restitution; or (2)(A) notifies the government and the court that the defendant agrees to make full restitution as determined by the court, (B) fully cooperates with the government and the court in determining the amount of such restitution; and (C) makes partial restitution to the extent able to do so.

Commentary

Application Notes:

1. For the purposes of this guideline—

'Dangerous weapon' and 'firearm,' as used in subdivision (2), 'bodily injury,' 'offense,' and 'serious bodily injury,' are defined in the Commentary to § 1B1.1 (Application Instructions).

'Full restitution' means the amount of restitution required by law under 18 U.S.C. 3663.

'No criminal history points,' means the defendant has zero criminal history points as determined under § 4A1.1 (Criminal History Category).

'Substantive offense' has the meaning given that term in § 2X1.1, Application Note 3.

2. If the Chapter Two offense guideline for a count is not listed in subsection (a) above, but the applicable guideline results in the determination of the Chapter Two offense level solely by use of one or more listed guidelines, the defendant qualifies for a reduction under this guideline. For example, where the conduct set forth in a count of conviction ordinarily referenced to § 2E5.3 (an offense guideline not listed in subsection (a)) establishes § 2F1.1 (Fraud and Deceit) as the applicable offense guideline (an offense guideline listed in subsection (a)), this guideline would apply because the actual offense level is determined under § 2F1.1 (Fraud and Deceit).''.

Proposed Amendment: Firearms Table

15. *Synopsis of Proposed Amendment:* This proposed amendment presents two options for implementing the recommendation of the Bureau of Alcohol, Tobacco and Firearms (ATF) to increase the penalties in § 2K2.1 (Unlawful Receipt, Possession or Transportation of Firearms or Ammunition) for offenses involving more than 100 firearms.

Option 1 amends the firearms table in § 2K2.1 to provide an additional one-level increase for offenses that involve 100–199 firearms, and an additional two-level increase for offenses that involve more than 200 firearms. The ATF reports that these increases are needed to provide adequate and proportionate punishment in cases that involve large numbers of firearms. Under the current table, a defendant who trafficked in 200 firearms receives

the same six-level enhancement as a defendant who trafficked in 50 firearms. According to the ATF, from 1995 through 1997, nearly a quarter of all defendants sentenced under § 2K2.1 for trafficking more than 50 firearms received sentences of less than one year, or no term of imprisonment whatsoever, despite the encouraged upward departure provided in Application Note 15 to § 2K2.1.

Option 1 also makes a conforming change to Application Note 16 regarding upward departures.

Option 2 amends the table to provide increases of two level increments and compresses the table by providing a wider range for the number of firearms for each increase. Compressing the table in this manner diminishes some of the fact-finding required to determine how many firearms were involved in the offense.

Proposed Amendment

Option 1

Section 2K2.1(b)(1)(F) is amended by striking ''50 or more'' and inserting ''50–99''; and by striking the period at the end and inserting the following:

''(G)100–199 add 7
(H)200 or more add 8.''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended in Note 16 by striking ''significantly'' and inserting ''substantially''; and by striking ''fifty'' and inserting ''200''.

Option 2

Section 2K2.1(b)(1) is amended in the table by striking subdivisions (A) through (F) in their entirety and inserting the following:

''(A) 3–7 add 2
(B) 8–24 add 4
(C) 25–99 add 6
(D) 100–199 add 8
(E) 200 or more add 10.''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended in Note 16 by striking ''significantly'' and inserting ''substantially''; and by striking ''fifty'' and inserting ''200''.

Proposed Amendment: Prohibited Person Definition

16. *Synopsis of Proposed Amendment:* This proposed amendment modifies the definition of ''prohibited person'' in §§ 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials) and 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) to refer to the relevant prohibited persons statutes for explosive and firearm offenses, respectively. (There is no statutory definition of ''prohibited person''.) The relevant statutory provision for § 2K1.3 is 18 U.S.C. 842(i), and for § 2K2.1, the relevant statutory provisions are 18 U.S.C. 922(g) and (n).

The proposed amendment also clarifies that the relevant time to determine whether a person qualifies as a ''prohibited person'' is as of the time the defendant committed the instant offense. This clarification is consistent with the proposed amendment on prior felonies, which provides that increased base offense levels are only applied if the defendant committed the instant offense subsequent to sustaining certain felony convictions.

Proposed Amendment

Section 2K1.3(a)(1) and (a)(2) are amended by striking ''; or'' each place it appears and inserting a semi-colon.

Section 2K1.3(a) is amended by striking the text of subdivision (3) in its entirety and inserting the following:

''16, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; or (B) knowingly distributed explosive materials to a prohibited person; or''.

The Commentary to § 2K1.3 captioned ''Application Notes'' is amended by striking the text of Note 3 in its entirety and inserting the following:

''For purposes of subsection (a)(3), 'prohibited person' means any person designated in 18 U.S.C. § 842(i).''.

Sections 2K2.1(a)(1), (a)(2), and (a)(3) are amended by striking ''; or'' each place it appears and inserting a semi-colon.

Section 2K2.1(a)(4)(B) is amended by striking ''is'' after ''(i)'' and inserting ''was''; by inserting ''at the time the defendant committed the instant offense'' after ''prohibited person''; and by striking ''or'' after ''922(d);''.

Section 2K2.1(a)(5) is amended by striking ''or'' after ''§ 922(d);''.

Section 2K2.1(a)(6) is amended by striking ''is'' after ''(A)'' and inserting ''was''; by inserting ''at the time the defendant committed the instant offense'' after ''prohibited person''; and by striking ''or'' after ''§ 922(d));''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended by striking the text of Note 6 in its entirety and inserting the following:

''For purposes of subsections (a)(4)(B) and (a)(6), a 'prohibited person' is any person designated in 18 U.S.C. 922(g) or 922(n).''.

Proposed Amendment: Prior Felonies

17. *Synopsis of Proposed Amendment:* This proposed amendment resolves a circuit conflict regarding whether a crime committed after the commission of the instant offense of felon in possession of a firearm, but sentenced before sentencing on the instant offense, is counted as a ''felony conviction'' for purposes of determining the defendant's base offense level. The proposed amendment adopts the minority view that an offense committed after the commission of any part of the offense cannot be counted as a ''felony conviction''. Accordingly, the proposed amendment clarifies, in § 2K2.1(a)(1), (a)(2), (a)(3) and (a)(4)(A), that the instant offense must have been committed subsequent to sustaining the prior felony conviction(s). In so doing, the proposed amendment adopts a rule that is consistent with the requirements concerning the use of prior convictions under §§ 4B1.1 (Career Offender) and 4B1.2 (Definitions of Terms Used in Section 4B1.1).

The proposed amendment also makes conforming changes to § 2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials).

Proposed Amendment

Section 2K1.3(a)(1) is amended by striking ''had at least two prior felony convictions of either a crime of violence or a controlled substance offense; or'' and inserting ''committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;'';

Section 2K1.3(a)(2) is amended by striking ''had one prior felony conviction of either a crime of violence or a controlled substance offense; or'' and inserting ''committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;''.

The Commentary to § 2K1.3 captioned ''Application Notes'' is amended by striking the text of Note 2 in its entirety and inserting the following:

''For purposes of this guideline—

'Controlled substance offense' has the meaning given that term in § 4B1.2(b) and Application Note 1 of the Commentary to § 4B1.2 (Definitions of Terms Used in Section 4B1.1).

'Crime of violence' has the meaning given that term in § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2 (Definitions of Terms Used in Section 4B1.1).

'Felony conviction' means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.,* a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).''.

The Commentary to § 2K1.3 captioned ''Application Notes'' is amended in Note 9 by inserting before the first paragraph the following:

''For purposes of applying subsection (a)(1) or (2), use only those felony convictions that receive criminal history points under § 4A1.1(a), (b), or (c). In addition, for purposes of applying subsection (a)(1), use only those felony convictions that are counted separately under § 4A1.1(a), (b), or (c). *See* § 4A1.2(a)(2); § 4A1.2, comment. (n.3).''.

Section 2K2.1(a)(1) is amended by striking ''had at least two prior felony convictions of either a crime of violence or a controlled substance offense; or'' and inserting ''committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;''.

Section 2K2.1(a)(2) is amended by striking ''had at least two prior felony convictions of either a crime of violence or a controlled substance offense; or'' and inserting ''committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;''.

Section 2K2.1(a)(3) is amended by striking ''had one prior felony conviction of either a crime of violence or controlled substance offense; or'' and inserting ''committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;''.

Section 2K2.1(a)(4)(A) is amended by striking ''had one prior felony conviction of either a crime of violence or controlled substance offense'' and inserting ''committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or''.

Section 2K2.1(a) is amended in subdivision (4)(B) by striking ''; or'' after ''922(d)'' and inserting a semi-colon; in subdivision (5), by striking the ''; or'' after ''921(a)(30)'' and inserting a semi-colon; and in subdivision (6) by striking ''; or'' after ''§ 922(d)'' and inserting a semi-colon.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended by striking Note 5 in its entirety and inserting the following:

''5. For purposes of this guideline—

'Controlled substance offense' has the meaning given that term in § 4B1.2(b) and Application Note 1 of the Commentary to § 4B1.2 (Definitions of Terms Used in Section 4B1.1).

'Crime of violence' has the meaning given that term in § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2 (Definitions of Terms Used in Section 4B1.1).

'Felony conviction' means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (*e.g.,* a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).''.

The Commentary to § 2K2.1 captioned ''Application Notes'' is amended in Note 15 by inserting before the first paragraph the following:

''For purposes of applying subsection (a)(1), (2), (3), or (4)(A), use only those felony convictions that receive criminal history points under § 4A1.1(a), (b), or (c). In addition, for purposes of applying subsection (a)(1) and (a)(2), use only those felony convictions that are counted separately under § 4A1.1(a), (b), or (c). *See* § 4A1.2(a)(2); § 4A1.2, comment. (n.3).''.

Proposed Amendment: Immigration

18. *Synopsis of Proposed Amendment:* This amendment modifies § 2L1.2(b)(1) (Unlawful Entering or Remaining in the United States) to provide more graduated sentencing enhancements based on the seriousness of the prior aggravated felony conviction. Subsection (b)(1)(A) currently provides a 16-level enhancement if the defendant was previously deported after a criminal conviction, and the conviction was for an aggravated felony.

The Commission has received comment that § 2L1.2 often results in offense levels that are disproportionate to the seriousness of the prior aggravated felony conviction. This occurs for two primary reasons. First, 8 U.S.C. 1101(a)(43) and, by reference, § 2L1.2, defines aggravated felony very broadly. Second, subsection (b)(1) neither distinguishes among the many types of aggravated felonies for purposes of triggering the 16-level enhancement, nor provides for smaller increases for less serious aggravated felonies.

The proposed amendment is intended to achieve more proportionate punishment by providing tiered sentencing enhancements based on the period of imprisonment the defendant actually served for the prior aggravated felony. In addition, the amendment contains two options for providing increased punishment for the most serious aggravated felonies. Under Option One, the 16-level enhancement would be triggered not only by the period of imprisonment actually served but also by all aggravated felonies involving death, serious bodily injury, the discharge or other use of a firearm or dangerous weapon, or a serious drug trafficking offense, regardless of the period of imprisonment actually served by the defendant. Alternatively, Option Two would encourage an upward departure in such cases, which could result in an increase greater than the 16-level enhancement for these most serious aggravated felonies.

The Commission invites comment as to whether the 16-level enhancement provided by subsection (b)(1) should be graduated on some basis other than period of imprisonment actually served, perhaps by extending the approach taken by Option 1 throughout the other tiers. In addition, the Commission invites comment as to whether aggravated felonies that were committed beyond a certain number of years prior to the instant offense should not count for purposes of triggering subsection (b)(1).

Proposed Amendment

Chapter Two, Part L, Subpart 1, is amended by striking § 2L1.2 in its entirety and inserting the following:

''§ 2L1.2. Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: 8.

(b) Specific Offense Characteristic.

(1) If the defendant previously was deported after a criminal conviction, or if the defendant unlawfully remained in

the United States following a removal order issued after a criminal conviction, increase as follows (if more than one applies, apply the greater):

(A) If the conviction was for an aggravated felony; and—

(i) (I) The defendant actually served a period of imprisonment of at least ten years for such conviction [Option 1: or

(II) The aggravated felony involved death, serious bodily injury, the discharge or other use of a firearm or dangerous weapon, or a serious drug trafficking offense],

increase by 16 levels;

(ii) The defendant actually served a period of imprisonment of at least five years but less than ten years, increase by [10][12] levels;

(iii) The defendant actually served a period of imprisonment of at least two years but less than five years, increase by [8] levels; or

(iv)(I) The defendant actually served a period of imprisonment of less than two years, or (II) the sentence imposed was only a term of probation or other sentence alternative to a term of imprisonment, or a combination of probation and other sentence alternative to a term of imprisonment, increase by [6] levels.

(B) If the conviction was for (i) any felony other than an aggravated felony; or (ii) three or more misdemeanors that are crimes of violence or controlled substance offenses, increase by 4 levels.

Commentary

Statutory Provisions: 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. 1326. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

''1. Definitions.—For purposes of this guideline:

'Aggravated felony' has the meaning given that term in 8 U.S.C. 1101(a)(43) without regard to the date of conviction of the aggravated felony.

'Controlled substance offense'—

(A) Means an offense under federal or state law that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense; and

(B) Includes—

(i) Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (*see* 21 U.S.C. 841(d)(1));

(ii) Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (*see* 21 U.S.C. 843(a)(6));

(iii) Maintaining any place for the purpose of facilitating an offense described in subdivision (A) (*see* 21 U.S.C. 856);

(iv) Using a communications facility in committing, causing, or facilitating an offense described in subdivision (A) (*see* 21 U.S.C. 843(b)); and

(v) The offenses of aiding and abetting, conspiring, and attempting to commit any offense described in subdivision (A) or (B)(i), (ii), (iii), or (iv).

'Felony' means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.

'Misdemeanor' means any federal, state, or local offense punishable by imprisonment for a term of imprisonment of one year or less.

'Serious bodily injury' has the meaning given that term in Application Note 1 of the Commentary to § 1B1.1 (Application Instructions).

'Serious drug trafficking offense' has the meaning given that term in Application Note 1 of the Commentary to § 5K2.20 (Aberrant Behavior).

2. Application of Subsection (b)(1).—For purposes of subsection (b)(1):

(A) A defendant shall be considered to be deported if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.

(B) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, whether or not the deportation was in response to such conviction.

(C) A defendant shall be considered to have remained in the United States following a removal order issued after a conviction if the removal order was subsequent to the conviction, whether or not the removal order was in response to such conviction.

(D) The period of imprisonment that the defendant actually served for the aggravated felony includes, in the case of a defendant who escaped from imprisonment, time the defendant would have served if the defendant had not escaped.

3. Computation of Criminal History Points.—Prior felony and misdemeanor convictions taken into account under subsection (b) also are counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

4. Departure Provisions.—

[Option Two:

(A) Upward Departure Provisions.—There may be cases in which subsection (b)(1) applies but the applicable enhancement understates the seriousness of the aggravated felony taken into account under that subsection. In such cases, an upward departure may be warranted. For example an upward departure may be warranted if the aggravated felony involved any of the following:

(i) Serious bodily injury, as defined in Application Note 1 of the Commentary to § 1B1.1 (Application Instructions), or death.

(ii) The discharge or other use of a firearm or a dangerous weapon.

(iii) A serious drug trafficking offense, as defined in Application Note 1 of the Commentary to § 5K2.20 (Aberrant Behavior).]

(B) Downward Departure Provisions.—A downward departure may be warranted in a case in which the defendant was not advised, at the time the defendant previously was deported or removed, of the criminal consequences of reentry after deportation or removal.''.

Issues for Comment: The Commission invites comment regarding whether the enhancement in § 2L1.2(b)(1) for a previous conviction for an aggravated felony should be graduated based on a factor other than, or in addition to, the period of imprisonment the defendant actually served for the aggravated felony. Should the enhancement be graduated based on the type of aggravated felony involved? For example, should the approach of Option One for subsection (b)(1)(A)(i) be extended to subdivisions (ii) through (iv) of subsection (b)(1)?

The Commission also invites comment on whether the enhancement in § 2L1.2(b)(1) for a previous conviction for an aggravated felony should take into consideration only aggravated felonies that were committed within a specified time period, *e.g.,* fifteen years, or the counting rules provided by § 4A1.2 (Definitions and Instructions for Computing Criminal History).

Proposed Amendment: Nuclear, Biological, and Chemical Weapons

19. *Synopsis of Proposed Amendment:* This is a two-part amendment.

First, in response to the sense of Congress contained in section 1423(a) of the National Defense Authorization Act for Fiscal Year 1997 that guideline penalties are inadequate for certain offenses involving the importation, attempted importation, exportation, and attempted exportation of nuclear, chemical, and biological weapons, materials, or technologies, the proposed

amendment increases by four levels the base offense levels in §§ 2M5.1 (the guideline covering the evasion of export controls) and 2M5.2 (the guideline covering the exportation of arms, munitions, and military equipment without a license). A four-level increase is proposed for those offenses in subsection (a)(1) of both §§ 2M5.1 and 2M5.2 to make the penalty structure for those offenses proportional to other national security guidelines in Chapter Two, Part M. In addition, the Statutory Index is proposed to be amended to refer one of the offenses, 50 U.S.C. 1701 (which currently is not referenced in the Statutory Index), to both §§ 2M5.1 and 2M5.2.

Second, the proposed amendment substantially revises § 2M6.1 (the guideline covering the unlawful acquisition, alteration, use, transfer, or possession of nuclear material, weapons, or facilities) in order to incorporate into that guideline two relatively new offenses, 18 U.S.C. 175, relating to biological weapons, and 18 U.S.C. 229, relating to chemical weapons. Specifically, the amendment proposes to modify § 2M6.1 in the following ways:

(1) It provides two alternative base offense levels. The first base offense level of level 42 applies if the offense was committed with the intent to injure the United States or to aid a foreign government or foreign terrorist organization. This incorporates into the base offense level the 12-level enhancement currently found in the guideline for such intent and does not change the overall offense level for these offenses. ''Foreign terrorist organizations'' are added because Congress has found that such groups are investing in the acquisition of unconventional weapons such as nuclear, biological, and chemical agents. It is anticipated that this base offense level will apply to cases as apparently originally contemplated by the guideline, *i.e.,* the acquisition of nuclear material from defense, or even civilian, nuclear facilities in order to assist foreign governments, thereby creating a threat to the national security, as well as to cases that implicate the national security but involve biological and chemical weapons.

The proposed amendment provides that, if the base offense level of level 42 applies, none of the adjustments in subsection (b) shall apply. This is intended to cap the very high offense level attendant to this base offense level and also to preclude the possibility of a downward adjustment if the offense involved only a threat. However, if death results, the cross reference allows for the possibility of a higher offense level through application of the first degree murder guideline.

It is anticipated that the second base offense level, of level [28][30], will apply in most cases, specifically those cases that do not threaten the national security of the United States.

(2) It provides a six-level decrease, in subsection (b)(1), if the offense involved only a threat to use a nuclear, biological, or chemical weapon or material, and there was no conduct evidencing an intent to carry out the threat. After review of the cases and meeting with representatives of the Department of Justice and the Federal Bureau of Investigations, it became apparent that the least culpable offenders, and the least serious of these offenses, are those that involve non-credible threats. The extent of the adjustment (*i.e.,* six levels) mirrors in reverse the six-level increase in the threatening communications guideline, § 2A6.1, if the conduct involved an actual intent to carry out the threat.

(3) It provides, in brackets, a two-level enhancement, in subsection (b)(2), if the offense involved particularly dangerous types of nuclear, chemical, and biological weapons and materials. Those weapons and materials are defined in the guideline commentary by reference to the applicable statutory and regulatory provisions. This enhancement acknowledges the distinctions already made in international treaties, provisions of title 18, United States Code, the relevant regulatory schemes, and by representatives of the Department of Justice and the Federal Bureau of Investigations, that certain types of weapons and materials are inherently more lethal and pose a greater threat to the public safety.

(4) It provides an enhancement, in subsection (b)(3), if any victim sustained serious bodily injury or death. This enhancement is modeled after the enhancement found in § 2N1.1, the guideline covering tampering with consumer products. Like that guideline, the amendment provides commentary (in the background) stating that the base offense level reflects that the offense typically will involve a risk of serious bodily injury or death or will cause or intend to cause bodily injury.

(5) It provides two options for cases involving a substantial disruption of public, governmental, or business functions or services, or the substantial expenditure of funds for clean up and decontamination efforts. Option One provides for a four-level enhancement in such cases. Option Two provides for an upward departure provision.

(6) It provides two cross references, if the resulting offense level is greater, if death resulted (in which case the first or second degree murder guideline would apply) or if the offense was tantamount to attempted murder (in which case the attempted murder guideline would apply). These cross references are also modeled after cross references found in § 2N1.1, the guideline for tampering with consumer products.

(7) It provides a special instruction that if the defendant is convicted of one count involving the death of, serious bodily injury to, or attempted murder of, more than one victim, the grouping rules will be applied as if the defendant had been convicted of separate counts for each such victim.

(8) It amends the Statutory Index to refer 18 U.S.C. 175 and 229 to § 2M6.1 and to delete a number of guideline references for 18 U.S.C. 2332a and instead provide a reference for that offense to §§ 2K1.4 (in the case of weapons of mass destruction that are explosive devices and 2M6.1 (in the case of other weapons of mass destruction).

Three issues for comment follow the proposed amendment.

Proposed Amendment

Section 2M5.1 is amended by striking subsection (a) in its entirety and inserting the following:

''(a) Base Offense Level (Apply the greater):

(1) [26,] if national security controls or controls relating to the proliferation of nuclear, biological, or chemical weapons or materials were evaded; or

(2) 14, otherwise.''.

Section 2M5.2(a)(1) is amended by striking ''22'' and inserting ''[26]''.

The heading to Chapter Two, Part M, is amended by adding at the end ''And Weapons of Mass Destruction''.

The heading to Chapter Two, Part M, Subpart 6, is amended by striking ''Atomic Energy'' and inserting '' Nuclear, Biological, And Chemical Weapons And Materials, And Other Weapons of Mass Destruction''.

Chapter Two, Part M, is amended by striking § 2M6.1 in its entirety and inserting the following:

''§ 2M6.1. Unlawful Production, Development, Acquisition, Stockpiling, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities, Biological Agents, Chemical Weapons, or Other Weapons of Mass Destruction

(a) Base Offense Level:

(1) [42], if the offense was committed with intent (A) to injure the United States; or (B) to aid a foreign nation or a foreign terrorist organization; or

(2) [28][30], otherwise.

(b) Specific Offense Characteristics:

If subsection (a)(2) applies, and:

(1) If the offense (A) involved a threat to use a nuclear weapon, nuclear material, nuclear byproduct material, biological agent, chemical weapon, or other weapon of mass destruction; and (B) did not involve any conduct evidencing an intent or ability to carry out the threat, decrease by [6] levels.

[(2) If the offense involved (A) a select biological agent; (B) a listed precursor or a listed toxic chemical; (C) nuclear material or nuclear byproduct material; or (D) a weapon of mass destruction that contains any agent, precursor, toxic chemical, or material referred to in subdivision (A), (B), or (C), increase by [2] levels.]

(3) If (A) any victim sustained permanent or life-threatening bodily injury, increase by 4 levels; (B) any victim sustained serious bodily injury, increase by 2 levels; or (C) the degree of injury is between that specified in subdivisions (A) and (B), increase by 3 levels.

[Option One: (4) If the offense resulted in (A) substantial disruption of public, governmental, or business functions or services; or (B) a substantial expenditure of funds to clean up, decontaminate, or otherwise respond to the offense, increase by [4] levels.]

(c) Cross References:

(1) If the offense resulted in death, apply § 2A1.1 (First Degree Murder) if the death was caused intentionally or knowingly, or § 2A1.2 (Second Degree Murder) in any other case, if the resulting offense level is greater than that determined above.

(2) If the offense was tantamount to attempted murder, apply § 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), if the resulting offense level is greater than that determined above.

(d) Special Instruction:

(1) If the defendant is convicted of a single count involving (A) the death or permanent, life-threatening, or serious bodily injury of more than one victim, or (B) conduct tantamount to the attempted murder of more than one victim, Chapter Three, Part D (Multiple Counts), shall be applied as if the defendant had been convicted of a separate count for each such victim.

Commentary

Statutory Provisions: 18 U.S.C. §§ 175, 229, 831, 2332a (only with respect to weapons of mass destruction as defined in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D)); 42 U.S.C. §§ 2077(b), 2122, 2131. For additional statutory provision(s), *see* Appendix A (Statutory Index).

Application Notes:

''1. Definitions.—For purposes of this guideline:

Biological agent has the meaning given that term in 18 U.S.C. 178(1).

Chemical weapon has the meaning given that term in 18 U.S.C. 229F(1).

Foreign terrorist organization (A) means an organization that engages in terrorist activity that threatens the security of a national of the United States or the national security of the United States; and (B) includes an organization designated by the Secretary of State as a foreign terrorist organization pursuant to section 219 of the Immigration and Nationality Act (8 U.S.C. 1219). National of the United States has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)).

Listed precursor or listed toxic chemical means a precursor or toxic chemical, respectively, listed in Schedule I of the Annex on Chemicals to the Chemical Weapons Convention. *See* 18 U.S.C. 229F(6)(B), (8)(B). Precursor has the meaning given that term in 18 U.S.C. 229F(6)(A). Toxic chemical has the meaning given that term in 18 U.S.C. 229F(8)(A).

Nuclear byproduct material has the meaning given that term in 18 U.S.C. 831(f)(2).

Nuclear material has the meaning given that term in 18 U.S.C. 831(f)(1).

Select biological agent means a biological agent or toxin identified by the Secretary of Health and Human Services on the select agent list established pursuant to section 511(d) of the Antiterrorism and Effective Death Penalty Act, Pub. L. 104–132. *See* 42 CFR part 62. Toxin has the meaning given that term in 18 U.S.C. 178(2).

Weapon of mass destruction (A) has the meaning given that term in 18 U.S.C. § 2332a(c)(2)(B), (C), and (D); and (B) includes any radiological dispersal device, regardless of whether the radioactive material contained in that radiological dispersal device was nuclear material, nuclear byproduct material, or other radioactive material (such as low-grade medical, industrial, or research radioactive waste). Radiological dispersal device means any device, including any weapon or equipment, other than a nuclear explosion, specifically designed to disseminate radioactive material in order to cause property destruction, damage, or bodily injury by means of the radiation produced by the decay of the radioactive material.

2. Inapplicability of Subsection (b) to Subsection (a)(1) Cases.—If subsection (a)(1) applies, do not apply subsection (b).

3. Applicability of Subsections (b)(2) and (b)(4) in Threat Cases.—The application of subsection (b)(1) in a case involving a threat shall not preclude the application of either subsection (b)(2) or subsection (b)(4) in such a case.

4. Application of Special Instruction.—Subsection (d) applies in any case in which the defendant is convicted of a single count involving (A) the death or permanent, life-threatening, or serious bodily injury of more than one victim; or (B) conduct tantamount to the attempted murder of more than one victim, regardless of whether the offense level is determined under subsection (a), subsections (a) and (b), or subsection (c).

5. Inapplicability of § 3A1.4 in Certain Cases.—If subsection (a)(1) applies because the offense was committed with the intent to aid an international foreign terrorist organization, do not apply § 3A1.4 (Terrorism).

6. Departure Provisions.—

(A) Upward Departure Provisions.—There may be cases in which the offense level determined above substantially understates the seriousness of the offense. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of circumstances in which an upward departure may be warranted:

(i) The offense posed a substantial risk of death or serious bodily injury to numerous victims (*e.g.,* chlorine gas was released in a crowded movie theater).

(ii) The offense caused extreme psychological injury. *See* § 5K2.3 (Extreme Psychological Injury).

(iii) The offense caused substantial property damage or monetary loss. *See* § 5K2.5 (Property Damage or Loss).

[Option Two: (iv) The offense resulted in substantial disruption of public, governmental, or business functions or services, or the response to the offense required a substantial expenditure (*e.g.,* to provide environmental decontamination of the affected area). *See, e.g.,* § 5K2.7 (Disruption of Governmental Function).]

(B) Downward Departure Provision.—There may be cases in which the offense level determined above substantially overstates the seriousness of the offense. In such cases, a downward departure may be warranted. For example, in the unusual case in which the offense did not cause a risk of death or serious bodily injury, and neither caused nor was intended to cause bodily injury, a downward departure may be warranted.

Background: The base offense level reflects that this offense typically poses a risk of death or serious bodily injury

to one or more victims; or causes, or is intended to cause, bodily injury.''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to ''18 U.S.C. § 155'' the following:

''18 U.S.C. § 1752M6.1''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to ''18 U.S.C. 228'' the following:

''18 U.S.C. § 2292M6.1''.

Appendix A (Statutory Index) is amended in the line referenced to 18 U.S.C. 2332a by striking ''2A1.1, 2A1.2, 2A1.3, 2A1.4, 2A1.5, 2A2.1, 2A2.2, 2B1.3,'' and by inserting '', 2M6.1'' after ''2K1.4''.

Appendix A (Statutory Index) is amended by inserting after the line referenced to ''50 U.S.C. App. 462'' the following:

''50 U.S.C. App. § 1701 2M5.1, 2M5.2''.

Issues for Comment

(1) The Commission invites comment on whether the above proposal appropriately addresses the offenses in 18 U.S.C. 175, relating to biological weapons, and in 18 U.S.C. 229, relating to chemical weapons. Specifically, are these offenses more appropriately addressed through a guideline that incorporates into the base offense level any or all of the aggravating factors that may be associated with these offenses (*e.g.,* the inherent psychological harm, the risk of bodily harm, and the economic harm associated with cleanup and decontamination efforts), or is it preferable to address these harms as specific offense characteristics?

(2) The Commission also invites comment on how threats to use nuclear, biological, or chemical weapons should be punished under the guidelines. Should there be a greater differentiation in punishment under proposed § 2M6.1 between offenses that involve only the threatened use of such weapons (whether or not the defendant engaged in conduct evidencing an intent or ability to carry out the threat) and other conduct punished under that guideline? Alternatively, should the threatened use of such weapons be punished under § 2A6.1 (Threatening or Harassing Communications), and if so, how severely should such conduct be punished in relation to other types of threats punished under that guideline?

(3) How should attempts, conspiracies, and solicitations to commit an offense under 18 U.S.C. 175 or 229 be covered under the guidelines? Should such attempts, conspiracies, and solicitations be expressly covered by the proposed new guideline, § 2M6.1, or should § 2X1.1 (Attempt, Solicitation, or Conspiracy) apply?

Proposed Amendment: Money Laundering

20. *Synopsis of Proposed Amendment:*

Overview

The proposed amendment consolidates the two current money laundering guidelines, §§ 2S1.1 and 2S1.2, and applies to convictions under either 18 U.S.C. 1956 or 1957. The primary feature of the consolidated amendment structure is that it ties offense levels for money laundering more closely to the underlying criminal conduct that was the source of the criminally derived funds. The amendment accomplishes this objective by separating money laundering offenders, regardless of the statute of conviction, into two categories for purposes of determining the base offense level. The base offense level is determined differently, depending on whether the defendant is a ''direct'' or a ''third party'' money launderer (money launderers who commit the underlying offense which generated the criminal proceeds versus money launderers who did not commit the underlying offense). Specific offense characteristics are included in this proposed amendment to increase the total offense level in order to assure greater punishment for those money laundering defendants whose conduct is considered more serious and harmful to the societal interests which the money laundering laws are designed to protect.

Base Offense Level

Subsection (a) provides two distinct methods for determining the base offense level, depending on whether the defendant is a ''direct'' money launderer or a ''third party'' money launderer. Subsection (a)(1) sets the base offense level for ''direct'' money launderers at the offense level for the underlying offense from which the laundered funds were derived (*i.e.,* the base offense level and all applicable specific offense characteristics for the underlying offense), if the offense level for the underlying offense can be determined. A data analysis of a representative sample of 259 money laundering cases conducted by the Commission indicated that subsection (a)(1) would apply to 86 percent of defendants sentenced under the guideline (*i.e.,* ''direct'' money launderers comprise 86 percent of the money laundering defendants).

This proposed amendment excludes from application of subsection (a)(1) offenders who otherwise would be accountable for the underlying offense solely on the basis of § 1B1.3(a)(1)(B) (*i.e.,* jointly undertaken criminal activity). However, this limitation has minimal practical consequence. Commission data indicate that less than one percent of defendants who would not be categorized as ''direct'' money launderers because of this limitation would be subject to subsection (a)(1) if it were expanded to include defendants who would be otherwise accountable for the underlying offense under § 1B1.3(a)(1)(B). The Commission invites comment as to whether application of subsection (a)(1) should be expanded to include offenders who otherwise would be accountable for the underlying offense solely on the basis of § 1B1.3(a)(1)(B).

For ''third party'' money launderers (*i.e.,* defendants who did not commit or would not be accountable for the underlying offense under § 1B1.3(a)(1)(A)), subsection (a)(2) sets the base offense level at level eight, plus an increase based on the value of the laundered funds from the table in subsection (b)(1) of § 2F1.1 (Fraud and Deceit). Subsection (a)(2) also applies to ''direct'' money laundering defendants for whom subsection (a)(1) would apply but the offense level for the underlying offense is impossible or impracticable to determine.

Under the structure of this proposed amendment, there may be some cases in which the ''third party'' money launderers will receive a higher base offense level than the offenders who committed the underlying offense. This conceivably could occur in cases in which the underlying offense that generated the criminally derived proceeds is a fraud or other economic crime covered by a guideline that uses the table in subsection (b)(1) of § 2F1.1, and the loss calculation is less than the value of the laundered funds. For example, the underlying offense may have involved the fraudulent sale of stock for $200,000 that was worth $180,000. The defendant did not commit the underlying offense, but laundered all of the $200,000. In such a case, the value of the laundered funds is $200,000, but the loss amount for purposes of § 2F1.1(b)(1) is $20,000. In such a case, the ''third party'' money laundering defendant may receive a higher base offense level than the Chapter Two offense level for the offender who committed the fraud.

Three options in Application Note 3 are presented for addressing this type of case. Option 1 provides that a downward departure may be warranted in such a case, but limits the extent of such a departure to the offense level for

the underlying offense conduct that would result if the base offense level were determined using subsection (a)(1). Option 2 creates a rule that the value of the funds is the lesser of either the actual value of the laundered funds or the value of the loss as calculated for purposes of § 2F1.1(b)(1). Option 3 provides no specific provision to address this type of case.

An analysis conducted by the Commission indicates that this type of case will rarely occur. In its sample of 259 cases, Commission identified no cases in which the loss amount was less than the value of laundered funds. In fact, this issue can arise only in ''third party'' money laundering cases, which comprise only 14 percent (36 of 259 cases) of the money laundering cases in the representative sample. Furthermore, in the overwhelming majority—89 percent—of those 36 ''third party'' cases, the underlying offense was a drug offense, which does not give rise to this problem. In its sample, the Commission identified only three ''third party'' money laundering cases for which the underlying offense was a fraud or other economic crime.

Adjustments

In addition to the base offense level, the proposed amendment contains a number of adjustments. Consistent with the approach of tying the base offense level to the underlying offense that generated the criminally derived funds, subsection (b)(1) provides a [2][4][6] level enhancement for ''third party'' money launderers who know or believe that any of the laundered funds were the proceeds of, or were intended to promote, certain types of more serious underlying criminal conduct; specifically, drug trafficking, crimes of violence, offenses involving firearms, explosives, national security, terrorism, and the sexual exploitation of a minor.

Subsection (b)(2) provides four alternative enhancements, with the greatest applicable enhancement to be applied. Subsection (b)(2)(A) provides a [2][3][4] level increase if the defendant is a ''third party'' money launderer who is ''in the business'' of laundering funds. This adjustment reflects the view that, similar to a professional ''fence'' (see § 2B1.1(b)(4)(B)), defendants who routinely engage in laundering funds on behalf of third parties and who gain financially from engaging in such transactions warrant additional punishment because they encourage the commission of additional underlying criminal offenses. Application Note 6 directs the court to consider the totality of the circumstances in determining whether a defendant was in the business of laundering funds and provides a non-exhaustive list of factors to be considered in making this determination. The Commission invites comment as to whether eligibility for this enhancement should be expanded to include ''direct'' money launderers who launder the criminal derived proceeds of others, in addition to their own criminally derived proceeds.

Subsection (b)(2)(B) provides a [2][3] level enhancement if any of the laundered funds were used [or intended to be used] to [significantly] [materially] promote further criminal conduct. Application Note 5 limits applicability of this enhancement to the use of laundered funds to further criminal conduct in addition to, or beyond, the criminal conduct from which the laundered funds were derived, as opposed to underlying offenses that were completed at the time of the laundering. This enhancement attempts to provide increased punishment for two types of offense conduct: (1) Cases in which the defendant uses criminally derived funds to cause criminal conduct in addition to or beyond the criminal conduct that initially generated the criminally derived funds that are the subject of the money laundering conviction; or (2) cases in which the defendant reinvests all or some of the laundered funds back into an ongoing criminal scheme to finance the continued operation or expansion of the criminal scheme.

Subsection (b)(2)(C) provides a [2][3] level enhancement if the offense involved ''sophisticated concealment.'' Application Note 6 defines ''sophisticated concealment'' as especially complex or especially intricate offense conduct where the defendant takes deliberate steps to conceal the nature, location, source, ownership, or control of the criminally derived funds to make the transaction more difficult to detect. Application Note 6 also provides examples of conduct that typically constitutes sophisticated concealment. The Commission invites comment as to whether the applicability of this enhancement should be expanded to include all forms of concealment, even if the concealment is not sophisticated.

Subsection (b)(2)(D) provides a [1][2] level enhancement if the defendant launders funds with the intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code (title 26, United States Code). A conviction under the relevant subsection of 18 U.S.C. 1956 is required for the enhancement to apply. The Commission invites comment as to whether the proposed guideline should include such an enhancement, absent additional aggravating money laundering conduct.

Subsection (b)(3) provides a [1] level increase if the defendant is a ''direct'' money launderer, none of the enhancements under subsection (b)(2) apply, and the value of the laundered funds is greater than $10,000. This enhancement is intended to ensure that defendants who also commit the underlying offense receive some incremental punishment for the money laundering offense, even if ineligible for any of the other enhancements that reflect more aggravated money laundering offense conduct. The Commission specifically invites comment as to whether the proposed guideline should contain such an enhancement.

Subsection (b)(4) provides a [2] level decrease for cases in which three conditions are met: (1) The defendant did not commit the underlying offense that generated the criminally derived funds; (2) the defendant was convicted under 18 U.S.C. 1957 only; and, (3) none of the other enhancements apply. This downward adjustment recognizes that section 1957 offenses, with no aggravating factors, may be considered less serious than section 1956 offenses because the statutory maximum of the former is half (10 years) that of the latter (20 years), and because the government is not required to prove that the section 1957 defendant knew that the offense from which the laundered funds were derived was a specified unlawful activity (*see* 18 U.S.C. 1957(c)).

Application Note 7 provides that in a case in which the defendant is to be sentenced on a count of conviction for money laundering and a count of conviction for the underlying offense that generated the laundered funds, such counts shall be grouped pursuant to subsection (c) of § 3D1.2 (Groups of Closely-Related Counts), thereby resolving a circuit conflict on this issue. Providing for grouping under § 3D1.2(c) may make appropriate a conforming amendment to Application Note 5 of § 3D1.2 to provide that grouping under § 3D1.2(c) also applies in cases in which the base offense level from the guideline applicable to one count specifically incorporates the offense level applicable to the other related count. In such cases, the conduct that forms the basis for the base offense level in one count is the same aggravating conduct that forms the basis for the offense level of the other count.

The proposed amendment provides that convictions under 18 U.S.C. 1960 (Illegal Money Transmitting Businesses; failure to obtain appropriate licenses or

comply with registration requirements for money transmitting businesses) be referenced to § 2T2.2 (Regulatory Offenses). The Commission invites comment as to whether such violations are more appropriately referenced to § 2S1.3 (Structuring Transactions to Evade Reporting Requirements). Finally, the proposed amendment provides that convictions under 31 U.S.C. § 5326 relevant to structuring violations be referenced to § 2S1.3 (Structuring Transactions).

Proposed Amendment

Chapter Two, Part S, Subpart 1 is amended by striking §§ 2S1.1 and 2S1.2 and their accompanying commentary in their entirety and inserting the following:

''§ 2S1.1. Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity

(a) Base Offense Level:

(1) The offense level for the underlying offense from which the laundered funds were derived, if (A) the defendant committed the underlying offense (or otherwise would be accountable for the underlying offense under § 1B1.3(a)(1)(A) (Relevant Conduct)); and (B) the offense level for that offense can be determined; or

(2) 8 plus the number of offense levels from the table in subsection (b)(1) of § 2F1.1 (Fraud and Deceit) corresponding to the value of the laundered funds, otherwise.

(b) Specific Offense Characteristics:

(1) If (A) subsection (a)(2) applies because the defendant did not commit the underlying offense; and (B) the defendant knew or believed that any of the laundered funds were the proceeds of, or were intended to promote (i) an offense involving the manufacture, importation, or distribution of a controlled substance or a listed chemical; (ii) a crime of violence [as defined under § 4B1.2(a)(1) (Definitions of Terms Used in § 4B1.1)]; or (iii) an offense involving firearms, explosives, national security, terrorism, or the sexual exploitation of a minor, increase by [2][4][6] levels.

(2) (Apply the greatest):

(A) If [(i) subsection (a)(2) applies because the defendant did not commit the underlying offense; and (ii)] the defendant was in the business of laundering funds, increase by [2][3][4] levels.

(B) If any of the laundered funds were used [or were intended to be used] to [significantly] [materially] promote further criminal conduct, increase by [2][3] levels.

(C) If the offense involved sophisticated concealment, increase by [2][3] levels.

[(D) If the defendant is convicted (A) under 18 U.S.C. § 1956(a)(1)(A)(ii); (B) under 18 U.S.C. § 1956(a)(1)(B)(ii); (C) under 18 U.S.C. § 1956(a)(2)(B)(ii); (D) under 18 U.S.C. § 1956(a)(3)(C); or (E) of attempting, aiding or abetting, or conspiracy to commit any of the offenses referred to in subdivisions (A) through (D), increase by [1][2] levels.]

[(3) If (A) subsection (a)(1) applies; (B) subsection (b)(2) does not apply; and (C) the value of the laundered funds is greater than $10,000, increase by [1] level.]

[(4) If (A) subsection (a)(2) applies because the defendant did not commit the underlying offense; (B) the defendant is convicted under 18 U.S.C. 1957; and (C) none of the enhancements in subsections (b)(1) and (b)(2) apply, decrease by [2] levels.]

Commentary

Statutory Provisions: 18 U.S.C. 1956, 1957.

Application Notes:

1. Definitions.—For purposes of this guideline:

'Crime of violence' has the meaning given that term in subsection (a)(1) of § 4B1.2 (Definitions of Terms Used in § 4B1.1).

'Criminally derived funds' means any funds derived [or represented to be derived] from conduct constituting a criminal offense.

'Laundered funds' means the property, funds, or monetary instrument involved in the transaction, financial transaction, monetary transaction, transportation, transfer, or transmission in violation of 18 U.S.C. 1956 or 1957.

'Laundering funds' means the making of a transaction, financial transaction, monetary transaction, or transmission, or the transporting of, property, funds, or a monetary instrument in violation of 18 U.S.C. 1956 or 1957.

'Sexual exploitation of a minor' means an offense involving (A) promoting prostitution by a minor; (B) sexually exploiting a minor by production of sexually explicit visual or printed material; (C) distribution of material involving the sexual exploitation of a minor, or possession of material involving the sexual exploitation of a minor with intent to distribute; or (D) aggravated sexual abuse sexual abuse, or abusive sexual contact, involving a minor. 'Minor' means an individual under the age of 18 years.

2. Application of Subsection (a)(1).—

(A) Multiple Underlying Offenses.—In cases in which subsection (a)(1) applies and there is more than one underlying offense, the offense level for the underlying offense is to be determined under the procedures set forth in Application Note 3 of the Commentary to § 1B1.5 (Interpretation of References to Other Guidelines).

(B) Defendants Otherwise Accountable.—In order for subsection (a)(1) to apply, the defendant must have committed the underlying offense or be otherwise accountable for the underlying offense under § 1B1.3(a)(1)(A) (Relevant Conduct). The fact that the defendant was involved in laundering criminally derived funds after the commission of the underlying offense, without additional involvement in the underlying offense, does not establish that the defendant committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused the underlying offense.

(C) Non-Applicability of Enhancements—If subsection (a)(1) applies, and the conduct that forms the basis for an enhancement under the guideline applicable to the underlying offense is the only conduct that forms the basis for application of any of the enhancements in subsection (b) of this guideline, do not apply the subsection (b) enhancement under this guideline.

3. Application of Subsection (a)(2).—

(A) In General.—Subsection (a)(2) applies to cases in which (A) the defendant did not commit the underlying offense; or (B) the defendant committed the underlying offense (or otherwise would be accountable for the underlying offense under subsection (a)(1)(A) of § 1B1.3 (Relevant Conduct), but the offense level for the underlying offense is impossible or impracticable to determine.

(B) Commingled Funds.—In a case in which a transaction, financial transaction, monetary transaction, transportation, transfer, or transmission results in the commingling of legitimately derived funds with criminally derived funds, the value of the laundered funds, for purposes of subsection (a)(2), is the amount of the criminally derived funds, not the total amount of the commingled funds, if the defendant provides sufficient information to determine the amount of criminally derived funds without unduly complicating or prolonging the sentencing process. If the amount of the criminally derived funds is difficult or impracticable to determine, the value of the laundered funds, for purposes of subsection (a)(2), is the total amount of the commingled funds.

[Value of Funds—Option 1:

(C) Value of Laundered Funds for Certain Defendants.—There may be

cases in which (A) subsection (a)(2) applies; (B) the defendant did not commit the underlying offense; (C) the underlying offense is a fraud or another economic crime covered by a guideline that uses the table in subsection (b)(1) of § 2F1.1 (Fraud and Deceit); and (D) the value of the laundered funds under subsection (a)(2) is substantially greater than the value of the loss or other monetary amount attributable to the underlying offense for purposes of § 2F1.1(b)(1). In such cases, a downward departure may be warranted to ensure that the seriousness of the punishment for the money laundering offense is reasonably related to the seriousness of the punishment that would be warranted for the underlying offense. However, any such downward departure shall not result in an offense level lower than that which would result if the sentence were determined using the base offense level under subsection (a)(1). For example, the underlying offense may have involved the fraudulent sale of stock for $200,000 that was worth $180,000. The defendant did not commit the underlying offense but laundered all of the $200,000. The value of the laundered funds is $200,000, but the loss amount for purposes of § 2F1.1(b)(1) is $20,000. In such a case, the downward departure shall not result in an offense level lower than the sum of the base offense level under § 2F1.1(a) and the enhancement under § 2F1.1(b)(1) for the value of the loss. Accordingly, a downward departure, if warranted, shall not result in an offense level lower than level 9 (§ 2F1.1(a) base offense level of level 6 plus § 2F1.1(b)(1) increase of 3 offense levels to account for loss amount of $20,000).]

[Value of Funds—Option 2:

(C) Value of Laundered Funds for Certain Defendants.—In a case in which (A) subsection (a)(2) applies; (B) the defendant did not commit the underlying offense; and (C) the underlying offense is a fraud or another economic crime covered by a guideline that uses the table in subsection (b)(1) of § 2F1.1 (Fraud and Deceit), the value of the laundered funds is the lesser of the actual value of the laundered funds or the value of the loss or other monetary amount attributable to the underlying offense for purposes of § 2F1.1(b)(1). For example, the underlying offense may have involved the fraudulent sale of stock for $200,000 that was worth $180,000. The defendant did not commit the underlying offense but laundered all of the $200,000. The actual value of the laundered funds is $200,000, but the loss amount for purposes of § 2F1.1(b)(1) is $20,000. In such a case, the value of the laundered funds, for purposes of subsection (a)(2), is $20,000. Accordingly, the base offense level under subsection (a)(2) is the sum of the base offense level under § 2F1.1(a) and the enhancement under § 2F1.1(b)(1) for the value of the loss. Therefore, in this example, the base offense level under subsection (a)(2) is level 9 (§ 2F1.1(a) base offense level of level 6 plus § 2F1.1(b)(1) increase of 3 offense levels to account for loss amount of $20,000.]

[Value of Funds—Option 3: No specific provision]

4. Enhancement for Business of Laundering Funds.—

(A) In General.—The court shall consider the totality of the circumstances to determine whether a defendant who did not commit the underlying offense was in the business of laundering funds, for purposes of subsection (b)(2)(A).

(B) Factors to Consider.—The court shall consider the following factors in determining whether, under the totality of circumstances, the defendant was in the business of laundering funds for purposes of subsection (b)(2)(A):

(i) The defendant [regularly] [routinely] engaged in acts of laundering funds during an extended period of time.

(ii) The defendant laundered criminally derived funds from multiple sources during an extended period of time.

(iii) The defendant generated a substantial amount of revenue in return for laundering the funds.

(iv) At the time the defendant committed the instant offense, the defendant had one or more prior convictions of an offense under 18 U.S.C. 1956 or 1957, [31 U.S.C. 5313, 5314, 5316, 5324, or 5326] or any similar offense under state law, or an attempt or conspiracy to commit any such federal or state offense. Prior convictions taken into account under subsection (b)(2)(A) also are counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

5. [Significant][Material] Promotion of Further Criminal Conduct.—In order for subsection (b)(2)(B) to apply, all or part of the laundered funds must have been used to further criminal conduct in addition to or beyond the criminal conduct from which the laundered funds were derived. [Subsection (b)(2)(B) does not apply if the defendant laundered criminally derived proceeds that were generated from an underlying offense that was completed at the time of the laundering.] For example, subsection (b)(2)(B) would apply in a case in which the defendant reinvested (*i.e.*, plowed-back) all or part of the laundered funds from an ongoing, fraudulent telemarketing scheme to finance the continued operation of that scheme but would not apply in a case in which the defendant used all or part of the laundered funds only to finance a lavish lifestyle. Similarly, subsection (b)(2)(B) would apply in a case in which the defendant used laundered funds from an underlying drug offense to purchase additional drugs for distribution but would not apply in a case in which the defendant used those laundered funds to pay for drugs the defendant had already distributed as part of the underlying drug offense.

Subsection(b)(2)(B) does not apply to transactions that only give the defendant access to, or the use of for otherwise legal purposes, the criminally derived funds. For example, subsection (b)(2)(B) does not apply in a case in which the defendant deposits checks that represent the criminally derived proceeds from a fraudulent scheme into an account, and subsequently spends the funds for items that are not inherently illegal or items that do not further additional criminal conduct.

[Subsection (b)(2)(B) does not apply if the value of laundered funds used or intended to be used to promote criminal conduct was de minimis relative to the value of the laundered funds.]

6. Sophisticated Concealment.—For purposes of subsection (b)(2)(C), sophisticated concealment means especially complex or especially intricate offense conduct in which deliberate steps were taken to conceal the nature, location, source, ownership, or control of the criminally derived funds, in order to make the transaction, financial transaction, monetary transaction, transportation, transfer, or transmission in violation of 18 U.S.C. 1956 or 1957, or the extent of that violation, difficult to detect.

Sophisticated concealment typically involves hiding assets or hiding transactions, or both, through:

(A) The use of fictitious entities;

(B) The use of shell corporations;

(C) The creation of two or more levels (*i.e.,* layering) of transactions, transportation, transfers, or transmissions, of criminally derived funds that were intended to appear legitimate; or

(D) the transportation, transmission, or transfer of criminally derived funds from or through a place inside the United States to or through a place outside the United States (*e.g.,* an offshore bank account) or from or

through a place outside the United States to or through a place inside the United States. For purposes of this subdivision, United States has the meaning given that term in Application Note 1 of the Commentary to § 2B5.1 (Offenses Involving Counterfeit Bearer Obligations of the United States).

7. Grouping of Multiple Counts.—In a case in which the defendant is to be sentenced on a count (or a Group of counts) for the underlying offense from which the laundered funds were derived, the count for the offense under this guideline shall be grouped pursuant to subsection (c) of § 3D1.2 (Groups of Closely-Related Counts) with the count for the underlying offense or, in the case of a Group of counts for the underlying offense, with the most serious of the counts comprising the Group, *i.e.,* the count resulting in the greatest offense level.''.

The Commentary to § 2S1.3 captioned ''Statutory Provisions'' is amended by inserting '', 5326'' after ''5324''.

The Commentary to § 2T2.2 captioned ''Statutory Provisions'' is amended by inserting ''18 U.S.C. 1960;'' before ''26 U.S.C.''; by striking ''provided'' and inserting ''if''; and by inserting ''; 31 U.S.C. 5326'' after ''taxes''.

Appendix A (Statutory Index) is amended in the line referenced to ''18 U.S.C. 1957'' by striking ''2S1.2'' and inserting ''2S1.1''; By inserting after the line referenced to ''18 U.S.C. 1959'' the following new line:

''18 U.S.C. 1960 2T2.2'';

B-Date: 01-24-01 10:11 striking ''31 U.S.C. 5322 2S1.3''; and by inserting after the line referenced to ''31 U.S.C. 5324'' the following new line:

''31 U.S.C. 5326 2S1.3, 2T2.2''.

The Commentary to § 1B1.3 captioned ''Application Notes'' is amended in the first and second paragraphs of Note 6, by striking the second sentence in its entirety, in each instance.

Section 3D1.2(d) is amended in the second paragraph by striking ''2S1.2,''.

Section 8C2.1(a) is amended by striking ''2S1.2,''.

The Commentary to § 8C2.4 captioned ''Application Notes'' is amended in Note 5 by striking ''; 2S1.1 (Laundering of Monetary Instruments); and 2S1.2 (Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity)''.

The Commentary to § 8C2.4 captioned ''Background'' is amended in the seventh sentence by striking ''and money laundering''.

Issues for Comment: The Commission invites comment on the following:

(1) Whether application of subsection (a)(1) of proposed § 2S1.1 should be expanded to include defendants who are otherwise accountable for the underlying offense under § 1B1.3(a)(1)(B)(Relevant Conduct), in addition to defendants who commit or are otherwise accountable for the underlying offense under § 1B1.3(a)(1)(A).

(2) Whether proposed § 2S1.1 should include enhancements for conduct that constitutes elements of the money laundering offense, even if the conduct did not constitute an aggravated form of money laundering offense conduct. Specifically, the Commission invites comment on whether and, if so, to what extent, proposed § 2S1.1 should include an enhancement if:

(A) The offense involved concealment (coextensive with the meaning of the term under 18 U.S.C. 1956), even if the conduct did not constitute sophisticated concealment.

(B) If the defendant is convicted (A) under 18 U.S.C. 1956(a)(1)(A)(ii); (B) under 18 U.S.C. 1956(a)(1)(B)(ii); (C) under 18 U.S.C. 1956(a)(2)(B)(ii); (D) under 18 U.S.C. 1956(a)(3)(C); or (E) of attempting, aiding or abetting, or conspiracy to commit any of the offenses referred to in subdivisions (A) through (D).

(C) If subsection (a)(1) applies and (1) the defendant did not engage in an aggravated form of money laundering as accounted for by subsection (b)(2), and (2) the value of funds laundered exceeded $10,000.

(3) Whether application of subsection (b)(2)(A) (''in the business of laundering funds'') should be expanded to include defendants (1) whose base offense level is determined under subsection (a)(1) and (2) who launder criminally derived funds generated by offenses which they did not commit and are not otherwise accountable under § 1B1.3(a)(1)(A).

(4) Whether violations of 18 U.S.C. 1960 (Illegal Money Transmitting Businesses) should be referenced to § 2S1.3 (Structuring Transactions to Evade Reporting Requirements).

Proposed Amendment: Miscellaneous New Legislation and Technical Amendments

21. *Synopsis of Proposed Amendment:* This is a two-part proposed amendment.

First, the proposed amendment addresses miscellaneous legislation enacted during the 106th Congress by (1) adding to Appendix A (Statutory Index) and the statutory provisions of several guidelines references to new statutes; and (2) providing commentary to § 2M3.9 that implements the new consecutive sentencing requirement of 50 U.S.C. 421 (pertaining to the disclosure of information identifying a covert agent). Note that there were no directives to the Commission contained in any of the legislation that created these new offenses.

In each instance, the new Appendix A references are based on a determination that the new offense is sufficiently similar to other offenses covered by the referenced guideline.

The new offenses and proposed guideline references are as follows:

7 U.S.C. 7734—prohibits knowingly importing, exporting, or moving in interstate commerce any plant pest or noxious weed, or knowingly forging any permit authorizing movement of plant pests or noxious weeds. Referenced to § 2N2.1 (Violations of Statutes and Regulations Dealing with Any Food, Drug, Biological Product, Device, Cosmetic, or Agricultural Product).

5 U.S.C. 6821—prohibits (A) obtaining or attempting to obtain customer information from a financial institution by false statements, representations, or documents; or (B) requesting another person to obtain customer information knowing the information will be obtained under false pretenses. Referenced to § 2F1.1 (Fraud and Deceit).

18 U.S.C. 38—prohibits falsifying any material fact, or making any fraudulent representation concerning aircraft or space vehicle parts. Referenced to § 2F1.1 (Fraud and Deceit).

18 U.S.C. 842(p)(2)—prohibits any person to teach or demonstrate the making or use of an explosive, a destructive device, or a weapon of mass destruction, or distribute by any means information pertaining to the manufacture of an explosive, destructive device, or weapon of mass destruction with the intent that the teaching, demonstration, or information will be used for, or in furtherance of any federal crime of violence. Referenced to § 2K1.3 (Unlawful Receipts, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials) or § 2M6.1 (Unlawful Acquisition, Alteration, Use, Transfer, or Possession of Nuclear Material, Weapons, or Facilities) (if the information pertained to a weapon of mass destruction).

42 U.S.C. 1011—knowingly and willfully making of any false statement or representation of a material fact in an application for benefits established by the Social Security Act. Referenced to § 2F1.1 (Fraud and Deceit).

49 U.S.C. 30170—prohibits violating 18 U.S.C. 1001 with respect to the reporting requirements of 49 U.S.C. 30166, with the specific intention of misleading the Secretary of Transportation regarding motor vehicle

or motor vehicle equipment safety related defects that have caused death or serious bodily injury to an individual. Referenced to § 2F1.1 (Fraud and Deceit).

49 U.S.C. 46317(a)—prohibits (1) knowingly and willfully serving or attempting to serve as an airman operating an aircraft without an airman's certificate; or (2) knowingly and willfully employing as an airman to operate an aircraft any individual who does not have an airman's certificate. Referenced to § 2F1.1 (Fraud and Deceit).

49 U.S.C. 46317(b) prohibits offenses described in 49 U.S.C. 46317(a) that relate to transporting a controlled substance by aircraft or aiding or facilitating a controlled substance violation and that transporting, aiding, or facilitating—

Is punishable by imprisonment of more than one year under Federal or State law; or

Is related to a Federal or state controlled substance law (except simple possession) punishable by imprisonment of more than one year.

Referenced to § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking).

Second, the proposed amendment makes technical and conforming changes as follows: (1) Modifies Application Note 3 of the Commentary to § 2J1.6 to improve the transition between the first and second paragraphs; (2) adds a reference to 18 U.S.C. 842(l)–(o) to the Commentary of § 2K1.3; and (3) adds a reference to 7 U.S.C. 6810 to the Commentary of § 2N2.1. (With respect to the latter two technical amendments, the statutory provision was listed in Appendix A (Statutory Index) but not in the Commentary of the respective guidelines.)

Proposed Amendment

The Commentary to § 2D1.1 captioned ''Statutory Provisions'' is amended by inserting ''; 49 U.S.C. § 46317(b)'' after ''960(a), (b)''.

The Commentary to § 2F1.1 captioned ''Statutory Provisions'' is amended by inserting '', 6821'' after ''1644;''; by inserting ''38,'' after ''18 U.S.C. §§ ''; and by inserting ''; 42 U.S.C. 1011; 49 U.S.C. 30170, 46317(a)'' after ''2315''.

The Commentary to § 2K1.3 captioned ''Statutory Provisions'' is amended by inserting ''(l)–(o), (p)(2), after ''(i),''.

The Commentary to § 2M3.9 captioned ''Application Notes'' is amended by inserting after Note 2 the following:

''3. A term of imprisonment imposed for a conviction under 50 U.S.C. § 421 shall be imposed consecutively to any other term of imprisonment.''.

The Commentary to § 2M6.1 captioned ''Statutory Provisions'' is amended by inserting ''§ '' before ''§ 831''; by striking ''where'' and inserting ''if''; and by inserting '', 842(p)(2)'' after '' aforementioned statutory provisions)''.

The Commentary to § 2N2.1 captioned ''Statutory Provisions'' is amended by inserting '', 6810, 7734'' after ''150gg''.

Appendix A (Statutory Index) is amended by inserting the following at the appropriate place by title and section:

''7 U.S.C. 7734 2N2.1
15 U.S.C. 6821 2F1.1
18 U.S.C. 38 2F1.1
18 U.S.C. 842(p)(2) 2K1.3, 2M6.1
42 U.S.C. 1011 2F1.1
49 U.S.C. 30170 2F1.1
49 U.S.C. 46317(a) 2F1.1
49 U.S.C. 46317(b) 2D1.1''.

The Commentary to § 2J1.6 captioned ''Application Notes'' is amended in the first sentence of the second paragraph of Note 3 by striking ''In'' and inserting ''However, in''; and by inserting ''other than a case of failure to appear for service of sentence,'' after ''and the failure to appear,''.

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Part III

Security and Exchange Commission

Self-Regulatory Organizations; Order Approving Proposed Rule Changes by the National Association of Securities Dealers, Inc.; Notice

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–43863; File No. SR–NASD–99–53]

Self-Regulatory Organizations; Order Approving Proposed Rule Changes by the National Association of Securities Dealers, Inc. and Amendment Nos. 1, 2, 3, 4, 5, 6, 7 and 8 Thereto and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 9 Relating to the Establishment of the Nasdaq Order Display Facility and Order Collector Facility and Modifications of the Nasdaq Trading Platform

January 19, 2001.

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I. Introduction

On October 1, 1999, the National Association of Securities Dealers, Inc. (''NASD'' or ''Association''), through its wholly-owned subsidiary, the Nasdaq Stock Market, Inc. (''Nasdaq''), filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act''),[1] and Rule 19b–4 thereunder,[2] proposed rule changes to establish the Nasdaq Order Display Facility (''NODF'') and the Order Collector Facility (''OCF'') and to modify its primary trading platform, the Nasdaq National Market System (''NNMS''), collectively referred to as the SuperMontage proposal. On October 26 and October 29, 1999, respectively, Nasdaq filed Amendment Nos. 1 and 2 to the proposal.[3] The SuperMontage proposal and Amendment Nos. 1 and 2 were published for comment in the **Federal Register** on December 6, 1999.[4] On March 16, 2000, Nasdaq filed Amendment No. 3 to the proposal.[5] On March 23, 2000, Nasdaq filed Amendment No. 4 to the proposal,[6] which was published for comment in the **Federal Register** on March 30, 2000.[7] On May 19, 2000, Nasdaq filed Amendment No. 5 to the proposal;[8] on June 7, 2000, Nasdaq filed Amendment No. 6;[9] and on August 8, 2000, Nasdaq filed Amendment No. 7.[10] Amendment Nos. 5, 6 and 7 were published for comment on August 15, 2000.[11] On October 23, 2000, the NASD filed Amendment No. 8,[12] which was

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letters from Thomas P. Moran, Assistant General Counsel, Office of the General Counsel, Nasdaq, to Richard Strasser, Assistant Director, Division of Market Regulation (''Division''), Commission, dated October 26, 1999 (''Amendment No. 1''); and from John F. Malitzis, Assistant General Counsel, Office of the General Counsel, Nasdaq, to Richard Strasser, Assistant Director, Division, Commission, dated October 29, 1999 (''Amendment No. 2'').

[4] *See* Securities Exchange Act Release No. 42166 (November 22, 1999), 64 FR 68125 (December 6, 1999) (''December 6, 1999 notice'').

[5] *See* letter from Richard G. Ketchum, President, NASD, to Belinda Blaine, Associate Director, Division, Commission, dated March 15, 2000 (''Amendment No. 3''). In Amendment No. 3, the NASD responded to comment letters and submitted substantive, clarifying, and technical amendments to the proposal. Other than the response to the comment letters, Amendment No. 3 was repeated in Amendment No. 4, which was published for comment in the **Federal Register**.

[6] *See* letter from Richard G. Ketchum, President, NASD, to Belinda Blaine, Associate Director, Division, Commission, dated March 23, 2000 (''Amendment No. 4''). Among other things, in Amendment No. 4, the following aspects of the proposal were changed: (1) the order execution priorities of the system as they apply to electronic communications networks (''ECNs''), reserve size orders, and unlisted trading privilege exchanges (''UTP Exchanges''); (2) the five-second delay between price levels; and (3) the way odd-lots are processed.

[7] *See* Securities Exchange Act Release No. 42573 (March 23, 2000), 65 FR 16981 (March 30, 2000).

[8] *See* letter from Richard G. Ketchum, President, NASD, to Belinda Blaine, Associate Director, Division, Commission, dated May 16, 2000 (''Amendment No. 5''). Among other things, in Amendment No. 5, the NASD responded to comment letters received by the Commission in response to Amendment No. 4, submitted technical amendments to the proposed rule language, and provided a description of how the proposal would be implemented.

[9] *See* letter from Richard G. Ketchum, President, NASD, to Belinda Blaine, Associate Director, Division, Commission, dated July 6, 2000 (''Amendment No. 6''). Generally, in Amendment No. 6, the NASD stated that it intends to implement the SuperMontage only after the planned conversion to decimals takes place. It also confirmed that it will allow market participants ample opportunity to prepare and test their internal systems before the start-up of the SuperMontage. The NASD further amended the SuperMontage proposal to provide reciprocity for UTP Exchanges that provide automatic executions against their quotes/orders. Also, the NASD clarified the order routing process and quote update feature for UTP Exchanges that take order delivery.

[10] *See* letter from Richard G. Ketchum, President, NASD, to Annette Nazareth, Director, Division, Commission, dated August 7, 2000 (''Amendment No. 7''). Among other things, in Amendment No. 7, the NASD responded to comment letters sent to the Commission by Bloomberg Tradebook, LLC and Instinet Corporation. As discussed below, the NASD amended the Order Execution Algorithm to provide that Nasdaq will rank orders from ECNs that charge a separate access fee on parity with orders from market makers and ECNs that do not charge a separate fee if the ECN notifies the NASD that the order offers price improvement that exceeds the access fee. Also, Nasdaq revised the directed order processing rules so that ECNs and market makers can elect to receive Liability Orders through the directed order process of the system.

[11] *See* Securities Exchange Act Release No. 43133 (August 10, 2000), 65 FR 49842 (August 15, 2000).

[12] *See* letter from Richard G. Ketchum, President, Nasdaq, to Belinda Blaine, Associate Director, Division, Commission, dated October 20, 2000 (''Amendment No. 8''). Generally, in Amendment No. 8, the NASD revised its Order Execution Algorithm to allow market participants that enter non-directed orders to interact with quotes/orders in the SuperMontage based on price/time priority, price/size/time priority, and price/time priority taking into account ECN access fees; created a new

published for comment on November 15, 2000.[13] On January 9, 2001, the NASD filed Amendment No. 9.[14] The Commission received 104 comments regarding the proposal.[15] The Commission is approving the SuperMontage proposal, as amended, and is soliciting comments on Amendment No. 9 from interested persons.[16]

II. Executive Summary

A. Background of the Nasdaq System

The Nasdaq System originated 30 years ago for the purpose of collecting and displaying quotations posted by individual dealers in the over-the-counter market regulated by the NASD, which sponsored the system. Nasdaq's quotation management system currently collects and displays quotations of registered market makers and ECNs that are members of the NASD (collectively, ''Nasdaq Quoting Market Participants''). By agreement, Nasdaq also collects and displays quotations in Nasdaq securities from UTP Exchanges.[17]

The existing quotation management system permits each Nasdaq Quoting Market Participant and UTP Exchange to enter a single quotation into the system at any one time. This single quotation may reflect the Nasdaq Quoting Market Participant's or UTP Exchange's proprietary trading interest or customer limit orders handled by that participant, or both.[18] The quotations of Nasdaq Quoting Market Participants and UTP Exchanges are displayed on a quotation montage (arranged by price and time) that can be viewed on a Nasdaq screen, and are disseminated to vendors for further redistribution to broker-dealers and other subscribers.

Other Nasdaq systems facilitate a Nasdaq participant's ability to interact with the quotations of Nasdaq Quoting Market Participants and UTP Exchanges. In 1984, Nasdaq introduced the Small Order Execution System (''SOES''), which allows Nasdaq participants to execute small orders automatically against the quotation of a market maker at the best bid or offer (''BBO'').[19] Nasdaq's SelectNet system, introduced in 1988, allows Nasdaq participants to route orders to a particular market maker or ECN.[20] Although SelectNet is an order delivery service, rather than an execution service, a SelectNet order presented to a market maker or ECN at its displayed quotation obligates the market maker or ECN to execute the order at the price and size of its quote consistent with the Commission's Firm Quote Rule.[21] The SOES and SelectNet systems currently are not integrated, so that it is possible for a market maker to receive a SelectNet order that it is obligated to execute and a SOES execution against the same quote, creating a double liability exposure.[22]

Nasdaq's SOES and SelectNet systems supplement the separate order execution services offered by market makers, ECNs, and UTP Exchanges, but do not supplant those services. In fact, the large majority of orders are executed outside Nasdaq's order delivery and execution services through direct links—by telephone, dedicated line, or other means—among order entry firms, market makers, ECNs, and UTP Exchanges.

In recent years, changes in technology and market structure have placed increasing demands on, and created new challenges for, Nasdaq's systems. For example, while Nasdaq's existing quotation management system displays the best bid and offer of a Nasdaq Quoting Market Participant or UTP Exchange, many market participants are interested in seeing more of a Nasdaq Quoting Market Participant's or UTP Exchange's trading interest outside its best bid and offer. In addition, the entry of ECNs and UTP Exchanges trading Nasdaq securities has increased competition among execution service providers, including Nasdaq.

The changing competitive environment has been accompanied by changes in Nasdaq's structure and ownership. The NASD's ownership of Nasdaq was reduced to 60% on a fully diluted basis by a private placement sale of shares and warrants on June 28, 2000 and was further reduced to 40.6% by a second private placement just completed. The warrants are exercisable over a four year period beginning June 28, 2002. Under the terms of the sale, the voting rights for NASD shares underlying warrants will shift to the warrant holders upon registration of Nasdaq as an exchange. Nasdaq filed an application for registration with the Commission on November 9, 2000.[23]

Subsequently, the NASD Board adopted a resolution stating its intent to divest itself of all remaining shares of Nasdaq not subject to outstanding warrants by June 30, 2002, subject to existing contractual and legal arrangements and to the reasonable judgment of NASD management that market conditions permit.[23] The NASD also has undertaken that during any interim period it intends to vote its shares in Nasdaq on any matter in

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class of orders called preferenced orders; created a new data vendor data feed called NQDS Prime; clarified that SuperMontage will identify parties enering orders; modified the time priority feature to preserve time priority when quotes are increased in size; modified the response time frames for order-delivery ECNs and UTP Exchanges; modified the SuperMontage so that all non-directed orders entered by order-entry firms are designated as ''immediate or cancel'' orders; and revised the definition of agency orders for UTP Exchanges. Amendment No. 8 also contained a summary, Exhibit 3, that incorporated and reconciled the original rule proposal and the subsequent proposed amendments.

[13] *See* Securities Exchange Act Release No. 43514 (November 3, 2000), 65 FR 69084 (November 15, 2000).

[14] *See* letter from Richard G. Ketchup, President, Nasdaq, to Robert L.D. Colby, Deputy Director, Division, Commission, dated January 8, 2001 (''Amendment No. 9''). In Amendment No. 9, the NASD withdrew Alternative A, regarding preferenced orders with no price restrictions, made a technical correction to its rule text to conform the definition of a preferenced order with the rule text describing the processing of such orders, and represented that Nasdaq will not use data received through the Order Audit Trail System (''OATS'') to gain an unfair competitive advantage over other market participants, including another self-regulatory organization (''SRO'') or broker/dealer (market maker or ECN).

[15] A summary of the comment letters received by the Commission is available for public inspection in the Commission's Public Reference Room.

[16] In addition, the Commission notes that the NASD withdrew a proposed rule change relating to an Integrated Order Delivery and Execution System (''IODES'') on March 16, 2000 (SR–NASD–98–17).

[17] As of the date of this Order, the Chicago Stock Exchange (''CHX'') is the only active UTP Exchange.

[18] NASD Rule 4613 requires a registered market maker to submit a two-sided quote (both bid and offer) that represents its proprietary trading interest and/or customer limit orders handled by the market maker. NASD Rule 4623 requires an ECN to submit the prices and sizes of orders at the highest buy price and lowest sell price entered into the ECN by market makers (and, in some cases, other subscribers). By agreement, UTP Exchanges must submit a two-sided quote that represents their market's best quote.

[19] SOES was initially approved on a temporary basis in Securities Exchange Act Release No. 21567 (December 14, 1984), 50 FR 1662 (December 27, 1984). It was granted permanent approval in 1985. *See* Securities Exchange Act Release No. 21743 (February 12, 1985), 50 FR 7432 (February 22, 1985).

[20] *See* Securities Exchange Act Release No. 25263 (January 11, 1988), 53 FR 1430 (January 19, 1988). *See also* Securities Exchange Act Release No. 25690 (May 11, 1988), 53 FR 17523 (May 17, 1988) (order granting permanent approval of SelectNet).

[21] *See* Exchange Act Rule 11Ac1–1, 17 CFR 240.11Ac1–1.

[22] On January 14, 2000, the Commission approved an NASD rule change that allows Nasdaq to integrate the two systems to prevent most double liability situations. To date, the NASD has not implemented this change. *See* Securities Exchange Act Release No. 42344 (January 14, 2000), 65 FR 3987 (January 14, 2000), 65 FR 3987 (January 25, 2000) (''NNMS Order'').

[23] The Commission intends to give expeditious consideration to Nasdaq's application for registration and to similar applications from other markets, consistent with statutory requirements, in order to further competition and innovation among securities markets.

[24] *See* letter from Joan C. Conley, Corporate Secretary, NASD, to Robert Colby, Deputy Director, Division, dated January 18, 2001.

proportion to the votes of all other shareholders.

The Commission has considered the SuperMontage proposal in the context of increased demand for information about trading interest, increasing competition among execution service providers, and changes in Nasdaq's ownership structure. The Exchange Act requires the Commission to approve the proposed rule changes if it finds that the changes are consistent with the requirements of the Exchange Act applicable to the NASD.

In this context, including Nasdaq's demutualization, application for registration as an exchange, and impending full separation of the NASD and Nasdaq, and for the reasons discussed in this release, the Commission finds that the proposed rule changes are consistent with the requirements of the Exchange Act applicable to the NASD and therefore approves the proposed rule changes.

B. Overview of the SuperMontage Proposal

The SuperMontage proposal is designed to modify Nasdaq's systems in three principal areas: (1) Quote/order collection; (2) quote/order display; and (3) execution services.

1. Quote/Order Collection

SuperMontage will partially eliminate the distinction between quotes and orders and expand the ability of Nasdaq Quoting Market Participants and UTP Exchanges to represent quotes/orders in the Nasdaq market. It will permit, but not require, Nasdaq Quoting Market Participants and UTP Exchanges to enter multiple quotes/orders at the same price or at different prices.[25] In addition, SuperMontage will allow Nasdaq Quoting Market Participants to enter quotes/orders on a non-attributable basis (*i.e.*, anonymously), although market makers will be obligated to maintain a two-sided attributable quote/order consistent with Commission and NASD rules. UTP Exchanges will not be permitted to enter principal quotes on a non-attributable basis, but may enter agency quotes/orders on a non-attributable basis.

For Nasdaq Quoting Market Participants and UTP Exchanges that choose to enter multiple quotes/orders, SuperMontage will aggregate their best-priced attributable quotes/orders on each side of the market to create the Nasdaq Quoting Market Participant's or UTP Exchange's displayed quote, while maintaining the separate identity, price, and time of entry of each quote/order. Alternatively, a Nasdaq Quoting Market Participant or UTP Exchange may choose to maintain only its required quotation, and not enter additional quotes/orders.

2. Display of Quotes/Orders

To the extent Nasdaq Quoting Market Participants and UTP Exchanges use the quote/order collection system to represent more quotes and orders than they currently are able to represent, SuperMontage will show more information than the current quotation montage. SuperMontage will display the additional information in two ways. First, the best-priced non-attributable quotes/orders from all participants will be aggregated and displayed in the quotation montage as one buy and one sell price, each under the generic name ''SIZE'', along with the best-priced attributable quotes/orders of each Nasdaq Quoting Market Participant and UTP Exchange. Second, and more significantly, SuperMontage will aggregate all quotes/orders (attributable and non-attributable) at each price level, and display the three best prices with associated aggregate size on each side of the market through the NODF. This information will be distributed to market data vendors so that they can provide an equivalent display service to their customers. In addition, the NASD will make available to market data vendors individual attributable quotes/orders displayed in the three best price levels in the NODF.

Thus, to the extent Nasdaq Quoting Market Participants and UTP Exchanges voluntarily enter their ''near the market'' quotes/orders, investors and market professionals will be able to see the aggregate of this interest at three price levels in widely available displays.

3. Execution Services

SuperMontage will replace Nasdaq's current SOES and SelectNet services with two new processes: a directed order process and a non-directed order process. Nasdaq participants that wish to use either of these processes to interact with the quotes/orders of Nasdaq Quoting Market Participants and UTP Exchanges may enter orders into the same order collection facility used by Nasdaq Quoting Market Participants and UTP Exchanges to enter quotes/orders.

The directed order process will be functionally similar to the current SelectNet service in that it will allow a Nasdaq participant to direct an order to a particular Nasdaq Quoting Market Participant or UTP Exchange. As in SelectNet, a directed order can match a posted quote/order of the recipient (a Liability Order) or not match any quote/order of the recipient (a non-Liability Order).[26] To avoid creating a risk of double liability, no Nasdaq Quoting Market Participant or UTP Exchange is required to receive directed Liability Orders through the OCF, but may elect to do so.

The non-directed order process will be the default execution process for marketable orders entered by a Nasdaq participant into Nasdaq's order collection facility. A marketable order entered into the non-directed order process will be matched with the highest ranked quotes/orders of Nasdaq Quoting Market Participants and UTP Exchanges on the opposite side of the market, and either will be executed automatically or delivered (on a liability basis) to the matched Nasdaq Quoting Participants and UTP Exchanges, depending upon how such participants participate in the non-directed order process.[27]

The ranking of Nasdaq Quoting Market Participant and UTP Exchange quotes/orders in the non-directed order process will be established pursuant to one of three order execution algorithms: price/time priority, price/size/time priority, or price/time priority that account for ECN fees. The Nasdaq participant entering a non-directed order may select the algorithm used for executing its order, but the system will default to the price/time priority algorithm if none is selected. Within each algorithm, a non-directed order entered by a Nasdaq participant that is also a Nasdaq Quoting Market Participant will be matched first against its own quote/order on the other side of the market, provided that its quote/order is at the BBO. In addition, a Nasdaq participant entering a non-directed order will be permitted to ''preference'' the order to a particular Nasdaq Quoting Market Participant or UTP Exchange, if that participant's quote/order is at the BBO.

Nasdaq participants are not required to use either the directed or non-directed order processes to execute their orders but may choose, instead, systematically or on an order-by-order basis, to continue to use other methods such as telephone access or direct connections to market makers, ECNs,

[25] UTP Exchanges may only enter a single principal quote/order. *See* Proposed NASD Rule 4710(f).

[26] Non-liability orders are usually used to probe for undisplayed interest or to begin a negotiation.

[27] Registered market makers must accept automatic executions (a sthey do currently under SOES). UTP Exchanges and ECNs may elect to accept automatic executions or delivery of the order.

and UTP Exchanges. Any Nasdaq member is free to offer a competing execution service, and may even use the Nasdaq service as one of its options.

C. Summary Conclusions

The SuperMontage proposal generated significant controversy. Throughout a series of comment periods and revisions, commenters maintained that various aspects of the proposal were unfair or anti-competitive, and that the proposal as a whole fell short of the standards that ought to be required of National Market System facilities.

Many issues were resolved through the process of public comment and response. For example, under the original proposal Nasdaq Quoting Market Participants would have transmitted to Nasdaq multiple quotes/orders at the same price or at different prices, and Nasdaq would have aggregated the best priced orders on either side of the market to produce the participant's required quotation, which would then be distributed by Nasdaq, in its capacity as an exclusive processor for the OTC market.

In addition, Nasdaq would have distributed the aggregate amount of buying and selling interest at the three best price levels on either side of the market. Some commenters objected that the proposal in this form meant that Nasdaq alone would know the details of any quotes/orders not incorporated into participant quotations, and that it would be unfair for Nasdaq to keep such information to itself. In response, Nasdaq agreed to disseminate the details of all attributable quotes/orders in the three best price levels on either side of the market via a new information service, in addition to the aggregate amounts of interest at those prices. The result will be that all quote/order details will be generally available at the best price levels, except those quotes/orders that are submitted on an anonymous basis (non-attributable quotes/orders). The Commission believes that this additional information will be valuable to competitors that may offer execution services complementary to, or in competition with, Nasdaq's SuperMontage services, and that Nasdaq's proposal appropriately resolves the issue. Several other issues have been dealt with in similar fashion. All of these are described at length in the Discussion section below.

The remaining issues, which remain controversial, generally fall in two groups: (1) Disagreements about the appropriate priority and protections afforded to quotes/orders represented in SuperMontage under the applicable execution procedures, and (2) questions concerning the conflicts inherent in NASD's multiple roles as SRO and default regulator for the OTC market, and as the principal owner of Nasdaq, which will be the operator of SuperMontage. These issues have been carefully weighed by the Commission and are described individually and in detail in the Discussion section below. A more general description and overview of the Commission's analysis and reasoning follow:

1. Execution Procedures and Quote/Order Priority

Following Amendment No. 7, the proposed execution procedures involved a single execution algorithm for non-directed orders (without any preferencing), and the directed order process. Preferencing through the non-directed order process had not yet been proposed. The single execution algorithm applicable to non-directed orders was based on price/time priority, but gave lower priority to quotes/orders of an ECN that charges a separate fee for accessing its quotes/orders, and last priority to the principal quotes of UTP Exchange specialists.[28] Some ECNs and others objected to the treatment of quotes/orders involving payment of a separate fee, arguing among other things that many market participants preferred to deal with ECNs, even if they charged fees, because statistically the price improvement provided by certain ECNs exceeded the cost of their fees. Some also maintained that only displayed prices should be considered in assigning priority because any associated fees would be paid by brokers and not by customers. Still others argued that Nasdaq should not assign any priorities to quotes/orders but should only provide a means to access displayed quotes and leave the choice of priorities to participants.

In response to these arguments and others, the NASD in Amendment No. 8 proposed to offer participants much greater control of the execution process by creating two additional execution algorithms using price/time and price/size/time priorities respectively, ignoring any separate fees, and by creating the ability to send preferenced orders to any Nasdaq Quoting Market Participant or UTP Exchange at the discretion of the entering firm. This response was satisfactory to some earlier commenters that had sought greater control of the execution process, but not to certain ECNs that had wanted the execution process to ignore access fees. Moreover, the new approach embodied in Amendment No. 8 brought new objections from some commenters that it would be a step backward in achieving price/time priority that would encourage price competition.

The Commission believes that the competing interests of Nasdaq participants with respect to some of the issues of priority are essentially irreconcilable. For example, there is no way to simultaneously satisfy both those ECNs that want their orders executed and fees assessed when their orders have time priority at the displayed price, and other participants that want to avoid paying such fees when they can receive a better net price from other orders that do not have time priority. The Commission recognizes that there is merit to both sides of the discussion, but it believes that price priority ordinarily must take precedence over time priority. Because a quote that involves payment of a separate fee is, all other things equal, inferior to a quote at the same displayed price that does not involve payment of a fee, the Commission believes that it is reasonable to allow market participants to choose a method of execution that gives lower priority to quotes that require payment of a fee. It is true that price improvement may sometimes exceed the value of the required fee, but the fee is certain while price improvement is uncertain. The Commission believes that market participants are best able to exercise judgment in such cases.

The Commission shares the view expressed by some commenters that price/time priority tends to encourage price competition. The Commission notes, however, that although price priority is generally followed in the Nasdaq market, there is at present virtually no time priority across market centers. The proposal, in its present form, provides for more time priority than currently exists in the market, and may to that extent encourage more price competition. Moreover, for the reasons outlined above, a displayed price does not always represent the actual price to a participant and, indeed, the actual price is often not the same for all participants that might execute against a particular quote.[29] The Commission does not believe that it is appropriate to require strict time priority based on such prices.

[28] ECNs that charge fees were permitted to indicate on any individual quote/order that the quote/order would provide price improvement exceeding the applicable fee, and such quote/orders would be given parity with quotes/orders that did not require payment of a separate fee.

[29] Several ECNs have variable access fees that are differnt for subscribers and non-subscribers, and may depend on other factors, such as the volume of business.

For these reasons, the Commission finds that the combination of choices offered in the current proposal is both fair to participants and reasonably designed to promote competition.

2. Inherent Conflicts of NASD Roles

Many commenters raised issues that relate in one way or another to the multiple roles that the NASD has as an SRO and, through Nasdaq, as an exclusive processor of market information and as an operator of trading facilities. The Commission notes that conflicting roles are inherent in the self-regulatory model. Indeed, the Act specifically recognizes that SROs will act not only as regulators, but also as operators of markets, and exclusive processors of information derived from those markets. The Act authorizes the Commission to oversee SRO functions to address the inherent conflicts, and to ensure, among other things, that SROs do not abuse their regulatory powers,[30] and when acting as exclusive processors, make available market information in a non-discriminatory, fair, and reasonable fashion. Thus, the Commission's role is to reach a fair and appropriate balance of the conflicts inherent in the SRO structure, not to eliminate those conflicts.

Prior to Amendment No. 8, many objections were raised that SuperMontage, as then proposed, would become a centralized, monopolistic execution system. The gist of these arguments was that because NASD is the default regulator for the OTC market,[31] any market maker or ECN that wished to do business in Nasdaq securities must make its quotes available for execution through SuperMontage. Thus, SuperMontage would be, by the effect of NASD and Commission rules, the only execution system through which substantially all displayed trading interest could be reached. The only exception would have been any UTP Exchanges that chose not to participate in SuperMontage.

In response to these concerns, the NASD has agreed to provide an alternative quotation and transaction reporting facility for NASD members, including alternative trading systems (''ATSs''), ECNs, and market makers. In effect, this facility makes participation in SuperMontage voluntary. This facility will permit NASD members to comply with their obligations under Commission and NASD rules (including Rule 11Ac1–1(c)(5) and Regulation ATS) without participating in the Nasdaq execution facility. The facility will identify through the central processor the identity of the NASD member that is the source of each quote.[32] The facility also will provide a market neutral linkage to the Nasdaq and other marketplaces, but not an execution service. NASD represents that the facility will be available upon the implementation of SuperMontage by Nasdaq. The Commission believes that this undertaking by NASD, in conjunction with other terms applicable to the NASD's interaction with the SuperMontage,[33] provides an appropriate balance of NASD's role as regulator of the OTC market and its role (through Nasdaq) as operator of an execution service in a competitive market.

Some commenters also argued that automatic execution against market makers would give the SuperMontage an unfair advantage in attracting order flow, and make it difficult for others to offer competitive execution services. It appears that inherent in this argument is the view that Nasdaq should not be permitted to require its registered market makers to accept automatic executions, or that Nasdaq should not be permitted to operate a market itself, but should be restricted to providing connections among market makers and ECNs. Although the Commission is sensitive to the need to ensure that competition is fair, it cannot accept the view that Nasdaq should not be allowed to operate a market in which its registered market makers are required to accept automatic executions, particularly when participation in that market is voluntary. The Commission notes that compulsory automatic executions have been a feature of the Nasdaq market since at least 1988.[34] The ''SuperSOES'' proposal approved in January 2000 further expanded the scope of automatic execution against market maker quotes. The Commission therefore finds that the requirement that registered market makers in Nasdaq accept automatic executions against their published quotes is not a new feature of the SuperMontage and that it remains an appropriate feature of a system designed to provide economically efficient executions to investors within a fair and orderly market.

Some commenters argued that Nasdaq's role as the exclusive processor of information for Nasdaq-listed securities will give SuperMontage an unfair advantage. On close examination, these criticisms pertained less to the operation of SuperMontage than to the requirement that market makers and ECNs quote through Nasdaq, as the sole consolidator of market data for Nasdaq securities. To address this issue, the NASD has agreed to provide an alternative quote and trade reporting mechanism, while Nasdaq has said that it is willing to confer with the other markets about establishing a separate central processor for information on Nasdaq securities under the UTP Plan.[35] Nevertheless, the Commission believes that the current UTP plan must be revised to provide for a fair competitive environment in the future for all market centers trading in Nasdaq securities.[36] The Commission believes that these undertakings, which are discussed in detail below, appropriately address the concerns about an advantage to Nasdaq arising from its role as the exclusive processor for Nasdaq securities.

Finally, the Commission believes that Nasdaq, as well as the traditional exchanges, must have the flexibility to alter their existing services and to create new services in response to changes in the marketplace. Congress instructed the Commission to seek to ''enhance competition and to allow economic forces, interacting with a fair regulatory field, to arrive at appropriate variation in practices and services.''[37] The Commission believes that the SuperMontage proposal is consistent with these goals.

III. Description of the Proposal

The SuperMontage proposal will enhance Nasdaq's quotation montage by adding a new display facility for trading interest, the NODF, and establishing a new system for collecting quotes/orders, the OCF. This proposal also will modify Nasdaq's primary trading platform, the

[30] *See* discussion at Sectio V.I.2, *infra*, regarding limitations on the NASD's ability to use its regulatory authority to preference or prejudice another market or market participants.

[31] Any broker-dealer that does business with the public and is not a member of a registered national seucrities exchange must be a member of the NASD. *See* 15 U.S.C. 78*o*(b)(8).

[32] *See* Rule 11Ac1–1(b)(1)(iii); 17 CFR 240.11Ac1–1(b)(1)(iii).

[33] *See* discussion at Sections V.I.2 and 3, *infra*.

[34] SOES was initially developed in 1984, and market maker participation was made mandatory in 1988.

[35] *See* letter from Frank Zarb, Chairman and CEO, Nasdaq, to Senator Phil Gramm, dated October 24, 2000.

[36] The UTP Plan is the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Exchange-Listed Nasdaq/National Market System Securities Traded on Exchanges on an Unlisted Trading Privileges Basis. *See also*, discussion at Section V.I.3, infra, regarding the need to revise the UTP Plan.

[37] *See* S. Rep. No. 94–75, 94th Cong., 1st Sess. 7 (1975) at p. 8. (''Senate Report'').

NNMS, as approved on January 14, 2000.[38]

A. Nasdaq Order Display Facility

Today, the Nasdaq screen, commonly referred to as the Nasdaq Workstation II (''NWII''), is split into two primary display components. The top portion of the NWII contains, among other things: (1) the Market Minder Window, which allows market participants to monitor price activity (inside bid/offer and last sale) of selected stocks; and (2) the Dynamic Quote Window, which shows for a particular stock the inside bid and offer, the last sale, change in price from previous close, daily high and low, volume, and the short sale arrow indicator. The bottom portion of the NWII contains the Nasdaq Quotation Montage. The Nasdaq Quotation Montage shows for a particular stock two columns (one for bids, one for offers), under which is listed the market maker identification (''MMID'') for each registered market maker, ECN, and UTP Exchange in the stock, and the corresponding quote (price and size). Nasdaq ranks the bids and offers along with the corresponding MMID in price/time priority. Accordingly, the market participant at the best bid who is first in time appears first in the montage, the market participant at the best bid (or the next best bid) who is next in time is ranked second, and so on.

Market makers that choose to participate in Nasdaq are required to submit a two-sided principal quote,[39] which may reflect customer limit orders held by the market maker. ECNs, to qualify under the Order Handling Rules, must submit the prices and sizes of orders at the highest buy price and lowest sell price entered into the ECN by market makers.[40] UTP Exchanges that have an interface with Nasdaq are required under the UTP Plan to submit to Nasdaq a two-sided quote, which represents the exchange's best quote in the stock at issue.

1. Enhanced Display of Trading Interest

Under the proposal, Nasdaq will retain the bottom portion of the NWII, the Nasdaq Quotation Montage, which displays market maker, ECN and UTP Exchange attributable quotes ranked in price/time priority. Nasdaq proposes to add the NODF, which will be displayed in the top portion of the NWII. The NODF will display the three best price levels in Nasdaq on both the bid and offer side of the market. These displayed price levels will include, for the first time in the Nasdaq market, anonymous (or non-attributable) quotes/orders in addition to the attributable quotes/orders of market makers, ECNs, and UTP Exchanges. Each price level will be updated and will display the aggregate size of displayed trading interest (attributable and non-attributable, as explained below). In addition to displaying the aggregate size of displayed trading interest at the three best price levels, Nasdaq will create and make available a new vendor data feed called NQDS Prime. NQDS Prime will provide, on a real-time basis, all individual attributable quote/order information at the three best price levels displayed in the NODF.[41]

Nasdaq Quoting Market Participants will be required to designate a quote/order as attributable or non-attributable[42] and will be able to indicate a reserve size for the quote/order.[43] If a quote/order is designated as attributable, the price and size of the quote/order will be displayed next to the Nasdaq Quoting Market Participant or UTP Exchange's MMID in the Nasdaq Quotation Montage if it is the Nasdaq Quoting Market Participant or UTP Exchange's best-priced attributable quote/order. Attributable quotes/orders will be displayed in the NODF as part of the aggregate trading interest when the price of the quote/order is within the best three price levels (on either side of the market) in Nasdaq.

If a quote/order is designated as non-attributable, it will be displayed in the NODF as part of the aggregate trading interest when it is within the best three price levels. That quote/order will not, however, be displayed in the Nasdaq Quotation Montage next to the Nasdaq Quoting Market Participant's or UTP Exchange's MMID but instead may be displayed in a special ''SIZE MMID,'' which is described in greater detail below, representing the aggregate size of the best priced non-attributable bids or offers. Pursuant to NASD Rule 4613, market makers will continue to be required to publish a two-sided quote that is attributed to their MMID in the Nasdaq Quotation Montage.

2. SIZE MMID and Summary Scan

A SIZE MMID, representing the aggregate displayed size of the best-priced non-attributable bids or offers, will be shown in the Nasdaq Quotation Montage along with the other MMIDs for the Nasdaq Quoting Market Participants and UTP Exchanges displaying attributable size. The bid side and the offer side of the market each will have one SIZE MMID.[44]

The SuperMontage also will include a ''Summary Scan'' function. The Summary Scan will be a query-only function that will provide a snapshot of the total displayed size (attributable and non-attributable) for all levels below the three price levels in the NODF. The Summary Scan will anonymously display the aggregate interest (attributable and non-attributable) at each price level on both sides of the market, but will not be dynamically updated.

3. Reserve Size

Nasdaq Quoting Market Participants will be able to use reserve size. According to the NASD, reserve size will work in virtually the same manner as approved in the NNMS Order.[45] A

[38] *See* NNMS Order *supra* note 22.

[39] *See* NASD Rule 4613. While a market maker's quoted price and size is attributed to the market maker by the corresponding MMID, this may not represent the market maker's best price if the market maker has placed a better-priced order with an ECN that complies with the display alternative under SEC Rules 11Ac1–1(c)(5) and 11Ac1–4. *See* 17 CFR 240.11Ac1–1(c)(5) and 17 CFR 240.11Ac1–4.

[40] *See* NASD Rule 4623. ECNs also may be required to submit the prices and sizes of orders at the highest buy price and lowest sell price entered into the ECN by *all* subscribers to comply with Regulation ATS.

[41] *See* Amendment No. 8, *supra* note 12. The NASD has stated that if Nasdaq should display more than three price levels in the NODF, it will provide expanded price level information through NQDS Prime. Nasdaq will assess a separate, additional vendor data fee for quote/order information away from the inside. The NASD will seek approval for the fee from the Commission in a separate filing.

[42] According to the NASD, both attributable and non-attributable quotes/orders are considered ''displayed orders'' because they are displayed in the Nasdaq system.

[43] UTP Exchanges will only be permitted to display principal quotes/orders on an attributable basis and agency quotes/orders on a non-attributable basis. *See* Proposed NASD Rule 4710(f). Further, UTP Exchanges will not be permitted to indicate a reserve size. *See* Proposed NASD Rule 4701(dd).

[44] Nasdaq Level 1 Service provides the inside bid/offer quotations and identifies the market center at the best bid/best offer according to the Nasdaq UTP Plan. *See* NASD Rule 7010 and Nasdaq UTP Plan, Section VI, Paragraph C, Subparagraph 1. The National Quotation Data Service, or NQDS, provides individual market maker quotes, Level 1 Service, and last sale information. *See id.* According to the NASD, the SIZE MMID will be used in determining the best bid/best offer and corresponding market center for purposes of Level 1 and UTP.

[45] *See* NNMS Order, *supra* note 22. Nasdaq also filed a proposal with the Commission that will permit the separate display of customer orders by market makers in Nasdaq through a market maker agency identification symbol. *See* Securities Exchange Act Release No. 41128 (March 2, 1999), 64 FR 12198 (March 11, 1999) (notice of filing of SR–NASD–99–09) (''Agency Quote Proposal''). The Commission subsequently extended the comment period for the Agency Quote Proposal. *See* Securities Exchange Act Release No. 41243 (April 1, 1999), 64 FR 17428 (April 9, 1999). The Agency Quote Proposal currently is pending with the Commission. If the Commission approves the Agency Quote Proposal, a market maker's Agency Quote could also have reserve size.

Nasdaq Quoting Market Participant will be required to display (either as attributable or non-attributable) 1,000 shares in order to use reserve size. Reserve size will replenish displayed size (attributable or non-attributable) by at least 1,000 shares once displayed size is decremented to zero. Reserve size, along with displayed (both attributable and non-attributable) size, will be accessible through Nasdaq's trading platform, the NNMS. Reserve size, however, will not be displayed in either the NODF or the Nasdaq Quotation Montage. As described further below in the Order Execution Algorithms section of this Order, reserve size generally will be accessed after all displayed size at a given price in the Nasdaq market is exhausted.[46]

B. Order Collector Facility

Nasdaq proposes to establish an OCF as part of the SuperMontage that will: (1) transmit to Nasdaq multiple quotes/orders at one price or quotes/orders at multiple price levels entered by Nasdaq Quoting Market Participants and UTP Exchanges;[47] (2) accept orders to access quotes/orders displayed (as either attributable or non-attributable) in both the NODF and the Nasdaq Quotation Montage; and (3) unify Nasdaq's delivery of Liability Orders to Nasdaq Quoting Market Participants and UTP Exchanges,[48] which should minimize the potential for dual liability.

1. Entry of Quotes/Orders

Nasdaq proposes to allow Nasdaq Quoting Market Participants and UTP Exchanges to transmit multiple quotes/orders and quotes/orders at multiple price levels (subject to restrictions on a UTP Exchange's ability to send multiple quotes/orders for principal quotes/orders), which the system will manage and display in the SuperMontage consistent with a quote/order's parameters. Nasdaq will time stamp each quote/order upon receipt, and the time stamp will be used in determining the ranking of the quote/order for execution purposes. If a size increment is received from a Nasdaq Quoting Market Participant for an existing quote/order at a given price, the system will maintain the original time stamp for the original quantity and assign a separate time stamp for the augmentation, thus protecting the time priority of the originally-entered quantity. Subsequent decreases in size will be deducted from individually stamped components in reverse time priority. Once a displayed size is diminished to zero, however, the quote/order will no longer retain priority, although it may have a feature that automatically refreshes size.[49]

In addition, a Nasdaq Quoting Market Participant will designate a quote/order as either attributable or non-attributable, and could designate a reserve size.[50] As noted above, for attributable quotes/orders, the prices and sizes of a Nasdaq Quoting Market Participant's or UTP Exchange's best-priced attributable quotes/orders on both the bid and offer side will be aggregated and displayed in the Nasdaq Quotation Montage under the participant's MMID, and also will be included in aggregate trading interest displayed in the NODF if the quotes/orders fall within the three best price levels (on either side of the market) in Nasdaq. For non-attributable quotes/orders, Nasdaq will display the aggregate size of such quotes/orders in the NODF when the quotes/orders fall within the three best price levels (on either side of the market) in Nasdaq. In addition, the best-priced non-attributable quotes/orders from all Nasdaq Quoting Market Participants and UTP Exchanges will be aggregated and displayed next to the SIZE MMID in the Nasdaq Quotation Montage.

The proposal will not require Nasdaq Quoting Market Participants and UTP Exchanges to post multiple quotes/orders at multiple price levels. A market maker could continue to send only its best bid/best offer to Nasdaq, and an ECN could continue to send Nasdaq only its top of the book. In addition, UTP Exchanges may elect to provide only their best quotes for display in the Nasdaq Quoting Montage.[51]

2. Order Execution and Delivery

Even under NNMS (*i.e.*, the SOES and SelectNet integration), the SOES and SelectNet systems continue to operate on separate platforms, and from the end-user's perspective there are still two separate systems.[52] In order to further integrate the systems and minimize the potential for market maker dual liability, Nasdaq proposes to route all Liability and non-Liability Orders in the Nasdaq system through the OCF portion of the SuperMontage.

To access quotes/orders through the OCF, order entry firms, market makers, ECNs, and UTP Exchanges may enter either a directed or non-directed (including preferenced) order into the OCF.[53] The order can be up to 999,999 shares (there will be a separate odd-lot process), and must indicate whether it is a buy, sell, sell short, or sell short exempt order.[54] The order must be a priced or market order. Non-directed orders entered by order-entry firms will be designated as immediate or cancel orders. Orders entered by Nasdaq Quoting Market Participants or UTP Exchanges may be designated as immediate or cancel.[55]

Nasdaq will affix the MMID of the sender to all delivered orders. Further, preferenced orders and non-directed orders that are executed against a market maker or other market participant that participates in the automatic execution functionality of the system will result in an execution report being sent to each party to the trade immediately upon execution that identifies all counterparties to the trade. This is true whether a non-directed order is executed against an attributable quote/order or a non-attributable quote/order.[56]

The NASD represents that the SuperMontage improves the current SelectNet order cancellation process for ECNs and other participants that take order delivery. Today, a firm entering an order into SelectNet can cancel the order after 10 seconds regardless of the order's status—*i.e.*, regardless of whether the market participant that received the order is attempting to execute the order. In SuperMontage, an order that is in delivery to an ECN or UTP Exchange cannot be canceled. Thus, if a market participant requests to cancel an order that has been delivered to an ECN or UTP Exchange, the system will hold the cancel request until the ECN or UTP Exchange has completed interacting with the delivered order (*i.e.*, once the ECN or UTP Exchange

[46] *See* Amendment No. 4, *supra* note 6. The displayed size of UTP principal quotes/orders will be executed after the reserve size of other participants has been accessed.

[47] A UTP Exchange could only transmit a single bid quote/order or single offer quote/order for principal quotes/orders, but could send multiple quotes/orders for agency quotes/orders. *See* Proposed NASD Rule 4710(f).

[48] Under the proposed rule change, a Liability Order is an order that Nasdaq believes gives rise to liability under the Firm Quote Rule, Exchange Act Rule 11Ac1–1, for a Nasdaq Quoting Market Participant or UTP Exchange. *See* 17 CFR 240–11Ac1–1.

[49] *See* Amendment No. 8, *supra* note 12.

[50] Under the proposal, UTP Exchanges cannot use the reserve size function, but may submit multiple non-attributable quotes representing agency interest.

[51] *See* Amendment No. 8, *supra* note.

[52] *See* NNMS Order, *supra* note 22.

[53] *See* discussion in Section V.E., *infra*, for a description of the directed order process.

[54] Although Nasdaq eliminated the rule limiting the size of orders that may be entered into the NNMS, the system in the short term will only be able to deliver an execution up to 9,900 shares. However, if a market participant enters an order into the system that is eligible for automatic execution and exceeds the system size limit of 9,900, the OCF will break the order up into multiples of 9,900 shares. *See* NMMS Order, *supra* note 22.

[55] *See* Amendment No. 8, *supra* note 12.

[56] *See* Amendment No. 8, *supra* note 12.

executes, partially executes, or declines the order) or fails to respond within the allowable time. For example, if an order is delivered to an ECN and the entering market participant requests to cancel, the system will hold the cancel request. If the ECN declines or partially executes the order, the cancel request will be honored, thus canceling the original order (or the unexecuted balance of the original order for partially-executed orders).[57]

C. Non-Directed Orders

Under the proposal, a market participant will be able to immediately access the best prices in Nasdaq by entering a non-directed order into the OCF. A non-directed order is an order that the market participant does not route to a particular Nasdaq Quoting Market Participant or UTP Exchange, or a preferenced order (as further described below). A non-directed order must be a market order or a marketable limit order.[58] Upon receipt of a non-directed order that is not a preferenced order, the OCF will ascertain the next Nasdaq Quoting Market Participant or UTP Exchange in the queue due to receive an order pursuant to one of three Order Execution Algorithms and deliver either an execution or a Liability Order, depending on how the Nasdaq Quoting Market Participant or UTP Exchange participates in Nasdaq.[59] However, as described below in the Order Execution Algorithms section of this Order, a Nasdaq Quoting Market Participant's non-directed orders first will be matched against its own quotes/orders if the participant is at the Nasdaq BBO.

A new type of non-directed order called a ''preferenced order'' also can be entered into the non-directed order process, and will be considered a Liability Order. The market participant entering the preferenced order must designate the particular Nasdaq Quoting Market Participant or UTP Exchange against which the order is to be executed or delivered. When a preferenced order is next to be executed within the non-directed order queue it will be delivered to the designated party as an order or as an execution depending on how the party participates in Nasdaq. The SuperMontage will execute against (or deliver an order in an amount up to) both the displayed and reserve size of the preferenced Nasdaq Quoting Market Participant or UTP Exchange, but only if it is at the BBO. Any unexecuted portion will be returned to the entering market participant.[60]

1. Quote Decrementation of Non-Directed Orders

For Nasdaq Quoting Market Participants and UTP Exchanges accepting automatic executions, the SuperMontage will deliver an execution up to the size displayed by the participant, then to other displayed orders at that price, and then to the participant's reserve size (if any).[61] The SuperMontage will automatically decrement the aggregate quote in the NODF by the size of the delivered execution, and decrement the Nasdaq Quoting Market Participant's or UTP Exchange's quote/order in the Nasdaq Quotation Montage if the quote/order is attributable. Displayed (attributable or non-attributable) size will be replenished from reserve size for Nasdaq Quoting Market Participants accepting automatic executions if the participant's displayed size has been decremented to zero and the participant has reserve size. If an ECN accepts automatic executions and its attributable quotes/orders and reserve sizes are exhausted without the ECN updating or transmitting another attributable quote/order to Nasdaq, Nasdaq will zero out the side of the quote that is exhausted. If both sides of the ECN's quote are reduced to zero without the ECN updating or transmitting another attributable quote/order, the ECN will be placed into an excused withdrawal state until the ECN transmits a revised attributable quote/order to Nasdaq. However, Nasdaq will continue to access any non-attributable quotes/orders in NNMS while the ECN is in an excused withdrawal state.

For Nasdaq Quoting Market Participants and UTP Exchanges not participating in automatic executions (*i.e.,* order delivery ECNs and UTP Exchanges), Nasdaq will deliver a Liability Order. Nasdaq will automatically decrement the participant's quote by the size of the delivered order and the remaining quote, if not decremented to zero, will retain its priority in the queue.[62]

If an order delivery ECN or UTP Exchange declines or partially fills an order, or fails to respond in any manner within thirty seconds of order delivery, Nasdaq will immediately re-route the order (or unexecuted portion thereof) to the next Nasdaq Quoting Market Participant or UTP Exchange in the queue.[63] In addition, in the case of an order delivery ECN that has declined or partially filled an order without immediately transmitting a revised quote/order or that has failed to respond within 30 seconds, Nasdaq will zero out the ECN's quotes/orders at that price level on that side of the market. In the case of an order delivery UTP Exchange that has declined or partially filled an order without immediately transmitting a revised quote/order or that has failed to respond within 30 seconds, Nasdaq will move the side of the UTP Exchange's quote/order, to which the declined or partially filled order was delivered, to the lowest bid or highest offer in Nasdaq for 100 shares.[64]

Nasdaq also will apply a shorter uniform turn-around standard of a maximum of 5 seconds to order delivery ECNs. The purpose is to establish a general standard (as opposed to an order-by-order standard) that measures whether an ECN is providing an automated response in a time period that ensures market quality. Thus, Nasdaq proposes to monitor an ECN's order turnaround time based on information received from the ECN's Nasdaq Service Display Platform (''SDP''). Nasdaq will use SDPs linked to each ECN to assign a time-stamp for when an order is delivered to the ECN. Nasdaq also will capture the time-stamp via the SDP of when the ECN sends a

[57] *See* Amendment No. 7, *supra* note 10.

[58] Because non-directed orders entered by order-entry firms will be designated as ''immediate or cancel'' orders, if a marketable limit order becomes non-marketable after entry into the system, Nasdaq will return the order (or the unexecuted portion thereof) to the entering party. *See* Amendment No. 8, *supra* note 12.

If an order is a sell short that is not exempt from NASD Rule 3350 and the market moves from an up-bid to a down-bid after the order has been entered but before delivery or execution, the system will return the order to the participant who entered it. Sell-short exempt orders (*i.e.,* those entered by primary market makers) may be entered into the system for execution.

[59] Under the proposal, market makers will continue to be required to take automatic executions via the NNMS; however, ECNs and UTP Exchanges will have the option to participate in either the system's automatic execution or order delivery functions.

[60] *See* Amendment No. 8, *supra* note 12.

[61] UTP Exchanges cannot use the reserve size feature.

[62] For example, assume there are three market participants at the inside bid of $20 and ECN1, ranked first for execution purposes, is displaying 1,000 shares at $20 on the bid side of the market, with 5,000 in reserve. Further assume that five market sell orders are entered into the system for the following amounts: (1) 100 shares; (2) 100 shares; (3) 100 shares; (4) 100 shares; (5) 700 shares. These market sell orders will be processed as follows. The first 100-share order will be delivered to ECN1, reducing its displayed size to 900. The second, third and fourth orders also will be delivered to ECN1, further reducing its displayed size to 600. When the fifth order is delivered to ECN1, its displayed size will be reduced to zero and the remaining 100 shares will access the displayed size of the next market participant in the queue at $20. *See* Amendment No. 7, *supra* note 10. Nasdaq will not wait for an order to be processed before routing another order to an ECN. *See* Amendment No. 8, *supra* note 12.

[63] *See* Amendment No. 8, *supra* note 12.

[64] *See* Amendment No. 8, *supra* note 12.

response to the delivered order. Nasdaq will then calculate and monitor, on a real-time basis, the difference between the two time stamps and determine whether the ECN is meeting the 5 second maximum order-response standard. On an ongoing basis, Nasdaq will monitor ECN response times and provide each ECN with its own order responsiveness time statistics, which will not be made public. If an ECN regularly fails to meet the 5 second response time over a number of orders, Nasdaq will place that ECN's quote in a closed quote state. The closed quote state will be lifted when the ECN can certify that it can meet the 5 second response time requirement.[65]

2. Quote Refresh and Revised SOESed-Out-of-the-Box Procedures

As noted previously, market makers are required to maintain a two-sided, attributable principal quote in Nasdaq at all times. To assist with this requirement, market makers will be able to use the Quote Refresh (''QR'') function.[66] QR allows a market maker to designate a refresh size (with a default refresh size of 1,000 shares) and price (*e.g.,* a tick amount away from the price of its decremented quote) to which it wishes to refresh if its quoted size is decremented to zero. If a market maker is using QR but has an attributable quote/order in the system that is priced at or better than the quote that will be created by the QR, Nasdaq will display the better-priced or equally-priced attributable quote/order that is already in the system, not the QR-produced quote. If a market maker is not using QR and the market maker has given Nasdaq multiple attributable quotes/orders, Nasdaq will display the market maker's next best-priced attributable quote/order when its best-priced attributable quote/order is decremented to zero.

If a market maker's quote/order is decremented to zero and the market maker does not update its principal quote via QR, transmit a revised attributable quote/order to Nasdaq, or have another attributable quote/order in the system, Nasdaq will place the market maker's quote (both sides) in a closed state for three minutes. At the end of that time, if the market maker did not voluntarily update or withdraw its quote from the market, Nasdaq will refresh the market maker's quote/order to its normal unit of trading (generally 100 shares) at the lowest bid and highest offer currently being displayed in that security and reopen the market maker's quote.[67]

D. Order Execution Algorithms[68]

The OCF will execute non-directed orders, other than preferenced orders, against Nasdaq Quoting Market Participant's and UTP Exchange's quotes/orders based on price/time priority unless the market participant chooses to override this default algorithm and select one of the alternative algorithms made available by the OCF. These alternative algorithms are: (1) price/size/time priority; and (2) price/time priority that accounts for ECN quote access fees.

In the price/time algorithm, non-directed orders other than preferenced orders will be executed (within each price level) as follows: displayed quotes/orders of market makers, ECNs, and non-attributable agency interest of UTP Exchanges, in time priority; (2) reserve size of market makers and ECNs, in time priority; and (3) principal quotes of UTP Exchanges, in time priority.[69]

In the alternative order execution algorithm based on price/size/time priority, non-directed orders other than preferenced orders will be processed (within each price level) as follows: (1) Displayed quotes/orders of market makers, ECNs, and non-attributable agency interest of UTP Exchanges, in size/time priority; (2) reserve size of market makers and ECNs, in size/time priority, with size priority based on the size of the related displayed quote/order; and (3) principal quotes of UTP Exchanges, in size/time priority.

As a third choice, market participants will be able to indicate that their order should be executed in a manner that accounts for an ECN's separate quote access fee.[70] Under this option, non-directed orders other than preferenced orders will be executed (within each price level) as follows: (1) Displayed quotes/orders of market makers, ECNs that do not charge a separate quote access fee, and non-attributable agency interest of UTP Exchanges, as well as quotes/orders of ECNs that charge a separate quote access fee where the ECN indicates that the price improvement offered by the quote/order is equal to or exceeds the quote access fee, in time priority; (2) displayed quotes/orders of ECNs that charge a separate quote access fee to non-subscribers that do not indicate that the price improvement offered by the specific quote/order is equal to or exceeds the access fee, in time priority;[71] (3) reserve size of market makers and ECNs that do not charge a separate quote access fee to non-subscribers, as well as reserve size of quotes/orders from ECNs that charge a separate quote access fee to non-subscribers where the ECN entering such quote/order has indicated that the price improvement offered by the specific quote/order is equal to or exceeds the quote access fee, in time priority; (4) reserve size of ECNs that charge a separate quote access fee to non-subscribers that do not indicate that the price improvement offered by the specific quote/order is equal to or exceeds the quote access fee, in time priority; and (5) the principal interest of UTP Exchanges, in time priority.

Each of these algorithms will make an exception for non-directed, non-preferenced orders entered by a Nasdaq Quoting Market Participant when that Nasdaq Quoting Market Participant's quote/order is at the inside market. In that case, the SuperMontage will first attempt to match orders entered by the Nasdaq Quoting Market Participant against its own quote/order if the Nasdaq Quoting Market Participant is at the BBO. Finally, market participants may preference an order to a Nasdaq Quoting Market Participant or UTP Exchange at the BBO, as described above.

In all three algorithms, there will be a five-second interval delay in certain instances before an order moves to the next price level. As a general rule, where an order might be partially filled at one price level but the remaining shares of the order will not be filled in full within the next two minimum trading increments (*i.e.,* price ticks) away, there will be a five-second interval delay or pause before the order moves to the next price level. At any point after a delay, if the remainder of the order can be entirely filled within the next two price ticks away, there will be no further delays and the order will be filled completely. Thus, a large market order moving through many

[65] *See* Amendment No. 8, *supra* note 12.

[66] *See* NNMS Order, *supra* note 22.

[67] *See* discussion of current SOESed-out-of-the-Box procedure at Section V.C., *infra* and Proposed Amended NASD Rule 4613(a).

[68] The Order Execution Algorithm was substantially modified by Amendment Nos. 4, 6, 7, and 8 to the proposal. *See supra* notes 6, 9, 10, and 12.

[69] According to the NASD, similar to the Intermarket Trading System (''ITS''), the SuperMontage will generally attempt to probe and sweep the Nasdaq market before sending an order to another market center. *See, e.g.,* Section 8(a)(v) of the ITS Plan.

[70] The algorithm is similar to the algorithm proposed in Amendment No. 7. *See* Amendment No. 7, *supra* note 10.

[71] In Amendment No. 6, *supra* note 9, the NASD represented that if, in a decimals environment, ECNs changed the manner in which they charge fees to reflect their fees in their published quote, these ECN quotes will be given the same priority for non-directed orders as market makers and non-attributable agency quotes of UTP Exchanges.

price levels could pause for five seconds before every price move except for the last two.[72]

To reduce these interval delays, a market participant will be able to designate an individual order as a ''Sweep Order.'' A Sweep Order will trade through all interest (*i.e.,* displayed and reserve interest) at the three price levels being displayed in the NODF at the time of entry, without pausing five seconds between each displayed price. If the order is not executed in full at the third price level, the order will pause for five seconds between each subsequent price level.[73]

E. Directed Orders

A directed order is one that is routed by the market participant entering the order to a specific Nasdaq Quoting Market Participant or UTP Exchange. Unless the participant to which a directed order is being sent has agreed to accept directed orders that are Liability Orders, a directed order must be a non-Liability Order, and as such, must be designated as: (1) All-or-None (''AON'') with a size at least one unit of trading greater than the size of the attributable quote/order of the market participant to which the order is directed; or (2) a Minimum Acceptable Quantity order (''MAQ'') with a MAQ value of at least one unit of trading greater than the size of the attributable quote/order of the participant to which the order is directed. If a Nasdaq Quoting Market Participant or UTP Exchange is at the inside or is displaying (attributable or non-attributable) interest in the NODF and receives a directed non-Liability Order that it wants to fill, to avoid double execution, it may request to cancel its displayed quote/order in Nasdaq before it fills the non-Liability Order. Nasdaq will not decrement a quote/order upon the delivery of a directed non-Liability Order.

Nasdaq Quoting Market Participants and UTP Exchanges also can elect to receive directed orders that are Liability Orders (*i.e.,* orders that when delivered to market participants' quotes/orders impose an obligation to respond in a manner consistent with the Commission's Firm Quote Rule).[74] If a market participant chooses to accept directed Liability Orders, Nasdaq will append an indicator to the Nasdaq Quoting Market Participant's or UTP Exchange's MMID, showing that the market participant is available to receive directed Liability Orders.

F. Locked/Crossed Markets

A locked market occurs when a market participant's bid equals the lowest offer of another market participant. A crossed market occurs when a market participant's bid exceeds the lowest offer of another market participant. Under the NASD's proposal, if a Nasdaq Quoting Market Participant or UTP Exchange enters a quote/order that will lock or cross the market, the SuperMontage will not display the quote/order, but instead will reformat the quote/order as a marketable limit order and enter it into the SuperMontage as a non-directed order for execution.[75] The reformatted order will be routed to the displayed quote/order (attributable or non-attributable) next in the queue that will be locked or crossed, and the order will be executed at the price of the displayed quote/order. Once the lock or cross is cleared, if the Nasdaq Quoting Market Participant's or UTP Exchange's quote/order that would have locked or crossed the market has not been completely filled, the SuperMontage will reformat the order again and display it (consistent with the parameters of the quote/order) as a quote/order on behalf of the entering Nasdaq Quoting Market Participant or UTP Exchange. It should be noted, however, that a market participant will receive a system warning (as it does today) if it attempts to send a quote/order that will lock or cross the market. To complete the order entry, the participant will be required to override the system warning. This override will help market participants avoid automatic executions resulting from inadvertent locking or crossing quotes/orders by not overriding the system warning.[76]

If the market is locked or crossed at 9:30 a.m., Nasdaq will clear out the locked or crossed quotes by executing the oldest bid (offer) against the oldest offer (bid) which it is marketable against, at the price of the oldest quote/order. Nasdaq then will begin processing non-directed orders that are in the queue.[77]

G. UTP Exchange Participation

Under the proposal, UTP Exchanges will be able to enter orders into the SuperMontage. Orders from UTP Exchanges that offer automatic execution reciprocity to Nasdaq will receive automatic execution against Nasdaq Quoting Market Participants that take automatic executions.[78] Participating UTP Exchanges that do not offer automatic execution reciprocity to Nasdaq will have their orders delivered to the next Nasdaq Quoting Market Participant in the queue according to their choice of the Order Execution Algorithms.[79] Otherwise, UTP Exchanges will be able to use the directed[80] and non-directed order processes of SuperMontage in the same way as Nasdaq Quoting Market Participants. Also, UTP Exchanges will be able to enter multiple non-attributable quotes/orders representing agency interest. UTP Exchanges, however, will only be able to submit a single, two-sided attributable quote, and will not be able to use reserve size or QR.

As discussed above, pursuant to the Order Execution Algorithms, non-attributable agency interest of UTP Exchanges generally will be executed on parity with displayed quotes/orders (attributable and non-attributable) of market makers and ECNs.[81] The principal interest of UTP Exchanges will be last in priority under the Order

[72] Orders will be processed in time sequence. Thus, if an order is in interval delay because it meets the above parameters, orders that are behind the interval-delay order will be held in the queue.

[73] For example, assume that at 10:00:01 a.m., the inside market in Stock G is $104.55 to $104.60, and the following quotes/orders are being displayed in the system on the bid side of the market: MMA $104.55—1,000 (total, including reserve), MMB $104.50—2,000 (total, including reserve), ECN1 $104.45—9,000 (total, including reserve), MMC $104.45—10,000 (total, including reserve).

At 10:00:02 a.m., Institution Q enters a 10,000 share market sell order (through a market maker), which is designated as a Sweep Order. Since the order will be filled in full by the interest that is at the three price levels being displayed in Nasdaq, Institution Q's order is filled in full with no time delay between prices. If at 10:00:02 a.m., while the Sweep Order is executing against the quotes/orders in Nasdaq, an internal subscriber of ECN1 (an automatic execution ECN) wishes to execute against the $104.45 for 9,000 shares being displayed in Nasdaq, before filling the subscriber's order, ECN1 could send a request to cancel the order to Nasdaq. If Nasdaq had already executed against the 9,000 shares, ECN1 would send a message to its customer declining the execution because the Sweep Order had filled the quote/order. If Nasdaq had not executed against the 9,000 shares, ECN1's request to cancel would be granted, the internal execution could occur, and the remainder of Institution Q's order would be executed against MMC. *See* Amendment No. 5, *supra* note 8.

[74] *See* Exchange Act Rule 11Ac1–1, 17 CFR 240.11Ac1–1.

[75] *See* Proposed NASD Rule 4710(b)(3).

[76] *See* Amendment No. 7, *supra* note 10.

[77] According to the NASD, prior to the opening, Nasdaq will process ''trade-or-move'' messages in accordance with NASD Rule 4613, as amended by File Nos. SR–NASD–99–23 and SR–NASD–00–18. *See* Securities Exchange Act Release Nos. 42400 (February 7, 2000), 65 FR 7407 (February 14, 2000); and 42896 (June 2, 2000), 65 FR 36747 (June 9, 2000).

[78] *See* Amendment Nos. 4 and 6, *supra* notes 6 and 9.

[79] *See* Amendment No. 6, *supra* note 9. As a result, market makers may have to develop separate systems to accept order delivery from UTP Exchanges.

[80] *See* Proposed NASD Rule 4710(f).

[81] *See* Amendment Nos. 4 and 8, *supra* notes 6 and 12.

Execution Algorithms, and will be executed after the system does a complete sweep of the agency interest of UTP Exchanges and the displayed and reserve size of all Nasdaq Quoting Market Participants.

H. ECN Participation

As discussed above, ECNs that are NASD members will have the choice of participating in order delivery or automatic execution. Regardless of the method of participation, these ECNs will have full access to the SuperMontage for order entry and order delivery. Specifically, ECNs that are NASD members will be able to designate quotes/orders as attributable or non-attributable, and will be able to transmit multiple quotes/orders at the same price or at multiple prices. All ECNs will be able to use the SuperMontage's reserve size feature for quotes/orders. ECN participation in Nasdaq will continue to be governed by rule and private contract.

I. Odd-Lot Processing [82]

The SuperMontage will accept and execute orders for less than one normal unit of trading (*i.e.,* odd-lot orders). The SuperMontage will provide a separate mechanism for processing and executing odd-lot orders including: (1) An ''odd-lot exposure limit'' for market makers; (2) an interval delay between odd-lot executions against the same market maker; and (3) an odd-lot order entry limitation of one order per second, per firm.

Odd-lot orders will be processed in a round-robin fashion against market makers with an available exposure limit and will be executed at the BBO, even if the market makers are not at the inside. A market maker can set its exposure limit, on a security-by-security basis, from 0 to 999,999 shares. The SuperMontage will not execute an odd-lot order against a market maker unless the market maker has a sufficient exposure limit to fill the odd-lot order. When a market maker's odd-lot exposure limit is reduced to zero, it will be taken out of the odd-lot rotation unless and until the market maker sets a new exposure limit. If no market maker has an odd-lot exposure limit, the SuperMontage will suspend the processing of odd-lots until an exposure limit is refreshed. Odd-lot executions will decrement the exposure limit (but not the quote/order sizes displayed in the Nasdaq Quotation Montage or NODF) by the size of the odd-lot order. To ensure continuity of price, if a mixed-lot is entered into the system, the odd-lot portion will be executed against the next market maker in the rotation at the round-lot portion price once the round-lot portion has been executed.

The odd-lot processing mechanism also will provide a maximum five-second interval delay between executions against the same market maker in the same security. A market maker will be able to adjust its interval-delay time down (*i.e.,* down to 0–4 seconds), so that it may receive odd-lot executions more frequently than five seconds apart. Thus, after an odd-lot has been executed against a market maker with an available exposure limit, there will be at most a five-second interval delay before the market maker will be subject to another odd-lot execution. During the five-second (or less) interval delay, the market maker could adjust its odd-lot exposure limit up or down. Finally, the system will be programmed to accept odd-lot orders at a rate no faster than one order per second from any single participant.

J. Nasdaq SmallCap

Nasdaq proposes to use the SuperMontage for all Nasdaq securities, including SmallCap securities. Nasdaq proposes to delete the current SOES rules excluding SmallCap securities from the NNMS.

K. System Roll Out [83]

Nasdaq intends to implement the SuperMontage as soon as practicable after decimal pricing is fully implemented in Nasdaq.[84] Nasdaq plans to give market participants and vendors at least 90 days notification of changes in system specifications. At the time of such notification, market participants will be given new specifications in order to begin analyzing the system changes. Nasdaq has represented that its staff will work throughout this period with market participants to address any system and specification-related questions and issues.

At least 60 days prior to system implementation, Nasdaq plans to give participants notice of specific testing dates and of the availability of a testing environment. In addition, at least 30 days prior to system implementation, Nasdaq plans to make available a testing environment in which firms may begin testing their software and hardware (if applicable). Finally, Nasdaq plans to hold at least two full-day, mock trading sessions on a weekend. This will allow market participants to train their personnel on the new system and to participate in a real-time trading environment.

Nasdaq plans to phase-in Nasdaq securities similar to the way the SEC's Order Handling Rules were introduced. Specifically, Nasdaq intends to initially implement the system for a limited number of securities (*e.g.,* 100) representing a cross-section of Nasdaq-listed stocks. On a regular basis thereafter, Nasdaq will add 100 new stocks until the system is implemented for all Nasdaq-listed securities. Nasdaq will select a cross section of stocks to be included in each group of 100 securities to be rolled out during a particular week.

The purpose of the system roll out is to give Nasdaq and its members the opportunity to observe and gain experience with the new system, and to give Nasdaq the opportunity to make any adjustments to the system (subject to approval by the Commission), if necessary. Nasdaq intends to work closely with the Commission during the roll-out phase to ensure a smooth transition to the new system.

IV. Summary of Comments

The Commission received 21 comment letters in response to the December 6, 1999 notice.[85] Ten commenters supported [86] and five commenters opposed [87] the proposal to

[82] The system's odd-lot processing function was substantially modified by Amendment No. 4 to the proposal. *See* Amendment No. 4, *supra* note 6.

[83] Nasdaq described its proposed system roll out in Amendment No. 5 to the proposal. *See* Amendment No. 5, *supra* note 8.

[84] *See* Amendment No. 6, *supra* note 9.

[85] *See* December 6, 1999 notice, *supra* note 4, and Comment Summary for a complete description of these comments. The Commission notes that several commenters addressed the NNMS, which was pending at the time that the NASD submitted this proposed rule change. The Commission is not addressing these comments because the Commission has already approved the NNMS. *See* NNMS Order, *supra* note 22. The Commission also notes that several commenters raised issues with respect to the Agency Quote proposal currently pending before the Commission. The Commission will address those comments when it considers the Agency Quote proposal. If the Agency Quote proposal is not approved by the Commission, Nasdaq has represented that it will file conforming rule changes to eliminate references to Agency Quotes in its rule text. *See* Amendment No. 3, note 8, *supra* note 5. At least one commenter also questioned the application of the proposal with respect to the IODES proposal. Nasdaq, however, has withdrawn this proposal. *See supra* note 16. Other comments not directly related to the SuperMontage are also not addressed in this Order.

[86] *See* Electronic Traders Association Letter (''ETA'' Letter); Investment Company Institute Letter (''ICI'' Letter); Security Traders Association Letter (''STA'' Letter); Security Traders Association of New York, Inc. Letter (''STANY'' Letter); Merrill Lynch Letter; Chicago Stock Exchange Letter (''CHX'' Letter); Morgan Stanley Dean Witter Letter (''MSDW'' Letter); Goldman Sachs Letter; Nasdaq Institutional Advisory Council Letter (''ITAC'' Letter); and ITG Letter.

[87] *See* Bloomberg Letter; Automated Trading Desk Letter (''ATD'' Letter); Instinet Letter; Island Letter (Initially, Island did not explicitly approve of or

establish the SuperMontage. Six commenters did not clearly state a position on the proposal.[88] Of the commenters who supported the proposal, all expressed reservations regarding certain aspects of the proposal.[89]

In response to the comment letters, the NASD and Nasdaq made several amendments to the proposal. These proposed changes were published for comment in the **Federal Register** on March 30, 2000 as Amendment No. 4.[90] The Commission received 31 comment letters from a total of 27 commenters in response to Amendment No. 4.[91] Of these 27 commenters, 20 generally supported the proposal,[92] while five opposed the proposal, including the proposed changes.[93] Two commenters expressed neither support nor opposition to the proposal.[94] Of those commenters who expressed support for the proposal, three expressed reservations about certain aspects of the proposal.[95]

In response to these comments, the NASD and Nasdaq made additional revisions to the proposal. The proposed changes were published in the **Federal Register** as Amendment Nos. 5, 6, and 7 on August 15, 2000.[96] The Commission received 28 comment letters in response to these Amendments.[97] Twelve expressed support for the proposal,[98] while 13 continued to oppose it.[99] Three commenters supported the general concept of the SuperMontage, but expressed concerns about specific provisions contained in the proposal, or did not clearly state a position on the proposal.[100]

In response to these comments, the NASD and Nasdaq made several additional changes to the proposed rule change. The proposed changes were published in the **Federal Register** as Amendment No. 8 on November 15, 2000.[101] The Commission received 24 comment letters in response to Amendment No. 8. One commenter expressed support for the proposal,[102] while 6 continued to oppose it.[103] Eight

oppose the proposed rule change. Island recommended that the Commission delay consideration of the proposed rule ''until such time as the Nasdaq market is restructured to ensure fair competition between Nasdaq and ECNs or until such time as the Commission has permitted ECNs such as Island to become registered national securities exchanges.'' However, in its comment letter responding to Amendment No. 4, Island expressed its opposition to the proposal); and NexTrade Letter.

[88] *See* BNY ESI & Co. Letter (''BNY'' Letter); Bancorp Letter; Heartland Letter (Heartland believed that the proposed rule change should not be approved until the SOES/SelectNet Integration is used and tested); American Century Investment Management Letter (''ACIM'' Letter); Salomon Smith Barney Letter; and Mount Pleasant Brokerage Services Letter (''MPBS'' Letter).

[89] *See* ETA Letter; ICI Letter; STA Letter; STANY Letter; Merrill Lynch Letter; MSDW Letter; ITAC Letter; CHX Letter; Goldman Sachs Letter; and ITG Letter.

[90] *See* Securities Exchange Act Release No. 42573, *supra* note.

[91] *See* Instinet Letter; ICI Letter; Bloomberg Letter; CHX Letter; Joseph J. Burrello, Principal and Manager of Nasdaq Trading, William Blair & Company, Larry Elmore, Partner and Manager of Equity Trading, J.C. Bradford & Co., Dennis A. Green, Senior Vice President and Manager of Nasdaq Trading, Legg Mason Wood Walker, Inc., Jack Hughes, First Vice President and Manager of Equity Trading, Janney Montgomery Scott, LLC, Robert Krohn, Managing Director of Nasdaq Trading, McDonald Investments, Inc., Greg Lemaster, Manager of Nasdaq Trading, Stifel, Nicolaus & Company, Inc., James R. Miller, Manager of Nasdaq Trading, Robert W. Baird & Company, Inc., Bobby Olsen, Vice President and Manager of Nasdaq Trading, Advest, Inc., Gerard Yurasits, Senior Nasdaq Trader, First Albany Corporation, Hedi H. Reynolds, Managing Director of Nasdaq Trading, Morgan, Keegan & Company, Inc., William Cahill, Managing Director of Nasdaq Trading, Robinson Humphrey Letter (''Traders'' Letter); Island Letter; Archipelago Letter; Granite Financial Letter; Security Investment Company Letters; Charles Schwab Letter (addressed to Senator Phil Gramm); Telemet Letter; Congressman Drier Letter; Congressman Pallone Letter; Congressman Dingell Letter; Congresswoman Morella Letter; Congressman Stupak Letter; Congresswoman Wilson Letter; Congressman Radanovich Letter; Congressman Towns Letter; Congressman McInnis Letter; Congressman Thomas Letter; Spears, Leeds & Kellogg Letter (addressed to Senator Phil Gramm); First Union Letter (addressed to Alfred R. Berkeley, President, the Nasdaq Stock Market); Seidel Letter (''Seidel'' Letter); Thurston, Springer, Miller, Herd & Titak Letter (''Titak'' Letter); Philadelphia Corporation for Investment Services Letter (''Philadelphia Corp.'' Letter)(address to Senator Arlen Spector); and Robert Bannon Letter (''Bannon'' Letter).

The Commission notes that commenters did not limit their discussion to the topics addressed in Amendment No. 4. Rather, many commenters discussed the proposal in its entirety. These commenters are listed as responding to Amendment No. 4 because their letters were dated after Amendment No. 4 was published.

[92] *See* ICI Letter; CHX Letter; Traders Letter; Charles Schwab Letter; Congressman Drier Letter; Congressman Pallone Letter; Congresswoman Morella Letter; Congressman Stupak Letter; Congresswoman Wilson Letter; Congressman Towns Letter; Congressman McInnis Letter; Congressman Thomas Letter; Congressman Radanovich Letter; Titak Letter; Philadelphia Corp. Letter; Spears, Leeds & Kellogg Letter; First Union Letter; Security Investment Company Letters; Seidel Letter; and Bannon Letter.

[93] *See* Instinet Letter; Bloomberg Letter; Archipelago Letter; Granite Financial Letter; and Island Letter.

[94] *See* Congressman Dingell Letter; and Telemet Letter.

[95] *See* ICI Letter; Traders Letter; and Bannon Letter.

[96] *See* Securities Exchange Release No. 43133, *supra* note 11.

[97] The Commission notes that commenters did not limit their discussion to the topics addressed in Amendment Nos. 5, 6, and 7. Rather, many commenters discussed the proposal in its entirety. These commenters are listed as responding to Amendment Nos. 5, 6 and 7 because their letters were dated after Amendment No. 7 was published.

[98] *See* Senator Schumer Letter; Congressman Ehrlich Letter; Congressman Shays Letter; Congressman Fossella Letter; Starbucks Coffee Letter (''Starbucks'' Letter)(addressed to Congresswoman Jennifer Dunn); STA Letter; Association of Publicly Traded Companies Letter (''APTC'' Letter); American Shareholder's Association Letter (''ASA'' Letter); Consumer Federation of America Letter (''CFA'' Letter); Wendell Garrett Letter (''Garrett'' Letter) (addressed to Congressman John Shadegg and Senator Jon Kyl); O'Connor Letter; and Jeffries Letter.

[99] *See* Philadelphia Stock Exchange Letter (''Phlx'' Letter); ACIM Letter; Instinet Letter; Bloomberg Letter; BRUT Letter; Harold Bradley Letter (''Bradley'' Letter); Archipelago Letter; NexTrade Letter; Seema Aurora Letter (''Aurora'' Letter); Island Letter; Renaissance Letter; Leon Letter; and Kupfer Letter.

[100] *See* T. Rowe Price Associates, Inc. Letter (''TRPC'' Letter); Gramm Letter; and Scudder Kemper Investments Letter (''Scudder Kemper'' Letter).

[101] *See* Securities Exchange Act Release No. 43514, *supra* note 13.

[102] *See* Bloomberg Letter.

[103] *See* Instinet Letter (Instinet also submitted a letter addressing changes to be made by Amendment No. 8 prior to the Commission's receipt of the Amendment. This letter has also been incorporated); Archipelago Letter; Letter from American Century Investment Management, Inc., Janus Capital Corporation, Neptune Capital Management LLC, State Farm Mutual Automobile Insurance Company, Alex Brown Investment Management, LP, Boston Company, Wachovia Bank, NA, State Street Research & Management Co., Banc One Investment Advisors Corporation, West Highland Capital, Inc., Fidelity Trust Company, GMG/Seneca Capital Management, Westchester Capital Management, Inc., Becker Capital Management, Inc., Greenville Capital Management, Inc., Friess Associates of Delaware, Inc., C.E. Unterberg, Tobin Advisors, LP, Kepmen Capital, Schroder Investment Management Ltd., Foreign & Colonial Management, Ltd., RAS Asset Management SGR, Scudder Investor Services, Inc., New York State Common Retirement Fund, Dreyfus Fund, Virginia Retirement System, Pennsylvania School Employee Retirement Systems, Harris Associates Securities, LP, Columbia Partners, LLC Investment Management, Caterpillar Investment Management, Ltd., Nicholas Applegate Capital Management, Inc., Symphony Asset Management, Monetta Financial Services, Inc., Buckingham Capital Management, Sedacca Capital Management, Inc., Robeco Group NV, Montag & Caldwell, Gemini Management Partners, LLC, Abu Dhabi Investment Authority, BT&T Asset Management AG, Jacobs Levy Equity Management, Inc., Newton Investment Management Ltd., Berliner Freiverkehrs (Aktien) AG, Compass Capital Ltd., SAC Capital, Standish, Ayer & Wood, Minnesota Power and Light Co., Frontier Capital Management, Sage Asset Management, LLC, Target Holdings Corporation, Lincoln Partners, Apex Capital, LLC, Twin Capital Management, Kanaly Trust Company, Rothschild Bank AG, Sanpaolo IMI Asset Management SGR, Banque Paribas Luxembourg, Golden Capital Management, Investment Adviser, Inc., R.H. Capital Associates, Quaker Capital Management, Eagle and Dominion Asset Management Ltd., Bank Invest, Morley Fund Management, Provident Investment Counsel, Gruber & McBaine Capital Management, Dupont Capital Management, Masters Capital Investments, LLC, Sawgrass Asset Management, LLC, Kaintuck Capital Management, LP, HighMark Capital Management, Inc., Atticus Holdings, LLC, Credit Agricole Indosuez Cheuvreux, Royce & Associates, Inc., OrbiMed Advisors LLC, Cordillera Asset Management, Inc., Fisher Investments, Inc., Ohio Valley Management, Inc., Loews Corporation, National City Investment Company, Zak Capital, Inc., Ocean Park Capital Management, LLC,

Continued

commenters supported the general concept of the SuperMontage, but expressed concerns about specific provisions contained in the proposal.[104] Nine commenters, while objecting to certain aspects of the proposal, did not clearly state a position on the proposal as a whole.[105]

V. Discussion

After carefully considering the comments, the Commission finds, for the reasons discussed below, that the SuperMontage proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the NASD. In particular, the Commission finds that the proposal is consistent with the requirements of Sections 15A(b)(6), (9), and (11), and 11A(a)(1)(C) of the Act.[106] Section 15A(b)(6)[107] requires that the rules of a registered national securities association be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Section 15A(b)(9) requires that the rules of an association not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.[108] Section 15A(b)(11)[109] requires that the rules of an association be designed to produce fair and informative quotations, prevent fictitious or misleading quotations, and to promote orderly procedures for collecting, distributing, and publishing quotations. And finally, in Section 11A(a)(1)(C),[110] Congress found that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure: (1) The economically efficient execution of securities transactions; (2) fair competition among brokers and dealers; (3) the availability to brokers, dealers, and investors of information with respect to quotations and transactions in securities; (4) the practicability of brokers executing investors' orders in the best market; and (5) an opportunity for investors' orders to be executed without the participation of a dealer.

As discussed more fully below, the Commission finds that the proposed changes are in the public interest and are designed to assure the economically efficient execution of securities transactions by increasing the availability of pre-trade information in Nasdaq securities, as well as the opportunity for the orders of market makers, public customers, and order entry firms to interact. Several commenters believed that the proposal will improve the Nasdaq market by either providing more information to investors, promoting greater efficiency in executions, or increasing overall market transparency.[111] The ICI, for example, stated that ''creating a system that provides investors with greater access to priced orders and allows them to execute against those orders will greatly enhance the quality of the Nasdaq market.''[112] MSDW stated that the ''ability to enter multiple proprietary/agency quotes/orders at multiple price levels will greatly assist market makers in managing their limit orders.''[113] TRPA stated that ''the SuperMontage concept furthers the goals of unifying the markets and providing a means for orders to interact with one another, while allowing for continuing innovation.''[114] The Commission agrees with these commenters that there is good reason to conclude that the SuperMontage, by providing for the enhanced display of trading interest in Nasdaq securities and by expanding the availability of automatic execution, will facilitate the price discovery process and promote quote competition among Nasdaq Quoting Market Participants and UTP Exchanges, thus helping to ensure the best execution of customer orders.

In addition, by introducing features to: (1) Assist market makers with the management of their quotes/orders; (2) reduce instances of double liability for market makers; and (3) encourage the entry of larger sized quotations and orders by market makers and ECNs, the proposal likely will add liquidity to the market and help assure the economically efficient execution of transactions in Nasdaq securities. The proposed changes thus should enhance the efficiency and increase the depth and liquidity of the market for Nasdaq securities, to the benefit of all investors.

A. Nasdaq Order Display Facility

The NODF will increase the availability of information about quotations by displaying the three best price levels in Nasdaq on both the bid and offer side of the market to supplement the Nasdaq Quotation Montage. Each price level will be updated and will display aggregate trading interest at that price level.

Several commenters stated this aspect of the proposal will result in more information to investors, promote greater efficiency in executions, promote liquidity, increase market transparency, and reduce market fragmentation.[115] For example, several

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Tattersall Advisory Group, Peninsula Capital Management, Westway Capital, LLC, Munder Capital Management, Kadem Capital, LLC, Phoenix Zweig Advisers, Fuller & Thaler Asset Management, Chicago Equity Partners, LLC, Amerindo Advisers, Ltd., Group Aesop Capital Partners, LLC, Wilen Management Corporation, Ballentine Capital Management, Inc., Summit Capital Management LLC, Sirach Capital Management LLC, Cadwell and Orkin, Wentworth, Hauser & Violich, Inc., Matrix Asset Advisors, Inc., George Weiss Associates (''Investment Companies Letter'')(addressed to Senator Phil Gramm); CFA Letter; Office of the Comptroller, State of New York (''NY'' Letter) (stating that SuperMontage could ideally increase information, but may provide unfair advantages to market makers); and Adriaanse Letter (''Adriaanse Letter'').

[104] *See* Security Investment Company Letter; ICI Letter; STA Letter; Pershing Trading Company, L.P. (''Pershing'' Letter); ACIM Letter; Cincinnati Stock Exchange (''CSE'' Letter); Scudder Kemper Letter; and Vanguard Letter.

[105] *See* Island Letter; BRUT Letter; Ryley Letter; CHX Letter; Suss Letter (''Suss Letter''); Silverman Letter (''Silverman Letter''); Erfort Letter (''Erfort Letter''); Birmingham Letter (''Birmingham Letter'') and aLV Letter (''aLV Letter'') (urging Commission to re-think passing the SuperMontage in its current form).

[106] 15 U.S.C. 78*o*–3(b)(6), (9), and (11), and 15 U.S.C. 78k–1(a)(1)(C).

[107] 15 U.S.C. 78*o*–3(b)(6).

[108] 15 U.S.C. 78*o*–3(b)(9).

[109] 15 U.S.C. 78*o*–3(b)(11).

[110] 15 U.S.C. 78k–1(a)(1)(C).

[111] *See* ETA Letter; Merrill Lynch Letter; Goldman Sachs Letter; MSDW Letter; STA Letter; STANY Letter; ITAC Letter; ICI Letter; Bannon Letter; Bancorp Letter; Charles Schwab Letter; Congressman Drier Letter; Congressman Pallone Letter; Congresswoman Morella Letter; Congressman Stupak Letter; Congresswoman Wilson Letter; Congressman Towns Letter; Congressman McInnis Letter; Congressman Thomas Letter; Spear, Leeds & Kellogg Letter; First Union Letter; Seidel Letter; Security Investment Company Letters; ITG Letter; APTC Letter; Jeffries Letter; Senator Schumer Letter; Congressman Radanovich Letter; Congressman Shays Letter; Congressman Fossella Letter; Titak Letter; ASA Letter; Starbucks Letter; Philadelphia Corp. Letter; Garrett Letter; NY Letter; and Congressman Ehrlich Letter.

[112] *See* ICI Letter.

[113] *See* MSDW Letter.

[114] *See* TRPA Letter.

[115] *See* ETA Letter; Merrill Lynch Letter; Goldman Sachs Letter; STA Letter; STANY Letter; ITAC Letter; ICI Letter; Bannon Letter; Bancorp Letter; MSDW Letter; Charles Schwab Letter; Congressman Drier Letter; Congressman Pallone Letter; Congresswoman Morella Letter; Congressman Stupak Letter; Congresswoman Wilson Letter; Congressman Towns Letter; Congressman McInnis Letter; Congressman Thomas Letter; Spears, Leeds & Kellogg Letter; First Union Letter; Seidel Letter; Security Investment Company Letters; ITG Letter; APTC Letter; Senator Schumer Letter; Congressman Radanovich Letter; Congressman Shays Letter; Congressman Fossella Letter; Titak Letter; ASA Letter; Starbucks Letter; Philadelphia Corp. Letter; Jeffries Letter; Garrett Letter; NY Letter; and Congressman Ehrlich Letter.

commenters believed that the proposal will provide a better overall picture of the market's depth by enabling market participants to display (and accept) multiple levels of priced orders.[116] In addition, one commenter believed that the enhanced display of trading interest will promote investor protection by decreasing trade-throughs (*i.e.,* trades at prices worse than those available for a security) and giving market participants more options for meeting best execution, firm quote, and limit order display obligations.[117] Another commenter stated that the proposal will help improve the current state of fragmented trading in Nasdaq securities, and offer an improved execution system over SOES and SelectNet.[118] A third commenter believed that the NODF ''will offer an enhanced means for market participants to gauge trading interest at the Nasdaq inside market and prices near the inside market.'' [119]

Two commenters, however, questioned the need for the NODF.[120] One of these commenters believed that fragmentation was no longer a problem in the Nasdaq market.[121] Further, this commenter argued that if the NASD was concerned about the fragmentation and transparency of pre-trade information, the NASD should allow market participants to display all of their bids and offers under their MMID.[122] Another commenter argued that the NODF would create a false perception of liquidity in Nasdaq because orders below a market participant's top of book will not be attributed to the firm representing the order.[123] This commenter believed, as a result, that liquidity will appear to reside in Nasdaq, rather than with the broker/dealer that represents the liquidity in Nasdaq.[124]

One commenter also believed that the NODF was unnecessary because ECNs and market makers have created their own limit order books, and that the proposed NODF will not provide any additional capability to the market.[125] Another commenter believed that the SuperMontage proposal did not provide complete transparency because of its anonymous display and reserve size features.[126] This commenter urged the Commission to review this issue to ensure that large players do not receive an unfair trading advantage that is not available to small investors.[127] Two commenters also suggested that the NODF should display the five best price levels in Nasdaq on both the bid and offer side of the market to allow investors to better gauge the market [128] and to constrain volatility.[129] Another commenter believed that Nasdaq should display information for individual market makers and ECNs up to three price levels.[130]

The Commission finds that the NODF, as part of the SuperMontage, is consistent with Sections 15A(b)(6) and 15A(b)(11) of the Act [131] in that, among other things, it is designed to facilitate transactions in securities and to produce fair and informative quotations. Further, the Commission finds that the order aggregation characteristics of the proposed rule change are consistent with Sections 11A(a)(1)(B) and 11A(a)(1)(C) of the Act.[132] In particular, in Section 11A(a)(1)(B), Congress found that new data processing and communications techniques create the opportunity for more efficient and effective market operations.[133]

The Commission believes that the NODF has the potential to facilitate securities transactions by enhancing the display of trading interest. Currently, when Nasdaq receives a quote, it cannot discern whether that quote represents a single order or multiple orders at one price. Nasdaq Quoting Market Participants and UTP Exchanges can send Nasdaq only a single, two-sided quote. In contrast, under the proposal, Nasdaq Quoting Market Participants and UTP Exchanges generally will have the ability to transmit multiple orders at multiple price levels for display at their discretion.[134] In addition, the NODF has two other features designed to enhance the display of trading interest—the size of displayed interest will be aggregated at the best three price levels on both sides of the market and the Summary Scan function will show the total displayed size (attributable and non-attributable) for all levels below the first three price levels. With the implementation of decimals, market participants will need to view and access greater depth. At a penny quotation increment, for example, a best offer of $20 for 100 shares may be less meaningful than a second best offer at $20.01 for 1,000 shares. As discussed in more detail below, because the NODF is designed to enhance the display of trading interest among participants, it should facilitate trading in a decimals environment.[135] While the Commission agrees with certain commenters that display of depth beyond three levels may be necessary once the markets move to decimals, the Commission understands that Nasdaq will consider expanding the number of levels as it further develops the system.

With respect to concerns that Nasdaq should display even greater information, the Commission believes that Nasdaq's proposed NQDS Prime, which will provide on a real-time basis, all individual attributable quote and order information at the three best price levels displayed in the NODF,[136] will help to address these concerns. NQDS Prime will enhance the display of trading interest and provide market participants greater information in making order-routing decisions. The Commission believes that this will provide investors with more options since market participants will be able to use this information to access liquidity through Nasdaq or non-Nasdaq systems (such as proprietary links).

1. Non-Attributable Quotes and Other Features

Under the proposed rule change, a SIZE MMID, representing the aggregate size of the best-priced non-attributable bids or offers, will be displayed in the Nasdaq Quotation Montage along with the other MMIDs for the Nasdaq Quoting Market Participants and UTP Exchanges displaying attributable size.

The Commission received several comment letters addressing this display feature in response to the December 6, 1999 notice.[137] One commenter believed that there is a risk that non-attributable

[116] *See* ITAC Letter; Congressman Fossella Letter; APTC Letter; and Charles Schwab Letter; *see also* Bannon Letter and Island Letter.

[117] *See* ITAC Letter.

[118] *See* Bannon Letter; *see also* Senator Schumer Letter.

[119] *See* MSDW Letter.

[120] *See* Bloomberg Letter and NexTrade Letter.

[121] *See* Bloomberg Letter.

[122] *See* Bloomberg Letter.

[123] *See* Archipelago Letter.

[124] *See* Archipelago Letter.

[125] *See* NexTrade Letter.

[126] *See* CFA Letter.

[127] *See* CFA Letter.

[128] *See* ICI Letter and ACIM Letter; *see also* ITAC Letter.

[129] *See* ACIM Letter.

[130] *See* Bloomberg Letter.

[131] 15 U.S.C. 78*o*–3(b)(6), (b)(11).

[132] 15 U.S.C. 78k–1(a)(1)(B)–(a)(1)(C).

[133] 15 U.S.C. 78k–1(a)(1)(B).

[134] UTP Exchanges will be permitted only to send a single bid and a single offer for principal orders/quotes, but may submit multiple agency quotes/orders. *See* Proposed NASD Rule 4710(f).

[135] As discussed in Section III.K, *supra,* the SuperMontage will not be implemented until after decimals in the Spring of 2001. In a recent study, SRI Consulting found that with smaller minimum pricing increments, liquidity may be dispersed as limit orders are spread over smaller price intervals. *See* SRI Consulting, Assessing the Impact on Message Traffic of Trading Equities and Option in Decimal Increments (Executive Summary at p. 31) (April 16, 1999). Therefore, market participants may want to see more price levels away from the BBO.

[136] *See* Amendment No. 8, *supra* 12. At least one commenter supported the addition of NQDS Prime. *See* STA Letter.

[137] *See* December 6, 1999 notice, *supra* note 4.

proprietary orders will be susceptible to manipulation because a market maker could post a small bid under its own MMID and post a larger sell order anonymously.[138] Another commenter argued that because Nasdaq Quoting Market Participants and UTP Exchanges can display quotes/orders anonymously under the proposed rule change, a ''moral hazard'' might be created.[139] The commenter expressed concern that participants with weaker credit might ''hide behind unattributable quotations in times of market stress.'' [140] Further, this commenter noted that because the solvency of a participant's counterparty may be unknown, investor confidence could be threatened.[141] This commenter also opined that the anonymous display feature will deny viewers the opportunity to access secondary or tertiary quotations directly.[142] In addition, one commenter believed that order entry firms could use the feature to access ECNs without paying an access fee.[143]

Another commenter pointed out that the NASD has not revealed how it proposes to provide participants with transaction reports.[144] This commenter stated that the counterparty to a transaction should be disclosed at the time an order is executed, not at the end of the trade day.[145] This commenter explained that disclosure of a counterparty's identity at the time of execution is critical in order for a market participant to monitor its intraday credit risk exposure.[146]

In response to some of the issues raised by commenters, the NASD has committed to assist market participants in their efforts to manage operational and credit risk.[147] Nasdaq will affix the MMID of the sender to all directed orders, delivered non-directed orders, and delivered preferenced orders. Further, preferenced orders and non-directed orders that are executed against a market maker or other market participant that participates in the automatic execution functionality of the system will result in an execution report immediately upon execution that identifies all of the parties to the trade. This is true if a non-directed order is executed against an attributable order or a non-attributable order.[148]

Two commenters believed that these features will allow ECNs to deny access to their quotes through SuperMontage to non-subscribing firms that do not pay their fees.[149] One of these commenters believed that ''[s]anctioning the denial of quote access through SuperMontage also conflicts with [b]est [e]xecution, as a firm who has been denied access may be unable to hit the inside bid or offer.'' [150]

As an initial matter, the Commission notes that market makers currently can enter multiple quotes/orders by submitting a quote/order to Nasdaq and orders to multiple ECNs. Under the Commission's Order Handling Rules,[151] a market maker can place a better-priced order with an ECN anonymously without updating its quote to reflect the better-priced order, as long as the ECN displays the order in the public market. Other market participants also may submit orders to ECNs and have their orders traded on an anonymous basis. As a result, market participants trading with ECN quotes currently are subject to a certain level of uncertainty regarding their ultimate counterparty. The SuperMontage proposal merely provides market makers with the ability to display multiple quotes in Nasdaq on an attributable and non-attributable basis, which is consistent with the ability of market makers and other market participants to display orders on ECNs today.

The Commission believes that the use of non-attributable quotes (*i.e.*, SIZE MMID) in the SuperMontage has the potential to promote the display of greater market interest and encourage greater transparency in the Nasdaq market. The ability to display non-attributed market interest may encourage certain market participants to submit larger quotes/orders, particularly institutions wishing to minimize the market impact of their orders. Furthermore, the Commission believes that the NASD has minimized the concerns raised by commenters regarding the identity of those with whom they are trading by affixing the MMID of the sender on delivered orders and identifying the counterparties in execution reports. Moreover, because only Nasdaq market makers, ECNs, and UTP Exchanges can enter non-attributable orders into the system, the range of participants that are responsible for non-attributable orders on their own behalf or for an anonymous customer is limited. All Nasdaq Quoting Market Participants have established clearing arrangements and credit standings monitored by the NASD and the National Securities Clearing Corporation (''NSCC''). UTP Exchanges have similar provisions to ensure financial responsibility. Moreover, the Commission fully expects that the NASD will monitor the use of these quotes/orders with a view towards preventing manipulation. Finally, as discussed further below, the Commission notes that market participants that wish to interact with a specific market participant still will be able to direct or preference orders to Nasdaq Quoting Market Participants and UTP Exchanges, including ECNs.

2. Reserve Size

The proposed reserve size function will allow Nasdaq Quoting Market Participants to publicly display part of the full size of their order or interest, with the remainder held in reserve on a non-attributable basis.[152] The reserve size function requires Nasdaq Quoting Market Participants to initially display a minimum of 1,000 shares, and to refresh the displayed size by a minimum of 1,000 shares each time the displayed size is decremented to zero. As originally described in the December 6, 1999 notice, reserve size would have been accessed based on time priority and status as a market maker, automatic execution ECN, or order delivery ECN.

Several commenters expressed support for the reserve size feature.[153] One commenter felt that the reserve size feature would benefit investors,[154] while another believed it would minimize the adverse market price impact associated with a larger-sized order.[155] Another commenter, however, suggested that the reserve size feature should be altered to provide market participants with incentives to display large size attributable quotations.[156]

In response to the commenter, in Amendment No. 4, the NASD added the ''size/time priority'' characteristic to the reserve size function to provide order execution priority for orders with the larger displayed size (after being refreshed out of reserve) over smaller displayed sizes (refreshed out of reserve size), with time priority being given to identically sized quotes.[157] In addition, the NASD revised its original Order

[138] *See* ATD Letter.
[139] *See* Bloomberg Letter.
[140] *See* Bloomberg Letter.
[141] *See* Bloomberg Letter.
[142] *See* Bloomberg Letter.
[143] *See* Bloomberg Letter.
[144] *See* Island Letter.
[145] *See* Island Letter.
[146] *See* Island Letter.
[147] *See* Amendment No. 8, *supra* note 12.
[148] *See* Amendment No. 8, *supra* note 12.
[149] *See* STA Letter and Pershing Letter.
[150] *See* STA Letter.
[151] *See* 17 CFR 240.11Ac1–1(c)(5).
[152] Market makers must display the full size of customer limit orders in some circumstances pursuant to the Commission's Order Handling Rules.
[153] *See* ITG Letter; ITAC Letter; and First Union Letter.
[154] *See* ITG Letter.
[155] *See* ITAC Letter.
[156] *See* Goldman Sachs Letter.
[157] *See* Amendment No. 4, *supra* note 6.

Execution Algorithm so that it no longer distinguished between the reserve size of order delivery and automatic execution ECNs.[158] Instead, the reserve size of market makers and ECNs that did not charge a separate access fee received priority over ECNs that charged a separate access fee.

In response to the NASD's change in Amendment No. 4, one commenter questioned the Order Execution Algorithm's size/time prioritization of reserve size.[159] The commenter expressed concern that the proposed algorithm would discourage market participants from displaying orders greater than 1,000 shares.[160] Another commenter believed that size/time priority was inconsistent with the basic premise of time priority and that the first quote accessed should maintain priority regardless of size.[161]

In Amendment No. 7, the NASD again revised the reserve feature to give equal priority to quotes/orders of ECNs that charge separate access fees if they indicate that the price improvement exceeds the fee for that particular quote/order.[162] In further response to the various concerns of commenters concerning the Order Execution Algorithm, Nasdaq amended the Order Execution Algorithm for non-directed orders to allow market participants to take into account their objectives in executing their orders against the displayed and reserve size of Nasdaq Quoting Market Participants and UTP Exchanges.[163] Nasdaq now permits market participants to select one of three Order Execution Algorithms: price/time priority; price/size/time priority; and price/time priority that accounts for ECN fees.

As an initial matter, the Commission notes that all Nasdaq Quoting Market Participants can use reserve size.[164] As a result, the Commission believes that the reserve size feature should give market participants greater flexibility in handling large orders. In particular, the reserve size could prove useful to institutions that wish to minimize the market impact of their orders. Increased participation should, in turn, enhance the depth and liquidity of the market for Nasdaq securities, to the benefit of all market participants. In this regard, the Commission notes that ECNs have used reserve size features for years with considerable success.

Two requirements should ensure that market participants continue to have an incentive to display their quotes/orders. First, market participants must display a *minimum* of 1,000 shares to use the reserve size feature. Second, all displayed quotations at the same price level in the SuperMontage generally will have priority up to their displayed size over all reserve size at the same price level. Third, market forces and competition may encourage Nasdaq Quoting Market Participants to display greater size if the price/size/time algorithm is widely used. In sum, the Commission concludes that Nasdaq's use of the reserve size feature is reasonable and could result in increased depth and liquidity in Nasdaq. The Commission, however, expects the NASD to monitor trading to ensure the proper use of the reserve size feature and compliance with the requirements applicable to the use of reserve size.

B. Order Collector Facility

Under the proposal, the OCF will: (1) Transmit to Nasdaq multiple quotes/orders and quotes/orders at multiple price levels entered by Nasdaq Quoting Market Participants and UTP Exchanges;[165] (2) accept orders to access quotes/orders displayed (as either attributable or non-attributable) in both the NODF and the Nasdaq Quotation Montage; and (3) unify Nasdaq's delivery of Liability Orders to Nasdaq Quoting Market Participants and UTP Exchanges, which should minimize the potential for dual liability. Upon receipt of an order seeking to access displayed quotes/orders, the OCF will determine whether to deliver an order or an execution based on the manner in which the market participant receiving the order participates in the Nasdaq market. For example, market makers will take automatic execution,[166] and ECNs and UTP Exchanges will have the option of taking automatic execution or order delivery.[167]

As discussed further below, the Commission believes that the proposed OCF is consistent with Sections 15A(b)(6)[168] and 11A(a)(1)(C)(i) of the Act,[169] particularly with Congress' finding that it is in the public interest, and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the economically efficient execution of securities transactions. The OCF should provide market participants with greater flexibility to reflect their buying and selling interest at various price levels by allowing them to transmit multiple attributable quotes/orders at multiple price levels, as well as non-attributable quotes/orders that conceal the identity of the responsible participant until executed.

1. Order Entry and Access

Under the proposal, order entry firms, market makers, ECNs, and UTP Exchanges will be able to access quotes/orders by submitting directed or non-directed orders up to 999,999 shares in the OCF.[170] Large orders may be submitted as non-directed orders and receive automatic execution, subject to the possible application of a 5-second interval delay between successive price levels if the order is not categorized as a Sweep Order or cannot be filled completely at the inside price plus (or minus) two price ticks.

Five commenters expressed concern about access to the system.[171] One of these commenters stated that the SuperMontage, as proposed, was too limited, and should permit all NASD members to enter non-attributable limit orders in the system.[172] One commenter specifically expressed concern that order entry firms would be excluded from receiving automatic executions for proprietary orders sent to the system.[173]

The Commission believes that the NASD has adequately addressed the commenters' concerns that access to the proposed system is too limited. First, the NASD has stated that order entry firms, as well as Nasdaq Quoting Market Participants and UTP Exchanges, may enter either directed or non-directed orders intended for execution into the OCF. Moreover, order entry firms sending proprietary orders to the system to access market maker quotes/orders will receive automatic execution of those orders. Second, the Commission believes that it is reasonable for Nasdaq to limit the ability to *display* quotes/orders to registered market makers, ECNs, and UTP Exchanges. These participants have certain obligations

[158] *Id.* Originally, the NASD proposed that non-directed orders be processed pursuant to one algorithm. In Amendment No. 8, the NASD proposed to offer market participants three algorithms from which to choose. *See* Amendment No. 8, *supra* note 12.

[159] *See* ICI Letter.

[160] *See* ICI Letter.

[161] *See* Traders Letter.

[162] *See* Amendment No. 7, *supra* note 10.

[163] *See* Amendment No. 8, *supra*.

[164] *See* Proposed NASD Rules 4710(b)(1)(B); 4710(b)(2); 4701(y), and 4701(t).

[165] A UTP Exchange may transmit only a single bid or single offer for principal quotes/orders, but may send multiple agency quotes/orders. *See* Proposed NASD Rule 4710(f).

[166] *See* Proposed NASD Rule 4701(u).

[167] *See* Amendment 6, *supra* note 9.

[168] 15 U.S.C. 78*o*-3(b)(6).

[169] 15 U.S.C. 78k-1(a)(1)(C)(i).

[170] Currently, Nasdaq can only handle orders up to 9,900 shares. However, if a market participant enters an order for automatic execution that exceeds 9,900 shares, the OCF will break the order up into multiples of 9,900 shares and execute the orders.

[171] *See* MPBS Letter; ITG Letter; ETA Letter; CHX Letter; and ATD Letter.

[172] *See* ITG Letter; *See also* MPBS Letter.

[173] *See* ATD Letter.

under the Exchange Act, including those under the Order Handling Rules. Market makers in particular have unique obligations under NASD rules, such as the requirement to maintain continuous two-sided markets. ECNs offer efficient display and execution systems for limit orders. Limiting the ability to enter non-attributable limit orders into the system to market makers and ECNs encourages their participation in the Nasdaq market, which strengthens the Nasdaq market as a whole. Accordingly, the Commission concludes that the OCF is reasonably designed to provide order entry firms, as well as market makers, ECNs, and UTP Exchanges, with prompt access that is not unfairly discriminatory to the current inside market in Nasdaq securities.[174] By facilitating the prompt and efficient execution of orders at the best available prices in Nasdaq, the OCF should strengthen the Nasdaq market, which will benefit market participants and investors.

2. Non-Marketable Limit Orders

As originally proposed, marketable limit orders entered into the SuperMontage that became unmarketable prior to execution would have been held in the queue for 90 seconds to enable the order to retain time priority should it become marketable again. One commenter opined that this treatment of limit orders would violate the Commission's Order Handling Rules.[175]

Under Amendment No. 8, non-directed orders entered by order-entry firms must be designated as immediate or cancel orders, while orders entered by Nasdaq Quoting Market Participants and UTP Exchanges may be designated as immediate or cancel. As a result, if an order-entry firm enters a marketable limit order that becomes unmarketable after entry into the system, Nasdaq will return the order (or the unexecuted portion thereof) to the entering party.[176] If a Nasdaq Quoting Market Participant or UTP Exchange enters a marketable limit order that becomes unmarketable after entry and is not designated immediate or cancel, the system will reformat the order and display it as a quote/order on behalf of the entering participant.

The Commission believes that the NASD's amendment addresses concerns about the SuperMontage retaining undisplayed orders in the system. Further, the Commission notes that the NASD must comply with the Order Handling Rules and the dissemination of bids and offers.

C. Quote Refresh and Revised SOESed-Out-of-the-Box Procedures

Under the proposed rule change, market makers can refresh size and price using the QR function if their quotes are decremented to zero. If a market maker uses QR, but has an attributable quote/order in the system that is priced at or better than the quote/order created by QR, Nasdaq will display the better-priced or equally-priced attributable quote/order in the system. If a market maker is not using QR and the market maker has given Nasdaq multiple attributable quotes/orders, Nasdaq will display the market maker's next best-priced attributable quote/order if its displayed quote/order has been decremented to zero. In addition, if a market maker's quote is closed for three minutes, and the market maker has failed to transmit a revised attributable quote/order, the market maker's quote will be automatically reopened at the lowest bid and highest offer currently being displayed for a normal unit of trading.

One commenter applauded the NASD's decision to reduce the time period that market makers have for updating their quotes from five to three minutes.[177] This commenter and another commenter, however, believed that the 3-minute grace period during which a quote could be closed was too long.[178] In addition, the commenter believed that the NASD's proposal to restore a quote after the three-minute grace period to the outside displayed quote/order was contrary to the NASD's policy on autoquotes reflected in NASD IM 4613.[179] Another commenter opined that there could be a large number of market makers that are not in the market as their size is decremented to zero, particularly during times of significant market volatility.[180]

The Commission believes that the QR function of the OCF, together with the reserve size refresh function, should help market makers maintain continuous, two-sided quotes and thereby facilitate market liquidity. In particular, the SuperMontage's automatic refreshing and reopening of the market maker's quote for a normal unit of trading (generally 100 shares) at the lowest bid and highest offer currently being displayed in that security should assist market makers in the management of their quotes and also ensure a market maker's continued participation in the market. Under the NASD's current rules, if a market maker fails to restore its quote in a security within five minutes after the quote is decremented to zero, then, subject to certain exceptions, that market maker is prohibited from re-entering its quote for 20 days. The current rule thus effectively eliminates the participation of market makers for 20 days (also known as being ''SOESed-out-of-the-box''). In contrast, the revised procedures should help to ensure the presence of liquidity providers in the market.

The Commission believes that Nasdaq has struck an appropriate balance by eliminating the SOESed-out-of-the-box penalty while adding features to assist market makers with their quote management, and by reducing the time that a quote may be in a closed state from five minutes to three minutes. The Commission fully expects, however, that the NASD will monitor the use of the system defaults by market makers to ensure that they do not become a surrogate for meaningful market making, and that the NASD will reevaluate the penalties against market makers for failure to properly maintain two-sided quotes if there is a decline in the overall quality of market making, particularly during market volatility.

D. Order Execution Algorithms

The originally proposed Order Execution Algorithm, described in the December 6, 1999 notice, distinguished between market makers and ECNs that participated in the automatic execution functionality of the system and ECNs that participated in the order delivery functionality of the system. Market participants that received automatic executions would have been given priority in the Order Execution Algorithm.

Six commenters criticized the NASD's proposed Order Execution Algorithm.[181] Three of these commenters specifically opposed the Order Execution Algorithm's prioritization of automatic execution

[174] Several ECNs believe that the automatic execution feature of the OCF, among other things, is anti-competitive. These comments are discussed in Section V.I, *infra*.

[175] *See* Archipelago Letter (citing Exchange Act Rule 11Ac1–1(b)(1)(i)).

[176] *See* Amendment No. 8, *supra* note.

[177] *See* ETA Letter.

[178] *See* ETA Letter and MSDW Letter.

[179] *See* ETA Letter. The Commission notes that NASD IM 4613 bans automated quote updates or tracking of *inside quotations* in Nasdaq subject to two exceptions. The Commission notes that the revised SOESed—Out-of-the-Box procedures are not related to the inside market.

[180] *See* Island Letter.

[181] *See* Bloomberg Letter; ACIM Letter; Merrill Lynch Letter; Instinet Letter; NexTrade Letter; and CHX Letter. One commenter believed that by ranking customer orders by the status of the delivering broker, the Order Execution Algorithm impedes efficient order interaction. *See* ACIM Letter.

participants (*i.e.*, market makers and ECNs that accept automatic executions) over order delivery participants.[182]

In response, the NASD amended the Order Execution Algorithm, eliminating the distinction between automatic execution participants and order delivery participants.[183] In lieu of this distinction, the NASD proposed to give ECNs that do not charge a separate quote access fee priority over those that do.[184] After receiving comments on this proposed change,[185] the NASD again revised the Order Execution Algorithm.[186]

In Amendment No. 7, the NASD proposed that the Order Execution Algorithm would execute non-directed orders, based on time priority, against: (1) The displayed quotes/orders (attributable and non-attributable) of market makers, ECNs that do not charge a separate quote access fee to non-subscribers, ECNs that charge a separate quote access fee to non-subscribers but indicate that the price improvement offered by their quote/order exceeds the separate quote access fee, and non-attributable quotes reflecting agency interest of a UTP Exchange; (2) displayed interest of ECNs that charge a separate quote access fee and do not indicate that the price improvement offered by their quote/order exceeds the separate quote access fee; (3) reserve size of market makers, ECNs that do not charge a separate quote access fee, and ECNs that indicate that the price improvement for their quote/order is in excess of their quote access fee (in size/time priority); (4) reserve size of ECNs that charge a separate quote access fee and do not indicate that the price improvement offered by the specific quote/order exceeds the separate quote access fee (in size/time priority); and (5) principal quotes of UTP Exchanges.[187]

In response to these changes, certain commenters again expressed objections to the Order Execution Algorithm.[188] Four commenters suggested that the Nasdaq system should be premised on strict price/time priority.[189] Another commenter suggested that the NASD replace the Order Execution Algorithm with a purely directed system, similar to SelectNet.[190] One commenter believed that access fees should not affect the determination of the BBO.[191]

In response to these commenters, in Amendment No. 8,[192] the NASD amended the proposal to give market participants that enter non-directed orders several options as to how their orders will interact with quotes/orders in Nasdaq: price/time; price/size/time; price/time that accounts for ECN access fees; and preferencing at the best price.[193] The SuperMontage will be programmed to default to the price/time priority algorithm for non-directed, non-preferenced orders. With all three algorithms for non-directed, non-preferenced orders, the system will make an exception for orders entered by a Nasdaq Quoting Market Participant when that Nasdaq Quoting Market Participant is at the inside market.[194]

One commenter supported the NASD's revision of the system's algorithms stating that generally ''market participants are better off when they can make informed choices.''[195] Another commenter also supported the NASD's elimination of the *per se* treatment of ECN order access fees.[196]

However, three commenters stated that giving participants a choice of algorithms was an unacceptable compromise because participants still would be offered an algorithm that discriminated against ECN orders.[197] Specifically, one commenter believed that it would be market makers, not investors, making this election, and that marker makers would put investors' orders entered on ECNs behind market makers to avoid interacting with ECNs.[198] Another commenter believed that the default algorithm, in part, provided ''a level of institutional and regulatory legitimacy to ECN access fees, even though the vast majority of market participants consider those fees invalid and have never had the opportunity to debate or challenge them.''[199] Two commenters also believed that investors' orders should be executed against first.[200] In addition, four commenters generally supported executions based on strict price/time priority.[201]

Seven commenters also objected to the addition of the price/size/time algorithm proposed in Amendment No. 8.[202] Two of these commenters stated that granting size priority ahead of time priority would negate the incentive for price improvement.[203] In addition, one of the commenters argued that the price/size/time algorithm would offer little, if any, benefit because, under the other two algorithms, participants would still have the ability to sweep through all orders at a given price level.[204] Further, this commenter noted that participants could utilize directed orders to send an order to a participant displaying greater size.[205] Another commenter believed that the price/size/time algorithm would handicap small retail traders that rely on limit orders to avoid the uncertain execution risk of market orders sold to wholesale trading interests.[206] One commenter stated that the price/size/time algorithm was an unacceptable effort to attract larger orders.[207]

As discussed in more detail below, the Commission finds that the Order Execution Algorithms are consistent with Section 15A(b)(6) of the Act[208] because they do not unfairly discriminate against customers, issuers, brokers or dealers. The Commission also finds that the algorithms are consistent with Section 11A of the Act[209] in that they promote the creation of a national

[182] *See* Instinet Letter; Bloomberg Letter; and NexTrade Letter. Instinet suggested that the inferior priority of order delivery participants will (1) impair the ability of participants to obtain best execution for their customers; and (2) improperly influence investors' choices of trading venues and inhibit the interaction of pools of liquidity.

[183] *See* Amendment No. 4, *supra* note 6.

[184] For a discussion of how ECNs are treated under the Order Execution Algorithms, *see* Section V.D.3, *infra*. One commenter expressed support for the Order Execution Algorithm's basic foundation, execution of orders based on price/time priority, stating that this would encourage competition. *See* Bannon Letter.

[185] These comments are discussed in detail in Section V.D.3.a, *infra*.

[186] *See* Amendment No. 7, *supra* note 10.

[187] *See* Amendment Nos. 4 and 7, *supra* notes 6 and 10. The SuperMontage would have initially executed non-directed orders of Nasdaq Quoting Market Participants against their own quotes/orders that are at the BBO.

[188] *See* BRUT Letter; Instinet Letter; ACIM Letter; Bradley Letter; Archipelago Letter; Phlx Letter; Scudder Kemper Letter; CFA Letter; and Bloomberg Letter. These comments are discussed in detail in Section V.D.3, *infra*.

[189] *See* ACIM Letter; Archipelago Letter; TRPA Letter; and Scudder Kemper Letter.

[190] *See* Archipelago Letter.

[191] *See* TRPA Letter.

[192] *See* Amendment No. 8, *supra* note .

[193] Market makers and ECNs will not lose time priority for updating trading interest to display greater size. Proposed NASD Rule 4707(a)(2).

[194] *See* Section V.D.2, *infra,* for a discussion of preferenced orders.

[195] *See* CHX Letter. *See also*, discussion at Section V.D.4 regarding the commenter's concerns regarding the treatment of UTP Exchanges.

[196] *See* ICI Letter. This commenter also supported maintaining time priority when a market participant increases its displayed size. *See also* CFA Letter (supporting price/time default algorithm).

[197] *See* CFA Letter; Investment Companies Letter; and NY Letter; *see also* Scudder Kemper Letter; Adriaanse Letter; and Silverman Letter.

[198] *See* Investment Companies Letter.

[199] *See* STA Letter; *see also* Pershing Letter.

[200] *See* Vanguard Letter and Instinet Letter.

[201] *See* Vanguard Letter; Security Investment Company Letters; ICI Letter; and NY Letter; *see also* Scudder Kemper Letter.

[202] *See* ICI Letter; ACIM Letter; Scudder Kemper Letter; Suss Letter; Birmingham Letter; Adriaanse Letter; and Vanguard Letter.

[203] *See* ICI Letter and Vanguard Letter. *See also* Adriaanse Letter.

[204] *See* ICI Letter; see also Vanguard Letter.

[205] *See* ICI Letter.

[206] *See* ACIM Letter.

[207] *See* Scudder Kemper Letter.

[208] 15 U.S.C. 78*o*-3(b)(6).

market system by helping to create the opportunity for more efficient and effective markets, maintain fair and orderly markets, and assure the economically efficient execution of securities transactions. Although none of the algorithms maintains pure price/time priority, they afford price/time priority to a wider range of orders than is currently available in Nasdaq.

The Commission believes that the NASD's decision to retain the algorithm that executes/delivers orders on a price/time priority basis, taking into account ECN quote access fees, as one of the algorithms offered, is acceptable. The Commission does not believe that the proposed algorithm unfairly discriminates against ECNs, particularly in light of the fact that participants may choose either of two other algorithms that do not consider ECN fees.[210] The choice rests with the participant entering an order. By offering three algorithms, participants may interact with the SuperMontage based on their preferences and priorities. For example, at least one ECN commenter argued prior to Amendment No. 8 that market participants frequently place greater importance on price improvement offered by ECNs than on the access fees they charge, and therefore, they prefer to interact with ECNs.[211] Thus, presumably, these market participants would use the SuperMontage's default algorithm based on price/time priority to interact with ECNs that offer price improvement. For the same reason, the Commission believes that the default algorithm is acceptable. Those market participants that elect to take into account ECN fees may do so under the price/time algorithm that takes into account ECN fees.

The Commission also concludes that the NASD's algorithm based on price/size/time priority is consistent with the statute. This algorithm will assist participants in quickly assessing liquidity in a dynamic trading environment, while rewarding liquidity providers, particularly in a decimals environment where liquidity may be spread over a greater number of trading increments. The Commission acknowledges concerns raised by commenters that the choice of algorithms lessens the importance of time priority, and thus may provide less incentive to aggressively enter better-priced quotes. However, as stated above, the three algorithms proposed by the NASD afford greater price/time priority than currently exists in the market.

The Commission notes that today most orders in Nasdaq securities are executed directly between Nasdaq participants, not using Nasdaq systems. No price/time priority rules apply to this trading, other than a market maker's duty to protect its customer limit orders before trading as principal. While price priority is generally honored as a market principle in executing orders outside of Nasdaq's systems, time priority is not accorded to quotes in this trading. Even after SuperMontage is implemented, many orders probably will be executed outside of SuperMontage free from time priorities.

The Commission does not believe that entering orders into the SuperMontage should be mandated. Therefore, requiring time priority within SuperMontage runs the risk of reducing market participants' willingness to enter orders into SuperMontage, undermining its effectiveness. For this reason, the Commission believes that providing the choice of a price/size/time priority algorithm is a statutorily-permissible balance between encouraging liquidity, accommodating the preferences of market participants, and maintaining time priority. Furthermore, while this algorithm may reduce the incentive to be the first with the better price, it may encourage a Nasdaq Quoting Market Participant to display greater size. By providing this choice of algorithms, SuperMontage will allow broker/dealers to manage their orders in SuperMontage to obtain the best execution as they would in the dealer market where time priority does not apply, while still increasing order interaction within SuperMontage. The Commission also believes that the choice of algorithms could promote greater competition and innovation among market centers and market participants.

1. Matching Against a Participant's Own Quote/Order at the BBO

All three Order Execution Algorithms first match orders entered by a Nasdaq Quoting Market Participant against its own quote/order on the other side of the market if the Nasdaq Quoting Market Participant is at the BBO. Several commenters expressed support for this internalization feature of the Order Execution Algorithm.[212] The commenters believed that matching a market participant's order against the market participant's quote/order if the market participant is at the BBO will enable market participants to better manage their order flow while at the same time providing customers with best execution.[213] Without the internalization feature, one commenter wrote, ''the [proposed Nasdaq] system begins to look like a central limit order book [''CLOB''],'' which the commenter opposed.[214]

Five commenters, however, questioned or opposed the proposal's internal matching provision.[215] One of these commenters opined that the internalization of orders could impede access to liquidity and price discovery for market participants, especially if a significant amount of a particular security's daily volume is internalized.[216] Two commenters stated that market makers receiving directed orders should be under an affirmative obligation to seek price improvement.[217] One of the two commenters also stated that the internalization function provided a disincentive for market makers to price improve.[218] This commenter suggested that the internalization function, combined with the inferior priority of ECNs that charge separate access fees, would reduce market maker incentives to better the national BBO.[219] Another commenter expressed strong opposition to the internalization function of the SuperMontage, arguing that it was an example of the proposal's bias towards market maker interests.[220]

The Commission recognizes that, today, trading interest in the Nasdaq market is largely divided among different market centers. It is primarily a dealer market, in which multiple market makers compete for order flow based on a variety of factors, including internalization and payment for order flow arrangements.[221] Under these arrangements, orders are routed to a particular market maker that has an opportunity to execute the orders as principal without facing significant competition from investors or other

[210] *See* discussion in Section V.D.3.a, *infra.*

[211] *See* Instinet Letter.

[212] *See* STA Letter; MSDW Letter; and STANY Letter.

[213] *See* STA Letter; MSDW Letter; and STANY Letter.

[214] *See* STANY Letter.

[215] *See* ICI Letter; Instinet Letter; CFA Letter; Bloomberg Letter; and ACIM Letter.

[216] *See* ICI Letter; *see also* Scudder Kemper Letter.

[217] *See* ACIM Letter; and CFA Letter.

[218] *See* ACIM Letter; *see also* Scudder Kemper Letter.

[219] *See* ACIM Letter; *see also* Bradley Letter.

[220] *See* Instinet Letter; *see also* Bloomberg Letter and Bradley Letter.

[221] *See* Securities Exchange Act Release No. 42450 (February 23, 2000), 65 FR 10577 (February 28, 2000). In September 1999, for example, there was an average of 11.4 market makers per Nasdaq issue. NASD, <http://www.marketdata.nasdaq.com> (visited December 11, 1999). There was an average of 47.5 market makers in the top 1% of issues by daily dollar trading volume, 24.0 market makers in the next 9% of issues, and 4.9 market makers in the bottom 10% of issues. *Id.*

dealers who may wish to interact with the directed order flow. Thus, presently, market makers internalize order flow without ever providing access to any other market participants publicly displaying their quotes/orders.[222] It is unlikely that market makers will enter customer market orders into SuperMontage rather than simply internalizing them directly. Still, the internal matching function attempts to encourage market makers to enter these orders into SuperMontage where superior quotes would have some chance of interacting with them. The Commission believes that the SuperMontage's internalization feature is a reasonable attempt to encourage Nasdaq Quoting Market Participants to include their customer orders in a system that will provide greater transparency and accessibility to other participants, and could lead to a more transparent and seamless integration of internalizing market makers with the rest of the marketplace.

The Commission reiterates, however, that its approval of this aspect of the proposal is based on the structure of the existing dealer market and the voluntary nature of the SuperMontage. The Commission also reiterates its long-standing position that, while a broker does not necessarily violate its duty of best execution by internalizing its agency orders, the duty also is not necessarily satisfied by routing orders to a market center that merely guarantees an execution at the national BBO without taking into account the possibility of price improvement.[223]

2. Preferenced Orders

Prior to Amendment No. 8, one commenter recommended bringing back preferencing, arguing that it would separate quotation collection and accessing technologies, because ''market participants would be able to respond to quotations in the market place without placing their orders in the SuperMontage ECN order book. Accordingly, participation in the SuperMontage could then more appropriately be said to be voluntary.'' [224]

In response to the commenter, the NASD amended the proposal to include a new class of order called a preferenced order.[225] The NASD proposed two possible approaches to preferenced orders: preferenced orders with no price restrictions (Alternative A) and preferenced orders only at the best price (Alternative B).

Two commenters supported Alternative A, because it would provide flexibility.[226] Another commenter, who did not specifically support Alternative A, opposed the adoption of Alternative B because it would constitute a first step in transforming the SuperMontage into a CLOB.[227] However, other commenters disagreed, claiming, for example, that allowing market makers to preference orders away from the BBO would give them the ability to trade with each other and ignore better-priced quotes/orders offered by other participants.[228] The NASD responded by withdrawing Alternative A.[229]

Under the current proposal, a market participant entering a preferenced order must designate by MMID the Nasdaq Quoting Market Participant or UTP Exchange against which the order is to be executed or delivered. The preferenced order will be entered into the non-directed order process, and will be considered a Liability Order. Preferenced orders will be processed in the same queue as non-directed orders. Additionally, like non-directed orders, a preferenced order will be delivered as an order to an ECN or UTP Exchange that does not participate in the automatic execution functionality of the system, or will be delivered as an execution against market makers as well as ECNs or UTP Exchanges that choose to accept automatic executions.

When a preferenced order is next to be executed within the non-directed order queue, the preferenced order will be executed (or delivered for execution) against the preferenced Nasdaq Quoting Market Participant or UTP Exchange to which the order is being directed only if the Nasdaq Quoting Market Participant or UTP exchange is at the BBO up to the displayed and reserve size. If the preferenced Nasdaq Quoting Market Participant or UTP Exchange is not at the BBO when the preferenced order is next to be executed or delivered, the preferenced order will be returned to the entering participant. Thus, under this approach, preferenced orders only will be executed at the BBO, and only if the preferenced Nasdaq Quoting Market Participant or UTP Exchange is quoting at the BBO at the time of execution or delivery.

Several commenters objected to the addition of preferenced orders.[230] Two commenters believed that market makers will use preferenced orders to avoid order routing priorities (such as price/time) in Nasdaq.[231] Two commenters believed that because preferenced orders will allow market participants to trade around price-setting orders, broker/dealers will be able to enter into payment for order flow agreements more easily.[232] Another commenter also argued that because preferenced orders will diminish price/time priority, fewer investors will enter limit orders into the SuperMontage, thus decreasing liquidity in the system.[233]

The Commission notes, first, that the preferencing feature allows any market participant to designate those market participants with whom it wishes to transact on a Liability Order basis,[234] while ensuring that its customers receive executions at the BBO. Second, preferenced orders allow ECNs, UTP Exchanges, and market makers to accept Liability Orders designated for them without incurring double liability since these orders will be processed in the non-directed order queue. This may encourage market participants to display larger size quotations and thereby increase liquidity in the market. Third, the Commission notes that this is just one of the delivery options available to market participants and that market participants also may send directed orders, non-directed non-preferenced orders, and orders outside the SuperMontage (via private links) using, in part, data from NQDS Prime.

The Commission also notes that preferenced orders will not duplicate the features offered by directed orders. These orders differ significantly. Directed orders will always be delivered for a response (*e.g.,* accept or decline), as opposed to an automatic execution, and directed orders will not decrement a quote. Preferenced orders, on the other hand, will be Liability Orders processed

[222] According to the NASD, only 26% of the share volume and 36% of trades in Nasdaq are executed using SOES or SelectNet. *See* e-mail to William Atkinson, Office of Economic Analysis, Commission, from Michael Edleson, Senior Vice President, Chief Economist, NASD, dated August 18, 2000.

[223] *See* Securities Exchange Act Release No. 42450 at notes 48 and 49 and accompanying text, *supra* note 221; *see also* Securities Exchange Act Release No. 35751 (May 22, 1995), 60 FR 27997 (May 26, 1995) (''Manning II'') (prohibiting market makers from trading ahead of their customer limit orders in Nasdaq securities).

[224] *See* Bloomberg Letter.

[225] *See* Amendment No. 8, *supra* note 12.

[226] *See* CHX Letter and STA Letter.

[227] *See* Bloomberg Letter.

[228] *See* Instinet Letter; ACIM Letter; CSE Letter; Scudder Kemper Letter; and NY Letter.

[229] *See* Amendment No. 9, *supra* note 14.

[230] *See* Instinet Letter; NY Letter; CFA Letter; ICI Letter; Investment Companies Letter; ACIM Letter; Birmingham Letter; Adriaanse Letter; and Vanguard Letter.

[231] *See* Instinet Letter; NY Letter; *see also* Investment Companies Letter; Adriaanse Letter; and Vanguard Letter.

[232] *See* CFA Letter and ICI Letter.

[233] *See* Vanguard Letter.

[234] The Commission notes that a Nasdaq Quoting Market Participant or UTP Exchange may elect not to take a directed order on a Liability Order basis. *See* Proposed NASD Rule 4710(c).

in time sequence (like non-directed orders), will be delivered to the quote/order, or will be automatically executed against the quote/order of a market participant, and will decrement the size of a quote/order. Based on these differences, the Commission believes that directed orders and preferenced orders will provide participants with distinct features from which they may choose, depending on their needs.

It is highly unlikely that orders subject to payment for order flow will be preferenced through SuperMontage rather than routed directly to market makers. Still, those orders that are preferenced will not freely interact with limit orders and quotes in SuperMontage, and so will not encourage aggressive quoting in SuperMontage, as noted by commenters. But, here again, SuperMontage will be a voluntary system operating in a market with no general time priority. Orders that might be preferenced within SuperMontage could also be routed directly to market makers and ECNs outside of SuperMontage. Nasdaq evidently determined that preferenced orders otherwise would simply be executed outside of SuperMontage, and chose to accommodate them within SuperMontage.

The proposal now requires the recipient of the preferenced order to be quoting at the BBO, which encourages Nasdaq Quoting Market Participants or UTP Exchanges to at least quote as well as the best quote to receive these orders. Thus, the requirement encourages better quotes from these participants.

In all, while the Commission recognizes that preferenced orders do not create as strong incentives to quote aggressively in SuperMontage as would strict time priority, there is substantial doubt whether these orders would be entered in SuperMontage at all without the preferencing feature. And, by preferencing these orders through SuperMontage, order entry firms can provide special handling to difficult orders while encouraging recipients to maintain competitive quotes. The Commission's approval of this aspect of the Order Execution Algorithms is predicated on the context of the existing dealer market.

3. ECNs

a. Order Execution Algorithms

In Amendment No. 4, the NASD amended the original Order Execution Algorithm to give market makers [235] and ECNs that do not charge separate quote access fees priority over ECNs that charge separate access fees.[236] The NASD stated that this prioritization was consistent with the practice of many market participants to route their orders to market makers that do not charge a fee before routing to ECNs that do, in order to ensure that they incur the lowest possible trading costs consistent with best execution principles.[237]

Six commenters addressed this change to the proposal.[238] Two commenters agreed with the NASD that it is appropriate to give the orders of ECNs that do not charge fees priority over those that do because the ECNs that charge fees provide an inferior execution price.[239] One of these commenters stated that, ''by definition, ECNs that are charging access fees should lose their standing as their order is effectively an inferior price.''[240] An earlier commenter on the original proposal also suggested that any access fees charged by ECNs should be reflected in their displayed quote so that other market participants could make informed order routing and best execution decisions.[241]

Four commenters, however, objected to the priority rules and disagreed with the NASD's rationale.[242] Instinet, for example, argued that ECNs frequently offer a better price than market makers at the national BBO, even after access fees have been deducted from the execution price.[243] Instinet believed that the Order Execution Algorithm would result in an anti-competitive trading environment because it was based on the false assumption that ECNs that charge fees provide inferior executions, and because the Nasdaq system has no mechanism to identify an ECN's true price. Instinet also stated that market participants appear to place greater importance on price improvement opportunities than on ECN access fees. In addition, Instinet asserted that the amended Order Execution Algorithm failed to take into account the general negative impact on best execution and the diminished opportunities for price improvement that would result from giving ECNs that charge order access fees inferior priority. Similarly, Island argued that it was inconsistent for the NASD to claim, on one hand, that ''the de minimus access fee that ECNs typically charge warrants consideration under the principles of best execution,'' while on the other hand refusing to acknowledge the price improvement, however small, that ECNs generate for investors by providing a rounding indicator of ECN quotations that better the inside market.[244]

In response, the NASD revised the Order Execution Algorithm to allow an ECN to offset the price improvement for the particular quote/order against the access fee for purposes of determining price priority. Where price improvement exceeds the fee charged to non-subscribers, the ECN quote would be on parity with the quotes/orders of market makers, ECNs that do not charge a separate fee, and the non-attributable agency quotes/orders of UTP Exchanges.[245] The NASD also represented that if, in the decimals environment, ECNs change the manner in which they charge fees and develop the capability to reflect access fees in their published quotes, the NASD would give these ECNs the same priority for non-directed orders as market maker quotes/orders and non-attributable agency quotes/orders of UTP Exchanges.[246] Further, the NASD committed to re-examine the Order Execution Algorithm if, after decimals are implemented, Nasdaq quotation increments are finer than one penny. Should this occur, the NASD would determine whether it is prudent and feasible to rank orders based on quotation increments of less than one penny.[247]

Several commenters expressed objections to Amendment No. 7 as it pertained to ECN fees.[248] Specifically, one commenter stated that the algorithm was based on the assumption that access fees affect a dealer's decision to hit a bid or take an offer.[249] This commenter pointed out that dealer bids often ''remain at a specific price while a market maker sells stock at the same price in the ECNs, accepting their fee. The dealers have the opportunity to trade net but choose the liquidity and

[235] Market makers are prohibited from charging access fees under the Firm Quote Rule. *See* Exchange Act Rule 11Ac1–1.

[236] The NASD's original proposal gave priority to participants that accepted automatic execution over those that accepted order delivery. In response to commenters, in Amendment Nos. 3 and 4, the NASD amended the Order Execution Algorithm. One commenter stated that the amended Order Execution Algorithm offered ''some improvement,'' but it was still discriminatory because UTP Exchanges would be executed behind market makers. *See* Bloomberg Letter.

[237] *See* Amendment No. 4, *supra* note 6.

[238] *See* CHX Letter; Bannon Letter; Instinet Letter; Archipelago Letter; Bloomberg Letter; and Island Letter.

[239] *See* CHX Letter and Bannon Letter.

[240] *See* Bannon Letter.

[241] *See* ITG Letter.

[242] *See* Instinet Letter; Bloomberg Letter; Archipelago Letter; and Island Letter.

[243] *See* Instinet Letter.

[244] *See* Island Letter.

[245] *See* Amendment No. 7, *supra* note 10.

[246] *See* Amendment No. 6, *supra* note 9.

[247] *Id.*

[248] *See* Instinet Letter, ACIM Letter, BRUT Letter; Scudder Kemper Letter; Bradley Letter; Archipelago Letter; CFA Letter; and Bloomberg Letter.

[249] *See* Scudder Kemper Letter.

anonymity of the ECNs instead in exchange for the fee.'' [250]

Various commenters suggested that the Order Execution Algorithm was unfairly discriminatory. For instance, one commenter stated that the revised algorithm was discriminatory since the only fees included were ECN fees.[251] The commenter believed that the need for this treatment was unsubstantiated.[252] Another commenter objected to the manner in which the NASD proposed to determine whether an ECN offered price improvement net of its access fee, and therefore could be treated on par with market makers.[253] This commenter stated that the proposed algorithm will use an ECN's net price when the ECN's gross price is equivalent to, and the net price is inferior to, other orders displayed in Nasdaq, but will use an ECN's gross price when the gross price is equivalent to, and the net price is superior to, all other orders in Nasdaq.[254]

Two commenters suggested that the proposed amendment would negatively affect price competition and result in wider spreads. In particular, the commenters noted that market makers would have no incentive to provide price improvement at the national BBO.[255] One commenter stated that ECNs should be given top priority if their orders, when factoring in price improvement, represent the best bid or offer, and that all limit orders should be processed in strict price/time priority without regard to ECN access fees.[256] Another commenter also objected to providing ECNs with execution parity only when their price improvement exceeds their fee.[257]

One commenter suggested that the proposal would ''unwind the SEC's order-handling rules by pushing a significant majority of ECNs to the back of Nasdaq's priority queues despite a record of publishing the market's best prices with far greater frequency than Nasdaq market makers.'' [258] Another commenter stated that the proposal to have ECNs report price improvement within their quote is ''unrealistic'' in a ''dynamic order environment.'' [259] This commenter also believed that if Nasdaq ''is to become a for-profit central execution center, it is inappropriate for Nasdaq to impose any methodology of prioritization within the system on factors other than displayed price.'' [260]

One commenter also questioned the NASD's rationale for the need of the algorithm.[261] The commenter opined that firms, not investors, pay the access fees charged by ECNs and, therefore, it is not true that individuals who execute a particular trade on an ECN that charges an access fee automatically receive a clearly inferior price.[262] In addition, the commenter believed that, as a result of rounding, even in a decimals environment, investors may be denied access to a better price.[263]

In addition, four commenters believed that the algorithm unfairly penalized order delivery ECNs that enter an order at one quantity and then increase size to add an additional quantity to reflect one or more customer limit orders.[264] Specifically, two of these commenters believed that ECNs were treated unfairly under the algorithm if they either reduced the order size or placed or changed an order on the other side of the market for the security.[265] The commenters believed that, under the current algorithm, the changes would take away a market maker's or ECN's established time priority.[266]

In response to commenters, the NASD amended the Order Execution Algorithm to provide three alternative Order Execution Algorithms for accessing quotes/orders in the SuperMontage. These alternatives are based on price/time priority, price/time priority considering quote access fees, and price/size/time priority. Further, the NASD amended the proposal to give parity to ECNs that charge quote access fees when the price improvement on a particular quote/order at least equals the fee under the price/time priority option that takes ECN fees into account. In addition, the NASD responded to commenters by protecting the time priority of Nasdaq Quoting Market Participants that change their displayed trading interest by increasing displayed size.[267] As amended, the system will maintain the original time stamp for the original quantity and assign a separate time stamp for the augmentation, thus protecting the time priority of the originally entered quantity. Subsequent non-execution decreases in size will be deducted from individually stamped components in reverse time priority (*i.e.,* the last entered size component will be exhausted first).

One commenter complained that the revised Order Execution Algorithms fail to provide a real choice, since market makers will ''inevitably choose the algorithm that allows them to avoid interacting with investor orders on ECNs as ECNs charge access fees.'' [268] Another commenter questioned the NASD's justification for taking into account ECN fees under the theory of ''best execution.'' [269] This commenter believed that the Commission's approval of this theory ''suggests that brokers must now consider market access fees charged to brokers in connection with their order routing decisions[,]'' including payment for order flow.[270] Further, this commenter noted that the algorithm fails to ''give greater priority to ECN orders that offer 'net' price improvement (after taking into account access fees) over other orders displayed at the same price. * * * and fails to distinguish between ECNs that charge different access fees.'' [271] Five commenters also believed that the algorithms fail to protect the standing of investor orders displayed on Nasdaq through ECNs.[272]

The Commission concludes that the Order Execution Algorithms and time priority protection for size increases are consistent with Section 15A(b)(6) of the Act [273] in that they remove impediments to and perfect the mechanism of a free and open market. These alternatives will give market participants greater flexibility in determining how their orders will be executed based on individual preferences and priorities and should provide broker/dealers with greater opportunities to take into account known fees and possible price improvement in choosing how to obtain the best execution for an order. If ECNs in fact offer better prices than the quote, even after taking into account their fees, then order entry firms may choose the algorithm that ignores ECN fees, or preference them directly. If ECN fees predominate over their price improvement, order entry firms likely will choose the algorithm that takes ECN fees into account. This is especially

[250] *See* Scudder Kemper Letter.

[251] *See* Bloomberg Letter.

[252] *See* Bloomberg Letter.

[253] *See* Archipelago Letter.

[254] *See* Archipelago Letter (see examples provided in footnote 11).

[255] *See* Instinet Letter and ACIM Letter.

[256] *See* Instinet Letter.

[257] *See* BRUT Letter.

[258] *See* ACIM Letter.

[259] *See* BRUT Letter.

[260] *See* BRUT Letter.

[261] *See* CFA Letter.

[262] *See* CFA Letter.

[263] *See* CFA Letter.

[264] *See* Bloomberg Letter; Instinet Letter; Scudder Kemper Letter; and TRPA Letter.

[265] *See* Bloomberg Letter and Instinet Letter.

[266] *See* Bloomberg Letter and Instinet Letter.

[267] *See* Amendment No. 8, *supra* note 12. Under the prior proposal, if a market participant chose to give Nasdaq a quote instead of *order* detail, the market participant would have lost time priority to its quote when it added to size. At least one commenter supported this change. *See* STA Letter.

[268] *See* Instinet Letter; *see also* CFA Letter and NY Letter.

[269] *See* Island Letter.

[270] *See* Island Letter.

[271] *See* Island Letter; *see also* CFA Letter.

[272] *See* Instinet Letter; Suss Letter; Birmingham Letter; and Adriaanse Letter; and CFA Letter.

[273] 15 U.S.C. 78*o*(b)(6).

true given that the orders most likely to be routed through SuperMontage will be on behalf of the market makers themselves or institutional or sophisticated traders that can well judge whether ECN price improvement is likely to exceed ECN fees. In addition, the Commission believes that the alternative Order Execution Algorithms will provide an incentive for Nasdaq Quoting Market Participants and UTP Exchanges to display greater size and to provide price improvement to attract greater order flow under each of the possible execution alternatives.

With respect to the price/time algorithm that takes ECN fees into account, the Commission finds that it is reasonable for Nasdaq to give priority to the interest of market makers and ECNs that do not charge fees over the interest of ECNs that charge separate access fees because the quotes/orders of non-charging market makers and ECNs are equivalent at the displayed price. The quote/order of an ECN that charges a separate fee, on the other hand, typically is not comparable to the quote/order of a market maker or a non-charging ECN because it may actually result in an inferior execution price after the fee is added. In other words, when a broker-dealer accesses a market maker quote, the broker-dealer knows that it will pay exactly the amount displayed because market makers do not charge fees in addition to their quotes.[274] If a broker-dealer accesses a quote/order of an ECN that charges a separate fee, however, the broker-dealer may be charged a fee of up to 1.5 cents per share in addition to the quoted price, which may be passed along to its customer. This per-share fee may add significantly to the costs of trading with that ECN. The price/time algorithm that takes ECN access fees into account is a reasonable attempt to allow market participants to access the quote of an entity that does not charge fees before directing their orders to an ECN that charges fees.[275]

The Commission notes, however, that today some ECNs allow finer quoting increments than Nasdaq and therefore, on occasion, may offer internal prices that are better than the prices displayed in Nasdaq, notwithstanding their fee.[276] However, until such time as SuperMontage uses quoting increments that are small enough to reflect all potential ECN fees and price improvement alternatives, it is not possible to reflect the actual net price in the quote. Thus, it is necessary for a market participant to consider *probabilities* in evaluating an ECN's quote. If the ECN charges a fee, that fee is a *certainty* in each trade to be weighed against a *possibility* of offsetting price improvement. It is reasonable for the NASD to take the certainty, but not the possibility, into account by providing an algorithm that reflects ECN fees.

Furthermore, within that algorithm, the NASD also recognizes that it is possible for an ECN's real price to be at least as good as the price displayed in Nasdaq even after its fee has been subtracted, if the price improvement offered by the ECN's internal price (as opposed to its rounded displayed price on Nasdaq) is equal to or greater than its fee. As described above, the NASD has amended the algorithm to allow a fee charging ECN to indicate that the price improvement equals or exceeds the fee for a particular quote/order. Those quotes/orders will be given the same priority as the quotes/orders of market makers and ECNs that do not charge separate quote access fees. As a result of this change, the Commission believes that the price/time algorithm that accounts for ECN fees does not discriminate unfairly against any Nasdaq market participant.[277] The algorithm treats quotes/orders that are comparable equally; only those quotes/orders that have a separate fee that exceeds the price improvement will have lower priority within the system (with the exception of UTP Exchange principal quotes, which are discussed below).

In addition, the NASD has committed to work with ECNs to develop the capability to reflect access fees in their published quotes. If fees are reflected in the quote, they will be ranked equally with those quotes/orders without fees based on price. For example, if ECN1 represents a quote/order to buy at $20.00, and charges a fee of $.01 per share, it would enter a bid of $19.99, which would be ranked in time priority with other bids of $19.99 entered by market makers, ECNs that do not charge a separate fee, and agency interest of UTP Exchanges.

The Commission notes that while quotes/orders generally will be comparable if fees are displayed in the quote, an ECN quote, on occasion, still may not reflect the true ECN price because the quote will have to be rounded if the fee combined with the quote is not at a whole penny increment.[278] However, the NASD has represented that it will re-examine the algorithm if, after decimals are implemented, quotations are in increments smaller than one penny. Should this occur, the NASD will determine whether it is prudent and feasible to rank orders based on quotation increments of less than one penny.[279]

For these reasons, the Commission finds that the price/time algorithm taking ECN fees into account is consistent with Section 15A(b)(6) of the Act,[280] which requires that the rules of the association not be designed to permit unfair discrimination between brokers or dealers. For the same reasons, the Commission believes that it is appropriate for the reserve size of non-charging ECNs to have priority over the reserve size of ECNs that charge a separate fee.

b. Time Restrictions on the Order Delivery Feature

Under the original proposal, if a quote/order was routed to an order delivery ECN and the ECN failed to respond within five seconds of order delivery,[281] Nasdaq would immediately route the quote/order to the next Nasdaq Quoting Market Participant or UTP Exchange in the queue.

Two commenters argued that this aspect of the proposal would expose ECNs to significant financial risk because, in the event of Nasdaq system problems, ECNs might not be able to

[274] Moreover, trades in ITS between markets are not subject to market fees, even though these markets charge fees to their members for executing trades on that market. *See* Securities Exchange Act Release No. 42536 (March 16, 2000), 65 FR 15401 (March 22, 2000).

[275] While, today, ECN fees are small in relation to the existing quotation increment of 1/16, with the coming of decimal pricing the significance of ECN fees in comparison to the minimum quotation increment could become much greater.

[276] Currently, ECN public quotes are rounded away to the next 1/16th price when the ECN's best internal price is at a fraction smaller than 1/16th (the current minimum Nasdaq quote increment).

[277] Even if the SuperMontage were to include an identifier flagging ECN price improvement, as some commenters suggest, the *amount* of that price improvement would remain unknown, and could in fact be trivial, whereas the fee charged is known to a participant.

[278] In a decimals environment, Nasdaq's minimum quoting increment may be a penny.

[279] The Commission notes that quoting in subpennies raises other issues, such as capacity and trading issues, not related to the SuperMontage. These issues will need to be addressed marketwide. *See* Securities Exchange Act Release No. 42914 (June 8, 2000), 65 FR 38010 (June 19, 2000) (ordering the implementation of decimal pricing). In the Commission's order requiring the implementation of decimals, the Commission called for a study regarding the impact of decimal pricing on systems capacity, liquidity, and trading behavior, including an analysis of whether there should be a uniform minimum increment for a security.

[280] 15 U.S.C. 78*o*–3(b)(6).

[281] Nasdaq subsequently clarified that it will add two seconds for ''processing time,'' and therefore, the time to respond would actually be seven seconds. *See* letter from Richard G. Ketchum, President, NASD, to Annette Nazareth, Director, Division, Commission, dated July 18, 2000.

confirm the execution of a trade before Nasdaq automatically re-routed the order to the next Nasdaq Quoting Market Participant in the queue, and in turn would be required to assume the risk of filling a customer's trade.[282] One commenter recommended that the NASD give ECNs at least ten seconds to respond to incoming orders.[283] Another commenter opined that the NASD should not be able to ''[d]eclare itself non-liable for errors and losses caused by Nasdaq technology failures * * * that can shift business risk to market participants. * * *''[284] To avoid punishing ECNs when the failure is Nasdaq's, one commenter proposed canceling orders if it is clear from the ECN's response that the time elapsed between the ECN's actual receipt and response exceeds a mandated minimum.[285]

In response to these comments, the NASD altered its approach to monitoring order-delivery ECN responsiveness. First, in Amendment No. 8, Nasdaq established a 30-second (as opposed to 7-second) maximum time period for an ECN to respond to any given order.[286] That is, if an ECN fails to respond within 30 seconds of the time a particular order is dispatched from the Nasdaq system to the ECN, Nasdaq will withdraw the order and ''zero out'' the affected side of the unresponsive ECN's quote until the ECN transmits a revised attributable quote/order.

Second, the NASD proposed a shorter uniform turn-around time of a maximum of 5 seconds. The purpose is to establish a general standard (as opposed to an order-by-order standard) that measures whether an ECN is providing an automated response in a time period that ensures market quality. If an ECN regularly fails to meet the five-second response time over a period of orders, Nasdaq will place that ECN's quote in a closed-quote state. The closed-quote state will be lifted when the ECN can certify that it can meet the five-second response time requirement.

One commenter believed that the 30-second maximum response time was reasonable and balances the competing interests of avoiding dual liability and providing an efficient trading system.[287] However, one commenter objected to the 30-second response time.[288] This commenter believed that 30 seconds was too long in today's volatile, fast-paced market. Another commenter, however, expressed significant reservations about the 5-second response time standard for ECNs.[289] The commenter questioned how a determination would be made that an ECN ''regularly'' failed to meet the 5-second response time over a period of orders. The commenter recommended that a neutral body, such as the Commission, make this determination using objective criteria.

The Commission believes that the NASD has responded reasonably to the concerns of the commenters that systems delays may expose them to an unacceptable degree of risk by incorporating several suggestions made by commenters, such as increasing the ECN response time and incorporating a second 5-second measurement based on an ECN's actual receipt time. While the Commission understands the concerns raised by one commenter regarding the 5-second response time measurement, the Commission notes that ECNs are required to provide an immediate automated response to SelectNet messages, and, in Nasdaq's experience, ECNs generally respond in far less than 5 seconds to orders presented to their quotes.[290] Therefore, the Commission believes that this is a reasonable time in which to expect ECNs to respond to orders on a regular basis. In addition, an earlier ECN commenter on the proposal, prior to Amendment No. 8, stated that a 5-second response time for order delivery ECNs should be more than adequate under normal circumstances.[291] Further, the Commission believes that a certain level of discretion in determining whether an ECN regularly meets this standard is necessary to maintain a flexible standard that can accommodate delays that may result from a variety of circumstances. Also, the Commission notes that Nasdaq will lift the closed-quote state of an ECN failing this standard when the ECN (not Nasdaq) certifies that it can meet the 5-second standard.

The Commission believes that the 5-second parameter should ensure that overall response times remain prompt, while still accommodating order delivery ECNs on individual orders with a 30-second response time. The Commission believes that the provisions made by the NASD to permit ECNs to control the risk of errors are reasonable and ECNs should be able to protect themselves adequately under normal operating conditions. The Commission expects, however, that during the implementation period the NASD will carefully monitor its systems to determine whether the 30-second and 5-second response times should be modified.

c. ECN's Automatic Execution Function

Under the proposal, ECNs will have the option to receive automatic executions or to receive delivered orders to which they will respond. Regardless of the method of participation, ECNs will have full access to the SuperMontage for order entry and order delivery. The SuperMontage also will have a ''request a cancel'' feature.[292] For example, under this proposal, if an internal subscriber of an ECN that accepts automatic executions wants to access an order in the ECN that also is being displayed in Nasdaq, the ECN could request a cancel before effecting the internal match. If the request is declined because the order already is executed in Nasdaq, the ECN could decline its internal customer's order to avoid dual liability.[293] Alternatively, the ECN could choose to take only order delivery.

Three commenters believed that ECNs should be required to participate in the automatic execution functionality instead of having an option to participate as order delivery ECNs.[294] Two of these commenters believed that the ''request a cancel'' functionality would minimize the potential of double executions against ECNs, and eliminate any valid reason for such a distinction between market makers and ECNs.[295] One of these commenters believed that ECNs, with certain modifications, could operate within their current business models in an automatic execution environment.[296] The commenter believed that automatic executions are essential to ensure that market participants meet their firm quote rule obligations.[297] The commenter also suggested that if certain market participants accepted order delivery

[282] *See* Instinet Letter and Bloomberg Letter.

[283] *See* Instinet Letter.

[284] *See* ACIM Letter.

[285] *See* Bloomberg Letter.

[286] *See* Amendment No. 8, *supra* note 12.

[287] *See* CHX Letter.

[288] *See* STA Letter.

[289] *See* Instinet Letter.

[290] *See* Securities Exchange Act Release No. 42847 (May 26, 2000), 65 FR 35690 (June 5, 2000) (noticing a proposed rule change by the NASD to include UTP Exchanges in the NNMS).

[291] *See* Island Letter.

[292] In SuperMontage, an order that has exited the Nasdaq system and is en route to an ECN or UTP Exchange cannot be canceled. Thus, if a market participant requests to cancel an order, the system will hold the cancel request until the ECN or UTP Exchange completes interacting with the delivered order (*i.e.*, the ECN or UTP Exchange executes, partially executes, or declines the order) or fails to respond within the allowable time.

[293] *See* Amendment No. 5, *supra* note 8.

[294] *See* Merrill Lynch Letter; MSDW Letter; and Goldman Sachs.

[295] *See* Goldman Sachs Letter; and MSDW Letter.

[296] *See* Merrill Lynch Letter.

[297] *See* Merrill Lynch Letter.

while market makers were required to participate with automatic executions, market makers would have to develop dual systems.[298]

Two commenters opined that automatic execution ECNs could be exposed to dual liability if Nasdaq execution messages arrived after matches were executed within the ECN.[299] Another commenter stated that the ''request a cancel'' function would cause significant execution delays thereby undermining the competitiveness of ECNs by eliminating one of the principal benefits offered by agency brokers—speed of execution.[300]

The Commission agrees with the NASD's position that it is necessary to accommodate the different trading models of all participants in the SuperMontage. In order to accommodate ECNs, the NASD has chosen to provide them an alternative to automatic execution: order delivery. The Commission believes that given the different business models of ECNs, it is not inconsistent with the statute to provide them with this alternative to automatic execution.

With regard to the commenters' concerns that ECNs may be subject to dual liability under automated execution, the Commission notes that ECNs may limit their risk of dual liability by not accepting automatic executions. Further, even if ECNs choose to accept automatic executions, their risk of dual liability may be limited by the ''request a cancel'' function and their ability to receive directed orders.[301] As a result, the Commission believes that ECNs have sufficient alternatives for limiting their exposure to dual liability.

4. UTP Exchange Priority

In response to commenters, the NASD amended the proposal to allow UTP Exchanges to receive automatic executions for their orders as long as they provide reciprocal automatic executions for orders sent to them from Nasdaq. Further, the NASD amended the proposal to allow UTP Exchanges to display agency interest on a non-attributable basis and have that interest receive parity with quotes/orders of Nasdaq Quoting Market Participants.[302] However, under the amended Order Execution Algorithms, the principal interest of UTP Exchanges will still be lower in priority than the quote/orders of Nasdaq Quoting Market Participants.

One commenter argued that it would be unfair and ''grossly anticompetitive to give the principal interest of the UTP Exchange last priority at a given price level.'' [303] Another commenter stated that the SuperMontage will ''severely curtail the ability of other market centers to trade Nasdaq-listed securities.'' [304] Two commenters believed that the SuperMontage imposes burdens on competition by not permitting attributable UTP agency orders and by placing UTP principal orders last in the queue.[305] One of these commenters also questioned the treatment of orders from UTP Exchanges that elect to receive orders rather than executions and the applicability of the Firm Quote Rule to such orders.[306]

Two commenters objected to the proposal's requirement that UTP Exchanges may only submit non-attributable orders, and thus depriving them of credit for the liquidity provided to Nasdaq.[307] One of these commenters also noted that the execution of non-attributable UTP Exchange orders in SuperMontage will deny UTP Exchanges revenue from the sale of quotation and last sale data generated by these orders.[308]

Two commenters argued that UTP Exchanges must be treated on par with NASD members regardless of whether such Exchanges submit agency or proprietary orders.[309] One of these commenters believed that the algorithms, as proposed in Amendment No. 8, will place UTP Exchanges' proprietary quotes below inferior ECN quotes.[310] The other commenter called the NASD's proposal to give the proprietary quotes of UTP Exchanges the lowest priority in the algorithms ''a bold attempt to protect Nasdaq market makers from competition,'' and that this treatment is not consistent with the fair competition requirement of the Act.[311] Lastly, these two commenters argued that all participants in the SuperMontage must be treated equally in order for Nasdaq to fulfill its dual responsibilities as a securities market and as an exclusive SIP.[312]

The Commission believes that it is reasonable to rank principal quotes/orders of UTP Exchanges after the quotes/orders of Nasdaq Quoting Market Participants in the SuperMontage's execution algorithms because UTP Exchanges compete with Nasdaq for order flow. Under the current UTP Plan, Nasdaq serves as the processor for quotes and trade reports in Nasdaq securities, and in this capacity UTP data is given equal treatment. However, neither the UTP Plan nor Nasdaq's SIP role requires Nasdaq to imbed competing exchanges in its trading system. Moreover, it is reasonable for Nasdaq to first conduct a complete sweep of Nasdaq Quoting Market Participants' interest before matching an order against the principal interest of another competing exchange. This practice is consistent with the practice of certain exchanges, which first probe their own markets before directing an order to another exchange. Indeed, the Intermarket Trading System (''ITS'') Plan requires such a probe.[313] The Commission notes that the SuperMontage has provided that a UTP Exchange's non-attributable agency interest will receive priority on parity with market makers and ECNs. The Commission believes that the superior execution priority of non-attributable UTP Exchange agency interest over attributable UTP Exchange principal interest helps to protect agency orders and to increase order interaction in the markets.[314]

The Commission recognizes the concern raised by commenters that, because UTP agency orders are not attributed to the UTP Exchange, the liquidity contributed by the UTP Exchange will not be displayed and acknowledged. However, the Commission believes that the SuperMontage should not be required to promote and provide attribution for the agency orders of another market that have been included in the SuperMontage for execution purposes. If, however, Nasdaq as an exclusive processor is publishing depth of book for the SuperMontage, it would need to disseminate similar depth of book that another UTP Plan participant wished to display. The Commission believes that it is sufficient that agency orders of other markets receive parity with quotes/orders of market makers and ECNs. Further, with respect to the commenter's other concern regarding the applicability of the Firm Quote Rule to orders received from UTP Exchanges,

[298] *See* Merrill Lynch Letter.

[299] *See* NexTrade Letter and Bloomberg Letter; *see also* Instinet Letter.

[300] *See* Instinet Letter.

[301] *See* Amendment Nos. 7 and 8, *supra* notes 10 and 12.

[302] *See* Amendment No. 4, *supra* note 6.

[303] *See* Archipelago Letter. *See also* CHX Letter; CSE Letter; and Section V.G., *infra.*

[304] *See* Phlx Letter.

[305] *See* CSE Letter and Phlx Letter.

[306] *See* Phlx Letter.

[307] *See* CSE Letter and Phlx Letter.

[308] *See* CSE Letter.

[309] *See* CHX Letter and CSE Letter.

[310] *See* CHX Letter.

[311] *See* CSE Letter.

[312] *See* CHX Letter and CSE Letter.

[313] *See* Section 8(a)(v) of the ITS Plan.

[314] The Commission notes that the NASD is currently negotiating with at least one UTP Exchange. The Commission expects that the UTP Plan will be amended, if needed, to reflect changes provided for in this proposal.

the Commission notes that NASD Rule 4710(b) requires market makers to accept and execute non-directed orders against their quotes.

With respect to concerns raised by another commenter regarding revenue appropriation from the sale of quotation and last sale data generated by agency orders from UTP Exchanges and executed within the SuperMontage, the Commission notes that the UTP Plan outlines the responsibilities of UTP Plan participants, but does not provide a comprehensive or exclusive set of terms that govern the interaction of the markets. Because the UTP Plan only covers distribution and other basic terms, it is not uncommon for the NASD and UTP Plan Participants to negotiate terms for dealing with each other. Therefore, the Commission expects that these issues will be resolved among the participants of the UTP Plan. For instance, the NASD negotiated the terms of SuperMontage participation with the UTP Plan's only active participant, the CHX.[315]

5. Five-Second Interval Delay

As originally proposed, after all interest was exhausted at a price level, the SuperMontage would have imposed a limited 5-second interval delay before moving to the next price level. Two commenters questioned whether the proposed 5-second delay would reduce volatility in the markets as intended.[316] In addition, four commenters believed that the 5-second interval delay either was too long or too short, depending on activity in the stock.[317] Two commenters also opposed the 5-second interval delay as unnecessary and inconsistent with the interest of investors.[318] Specifically, one commenter believed that the delay would permit market makers, ECNs, and UTP Exchanges to decline to fill a non-Liability Order before moving their quotes to an inferior price.[319] This commenter believed that the ability of a market participant to consider whether to decline or accept an execution at a published quote would interfere with the need of investors and traders for certainty and could result in executions at inferior prices.[320]

In response to these comment letters, the NASD revised its process.[321] The SuperMontage, subject to the exception for orders designated as Sweep Orders, will limit the 5-second interval delay to situations where an order is partially filled at the inside price and the remaining shares of the order cannot be filled within the next two trading ticks. In this situation, there will be an interval delay or pause before the order moves to the next price level away from the original price level. If, at any point, the remainder of the order can be filled within the next two trading ticks, the order will be executed immediately. If an order is in interval-delay because it meets the above parameters, orders that are behind the ''interval-delay order'' will not jump the queue. In addition, a market participant may set a parameter on individual orders so that these orders will trade through all interest (*i.e.,* displayed and reserve interest) at the three price levels being displayed in the NODF at the time of entry, without pausing 5 seconds in between each displayed price (*i.e.,* a Sweep Order).

One commenter supported the limited 5-second interval delay between price levels, and the proposed Sweep Order parameter.[322] However, the commenter was still uncertain if the NASD's modifications to the process went far enough to address concerns about SuperMontage-imposed trading delays.[323]

The Commission finds that the limited 5-second interval delay is consistent with Sections 15A(b)(6) and 11A of the Act[324] in that it is designed to facilitate transactions in securities and maintain a fair and orderly market. The 5-second interval delay is designed to provide Nasdaq Quoting Market Participants and UTP Exchanges with adequate time to update their quotes, without unduly delaying executions. The Commission believes that the 5-second interval delay could assist market makers in fulfilling their obligation to maintain continuous two-sided quotes, and, in turn, could promote quote competition among all market participants. The Commission notes that during the 5-second delay it will be possible for market makers and other market participants, who are not at the inside quote, to change their quotes to the inside because of market interest. Such competition should, in turn, enhance the quality of the Nasdaq market by improving the price discovery process for Nasdaq securities. The Commission also believes that the delay could help stabilize the market during periods of volatility by allowing Nasdaq Quoting Market Participants and UTP Exchanges the opportunity to monitor and assess their quotes in a reasonable manner in response to changing market conditions.[325]

The Commission believes that the two exceptions to the 5-second interval delay between price levels (for orders that can be filled at the initial price level and within the next two price ticks away and orders designated as Sweep Orders) provide a reasonable compromise between the need for fast executions and the need to provide market participants adequate time to manage their capital risk by monitoring and updating their quotes. Finally, the Commission expects that NASD will monitor market performance in the SuperMontage as it relates to the five-second interval delay, particularly the potential for queuing, and consider modifying that time period, if modification is necessary.

E. Directed Orders

As proposed in the original notice, directed orders would have allowed Nasdaq market participants to deliver a non-Liability Order[326] to a Nasdaq Quoting Market Participant or UTP Exchange only if the order was designated as AON or MAQ for a size that is at least one normal unit of trading (*e.g.,* 100 shares) greater than the displayed amount of the quote/order to which the order is directed.

One commenter believed that directed orders away from the BBO should be treated as Liability Orders.[327] Another commenter expressed concern that if a recipient accepts a directed order for execution, a trade-through could occur if that order is executed at a price outside of the displayed price.[328] This commenter recommended adding a ''clean-up'' feature for directed orders pursuant to which a directed order could be executed only if the order satisfied the interest displayed on the proposed system at better prices (with no five-second delay if within two price levels from the inside quote if the order goes through several price levels).[329] Two commenters also recommended developing a workable trade-through rule, in conjunction with the Order

[315] *See* Amendment No. 4, *supra* note 6.

[316] *See* ETA Letter and ICI Letter.

[317] *See* STA Letter; STANY Letter; Salomon Smith Barney Letter; and Merrill Lynch Letter.

[318] *See* ETA Letter and STANY Letter; *see also* ACIM Letter.

[319] *See* ETA Letter.

[320] *See* ETA Letter.

[321] *See* Amendment No. 4, *supra* note 6.

[322] *See* ICI Letter.

[323] *See* ICI Letter.

[324] 15 U.S.C. 78*o*–3(b)(6) and 15 U.S.C. 78k–1.

[325] Although one commenter was concerned that the five-second interval delay would allow a market participant to decline an execution at its published quote, the Commission notes that market makers will still be subject to automatic execution and therefore, will not be able to decline orders sent to their quotes. *See* ETA Letter.

[326] A non-Liability Order is an order that when delivered imposes no obligation to respond under the Firm Quote Rule. *See* Proposed NASD Rule 4701(q).

[327] *See* Heartland Letter.

[328] *See* MSDW Letter.

[329] *See* MSDW Letter.

Execution Algorithm, to provide incentives for the entry and protection of better-priced quotes displayed in the system.[330] Two other commenters argued that the order routing process as proposed would not allow customers to preference them.[331] They stated that the non-directed order process offered no capability for preferencing, and the directed order process offered an ineffective way of preferencing because all directed orders must be designated as non-Liability Orders.[332]

In response to these comments, the NASD revised the proposal to allow Nasdaq Quoting Market Participants and UTP Exchanges to elect to receive Liability Orders through the directed order process.[333] Under the proposed change, a Nasdaq Quoting Market Participant or UTP Exchange can choose to receive a directed order against its quote that is also a Liability Order. A market participant also can choose to accept directed orders against its quotes only as non-Liability Orders.[334] Thus, for example, a market maker can choose to receive both non-directed and directed Liability Orders, or it can choose to receive only non-directed orders on a liability basis. The NASD and Nasdaq have indicated that ECNs that opt to receive directed Liability Orders will avoid dual liability because they will retain the ability to fill, partially execute, or decline a directed or non-directed Liability Order.[335]

One commenter believed that the NASD's change provided a partial solution, but expressed concern that it will subject market makers to double liability if market makers elect to receive directed Liability Orders.[336] Another commenter believed that allowing directed orders would permit trade-throughs to occur.[337] One commenter stated that directed orders would limit the ability of institutional traders to effectively participate in the SuperMontage.[338]

The Commission believes that these proposed rules are in accordance with Section 15A(b)(6) of the Act[339] because they are designed to facilitate transactions in securities, remove impediments to and perfect the mechanism of a free and open market and national market system. While the Commission recognizes the concern raised by one commenter regarding the potential double liability of market makers, the Commission also recognizes that market makers are not required to receive directed Liability Orders. If a market maker does not elect to receive directed Liability Orders, the market maker will not be exposed to double liability.[340] Reducing the potential for dual liability may encourage market makers to display larger sized quotations, thereby providing greater liquidity to the market for Nasdaq securities. Further, the ''request a cancel'' feature limits the exposure of Nasdaq Quoting Market Participants and UTP Exchanges by allowing participants to fill directed non-Liability Orders without being exposed to a dual execution. At the same time, ECNs and others that choose to use the directed order process to take Liability Orders may do so.

The Commission emphasizes, however, that while directed orders are not necessarily inconsistent with the achievement of best execution, a market participant must periodically assess the quality of competing markets to assure that order flow is directed to markets providing the most advantageous terms for its customers' orders. Thus, a participant may not simply employ default order routing to a broker-dealer affiliate or particular NASD member without undertaking such an evaluation on an ongoing basis.[341]

F. Locked/Crossed Markets

Generally, under Nasdaq's proposal, if a Nasdaq Quoting Market Participant or UTP Exchange enters an order that will lock or cross the market, the OCF will not display the order as a quote/order, but instead the order will be treated as a marketable limit order and entered into the OCF as a non-directed order for execution. If the market is locked or crossed at the opening, the system will clear the locked or crossed quotes by executing the oldest bid (offer) against the oldest marketable offer (bid) at the price of the oldest quote/order.

One commenter believed that locked or crossed markets at the opening should be resolved in price/time and not time/price priority.[342] Another commenter stated that the potential for locked or crossed markets will continue to exist if ECNs opt to take order delivery for Liability Orders.[343] The commenter believed that the problem would be alleviated if ECNs were required to receive automatic executions.[344] However, as described in greater detail previously, the NASD believes that it is necessary to accommodate the needs of ECNs by providing them with an alternative to automatic execution.

In addition to the issues raised above, one commenter questioned the manner in which the NASD proposed to resolve locks and crosses on the opening of the market.[345] This commenter stated that, as proposed, the system will permit participants to enter non-firm quotes up until the opening and then execute the oldest bids against the oldest offers at the open.[346] This commenter opined that in this system market participants will have no incentive to find the correct price for a stock before the opening.[347]

Another commenter raised the concern that SuperMontage will subject ECNs to an unacceptable risk of automatic execution by converting ECN quotes into orders when they lock or cross the market.[348] This commenter explained that ECNs are not capable of receiving automatic executions because they do not take proprietary positions and therefore, cannot accept the risk of multiple executions against their quotes.[349]

The NASD responded by explaining that when a market participant enters a locking or crossing quote into the system, it will receive a system warning, as it does today.[350] In order to complete the quote entry, the participant is required to override the system warning. After overriding the warning, the quote results in an order being generated that accesses the quote that will be locked or crossed. Therefore, the NASD stated, ECNs can avoid automatic executions for their own quotes by not overriding the system warning.[351]

The NASD added that ECNs are not at risk if another participant enters a quote/order that locks or crosses an existing ECN quote. If that occurs, the system again will issue a warning to the party attempting to lock or cross the market. If that party overrides the system warning, the system will then convert the locking or crossing quote

[330] *See* ITAC Letter and CSE Letter.

[331] *See* Instinet Letter; and Bloomberg Letter.

[332] *See* Instinet Letter; and Bloomberg Letter.

[333] *See* Amendment No. 7, *supra* note 10.

[334] *See* Amendment No. 7, *supra* note 10.

[335] *See* Amendment No. 7, *supra* note 10.

[336] *See* Bloomberg Letter.

[337] *See* CSE Letter.

[338] *See* Scudder Kemper Letter.

[339] 15 U.S.C. 78*o*–3(b)(6).

[340] The Commission notes that market participants will still be able to preference market makers on a Liability Order basis. Under this option, market makers will not be exposed to double liability because preferenced orders are processed in the non-directed order queue.

[341] *See* Securities Exchange Act Release No. 37619A (September 6, 1996), 61 FR 48290 (September 12, 1996) (order approving the Order Handling Rules).

[342] *See* ACIM Letter.

[343] *See* MSDW Letter.

[344] *See* MSDW Letter.

[345] *See* Island Letter.

[346] *See* Island Letter.

[347] *See* Island Letter.

[348] *See* Instinet Letter.

[349] *See* Instinet Letter.

[350] *See* Amendment No. 7, *supra* note 10.

[351] *See* Amendment No. 7, *supra* note 10.

and process it as a non-directed order. It will not deliver an automatic execution to an ECN that chooses to accept only order delivery against its quote. In either case, there is little or no risk to an order delivery participant of an unwanted automatic execution.[352]

The Commission finds that the proposal's provision to address locked and crossed markets is consistent with the Act because it is designed to reduce the frequency of locked and crossed markets, which should help to provide reliable quotation information, facilitate price discovery, and contribute to the maintenance of a fair and orderly market. The proposal also should facilitate more efficient openings. The proposal seeks to eliminate locked and crossed markets by matching marketable orders against one another, after providing notice that an execution will occur. The Commission believes this approach is reasonable. As the Commission has concluded previously, continued locking and crossing of the market can negatively impact market quality.[353] By helping to reduce the frequency of locked and crossed markets, the Commission believes that the proposal should improve market quality and enhance the production of fair and orderly quotations.

While the Commission understands the commenter's concern that the proposal will not completely eliminate crossed and locked markets because ECNs will be given the option of taking order delivery for Liability Orders rather than automatic executions, the ECNs still will be required to execute the locking order immediately, and Nasdaq will decrement the ECNs' quote upon delivery of the order. Thus, the lock or cross should be removed quickly. In addition, as stated previously, the Commission believes the NASD's position that, despite this negative aspect, it is necessary to accommodate the ECNs by providing them with an alternative to automatic execution is consistent with the Act.

G. UTP Exchange Participation as Automatic Execution Participants

One commenter supported UTP Exchange participation in the SuperMontage and stated that the proposal represented a ''positive step in integrating the Nasdaq and UTP Exchange markets.'' [354] This commenter, however, stated that as a purely legal matter, the proposal could not be implemented without an amendment to the UTP Plan because certain features of the proposal change the obligations of Nasdaq under the UTP Plan.[355]

In the original proposal, UTP Exchanges had the option of receiving orders either for delivery or automatic execution, but they were only permitted to send orders to the SuperMontage for order delivery. Some commenters disapproved of this approach. Specifically, they argued that incoming UTP Exchange orders should be subject to automatic execution, so that market makers could avoid having duplicate systems solely to service UTP Exchanges.[356] While one commenter acknowledged the rationale behind the proposal's exclusion of UTP Exchanges from automatic execution, it argued that their inclusion was ''in the best interests of all market participants,'' and that such inclusion would be equitable if UTP Exchanges provided reciprocal automatic execution capability to incoming market maker orders.[357] The Chicago Stock Exchange also objected to the inability of UTP Exchanges to participate in automatic executions and the prioritization of UTP Exchanges in the Order Execution Algorithm.[358]

Another commenter acknowledged that it would be difficult for the NASD to surveil, and if necessary, discipline UTP Exchange members for ''backing away'' from their quotes, and suggested that potential solutions should be considered.[359] In addition to the duplicate systems issues, the commenter cited a potential loss of liquidity that would result if UTP Exchanges and ECNs did not participate in automatic executions.[360]

In response to concerns about UTP Exchange participation as originally filed, the NASD amended the proposal to give UTP Exchanges the option to receive automatic executions in the SuperMontage, provided that they give Nasdaq reciprocity.[361] In addition, UTP Exchanges will still have the option of accepting order delivery rather than automatic execution.[362]

One commenter objected to what it considered to be the unnecessarily disparate treatment for order-delivery UTP Exchanges and order-delivery ECNs that attempt to access other participants.[363] The commenter noted that order-delivery ECNs will have the ability to automatically execute against other participants, but order-delivery UTP Exchanges will not.[364] The commenter believed that this was done to put order-delivery UTP Exchanges at a competitive disadvantage.[365] Another commenter also disagreed with the NASD's proposal to provide a UTP Exchange automatic executions against Nasdaq's market only if the UTP Exchange is similarly willing to provide automated execution against its quotes.[366] The commenter believed that it was possible to promote inter-exchange competition without requiring UTP Exchanges to become part of Nasdaq's limit order book.

The Commission believes that the NASD's treatment of UTP Exchanges is consistent with the Act. While the Commission believes that it is reasonable for the NASD to attempt to accommodate the various needs of its members, the Commission does not believe that NASD must make the same accommodations for competing markets. The Commission believes that Nasdaq should be able to provide access to a competing exchange that is equivalent to the access the competing exchange provides for Nasdaq members.[367] In addition, the Commission notes that the SuperMontage is voluntary and that UTP Exchanges may elect to post their quotes/orders in the NASD's display alternative.[368]

H. Odd-Lot Processing

Certain commenters criticized the original proposal for handling limit orders, saying that it would be ''cumbersome'' and create the opportunity for ''gaming the system'' [369] by breaking large orders into odd-lots so that those orders would not affect the published quote.[370] Four commenters also expressed concern that dealers without a current interest in a security

[352] *See* Amendment No. 7, *supra* note 10.

[353] *See* Securities Exchange Act Release No. 40455 (September 22, 1998), 63 FR 51978 (September 29, 1998) (order approving File No. SR–NASD–98–01).

[354] *See* CHX Letter.

[355] *See* CHX Letter. The Commission notes that the NASD is currently working on amendments to the UTP Plan.

[356] *See* STA Letter; STANY Letter; and Merrill Lynch Letter.

[357] *See* STANY Letter.

[358] *See* CHX Letter; *see also* Archipelago Letter.

[359] *See* Merrill Lynch Letter.

[360] *See* Merrill Lynch Letter.

[361] *See* Amendment Nos. 4 and 6, *supra* notes 6 and 9.

[362] *See* Amendment No. 6, *supra* note 9.

[363] *See* CHX Letter.

[364] *See* CHX Letter.

[365] *See* CHX Letter. CHX noted that it is currently exploring with Nasdaq the possibility of allowing automatic execution UTP Exchanges to have the ability to revert to order-delivery if Nasdaq has systems delays.

[366] *See* CSE Letter.

[367] The Commission notes that Nasdaq is exploring other ways to accommodate UTP Exchanges. The Commission expects that some of the issues raised by UTP Exchanges will be further addressed in those discussions.

[368] *See* discussion at Section V.I.3, Nasdaq as an Exclusive Securities Information Processor.

[369] *See* STA Letter; STANY Letter; Salomon Smith Barney Letter; ITAC Letter; and MSDW Letter; *see also* Merrill Lynch Letter.

[370] *See* STA Letter; STANY Letter; Salomon Smith Barney Letter; and MSDW Letter.

would be forced into executions under the proposed odd-lot processing method.[371] At least one commenter opined that the proposed odd-lot processing would impose unnecessary administrative and operational burdens on firms,[372] and several commenters raised issues regarding decrementing a market maker's bids and offers.[373]

In response to these comments, the NASD revised its proposed odd-lot execution process.[374] Under the current proposal, the SuperMontage will include a separate mechanism for processing and executing odd-lot orders at the inside price that will provide: (1) An ''odd-lot exposure limit'' for market makers; (2) a market maker interval delay between odd-lot executions against the same market maker; and (3) an odd-lot order entry parameter of one order per second, per firm. Odd-lot orders will be processed in a round-robin fashion against a market maker with an available exposure limit, even if the market maker is not at the inside.[375] One commenter argued that ECNs should be permitted to interact with odd-lot orders.[376]

The Commission believes that the proposed rule change allows for greater market maker participation in executing odd-lot orders. The Commission also believes that allowing all market makers registered in a security to participate in executing these orders should strengthen the Nasdaq market and benefit market participants by permitting the prompt, efficient execution of odd-lot orders.[377] Market makers may elect to execute odd-lot orders at the inside price even when the market maker is not at the inside bid/offer, thereby adding to the depth and liquidity of the market. The Commission notes that historically only market makers have participated in the odd-lot process because ECNs do not take proprietary positions. If an ECN were to participate in the revised odd-lot process, it would have to take proprietary positions from time to time because it would be required to execute at the inside quote.[378] The Commission believes that the proposed odd-lot system is consistent with the Act based on the current roles of market makers and ECNs, but believes that Nasdaq should explore including ECNs in the odd-lot execution process if ECNs can demonstrate that they can provide equivalent treatment to these orders as market makers.

I. Issues Relating to Competition

1. Centralization

Many commenters believed that the proposal will improve the Nasdaq market by providing more information to investors, promoting greater efficiency in executions, or increasing overall market transparency.[379] One commenter believed that the SuperMontage is greatly needed and ''that it will eventually make the market more efficient and competitive, all to the benefit of the investor.''[380] Another commenter stated that the SuperMontage will improve the Nasdaq market and integrate ''market makers, ECNs and UTP Exchanges in a more unified, competitive manner.''[381] One commenter also believed that the SuperMontage will ''continue a natural competition between securities markets.''[382] Another commenter stated that the SuperMontage was ''an inclusive model built with the connectivity to link all market participants, including electronic communications networks into the market center. However, it in no way imposes new obligations or burdens, or diminishes the opportunity for market participants to interact with one another through other means.''[383] In addition, one commenter, after Amendment No. 8, stated that the ''SuperMontage has been transformed from a revolution in fundamental market structure to an incremental evolution in market technology characterized by a marketplace that preserves investor choice and competition.''[384]

Fourteen commenters, however, were concerned that the proposal will have a negative impact on competition.[385] Most of these commenters argued that the proposal was anti-competitive because, in their view, it will implement a monopolistic, centralized execution system that will compel participation by NASD regulated broker-dealers, and in turn stifle ECN innovation and diminish market competition. Several commenters also expressed concern that the automatic execution feature of the SuperMontage will have a negative impact on competition by forcing order flow into the SuperMontage.[386] Specifically, Instinet stated that, because of the NASD's status as a regulator, the NODF will effectively become a mandatory display facility for investors' orders to the exclusion of more efficient, better-priced pools of liquidity.[387] Instinet believed that Nasdaq's affiliation with NASD Regulation will create the perception among Nasdaq Quoting Market Participants that customer orders routed to the SuperMontage will be insulated from best execution challenges.[388] Instinet thus asserted that liquidity provided by other facilities could evaporate, and that investor order display and execution options will diminish.[389] Instinet also argued that Nasdaq will have a regulatory advantage over ECNs because of its ability to subsidize market operations from the revenues that Nasdaq earns from the sale of market data.[390]

Phlx believed that the SuperMontage will result in an ''unacceptable concentration of market power in the NASD at the expense of the regional exchanges * * * . Under the SuperMontage proposal, Nasdaq will function as its own ITS. * * * [without providing] for any representation.''[391]

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[371] *See* Salomon Smith Barney Letter; STA Letter; STANY Letter; and MSDW Letter.

[372] *See* Merrill Lynch Letter.

[373] *See* Salomon Smith Barney Letter; MSDW Letter; Merrill Lynch Letter; STA Letter; and STANY Letter.

[374] *See* Amendment No. 4, *supra* note 6.

[375] *Id.*

[376] *See* Island Letter.

[377] Currently, odd-lots are automatically executed only against market makers who are at the inside bid/offer.

[378] The Commission notes that any system operated by, or on behalf of, an OTC market maker or exchange market maker that executes customer orders primarily against the account of such market maker as principal is excluded from the definition of an ECN. See 17 CFR 240.11Ac1–1(a)(8)(ii). An OTC market maker is defined as any dealer who holds itself out as being willing to buy from and sell to its customers, or otherwise, a covered security for its own account on a regular or continuous basis otherwise than on an exchange in amounts of less than block size. *See* 17 CFR 240.11Ac1–1(a)(13).

[379] *See* ETA Letter; Merrill Lynch Letter; Goldman Sachs Letter; MSDW Letter; STA Letter; STANY Letter; ITAC Letter; ICI Letter; Bannon Letter; Bancorp Letter; Charles Schwab Letter; Congressman Dreier Letter; Congressman Pallone Letter; Congresswoman Morella Letter; Congressman Stupak Letter; Congresswoman Wilson Letter; Congressman Towns Letter; Congressman McInnis Letter; Congressman Thomas Letter; Spear, Leeds & Kellogg Letter; First Union Letter; ITG Letter; Jeffries Letter; Congressman Ehrlich Letter; Congressman Radanovich Letter; Congressman Shays Letter; Titak Letter; ASA Letter; APTC Letter; Philadelphia Corp. Letter; Garrett Letter; and Senator Schumer Letter.

[380] *See* STA Letter.

[381] *See* MSDW Letter.

[382] *See* APTC Letter.

[383] *See* Congressman Radanovich Letter.

[384] *See* Bloomberg Letter.

[385] *See* ETA Letter; Island Letter; Instinet Letter; Bancorp Letter; Archipelago Letter; Granite Financial Letter; ATD Letter; ACIM Letter; BRUT Letter; Phlx Letter; Leon Letter; Aurora Letter; Renaissance Letter; CSE Letter; and NexTrade Letter. In its comment letter, Island specifically questioned whether ECNs could compete in a regulatory environment structured to favor Nasdaq.

[386] *See* ETA Letter; Island Letter; Bloomberg Letter; Instinet Letter; Leon Letter; and NexTrade Letter.

[387] *See* Instinet Letter; *see also* Leon Letter.

[388] *See* Instinet Letter.

[389] *See* Instinet Letter; *see also* NexTrade Letter.

[390] *See* Instinet Letter.

[391] *See* Phlx Letter.

In response, the NASD stated that, while the proposal creates a central means for accessing liquidity in Nasdaq and other market centers, it in no way establishes the SuperMontage as the sole means for providing or accessing liquidity. NASD members, individual investors, and members of other exchanges will be free to route their orders to any market center they choose. Moreover, ECN subscribers will be free to use the execution services offered by the ECNs to access liquidity within the ECNs. The NASD emphasized that nothing in the proposal prohibits ECNs and other market participants from establishing links or order-routing arrangements.[392] The NASD maintained that providing a means for accessing liquidity and trading interest is an essential and core function of a market. The NASD pointed out that it already provides both quotation and execution services. Nasdaq has operated SOES since 1984, and SelectNet since 1988, both of which are integrated with Nasdaq's quotation system. The NASD believes that eliminating this capability would be a step backward for the market and investors, and would be contrary to Sections 11A and 15A of the Exchange Act as it will foster inefficiencies in the execution of securities, minimize opportunities to obtain best execution, limit market linkages, result in disorderly markets, and ultimately harm investors.[393]

The Commission believes that the SuperMontage does not impose any burden on competition that is not necessary or appropriate in furtherance of the Act. The Commission has long held the view that competition and innovation are essential to the health of the securities markets. Indeed, competition is one of the hallmarks of the national market system. The SuperMontage is a reasonable effort by the NASD to enhance the quality of the Nasdaq market by providing more information to investors, promoting greater efficiency in executions, and increasing overall market transparency. Although the SuperMontage may provide a new means for accessing liquidity in Nasdaq stocks, the SuperMontage will not be the sole means for providing or accessing liquidity. Under the proposal, broker-dealers may continue to seek alternative order routing and execution services that provide value to their customers through price, speed, and technology. Broker-dealers wishing to interact with institutional orders below the top of the book, for example, may continue to use ECNs.[394] Those that wish to continue to maintain anonymity through clearance and settlement may continue to use ECNs. In addition, market participants wishing to execute orders without the participation of a dealer may continue to do so under the proposal. NQDS Prime will provide all individual attributable quote/order information at the three best price levels displayed in the SuperMontage. With this information, market participants will have the choice of using Nasdaq's facility to access liquidity or private linkages outside of the SuperMontage to access liquidity. Moreover, participation in the SuperMontage is voluntary. A market participant, such as an ECN, may elect not to display, or provide access to, its quotes/orders through Nasdaq and instead display and provide access to its quotes/orders on other markets, such as the Chicago Stock Exchange, the Cincinnati Stock Exchange, and possibly in the future, the Pacific Exchange (''PCX''). In addition, the NASD has agreed to create an alternative quote reporting mechanism that will allow an ECN, ATS, or market maker to maintain its quotes in an NASD facility without being a participant in Nasdaq, and therefore the SuperMontage.[395]

At the heart of the commenters' competition arguments is the view that automatic execution against market makers gives the SuperMontage an unfair advantage in drawing order flow and makes it difficult for others to build competing links to market makers. The Commission finds that the automatic execution feature offered by the SuperMontage is a reasonable way for Nasdaq to improve market efficiency. Since at least 1988, automatic execution has been a vital element of Nasdaq's dealer market. The NASD's automatic execution system, SOES, was initially developed in 1984 to provide an efficient facility for order entry firms to execute retail customer orders of limited size in Nasdaq securities.[396] SOES offered an alternative for those firms to the traditional telephone contact and negotiation with market makers by providing automatic execution of customer orders against Nasdaq market makers at the best available market price.

Initially, participation in SOES was voluntary. During the October 1987 market break, however, the Nasdaq market experienced significant operational problems.[397] Sharp downward volatility and record volume resulted in delayed transaction reports and a large number of locked and crossed markets. The unusual market conditions created a situation in which it was impossible for market makers to ensure that their quotes, against which trades were continuing to be executed in SOES, accurately reflected the rapidly changing market. Because participation in SOES at that time was voluntary, a majority of market makers responded by withdrawing from SOES.[398] Trades that normally would have been handled through SOES then had to be executed by contacting market makers by telephone. This necessarily increased the already extraordinary workload of market makers and contributed to a large number of unfilled orders, as well as complaints that market makers were not accessible.

In response to those problems, the NASD adopted a number of rules to facilitate the execution of retail customer orders in SOES and to ensure market maker participation in the system (''1988 SOES modifications''), including making SOES participation mandatory for all market makers in Nasdaq securities.[399] These changes were intended, among other things, to ensure that order entry firms could obtain automatic executions for their customers in volatile markets. Upon approval, the Commission stated its belief that the 1988 SOES modifications would enhance market liquidity, improve the accuracy of Nasdaq's pricing systems, promote the timeliness of trade reporting, and help alleviate locked and crossed markets.[400]

In 1999, the NASD recognized that, while SOES and SelectNet provided

[392] *See* Amendment No. 5, *supra* note 8.

[393] *See* Amendment No. 7, *supra* note 10.

[394] While market participants also may interact with quotes/orders below the top of the book in the SuperMontage, the Commission notes that directed orders will have to be for a size greater than the quoted size unless the Nasdaq Quoting Market Participant or UTP Exchange is willing to accept a directed Liability Order. As a result, the Commission believes that market participants will continue to have the same incentive to access ECNs for quotes/orders below the top of the book as they do today. In addition, customer orders routed to the SuperMontage will not ''be insulated from best execution challenges'' merely because the orders are routed to an SRO's market. Indeed, the Commission has noted in this release several instances where best execution may not be achieved within SuperMontage. See e.g., discussions at V.D.2. and V.E.

[395] *See* Section V.I.3, NASD as an Exclusive Securities Information Processor, *infra.*

[396] *See* Securities Exchange Act Release No. 21433 (October 29, 1984), 49 FR 44042 (November 1, 1984).

[397] *See* Division of Market Regulation, The October 1987 Market Break 9–3 to 9–15 (February 1988) (''1987 Market Break Report'').

[398] As described more fully in the 1987 Market Break Report, the number of market making positions declined more than 83 percent between October 19 and October 22, 1987. *Id.* at 9–14.

[399] *See* Securities Exchange Act Release No. 25791 (June 9, 1988), 53 FR 22594 (June 16, 1988).

[400] *Id.*

valuable services to market participants, the operation of two separate and independent execution systems resulted in frequent dual liability for market makers. In response to this problem, the NASD proposed to integrate SOES and SelectNet, and re-establish SelectNet as a non-Liability Order delivery and execution system for Nasdaq National Market System securities and recast SOES as the NNMS. The Commission approved the integration on January 25, 2000.[401] Pursuant to the NNMS Order, the maximum order size now eligible for automatic execution in Nasdaq National Market System securities is 9,900 shares. Further, the NNMS Order permitted market makers to enter both proprietary and agency orders into NNMS, and receive executions.

The Commission continues to believe that automatic execution provides many benefits to a marketplace, particularly speed and certainty of executions. As the NASD pointed out, certainty of execution is important to all investors, particularly in fast moving markets. The automatic execution feature of the SuperMontage should promote investor confidence by increasing the likelihood that orders of moderate size from large and small investors alike will be filled almost instantaneously. The SuperMontage's automatic execution feature also should improve the accuracy of Nasdaq's pricing systems, promote the timeliness of trade reporting, and help alleviate locked and crossed markets. Further, the Commission notes that the SuperMontage does not dramatically modify the automatic execution feature in NNMS, which was approved by the Commission after being published for comment.

In a comment letter prior to Amendment No. 8, Bloomberg suggested an alternative, hybrid approach to automatic execution, in which Nasdaq could send order messages that converted into executions within a fraction of a second if market makers failed to respond.[402] Bloomberg stated that such a hybrid approach, which is both technologically feasible and affordable, would promote the use of automatic execution facilities among market professionals and enhance market efficiency.[403]

In response, the NASD stated that Bloomberg's approach could harm investors, particularly small investors, because there no longer would be a method of providing automatic execution to small orders. Further, the NASD stated that if all market participants receive only orders (as opposed to executions), which they may reject in full or fill partially, investors' orders would be ''bounced'' from one market participant to another. Thus, this approach could result in orders that are entered later in time being filled before orders that are entered earlier in time, depending on how and when the market participant receiving the order responds to the order.[404]

The NASD also noted that, under Bloomberg's alternative, instances of backing away could increase, particularly because it could exacerbate the dual liability problem that many market makers face today. Automatic execution, in comparison, reduces the potential that a market participant may back away from its quote.

Finally, the NASD argued that automatic execution significantly reduces the potential for locked and crossed markets. The NASD stated that its proposal will reduce instances of locked/crossed markets because a substantial number of market participant quotes will be subject to automatic execution. The NASD questioned whether Bloomberg's proposal would be equally effective in addressing locked/crossed markets, especially because the system presumably would not move stale quotes out of the way to resolve a locked/crossed market. Rather, under Bloomberg's proposal, the system would continue to deliver orders and default to executions against a stale quote. The quote would have to be manually removed before the lock/cross could be resolved.[405]

The Commission does not believe that Bloomberg's suggested hybrid approach would necessarily be as effective as the approach proposed by Nasdaq. A hybrid order delivery system would require the NASD to constantly monitor dealer executions to prevent instances of backing away outside of the system. It also would be less effective in addressing locked and crossed markets. In addition, the Commission notes that the NASD has represented that order delivery messages use significantly more message capacity than order execution messages. Thus, an increased reliance on automatic executions could reduce network traffic and increase speed and reliability of the entire Nasdaq market.[406] As discussed further below, the NASD has represented that a system based on an automatic execution platform can be expanded rapidly to handle any increased volume of message traffic.[407]

Finally, Instinet and Bloomberg argued that the order display and order routing facilities of the SuperMontage should not be linked to the order matching facility of the SuperMontage. Instead, Instinet and Bloomberg believed that Nasdaq's order display and routing facilities, which the NASD proposes to continue operating under the SuperMontage, should be separate from its proposed order matching facility.[408]

In the Commission's view, however, the SuperMontage not only builds on the order execution foundation laid by SOES and NNMS, but represents another step in the ongoing technological evolution of the U.S and global securities markets. This past year, for example, the Commission approved the first completely electronic options exchange, the International Stock Exchange.[409] The Commission also just approved a proposed rule change by the New York Stock Exchange to implement NYSe Direct+, which would provide automatic executions for certain limit orders of a specified size.[410] PCX also recently proposed to incorporate automatic execution into its trading platforms and create an electronic book for its equities business by operating the Archipelago Exchange as a facility of the PCX.[411]

These market developments are consistent with—and indeed, were foreshadowed by Congress in—Section 11A of the Exchange Act. In Section 11A, Congress recognized that technology would drive competition among the securities markets, stating that ''[n]ew data processing and communications techniques create the opportunity for more efficient and effective market operations.'' [412] The Commission believes that

[401] *See* NNMS Order, *supra* note 22.

[402] *See* Bloomberg Letter.

[403] *See* Bloomberg Letter.

[404] *See* Amendment No. 5, *supra* note 8.

[405] *See* Amendment No. 5, *supra* note 8.

[406] *See* NNMS Order, *supra* note 22.

[407] *See* Amendment Nos. 3 and 4, *supra* notes 5 and 6.

[408] As Instinet stated, ''[t]he NASD's proposal unnecessarily ties together two distinct services provided by Nasdaq—establishing a mandatory linkage between (i) Nasdaq's facilities for *displaying and making quotes accessible* under the Commission's order display rules (*i.e.,* the Order Handling Rules and Regulation ATS) and (ii) Nasdaq's new ECN-like facility for *automatically matching individual quotes and orders.*'' *See* Instinet Letter (emphasis in original).

[409] *See* Securities Exchange Act Release No. 42455 (February 24, 2000), 65 FR 11401 (March 2, 2000).

[410] *See* Securities Exchange Act Release No. 43767 (December 22, 2000), 66 FR 834 (January 4, 2001).

[411] *See* Securities Exchange Act Release No. 43608 (November 21, 2000), 65 FR 78822 (December 15, 2000) (noticing proposed rule change (SR–PCX–00–25) that the Archipelago ECN become a facility of PCX).

[412] 15 U.S.C. 78k–1.

SuperMontage proposal is consistent with Section 11A in that it incorporates new technological features to provide investors with the opportunity to receive economically efficient execution of their securities transactions and to promote fair and orderly markets.[413] It is not only essential that investors have the ability to see the depth of the supply and demand in a security, but also that they have the ability to access the depth of the supply. The SuperMontage will provide a new means of accessing that liquidity.

2. Other Issues Relating to Competition

Several commenters expressed concerns about the NASD's dual role as an operator of a market (*i.e.,* Nasdaq) and as a self-regulator.[414] Specifically, one commenter believed that the NASD will use its regulatory powers to ''nourish the private ECN'' and thereby restrain competition,[415] while another commenter believed that Nasdaq's regulatory privileges will inhibit competition and force market participants to accept what Nasdaq offers.[416] Other commenters viewed the proposal as an inappropriate attempt by the NASD to compete with its own members' trading systems, particularly ECNs, using the revenues generated by those participants to finance the SuperMontage.[417] Two commenters believed that the SuperMontage would receive financial subsidies from Nasdaq's market information revenues.[418] Three commenters believed that the NASD has an inherent conflict of interest with respect to the competing interests of market makers and order entry firms.[419] Another commenter believed that Nasdaq's interests will diverge from its market participants as it begins to compete with market makers and ECNs for executions.[420] One commenter urged the Commission to supervise the NASD's ''competitive stance'' so that ''no unfair advantage over market participants is created or even perceived.''[421] Another commenter recommended that the NASD ''divest itself of its residual interest in Nasdaq'' to reduce anti-competitive conflicts.[422] Finally, several commenters opined that the NASD's conflicts of interest might become more pronounced with Nasdaq's announced intention to demutualize.[423]

Another commenter questioned whether Nasdaq will use market data compiled by the NASD Automated Confirmation of Transactions (''ACT'') facility and OATS.[424] This commenter argued that because ECN competitors of the SuperMontage will not have access to this data, Nasdaq should not have access to the data and should be required to compete on equal ground with other trading systems.[425] To permit Nasdaq to use this information, the commenter argued, would allow Nasdaq to use its affiliation with NASD to unfairly compete for customer orders.[426]

Three commenters also expressed concern about the potential fees the NASD might charge for access to the SuperMontage.[427] One commenter stated that the NASD would have no incentive to control costs associated with the SuperMontage because it would be a monopoly.[428] This commenter noted that currently it costs twice as much to execute a trade through SelectNet as it does on the Island ECN.[429] The commenter attributed the difference in cost to the fact that Island has competitors while SelectNet has a unique relationship with the NASD.[430] The commenter opined that the fees associated with the SuperMontage will exceed those for SelectNet as a result of the monopoly created.[431]

The Commission recognizes the concerns of the commenters, but notes that many of these conflicts are inherent in the self-regulatory model. Indeed, the Act specifically contemplates that SROs not only will act as regulators, but also will operate markets.[432] For instance, the Act authorizes the Commission to oversee SRO functions to address the inherent conflicts of the self-regulatory model, and to attempt to ensure that an SRO does not secure advantages as a commercial entity by virtue of its regulatory authority. Among other things, the Commission must find that the rules of the NASD provide for fair representation of its members, appropriate discipline for violations of the Act, and a fair procedure for disciplining members.[433] The NASD is required to file proposed rule changes with the Commission when it establishes fees, and these fees must be reasonable and equitably allocated among members, issuers, and other persons using any facility or system of the SRO in accordance with Section 15A(a)(5) of the Act.[434] Further, NASD trading rules, such as the SuperMontage proposal, are subject to the Commission's rule review process. This process provides the opportunity for interested parties and the public to voice their comments and concerns about proposed rules to the Commission. Moreover, the Commission, through inspections, vigilantly monitors all SROs, including the NASD, for objective compliance and enforcement of their rules. Thus, through oversight, inspection, and provisions designed to ensure due process, the Act has provided, and the Commission implements, significant safeguards that serve to address the conflicts inherent in the self-regulatory model and that protect the legitimate interests of SRO members.

It would be inconsistent with the NASD's self-regulatory responsibility for

[413] 15 U.S.C. 78k–1.

[414] *See* ETA Letter; NexTrade Letter; Instinet Letter; Bancorp Letter; STA Letter; Bloomberg Letter; Island Letter; BRUT Letter; Phlx Letter; Renaissance Letter; ACIM Letter; Erfort Letter; and Archipelago Letter (stating that the SuperMontage will ''pose insurmountable conflicts''); *see also* Scudder Kemper Letter.

[415] *See* Bloomberg Letter; *see also* Renaissance Letter and Archipelago Letter.

[416] *See* BRUT Letter.

[417] *See* Island Letter; Instinet Letter; and NexTrade Letter; see also Scudder Kemper Letter.

[418] *See* NY Letter and Instinet Letter.

[419] *See* ETA Letter; Archipelago Letter; and Instinet Letter.

[420] *See* BRUT Letter.

[421] *See* STA Letter.

[422] *See* Archipelago Letter.

[423] *See* ETA Letter; Instinet Letter; Island Letter; and Bancorp Letter. In contrast, Archipelago believed that the conflicts will diminish if Nasdaq were *entirely* independent of the NASD.

[424] *See* Archipelago Letter; *see also* Renaissance Letter.

[425] *See* Archipelago Letter.

[426] *See* Archipelago Letter. *See* Commission discussion at Section V.I.3.

[427] *See* STANY Letter; ACIM Letter; and ITG Letter. ITG requested clarification regarding the fees for the NODF and OCF.

[428] *See* Renaissance Letter.

[429] *See* Renaissance Letter.

[430] *See* Renaissance Letter.

[431] *See* Renaissance Letter. As discussed above, the Commission notes that the SuperMontage will not be the sole means for providing or accessing liquidity. Broker-dealers may continue to pursue other alternative order routing and execution services that provide value to their customers. As a result, the Commission believes that competitive pressures may limit the fees associated with the SuperMontage. *See* discussion at V.I.1.

[432] Section 3(a)(26) of the Act defines an SRO as ''[a]ny national securities exchange, registered securities association, or registered clearing agency * * *.'' *See* 15 U.S.C. 78c(a)(26). Section 3(a)(1) of the Act defines an exchange as ''[a]ny organization, association, or group of persons * * * which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities * * *.'' *See* 15 U.S.C. 78c(a)(1).

[433] *See* 15 U.S.C. 78*o*–3(b)(4), (7), and (8).

[434] 15 U.S.C. 78*o*–3(a)(5). *See* also 15 U.S.C. 78*o*–3(b)(9) and (11), and 15 U.S.C. 78k–1(a)(1)(C). The Commission notes that the NASD will file a separate proposal to establish fees for the SuperMontage. The NASD has committed to the creation of a SuperMontage fee structure that does not discriminate between Nasdaq market participants that interact with the system on an order-delivery versus an automatic execution basis. The NASD has also committed to avoiding systemic biases including biases that result from differential fees or incentives between quotes and orders, whether they are directed, non-directed, or preferenced. *See* Amendment No. 8, *supra* not 12.

the NASD to use its regulatory power to advance Nasdaq's market interests to the detriment of its members, and the Commission intends to be vigilant to prevent this. As a result, the NASD will not be able to use its regulatory authority to act in any manner in preference to, or prejudice of, Nasdaq or any other stock market, marketplace, or market participant[435] generally or specifically because of that entity's relationship to the SuperMontage or Nasdaq.[436] For example, the NASD has no rule that would require the use of the SuperMontage for execution of orders; and such rules or interpretive positions clearly would be inappropriate.[437] Further, the operation of the SuperMontage by an affiliate of the NASD does not validate its use to satisfy best execution obligations, or replace the required regular and rigorous review by broker-dealers of execution quality available from different markets. Broker-dealers will continue to have the responsibility to make an independent determination of how to obtain best execution of their customers' orders.

In addition, the Commission believes that NQDS Prime should help eliminate any informational advantage accruing to the SuperMontage. Further, Nasdaq has asserted that it will not use information about the source and scope of a reserve size quote to influence reserve size execution priority within SuperMontage, or provide optimized reserve size executions based on information residing solely in the SuperMontage.[438]

Finally, the Commission notes that, under Regulation ATS, ECNs may choose whether to register as national securities exchanges and become their own SRO, or to register as broker-dealers and comply with the requirements of another SRO.[439] Today's regulatory structure is designed to provide all market centers with structural flexibility in order to enhance competition between market centers, while promoting market fairness, efficiency, and transparency.

3. Nasdaq as an Exclusive Securities Information Processor

Prior to Amendment No. 8, several commenters asserted that the Nasdaq as an exclusive securities information processor (''SIP'') can compel the submission of quotations to Nasdaq.[440] As such, commenters believed that the NASD could compel the submission of orders through the SuperMontage.[441] Also, two commenters stated that Nasdaq's proposed treatment of UTP Exchanges' principal interest is inconsistent with its role as the exclusive SIP, and will discourage competition with competing exchanges.[442]

Several commenters questioned whether the SuperMontage would impact Nasdaq in its capacity as an exclusive SIP.[443] Archipelago stated that Nasdaq could use its status as an exclusive SIP to gain competitive advantages not available to ECNs. Specifically, Archipelago maintained that Nasdaq, as an exclusive SIP and the operator of the SuperMontage, could access the ACT and OATS systems to analyze the trading activity of competitive systems and the order routing practices of all market participants to garner competitive advantages. Archipelago stressed that Nasdaq, as a market operator, should not be allowed to compete unfairly for order flow through its role as an exclusive SIP. Both Archipelago and Instinet suggested that the SuperMontage would contravene the congressional intent that Nasdaq, as an exclusive information processor, act in a ''manner which is absolutely neutral with respect to all market centers, all market makers, and all private firms.''[444] Instinet suggested that the proposal, as amended, would allow Nasdaq to use its regulatory advantages and status as an exclusive SIP to lock in its competitive position in the marketplace. Archipelago suggested that Nasdaq would not operate in a manner that is absolutely neutral with respect to market centers because ECNs and UTP Exchanges would be disadvantaged by the SuperMontage's Order Execution Algorithm.

To address concerns about mandatory participation in Nasdaq, in publishing Amendment No. 8 for comment, the Commission noted that the NASD agreed to provide an alternative quotation and transaction reporting facility for NASD members.[445] In response to Amendment No. 8, several commenters expressed concern that Nasdaq's regulatory and competitive advantages were not adequately addressed.[446] In particular, commenters indicated that Nasdaq's operation of the SuperMontage and status as an exclusive SIP presented a conflict of interest.[447] Commenters questioned whether Nasdaq could be a truly voluntary facility as long as it retained its status as an exclusive SIP.[448] Commenters suggested that a meaningful display alternative to Nasdaq for OTC securities would have to exist prior to the SuperMontage's implementation in order to truly make the SuperMontage voluntary.[449] Commenters also asserted that the Nasdaq, as an exclusive SIP, is mandated by Congress to operate in a manner that is ''absolutely neutral with respect to all market centers.''[450]

One commenter questioned whether SIP neutrality was possible since ''[o]nce Nasdaq enters the execution business, it itself becomes a market center. * * *''[451] One commenter stated that the only way Nasdaq could fulfill the dual roles of a securities market and exclusive SIP would be to treat NASD members and UTP Exchanges equally.[452] Another

[435] This would not preclude the NASD from contracting with Nasdaq for services.

[436] Moreover, the NASD should not share its regulatory data with Nasdaq for business purposes. When Nasdaq registers as a national securities exchange, it will have its own regulatory responsibilities as an SRO separate and apart from the NASD. Market participants will choose whether to be members of Nasdaq or the NASD. In reviewing for-profit exchanges, including Nasdaq's proposal, the Commission is considering ways to minimize the potential heightened conflict of interests. *See also*, discussion at Section V.I.3, NASD as an Exclusive Securities Information Processor.

[437] For example, the fact that SOES was available in the past did not mean that broker-dealers were forced to use it to execute customer orders, nor did it free a broker-dealer from its duty to consider price improvement opportunities.

[438] *See* Amendment No. 8, *supra* note.

[439] *See* Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844 (December 22, 1998). To date, two ECNs have applied to register as exchanges. As noted in note #411, *supra,* PCX has proposed that Archipelago become a facility of the Exchange.

[440] *See* Bloomberg Letter; Scudder Kemper Letter; Instinet Letter; and Archipelago Letter.

[441] *See* Bloomberg Letter; Scudder Kemper Letter; Instinet Letter; and Archipelago Letter.

[442] *See* Archipelago Letter and CSE Letter.

[443] Under Section 3(a)(22)(B) of the Act, the term ''exclusive processor'' is defined as a ''securities information processor * * * which, directly or indirectly, engages on an exclusive basis on behalf of any national securities exchange or registered securities association * * * in collecting, processing, or preparing for distribution or publication any information with respect to (i) transactions or quotations on or effected or made by means of any facility of such exchange or (ii) quotations distributed or published by means of any electronic system operated or controlled by such association.'' 15 U.S.C. 78c(22).

[444] Archipelago Letter and Instinet Letter. *Also see* Gramm Letter; Scudder Kemper Letter; ACIM Letter; and BRUT Letter.

[445] *See* Amendment No. 8, *supra* note 12.

[446] *See* Instinet Letter; Brut Letter; NY Letter; Investment Companies Letter; ACIM Letter; Archipelago Letter; Scudder Kemper Letter; and CHX Letter.

[447] *See* Instinet Letter; Brut Letter; Archipelago Letter; and NY Letter.

[448] *See* Instinet Letter; Brut Letter; and NY Letter.

[449] *See* Instinet Letter and Brut Letter.

[450] *See* Instinet Letter and Brut Letter (citing S. Rep. No. 94–75, at 11–12 (1975); *see also* ACIM Letter; Scudder Kemper Letter; Archipelago Letter; and CSE Letter.

[451] *See* Brut Letter.

[452] *See* CHX Letter.

commenter stated that the SuperMontage should be approved only within the context of a broader program of reform of Nasdaq's role in OTC market structure that leaves Nasdaq to compete on the merits of its technology and vision with no regulatory advantages.[453] Some commenters suggested that if Nasdaq was not required to divest itself of its SIP status, irreparable harm could be done to the competitive landscape for Nasdaq traded securities.[454]

One commenter expressed concern that if Nasdaq becomes a registered exchange, stocks traded on Nasdaq would be excluded from the NASD display alternative.[455] Instinet stated that a neutral and viable alternative facility for all Nasdaq stocks with sufficient technological resources should be available prior to approval of the SuperMontage. Instinet also believed that Nasdaq's role as SIP for Nasdaq-listed securities should be discontinued [456] and the SIP for Nasdaq securities should not be affiliated with any market center. Instinet said that ownership, governance, and market data revenue of such a SIP should be broadly shared among market centers or vested through a competitive bidding process. Instinet also stated that all market centers should have direct access to the SIP's facilities and that its order routing and execution functions should not privilege any market center's individual liquidity pool over another's.

In the early 1970's, the Commission took the initial steps toward creating a central market system in which investors would have access to information from all markets. Congress adopted this fundamental policy determination when it enacted the Securities Acts Amendments of 1975 (''1975 Amendments'').[457] To implement the national market system, the Commission has required the SROs to act jointly pursuant to various national market system plans in disseminating consolidated market information. These plans govern all aspects of the arrangements for disseminating market information. Among other things, they require the individual SROs to funnel market information to a central processor, which then consolidates the information into a single stream for dissemination to the public. In this way, the public is assured of access to a highly reliable source of information that is fully consolidated from all the various market centers that trade a particular security.

Currently, Nasdaq is registered with the Commission as an exclusive SIP under Section 11A(b) of the Act.[458] Nasdaq functions as an exclusive processor in two separate but closely related activities. First, it is responsible for the collection of quotation and transaction information for the OTC market in Nasdaq-listed securities pursuant to NASD rules. And, second, it is the processor for the UTP Plan.

The UTP Plan was jointly developed and negotiated by its participants, the American Stock Exchange (''AMEX''), CHX, NASD, PCX, and the Phlx.[459] The UTP Plan provides for an Operating Committee composed of one representative for each participant. The responsibilities of the Operating Committee include oversight of the consolidation and dissemination of quotation information and transaction reports, evaluating the processor, and determining cost allocation and revenue sharing. The Operating Committee, by majority vote of the full participants, also may terminate the processor, for cause, if it determines that the processor has failed to perform its functions in a reasonably acceptable manner, or that its reimbursable expenses have become excessive and are not justified on a cost basis.[460]

Under NASD Rules, Nasdaq, acting on behalf of the NASD, collects and prepares for distribution information concerning quotations and transactions in the OTC market for Nasdaq-listed securities, including Nasdaq National Market System Securities and Nasdaq Small Cap securities. Under the UTP Plan, information concerning quotations and transactions in participant exchange markets for Nasdaq National Market System securities, but not for Nasdaq Small Cap securities, is collected and consolidated by Nasdaq with the information collected by Nasdaq on behalf of NASD. Amendments to the NASD's rules (including changes in market information fees relating to all Nasdaq System securities) are subject to Commission review under Section 19(b) of the Exchange Act.[461] Amendments to the Nasdaq/UTP Plan are subject to Commission review under Rule 11Aa3–2.[462] Participants may withdraw from the UTP Plan with thirty days' prior written notice.

The Commission appreciates concerns about Nasdaq's status as an exclusive SIP, because at the heart of the commenters' exclusive SIP argument is the concern that Nasdaq's role as an exclusive SIP compels SuperMontage participation. To address concerns that Nasdaq has an advantage as the mandatory collector of quotes and trade data for over-the-counter market participants, and thus, that the SuperMontage would be involuntary, the NASD has committed to provide NASD members with the ability to opt-out of the SuperMontage by providing an alternative quotation and transaction reporting facility for NASD members. This would allow NASD members to publish quotes and effect transactions in the over-the-counter market, but not to participate in the OCF function of the SuperMontage.[463] The facility would be designed to allow NASD members to meet their obligations under the SEC's Order Handling Rules and Regulation ATS, as well as any transaction reporting obligations imposed by NASD rules. The NASD intends its display alternative, which would be operational contemporaneously with the SuperMontage, to provide a market-neutral electronic linkage to the Nasdaq, as well as other marketplaces. Thus, Nasdaq's functions as the mandatory over-the-counter data collector will be disentangled from its roles as a self-regulator and market operator.

The Commission believes that the NASD display alternative should help assuage concerns about Nasdaq's competitive advantages, and further distinguish its status as a trading market and the collector of over-the-counter quotes and trades. The Commission, therefore, is conditioning its approval of

[453] *See* Brut Letter.

[454] *See* Instinet Letter and Brut Letter.

[455] *See* Instinet Letter. The Commission notes that the NASD has committed to provide an alternative quotation and transaction reporting facility for its members who transact business in the residual over-the-counter (''OTC'') market. The term residual OTC market ''refers to transactions by NASD members otherwise than on an exchange or Nasdaq, *in securities listed on an exchange or Nasdaq,* but not reported elsewhere. *See* letter from Robert Glauber, Chief Executive Officer and President, NASD, to Arthur Levitt, Chairman, Commission, dated December 13, 2000.

[456] *See also* Archipelago Letter.

[457] Pub. L. 94–29, 89 Stat. 97 (1975).

[458] *See* 15 U.S.C. 78k–1(b).

[459] AMEX has withdrawn from the UTP Plan. The Boston Stock Exchange (''BSE'') is a limited participant. A ''limited participant'' is a national securities exchange whose participation in the Nasdaq/UTP Plan is restricted to reporting market information. Recently, CSE became a full participant in the UTP Plan.

[460] The UTP Plan terminates in March, 2001. *See* discussion below regarding the need to re-evaluate the plan in light of market changes.

[461] Exchange Act Rule 11Aa3–2 establishes the procedures that govern amendments to each of the Plans. In addition, Section 19(b) of the Act, and Rule 19b–4 thereunder, govern proposed rule changes by the NASD that relate to the Nasdaq System. In general, all amendments to the Plans and NASD rules must be filed with the Commission, published for public comment, and approved by the Commission.

[462] *See* 17 CFR 11Aa3–2.

[463] *See* letter from Robert Glauber, Chief Executive Officer and President, NASD, to Arthur Levitt, Chairman, Commission, dated December 13, 2000.

the SuperMontage on the following, which must be implemented prior to or at the same time as the SuperMontage: (1) that the NASD will offer a quote and trade reporting alternative that satisfies the Order Handling Rules, Regulation ATS, and other regulatory requirements for ATSs, ECNs, and market makers; (2) that NASD quotes disseminated through the exclusive SIP will identify the ATS, ECN, or market maker source of the quote; and (3) that participation in SuperMontage will be entirely voluntary, because NASD quotes will be included in the Nasdaq quotation management system while Nasdaq is the exclusive SIP, but only for display purposes, and the NASD will provide access to its quotes on a market-neutral basis.

The commenters' other concerns about Nasdaq's role as central processor are, in fact, criticisms generally of the current structure for providing consolidated data. They also blur the distinction between the roles of Nasdaq as SIP for Nasdaq's own market, and Nasdaq's role as exclusive processor for all markets trading Nasdaq-listed securities. The operation of SuperMontage's trading system does not depend on Nasdaq's exclusive processor function; rather, UTP Exchanges need not participate in any aspect of Nasdaq other than its consolidation of quotes and trade information. As noted previously, this consolidation function grew out of Nasdaq's origination of this market. It is subject to renegotiation of the markets trading Nasdaq securities, and as mentioned previously, Nasdaq has indicated that it is willing to confer with all relevant parties about establishing an independent exclusive SIP that is jointly owned by the exchanges that trade Nasdaq securities.[464]

As a separate policy matter, and in light of commenters' concerns, the Commission believes that it is now appropriate for the NASD and the UTP Exchanges to re-evaluate the UTP Plan.[465] The Commission notes that the SuperMontage is being implemented in conjunction with several other market initiatives, such as Nasdaq becoming an exchange,[466] and further, that more exchanges may begin trading Nasdaq securities in the near future. In light of the foregoing and the fact that the UTP Plan will be coming up for renewal and consideration by the Commission within the next few months, the Commission believes that it is appropriate to discuss its concerns regarding the UTP Plan in the context of this Order to initiate a dialog among the UTP Plan participants.

Accordingly, the Commission intends to require as a condition for extending the existing plan beyond the March, 2001 termination date, that there be good faith negotiations among the plan participants on a revised plan for Nasdaq securities that provides for either (i) a fully viable alternative exclusive SIP for all Nasdaq securities, or (ii) a fully viable alternative non-exclusive SIP in the event that the plan does not provide for an exclusive SIP. If the revised plan provides for an exclusive consolidating SIP, a function currently performed by Nasdaq, the Commission believes that, in order to avoid conflicts of interest, there should be a presumption that a plan participant, and in particular Nasdaq, should not operate such exclusive consolidating SIP. The presumption may be overcome if: (i) The plan processor is chosen on the basis of bona fide competitive bidding and the participant submits the successful bid; and (ii) any decision to award a contract to a plan participant, and any ensuing review or renewal of such contract, is made without that plan participant's direct or indirect voting participation. If a plan participant is chosen to operate such exclusive SIP, the Commission believes there should be a further presumption that the participant-operated exclusive SIP shall operate completely separate from any order matching facility operated by that participant and that any order matching facility operated by that participant must interact with the plan-operated exclusive SIP on the same terms and conditions as any other market center trading Nasdaq listed securities. Further, the Commission will expect the NASD to provide direct or indirect access to the alternative SIP, whether exclusive or non-exclusive, by any of its members that qualifies, and to disseminate transaction information and individually identified quotation information for these members through the SIP.

The Commission believes that the revised plan should be open to all SROs and that the plan should share governance of all matters subject to the plan equitably among the SRO participants. The plan should provide for sharing of market data revenues among SRO participants. The Commission also believes the Plan should provide a role for participation in decision making to non-SROs that have direct or indirect access to the alternative SIP provided by NASD.

If negotiations among plan participants do not produce a revised plan within six months from the date of this order,[467] the Commission intends promptly to amend the plan directly in a manner consistent with the foregoing.

The Commission also recognizes that the NASD, in its regulatory capacity, can obtain sensitive market data that could benefit Nasdaq's market operation if used for competitive purposes. Thus, the Commission has received assurances from Nasdaq that it will not use OATS data to gain an unfair competitive advantage over other market participants.[468] The Commission will maintain vigilant oversight of this matter. In addition, in response to the concern that Nasdaq could accrue an unfair informational advantage through the SuperMontage, the filing was amended to provide, on a real-time basis, all individual attributable quote and order information at the three best price levels displayed in the NODF through NQDS Prime, and to identify the sender of all directed orders, delivered non-directed orders, and delivered preferenced orders.[469] The Commission believes that these provisions help to address commenter concerns, and demonstrate the NASD's intent not to impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[470]

Notwithstanding the above, the Commission recognizes that the ongoing evolution of the securities industry requires that traditional interaction of market participants be reevaluated, and may necessitate fundamental structural change. In that regard, the Commission is reviewing SIP and market information

[464] *See* letter from Frank Zarb, Chairman and CEO, Nasdaq, to Senator Phil Gramm, dated October 24, 2000. The UTP Plan outlines the responsibilities of UTP Plan participants but does not provide a comprehensive or exclusive set of terms that govern the interaction of the markets. Because the UTP Plan only covers distribution and other basic terms, it is not uncommon for the NASD and UTP Plan Participants to negotiate terms for dealing with each other separate from the UTP Plan. For instance, the NASD negotiated the terms of participation in the OCF function of SuperMontage with the UTP Plan's only active participant, the CHX. *See* Amendment No. 4, *supra* note 6. In addition, Nasdaq discussed with Archipelago its participation in the OCF function as a UTP Exchange in light of the proposal for Archipelago to become a facility of the PCX.

[465] The Commission notes that its discussion of possible changes to the UTP Plan should not be interpreted as necessary pre-conditions to the implementation of the SuperMontage.

[466] *See* Form 1 submitted on November 9, 2000.

[467] The Commission will consider allowing an additional 3 months for negotiation if it is requested by the participants for good cause.

[468] *See* Amendment No. 9, *supra* note 14.

[469] *See* Amendment No. 8, *supra* note 12.

[470] 15 U.S.C. 78o–3(b)(9).

arrangement issues in a context separate from the SuperMontage, and has initiated a Market Data Advisory Committee under the Federal Advisory Committee Act. The Commission will continue to consider market data issues, including through its Advisory Committee on Market Data. The Commission may adopt alternative market data approaches that supersede the need for the UTP Plan discussed previously.

4. Commission's Conclusion on Competition Issues

The Commission believes that Nasdaq and traditional exchanges must have the flexibility to rethink their structures to permit appropriate responses to the rapidly changing marketplace. Congress instructed the Commission to seek to ''enhance competition and to allow economic forces, interacting with a fair regulatory field, to arrive at appropriate variation in practices and services.'' [471] The Commission finds that the SuperMontage is consistent with these goals in that it is reasonably designed to promote price discovery, best execution, liquidity, and market innovation, while continuing to preserve competition among market centers.

In addition, the Commission finds that the SuperMontage does not unfairly discriminate among brokers and dealers. First, the Commission notes that the proposal was amended to eliminate distinctions between automatic execution participants and order delivery participants with regard to order execution priority. Second, the proposal always has provided ECNs with the opportunity to participate either as automatic execution ECNs or order delivery ECNs.[472] Third, the NASD amended the proposal to allow ECNs, market makers, and UTP Exchanges to accept Liability Orders through the directed order process. Further, the NASD amended the proposal to have the execution algorithm default to a price/time priority algorithm and allow executions based on priorities other than access fees. By providing ECNs with the option of automatic execution or order delivery, by amending the directed order process, by revising the Order Execution Algorithms, and by giving ECNs that accept automatic executions the ability to request a cancellation in order to avoid dual liability, the Commission believes that the NASD has made reasonable efforts to ensure that ECNs will have the ability to participate fairly in the SuperMontage.[473]

The Commission again notes that mandatory market maker participation in automatic execution is not new. Mandatory market maker participation in automatic executions has been a characteristic of the Nasdaq market since the 1988 SOES modifications. The Commission believes that many of the same principles that served as a catalyst for the 1988 SOES modifications currently exist, including speed and certainty of executions at the best displayed price, market liquidity and depth, investor protection in fast moving or volatile markets, and the maintenance of investor confidence. These continue to be reasons for automatic executions in the Nasdaq market today.

In the Commission's view, Nasdaq has the right to seek a more efficient model of doing business. Nasdaq, like other markets and market participants, must be permitted to innovate and adjust to the dynamic nature of today's securities industry. The Commission believes that the NASD has developed a reasonable system architecture for the SuperMontage that attempts to strengthen its market while accommodating the business operations and interests of all Nasdaq Quoting Market Participants, and without unfairly discriminating against UTP exchanges. The Commission finds that the proposal is consistent with Section 15A(b)(9) of the Act in that it does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[474] In short, the Commission concludes that the SuperMontage represents a market innovation that is likely to strengthen the Nasdaq market while leaving room for further market initiatives by competing markets and Nasdaq market participants.

J. Technology Issues

Many aspects of the proposal will require significant technological changes to the present system architecture, particularly the NODF and the OCF. Several commenters expressed concern about the NASD's technological capability to implement the proposal, particularly in light of Nasdaq's past system delays and outages, the increased message traffic that could be created by the proposal, and other changes, such as decimalization.[475] Commenters called for Nasdaq to improve its technology and capacity prior to implementing the present changes; to provide assurances that the systems can accommodate any foreseeable market conditions; and to correct any present deficiencies before embarking on the implementation of the SuperMontage.[476] In addition, one commenter believed that all systems specifications should be made available for public inspection and comment.[477] Finally, one commenter expressed the concern that because proposed NASD Rule 4705(g) relieves Nasdaq of all liability for losses stemming from use of the SuperMontage, Nasdaq has no incentive to prevent outages.[478] Given this, the commenter recommended that there be rigid oversight over Nasdaq's system performance.[479]

In response, the NASD stated that, like the commenters, it seriously considered the impact of the increase in trading volume from the new system, and the corresponding stress that such an increase could place on Nasdaq's computer systems.[480] The NASD explained that the NODF has been designed, and will be constructed, around a state-of-the-art ''scaleable'' architecture that Nasdaq can easily expand to meet future demands on the system. Specifically, the NASD represented that the new architecture for the NODF does not have the limitations associated with the underlying systems for SOES and SelectNet. The NODF architecture has been developed to provide for full horizontal scalability. This means that Nasdaq will be able to run multiple replications of the NODF/NNMS system, called ''Security Processors.'' Each Security Processor will contain the entire NODF/NNMS functionality to support the quotes, executions, and orders for a given subset of Nasdaq securities. The Security Processors will not communicate with one another in

[471] *See* Senate Report at p. 8, *supra* note 37.

[472] Amendment No. 6 to the proposal makes clear that UTP Exchanges have a similar option. *See* note 9, *supra*.

[473] The Commission also notes that like today, all ECNs (even if they are order delivery participants in the system) will be able to automatically execute against market maker quotes. In addition, order delivery ECNs will continue to receive messages that include the identity of the market participant hitting their quote. *See* Amendment No. 8, *supra* note 12.

[474] 15 U.S.C. 78o–3(b)(9).

[475] *See* ITAC Letter; ETA Letter; Bancorp Letter; Bloomberg Letter; STA Letter; STANY Letter; NexTrade Letter; Salomon Smith Barney Letter; Instinet Letter; and MSDW Letter; *see also* CHX Letter; Renaissance Letter; and ACIM Letter.

[476] *See* ETA Letter; Bancorp Letter; STANY Letter; STA Letter; Salomon Smith Barney Letter; Instinet Letter; and NexTrade Letter.

[477] *See* Bloomberg Letter.

[478] *See* Archipelago Letter.

[479] *See* Archipelago Letter.

[480] Nasdaq also noted that while market participants may give Nasdaq multiple levels of orders for display in the system, they are not required to do so. Market participants may opt to give Nasdaq only their top of file—as they do today—as long as they comply with the Commission's Order Handling Rules.

the processing of quotes, executions, or orders. In addition, the NASD noted that Security Processors could be added, as necessary, to allow the system to expand and increase in capacity as volume grows. The NASD stated that the scaleable Security Processor approach should eliminate several different problems that market participants currently encounter, including (1) delays for current users; (2) delays in updating quotes to reflect an execution; and (3) performance problems associated with SelectNet. For the same reasons, the NASD is confident that the NODF will be able to meet all capacity requirements for decimal pricing in the U.S. securities markets.[481]

Further, according to the NASD, the proposed system will not be affected by any announced capacity constraints on Nasdaq's systems because the NODF is based on a different architecture, as described above. Therefore, the capacity constraints Nasdaq experiences with its current architecture will not affect the development or operation of the NODF architecture.

In Amendment No. 5, the NASD further stated that construction of the proposed system has not diverted resources from its continuing decimalization efforts. The NASD emphasized that it has not and will not, in any way, divert technology resources from its decimalization efforts. The NASD represented that the system development team consists of personnel that are exclusively dedicated to the proposed system and are completely separate from other Nasdaq software teams. In addition, the NASD stated that it uses outside consultants to augment internal staff where needed.

Specifically, according to the NASD, the SuperMontage is being built using the Tandem System. On the other hand, Nasdaq is modifying its existing Unisys-based quotation platform to accommodate decimal pricing, and that project is staffed with a dedicated Unisys-based development team.[482] The NASD asserted that personnel resources for decimals will take complete priority over other Nasdaq projects, including the SuperMontage.[483]

Further, the NASD's international development efforts have been out-sourced to separate and distinct teams, with only two individuals coming from existing NASD staff—neither of whom were involved in any related Nasdaq market systems. All systems development for the international markets is being performed by a joint venture company and has no impact on domestic Nasdaq development or resources.[484] Finally, in response to the concerns of some commenters, Nasdaq will attempt to roll out the system on a measured basis.[485]

After considering the above representations, the Commission believes that the NASD has provided the appropriate assurance that Nasdaq has a plan to address the technological concerns and objections raised about the SuperMontage. The Commission notes the importance of the reliability of systems capability and capacity to investors, market intermediaries, and the markets as a whole. The Commission expects the NASD and Nasdaq to continually evaluate and monitor the development of the SuperMontage and to implement any additional technological changes as necessary before fully implementing the system. The Commission also expects the NASD to demonstrate that the development and capabilities of the system satisfy the Commission's Automation Review Policy[486] before implementing the proposed system. In particular, the Commission expects the NASD to provide to the Commission staff documentation called for in ARP II relating to systems change notifications, including, but not limited to: (1) Capacity estimates; (2) test plans and schedules; (3) contingency protocols; (4) vulnerability assessments; and (5) production schedules (*e.g.*, project management and task schedules). The Commission expects the NASD to provide this information as it is developed and prior to testing, as appropriate, and to update periodically this information, including a description of all test results.

Finally, the Commission notes that the NASD has provided assurance that technological resources will not be diverted from Nasdaq's decimalization efforts to any other Nasdaq initiative, including the current proposal. In any case, the Commission notes that the NASD has committed to delaying implementation of the proposed system until *after* the full implementation of decimal pricing.[487]

K. Impact on Competition, Efficiency and Capital Formation

Section 3(f) of the Act requires that the Commission consider whether the NASD's proposal will promote efficiency, competition, and capital formation.[488] As discussed above, the Commission has carefully considered the merits of the issues raised by each of the commenters, and has concluded that the design of SuperMontage, in conjunction with the conditions imposed by the Commission, attempts to accommodate all Nasdaq market participants and does not prohibit the development of other trading systems or market innovation. The Commission believes that the SuperMontage is a reasonable effort by the NASD to enhance the quality of the Nasdaq market by providing more information to investors, promoting greater efficiency in executions, and increasing overall market transparency. While the SuperMontage will provide a central means for accessing liquidity in Nasdaq stocks, it does not represent an exclusive means, nor does it prevent broker-dealers from seeking alternative order routing and execution services. In addition, the Commission believes that the proposal should promote competition and capital formation by providing market makers and ECNs with several quote and order management options (*e.g.*, unattributable quotes and reserve size), and by providing ECNs and UTP Exchanges the ability to participate in the SuperMontage as either automatic execution participants or order delivery participants.[489]

VI. Amendment No. 9

In Amendment No. 9, the NASD selected how preferenced orders would be processed. Under the Amendment, preferenced orders will be executed only if the preferenced Nasdaq Quoting Market Participant or UTP Exchange is

[481] *See* Amendment No. 5, *supra* note 8.

[482] The NASD represented that there are 30 programmers who are dedicated to Nasdaq's efforts to achieve decimals. Nasdaq explained that these resources will not be used or otherwise diverted from its efforts to achieve trading in a decimal environment, nor will other resources related to achieving decimalization—such as quality assurance and testing personnel—be used at the expense of completing decimalization efforts.

[483] The NASD also explained that the SuperMontage uses dedicated Tandem computing resources for development and integration testing while sharing the actual production testing facilities with other Tandem-based applications. The decimalization of other Tandem legacy applications, such as SOES, SelectNet, and ACT, use different resources.

[484] All NASD and NASD Regulation activities have been out-sourced to Electronic Data Systems, which relieves the Nasdaq team of any billing or administrative technology burdens. Systems development for the American Stock Exchange is managed by a fully independent team that is now out-sourced to SIAC.

[485] On a temporary basis, it will be possible to operate the NODF side-by-side with the NNMS and SmallCap SOES systems, and for a security to trade on either the NODF or the NNMS/SmallCap SOES, but not both simultaneously. In Amendment No. 5, the NASD described the roll out of the system in greater detail. *See* Section III.K, *supra.*

[486] *See* Securities Exchange Act Release Nos. 27445 (November 16, 1989), 54 FR 48703 (November 24, 1989) and 29185 (May 9, 1991), 56 FR 22490 (May 15, 1991) (''ARP II'').

[487] *See* Amendment No. 6, *supra* note 9.

[488] 15 U.S.C. 78c(f).

[489] 15 U.S.C. 78c(f).

at the BBO. This limitation ensures that customers will always receive executions at the BBO and should assist broker-dealers in fulfilling their best execution obligations. The Commission notes that those market participants wishing to access a Nasdaq Quoting Market Participant or UTP Exchange outside of the BBO may submit directed orders through the system or submit orders outside of Nasdaq (via private links or through ECNs).

The Commission finds that Amendment No. 9 is consistent with Section 15A(b)(6) of the Act,[490] which requires that the rules of an association be designed to promote just and equitable principles of trade and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The Commission also finds good cause to approve Amendment No. 9 to the proposed rule change prior to the thirtieth day after the date of publication of notice of filing of the amendment in the **Federal Register**. Specifically, Amendment No. 9 merely withdraws one alternative to the processing of preferenced orders, which was noticed in Amendment No. 8, and makes a technical correction to the definition of preferenced orders to make the definition conform with the description of how preferenced orders are processed against displayed quote/orders and reserve size, as well as represent that Nasdaq will not use OATS data to gain an unfair competitive advantage over other market participants. The Commission notes that in Amendment No. 8 the NASD specifically sought comment on two possible alternatives for processing preferenced orders with the clear intention of withdrawing one of the alternatives. Further, the Commission notes that the description in Amendment No. 8 made clear that preferenced orders would be processed against displayed quote/orders and reserve size. Accordingly, the Commission believes that there is good cause, consistent with Sections 15A(b)(6) and 19(b) of the Act[491] to approve Amendment No. 9 to the proposal on an accelerated basis.

VII. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment No. 9, including whether Amendment No. 9 is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR–NASD–99–53 and should be submitted by February 16, 2001.

VIII. Conclusion

For the reasons discussed above, the Commission finds that the SuperMontage proposal, as amended, is consistent with the requirements of the Act (specifically, Sections 3, 11A, and 15A of the Act) and the rules and regulations thereunder applicable to a national securities association.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[492] that the SuperMontage proposal (SR–NASD–99–53), as amended, be and hereby is approved.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 01–2381 Filed 1–25–01; 8:45 am]

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[490] 15 U.S.C. 78o–3(b)(6).

[491] 15 U.S.C. 78o–3(b)(6) and 78s(b).

[492] 15 U.S.C. 78s(b)(2).

Federal Register

Friday,
January 26, 2001

Part IV

Department of Transportation

Federal Transit Administration

Over-the-Road Bus Accessibility Program Grants; Notice

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Over-the-Road Bus Accessibility Program Grants

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of availability of funds; Solicitation of grant applications.

SUMMARY: The U.S. Department of Transportation (DOT) Federal Transit Administration (FTA) announces the availability of funds in fiscal year (FY) 2001 for the Over-the-Road Bus (OTRB) Accessibility Program, authorized by Section 3038 of the Transportation Equity Act for the 21st Century (TEA–21), Pub. L. 105–178. The OTRB Accessibility Program makes funds available to private operators of over-the-road buses to finance the incremental capital and training costs of complying with DOT's over-the-road bus accessibility final rule, published in a **Federal Register** Notice on September 24, 1998. The OTRB Accessibility Program calls for national solicitation of applications, with grantees to be selected on a competitive basis. FTA's FY 2001 Appropriation Act makes Federal funds available to intercity fixed-route providers and other OTRB providers at up to 90 percent of the project cost.

A total of $24.3 million is available for the program over the life of TEA–21. The guaranteed level of funding available for intercity fixed-route service was $2 million in FYs 1999 and 2000, and is $3 million in FY 2001, and $5.25million in FYs 2002 and 2003, for a total of $17.5 million. The guaranteed level of funding for other over-the-road bus services, including charter and tour bus, is $1.7 million per year from FYs 2000 and 2003, for a total of $6.8 million.

For FY 2001, $3 million was appropriated for intercity fixed-route service providers and $1.7 million was appropriated for other over-the-road service providers. After applying the .22 percent reduction for the government-wide rescission required by the FY 2001 Omnibus Consolidated Appropriations Act, Pub.L. 106–554, the amount available for the OTRB Accessibility Program has been reduced to $4,689,660. Of this amount, $2,993,400 is available to providers of intercity fixed-route service, and $1,696,260 is available to other providers of over-the-road bus services, including local fixed-route service, commuter service, and charter and tour service.

This announcement describes application procedures for the OTRB Accessibility Program and the procedures FTA will use to determine which projects it will fund. It includes all of the information needed to apply for an OTRB Accessibility Program grant.

This announcement is available on the Internet on the FTA website at: [*http://www.fta.gov/library/legal/federal register/2001/index.htm*]. FTA will announce final selections on the website and in the **Federal Register**.

DATES: Complete applications for OTRB Accessibility Program grants must be submitted to the appropriate FTA regional office (see Appendix A) by the close of business April 27, 2001. The appropriate FTA regional office is that office which serves the state in which an applicant's headquarters office is located. FTA intends to announce grant selections in July 2001, and it is anticipated that grants will be made by September 30, 2001, the end of the Federal fiscal year. FTA will accept comments on this notice until (30 days after date published). Based on input, FTA may provide amending or clarifying program information.

ADDRESSES: Comments and questions related to this notice can be mailed, faxed, or electronically submitted to the following: Sue Masselink, Federal Transit Administration, Room 9315, 400 7th Street, S.W., Washington, D.C. 20590 (FAX (202) 366–7951, e-mail address: sue.masselink@fta.dot.gov).

FOR FURTHER INFORMATION CONTACT: The appropriate FTA Regional Administrator (Appendix A) for application-specific information and issues. For general program information, contact Sue Masselink, Office of Program Management, (202) 366–2053, e-mail: *sue.masselink@fta.dot.gov.* A TDD is available at 1–800–877–8339 (TDD/FIRS).

SUPPLEMENTARY INFORMATION

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I. General Program Information

A. Authority

The program is authorized under section 3038 of the Transportation Equity Act for the 21st Century (TEA–21). Funds have been appropriated for this program under the Department of Transportation and Related Agencies Appropriations Act, 2001, Pub.L. 106–346; however, a .22 percent rescission was required pursuant to section 1403(a) of the FY 2001 Omnibus Consolidated Appropriations Act.

B. Background

Over-the-road buses are used in intercity fixed-route service as well as other services, such as charter and tour bus services. These services are an important element of the U.S. transportation system. TEA–21 authorized FTA's Over-the-road Bus Accessibility Program to assist over-the-road bus operators in complying with the Department's Over-the-road Bus Accessibility rule, ''Transportation Services for Individuals with Disabilities (ADA)'' (49 CFR part 37) published in a **Federal Register** notice on September 24, 1998.

Summary of DOT's Over-the-Road Bus Accessibility Rule. Under the over-the-road bus accessibility rule, all new buses obtained by large (Class I carriers, i.e., those with gross annual operating revenues of $5.3 million or more), fixed-route carriers, starting in 2000, must be accessible, with wheelchair lifts and tie-downs that allow passengers to ride in their own wheelchairs. The rule requires the fixed-route carriers' fleets to be completely accessible by 2012. The buses acquired by small (gross operating revenues of less than $5.3 million annually) fixed-route providers also are required to be lift-equipped, although they do not have a deadline for total fleet accessibility. Small providers also can provide equivalent service in lieu of obtaining accessible buses. Starting in 2001, charter and tour companies will have to provide service in an accessible bus on 48 hours' advance notice. Fixed-route companies must also provide this kind of service on an interim basis until their fleets are completely accessible.

Small carriers who provide mostly charter or tour service and also provide a small amount of fixed-route service can meet all requirements through 48-hour advance-reservation service. Small carriers have an extra year to begin complying with the requirements which apply to them starting in October 2001, compared to October 2000 for large carriers.

Specifications describing the design features that an over-the-road bus must have to be readily accessible to and usable by persons who use wheelchairs or other mobility aids required by the ''Americans with Disabilities Act Accessibility Guidelines for Transportation Vehicles: Over-the-Road

Buses'' rule (36 CFR part 1192) were published in another **Federal Register** Notice on September 28, 1998.

C. Scope

Improving mobility and shaping America's future by ensuring that the transportation system is accessible, integrated, efficient and offers flexibility of choices is a key strategic goal of the Department of Transportation. Over-the-road Bus Accessibility projects will improve mobility for individuals with disabilities by providing financial assistance to help make vehicles accessible and provide training to ensure that drivers and others understand how to use accessibility features as well as how to treat patrons with disabilities.

D. Eligible Applicants

Grants will be made directly to operators of over-the-road buses. Intercity, fixed-route over-the-road bus service providers may apply for the nearly $3 million available to intercity fixed-route providers in FY 2001. Other over-the-road bus service providers, including operators of local fixed-route service, commuter service, and charter or tour service may apply for the nearly $1.7 million available in FY 2001 for these providers. OTRB operators who provide intercity, fixed-route service and another type of service, such as commuter, charter or tour, may apply for both categories of funds with a single application. Private for-profit operators of over-the-road buses are eligible to be direct applicants for this program. This is a departure from the other FTA programs in which the direct applicant must be a state or local public body.

E. Vehicle and Service Definitions

An ''over-the-road bus'' is a bus characterized by an elevated passenger deck located over a baggage compartment.

Intercity, fixed-route over-the-road bus service is regularly scheduled bus service for the general public, using an over-the-road bus that: operates with limited stops over fixed routes connecting two or more urban areas not in close proximity or connecting one or more rural communities with an urban area not in close proximity; has the capacity for transporting baggage carried by passengers; and makes meaningful connections with scheduled intercity bus service to more distant points.

Other over-the-road bus service means any other transportation using over-the-road buses, including local fixed-route service, commuter service, and charter or tour service (including tour or excursion service that includes features in addition to bus transportation such as meals, lodging, admission to points of interest or special attractions). While some commuter service may also serve the needs of some intercity fixed-route passengers, the statute includes commuter service in the definition of ''other'' service. Commuter service providers should apply for these funds, even though the services designed to meet the needs of commuters may also provide service to intercity fixed-route passengers on an incidental basis. If a service provider can document that more than 50 percent of its passengers are using the service as intercity fixed-route service, the provider may apply for the funds designated for intercity fixed-route operators.

F. Eligible Projects

Projects to finance the incremental capital and training costs of complying with DOT's over-the-road bus accessibility rule (49 CFR Part 37, subpart H) are eligible for funding. Incremental capital costs eligible for funding include adding lifts, tie downs, moveable seats, doors and all labor costs associated with work on the vehicle needed to make new vehicles accessible. Retrofitting vehicles with such accessibility components is also an eligible expense. Please see Buy America section for further determination of eligibility.

Funds may be awarded by FTA for costs already incurred by the applicants. For example, new wheelchair accessible vehicles delivered since June 9, 1998, the date that the TEA–21 was signed into law, are eligible for funding under the program. Vehicles of any age that have been retrofitted with lifts and other accessibility components since June 9, 1998 are also eligible for funding.

Eligible training costs are those required by the final accessibility rule as described in 49 CFR 37.209. These activities include training in proper operation and maintenance of accessibility features and equipment, boarding assistance, securement of mobility aids, sensitive and appropriate interaction with passengers with disabilities, and handling and storage of mobility devices. The costs associated with developing training materials or providing training for local providers of over-the-road bus services for these purposes are eligible expenses.

FTA has sponsored the development of accessibility training materials for public transit operators. FTA-funded Project Action is a national technical assistance program to promote cooperation between the disability community and transportation industry. Project Action provides training, resources and technical assistance to thousands of disability organizations, consumers with disabilities, and transportation operators. It maintains a resource center with the most up-to-date information on transportation accessibility. Project Action may be contacted at: Project Action, 700 Thirteenth Street, N.W., Suite 200, Washington, DC 20590, Phone: 1–800–659–6428, Internet address: *http://www.projectaction.org/.*

G. Grant Criteria

FTA will award grants based on:

a. The identified need for over-the-road bus accessibility for persons with disabilities in the areas served by the applicant;

b. The extent to which the applicant demonstrates innovative strategies and financial commitment to providing access to over-the-road buses to persons with disabilities;

c. The extent to which the over-the-road bus operator acquires equipment required by DOT's over-the-road bus accessibility rule prior to the required timeframe in the rule;

d. The extent to which financing the costs of complying with DOT's rule presents a financial hardship for the applicant; and

e. The impact of accessibility requirements on the continuation of over-the-road bus service, with particular consideration of the impact of the requirements on service to rural areas and for low-income individuals.

These are the statutory criteria upon which funding decisions will be made. In addition to these criteria, FTA may also consider other factors, such as the size of the applicant's fleet and the approximate proportion of use the vehicle will get for the services eligible under the category of funds for which the applicant is applying. Funding decisions may also take into consideration whether intercity fixed-route carriers are large (Class I carriers, i.e., those with gross annual operating revenues of $5.3 million or more) or small (gross operating revenues of less than $5.3 million annually).

H. Grant Requirements

The grant application must include documentation necessary to meet the requirements of FTA's Nonurbanized Area Formula program (49 U.S.C. 5311). Technical assistance regarding these requirements is available in each FTA regional office. Federal requirements apply only to the incremental cost of adding the wheelchair accessibility features, either to new vehicles or when retrofitting existing vehicles.

Training costs are not subject to all requirements. For example, labor protections, Buy America, and school transportation are not applicable to training assistance.

1. *Buy America.* In the OTRB Accessibility program, FTA's Buy America regulations, 49 CFR part 661, apply to the incremental capital cost of making vehicles accessible. Those regulations do not apply to associated labor costs. The following discussion relates to the contract between the grantee and the prime contractor.

The ''General Requirements'' found at 49 CFR 661.5 apply to that portion of the accessibility system being funded. That section requires that all of the manufacturing processes for the product take place in the United States and that all components of the product be made in the United States. A component is considered domestic if it is manufactured in the U.S.A., regardless of the origin of its subcomponents. The lift, the moveable seats, and the securement devices will all be considered components for purposes of this program; accordingly, a ''General Requirements'' analysis should be applied to each of these items individually. Should a recipient choose to request funding for only a specific component, such as the lift or the securement device, then the Buy America requirements would apply only to that item funded by FTA.

Three exceptions to the general requirements that can be found at 49 CFR 661.7: first, a waiver may be requested when the application of the regulation is not in the public interest; second, the general requirements will not apply if materials and products being procured are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; and third, a price differential waiver will be available under this program only if the grantee conducts a competitive procurement (see Competitive Procurement Section, below). FTA approval must be received by the recipient of FTA funds prior to the execution of contract.

It should also be noted that FTA has issued a general public interest waiver for all purchases under the Federal ''small purchase'' threshold, which is currently set at $100,000. This waiver can be found in 49 CFR 661.7, Appendix A(e). In section 3038(b) of TEA–21, Congress authorized FTA financing of the incremental capital costs of compliance with DOT's OTRB accessibility rule. Consistent with this provision, the small purchase waiver applies only to the incremental cost of the accessibility features FTA is funding. Where more than one bus is purchased, the grantee must consider the incremental cost increase for the entire procurement when determining if the small purchase waiver applies. For example, if $30,000 is the incremental cost for the accessibility features eligible under this program per bus (regardless of the Federal share contribution), then a procurement of three buses with a total such cost of $90,000, would qualify for the small purchase waiver. No special application to FTA would be required.

The grantee must obtain a certification from the bus manufacturer that all items included in the incremental cost for which the applicant is applying for funds meet Buy America requirements.

The Buy America regulations can be found at *www.fta.dot.gov/library/legal/49961.htm.*

2. *Labor Protection.* Before FTA may award a grant for capital assistance, 49 U.S.C. 5333(b) requires that fair and equitable arrangements must be made to protect the interests of transit employees affected by FTA assistance. Those arrangements must be certified by the Secretary of Labor as meeting the requirements of the statute. When a labor organization represents a group of affected employees in the service area of an FTA project, the employee protective arrangement is usually the product of negotiations or discussions with the union. The grant applicant can facilitate Department of Labor (DOL) certification by identifying in the application any previously certified protective arrangements that have been applied to similar projects undertaken by the grant applicant, if any. Receiving funds under the OTRB Accessibility program, however, will not require the grantee's employees to be represented by organized labor. Upon receipt of a grant application requiring employee protective arrangements, FTA will transmit the application to DOL and request certification of the employee protective arrangements. In accordance with DOL guidelines, DOL notifies the relevant unions in the area of the project that a grant for assistance is pending and affords the grant applicant and union the opportunity to agree to an arrangement establishing the terms and conditions of the employee protections. If necessary, DOL furnishes technical and mediation assistance to the parties during their negotiations. The Secretary of Labor may determine the protections to be certified if the parties do not reach an agreement after good faith bargaining and mediation efforts have been exhausted. DOL will also set the protective conditions when affected employees in the service area are not represented by a union. When DOL determines that employee protective arrangements comply with labor protection requirements, DOL will provide a certification to FTA. The grant agreement between FTA and the grant applicant incorporates by reference the employee protective arrangements certified by DOL.

Applicants must identify any labor organizations that may represent their employees and all labor organizations that represent the employees of any other transit providers in the service area of the project.

For each local of a nationally affiliated union, the applicant must provide the name of the national organization and the number or other designation of the local union. (For example, Amalgamated Transit Union local 1258.) Since DOL makes its referral to the national union's headquarters, there is no need to provide a means of contacting the local organization.

However, for each independent labor organization (i.e., a union that is not affiliated with a national or international organization) the local information will be necessary (name of organization, address, contact person, phone, fax numbers).

Where a labor organization represents transit employees in the service area of the project, DOL must refer the proposed protective arrangements to each union and to each recipient. For this reason, please provide DOL with a contact person, address, telephone number and fax number for your company, and associated union information.

DOL issued a **Federal Register** Notice addressing the new TEA–21 programs, including the OTRB Accessibility Program, ''Amendment to Section 5333(b) Guidelines to Carry Out New Programs Authorized by the Transportation Equity Act for the 21st Century (TEA–21); Final Rule, dated July 28, 1999. FTA issued a ''Dear Colleague'' letter, dated December 5, 2000, addressing DOL processing of grant applications. Attached to the letter is an application checklist which provides information that DOL must have in order to review and certify FTA grant applications. This letter and attachment can be found at: *http://www.fta.dot.gov/office/public/c0019.html.* Questions concerning protective arrangements and related matters pertaining to transit employees should be addressed to the Division of Statutory Programs, Department of Labor, 200 Constitution Avenue, NW., Room N–5411, Washington, DC 20210;

telephone (202) 693–0126, fax (202) 219–5338.

3. *Competitive Procurement.* Federal procurement requirements apply to FTA funds awarded to state and local governments and private nonprofit agencies under 49 CFR parts 18 and 19. To the extent a direct recipient of FTA funds under this program is a private for-profit entity, the Federal procurement requirements do not apply.

4. *Debarment, Suspension and Other Responsibility Matters.* Pursuant to Executive Order 12549; 41 USC 701; and 49 CFR part 29, grantees must ensure that FTA funds are not given to anyone who has been debarred, suspended, or declared ineligible or voluntarily excluded from participation in federally assisted transactions. The burden of disclosure is on those debarred or suspended. The U.S. General Services Administration (GSA) issues a document titled ''Lists of Parties Excluded from Federal Procurement or Nonprocurement Programs'' monthly. The list is available on the GSA website (http// www.gsa.gov/index). If at any time the grantee or other covered entity learns that a certification it made or received was erroneous when submitted or if circumstances have changed, disclosure to FTA is required.

5. *Drug-Free Workplace.* Grantees must maintain a drug-free workplace for all employees and have an anti-drug policy and awareness program. The grant applicant must certify to FTA that it will provide a drug-free workplace and comply with all requirements of the Drug-Free Workplace Act of 1988 (Public Law 100–690) and U.S. DOT's implementing regulations, 49 CFR part 29, Subpart F. The grantee is required to provide a written Drug-Free Workplace policy statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the workplace and stating specific actions that will be taken for violations. The ongoing drug-free awareness program must inform employees about the dangers of drug abuse; about any available drug counseling, rehabilitation, and employee assistance programs; about penalties that may be imposed; and that employees are to be aware that the recipient operates a drug-free workplace. An employee of an FTA grantee is required to report in writing any conviction for a violation of criminal drug statute occurring in the workplace, and the grantee/employer is required to provide written notice to FTA within 10 days of having received the notice. Within 30 days of receiving the notice of a conviction, the grantee/employer must have taken appropriate action against the employee or have required participation in a drug abuse assistance or rehabilitation program.

6. *Nondiscrimination Requirements.* 49 U.S.C. section 5332 states that ''a person (defined broadly) may not be excluded from participating in, denied a benefit of, or discriminated against, under a project, program, or activity receiving financial assistance (from FTA) because of race, color, creed, national origin, sex, or age.''

7. *Title VI.* Grantees must assure FTA that transit services and benefits obtained with FTA assistance will be provided in a nondiscriminatory manner, without regard to race, color, or national origin.

8. *Disadvantaged Business Enterprise.* Grantees must assure FTA that disadvantaged business enterprises (DBEs) are provided the maximum opportunity to compete for FTA-assisted contracts and procurements.

9. *Equal Employment Opportunity (EEO).* The grantee must assure that it will not discriminate against any employee or applicant for employment because of race, color, religion, sex, disability, age or national origin.

10. *Americans with Disabilities Act and Section 504.* Compliance with the Americans with Disabilities Act of 1990 (ADA) (Public Law 101–336) and DOT's implementing regulations (49 CFR parts 27, 37, and 38) and section 504 of the Rehabilitation Act of 1973, as amended, are eligibility requirements for Federal financial assistance. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance. The ADA prohibits discrimination against persons with disabilities in the provision of transportation services.

11. *Restrictions on Lobbying.* Federal financial assistance may not be used to influence any member of Congress or an officer or employee of any agency in connection with the making of any Federal contract, grant, or cooperative agreement. The state, subrecipients, and third party contractors at any tier awarded FTA assistance exceeding $100,000 must sign a certification so stating and also must disclose the expenditure of non-Federal funds for such purposes (49 CFR part 20). Other Federal laws also govern lobbying activities. For example, Federal funds may not be used for lobbying congressional representatives or senators indirectly, such as by contributing to a lobbying organization or funding a grass-roots campaign to influence legislation (31 U.S.C. 1352). General advocacy for over-the-road bus transportation and providing information to legislators about the services a recipient provides are not prohibited, nor is using non-Federal funds for lobbying, so long as the required disclosures are made.

12. *Environmental Protection.* Neither incremental capital costs associated with making vehicles wheelchair accessible nor training costs involve significant environmental impacts. Projects that do not involve significant environmental impacts are considered ''categorical exclusions'' in FTA's procedures because they have been categorically excluded from FTA's requirements to prepare environmental documentation. (49 USC part 622, incorporating 23 CFR part 771)

13. *Planning.* Applicants are encouraged to notify the appropriate state departments of transportation and metropolitan planning organizations (MPO) in areas likely to be served by equipment made accessible through funds made available in this program. Those organizations, in turn, should take appropriate steps to inform the public, and individuals requiring fully accessible services in particular, of operators' intentions to expand the accessibility of their services. Incorporation of funded projects in the plans and transportation improvement programs of states and metropolitan areas by states and MPOs also is encouraged, but is not required.

II. Guidelines for Preparing Grant Application

FTA is conducting a national solicitation for applications under the OTRB Accessibility program. Grant awards will be made on a competitive basis. Although most FTA grant applications are now submitted electronically, paper applications for the OTRB Accessibility program will be accepted. An original and two copies of the application must be submitted to the appropriate FTA Regional Office. The OTRB operators should submit the application to the office in the region in which its headquarters office is located. The application should provide information on all items for which you are requesting funding in FY 2001. The application must include the following elements:

1. Transmittal Letter

This addresses basic identifying information, including:

a. Grant applicant.

b. Contact name, address, fax and phone number.

c. Amount of grant request.

d. Type of services for which funds are sought, either intercity fixed route services, other services, or both.

e. For fixed-route carriers, whether you are a large (Class I, with gross annual operating revenues of $5.3 million or more) or small (gross operating reveues of less than $5.3 million annually) carrier.

2. Project Eligibility

Every application must:

a. Describe the applicant's technical, legal, and financial capacity to implement the proposed projects.

b. Document matching funds, including amount and source.

c. Include OMB Standard Form 424, ''Federal Assistance,'' which is a multi-purpose form which must be completed in its entirety. The forms are available from the FTA regional offices.

3. Project Information

Provide a summary of project activities for which you are requesting funds. The summary should include:

a. Description of the components included in request for funds, i.e., lifts, tie-downs, moveable seats, etc.

b. Each project's time line, including significant milestones such as date of contract for purchase of vehicle(s), and actual or expected delivery date of vehicle(s).

c. Project budget (See Appendix B).

4. Project Narrative

Provide the information that addresses the criteria set forth in this notice at Section G, ''Grants Criteria''. Grants will be awarded competitively based upon that criteria. Please also provide the following information, which may also be used for funding decisions:

a. *Fleet Information.* Provide information on the number of over-the-road buses in your fleet, how many of those vehicles are accessible, and whether the vehicles for which you are seeking funds will be used to replace vehicles in your current fleet or to expand your fleet.

b. *Service Information.* If funds are being sought for intercity fixed-route service, please describe how the service meets the definition of intercity fixed route service, including how the service makes meaningful connections with scheduled intercity bus service to more distant points. If you provide both intercity fixed-route service and another type of service, such as commuter, charter or tour service, please provide an estimate of the proportion of your service that is intercity fixed-route service. Describe your service area.

5. Labor Information

a. Identify any labor organizations that may represent your employees and all labor organizations that represent the employees of any transit providers in the service area of the project. For each local of a nationally affiliated union, the applicant must provide the name of the national organization and the number or other designation of the local union. (For example, Amalgamated Transit Union local 1258.) Since DOL makes its referral to the national union's headquarters, there is no need to provide a means of contacting the local organization.

b. For each independent labor organization (i.e., a union that is not affiliated with a national or international organization) the local information will be necessary (name of organization, address, contact person, phone, fax numbers).

c. Where a labor organization represents transit employees in the service area of the project, DOL must refer the proposed protective arrangements to each union and to each recipient. For this reason, please provide DOL with a contact person, address, telephone number and fax number for your company and associated union information.

III. Submission of Applications and Grant Review Process

Applications are to be submitted to the appropriate FTA Regional Office by the close of business on April 27, 2001. FTA will screen all applications to determine whether all required eligibility elements, as described in Section 2 of the application, are present. An FTA evaluation team will evaluate each application according to the criteria described in this announcement.

A. Notification

FTA expects to notify all applicants, both those selected for funding and those not selected, in July 2001. Grants are expected to be made by September 30, 2001, the end of Federal fiscal year 2001. FTA is committed to obligating FY 2001 OTRB Accessibility program funds expeditiously. Therefore, FTA urges applicants to develop and submit with their applications complete documentation necessary to meet the applicable FTA Section 5311 requirements.

Issued on: January 19, 2001.

Hiram J. Walker,

Associate Administrator for Program Management.

APPENDIX A—FTA REGIONAL OFFICES

Region I—Massachusetts, Rhode Island, Connecticut, New Hampshire, Vermont and Maine

Richard H. Doyle, FTA Regional Administrator, Volpe National Transportation Systems Center, Kendall Square 55 Broadway, Suite 920, Cambridge, MA 02142–1093, (617) 494–2055

Region II—New York, New Jersey, Virgin Islands

Letitia Thompson, FTA Regional Administrator, 26 Federal Plaza, Suite 2940, New York, NY 10278–0194, (212) 264–8162

Region III—Pennsylvania, Maryland, Virginia, West Virginia, Delaware, Washington, DC

Susan Schruth, FTA Regional Administrator, 1760 Market Street, Suite 500, Philadelphia, PA 19103–4124, (215) 656–7100

Region IV—Georgia, North Carolina, South Carolina, Florida, Mississippi, Tennessee, Kentucky, Alabama, Puerto Rico

Jerry Franklin, FTA Regional Administrator, 61 Forsyth Street, S.W., Suite 17T50, Atlanta, GA 30303, (404) 562–3500

Region V—llinois, Indiana, Ohio, Wisconsin, Minnesota, Michigan

Joel Ettinger, FTA Regional Administrator, 200 West Adams Street, Suite 2410 Chicago, IL 60606–5232, (312) 353–2789

Region VI—Texas, New Mexico, Louisiana, Arkansas, Oklahoma

Robert Patrick, FTA Regional Administrator, 819 Taylor Street, Room 8A36, Ft. Worth, TX 76102 (817) 978–0550

Region VII—Iowa, Nebraska, Kansas, Missouri

Mokhtee Ahmad, FTA Regional Administrator, 901 Locust Street, Suite 404, Kansas City, MO 64106, (816) 329–3920

Region VIII—Colorado, North Dakota, South Dakota, Montana, Wyoming, Utah

Lee Waddleton, FTA Regional Administrator, Columbine Place, 216 16th Street, Suite 650, Denver, CO 80202–5120, (303) 844–3242

Region IX—California, Arizona, Nevada, Hawaii, American Samoa, Guam

Leslie Rogers, FTA Regional Administrator, 201 Mission Street, Suite 2210, San Francisco, CA 94105–1831, (415) 744–3133

Region X—Washington, Oregon, Idaho, Alaska

Helen Knoll, FTA Regional Administrator, Jackson Federal Building, 915 Second

Avenue, Suite 3142, Seattle, WA 98174–1002, (206) 220–7954

APPENDIX B—SAMPLE OTRB ACCESSIBILITY PROGRAM PROJECT BUDGET

[Grantee: Hillsdale Intercity Services; Project: OR–38–0001]

	Federal share	Eligible project cost
Scope—111–01:.		
Bus Rolling Stock		
Activity: 11.42.43 Incremental cost of lift, securement devices and labor quantity—1	$20,700	$23,000
Activity: 11.44.33 Retrofit vehicle with lift quantity—1	39,600	44,000
Scope—117–00:		
Bus—Other		
Activity: 11.7D.01 Training	18,000	20,000
Eligible project cost	87,000	
Federal share (10 percent)	78,300	
Applicant share (90 percent)	8,700	

APPENDIX C—CERTIFICATIONS AND ASSURANCES

List of Certifications and Assurances for Federal Transit Administration Over-the-Road-Bus Accessibility Grants

This list is a comprehensive compilation of the certifications and assurances required by Federal law for the OTRB Accessibility program. At the end of this list is a single Signature Page on which the applicant and its attorney certifies compliance with all certifications and assurances applicable to the OTRB Accessibility program.

All applicants are advised to read the entire list of Certifications and Assurances to be confident of their responsibilities and commitments. The applicant may signify compliance with all categories by placing a single ''X'' in the appropriate space at the top of the signature selection page.

References

The Transportation Equity Act for the 21st Century, Pub. L. 105–178, June 9, 1998, as amended, 49 U.S.C. chapter 53, Title 23, U.S.C., U.S. DOT and FTA regulations at 49 CFR, and FTA Circulars.

Over-the-Road Bus Accessibility Program Certifications and Assurances

1. Certifications and Assurances Required of Each Applicant

Each Applicant for Federal assistance awarded by FTA must provide all certifications and assurances in this category I. Consequently, FTA may not award any Federal assistance until the Applicant provides assurance of compliance by selecting category ''I'' Signature Page at the end of this document.

A. Authority of Applicant and Its Representative

The authorized representative of the Applicant and legal counsel who sign these certifications, assurances, and agreements affirm that both the Applicant and its authorized representative have adequate authority under state and local law and the by-laws or internal rules of the Applicant organization to:

(1) Execute and file the application for Federal assistance on behalf of the Applicant,

(2) Execute and file the required certifications, assurances, and agreements on behalf of the Applicant binding the Applicant, and

(3) Execute grant agreements and cooperative agreements with FTA on behalf of the Applicant.

B. Standard Assurances

The Applicant assures that it will comply with all applicable Federal statutes, regulations, executive orders, FTA circulars, and other Federal administrative requirements in carrying out any project supported by the FTA grant. The Applicant acknowledges that it is under a continuing obligation to comply with the terms and conditions of the grant agreement issued for its project with FTA. The Applicant understands that Federal laws, regulations, policies, and administrative practices might be modified from time to time and affect the implementation of the project. The Applicant agrees that the most recent Federal requirements will apply to the project, unless FTA issues a written determination otherwise.

C. Debarment, Suspension, and Other Responsibility Matters for Primary Covered Transactions

As required by U.S. DOT regulations on Government-wide Debarment and Suspension (Nonprocurement) at 49 CFR 29.510:

(1) The Applicant (Primary Participant) certifies, to the best of its knowledge and belief, that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;

(b) Have not, within a three (3) year period preceding this certification, been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, state, or local) transaction or contract under a public transaction, violation of Federal or state antitrust statutes, or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, state, or local) with commission of any of the offenses listed in subparagraph (1)(b) of this certification; and

(d) Have not within a three-year period preceding this certification had one or more public transactions (Federal, state, or local) terminated for cause or default.

(2) The Applicant also certifies that, if it later becomes aware of any information contradicting the statements of paragraph (1) above, it will promptly provide that information to FTA.

(3) If the Applicant (Primary Participant) is unable to certify to all statements in paragraphs (1) and (2) above, it shall indicate so in its signature page and provide a written explanation to FTA.

D. Drug-Free Workplace Agreement

As required by U.S. DOT regulations, ''Drug-Free Workplace Requirements (Grants),'' 49 CFR part 29, Subpart F, as modified by 41 U.S.C. 702, the Applicant agrees that it will provide a drug-free workplace by:

(1) Publishing a statement notifying its employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in its workplace and specifying the actions that will be taken against its employees for violation of that prohibition;

(2) Establishing an ongoing drug-free awareness program to inform its employees about:

(a) The dangers of drug abuse in the workplace,

(b) Its policy of maintaining a drug-free workplace,

(c) Any available drug counseling, rehabilitation, and employee assistance programs, and

(d) The penalties that may be imposed upon its employees for drug abuse violations occurring in the workplace;

(3) Making it a requirement that each of its employees to be engaged in the performance of the grant be given a copy of the statement required by paragraph (1) above;

(4) Notifying each of its employees in the statement required by paragraph (1) that, as a condition of employment financed with Federal assistance provided by the grant, the employee will be required to:

(a) Abide by the terms of the statement, and

(b) Notify the employer (Applicant) in writing of any conviction for a violation of a criminal drug statute occurring in the workplace no later than five (5) calendar days after that conviction;

(5) Notifying FTA in writing, within ten (10) calendar days after receiving notice required by paragraph (4)(b) above from an employee or otherwise receiving actual notice of that conviction. The Applicant, as employer of any convicted employee, must provide notice, including position title, to every project officer or other designee on whose project activity the convicted employee was working. Notice shall include the identification number(s) of each affected grant;

(6) Taking one of the following actions within thirty (30) calendar days of receiving notice under paragraph (4)(b) of this agreement with respect to any employee who is so convicted:

(a) Taking appropriate personnel action against that employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended, or

(b) Requiring that employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, state, or local health, law enforcement, or other appropriate agency; and

(7) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (1), (2), (3), (4), (5), and (6) of this agreement. The Applicant agrees to maintain a list identifying its headquarters location and each workplace it maintains in which project activities supported by FTA are conducted, and make that list readily accessible to FTA.

E. Intergovernmental Review Assurance

The Applicant assures that each application for Federal assistance submitted to FTA has been or will be submitted, as required by each state, for intergovernmental review to the appropriate state and local agencies. Specifically, the Applicant assures that it has fulfilled or will fulfill the obligations imposed on FTA by U.S. DOT regulations, ''Intergovernmental Review of Department of Transportation Programs and Activities,'' 49 CFR part 17.

F. Nondiscrimination Assurance

As required by 49 U.S.C. 5332 (which prohibits discrimination on the basis of race, color, creed, national origin, sex, or age, and prohibits discrimination in employment or business opportunity), Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000d, and U.S. DOT regulations, ''Nondiscrimination in Federally-Assisted Programs of the Department of Transportation—Effectuation of Title VI of the Civil Rights Act,'' 49 CFR part 21 at 21.7, the Applicant assures that it will comply with all requirements of 49 CFR part 21; FTA Circular 4702.1, ''Title VI Program Guidelines for Federal Transit Administration Recipients'', and other applicable directives, so that no person in the United States, on the basis of race, color, national origin, creed, sex, or age will be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination in any program or activity (particularly in the level and quality of transportation services and transportation-related benefits) for which the Applicant receives Federal assistance awarded by the U.S. DOT or FTA as follows:

(1) The Applicant assures that each project will be conducted, property acquisitions will be undertaken, and project facilities will be operated in accordance with all applicable requirements of 49 U.S.C. 5332 and 49 CFR part 21, and understands that this assurance extends to its entire facility and to facilities operated in connection with the project.

(2) The Applicant assures that it will take appropriate action to ensure that any transferee receiving property financed with Federal assistance derived from FTA will comply with the applicable requirements of 49 U.S.C. 5332 and 49 CFR part 21.

(3) The Applicant assures that it will promptly take the necessary actions to effectuate this assurance, including notifying the public that complaints of discrimination in the provision of transportation-related services or benefits may be filed with U.S. DOT or FTA. Upon request by U.S. DOT or FTA, the Applicant assures that it will submit the required information pertaining to its compliance with these requirements.

(4) The Applicant assures that it will make any changes in its 49 U.S.C. 5332 and Title VI implementing procedures as U.S. DOT or FTA may request.

(5) As required by 49 CFR 21.7(a)(2), the Applicant will include in each third party contract or subagreement provisions to invoke the requirements of 49 U.S.C. 5332 and 49 CFR part 21, and include provisions to invoke those requirements in deeds and instruments recording the transfer of real property, structures, improvements.

G. Assurance of Nondiscrimination on the Basis of Disability

As required by U.S. DOT regulations, ''Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance,'' at 49 CFR part 27, implementing the Rehabilitation Act of 1973, as amended, and the Americans with Disabilities Act of 1990, as amended, the Applicant assures that, as a condition to the approval or extension of any Federal assistance awarded by FTA to construct any facility, obtain any rolling stock or other equipment, undertake studies, conduct research, or to participate in or obtain any benefit from any program administered by FTA, no otherwise qualified person with a disability shall be, solely by reason of that disability, excluded from participation in, denied the benefits of, or otherwise subjected to discrimination in any program or activity receiving or benefiting from Federal assistance administered by the FTA or any entity within U.S. DOT. The Applicant assures that project implementation and operations so assisted will comply with all applicable requirements of U.S. DOT regulations implementing the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, and the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. 12101 *et seq.* at 49 CFR parts 27, 37, and 38, and any applicable regulations and directives issued by other Federal departments or agencies.

1. Certifications Prescribed by the Office of Management and Budget (SF–424B and SF–424D)

The Applicant certifies that it:

(1) Has the legal authority to apply for Federal assistance and the institutional, managerial, and financial capability (including funds sufficient to pay the non-Federal share of project cost) to ensure proper planning, management, and completion of the project described in its application.

(2) Will give FTA, the Comptroller General of the United States and, if appropriate, the state, through any authorized representative, access to and the right to examine all records, books, papers, or documents related to the award; and will establish a proper accounting system in accordance with generally accepted accounting standards or agency directives.

(3) Will establish safeguard to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest or personal gain.

(4) Will initiate and complete the work within the applicable project time periods following receipt of FTA approval.

(5) Will comply with all statutes relating to nondiscrimination including, but not limited to:

(a) Title VI of the Civil Rights Act, 42 U.S.C. 2000d, which prohibits discrimination on the basis of race, color, or national origin;

(b) Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. 1681, 1683, and 1685 through 1687, which prohibits discrimination on the basis of sex;

(c) Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794, which prohibits discrimination on the basis of handicaps;

(d) The Age Discrimination Act of 1975, as amended, 42 U.S.C. 6101 through 6107, which prohibit discrimination on the basis of age;

(e) The Drug Abuse Office and Treatment Act of 1972, Pub. L. 92–255, March 21, 1972, and amendments thereto, relating to nondiscrimination on the basis of drug abuse;

(f) The Comprehensive Alcohol Abuse and Alcoholism Prevention Act of 1970, Pub. L. 91–616, Dec. 31, 1970, and amendments thereto, relating to nondiscrimination on the basis of alcohol abuse or alcoholism;

(g) The Public Health Service Act of 1912, as amended, 42 U.S.C. 290dd–3 and 290ee–3, related to confidentiality of alcohol and drug abuse patient records;

(h) Title VIII of the Civil Rights Act, 42 U.S.C. 3601 *et seq.*, relating to nondiscrimination in the sale, rental, or financing of housing;

(i) Any other nondiscrimination provisions in the specific statutes under which Federal assistance for the project may be provided including, but not limited to section 1101(b) of the Transportation Equity Act for the 21st Century, 23 U.S.C. 101 note, which provides for participation of disadvantaged business enterprises in FTA programs; and

(j) The requirements of any other nondiscrimination statute(s) that may apply to the project.

(6) Will comply, or has complied, with the requirements of Titles II and III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, (Uniform Relocation Act) 42 U.S.C. 4601 *et seq.*, which provide for fair and equitable treatment of persons displaced or whose property is acquired as a result of Federal of federally-assisted programs. These requirements apply to all interests in real property acquired for project purposes regardless of Federal participation in purchases. As required by U.S. DOT regulations, ''Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally Assisted Programs,'' at 49 CFR 24.4, and sections 210 and 305 of the Uniform Relocation Act, 42 U.S.C. 4630 and 4655, the Applicant assures that it has the requisite authority under applicable state and local law and will comply or has complied with the requirements of the Uniform Relocation Act, 42 U.S.C. 4601 *et seq.*, and U.S. DOT regulations, ''Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally Assisted Programs,'' 49 CFR part 24 including, but not limited to the following:

(a) The Applicant will adequately inform each affected person of the benefits, policies, and procedures provided for in 49 CFR part 24;

(b) The Applicant will provide fair and reasonable relocation payments and assistance required by 42 U.S.C. 4622, 4623, and 4624; 49 CFR part 24; and any applicable FTA procedures, to or for families, individuals, partnerships, corporations or associations displaced as a result of any project financed with FTA assistance;

(c) The Applicant will provide relocation assistance programs offering the services described in 42 U.S.C. 4625 to such displaced families, individuals, partnerships, corporations, or associations in the manner provided in 49 CFR part 24 and FTA procedures;

(d) Within a reasonable time before displacement, the Applicant will make available comparable replacement dwellings to displaced families and individuals as required by 42 U.S.C. 4625(c)(3);

(e) The Applicant will carry out the relocation process in such a manner as to provide displaced persons with uniform and consistent services, and will make available replacement housing in the same range of choices with respect to such housing to all displaced persons regardless of race, color, religion, or national origin; and

(f) In acquiring real property, the Applicant will be guided to the greatest extent practicable under state law, by the real property acquisition policies of 42 U.S.C. 4651 and 4652;

(g) The Applicant will pay or reimburse property owners for necessary expenses as specified in 42 U.S.C. 4653 and 4654, with the understanding that FTA will participate in the Applicant's eligible costs of providing payments for those expenses as required by 42 U.S.C. 4631;

(h) The Applicant will execute such amendments to third party contracts and subagreements financed with FTA assistance and execute, furnish, and be bound by such additional documents as FTA may determine necessary to effectuate or implement the assurances provided herein; and

(i) The Applicant agrees to make these assurances part of or incorporate them by reference into any third party contract or subagreement, or any amendments thereto, relating to any project financed by FTA involving relocation or land acquisition and provide in any affected document that these relocation and land acquisition provisions shall supersede any conflicting provisions.

(7) To the extent applicable, will comply with provisions of the Hatch Act, 5 U.S.C. 1501 through 1508, and 7324 through 7326, which limit the political activities of state and local agencies and their officers and employees whose principal employment activities are financed in whole or part with Federal funds including a Federal loan, grant, or cooperative agreement, but pursuant to 23 U.S.C. 142(g), does not apply to a nonsupervisory employee of a transit system (or of any other agency or entity performing related functions) receiving FTA assistance to whom the Hatch Act does not otherwise apply.

(8) To the extent applicable, will comply with the Davis-Bacon Act, as amended, 40 U.S.C. 276a through 276a(7), the Copeland Act, as amended, 18 U.S.C. 874 and 40 U.S.C. 276c, and the Contract Work Hours and Safety Standards Act, as amended, 40 U.S.C. 327 through 333, regarding labor standards for federally-assisted subagreements.

(9) To the extent applicable, will comply with flood insurance purchase requirements of section 102(a) of the Flood Disaster Protection Act of 1973, as amended, 42 U.S.C. 4012a(a), requiring recipients in a special flood hazard area to participate in the program and purchase flood insurance if the total cost of insurable construction and acquisition is $10,000 or more.

(10) Will comply with environmental standards that may be prescribed to implement the following Federal laws and executive orders:

(a) Institution of environmental quality control measures under the National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4321 *et seq.* and Executive Order No. 11514, as amended, 42 U.S.C. 4321 note;

(b) Notification of violating facilities pursuant to Executive Order No. 11738, 42 U.S.C. 7606 note;

(c) Protection of wetlands pursuant to Executive Order No. 11990, 42 U.S.C. 4321 note;

(d) Evaluation of flood hazards in floodplains in accordance with Executive Order 11988, 42 U.S.C. 4321 note;

(e) Assurance of project consistency with the approved State management program developed pursuant to the requirements of the Coastal Zone Management Act of 1972, as amended, 16 U.S.C. 1451 *et seq.*

(f) Conformity of Federal actions to State (Clean Air) Implementation Plans under section 176(c) of the Clean Air Act of 1955, as amended, 42 U.S.C. 7401 *et seq.*;

(g) Protection of underground sources of drinking water under the Safe Drinking Water Act of 1974, as amended, 42 U.S.C. 300h *et seq.*;

(h) Protection of endangered species under the Endangered Species Act of 1973, as amended, Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*; and

(i) Environmental protections for Federal transit programs, including, but not limited to protections for a park, recreation area, or wildlife or waterfowl refuge of national, state, or local significance or any land from a historic site of national, state, or local significance used in a transit project as required by 49 U.S.C. 303.

(11) Will comply with the Wild and Scenic Rivers Act of 1968, as amended, 16 U.S.C. 1271 *et seq.* relating to protecting components of the national wild and scenic rivers systems.

(12) Will assist FTA in assuring compliance with section 106 of the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470f, Executive Order No. 11593 (identification and protection of historic properties), 16 U.S.C. 470 note, and the Archaeological and Historic Preservation Act of 1974, as amended, 16 U.S.C. 469a–1 *et seq.*

(13) Will comply with the Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. 4801, which prohibits the use of lead-based paint in construction or rehabilitation of residence structures.

(14) Will not dispose of, modify the use of, or change the terms of the real property title, or other interest in the site and facilities on which a construction project supported with FTA assistance takes place without permission and instructions from the awarding agency.

(15) Will record the Federal interest in the title of real property in accordance with FTA directives and will include a covenant in the title of real property acquired in whole or in part with Federal assistance funds to assure nondiscrimination during the useful life of the project.

(16) Will comply with FTA requirements concerning the drafting, review, and approval of construction plans and specifications of any construction project supported with FTA assistance. As required by U.S. DOT regulations, ''Seismic Safety,'' 49 CFR 41.117(d), before accepting delivery of any building financed with FTA assistance, it will obtain a certificate of compliance with the seismic design and construction requirements of 49 CFR part 41.

(17) Will provide and maintain competent and adequate engineering supervision at the construction site of any project supported with FTA assistance to ensure that the complete work conforms with the approved plans and specifications and will furnish progress reports and such other information as may be required by FTA or the State.

(18) Will comply with the National Research Act, Pub. L. 93–348, July 12, 1974, as amended, regarding the protection of human subjects involved in research, development, and related activities supported by Federal assistance and DOT regulation, ''Protection of Human Subjects,'' 49 CFR part 11.

(19) Will comply with the Laboratory Animal Welfare Act of 1966, as amended, 7

U.S.C. 2131 *et seq.* pertaining to the care, handling, and treatment of warm blooded animals held for research, teaching, or other activities supported by FTA assistance.

(20) Will have performed the financial and compliance audits required by the Single Audit Act Amendments of 1996, 31 U.S.C. 7501 *et seq.* and OMB Circular No. A–133, ''Audits of States, Local Governments, and Non-Profit Organizations and Department of Transportation provisions of OMB A–133 Compliance Supplement, March 2000.''

(21) Will comply with all applicable requirements of all other Federal laws, executive orders, regulations, and policies governing the project.

2. Lobbying Certification for an Application Exceeding $100,000

An Applicant that submits, or intends to submit this fiscal year, an application for Federal assistance exceeding $100,000 must provide the following certification. Consequently, FTA may not provide Federal assistance for an application exceeding $100,000 until the Applicant provides this certification by selecting category ''II'' on the Signature Page at the end of this document.

A. As required by U.S. DOT regulations, ''New Restrictions on Lobbying,'' at 49 CFR 20.110, the Applicant's authorized representative certifies to the best of his or her knowledge and belief that for each application for a Federal assistance exceeding $100,000:

(1) No Federal appropriated funds have been or will be paid, by or on behalf of the Applicant, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress pertaining to the award of any Federal assistance, or the extension, continuation, renewal, amendment, or modification of any Federal assistance agreement; and

(2) If any funds other than Federal appropriated funds have been or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any application to FTA for Federal assistance, the Applicant assures that it will complete and submit Standard Form-LLL, ''Disclosure Form to Report Lobbying,'' including the information required by the form's instructions, which may be amended to omit such information as permitted by 31 U.S.C. 1352.

B. The Applicant understands that this certification is a material representation of fact upon which reliance is placed and that submission of this certification is a prerequisite for providing Federal assistance for a transaction covered by 31 U.S.C. 1352. The Applicant also understands that any person who fails to file a required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Over-the-Road Bus Accessibility Program Certifications and Assurances for FTA Assistance

Name of applicant: _____

The Applicant agrees to comply with applicable requirements of Categories I–III.

(The Applicant may make this selection in lieu of individual selections below.)

or

The applicant agrees to comply with the applicable requirements of the following categories it has selected:

I. Certifications and Assurances Required of Each Applicant _____

II. Lobbying Certification _____

Over-the-Road Bus Accessibility Certifications and Assurances

Name of Applicant:

_____

Name and relationship of Authorized Representative: _____

BY SIGNING BELOW I, _____ (name), on behalf of the Applicant, declare that the Applicant has duly authorized me to make these certifications and assurances and bind the Applicant's compliance. Thus, the Applicant agrees to comply with all Federal statutes, regulations, executive orders, and administrative guidance required for each application it makes to the Federal Transit Administration (FTA).

FTA intends that the certifications and assurances the Applicant selects on the other side of this document should apply, as required, to each project for which the applicant seeks FTA assistance.

The applicant affirms the truthfulness and accuracy of the certifications and assurances it has made in the statements submitted herein with this document and any other submission made to FTA, and acknowledges that the provisions of the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. 3801 *et seq.*, as implemented by U.S. DOT regulations, ''Program Fraud Civil Remedies,'' 49 CFR part 31 apply to any certification, assurance or submission made to FTA. The criminal fraud provisions of 18 U.S.C. 1001 apply to any certification, assurance, or submission made in connection with any other program administered by FTA.

In signing this document, I declare under penalties of perjury that the foregoing certifications and assurances, and any other statements made by me on behalf of the Application are true and correct.

Signature _____

Date _____

Name _____

Authorized Representative of Applicant

Affirmation of Applicant's Attorney

For _____

(Name of Applicant)

As the undersigned legal counsel for the above name applicant, I hereby affirm to the Applicant that it has authority under state and local law to make and comply with the certifications and assurances as indicated on the foregoing pages. I further affirm that, in my opinion, the certifications and assurances have been legally made and constitute legal and binding obligations on the applicant.

I further affirm to the Applicant that, to the best of my knowledge, there is no legislation or litigation pending or imminent that might adversely affect the validity of these certifications and assurances, or of the performance of the project. Furthermore, if I become aware of circumstances that change the accuracy of the foregoing statements, I will notify the applicant promptly, which may so inform FTA.

Signature _____

Date _____

Name _____

Applicant's Attorney

Each Applicant for FTA financial assistance and each FTA grantee with an active capital project must provide an attorney's affirmation of the Applicant's legal capacity.

APPENDIX D—GRANT APPLICATION CHECKLIST

1. Transmittal letter
2. Project Eligibility
3. Project Information
4. Project Narrative
5. Fleet Information
6. Service Information
7. Labor Information

[FR Doc. 01–2273 Filed 1–25–01; 8:45 am]

BILLING CODE 4910–57–P

Federal Register

Friday,
January 26, 2001

Part V

National Skill Standards Board

Partnership Organization: Manufacturing Skill Standards Council (MSSC): Solicitation of Comments; Notice

NATIONAL SKILL STANDARDS BOARD

Partnership Organization: Manufacturing Skill Standards Council (MSSC): Solicitation of Comments

AGENCY: National Skill Standards Board.

ACTION: Solicitation of comments.

SUMMARY: The National Skill Standards Board (NSSB) is building a voluntary national system of skill standards, assessment, and certification that will enhance the ability of the U.S. to compete effectively in a global economy. The Manufacturing Skill Standards Council (MSSC) is the first of four industry-based Voluntary Partnerships that have been recognized by the NSSB to develop proposed skill standards. As NSSB requires of Voluntary Partnerships, MSSC seeks public comment to improve the product, receive input on potential uses of the skill standards in various organizations, and to assist in the design of associated assessment and certification systems related to the skill standards' full implementation and continuous improvement. Comments must be submitted in writing in order to be considered, and details on submitting comments via e-mail, fax, or regular mail are provided in the Addresses section. Due to the complexity and length of the proposed skill standards, only a summary is published in this Notice. To obtain the full text of the proposed MSSC Skill Standards, see the Supplementary Information section.

DATES: The Manufacturing Skill Standards Council will accept written comments on the proposed Manufacturing Industry Skill Standards on or before March 27, 2001.

ADDRESSES: Please send comments via regular mail to: MSSC, 1201 New York Ave., NW., Suite 725, Washington, DC 20005–3917. To submit comments via fax, transmit to Standards Release at 202–289–7618. To submit comments via the Web, go to *http://www.msscusa.org/*. Click on the icon titled ''View and Comment On the Skill Standards Here''

FOR FURTHER INFORMATION CONTACT: For further information regarding MSSC's development of skill standards, assessment, and certification for the manufacturing industry, contact the Manufacturing Skill Standards Council (MSSC) at 1201 New York Avenue, Suite 725, Washington DC 20005–3917 (202–216–2740), *http://www.msscusa.org/*. For further information on the Voluntary National System of Industry Skill Standards, contact the National Skill Standards Board (NSSB): 1441 L Street, NW., Suite 9000, Washington DC 20005, 202–254–8628, http://www.nssb.org.

SUPPLEMENTARY INFORMATION:

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VIII. Proposed Standards
IX. Resolution of Comments

I. Contact Information for Submitting Comments

The full text of the proposed MSSC Skill Standards, A Blueprint for Workforce Excellence, may be obtained by submitting a written request to the following mailing address: Attention, Standards Release, MSSC, 1201 New York Ave., NW, Suite 725, Washington, DC 20005–3917, or by faxed request to Standards Release at 202–289–7618. The full text of the proposed MSSC Skill Standards is also available on the MSSC website at *http://www.msscusa.org/*. Proposed skill standards may be viewed on the web or downloaded (PDF files). Printed copies of the proposed skill standards may also be obtained from the downloadable PDF at *http://www.msscusa.org/validation/Standards/Feedback.pdf*.

II. Background

Under a Cooperative Agreement with the National Skill Standards Board (NSSB), the Manufacturing Skill Standards Council (MSSC) has developed *voluntary* industry-wide standards covering six (6) broad concentrations of work within 14 sectors of manufacturing, and has determined and proposes core skill standards common to each of the six concentrations. The concentrations are: (1) Production; (2) Health, Safety and Environmental Assurance; (3) Logistics and Inventory Control; (4) Maintenance, Installation and Repair; (5) Production Process Development; and, (6) Quality Assurance. The National Skill Standards Act of 1994 defines a skill standard as one that specifies the level of knowledge and skills required to successfully perform work-related functions within an occupational cluster. The MSSC proposed standards describe the work requirements and worker skills necessary for a high performance manufacturing environment. These standards incorporate a common language that will enhance communication among and determine portability of skills for employers, job seekers, employees, human resource professionals, union representatives, educators, and training providers across all industries in the U.S. economy.

III. Authorizing Legislation

Public Law 103–227, Title V, National Skill Standards Act of 1994.

IV. National Skill Standards Board (NSSB)

The National Skill Standards Act of 1994 created ''a National Skill Standards Board to serve as a catalyst in stimulating the development and adoption of a voluntary national system of skill standards and of assessment and certification of attainment of skill standards.'' Industry coalitions called Voluntary Partnerships are developing the skill standards, assessment and certification systems within fifteen NSSB-defined industry sectors.

V. Manufacturing Skill Standards Council (MSSC)

In March 1998, the National Skill Standards Board formally recognized the Manufacturing Skill Standards Council as the first Voluntary Partnership established to develop a system of voluntary skill standards for the manufacturing industry. This system is industry-led with full partnership and full and balanced participation of representatives of employees, unions, education, civil rights organizations, and community stakeholders. The Manufacturing Skill Standards Council (MSSC) is staffed and managed by the National Coalition for Advanced Manufacturing (NACFAM), *http://www.nacfam.org*, and the AFL–CIO Working for America Institute, *http://workingforamerica.org*.

VI. Mission of the Manufacturing Skill Standards Council

The mission of the MSSC is to develop a nationwide system of workforce skill standards for workers in 14 sectors of manufacturing. This nationwide Manufacturing Skill Standards System seeks to:

- Enhance productivity and global economic competitiveness of U.S.-based manufacturing companies;
- Raise the standard of living and economic security of American workers by improving their access to high-skill, high-wage employment and career opportunities for those currently in, entering, or reentering the workforce;
- Encourage the use of world-class academic, occupational and employability standards to guide

continuous education and training for current and future workers.

VII. Background for Proposed Standards Release

On November 14–15, 2000, the Manufacturing Skill Standards Council reviewed the completed research and final data analyses on the proposed Manufacturing Skill Standards. The MSSC Steering Committee approved the proposed skill standards in their entirety and formally submitted them to the National Skill Standards Board for approval. The proposed MSSC Skill Standards are the product of over two years of intensive field research involving over 700 companies, 3800 workers, 300 subject matter experts and 30 facilitating organizations. Completion of these proposed standards for submission to the National Skill Standards Board marks the first major step towards developing a nationwide system of voluntary skill standards, assessments and certification, as envisioned in the National Skill Standards Act of 1994.

VIII. Proposed Standards

The MSSC Standards include information on the work (*i.e.*, critical work functions, key activities, and performance indicators) as well as the knowledge and skills (academic, employability, and occupational/technical) needed in the six broad concentrations of work in manufacturing:

- Production;
- Health, Safety and Environmental Assurance;
- Logistics and Inventory Control;
- Maintenance, Installation & Repair;
- Production Process Development; and,
- Quality Assurance.

IX. Resolution of Comments

The Manufacturing Skill Standards Council shall review and take into consideration all comments; will respond in writing to comments as appropriate; and, with agreement from the National Skill Standards Board, will make revisions as deemed appropriate. At the end of the comment period the MSSC will post a summary of comments on the MSSC Web site, *http://www.msscusa.org/*. A summary of the response to comments and a notice of revision will be posted at a later date. The summary of responses may also be accessed at the NSSB website, *http://www.nssb.org*, via hyperlink to the MSSC website.

Signed at Washington DC this 23rd day of January, 2001.

Edie West,

Executive Director, National Skill Standards Board.

[FR Doc. 01–2405 Filed 1–25–01; 8:45 am]

BILLING CODE 4510–BF–P

Federal Register

Friday,
January 26, 2001

Part VI

Department of Health and Human Services

Office of Child Support Enforcement

45 CFR Part 303

National Medical Support; Delay of Effective Date; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Child Support Enforcement

45 CFR Part 303

RIN 0970–AB97

National Medical Support Notice; Delay of Effective Date

AGENCY: Office of Child Support Enforcement, HHS.

ACTION: Final rule; Delay of effective date.

SUMMARY: In accordance with the memorandum of January 20, 2001, from the Assistant to the President and Chief of Staff, entitled ''Regulatory Review Plan,'' published in the **Federal Register** on January 24, 2001, this action temporarily delays for 60 days the effective date of the rule entitled ''National Medical Support Notice'', published in the **Federal Register** on December 27, 2000 (65 FR 82154). That rule concerns a statutory obligation that the secretary of health and human services require in regulation that state child-support enforcement agenceis use a standard form—entitled the National Medical Support Notice—to notify employers of the terms of a non-custodial parent's obligations regarding health insurance coverage under a child support agreement. To the extent that 5 U.S.C. section 553 applies to this action, it is exempt from notice and comment because it constitutes a rule of procedure under 5 U.S.C. section 553(b)(A). Alternatively, the Department's implementation of this rule without opportunity for public comment, effective immediately upon publication today in the Federal Register, is based on the good cause exceptions in 5 U.S.C. section 553(b)(B) and 553(d)(3), in that seeking public comment is impracticable, unnecessary and contrary to the public interest. The temporary 60-day delay in effective date is necessary to give Department officials the opportunity for further review and consideration of new regulations, consistent with the Assistant to the President's memorandum of January 20, 2001. Given the imminence of the effective date, seeking prior public comment on this temporary delay would have been impractical, as well as contrary to the public interest in the orderly promulgation and implementation of regulations. In addition, allowing the rule to become effective before the temporary suspension date could create confusion among State agencies, employees, and Plan administrators regarding the qualified status of National Medical Support Notices that may be issued by some states before and during the suspension period.

DATES: The effective date of National Medical Support Notice, published in the **Federal Register** on December 27 (FR 65 82154) is delayed for 60 days, from January 26, 2001 to a new effective date of March 27, 2001.

FOR FURTHER INFORMATION CONTACT: Elizabeth Matheson, Office of Child Support Enforcement Policy, (202) 410–9386.

Dated: January 25, 2001.

David Satcher,

Acting Secretary.

[FR Doc. 01–2580 Filed 1–25–01; 1:25 pm]

BILLING CODE 4184–01–P

Federal Register

Friday,
January 26, 2001

Part VII

Department of Labor

Pension and Welfare Benefits Administration

29 CFR Part 2590

National Medical Support; Delay of Effective Date; Final Rule

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

29 CFR Part 2590

RIN 1210–AA72

National Medical Support Notice: Delay of Effective Date

AGENCY: Pension and Welfare Benefits Administration, Department of Labor.

ACTION: Final rule; Delay of effective date.

SUMMARY: In accordance with the memorandum of January 20, 2001, from the Assistant to the President and Chief of Staff, entitled ''Regulatory Review Plan,'' published in the **Federal Register** on January 24, 2001, this action temporarily delays for 60 days the effective date of the rule entitled National Medical Support Notice, published in the **Federal Register** on December 27, 2000, 65 FR 82128. That rule promulgates a notice to be issued by State Agencies as a means to enforce health care coverage provisions in a child support order and to be treated by administrators of group health plans as a qualified medical child support order under section 609(a) of the Employee Retirement Income Security Act (ERISA). To the extent that 5 U.S.C. section 553 applies to this action, it is exempt from notice and comment because it constitutes a rule of procedure under 5 U.S.C. section 553(b)(A). Alternatively, the Department's implementation of this rule without opportunity for public comment, effective immediately upon publication today in the **Federal Register**, is based on the good cause exceptions in 5 U.S.C. section 553(b)(B) and 553(d)(3), in that seeking public comment is impracticable, unnecessary and contrary to the public interest. The temporary 60-day delay in effective date is necessary to give Department officials the opportunity for further review and consideration of new regulations, consistent with the Assistant to the President's memorandum of January 20, 2001. Given the imminence of the effective date, seeking prior public comment on this temporary delay would have been impractical, as well as contrary to the public interest in the orderly promulgation and implementation of regulations. In addition, allowing the rule to become effective before the temporary suspension could create confusion among State agencies, employers and plan administrators regarding the qualified status of child support orders issued before and during the suspension period.

DATES: The effective date of the National Medical Support Notice, published in the **Federal Register** on December 27, 2000, at 65 FR 82128, is delayed for 60 days, from January 26, 2001 to a new effective date of March 27, 2001.

FOR FURTHER INFORMATION CONTACT: David Lurie or Susan Rees, Office of Regulations and Interpretations, Pension and Welfare Benefits Administration, 200 Constitution Avenue, NW, Room N–5669, Washington, DC 20010, (202) 219–8671 (this is not a toll-free number).

Signed at Washington, DC, this January 25, 2001.

Alan D. Lebowitz,

Deputy Assistant Secretary for Program Operations, Pension and Welfare Benefits Administration, Department of Labor.

[FR Doc. 01–2581 Filed 1–25–01; 1:43 pm]

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Note: The List of Public Laws for the 106th Congress, Second Session has been completed and will resume when bills are enacted into public law during the next session of Congress.

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